

SJ Quinney College of Law, University of Utah

Utah Law Digital Commons

Utah Code Annotated 1943-1995

1980

Title 70A: Uniform Commercial Code - 1980

Utah Code Annotated

Follow this and additional works at: <https://dc.law.utah.edu/uca>

The Utah Code Annotated digital collection, hosted by Digital Commons, is brought to you for free and open access by the James E. Faust Law Library at the S.J. Quinney College of Law. Funds for this project have been provided by the Institute of Museum and Library Services through the Library Services and Technology Act and are administered by the Utah State Library Division. For more information, please contact valeri.craigle@law.utah.edu. Reprinted with permission. Copyright 2020 LexisNexis. All rights reserved.

TITLE 70A

UNIFORM COMMERCIAL CODE

Chapter

- 70A-1. General provisions.
- 70A-2. Sales.
- 70A-3. Commercial paper.
- 70A-4. Bank deposits and collections.
- 70A-5. Letters of credit.
- 70A-6. Bulk transfers.
- 70A-7. Warehouse receipts, bills of lading and other documents of title.
- 70A-8. Investment securities.
- 70A-9. Secured transactions — Sales of accounts, contract rights and chattel paper.
- 70A-10. Effective date and repealer.
- 70A-11. Corrected uniform commercial code — Effective date and transition provisions.

CHAPTER 1

GENERAL PROVISIONS

Part

1. Short title, construction, application and subject matter of the act.
2. General definitions and principles of interpretation.

PART 1

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

Section

- 70A-1-101. Short title.
- 70A-1-102. Purposes — Rules of construction — Variation by agreement.
- 70A-1-103. Supplementary general principles of law applicable.
- 70A-1-104. Construction against implicit repeal.
- 70A-1-105. Territorial application of the act — Parties' power to choose applicable law.
- 70A-1-106. Remedies to be liberally administered.
- 70A-1-107. Waiver or renunciation of claim or right after breach.
- 70A-1-108. Severability.
- 70A-1-109. Section captions.

70A-1-101. Short title. This act shall be known and may be cited as Uniform Commercial Code.

History: L. 1965, ch. 154, § 1-101.

Compiler's Notes.

Title 70A constitutes the "Uniform Commercial Code" approved by the National Conference of Commissioners on Uniform State

Laws in 1952. The numbers following the title designation 70A conform to the numbering used in the official text of the Uniform Commercial Code.

Title of Act.

An act to be known as the Uniform Commercial Code, relating to certain commercial transactions in or regarding personal property and contracts and other documents concerning them, including sales, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, other documents of title, investment securities, and secured transactions, including certain sales of accounts, chattel paper, and contract rights; providing for public notice to third parties in certain circumstances; regulating procedure, evidence and damages in certain court actions involving such transactions, contracts or documents; to make uniform the law with respect thereto; and repealing inconsistent legislation. — Laws 1965, ch. 154.

Comparable Provisions.

Jurisdictions which have enacted the Uniform Commercial Code are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Collateral References.

Banks and Banking ⇔ 119-231; Bills and Notes ⇔ 1 et seq.; Brokers ⇔ 6-106; Carriers ⇔ 39-202; Chattel Mortgages ⇔ 1 et seq.; Fraudulent Conveyances ⇔ 172-204; Guaranty ⇔ 27-96; Sales ⇔ 1 et seq.; Warehousemen ⇔ 11-37.

9 CJS Banks and Banking §§ 212-382; 10-11 CJS Bills and Notes §§ 1 et seq.; 12 CJS Brokers §§ 23-123; 13 CJS Carriers §§ 59-450; 14 CJS Chattel Mortgages §§ 1 et seq.; 37 CJS Fraudulent Conveyances §§ 471-503; 38 CJS Guaranty §§ 43-116; 77-78 CJS Sales §§ 1 et seq.; 93 CJS Warehousemen and Safe Depositaries §§ 16-85.

15A AmJur 2d 451 to 592, Commercial Code §§ 1 to 121.

Law Reviews.

Freedom of Contract Under Uniform Commercial Code, Charles Bunn, 2 Boston College L. Rev. 59.

Uniform Commercial Code as Enacted in Massachusetts, W. D. Malcolm, 13 Business Lawyer 490.

New Movement Toward Uniformity in Commercial Law — The Uniform Commercial Code Marches On, W. A. Schnader, 13 Business Lawyer 646.

Legislative History of the Uniform Commercial Code, R. Braucher, 58 Colum. L. Rev. 798.

Current Developments on the Uniform Commercial Code, H. R. Levy, 63 Com. L. J. 322.

Major Differences Between Massachusetts and Pennsylvania Uniform Commercial Code, 71 Harv. L. Rev. 674.

Uniform Commercial Code: Its Impact on Kentucky Law, 48 Ky. L. J. 191.

Impact of the Uniform Commercial Code on the Law of Contracts, R. C. Tisdale, 39 N. D. L. Rev. 7.

Uniform Commercial Code and Illinois Law — A Symposium, 53 Nw. U. L. Rev. 315.

Uniform Commercial Code in Utah, R. N. Boyce, 1966 Utah L. Rev. 31.

Disparate Construction of the Uniform Commercial Code — The Need for Federal Legislation, 1969 Utah L. Rev. 722.

Promissory Estoppel, Equitable Estoppel and Farmer as a Merchant: The 1973 Grain Cases and the UCC Statute of Frauds, 1977 Utah L. Rev. 59.

Uniform Commercial Code — Sales, Bulk Sales, and Documents of Title, P. D. Carrington, 15 Wyo. L. J. 1.

70A-1-102. Purposes — Rules of construction — Variation by agreement.

- (1) This act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this act are
 - (a) to simplify, clarify and modernize the law governing commercial transactions;

- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.
- (3) The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured of such standards are not manifestly unreasonable.
- (4) The presence in certain provisions of this act of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).
- (5) In this act unless the context otherwise requires
 - (a) words in the singular number include the plural, and in the plural include the singular;
 - (b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

History: L. 1965, ch. 154, § 1-102.

31 CJS Estoppel §§ 57, 59, 86; 82 CJS Statutes § 315.

Collateral References.

Estoppel ⇔ 52, 71, 78; Statutes ⇔ 179.

11 AmJur 2d 65, 67, 77, Bills and Notes, §§ 43, 44, 51; 15A AmJur 2d 457, 476, 483, 484, Commercial Code §§ 3, 18, 29, 32.

DECISIONS UNDER FORMER LAW

Uniform law.

Under former provisions of section 74 of the Sales Act (Comp. Laws 1917, § 5183) providing that the act should be construed so as to give effect to its purpose to make uniform

laws of states which enact it, it was held that it was duty of Supreme Court to follow construction of court of last resort of any state in which the act was in force. *Stewart v. Hansen* (1923) 62 U 281, 218 P 959, 44 ALR 340.

70A-1-103. Supplementary general principles of law applicable.

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

History: L. 1965, ch. 154, § 1-103.

Collateral References.

Cross-References.

Capacity of children, 15-2-2, 15-2-3.

Statutes ⇔ 222 et seq.

77 CJS Sales § 6; 82 CJS Statutes § 362 et seq.

Fraud and deceit.

15A AmJur 2d 474, Commercial Code, § 15.

Contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud. *Lamb v. Bangart* (1974) 525 P 2d 602.

Civil liability of father for necessities furnished to child taken from home by mother, 32 ALR 1466.

Damages of infant on rescission of exchange of goods, 52 ALR 2d 1114.

Liability of parent for dental services to minor child, 7 ALR 1070.

70A-1-104. Construction against implicit repeal. This act being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

History: L. 1965, ch. 154, § 1-104.

15A AmJur 2d 479, Commercial Code § 25.

Collateral References.

Statutes ⇔ 158 to 167.
82 CJS Statutes § 288.

Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, 5 ALR 2d 1270.

70A-1-105. Territorial application of the act — Parties' power to choose applicable law.

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

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

Rights of creditors against sold goods. Section 70A-2-402.

Applicability of the chapter on Bank Deposits and Collections.
Section 70A-4-102.

Bulk transfers subject to the chapter on Bulk Transfers. Section 70A-6-102.

Applicability of the chapter on Investment Securities. Section 70A-8-106.

Perfection provisions of the chapter on Secured Transactions.
Section 70A-9-103.

History: L. 1965, ch. 154, § 1-105; 1977, ch. 272, § 1.

11 AmJur 2d 139, Bills and Notes § 100;
15A AmJur 2d 466 to 472, Commercial Code §§ 11 to 13.

Compiler's Notes.

The 1977 amendment substituted "perfection provisions" for "policy and scope"; and substituted "section 70A-9-103" for "sections 70A-9-102 and 70A-9-103" in the last line of subsec. (2).

What constitutes "reasonable" or "appropriate" relation to a transaction within the meaning of Uniform Commercial Code § 1-105 (1), 63 ALR 3d 341.

Law Reviews.

Uniform Commercial Code and Conflict of Laws, J. F. Burton, 9 Am. J. Comp. L. 458.

Ganz, "'Doing Business' in Illinois as a Basis of Jurisdiction Over Nonresidents — Due Process and Contacts," Vol. I, No. 4 Ill. C. L. E. 75 (October 1963).

Collateral References.

Contracts ⇔ 2, 144.
15 CJS Conflict of Laws § 8 (3); 17 CJS Contracts § 12 et seq.

70A-1-106. Remedies to be liberally administered.

- (1) The remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.
- (2) Any right or obligation declared by this act is enforceable by action unless the provision declaring it specifies a different and limited effect.

History: L. 1965, ch. 154, § 1-106.

Remedies for breach of obligation collateral to a contract for sale, 70A-2-701.

Cross-References.

Breach of contract for sale, buyer's right to specific performance or replevin, 70A-2-716.

Breach of contract for sale, damages recoverable by buyer, 70A-2-712 (2).

Breach of contract for sale, resale of goods by seller, 70A-2-706 (1).

Contract for sale, terms left open, enforcement, 70A-2-204 (3).

Obligation of good faith in performance or enforcement of contracts, 70A-1-203.

Supplementary general principles of law applicable, 70A-1-103.

Collateral References.

Action ⇔ 3, 34; Sales ⇔ 342.

1 CJS Actions §§ 5, 9; 78 CJS Sales §§ 436-461.

Law Reviews.

Illusory Remedy Under Uniform Commercial Code, Joseph B. Manello, 44 Mass. L. Q. 109.

70A-1-107. Waiver or renunciation of claim or right after breach.

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

History: L. 1965, ch. 154, § 1-107.

Obligation of good faith in performance or enforcement of contracts, 70A-1-203.

Cross-References.

Contract for sale, modification or limitation of remedy, 70A-2-719.

Contract for sale, statute of frauds, 70A-2-201.

Contract for sale, waiver of signed writings, 70A-2-209.

Collateral References.

Contracts ⇔ 316.

17 CJS Contracts § 491 et seq.

15A AmJur 2d 464, Commercial Code, § 8.

70A-1-108. Severability. If any provision or clause of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

History: L. 1965, ch. 154, § 1-108.

Collateral References.

Statutes ⇔ 64 (1).

82 CJS Statutes § 92 et seq.

70A-1-109. Section captions. Section captions are parts of this act.

History: L. 1965, ch. 154, § 1-109.

Collateral References.

Statutes ⇔ 211.

82 CJS Statutes § 350.

PART 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

Section

- 70A-1-201. General definitions.
70A-1-202. Prima facie evidence by third-party documents.
70A-1-203. Obligation of good faith.
70A-1-204. Time — Reasonable time — “Seasonably.”
70A-1-205. Course of dealing and usage of trade.
70A-1-206. Statute of frauds for kinds of personal property not otherwise covered.
70A-1-207. Performance or acceptance under reservation of rights.
70A-1-208. Option to accelerate at will.

70A-1-201. General definitions. Subject to additional definitions contained in the subsequent chapters of this act which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this act:

- (1) “Action” in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined.
- (2) “Aggrieved party” means a party entitled to resort to a remedy.
- (3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act (sections 70A-1 205 and 70A-2-208). Whether an agreement has legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts (section 70A-1 103). (Compare “Contract.”)
- (4) “Bank” means any person engaged in the business of banking.
- (5) “Bearer” means the person in possession of an instrument, document of title, or security payable to bearer or indorsed in blank.
- (6) “Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.
- (7) “Branch” includes a separately incorporated foreign branch of a bank.
- (8) “Burden of establishing” a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.
- (9) “Buyer in ordinary course of business” means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at

wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

- (10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.
- (11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this act and any other applicable rules of law. (Compare "Agreement.")
- (12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.
- (13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.
- (14) "Delivery" with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.
- (15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.
- (16) "Fault" means wrongful act, omission or breach.
- (17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this act to the extent that under a particular agreement or document unlike units are treated as equivalents.
- (18) "Genuine" means free of forgery or counterfeiting.
- (19) "Good faith" means honesty in fact in the conduct or transaction concerned.

- (20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.
- (21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.
- (22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.
- (23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.
- (24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.
- (25) A person has "notice" of a fact when
 - (a) he has actual knowledge of it; or
 - (b) he has received a notice or notification of it; or
 - (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

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

- (26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when
 - (a) it comes to his attention; or
 - (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.
- (27) Notice, knowledge of a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

- (28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this act.
- (30) "Person" includes an individual or an organization (See section 70A-1-102).
- (31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.
- (32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.
- (33) "Purchaser" means a person who takes by purchase.
- (34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.
- (35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.
- (36) "Rights" includes remedies.
- (37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 70A-2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of account or chattel paper which is subject to chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under section 70A-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with chapter 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (section 70A-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.
- (38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for

- and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.
- (39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.
- (40) "Surety" includes guarantor.
- (41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.
- (42) "Term" means that portion of an agreement which relates to a particular matter.
- (43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.
- (44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (sections 70A-3 303, 70A-4-208 and 70A-4-209) a person gives "value" for rights if he acquires them
- (a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or
 - (b) as security for or in total or partial satisfaction of a pre-existing claim; or
 - (c) by accepting delivery pursuant to a pre-existing contract for purchase; or
 - (d) generally, in return for any consideration sufficient to support a simple contract.
- (45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.
- (46) "Written" or "writing" includes printing, typewriting or any other intentional reduction to tangible form.

History: L. 1965, ch. 154, § 1-201; 1977, ch. 272, § 2.

Compiler's Notes.

The 1977 amendment inserted the second sentence in subsec. (9); substituted "of" for "or" near the beginning of subsec. (27); and substituted "buyer of account or chattel paper" in the third sentence of subsec. (37) for "buyer of accounts, chattel paper."

Good faith.

"Good faith" within the meaning of this section requires only an honest belief by a creditor that he is insecure, not that the belief be reasonable; where bank's honest belief was that its prospects for repayment

were impaired by borrower's conduct of his mink ranching business and his loss by theft of a substantial quantity of mink pelts, it acted in good faith in invoking acceleration clause of loan agreement, and the reasonableness of its belief in its insecurity was irrelevant. *State Bank of Lehi v. Woolsey* (1977) 565 P 2d 413.

Lease as security interest.

The option price was nominal and the lease with an option to purchase was intended as security where the option price was 10% of the original cost of the property, and only 6% of the total lease payments, and at the time the option was to be exercised the property still had a useful life so as to leave the lessee with no sensible alternative but to

purchase the property. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Tests used in determining if a lease with an option to purchase contains nominal consideration for the exercise of the option, making the lease a security interest, involves comparison of the option price with the original list price or costs of the property, comparison of the option price with sensible alternatives at time the option is to be exercised, and comparison of the option price to the fair market value of the property at the time the option is to be exercised. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Notice.

Bank's notification by letter to defendant of assignment to the bank of accounts receivable of debtor is sufficient notice to defendant that it is under a duty to pay the bank the amount due. *Moab Nat. Bank v. Keystone-Wallace Resources* (1973) 30 U 2d 330, 517 P 2d 1020.

Where bank did not deal directly with purchaser, but relied on corporate agent to procure signatures acknowledging assignment of debt, and the agent delivered letters personally to an unauthorized employee of purchaser who worked at a different building than the address printed on the invoices, the bank had no notice of the assignments within the meaning of subsec. (26). *Bank of Salt Lake v. Corporation of the President of the*

Church of Jesus Christ of Latter-Day Saints (1975) 534 P 2d 887.

Where intermediary bank, in lieu of its regular notice procedures, telephoned notice of dishonored check to depository bank, but gave no written notice or confirmation until six months later, the telephone call did not constitute notice. *Valley Bank & Trust Co. v. First Security Bank of Utah, N. A.* (1975) 538 P 2d 298.

Security for contingent liability.

Right to contribution from joint obligor on indemnity agreement, although a contingent claim, constitutes "value given" in transfer of corporate stock. *Prisbrey v. Noble* (1974) 505 F 2d 170.

Collateral References.

Statutes ⇄ 179.

82 CJS Statutes § 315.

15A AmJur 2d 458 to 464, Commercial Code §§ 4 to 7.

Equipment leases as security interest within Uniform Commercial Code § 1-201 (37), 76 ALR 3d 11.

Who is "buyer in ordinary course of business" under uniform commercial code, 87 ALR 3d 11.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201 (9) defining buyer in ordinary course of business for purposes of UCC § 9-307 (1), 73 ALR 3d 338.

70A-1-202. Prima facie evidence by third-party documents. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

History: L. 1965, ch. 154, § 1-202.

Collateral References.

Evidence ⇄ 370.

32 CJS Evidence § 733.

15A AmJur 2d 484, Commercial Code § 33.

Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness, 72 ALR 3d 1243.

70A-1-203. Obligation of good faith. Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.

History: L. 1965, ch. 154, § 1-203.

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Delay in delivery or nondelivery of goods, excuse by failure of presupposed conditions, 70A-2-615.

"Good faith" defined, 70A-1-201 (19),
70A-2-103 (1) (b).

Improper tender or delivery of goods, cure
by seller, 70A-2-508.

Merchant buyer's duties as to rejected
goods, 70A-2-603.

Option to accelerate at will, 70A-1-208.

Substituted performance of contract for
sale, 70A-2-614.

Collateral References.

17 CJS Contracts § 494.

15A AmJur 2d 478, Commercial Code § 26.

Effectiveness of original financing state-
ment under UCC article 9 after change in
debtor's name, identity, or business struc-
ture, 99 ALR 3d 1194.

70A-1-204. Time — Reasonable time — "Seasonably."

- (1) Whenever this act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.
- (2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.
- (3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

History: L. 1965, ch. 154, § 1-204.

should be ruled upon as a matter of law. Lish
v. Compton (1976) 547 P 2d 223.

Questions of fact and law.

What constitutes a reasonable time is usu-
ally a question of fact, but if the time elapsed
was outside the ambit which fair-minded
persons might conclude was reasonable, it

Collateral References.

Time ⇄ 15.

86 CJS Time § 8.

15A AmJur 2d 480, Commercial Code § 27.

70A-1-205. Course of dealing and usage of trade.

- (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
- (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
- (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.
- (5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

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

History: L. 1965, ch. 154, § 1-205.

"Merchant" defined, 70A-2-104.

Obligation of good faith in performance or enforcement of contract, 70A-1-203.

Variation of contract by agreement, 70A-1-102.

Cross-References.

"Agreement" defined, 70A-1-201 (3).

Contract for sale, construction, statute of frauds, 70A-2-201, 70A-2-301 to 70A-2-328.

Contract for sale, course of performance or practical construction, 70A-2-208.

Contract for sale, explained or supplemented by course of dealing or usage of trade, 70A-2-202.

Contract for sale, terms left open, 70A-2-204 (3).

Contract for sale, unconscionable contract or clause, evidence as to commercial setting, 70A-2-302.

Collateral References.

Contracts ⇔ 170; Customs and Usages ⇔ 1, 10 et seq.

17 CJS Contracts § 325; 25 CJS Customs and Usages §§ 1, 14 et seq.

15A AmJur 2d 480, Commercial Code § 28; 17 AmJur 2d 643, Contracts § 251.

DECISIONS UNDER FORMER LAW

Construction and application.

Former section 60-6-1, providing for variation of implied obligations under sales contracts by course of dealing, did not apply

where "course of dealing" consisted of a single transaction in the sale of nonwarranty seed. Hoover v. Utah Nursery Co. (1932) 79 U 12, 7 P 2d 270.

70A-1-206. Statute of frauds for kinds of personal property not otherwise covered.

- (1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.
- (2) Subsection (1) of this section does not apply to contracts for the sale of goods (section 70A-2-201) nor of securities (section 70a-8-319) nor to security agreements (section 70A-9-203).

History: L. 1965, ch. 154, § 1-206.

37 CJS Frauds, Statute of § 138.

15A AmJur 2d 486, Commercial Code § 37; 72 AmJur 2d 666, Statute of Frauds § 130.

Collateral References.

Frauds, Statute of ⇔ 81.

70A-1-207. Performance or acceptance under reservation of rights.

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

History: L. 1965, ch. 154, § 1-207.

Cross-References.

Contract for sale, effect of acceptance of goods, 70A-2-607.

Collateral References.
Contracts ⇌ 305, 316.

17A CJS Contracts § 491; 31 CJS Estoppel § 114.

70A-1-208. Option to accelerate at will. A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

History: L. 1965, ch. 154, § 1-208.

Good faith belief.

Where defendants, debtors on installment note given in connection with the purchase of plaintiff's farm, had made every payment due to date though they were often late in doing so, failure to make one payment until more than a month after it was due because check had been lost in the mail was not grounds to believe in good faith that the prospect of payment was impaired, and did not give plaintiffs the right to accelerate payment of the note. *Williamson v. Wanlass* (1976) 545 P 2d 1145.

"Good faith" within the meaning of this section requires only an honest belief by a creditor that he is insecure, not that the belief be reasonable; where bank's honest belief was that its prospects for repayment were impaired by borrower's conduct of his mink ranching business and his loss by theft

of a substantial quantity of mink pelts, it acted in good faith in invoking acceleration clause of loan agreement, and the reasonableness of its belief in its insecurity was irrelevant. *State Bank of Lehi v. Woolsey* (1977) 565 P 2d 413.

Collateral References.

17A CJS Contracts § 507.

15A AmJur 2d 485, Commercial Code § 35.

Provision for acceleration on death as affecting instrument's character and validity as a contract, 1 ALR 2d 1206.

What constitutes "good faith" under Uniform Commercial Code § 1-208 dealing with "insecure" or "at will" acceleration clauses, 61 ALR 3d 244.

What is essential to exercise of option to accelerate maturity of bill or note, 5 ALR 2d 968.

CHAPTER 2

SALES

Part

1. Short title, general construction and subject matter.
2. Form, formation and readjustment of contract.
3. General obligation and construction of contract.
4. Title, creditors and good faith purchasers.
5. Performance.
6. Breach, repudiation and excuse.
7. Remedies.

PART 1

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

Section

- 70A-2-101. Short title.
 70A-2-102. Scope — Certain security and other transactions excluded from this chapter.
 70A-2-103. Definitions and index of definitions.
 70A-2-104. Definitions — "Merchant" — "Between merchants" — "Financing agency."

- 70A-2-105. Definitions — Transferability — “Goods” — “Future” goods — “Lot” — “Commercial unit.”
- 70A-2-106. Definitions: “Contract” — “Agreement” — “Contract for sale” — “Sale” — “Present sale” — “Conforming” to contract — “Termination” — “Cancellation.”
- 70A-2-107. Goods to be severed from realty — Recording.

70A-2-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Sales.

History: L. 1965, ch. 154, § 2-101.

Law Reviews.

Collateral References.

Construction and effect of UCC art. 2, dealing with sales, 17 ALR 3d 1010.

Uniform Commercial Code — Major Changes in Sales Law, F. W. Whiteside, Jr., 49 Ky. L. J. 165.

The Uniform Commercial Code in Utah, Ronald N. Boyce, 9 Utah L. Rev. 904, 908.

70A-2-102. Scope — Certain security and other transactions excluded from this chapter. Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

History: L. 1965, ch. 154, § 2-102.

Cross-References.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Inapplicable to livestock auction.

In replevin action by livestock grower to recover cattle sold at auction, sale was not governed by this chapter but by Utah Livestock Brand and Anti-Theft Act. Pugh v. Stratton (1969) 22 U 2d 190, 450 P 2d 463.

Collateral References.

67 AmJur 2d 116, Sales § 4.

Applicability of Uniform Sales Act and Uniform Commercial Code to contract between grower of vegetable or fruit crops

and purchasing processor, packer, or canner, 87 ALR 2d 739.

Conflict of laws as to conditional sale of chattels, 148 ALR 375, 13 ALR 2d 1312.

Title to unknown valuables secreted in articles sold, 4 ALR 2d 318.

Use of conditional sale contract to secure debt in addition to the purchase price, 148 ALR 346.

Validity and mutuality of agreement to buy where there is no express agreement to sell, 60 ALR 215.

Violation of statute as to form of, or terms to be included in, conditional sale contract, as invalidating entire transaction or merely its effect to reserve title in vendor, 144 ALR 1103.

What amounts to conditional sale, 175 ALR 1366.

DECISIONS UNDER FORMER LAW

Application and construction.

The Uniform Sales Act is applicable only to goods and chattels. Park v. Moorman Mfg. Co. (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

Conditional sale.

If personal property is delivered to buyer, title not to vest until payment of balance of purchase money, sale is a conditional one, and does not vest title until condition is per-

formed. Such transaction is not fraudulent as against third parties claiming through buyer, in absence of showing of bad faith. Shoshonetz v. Campbell (1890) 7 U 46, 24 P 672.

Where conditional sales contract provided that title to the goods were to remain in seller until payment of the purchase price and allowed the seller to repossess in the event of default, the seller could still bring action for the purchase price in the event of

default, obtain a judgment for the amount remaining unpaid, and could still have title remain in his possession. A seller, in such an instance has two concurrent remedies. He is entitled to the purchase price if he can collect and if he cannot collect he retains the

title to his property and the right to its possession. He does not waive his right to reclaim the property by bringing suit for the purchase price. *Soter v. Snyder* (1954) 3 U 2d 28, 277 P 2d 966.

70A-2-103. Definitions and index of definitions.

- (1) In this chapter unless the context otherwise requires
 - (a) "Buyer" means a person who buys or contracts to buy goods.
 - (b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
 - (c) "Receipt" of goods means taking physical possession of them.
 - (d) "Seller" means a person who sells or contracts to sell goods.
- (2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:
 - "Acceptance." Section 70A-2-606.
 - "Banker's credit." Section 70A-2-325.
 - "Between merchants." Section 70A-2-104.
 - "Cancellation." Section 70A-2-106 (4).
 - "Commercial unit." Section 70A-2-105.
 - "Confirmed credit." Section 70A-2-325.
 - "Conforming to contract." Section 70A-2-106.
 - "Contract for sale." Section 70A-2-106.
 - "Cover." Section 70A-2-712.
 - "Entrusting." Section 70A-2-403.
 - "Financing agency." Section 70A-2-104.
 - "Future goods." Section 70A-2-105.
 - "Goods." Section 70A-2-105.
 - "Identification." Section 70A-2-501.
 - "Installment contract." Section 70A-2-612.
 - "Letter of Credit." Section 70A-2-325.
 - "Lot." Section 70A-2-105.
 - "Merchant." Section 70A-2-104.
 - "Overseas." Section 70A-2-323.
 - "Person in position of seller." Section 70A-2-707.
 - "Present sale." Section 70A-2-106.
 - "Sale." Section 70A-2-106.
 - "Sale on approval." Section 70A-2-326.
 - "Sale or return." Section 70A-2-326.
 - "Termination." Section 70A-2-106.
- (3) The following definitions in other chapters apply to this chapter:
 - "Check." Section 70A-3-104.
 - "Consignee." Section 70A-7-102.
 - "Consignor." Section 70A-7-102.
 - "Consumer goods." Section 70A-9-109.

“Dishonor.” Section 70A-3-507.

“Draft.” Section 70A-3-104.

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

History: L. 1965, ch. 154, § 2-103.

“Person” defined, 70A-1-201.

Cross-References.

Assignment of rights, 70A-2-210.

Delegation of performance, 70A-2-210.

Delivery of documents of title, 70A-1-201
(14).

Collateral References.

Sales ⇔ 1, 3; Statutes ⇔ 179.

77 CJS Sales § 1; 82 CJS Statutes § 315.

67 AmJur 2d 122, 127, Sales §§ 9, 16.

DECISIONS UNDER FORMER LAW

Contract for work, labor and materials.

The Uniform Sales Act did not expand the law of sales to include a transaction which

was not a contract of sale, such as a contract for work, labor and materials. *Sidney Stevens Implement Co. v. Hintze* (1937) 92 U 264, 67 P 2d 632, 111 ALR 331.

70A-2-104. Definitions — “Merchant” — “Between merchants” — “Financing agency.”

- (1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
- (2) “Financing agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (section 70a-2-707).
- (3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

History: L. 1965, ch. 154, § 2-104.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Cross-References.

Delivery terms, 70A-2-319 to 70A-2-325.

Implied warranties, 70A-2-314, 70A-2-315.

Obligation of good faith in performance or enforcement of contract, 70A-1-203.

Rules of construction, variation by agreement, 70A-1-102.

Farmer not a merchant.

The term “merchant” refers primarily to one whose occupation is buying and selling; this definition does not exclude persons who sell products they make or raise if this is

done with such regularity as to be a substantial part of their occupation, but it does not include a farmer who sells his crops annually. *Lish v. Compton* (1976) 547 P 2d 223.

Farmers as "merchants" within provisions of UCC article 2, dealing with sales, 95 ALR 3d 484.

Collateral References.

Sales \Leftrightarrow 1 et seq.; Statutes \Leftrightarrow 179.
77 CJS Sales § 1 et seq.; 82 CJS Statutes § 315.
67 AmJur 2d 125, 128, Sales §§ 14, 17.

Law Reviews.

Commercial Law — A Farmer Is Not a Merchant Under the Uniform Commercial Code, 65 Mich. L. Rev. 345.

70A-2-105. Definitions — Transferability — "Goods" — "Future" goods — "Lot" — "Commercial unit."

- (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty (section 70A-2-107).
- (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.
- (3) There may be a sale of a part interest in existing identified goods.
- (4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.
- (5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.
- (6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

History: L. 1965, ch. 154, § 2-105.

Identification of goods, insurable interest, 70A-2-501.

Cross-References.

Formal requirements, statute of frauds, 70A-2-201.

"Fungible" goods defined, 70A-1-201 (17).

Goods to be severed from realty, recording, 70A-2-107.

Investment securities, 70A-8-101 to 70A-8-406.

Collateral References.

Sales \Leftrightarrow 11; Statutes \Leftrightarrow 179.

77 CJS Sales § 14; 82 CJS Statutes § 315.

67 AmJur 2d 123, Sales § 12.

Construction and effect of contract for sale of commodity or goods where quantity is described as "about" or "more or less" than an amount specified, 58 ALR 2d 377.

Contract of sale which calls for a definite quantity but leaves a quality, grade, or assortment optional with one of the parties as subject to objection of indefiniteness, 105 ALR 1283.

Electricity, gas, or water furnished by public utility as "goods" within provisions of

Uniform Commercial Code, article 2 on sales, 48 ALR 3d 1060.

Mutuality and enforceability of contracts to furnish another with his needs, wants, desires, requirements, etc., of certain commodities, 14 ALR 1300, 26 ALR 2d 1139.

Seller's estoppel to deny existence of property sold, 40 ALR 382.

Substantial performance of contract for manufacture or sale of article, 19 ALR 815.

Validity and construction of contract for sale of season's output, 23 ALR 574.

DECISIONS UNDER FORMER LAW

Construction and application.

The Uniform Sales Act did not expand the law of sales to include a transaction which was not a contract of sale, such as a contract for work, labor and materials. *Sidney Stevens Implement Co. v. Hintze* (1937) 92 U 264, 67 P 2d 632, 111 ALR 331.

Oral agreement whereby company agreed to build auto trailer for use in business by cash register salesman, which was to weigh one-half of what the finished trailer in fact weighed, held not a sale but a contract for work, labor and materials. *Sidney Stevens Implement Co. v. Hintze* (1937) 92 U 264, 67 P 2d 632, 111 ALR 331.

Conditional sale.

Undisclosed intent of seller is not of itself sufficient to make delivery conditional, and in order that there may be conditional sale and

title retained by vendor, the minds of parties must meet, unless contract be executory for article to be manufactured, and then under the Uniform Sales Act title does not pass prior to appropriation of goods to contract, and at time of appropriation to contract, vendor may reserve right of possession or right of property until certain conditions have been fulfilled. *Utah Assn. of Creditmen v. Buller* (1920) 57 U 270, 194 P 127.

Sale of goods and passage of title.

The fact that sugar under contract of sale was stored in different warehouses used in operation of business did not render inapplicable ordinary rules respecting sale and passage of title to part of fungible property without separation or segregation. *United States v. Amalgamated Sugar Co.* (1934) 72 F 2d 755.

70A-2-106. Definitions: "Contract" — "Agreement" — "Contract for sale" — "Sale" — "Present sale" — "Conforming" to contract — "Termination" — "Cancellation."

- (1) In this chapter unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (section 70A-2-401). A "present sale" means a sale which is accomplished by the making of the contract.
- (2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.
- (3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

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

History: L. 1965, ch. 154, § 2-106.

77 CJS Sales §§ 1, 2.

67 AmJur 2d 118 to 122, 128, Sales §§ 6 to 8, 10, 18.

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Course of performance or practical construction, 70A-2-208.

Improper tender or delivery, cure by seller, 70A-2-508.

Interparty agreements, 15-3.

Obligation of good faith in performance or enforcement of contract, 70A-1-203.

Contract for sale of goods as entire or divisible, 2 ALR 643.

Divisibility of contract for the sale of an outfit, plant or machinery, 4 ALR 1442.

Passing of title to personal property under a contract of sale, as affected by fact that contract covers both real and personal property, 117 ALR 395.

Validity and construction of contract for sale of season's output, 1 ALR 1392, 9 ALR 276, 23 ALR 574.

Collateral References.

Sales ⇔ 1 et seq.

DECISIONS UNDER FORMER LAW

Executory and executed contracts distinguished.

Whether a contract is one of sale or an executory contract to sell depends always upon what the parties to it intend in regard to the time when the title in the property is to pass to the buyer. *Jones v. Commercial Investment Trust* (1924) 64 U 151, 228 P 896, followed in *Harrison v. Auto Securities Co.* (1927) 70 U 11, 257 P 677, 57 ALR 388.

In contract to sell, parties agree to transfer property in goods at some future time, whereas in sale, parties agree to transfer property presently. *Middletown v. Evans* (1935) 86 U 396, 45 P 2d 570.

Intention of parties.

Where turkey poults were placed with growers by processor pursuant to written agreement between hatchery and processor, it was not a sale of the poults from hatchery to processor. It was an agreement relating to

sales of poults from hatcheries to growers in Utah to whom the poults would be distributed through processor. *Nephi Processing Plant v. Western Cooperative Hatcheries* (1957) 242 F 2d 567.

The intention of the parties at the time of the transaction is the controlling factor of whether or not title passed. The great weight of the evidence in this case is that the transactions between canneries and growers in reference to picking boxes are not sales. *E. C. Olsen Co. v. State Tax Comm.* (1946) 109 U 563, 168 P 2d 324.

"Sale" defined.

"Sale" is ordinarily understood to mean transfer of property for money. *Watson v. Odell* (1921) 58 U 276, 198 P 772, 20 ALR 280.

Essence of sale is transfer of title from seller to buyer. *Union Portland Cement Co. v. State Tax Comm.* (1947) 110 U 135, 170 P 2d 164, modified upon other grounds on rehearing 110 U 152, 176 P 2d 879.

70A-2-107. Goods to be severed from realty — Recording.

- (1) A contract for the sale of minerals or the like (including oil or gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.
- (2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of

timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

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

History: L. 1965, ch. 154, § 2-107; 1977, ch. 272, § 3.

Compiler's Notes.

The 1977 amendment substituted "minerals or the like (including oil or gas)" near the beginning of subsec. (1) for "timber, minerals or the like"; and inserted "or of timber to be cut" in the middle of subsec. (2).

Cross-References.

"Goods" defined, 70A-2-105, 70A-9-105 (f).
Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.
Statute of frauds, 70A-2-201.

Collateral References.

Sales ⇔ 10, 11.
77 CJS Sales §§ 13, 15.

PART 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

Section

- 70A-2-201. Formal requirements — Statute of frauds.
70A-2-202. Final written expression — Parol or extrinsic evidence.
70A-2-203. Seals inoperative.
70A-2-204. Formation in general.
70A-2-205. Firm offers.
70A-2-206. Offer and acceptance in formation of contract.
70A-2-207. Additional terms in acceptance or confirmation.
70A-2-208. Course of performance or practical construction.
70A-2-209. Modification, rescission and waiver.
70A-2-210. Delegation of performance — Assignment of rights.

70A-2-201. Formal requirements — Statute of frauds.

- (1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
- (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

- (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
- (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
 - (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
 - (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 70a-2-606).

History: L. 1965, ch. 154, § 2-201.

Cross-References.

"Action" defined, 70A-1-201 (1).

Additional terms in acceptance or confirmation, 70A-2-207.

Bulk sales, 70A-6-101 to 70A-6-111.

"Contract" defined, 70A-1-201 (11).

Modification, rescission and waiver, 70A-2-209.

Parol or extrinsic evidence, 70A-2-202.

Price payable in money, goods, realty, or otherwise, 70A-2-304.

Statute of frauds generally, 25-5.

Admission of contract's existence.

Where party to a transaction between a merchant and a nonmerchant admitted that he would have considered himself bound by their oral agreement if he had received confirmation of it within a reasonable time, the admission did not bring into operation the provisions of subd. (3) (b) and validate the otherwise unenforceable agreement. *Lish v. Compton* (1976) 547 P 2d 223.

"Between merchants" exception.

Since a farmer, party to a transaction with a grain dealer, was not a "merchant" within the meaning of this section, subsec. (2) did not apply and the statute of frauds rendered unenforceable an oral agreement to sell the farmer's whole wheat crop, valued substantially in excess of \$500. *Lish v. Compton* (1976) 547 P 2d 223.

Confirmatory memorandum.

Where two elephant merchants agreed over the telephone to the sale and purchase of the animal "Peggy," and buyer sent seller

a letter confirming the terms of the sale agreement, the statute of frauds was satisfied, since it did not appear that seller had objected to the memorandum in writing. *Miller v. Kaye* (1975) 545 P 2d 199.

Modification of contract.

The modification of a contract, which does not contain a provision under 70A-2-209 (2) requiring a signed writing applicable to the modification in question, is governed by subsecs. (1) and (2) of this section. *Monroc, Inc. v. Jack B. Parson Constr. Co.* (1979) 604 P 2d 901.

Collateral References.

Frauds, Statute of ⇄ 81 et seq.; Sales ⇄ 26 to 32.

37 CJS Frauds, Statute of § 138 et seq.; 77 CJS Sales §§ 58 to 64.

67 AmJur 2d 169 to 172, 213 to 217, Sales §§ 57 to 60, 99 to 102.

Acceptance satisfying statute where purchaser in possession at time of sale, 111 ALR 1312.

Admission of contract by defendant as affecting sufficiency of acts relied on to constitute part performance under statute of frauds, 90 ALR 231.

Agency to purchase personal property for another as within statute of frauds, 20 ALR 2d 1140.

Check as payment within contemplation of statute of frauds, 8 ALR 2d 251.

Check or note as memorandum satisfying statute of frauds, 20 ALR 363, 153 ALR 1112.

Construction and application of UCC § 2-201 (3) (b) rendering contract of sale

enforceable notwithstanding statute of frauds, to extent it is admitted in pleading, testimony, or otherwise in court, 88 ALR 3d 416.

Construction and application of UCC §2-201 (3) (c) rendering contract of sale enforceable notwithstanding statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted, 97 ALR 3d 908.

Construction and application of Uniform Sales Act, other than section 4 relating to statute of frauds, as regards distinction between contract of sale and contract for work or labor, 111 ALR 341.

Construction and effect of contract for sale of commodity to fill buyer's requirements, 26 ALR 2d 1099.

Construction and effect of exception making the statute of frauds provision inapplicable where goods are manufactured by seller for buyer, 25 ALR 2d 672.

Contract for sale of goods as entire or divisible, 2 ALR 643.

Contracts relating to corporate stock as within provision of statute of frauds dealing with sales of goods, 59 ALR 597.

Contract to fill in land as one for sale of goods within statute of frauds, 161 ALR 1158.

Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 ALR 172.

Divisibility of contract for the sale of an outfit, plant, or machinery, 4 ALR 1442.

Doctrine of part performance as sustaining action at law based on contract within statute of frauds, 59 ALR 1305.

Effect of statute of frauds on right to modify by parol agreement required to be in writing, 80 ALR 539, 118 ALR 1511.

Extrinsic writing referred to in written agreement as part thereof for purposes of statute of frauds, 73 ALR 1383.

Failure to comply with statute of frauds as to part of contract within statute as affecting enforceability of part not covered by statute, 71 ALR 479.

Money or other property in possession of seller, before contract was made, as satisfying condition of part payment which will take oral contract for sale of goods out of statute of frauds, 131 ALR 1252, 170 ALR 245.

Mutuality and enforceability of an agreement upon the sale of goods, to give the purchaser an option or the exclusive sale of similar goods without a corresponding obligation on his part, 45 ALR 1197.

Necessity and sufficiency of statement in writing of consideration or price for sale of goods or choses in action in order to satisfy statute of frauds, 59 ALR 1422.

Necessity that each of several papers constituting contract be signed by party to be charged, 85 ALR 1184.

Oral contracts of sale not to be performed within a year as taken out of statute of frauds by performance, 6 ALR 2d 1108, 1156, 1176.

Oral contract to enter into written agreement as within statute of frauds, 58 ALR 1015.

Place of signature on memorandum to satisfy statute of frauds, 112 ALR 937.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 ALR 3d 9.

Price or consideration for sale of goods, necessity and sufficiency of statement in writing, 59 ALR 1422.

Printed, stamped, or typewritten name as satisfying requirement of statute of frauds as regards signature, 171 ALR 334.

Public record as satisfying requirement of statute of frauds as to written contract or memorandum, 127 ALR 236.

Quasi contract: recovery, on theory of quasi contract, unjust enrichment, or restitution, of money paid in reliance upon unenforceable promise to accept a bill of exchange or draft, 81 ALR 2d 587.

Reformation of memorandum relied upon to take contract out of statute of frauds, 73 ALR 99.

Relation between doctrines of estoppel and part performance as basis of enforcement of contract not conforming to statute of frauds, 75 ALR 650, 117 ALR 939.

Sale of contractual rights; defect in written record as ground for avoiding sale, 10 ALR 2d 728.

Statute of frauds and conflict of laws, 105 ALR 652, 161 ALR 820.

Statute of frauds as applicable to seller's oral warranty as to quality or condition of chattel, 40 ALR 2d 760.

Statute of frauds as applied to agreements of repurchase or repayment on sale of corporate stock or other personal property, 121 ALR 312.

Statute of frauds, buyer's note as payment within contemplation of, 81 ALR 2d 1355.

Sufficiency of identification of vendor or purchaser in memorandum, 70 ALR 196.

Terms "bags," "bales," "cars," or other terms indefinite as to quantity or weight as satisfying statute of frauds, 129 ALR 1230.

Trade custom or usage to explain or supply essential terms in writing required by stat-

ute of frauds (or Sales Act) in sale of goods, 29 ALR 1218.

Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds, 12 ALR 2d 508.

When goods remaining in custody of seller or some third person deemed received by buyer within exception to statute, 4 ALR 902.

Writing between one of the parties to a contract and his agent or a third person as satisfying statute of frauds, 112 ALR 490.

Law Reviews.

Anatomy of Sections 2-201 and 2-202 of the Uniform Commercial Code (the statute of frauds and the parol evidence rule), 4 Boston Coll. Ind. & Com. L. Rev. 381.

Sales under Uniform Commercial Code, Inadvertent Acceptance of Buyer's Terms, 62 Dick. L. Rev. 170.

DECISIONS UNDER FORMER LAW

Acceptance and receipt of goods, effect.

It is a question for jury to determine whether or not defendant is to be deemed to have accepted the goods by his failure to reject them within a reasonable time. *Lauer v. Richmond Cooperative Mercantile Inst.* (1892) 8 U 305, 31 P 397.

It is not necessary for the accepting and receiving of goods to take place at the same time. One may precede the other, but both must have occurred before the seller is entitled to recover the price. *Hudson Furniture Co. v. Freed Furniture & Carpet Co.* (1894) 10 U 31, 36 P 132.

Manual and actual reception of the goods is not required; symbolic, constructive, or implied possession is sufficient. *Hudson Furniture Co. v. Freed Furniture & Carpet Co.* (1894) 10 U 31, 36 P 132.

A delivery f. o. b. to a carrier not specially designated by buyer is not such an acceptance and receipt by buyer as will avoid operation of statute of frauds, no part of purchase money being paid by buyer, and no note or memorandum of contract being signed by him. To satisfy statute there must be such an act, or such conduct, on part of buyer, as will manifest an intention to accept and receive goods as his own; such an act or such conduct as will supply the place of a written contract. The delivery must be complete delivery, and the acceptance must be final, unconditional and irrevocable, so that the goods will be reduced to the actual possession of the buyer. *Hudson Furniture Co. v. Freed Furniture & Carpet Co.* (1894) 10 U 31, 36 P 132.

It will be noted that one of the three ways of validating a verbal contract is that the buyer must both accept and receive the goods. The words are now in the conjunctive, whereas they were formerly in the disjunctive. Therefore, to entitle a person to recover under such an oral contract, both an acceptance and a delivery must be shown. *Hudson Furniture Co. v. Freed Furniture & Carpet Co.* (1894) 10 U 31, 36 P 132.

Contention that certain oral agreement for sale of certain shares of stock and to divide profits was void because it was not in writing was without merit, since statute of frauds did not apply where the transaction was fully executed and the seller of stock had received and retained the fruits of the transaction. *Western Securities Co. v. Spiro* (1923) 62 U 623, 221 P 856.

Where buyer was in possession of wheat as bailee and after oral contract for sale thereof was entered into he requested extension of time to pay for wheat, oral contract was taken out of statute of frauds. *James Mack Co. v. Bear River Milling Co.* (1924) 63 U 565, 227 P 1033, 36 ALR 643.

Either words or conduct may be sufficient to show acceptance of goods although the inference to be drawn from either should be clear and unequivocal. *James Mack Co. v. Bear River Milling Co.* (1924) 63 U 565, 227 P 1033, 36 ALR 643.

Agreement relating to sale.

Turkey poults placed with growers by processor pursuant to written agreement between hatchery and processor was not a sale of the poults from hatchery to processor. It was an agreement relating to sales of poults from hatcheries to growers in Utah to whom the poults would be distributed through processor. *Nephi Processing Plant, Inc. v. Western Cooperative Hatcheries* (1957) 242 F 2d 567.

Contract for sale of goods.

Utah adopted the Massachusetts rule with regard to what constituted a contract for the sale of goods. *Sidney Stevens Implement Co. v. Hintze* (1937) 92 U 264, 67 P 2d 632, 111 ALR 331.

Where amount involved in oral contract for sale of turkey poults was in excess of \$500, plea of statute of frauds precluded its enforcement. *Tanner v. Childers* (1945) 108 U 455, 160 P 2d 965.

Contract for work, labor and materials.

Oral agreement whereby company agreed to build auto trailer for use in business by cash register salesman which was to weigh one-half of what the finished trailer in fact weighed, held not a sale but a contract for work, labor and materials. *Sidney Stevens Implement Co. v. Hintze* (1937) 92 U 264, 67 P 2d 632, 111 ALR 331.

Definitions.

The terms "accept" and "actually receive" in former section 60-1-4, although ordinarily synonymous, did not necessarily mean the same thing in the statute of frauds. Case contains discussion of applicable words and phrases. *James Mack Co. v. Bear River Milling Co.* (1924) 63 U 565, 227 P 1033, 36 ALR 643.

Note or memorandum of contract, effect.

An insufficient memorandum will not be received. *Walker v. Bamberger* (1898) 17 U 239, 54 P 108.

Memorandum of offer to sell, which was only signed by seller, held sufficient within statute of frauds. *Bailey v. Leishman* (1907) 32 U 123, 89 P 78, 13 Ann Cas 1116.

Sufficiency of cablegram as memorandum satisfying requirements of statute of frauds, see *Hawaiian Equipment Co. v. Eimco Corp.* (1949) 115 U 590, 207 P 2d 794.

Part performance.

Where an option, not reduced to writing, on an option, is taken, and all its terms are complied with, the transactions will be taken out of the statute of frauds, and be regarded as valid. *Walker v. Bamberger* (1898) 17 U 239, 54 P 108.

Pleading statute.

If answer, in action on contract of sale of goods, admits contract without setting up its invalidity under statute of frauds, merely pleading nonperformance of contract, it was held that defendant could not on the trial plead statute of frauds. *Lauer v. Richmond Cooperative Mercantile Inst.* (1892) 8 U 305, 31 P 397.

Stock transactions.

Statute of frauds applied to transactions involving purchase and sale of stock. *Woolley v. Loose* (1920) 57 U 336, 194 P 908, 14 ALR 372.

Agreement between owner of option for purchase of stock and person who was to sell stock providing for a sharing of profits from stock sales was not a sale, and hence, statute of frauds did not apply. *Western Securities Co. v. Spiro* (1923) 62 U 623, 221 P 856.

70A-2-202. Final written expression — Parol or extrinsic evidence.

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

- (a) by course of dealing or usage of trade (section 70A-1-205) or by course of performance (section 70A-2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

History: L. 1965, ch. 154, § 2-202.

Cross-References.

Additional terms in acceptance or confirmation, 70A-2-207.

Course of dealing and usage of trade, 70A-1-205.

Exclusion or modification of warranties, 70A-2-316.

Unconscionable contract or clause, 70A-2-302.

Finality of written expression.

Where parties orally agreed to sale of certain used railroad materials salvaged from fifteen miles of track, purchaser sent seller purchase order containing specifications for the materials, seller signed the order, after inspecting the track purchaser sent new purchase orders with different specifications, seller neither signed nor objected to the new orders, and purchaser accepted materials not conforming to any of the orders, the purchase orders were clearly not intended by the parties to be a complete and exclusive state-

ment of the terms pertaining to quantity and dimension. *Durbano Metals, Inc. v. A & K Railroad Materials, Inc.* (1978) 574 P 2d 1159.

Collateral References.

Evidence ⇔ 397, 400, 413; Sales ⇔ 60.
32 CJS Evidence § 910; 77 CJS Sales § 71.
67 AmJur 2d 131 to 137, Sales §§ 22 to 26.

Application of parol evidence rule of UCC § 2-202 where fraud or misrepresentation is claimed in sale of goods, 71 ALR 3d 1059.

Law Reviews.

Parol Evidence: First New York Construction of Uniform Commercial Code Section 2-202, 66 Colum. L. Rev. 1370.

DECISIONS UNDER FORMER LAW

Sales tax payment.

Prime contractor did not succeed in placing burden of paying sales taxes on materialman by showing trade usage or course of dealing where record showed the parties were not

engaged in the same trade or business and that the custom varied from trade to trade, and where the evidence of a previous transaction by the parties was not conclusive. *Ralph Child Constr. Co. v. United States* (1966) 365 F 2d 841.

70A-2-203. Seals inoperative. The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

History: L. 1965, ch. 154, § 2-203.

Collateral References.

67 AmJur 2d 171, Sales § 59.

Cross-References.

Firm offers, 70A-2-205.

70A-2-204. Formation in general.

- (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
- (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
- (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

History: L. 1965, ch. 154, § 2-204.

Delivery.

View that contract to be valid and enforceable had to have been delivered was a mistaken view of the law since delivery is not necessary in the absence of an express intention. *Osguthorpe v. Anschutz Land & Livestock Co.* (1972) 456 F 2d 996.

Cross-References.

Additional terms in acceptance or confirmation, 70A-2-207.

Course of performance or practical construction, 70A-2-208.

Formal requirements, statute of frauds, 70A-2-201.

Modification, rescission and waiver, 70A-2-209.

Offer and acceptance, 70A-2-205, 70A-2-206.

Open terms, 70A-2-305 to 70A-2-311.

Supplementary general principles of law applicable, 70A-1-103.

Unconscionable contract or clause, 70A-2-302.

Collateral References.

Sales ⇔ 1 (1), 22 et seq.

77 CJS Sales §§ 1, 5, 24 et seq.

67 AmJur 2d 139, Sales § 29.

Contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than the amount specified, 58 ALR 2d 377.

Contract for sale of commodity to extent of buyer's requirements, 7 ALR 498, 26 ALR 2d 1099.

Contract for sale of goods as entire or divisible, 2 ALR 643.

Divisibility of contract for sale of an outfit, plant or machinery, 4 ALR 1442.

Sale agreement fixing price at retail less specified per cent as indefinite, 57 ALR 747.

Validity and construction of contract for sale of season's output, 1 ALR 1392, 9 ALR 276, 23 ALR 574.

DECISIONS UNDER FORMER LAW

Incomplete contract.

Where portion of contract relating to terms of payment is left for future determination, contract is incomplete, and no action premised thereon is maintainable. *Hi-Way Motor Co. v. Service Motor Co.* (1926) 68 U 65, 249 P 133, distinguished in 118 U 61, 218 P 2d 1069.

Where the original order signed by the prospective buyer of an automobile was

changed by the dealer's sales manager and the buyer, after failing to agree to a suggested financing plan, gave the dealer a check on which he wrote that the check was to be held until the buyer secured a loan for the amount and then stopped payment on the check the next day, the parties failed to complete a contract since there was no definite meeting of the minds. *J. Golden Barton Motor Co. v. Jackson* (1959) 9 U 2d 210, 341 P 2d 423.

70A-2-205. Firm offers. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

History: L. 1965, ch. 154, § 2-205.

Unconscionable contract or clause, 70A-2-302.

Cross-References.

Formal requirements, statute of frauds, 70A-2-201.

Rules of construction, variation by agreement, 70A-1-102.

Collateral References.

67 AmJur 2d 193, Sales § 80.

70A-2-206. Offer and acceptance in formation of contract.

- (1) Unless otherwise unambiguously indicated by the language or circumstances
 - (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
 - (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
- (2) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance

within a reasonable time may treat the offer as having lapsed before acceptance.

History: L. 1965, ch. 154, § 2-206.

Collateral References.

Sales \Leftrightarrow 1 (1), 22, 23.

77 CJS Sales §§ 1, 5, 24 et seq.

67 AmJur 2d 193, Sales § 81.

Acceptance of offer with condition which law would imply, 1 ALR 1508.

Acknowledging receipt of order for goods as an acceptance completing the contract, 10 ALR 683.

Acting on order for goods as an acceptance thereof, 29 ALR 1352.

70A-2-207. Additional terms in acceptance or confirmation.

- (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
- (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (a) the offer expressly limits acceptance to the terms of the offer;
 - (b) they materially alter it; or
 - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

History: L. 1965, ch. 154, § 2-207.

Cross-References.

Acceptance of goods by buyer, effect, 70A-2-607.

Adequate assurance of performance, right to, 70A-2-609.

Contractual modification or limitation of remedy, 70A-2-719.

Excuse by failure of presupposed conditions, 70A-2-615.

Excuse, procedure on notice claiming, 70A-2-616.

Inspection of goods, buyer's right to, 70A-2-513.

Installment contracts, 70A-2-612.

Liquidation or limitation of damages, 70A-2-718.

Rightful rejection of goods, manner and effect of, 70A-2-602.

Rules of construction, variation by agreement, 70A-1-102.

Substituted performance, 70A-2-614.

Transactions between merchants, 70A-2-104.

Unconscionable contract or clause, 70A-2-302.

Collateral References.

Sales \Leftrightarrow 1, 22 (4), 23 (4).

77 CJS Sales §§ 1, 5, 29.

67 AmJur 2d 208, Sales § 93.

What are additional terms materially altering contract within meaning of UCC § 2-207 (2) (b), 72 ALR 3d 479.

Law Reviews.

Uniform Commercial Code Section 2-207 and the "Counter Offer"; Acceptance Unlimited?, 57 Nw. U. L. Rev. 677.

70A-2-208. Course of performance or practical construction.

- (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
- (2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (section 70A-1-205).
- (3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

History: L. 1965, ch. 154, § 2-208.

Modification, rescission and waiver, 70A-2-209.

Cross-References.

Parol or extrinsic evidence, 70A-2-202.

Waiver of buyer's objections, 70A-2-605.

Acceptance of goods, effect, 70A-2-607.

"Agreement" defined, 70A-1-201,

Collateral References.

70A-2-106.

Sales ⇔ 54 et seq.

77 CJS Sales § 71 et seq.

Buyer's rights on improper delivery, 70A-2-601.

67 AmJur 2d 159 to 161, Sales §§ 146, 147.

70A-2-209. Modification, rescission and waiver.

- (1) An agreement modifying a contract within this chapter needs no consideration to be binding.
- (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
- (3) The requirements of the statute of frauds section of this chapter (section 70A-2-201) must be satisfied if the contract as modified is within its provisions.
- (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
- (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

History: L. 1965, ch. 154, § 2-209.

"Cancellation" and "termination" distinguished, 70A-2-106.

Cross-References.

Course of performance or practical construction, 70A-2-208.

"Agreement" defined, 70A-1-201,

70A-2-106.

Excuse by failure of presupposed conditions, 70A-2-615.

Excuse, procedure on notice claiming, 70A-2-616.

Formal requirements, statute of frauds, 70A-2-201.

Obligation of good faith, 70A-1-203.

Parol or extrinsic evidence, 70A-2-202.

Signed writing requirement.

A contract provision reading: "Claims for extras positively will not be allowed unless ordered in writing" did not require a signed writing under subsec. (2) of this section as to a price modification where other modifications were accepted without a writing signed by the adversely affected party. *Monroc, Inc. v. Jack B. Parson Constr. Co.* (1979) 604 P 2d 901.

The requirement of a signed writing under subsec. (2) of this section for modification is fulfilled by a writing by the adversely

affected party to a third person, who is not a party to the contract. *Monroc, Inc. v. Jack B. Parson Constr. Co.* (1979) 604 P 2d 901.

Waiver.

Waiver may occur by an oral agreement. *Durbano Metals, Inc. v. A & K R. Materials, Inc.* (1978) 574 P 2d 1159.

Collateral References.

Frauds, Statute of ⇐ 131; Sales ⇐ 89 et seq.

37 CJS Frauds, Statute of § 232; 77 CJS Sales § 83 et seq.

67 AmJur 2d 335 to 337, 339, 343, Sales §§ 210 to 212, 215, 219.

Assignability of right to rescind or of right to return of money or other property as incident of rescission, 162 ALR 743.

70A-2-210. Delegation of performance — Assignment of rights.

- (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
- (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.
- (3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation of (to) the assignee of the assignor's performance.
- (4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment of (for) security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.
- (5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assignee (section 70A-2-609).

History: L. 1965, ch. 154, § 2-210.

Cross-References.

Adequate assurance of performance, right to, 70A-2-609.

Assignment of account or contract right,
70A-9-317, 70A-9-318.

Letters of credit, 70A-5-101 to 70A-5-117.

Output, requirements and exclusive deal-
ings, 70A-2-306.

Secured transactions, sales of accounts,
contract rights and chattel paper, 70A-9-101
to 70A-9-507.

Collateral References.

Sales ⇔ 86.

77 CJS Sales § 80.

67 AmJur 2d 348 to 352, Sales §§ 222 to 225.

PART 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

Section

- 70A-2-301. General obligations of parties.
70A-2-302. Unconscionable contract or clause.
70A-2-303. Allocation or division of risks.
70A-2-304. Price payable in money, goods, realty, or otherwise.
70A-2-305. Open price term.
70A-2-306. Output, requirements and exclusive dealings.
70A-2-307. Delivery in single lot or several lots.
70A-2-308. Absence of specified place for delivery.
70A-2-309. Absence of specific time provisions — Notice of termination.
70A-2-310. Open time for payment or running of credit — Authority to ship under reser-
vation.
70A-2-311. Options and co-operation respecting performance.
70A-2-312. Warranty of title and against infringement — Buyer's obligation against
infringement.
70A-2-313. Express warranties by affirmation, promise, description, sample.
70A-2-314. Implied warranty — Merchantability — Usage of trade.
70A-2-315. Implied warranty — Fitness for particular purpose.
70A-2-316. Exclusion or modification of warranties.
70A-2-317. Cumulation and conflict of warranties express or implied.
70A-2-318. Third-party beneficiaries or warranties express or implied.
70A-2-319. F.O.B. and F.A.S. terms.
70A-2-320. C.I.F. and C.&F. terms.
70A-2-321. C.I.F. or C.&F. — "Net landed weights" — "Payment on arrival" — Warranty
of condition on arrival.
70A-2-322. Delivery "ex-ship."
70A-2-323. Form of bill of lading required in overseas shipment — "Overseas."
70A-2-324. "No arrival, no sale" term.
70A-2-325. "Letter of credit" term — "Confirmed credit."
70A-2-326. Sale on approval and sale or return — Consignment sales and rights of creditors.
70A-2-327. Special incidents of sale on approval and sale or return.
70A-2-328. Sale by auction.

70A-2-301. General obligations of parties. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

History: L. 1965, ch. 154, § 2-301.

Cross-References.

Course of dealing and usage of trade,
70A-1-205.

Course of performance or practical con-
struction, 70A-2-208.

Improper tender or delivery, cure by seller,
70A-2-508.

Installment contracts, 70A-2-612.

Modification, rescission and waiver,
70A-2-209.

Remedies liberally administered,
70A-1-106.

Collateral References.

Sales ⇔ 150, 177, 183.

77 CJS Sales §§ 132, 218, 229.

67 AmJur 2d 446, 456, 534, 559, Sales
§§ 308, 319, 382, 402.

Agent's authority to buy as including authority to accept goods, 55 ALR 2d 69.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

Substantial performance of contract for manufacture or sale of article, 19 ALR 815.

Law Reviews.

Obligation of Parties to Sales of Goods Under Uniform Commercial Code, B. T. Phalan, 62 Dick L. Rev. 235.

Implied Obligation of Good Faith, 46 Mass. L. Q. 41.

DECISIONS UNDER FORMER LAW

Measure of damages.

The buyer's measure of damages, where seller fails or refuses to deliver goods

ordered, is a matter of general law. Schwab Safe & Lock Co. v. Snow (1915) 47 U 199, 152 P 171.

70A-2-302. Unconscionable contract or clause.

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

History: L. 1965, ch. 154, § 2-302.

Collateral References.

67 AmJur 2d 231 to 234, Sales §§ 116, 117.

"Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto, 18 ALR 3d 1305.

Law Reviews.

Unconscionable Contracts Under the Uniform Commercial Code, 109 U. Pa. L. Rev. 401.

Bargaining Power and Unconscionability: A Suggested Approach to Uniform Commercial Code Section 2-302, 114 U. Pa. L. Rev. 998.

70A-2-303. Allocation or division of risks. Where this chapter allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden.

History: L. 1965, ch. 154, § 2-303.

Cross-References.

"Agreement" defined, 70A-1-201.

Risk of loss, 70A-2-509.

Rules of construction, variation by agreement, 70A-1-102.

Unconscionable contract or clause, 70A-2-302.

Collateral References.

Sales ⇌ 217.

77 CJS Sales §§ 286, 287.

67 AmJur 2d 383, Sales § 249.

70A-2-304. Price payable in money, goods, realty, or otherwise.

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

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

History: L. 1965, ch. 154, § 2-304.

33 CJS Exchange of Property § 1 et seq.; 77 CJS Sales §§ 21, 75.
67 AmJur 2d 218, Sales § 104.

Cross-References.

Contract for sale of goods to be severed from realty, recording, 70A-2-107.

Rules of construction, variation by agreement, 70A-1-102.

Supplementary general principles of law applicable, 70A-1-103.

Collateral References.

Exchange of Property ⇔ 1 et seq.; Sales ⇔ 1 (3), 74 et seq.

Necessity of independent consideration to support a modification of the price in a contract of sale, 34 ALR 511.

Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 23 ALR 630, 46 ALR 914.

Validity and enforceability of contract which expressly leaves open terms of payment for future negotiation, 49 ALR 1464.

DECISIONS UNDER FORMER LAW

Contract price controlling.

If the price is fixed by the contract, that controls. *Halverson v. Walker* (1910) 38 U 264, 112 P 804.

Reasonable price.

What constitutes a "reasonable price" is for the jury. *Mulliner v. McCormick & Co.* (1927) 69 U 557, 257 P 658; *Standard Coal Co. v. Stewart* (1928) 72 U 272, 269 P 1014.

70A-2-305. Open price term.

- (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
- (a) nothing is said as to price; or
 - (b) the price is left to be agreed by the parties and they fail to agree; or
 - (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
- (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
- (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as canceled or himself fix a reasonable price.
- (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

History: L. 1965, ch. 154, § 2-305.

Cross-References.

Anticipatory repudiation, 70A-2-610.

Breach of contract, buyer's procurement of substitute, 70A-2-712.

Breach of contract, seller's resale, 70A-2-706.

Buyer's right to specific performance, 70A-2-716.

Contract not indefinite, 70A-2-204 (3).

Obligation of good faith, 70A-1-203, 70A-2-103.

Options and cooperation respecting performance, 70A-2-311.

Collateral References.

Sales ⇄ 1 (3), 78.

77 CJS Sales §§ 21, 75.

67 AmJur 2d 221, 298 to 304, Sales §§ 106, 180 to 183.

Construction and application of UCC § 2-305 dealing with open price term contracts, 91 ALR 3d 1237.

"Escalator" price adjustment clause, 63 ALR 2d 1337.

70A-2-306. Output, requirements and exclusive dealings.

- (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
- (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

History: L. 1965, ch. 154, § 2-306.

77 CJS Sales § 172.

67 AmJur 2d 248 to 255, Sales §§ 136 to 140.

Cross-References.

Adequate assurance of performance, right to, 70A-2-609.

Delegation of performance, assignment of rights, 70A-2-210.

Obligation of good faith, 70A-1-203.

Construction and effect of contract for sale of commodity to fill buyer's requirements, 7 ALR 498, 26 ALR 2d 1099.

Requirements contracts under § 2-306 (1) of Uniform Commercial Code, 96 ALR 3d 1275.

Collateral References.

Sales ⇄ 71 (4).

70A-2-307. Delivery in single lot or several lots. Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

History: L. 1965, ch. 154, § 2-307.

67 AmJur 2d 472 to 474, Sales §§ 332, 333.

Cross-References.

Adequate assurance of performance, right to, 70A-2-609.

Improper delivery, buyer's rights, 70A-2-601.

"Party" defined, 70A-1-201 (29).

Tender of delivery, 70A-2-503, 70A-2-508.

Buyer's acceptance of delayed or defective installment of goods as waiver of similar default as to later installments, 32 ALR 2d 1117.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Right upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 ALR 825.

Collateral References.

Sales ⇄ 163, 183 et seq.

77 CJS Sales §§ 175, 229 et seq.

70A-2-308. Absence of specified place for delivery. Unless otherwise agreed

- (a) the place for delivery of goods is the seller's place of business or if he has none his residence; but
- (b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and
- (c) documents of title may be delivered through customary banking channels.

History: L. 1965, ch. 154, § 2-308.

Shipment by seller, 70A-2-504, 70A-2-505.
Tender of delivery, 70A-2-503.

Cross-References.

Documentary drafts, collection of, 70A-4-501 to 70A-4-504.

Letters of credit, 70A-5-101 to 70A-5-117.

Payment by buyer before inspection, 70A-2-512.

Collateral References.

Sales ⇔ 79, 150 (1).

77 CJS Sales §§ 132, 143 et seq.

67 AmJur 2d 296, 466, Sales §§ 177, 178, 328.

DECISIONS UNDER FORMER LAW

In general.

Subsection (1) of former section relating to place, time and manner of delivery of goods, was largely declaratory of the general law of

contract. United States Bond & Finance Corp. v. National Building & Loan Assn. of America (1932) 80 U 62, 12 P 2d 758, affirmed on rehearing 80 U 70, 17 P 2d 238.

70A-2-309. Absence of specific time provisions — Notice of termination.

- (1) The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time.
- (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.
- (3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

History: L. 1965, ch. 154, § 2-309.

Inspection of goods, buyer's right to, 70A-2-513.

Obligation of good faith, 70A-1-203, 70A-2-103.

Payment by buyer, 70A-2-511, 70A-2-512.

Reasonable time, 70A-1-204.

Seller's remedies in general, 70A-2-703.

Shipment by seller, 70A-2-504.

Cross-References.

Adequate assurance of performance, right to, 70A-2-609.

Anticipatory repudiation, 70A-2-610.

"Cancellation" and "termination" distinguished, 70A-2-106.

C.I.F. and C.F. terms, 70A-2-320, 70A-2-321.

Contract not indefinite, 70A-2-204.

Documents, delivery on acceptance or payment of draft, 70A-2-514.

Collateral References.

Sales ⇔ 81, 106, 126.

77 CJS Sales §§ 79, 108 et seq.

67 AmJur 2d 128, 467 to 471, Sales §§ 18, 329 to 331.

70A-2-310. Open time for payment or running of credit — Authority to ship under reservation. Unless otherwise agreed

- (a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and
- (b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (section 70A-2-513); and
- (c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and
- (d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

History: L. 1965, ch. 154, § 2-310.

Shipment under reservation, 70A-2-505.
Tender of payment by buyer, 70A-2-511.

Cross-References.

Absence of specified place for delivery, 70A-2-308.

Buyer's right to inspection of goods, 70A-2-513.

Documentary drafts, collection of, 70A-4-501 to 70A-4-504.

Payment by buyer before inspection, 70A-2-512.

Risk of loss in absence of breach, 70A-2-509.

Collateral References.

Sales ⇔ 82, 168 (2), 183.

77 CJS Sales §§ 189, 229, 234 et seq.

67 AmJur 2d 304 to 308, Sales §§ 184 to 187.

Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 ALR 2d 1229.

70A-2-311. Options and co-operation respecting performance.

- (1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of section 70A-2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.
- (2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1) (c) and (3) of section 70A-2-319 specifications or arrangements relating to shipment are at the seller's option.
- (3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's co-operation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies
 - (a) is excused for any resulting delay in his own performance; and

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

History: L. 1965, ch. 154, § 2-311.

Collateral References.

Cross-References.

Adequate assurance of performance, right to, 70A-2-609.

"Agreement" defined, 70A-1-201.

Contract not indefinite, 70A-2-204 (3).

Obligation of good faith, 70A-1-203.

Substituted performance, 70A-2-614.

Sales \Leftrightarrow 1 (4), 64, 83, 154.

77 CJS Sales §§ 5, 72, 159, 165.

67 AmJur 2d 452, Sales § 314.

Construction and effect of contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than amount specified, 58 ALR 2d 377.

DECISIONS UNDER FORMER LAW

Conditional sale.

Undisclosed intent of seller is not of itself sufficient to make delivery conditional, and in order that there may be conditional sale and title retained by vendor, the minds of parties must meet, unless contract be executory for article to be manufactured, and then under

the Uniform Sales Act title does not pass prior to appropriation of goods to contract, and at time of appropriation to contract vendor may reserve right of possession or right of property until certain conditions have been fulfilled. Utah Assn. of Creditmen v. Buller (1920) 57 U 270, 194 P 127.

70A-2-312. Warranty of title and against infringement — Buyer's obligation against infringement.

- (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
 - (a) the title conveyed shall be good, and its transfer rightful; and
 - (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
- (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
- (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

History: L. 1965, ch. 154, § 2-312.

Exclusion or modification of warranties, 70A-2-316.

Cross-References.

Acceptance of goods by buyer, effect of, 70A-2-607.

Adequate assurance of performance, right to, 70A-2-609.

Good faith purchase of goods, 70A-2-403.

Limitation of actions, 70A-2-725.

Obligation of good faith, 70A-1-203.

Collateral References.

Sales \Leftrightarrow 262 $\frac{1}{2}$, 263.

77 CJS Sales §§ 314, 315, 333, 334.

67 AmJur 2d 651 to 660, Sales §§ 479 to 488.

Assignment of lease, 19 ALR 608.

Breach of warranty as to title as within statutory provision requiring notice of breach of warranty on sale of goods, 114 ALR 707.

Validity of provision negating implied warranties, 117 ALR 1350.

Warranty of title by seller in conditional sale contract, 132 ALR 338.

DECISIONS UNDER FORMER LAW**Freedom from encumbrances.**

Upon the trial of an information for obtaining money and property under false pretenses, in which defendant failed to disclose liens against property, the court, in applying former section 60-1-13, relating to implied warranties of title, said that "at the time of delivery, when payment in full is made, there is an implied warranty that the seller has the ownership of the property or the right to sell, free and clear of encumbrances." *Ballaine v. District Court of First*

Judicial District for Box Elder County (1944) 107 U 247, 153 P 2d 265.

Warranty of title.

One may lawfully agree to sell either personal or real property to which at the time he has no title, and want of title furnishes no ground for rescission unless, upon tender, defendant is unable to comply with agreement. *Tuft v. Brotherson* (1944) 106 U 499, 150 P 2d 384, quoting *Maloney v. Houston* (1921) 51 Cal App 585, 197 P 661.

70A-2-313. Express warranties by affirmation, promise, description, sample.

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

History: L. 1965, ch. 154, § 2-313.

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Exclusion or modification of warranties, 70A-2-316.

Implied warranty of merchantability, 70A-2-314.

Modification, rescission and waiver, 70A-2-209.

Product Liability Act, 78-15-1 et seq.

Rules of construction, variation by agreement, 70A-1-102.

Supplementary general principles of law applicable, 70A-1-103.

Model or sample.

A sample is drawn from the bulk of the goods which is the subject matter of the sale; a model is a specially created item offered for

inspection and has not been drawn from the bulk of the goods. *Pacific Marine Schwabacher, Inc. v. Hydroswift Corp.* (1974) 525 P 2d 615.

Description of goods may be by words or expressed in some other manner such as use of technical specifications or blueprints; a model of the item to be sold or a piece of the construction material may constitute a representation as to quality of the goods, and be part of a basis for express warranties. *Pacific Marine Schwabacher, Inc. v. Hydroswift Corp.* (1974) 525 P 2d 615.

Collateral References.

Sales ⇌ 260 et seq.
77 CJS Sales § 308 et seq.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article "as is," in the condition in which it is, or equivalent term, 24 ALR 3d 465.

Construction and effect of express or implied warranty on sale of an article intended for use as an explosive, 62 ALR 1510.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

Question of law or fact as to express parol warranty, 67 ALR 2d 619.

Right of retailer to rely upon express or implied warranty by wholesaler or manufacturer where there is an express warranty to the consumer, 59 ALR 1239.

Sale of seed, nursery stock, etc., 16 ALR 859, 32 ALR 1241, 62 ALR 451, 117 ALR 470, 168 ALR 581.

Scope and effect of provision of Uniform Sales Act as to effect of express warranty or condition to negative implied warranty or condition, 64 ALR 951.

Time to inspect goods for compliance with warranty of fitness or merchantability, 52 ALR 2d 900.

Warranties and conditions upon sale of seed, nursery stock, etc., 168 ALR 581.

Warranty of amount by contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than an amount specified, 58 ALR 2d 377.

Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 104 ALR 551.

What amounts to a "sale by sample" as regards warranties, 12 ALR 2d 524.

What constitutes "affirmation of fact" giving rise to express warranty under UCC § 2-313 (1) (a), 94 ALR 3d 729.

DECISIONS UNDER FORMER LAW

Agents of seller.

There is a distinction between express authority of an agent to give warranties or to have warranties inferred, and the authority to make statements which may later be interpreted as warranties. *Park v. Moorman Mfg. Co.* (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

Contract description.

Where oil delivered by defendant was of a different type than plaintiff ordered and its use caused damage to trucks, the facts indicated a breach of warranty by defendant. *Jones v. Allen* (1957) 7 U 2d 79, 318 P 2d 637.

Future events.

A person may warrant the occurrence of future events or of events which could not possibly happen; the substance of such a warranty is in effect a promise to respond in damages proximately caused by the nonexistence of a represented fact or the failure of a promised event to occur. Recovery for breach of warranty does not require that the person making the representation or promise be aware that it is false; it is sufficient if the misrepresentation or promise has a natural tendency to induce another, in reliance

thereon, to purchase, sell or exchange his property. *Welchman v. Wood* (1960) 10 U 2d 325, 353 P 2d 165.

Nature of action for breach.

Former sections 60-1-12, defining express warranty and 60-5-7, providing remedy for breach, did not change action for rescission from equitable to law action. *Summers v. Provo Foundry & Machine Co.* (1919) 53 U 320, 178 P 916.

Nonwarranty notice.

Former section 60-1-14, providing implied warranty in sale by description, did not apply where seed is sold with a nonwarranty notice. *Hoover v. Utah Nursery Co.* (1932) 79 U 12, 7 P 2d 270.

Where a written contract provided that there was no warranty in the sale of a truck, and there was no evidence in the record that the buyer had not read the agreement, or that he had been precluded from reading it by any action or representation of the seller, the trial court did not err in refusing to submit to the jury the plaintiff's cause of action based upon breach of warranty. *Redmond v. Petty Motor Co.* (1952) 121 U 370, 242 P 2d 302.

Pleading.

Allegation that at time of entering into contract for sale of tractor seller falsely represented and warranted to buyer that tractor would pull plows plowing at depth of ten inches in soil, was not a charge of fraud but charge of breach of warranty since knowledge of falsity was necessary to charge of fraud. *Anglo-California Trust Co. v. Hall* (1922) 61 U 223, 211 P 991.

Rule of caveat emptor.

Where seller of potatoes made no representation whatever as to quality of potatoes, and buyer saw them, examined them, and knew kind of potatoes he was bargaining for, doctrine of caveat emptor applied and grower should not have been barred from recovering purchase price of potatoes on theory that they were expressly warranted as to quality. *Baker v. Latses* (1922) 60 U 38, 206 P 553.

Samples.

Whether sales by sample constitute express or implied warranties is matter of general law. *Jorgensen v. Gessell Pressed Brick Co.* (1914) 45 U 31, 141 P 460, Ann Cas 1917C 309.

Seller's talk.

There are many examples of "puffing" or "trader's talk" which are not actionable. *Campbell v. Zion's Cooperative Home Building & Real Estate Co.* (1914) 46 U 1, 148 P 401.

Statement that Hudson Super-Six motor car would do whatever any other Super-Six would do amounted to express warranty, and not mere "seller's talk," or an expression of opinion. *Summers v. Provo Foundry & Machine Co.* (1919) 53 U 320, 178 P 916.

Dealer's statement that stoves would "sell like hot cakes," held dealer's talk and not warranty. *Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co.* (1923) 61 U 503, 215 P 995, 29 ALR 659.

Rule that representations as to value of goods are mere expressions of opinion did not apply where seller of business represented that goods would inventory at certain price and that seller would guarantee same, and buyer was entitled to recover difference between actual value of goods and inventory price as represented by seller. *Beaver Drug Co. v. Hatch* (1923) 61 U 597, 217 P 695.

Matters of puffing or sales talk are not statements of "fact" or "promise" as contemplated by statute. *Park v. Moorman Mfg. Co.* (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

Trial.

The question of express warranty is properly submitted to the jury where the evidence is substantial, and supports the essential elements which the plaintiff is required to prove. *Park v. Moorman Mfg. Co.* (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

In an action for breach of warranties with regard to chicken feed which had been represented to produce certain results if used in a particular manner, the trial court did not err in refusing to submit the case upon a different theory for the method and for the feed. *Park v. Moorman Mfg. Co.* (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

What constitutes express warranty.

The Supreme Court of this state has declared what constitutes a warranty in the sale of personal property. *Jorgensen v. Gessell Pressed Brick Co.* (1914) 45 U 31, 141 P 460, Ann Cas 1917C 309; *Studebaker Bros. Co. v. Anderson* (1917) 50 U 319, 167 P 663; *Nielson v. Hermansen* (1946) 109 U 180, 166 P 2d 536.

What constitutes an express warranty in the sale of a new or a secondhand automobile is a matter of general law. *Studebaker Bros. Co. v. Anderson* (50 U 319, 167 P 663; *Rockhill v. Creer* (56 U 119, 189 P 668.

Statement in writing that car sold was a 1922 model was express warranty regardless of whether seller was or was not guilty of intentional deceit in delivering a 1921 model to buyer. *Stringfellow v. Botterill Auto Co.* (1923) 63 U 56, 221 P 861, 34 ALR 533.

Under former section 60-1-12 and the decisions of our Supreme Court it is clear that an affirmation of fact, that is, a representation, is a warranty and not merely evidence of a warranty, if its natural tendency is to induce the buyer to purchase the goods and the buyer thus induced does purchase them. Words of warranty such as "I guarantee or I warrant" are not necessary for an express warranty; a positive affirmation of the fact is enough to render the seller liable. The representation of fact which would naturally tend to and does induce a bargain is a warranty. The fact that the defendant did not intend to warrant is no defense if he did make a statement which brings him within the statute. *Nielson v. Hermansen* (1946) 109 U 180, 166 P 2d 536.

A positive statement by the seller by way of the identity, nature or kind of the goods or in regard to them, as a statement of fact, not opinion, is a warranty. Where it appears doubtful whether or not the statement is one of fact or opinion, and therefore whether there is a warranty, the question should be

left to the trier of the facts. *Nielson v. Hermansen* (1946) 109 U 180, 166 P 2d 536.

An affirmation of fact, that is a representation, is a warranty, if its natural tendency is to induce the buyer to purchase the goods, and the buyer thus induced does purchase them. *Park v. Moorman Mfg. Co.* (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

Where the principal's agent told the buyer that the weedicide would not harm onions under the ground there was an express warranty, which was an affirmation of a fact relating to the goods which did induce the buyer to purchase such goods in reliance

thereon. *Wasatch Chemical Co. v. Leon* (1953) 123 U 296, 259 P 2d 301.

Warranty provision in contract for the sale of draperies to the effect that draperies were guaranteed against "latent defects, faulty material and/or workmanship" was ambiguous, and trial court could properly consider extrinsic evidence in the form of expert testimony in concluding that such language warranted the draperies from discoloration during the period of the warranty. *Universal Investment Co. v. Carpets, Inc.* (1965) 16 U 2d 336, 400 P 2d 564.

70A-2-314. Implied warranty — Merchantability — Usage of trade.

- (1) Unless excluded or modified (section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade.

History: L. 1965, ch. 154, § 2-314.

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Exclusion or modification of warranties, 70A-2-316.

Implied warranty of fitness for particular purpose, 70A-2-315.

"Merchant" defined, 70A-2-104.

Obligation of good faith, 70A-1-203.

Product Liability Act, 78-15-1 et seq.

Proof of defect.

Where, after defendant sold plaintiff bags of hog feed, plaintiff started to use the feed

and some of his hogs became sick, and a veterinarian who had tests made found salmonella bacteria in both the feed and in fecal samples from the sick hogs, there was sufficient evidence of a defect for the jury to find a breach of the warranty implied by this section. *Utah Cooperative Assn. v. Egbert-Haderlie Hog Farms, Inc.* (1976) 550 P 2d 196.

Collateral References.

Sales ⇄ 266 et seq.

77 CJS Sales §§ 314 to 317.

67 AmJur 2d 627 to 637, Sales §§ 460 to 467.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR 3d 668.

Beverage, existence of implied warranty of fitness by manufacturer, bottler, or seller of, 77 ALR 2d 241, 243.

Chain, cable, or wire, implied warranty of strength or fitness, 59 ALR 1235.

Clothing, shoes, and similar products, implied warranty by manufacturer or seller of, 80 ALR 2d 707.

Construction and application of provision in conditional sale contract regarding implied warranties, 139 ALR 1276.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article "as is," in the condition in which it is, or equivalent term, 24 ALR 3d 465.

Container or package by manufacturer or seller of product sold in container or package, existence of implied warranty as to, 81 ALR 2d 257, 258.

Cosmetics, implied warranty by retailer, 131 ALR 123.

Drug or medicine, implied warranty by manufacturer or seller of, 79 ALR 2d 332.

Explosive, construction and effect of express or implied warranty on sale of an article intended for use as, 62 ALR 1510.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

Food for human consumption, implied warranty of reasonable fitness of, as breached by substance natural to the original product and not removed in processing, 143 ALR 1421.

Food, implied warranty of fitness by one serving, 7 ALR 2d 1027.

Food or food products, existence of implied warranty of fitness by manufacturer or seller of, 77 ALR 2d 55.

Food sold in sealed cans, implied warranty by other than packer of fitness of, 90 ALR 1269, 142 ALR 1434.

Industrial, business, or farm machinery, tool, equipment, or material, implied warranty of fitness by manufacturer or seller of, 78 ALR 2d 615 to 617.

Jobber's or dealer's liability for injuries on theory of breach of warranty as affected by buyer's or user's allergy or unusual susceptibility to injury from the article, 26 ALR 2d 966.

"Job lot," "leftovers," and the like, implied warranty of quality, condition, or fitness on sale of, 103 ALR 1347.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 111 ALR 1239, 140 ALR 191, 142 ALR 1490.

Liability of seller of article not inherently dangerous for personal injuries due to the defective or dangerous condition of the article, 74 ALR 343, 168 ALR 1054.

Liability on implied warranties in sale of used motor vehicle, 22 ALR 3d 1387.

Livestock, existence and scope of implied warranty of fitness on sale of, 53 ALR 2d 892.

Medical or health supplies, appliances, or equipment, implied warranty of fitness by manufacturer or seller of, 79 ALR 2d 401.

Paint, cement, building supplies, and like products, implied warranty of fitness by manufacturer or seller of, 78 ALR 2d 704.

Secondhand article, implied warranty of quality, condition, or fitness on sale of, 151 ALR 446.

Secondhand household or domestic machinery, appliance, furnishing, or equipment, implied warranty of fitness by seller of, 80 ALR 2d 618.

Time to inspect or test for compliance with warranty of fitness or merchantability, 52 ALR 2d 900.

Toy, game, athletic or sports equipment, or like products, existence of manufacturer's or seller's warranty of, 78 ALR 2d 741.

Trade name, trade-mark, or other particular description, implied warranty of fitness on sale of article by, 49 ALR 2d 852.

Warranty or misrepresentation as to character of article as new, where seller fails to disclose that article has been used or is secondhand, 104 ALR 551.

What are "merchantable" goods within meaning of UCC § 2-314 dealing with implied warranty of merchantability, 83 ALR 3d 694.

What constitutes a contract for sale under Uniform Commercial Code § 2-314, 78 ALR 3d 696.

Who is "merchant" under UCC § 2-314 (1) dealing with implied warranties of merchantability, 91 ALR 3d 876.

Law Reviews.

Products Liability: Defenses Based on Plaintiff's Conduct, David G. Epstein, 1968 Utah L. Rev. 267.

DECISIONS UNDER FORMER LAW

Evidence of custom.

The fact that it is not the usual or customary practice of a particular business to give

warranties in respect to the goods sold is of evidentiary value, but is not conclusive. Park

v. Moorman Mfg. Co. (1952) 121 U 339, 241 P 2d 914, 40 ALR 2d 273.

Fitness of goods.

Counterclaim in action for price of poultry feed for death of hens alleging that defendant did not know wheat which was sold to him by plaintiff was moldy and relied upon judgment of plaintiff, pleaded implied warranty, and was not subject to demurrer on ground that it sounded in tort not connected with subject of action. Thatcher Milling & Elevator Co. v. Campbell (1924) 64 U 422, 231 P 621.

Inspection of goods.

Where seller of potatoes made no representation whatever as to quality of potatoes, and buyer saw them, examined them, and knew kind of potatoes he was bargaining for, doctrine of caveat emptor applied and grower should not have been barred from recovering purchase price of potatoes on theory that they were impliedly warranted as to quality. Baker v. Latses (1922) 60 U 38, 206 P 553.

Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold shall be delivered. Landes & Co. v. Fallows (1933) 81 U 432, 19 P 2d 389, distinguished in 117 U 180, 214 P 2d 118.

Liability for injury.

In a personal injury action, where the facts did not require the application of the principle of strict liability based on warranty, the trial court's mistaken belief that it was submitting the question of defendant's liability on the theory of warranty was not prejudicial since the instructions given were as equally applicable to a theory of liability on the ground of negligence as they were on the ground of warranty and the evidence justified the jury's finding that the defendant failed to exercise ordinary care for the plaintiff's safety. Palmer v. Wasatch Chemical Co. (1960) 10 U 2d 383, 353 P 2d 985.

Furnishing blood by hospital at the specific request of a patient or his doctor, and for a charge, is a part of a service and not a sale and where a hospital is free of negligence in procuring, testing, and furnishing of transfusion blood, it was not liable for damages under an implied warranty theory because a patient responded negatively to the transfusion. Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital (1961) 12 U 2d 241, 364 P 2d 1085.

Nonwarranty clause.

Nonwarranty clause of a contract for sale of harvester precluded warranty that machine was fit for and would do work for which it was purchased. Landes & Co. v. Fallows (1933) 81 U 432, 19 P 2d 389, distinguished in 117 U 180, 214 P 2d 118.

Warranty of merchantable quality.

Where sale is by description, there is implied warranty that goods are of merchantable quality under subsec. (2) of former section 60-1-15. Ernest E. Fadler Co. v. Hesser (1948) 166 F 2d 904.

Generally, implied warranty relates only to time of sale. Ernest E. Fadler Co. v. Hesser (1948) 166 F 2d 904.

In sale of perishable goods where there is implied warranty that goods are suitable for shipment because buyer justifiably relies on seller to select goods suitable for shipment, seller does not assume risk of deterioration due to abnormal delay, or other abnormal conditions, while goods are in transit, but only impliedly warrants that goods are fit for shipment at time and place of sale. Ernest E. Fadler Co. v. Hesser (1948) 166 F 2d 904, citing cases from other jurisdictions as well as Williston, Sales, Vol. 1, 2d Ed., § 245, p. 494.

Warranty of soundness.

The general law of sales applied in the case of warranties in elevator contract. M. H. Walker Realty Co. v. American Surety Co. of New York (1922) 60 U 435, 211 P 998.

70A-2-315. Implied warranty — Fitness for particular purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

History: L. 1965, ch. 154, § 2-315.

Cross-References.

Allocation or division of risks, 70A-2-303.

Cumulation and conflict of warranties, 70A-2-317.

Exclusion or modification of warranties, 70A-2-316.

Implied warranty of merchantability, 70A-2-314.

Product Liability Act, 78-15-1 et seq.

Construction and application.

In view of the fact that there had been a course of dealing between the parties for a period of two years, it must be inferred that feed dealer knew of the purpose to which the feed it sold to hog farmer was to be put by him, and therefore, this section applied to their transaction. *Utah Cooperative Assn. v. Egbert-Haderlie Hog Farms, Inc.* (1976) 550 P 2d 196.

Notice of rejection.

In foreclosure action, buyer of mobile home cannot recover on his counterclaim for breach of implied warranty of fitness after having lived in mobile home for two years without giving notice of rejection or desire to rescind. *Chrysler Credit Corp. v. Burns* (1974) 527 P 2d 655.

Proof of defect.

Where, after defendant sold plaintiff bags of hog feed, plaintiff started to use the feed and some of his hogs became sick, and a veterinarian who had tests made found salmonella bacteria in both the feed and in fecal samples from the sick hogs, there was sufficient evidence of a defect that the jury could find a breach of the warranty implied by this section. *Utah Cooperative Assn. v. Egbert-Haderlie Hog Farms, Inc.* (1976) 550 P 2d 196.

Purchase for a particular purpose.

Where seller of goods manufactured to buyer's specifications had been informed of buyer's needs in general terms and buyer had relied on seller's expertise in developing aluminum electrified floor for amusement ride, the general statements of buyer's needs did not act to defeat the implied warranty of fitness. *Aluminum Co. of America v. Electro Flo Corp.* (1971) 451 F 2d 1115.

Collateral References.

Sales ⇔ 266 et seq.

77 CJS Sales §§ 314 to 317.

67 AmJur 2d 637 to 644, Sales §§ 468 to 472.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR 3d 668.

Liability on implied warranties in sale of used motor vehicle, 22 ALR 3d 1387.

Uniform Commercial Code: implied warranty of fitness for particular purpose as including fitness for ordinary use, 83 ALR 3d 656.

What constitutes "particular purpose" within meaning of UCC § 2-315 dealing with implied warranty of fitness, 83 ALR 3d 669.

Law Reviews.

Implied Warranty of Fitness and Privity of Contract, Thomas F. Conneally, Jr., 2 Boston College L. Rev. 105.

Uniform Commercial Code and Greater Consumer Protection Under Warranty Law, 49 Ky. L. J. 240.

DECISIONS UNDER FORMER LAW

Purchase for a particular purpose.

Where a buyer expressly or by implication makes known to the seller the particular purpose for which an article is to be used and the buyer relies upon the skill and judgment of the seller, there is an implied warranty that the article is reasonably fit for the purpose for which it was purchased. *Nephi Processing Plant, Inc. v. Talbott* (1957) 247 F 2d 771.

The provision of former section 60-1-15 warranting quality of goods as reasonable to fit purpose for which purchased was little more than a mere reaffirmation of the pre-existing law of sales. *Wright v. Howe* (1915) 46 U 588, 150 P 956, LRA 1916B 1104.

There is no warranty of fitness where buyer orders a specific article for a specific purpose known to seller. *Landes & Co. v. Fallows* (1933) 81 U 432, 19 P 2d 389, distinguished in 117 U 180, 214 P 2d 118.

The statute throws a partial cloak of protection around a buyer who purchases an

article for a particular purpose when he must rely on the skill or judgment of a seller to determine if the article will serve the purpose. *Carver v. Denn* (1950) 117 U 180, 214 P 2d 118.

Plaintiff, seller of air conditioner, was charged with statutory warranty of fitness, in view of the fact that he knew purchaser was unfamiliar with capabilities of machine and its proper installation, and recommended and selected machine as fit for purpose desired by purchaser. *Carver v. Denn* (1950) 117 U 180, 214 P 2d 118.

In action to recover cost of material furnished and labor performed in installing air cooler in defendant's place of business, where plaintiff, in addition to installing air cooling system, provided and sold all of the equipment necessary for the installation, and charged equipment and labor to defendant, who was not indebted to anyone else for any of the equipment installed, plaintiff could not assert that he was "installer" rather than

"seller," in order to avoid liability for breach of implied warranty of fitness. *Carver v. Denn* (1950) 117 U 180, 214 P 2d 118.

Where seller of air cooler was aware that buyer knew nothing about air-cooling equipment, and that buyer was primarily interested in air conditioning his place of business, rather than in purchasing any specific type of air cooler, implied warranty that air cooler would be fit for particular purpose was not negated by seller's use of brand name, when it was used merely for convenience in identifying equipment to be installed, and where from efforts of seller to remedy

defects, it could be reasonably inferred that he understood that he was to install suitable cooling system for buyer. *Carver v. Denn* (1950) 117 U 180, 214 P 2d 118.

Where the buyer expressly made known to the seller the particular purpose for which the weed killer was required, and it is evident that the buyer relied upon the seller's judgment in selecting such killer and the weedicide did damage onions below the ground although the seller had said that they wouldn't, there was both an express and implied warranty. *Wasatch Chemical Co. v. Leon* (1953) 123 U 296, 259 P 2d 301.

70A-2-316. Exclusion or modification of warranties.

- (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (section 70A-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
- (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."
- (3) Notwithstanding subsection (2)
 - (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
 - (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
 - (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
- (4) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (sections 70a-2-718 and 70A-2-719).

History: L. 1965, ch. 154, § 2-316.

Cross-References.

Contractual modification or limitation of remedy, 70A-2-719.

Course of dealing and usage of trade, 70A-1-205.

Course of performance or practical construction, 70A-2-208.

Liquidation or limitation of damages, 70A-2-718.

Parol or extrinsic evidence, 70A-2-202.

Exclusion of warranties.

Where knowledgeable purchaser of a motorboat specified one engine after being told by seller that a different one would be more suitable for his purposes, failure of boat to perform properly on account of the unsuitability of its engine was not grounds for a breach of warranty claim, all warranties having been effectively excluded. *Fry v. Duce Sporting Goods, Inc.* (1976) 547 P 2d 1338.

Inspection by buyer.

There was no implied warranty where buyer inspected goods prior to purchase. *Durbano Metals, Inc. v. A & K R. Materials, Inc.* (1978) 574 P 2d 1159.

Real estate contract provision.

Provision in real estate contract that the buyer accepted the property in its present condition and which also negated any representations, covenants or agreements between the parties thereto except as expressly set forth or attached was sufficient to defeat purchaser's subsequent counterclaim for breach of implied warranties by vendor who sued the purchaser for default on a note and mortgage. *Tibbetts v. Openshaw* (1967) 18 U 2d 442, 425 P 2d 160.

Validity of disclaimer.

The policy of this section is to disfavor semi-concealed or obscured self-protective provisions in a contract prepared by one party, which the other party is unlikely to notice; therefore, a disclaimer should not be binding upon a buyer of goods unless it was actually called to his attention, and in the absence of evidence that this was done, the

seller cannot rely upon it. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Collateral References.

Sales ⇔ 267.

77 CJS Sales § 317.

Application of warranty provisions of Uniform Commercial Code to bailments, 48 ALR 3d 668.

Construction and effect of UCC § 2-316 (2) providing that implied warranty disclaimer must be "conspicuous," 73 ALR 3d 248.

Express warranty as affecting existence of implied warranty by manufacturer or seller of drug or medicine, 79 ALR 2d 332.

Express warranty as affecting existence of implied warranty of fitness by manufacturer or seller of hair preparation, cosmetic, soap or other personal cleanser, or the like, 79 ALR 2d 445.

Express warranty as affecting existence of implied warranty of merchantability by manufacturer of automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR 2d 492.

Express warranty as affecting implied warranty by manufacturer or seller of paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR 2d 704, 705.

Express warranty as excluding implied warranty of fitness, 164 ALR 1321.

Injury-causing animal feed or medicine, crop spray, fertilizer, insecticide, rodenticide, or similar product, express warranty as affecting implied warranty by seller of, 81 ALR 2d 158.

Tobacco product, express warranty as affecting existence of implied warranty by manufacturer or seller of, 80 ALR 2d 687.

Validity of provision negating implied warranties, 117 ALR 1350.

Warranty of amount by contract for sale of commodity or goods wherein quantity is described as "about" or "more or less" than an amount specified, 58 ALR 2d 377.

70A-2-317. Cumulation and conflict of warranties express or implied. Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

- (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
- (b) A sample from an existing bulk displaces inconsistent general language of description.

- (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

History: L. 1965, ch. 154, § 2-317.

Collateral References.

Sales ⇔ 262 ½, 266, 271, 277.
77 CJS Sales §§ 313 to 319.

Cross-References.

Implied warranty of fitness for particular purpose, 70A-2-315.

70A-2-318. Third-party beneficiaries or warranties express or implied. A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

History: C. 1953, 70A-2-318, enacted by L. 1977, ch. 272, § 4.

Title of Act.

An act amending section 38-2-3, Utah Code Annotated 1953, as amended by chapter 74, Laws of Utah 1965, sections 38-3-2, 38-3-5, 41-1-80 and 57-3-2, Utah Code Annotated 1953, 70A-1-105, 70A-1-201, 70A-2-107, 70A-2-603, 70A-5-116, 70A-9-102, 70A-9-104, 70A-9-105, 70A-9-106, 70A-9-205, 70A-9-301, 70A-9-302, 70A-9-304, 70A-9-305, 70A-9-306, 70A-9-307, 70A-9-312, 70A-9-318, 70A-9-401, 70A-9-405, 70A-9-406, 70A-9-407, 70A-9-501, 70A-9-502 and 70A-9-504, Utah Code Annotated 1953, as enacted by chapter 154, Laws of Utah 1965; section 70A-9-203, Utah Code Annotated 1953, as enacted by chapter 154, Laws of Utah 1965, as amended by chapter 18, Laws of Utah 1969; sections 70A-9-402 and 70A-9-403, Utah Code Annotated 1953, as enacted by chapter 154, Laws of Utah 1965, as amended by chapter 185, Laws of Utah 1971, as amended by chapter 187, Laws of Utah 1973; section 70A-9-404, Utah Code Annotated 1953, as enacted by chapter 154, Laws of Utah 1965, as amended by chapter 187, Laws of Utah 1973; section 70A-9-505, Utah Code Annotated 1953, as enacted by chapter 154, Laws of Utah 1965, as amended by chapter 191, Laws of Utah 1967; enacting sections 70A-2-318, 70A-8-106, 70A-9-114, 70A-9-409, and 70A-11-101 through

70A-11-108, Utah Code Annotated 1953; repealing and reenacting sections 70A-9-103, 70A-9-204, 70A-9-308, 70A-9-313 and 70A-9-408, Utah Code Annotated 1953, as enacted by chapter 154, Laws of Utah 1965; repealing section 38-2-4, Utah Code Annotated 1953, as amended by chapter 61, Laws of Utah 1953, and sections 38-4-1 through 38-4-5, Utah Code Annotated 1953; relating to the Uniform Commercial Code; providing for the adoption of official amendments to Article Nine relating to secured transactions as promulgated by the National Conference of Commissioners on Uniform State Laws; providing for the adoption of conforming and corrective amendments to other sections of the Uniform Commercial Code and to other sections of the code relating to miscellaneous items, certificates of title and real estate recording. — Laws 1977, ch. 272.

Collateral References.

67 AmJur 2d 590, Sales § 429.

Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property, 16 ALR 3d 683.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury, 75 ALR 2d 39.

70A-2-319. F.O.B. and F.A.S. terms.

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

- (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (section 70A-2-504) and bear the expense and risk of putting them into the possession of the carrier; or
 - (b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (section 70A-2-503);
 - (c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (section 70A-2-323).
- (2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must
- (a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and
 - (b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.
- (3) Unless otherwise agreed in any case falling within subsection (1) (a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of co-operation under this chapter (section 70A-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.
- (4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History: L. 1965, ch. 154, § 2-319.

Cross-References.

Options and cooperation respecting performance, 70A-2-311.

Overseas shipment, form of bill of lading required, 70A-2-323.

Shipment by seller, 70A-2-504.

Tender of delivery by seller, 70A-2-503.

Collateral References.

Sales ⇄ 77, 79.

77 CJS Sales §§ 75, 143.

67 AmJur 2d 490 to 497, Sales §§ 347 to 350.

F.O.B. provision in sale contract as affecting time or place of passing title, 101 ALR 292.

What amounts to delivery f. o. b., 16 ALR 597.

70A-2-320. C.I.F. and C.&F. terms.

- (1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.&F. or C.F. means that the price so includes cost and freight to the named destination.
- (2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to
 - (a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and
 - (b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and
 - (c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and
 - (d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and
 - (e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.
- (3) Unless otherwise agreed the term C.&F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.
- (4) Under the term C.I.F. or C.&F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History: L. 1965, ch. 154, § 2-320.

Cross-References.

Improper tender or delivery, cure by seller, 70A-2-508.

Inspection of goods by buyer, 70A-2-321, 70A-2-512, 70A-2-513.

Letters of credit, 70A-5-101 to 70A-5-117.

Overseas shipment, form of bill of lading required, 70A-2-323.

Payment by buyer, 70A-2-321, 70A-2-512, 70A-2-513.

Risk of loss, 70A-2-509.

Waiver of buyer's objections by failure to particularize, 70A-2-605.

Collateral References.

Sales ⇔ 77 (2).

77 CJS Sales §§ 75, 217.

67 AmJur 2d 499, Sales § 352.

70A-2-321. C.I.F. or C.&F. — “Net landed weights” — “Payment on arrival” — Warranty of condition on arrival. Under a contract containing a term C.I.F. or C.&F.

- (1) Where the price is based on or is to be adjusted according to “net landed weights,” “delivered weights,” “out turn” quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.
- (2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.
- (3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

History: L. 1965, ch. 154, § 2-321.

77 CJS Sales §§ 190, 230, 286.

67 AmJur 2d 501, Sales § 353.

Cross-References.

“No arrival, no sale,” construction of term,
70A-2-324.

What constitutes delivery of goods sold
under “C.I.F.” contract, 10 ALR 701 and 20
ALR 1236.

Collateral References.

Sales ⇔ 168, 183, 201 (4).

70A-2-322. Delivery “ex-ship.”

- (1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from the
 - (a) ship which has reached a place at the named port of destination where goods of the kind are usually discharged.
- (2) Under such a term unless otherwise agreed
 - (a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and
 - (b) the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.

History: L. 1965, ch. 154, § 2-322.

Collateral References.

Sales ⇔ 77 (2), 201 (4).

77 CJS Sales §§ 75, 286.

67 AmJur 2d, Sales § 354.

Cross-References.

Delivery alongside vessel, 70A-2-319 (2).

70A-2-323. Form of bill of lading required in overseas shipment — “Overseas.”

- (1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C.&F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C.&F., received for shipment.
- (2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set
 - (a) due tender of a single part is acceptable within the provisions of this chapter on cure of improper delivery (subsection (1) of section 70A-2-508); and
 - (b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.
- (3) A shipment by water or by air or a contract contemplating such shipment is "overseas" in so far as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

History: L. 1965, ch. 154, § 2-323.

Collateral References.

Cross-References.

Improper tender or delivery, cure by seller, 70A-2-508.

Indemnities by banks presenting drafts under letters of credit, 70A-5-113.

Sales ⇔ 161, 162; Shipping ⇔ 106.
77 CJS Sales §§ 156, 164; 80 CJS Shipping § 111 et seq.
67 AmJur 2d 504, Sales § 355.

70A-2-324. "No arrival, no sale" term. Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,

- (a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the nonarrival; and
- (b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (section 70A-2-613).

History: L. 1965, ch. 154, § 2-324.

Obligation of good faith, 70A-1-203.

Cross-References.

Casualty to identified goods, 70A-2-613.

Identification of goods, 70A-2-501, 70A-2-613.

Insurable interest in goods, 70A-2-501.

Collateral References.

Sales ⇔ 83, 197, 224.

77 CJS Sales §§ 165, 259, 286.

67 AmJur 2d 504, Sales § 356.

70A-2-325. "Letter of credit" term — "Confirmed credit."

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

- (2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on reasonable notification to the buyer require payment directly from him.
- (3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

History: L. 1965, ch. 154, § 2-325.

Cross-References.

Effect of instrument on obligation for which it is given, 70A-3-802.

Good faith purchase of goods, 70A-2-403.

Letters of credit, 70A-5-101 to 70A-5-117.

Payment by check conditional, 70A-2-511
(3).

Collateral References.

Banks and Banking ⇔ 191; Sales ⇔ 191.

9 CJS Banks and Banking § 174 et seq.; 77 CJS Sales § 238.

67 AmJur 2d 569, Sales § 410.

Construction of provision for letter of credit in contract for sale, 38 ALR 608.

70A-2-326. Sale on approval and sale or return — Consignment sales and rights of creditors.

- (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is
 - (a) a "sale on approval" if the goods are delivered primarily for use, and
 - (b) a "sale or return" if the goods are delivered primarily for resale.
- (2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.
- (3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum." However, this subsection is not applicable if the person making delivery
 - (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
 - (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

- (c) complies with the filing provisions of the chapter on Secured Transactions (chapter 9).
- (4) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (section 70A-2-201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (section 70A-2-202).

History: L. 1965, ch. 154, § 2-326.

Cross-References.

Goods delivered under consignment, priorities, 70A-9-114.

Parol or extrinsic evidence, 70A-2-202.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Statute of frauds, 70A-2-201.

Acceptance.

Home furnishings sold on approval which were used by the buyers for two months and which included draperies and carpeting tailored to fit the house, are accepted within the meaning of the statute; and such furnishings are subject to a perfected security interest of the buyer's creditors. *Valley Bank & Trust Co. v. Gerber* (1974) 526 P 2d 1121.

Collateral References.

Factors ⇔ 1 et seq.; Sales ⇔ 204-206, 222.

35 CJS Factors § 1 et seq.; 77 CJS Sales § 268 et seq.

67 AmJur 2d 418 to 442, Sales §§ 278 to 302.

Conclusiveness of determination of third party whose approval is provided for by contract for sale of goods, 7 ALR 3d 555.

Consignment transactions under the Uniform Commercial Code, 40 ALR 3d 1078.

Contracts of sale or return as distinguished from contracts for sale on approval, 52 ALR 589.

Duty of purchaser of goods "on trial" or "on approval" regarding notice of rejection, 78 ALR 533.

Goods consigned to shipper's order, 60 ALR 677.

Presumption and burden of proof as to consignee's title to or interest in respect of goods comprising shipment, in consignee's action against carrier for loss, damage, delay, nondelivery, or conversion, 135 ALR 456.

70A-2-327. Special incidents of sale on approval and sale or return.

- (1) Under a sale on approval unless otherwise agreed
- (a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and
 - (b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and
 - (c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.
- (2) Under a sale or return unless otherwise agreed
- (a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably; and
 - (b) the return is at the buyer's risk and expense.

History: L. 1965, ch. 154, § 2-327.

Cross-References.

Acceptance of goods, revocation in whole or in part, 70A-2-608.

Buyer's acceptance of goods, effect, 70A-2-607.

"Good faith" and "notice" defined, 70A-1-201.

Improper delivery, buyer's rights, 70A-2-601.

Insurable interest in goods, 70A-2-501.

Merchant buyer's duties as to rightfully rejected goods, 70A-2-603.

Reasonable time, 70A-1-204.

Implied acceptance.

Acceptance of home furnishings sold on approval is implied where the homeowner used the furniture for more than two months, and the drapes and carpet were tailored to fit the house. *Valley Bank & Trust Co. v. Gerber* (1974) 526 P 2d 1121.

Collateral References.

Sales ⇔ 197, 204, 205.

77 CJS Sales § 268 et seq.

67 AmJur 2d 418 to 442, Sales §§ 278 to 302.

Duty of consignee as to valuation of goods on reshipment to consignor, 16 ALR 2d 866.

Reasonableness of personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer, 86 ALR 2d 200.

Risk of loss of goods in "sale or return" transaction under UCC § 2-327, 66 ALR 3d 190.

Time for return of goods sold on "sale or return" absent specific time provision in contract, 93 ALR 2d 342.

70A-2-328. Sale by auction.

- (1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.
- (2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.
- (3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.
- (4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

History: L. 1965, ch. 154, § 2-328.

Cross-References.

Firm offers, 70A-2-205.

Completion of sale.

Sale by auction is complete as a matter of law at the fall of the hammer. *Bullock v. Joe Bailey Auction Co.* (1978) 580 P 2d 225.

Collateral References.

Auctions and Auctioneers ⇔ 7, 8.

7 CJS Auctions and Auctioneers §§ 8 to 17.

7 AmJur 2d 371 to 386, Sales §§ 11 to 29.

Advertisements of property offered at auction as affecting rights of purchaser, 28 ALR 991, 158 ALR 1413.

Liability of defaulting purchaser to owner's broker or auctioneer, 30 ALR 3d 1395.

Modes of making and accepting bids at auctions, 11 ALR 543.

Title to goods, as between purchaser from, and one who entrusted them to auctioneer, 36 ALR 2d 1362.

Withdrawal of property from auction sale, 37 ALR 2d 1049.

PART 4

TITLE, CREDITORS AND GOOD FAITH PURCHASERS

Section

70A-2-401. Passing of title — Reservation for security — Limited application of this section.

70A-2-402. Rights of seller's creditors against sold goods.

70A-2-403. Power to transfer — Good faith purchase of goods — "Entrusting."

70A-2-401. Passing of title — Reservation for security — Limited application of this section. Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. In so far as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

- (1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (section 70A-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
- (2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading
 - (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but
 - (b) if the contract requires delivery at destination, title passes on tender there.
- (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,
 - (a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

- (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.
- (4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale."

History: L. 1965, ch. 154, § 2-401.

Cross-References.

Buyer's right to specific performance or replevin, 70A-2-716.

Good faith purchase of goods, 70A-2-403.

Insolvency of seller, buyer's right to goods, 70A-2-502.

Insurable interest in goods, 70A-2-501.

"Security interest" defined, 70A-1-201 (37).

Seller's creditors, rights against sold goods, 70A-2-402.

Transactions excluded, 70A-2-102.

Inapplicable to livestock auction.

In replevin action by livestock grower to recover cattle sold at auction, this section did not govern sale in view of 70A-2-102 which provides that chapter does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." *Pugh v. Stratton* (1969) 22 U 2d 190, 450 P 2d 463.

Collateral References.

Sales ⇄ 197 et seq.

77 CJS Sales § 245 et seq.

67 AmJur 2d 352 to 381, Sales §§ 227 to 247.

Accession to property which is the subject of a conditional sale or chattel mortgage, 68 ALR 1242.

Applicability of protective provisions of Uniform Conditional Sales Act or similar statutes where there has been a novation of the contract, 83 ALR 998.

Delivery to carrier of quantity of goods greater than that called for by contract as passing title, 38 ALR 1544.

F. o. b. provision in sale contract as affecting time or place of passing of title, 101 ALR 292.

Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 ALR 1116.

Right of seller of fixtures retaining title thereto or lien thereon, as against purchasers or encumbrancers of the realty, 111 ALR 362, 141 ALR 1283.

Time and place of passage of title to goods shipped under bill of lading, with draft attached, consigning them to shipper's order, 60 ALR 677.

Validity as to creditors of the buyer or consignee of reservation of title to goods delivered under implied or express authority to resell, 63 ALR 355.

Valuables secreted in articles sold, 4 ALR 2d 318.

Law Reviews.

Special Property Under the Uniform Commercial Code: A New Concept in Sales, 4 Natural Resources J. 98.

DECISIONS UNDER FORMER LAW

Assignment for benefit of creditors.

Assignee for benefit of creditors acquires no title to personal property in assignor's possession under contract of conditional sale when, at time of assignment, title has not vested in assignor by performance of condition. *Charles Lippincott & Co. v. Rich* (1899) 19 U 140, 56 P 806.

Assignment for benefit of creditors held void as to seller of personal property in assignor's possession under contract of conditional sale, condition of which was unperformed, since it empowered assignee to sell assigned property on credit. *Charles Lippincott & Co. v. Rich* (1899) 19 U 140, 56 P 806.

Bill of sale.

Before bill of sale can have effect of transferring any interest in personal property covered thereby, there must be delivery with necessary intention. *Jackson v. Jackson* (1948) 113 U 249, 192 P 2d 397.

Owner's intention as to whether bill of sale should effect transfer of property covered thereby or any interest therein, may be shown by parol evidence without violating rule against varying terms of written instrument by such evidence, since object is not to change terms of instrument but to show whether instrument ever went into effect as transfer of property or interest therein. Evidence that parties did not intend bill to effect

transfer was admissible. *Jackson v. Jackson* (1948) 113 U 249, 192 P 2d 397.

Conditional sale or delivery.

Undisclosed intent of seller is not of itself sufficient to make delivery conditional, and in order that there may be conditional sale and title retained by vendor, the minds of parties must meet, unless contract be executory for article to be manufactured, and then under the Uniform Sales Act title does not pass prior to appropriation of goods to contract, and at time of appropriation to contract vendor may reserve right of possession or right of property until certain conditions have been fulfilled. *Utah Assn. of Creditmen v. Buller* (1920) 57 U 270, 194 P 127.

Where property was delivered to purchaser, and there was no previous contract retaining title in seller, fact that delivery slip which accompanied the goods contained words, "conditional sale, title retained by vendor until paid in full," and was signed by purchaser to prove delivery in good condition could not be held to constitute contract between vendor and vendee, nor to show conditional sale. *Utah Assn. of Creditmen v. Buller* (1920) 57 U 270, 194 P 127.

Seller of property on title-retaining note had right to recover possession of property from anyone who had property after original purchaser had defaulted in payments as they became due, since seller had never parted with title thereto, and claim and delivery was proper action against third person who had possession of property as donee of original purchaser. *Taylor Bros. Co. v. Duden* (1948) 112 U 436, 188 P 2d 995.

Provision in sales contract involving title-retaining note, that purchaser could not sell, mortgage or otherwise dispose of property before title passed without written consent of seller, was for financial benefit of seller and could be waived by latter. *Taylor Bros. Co. v. Duden* (1948) 112 U 436, 188 P 2d 995.

Determination of intention of parties.

Where automobile was delivered to dealer upon agreement that it should be sold for not less than certain price and proceeds of such sale should be applied toward purchase price of new car, title to new car was intended to pass at time old car was sold although delivery was to take place upon payment of balance of purchase price, so that purchaser was entitled to car as against finance company who had title to car and claimed it after dealer's bankruptcy. *Jones v. Commercial Investment Trust* (1924) 64 U 151, 228 P 896.

Provision as to intention of parties controls passing of title to machinery from corporation to newly organized operational sub-

siary. *Boston Acme Mines Development Co. v. Clawson* (1925) 66 U 103, 240 P 165.

Where author of book was obligated by contract to purchase certain number of books after they were published, and procured order from bookstore for some books which publisher delivered to carrier consigned to bookstore, there was unconditional appropriation of books to contract, and sale was made to author who resold books to bookstore, as against contention in garnishment proceeding against bookstore based on judgment against author that sale was made directly to bookstore, and hence that bookstore was indebted to publisher rather than to author. *Middleton v. Evans* (1935) 86 U 396, 45 P 2d 570.

Under former section 60-2-2 as applied to transfer of title to sale of coal at the mines, the question of whether title to goods passed under the law of sales was a matter of intention of the parties. *Union Portland Cement Co. v. State Tax Comm.* (1946) 110 U 135, 170 P 2d 164, modified on rehearing 110 U 152, 176 P 2d 879.

Where parties to sale of coal do not expressly say when or where they intend title to the coal to be transferred, no title to coal at the mines can be transferred until the title to the coal is ascertained. *Union Portland Cement Co. v. State Tax Comm.* (1946) 110 U 135, 170 P 2d 164, modified on rehearing 110 U 152, 176 P 2d 879.

Property in specific goods does not pass until goods have been unconditionally appropriated to the contract, but, when goods have been appropriated, property in goods passes to purchaser in absence of provision to contrary. *Whitmore Oxygen Co. v. State Tax Comm.* (1948) 114 U 1, 196 P 2d 976.

Title passes according to the intention of the parties and, in an action for conversion of a new automobile, there was no passage of title to the buyer where the sale documents clearly indicated the intention that title not pass until manufacturer was paid in cash. *Reeder v. General Motors Corp.* (1957) 6 U 2d 216, 310 P 2d 401.

Determination of nature of contract.

In determining whether a contract is one of sale or one to sell, time when title is intended to pass is controlling. *Jones v. Commercial Investment Trust* (1924) 64 U 151, 228 P 896.

Employee stock purchases.

Where employee purchased stock of hotel corporation subject to repurchase agreement at agreed price if employee left employment or was discharged, upon discharge title to

stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed price. *Davies v. Semloh Hotel, Inc.* (1935) 86 U 318, 44 P 2d 689.

Estoppel and waiver.

Seller may estop himself from asserting retained title. *State v. Casperson* (1927) 71 U 86, 262 P 294.

Notice of reservation of title.

Registration of automobile in name of seller constitutes notice of retention of title. *Truitt v. Patten* (1930) 75 U 567, 287 P 175.

Relationship between vendor and purchaser.

Buyer on installment plan does not become agent of seller who retains title. *State v. Davis* (1919) 55 U 54, 184 P 161.

Repossession by seller.

The right of seller to retake possession may be regulated by terms of contract, which will control. *Walker v. Consolidated Wagon & Machine Co.* (1912) 41 U 255, 126 P 308; *Franz v. Hair* (1930) 76 U 281, 289 P 130, 83 ALR 990.

Sales f. o. b.

Ordinarily, both under Uniform Sales Act and at common law, title to f. o. b. sale

passes on delivery to carrier. However, there was no f. o. b. sale at time shipment left starting point in Louisiana since sale took place thereafter when buyer accepted seller's offer. *Ernest E. Fadler Co. v. Hesser* (1948) 166 F 2d 904.

In the case of sales of coal f. o. b., title to the coal passes when it is delivered f. o. b. to the carriers at the coal companies' mines. *Union Portland Cement Co. v. State Tax Comm.* (1946) 110 U 135, 170 P 2d 164, modified on rehearing 110 U 152, 176 P 2d 879.

Necessity implication of f. o. b. contract is that buyer shall bear all expense and all risk of loss after goods are delivered free on board, and presumption arises that property in goods passes when goods have been so delivered, and that place where goods are to be delivered f. o. b. shall be place of delivery to buyer. *Whitmore Oxygen Co. v. State Tax Comm.* (1948) 114 U 1, 196 P 2d 976.

Under contract for sale of acetylene cylinders by Indiana company to Utah company, f. o. b. factory, Speedway, Indiana, sale of cylinders was consummated in Indiana rather than in Utah for tax purposes, even though contract provided that its validity, interpretation and performance should be governed by laws of Utah. *Whitmore Oxygen Co. v. State Tax Comm.* (1948) 114 U 1, 196 P 2d 976.

70A-2-402. Rights of seller's creditors against sold goods.

- (1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this chapter (sections 70A-2-502 and 70A-2-716).
- (2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.
- (3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller
 - (a) under the provisions of the chapter on Secured Transactions (chapter 9); or
 - (b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of

the state where the goods are situated would apart from this chapter constitute the transaction a fraudulent transfer or voidable preference.

History: L. 1965, ch. 154, § 2-402.

Cross-References.

Bulk transfers, 70A-6-101 to 70A-6-111.
Defrauding creditors as misdemeanor, 76-6-511.
Sales without change of possession as fraudulent, 25-1-14.
Territorial application of act, 70A-1-105.

Collateral References.

Fraudulent Conveyances ⇔ 132 (1), 139; Sales ⇔ 230.
37 CJS Fraudulent Conveyances § 187; 77 CJS Sales § 281.
37 AmJur 2d 728 to 730, Fraudulent Conveyances §§ 38, 39; 67 AmJur 2d 415 to 418, Sales §§ 276, 277.

DECISIONS UNDER FORMER LAW

Possession by seller.

Purchasers of goods allowing sellers to retain possession take the chances of the enforcement of creditors' claims or those of subsequent purchasers in good faith. *Ewing v. Merkle* (1884) 3 U 406, 4 P 244.

Transaction of sale, without delivery or change of possession of things sold, was fraudulent as against creditors of vendor, so as to authorize granting of attachment. *Johnson v. Emery* (1906) 31 U 126, 86 P 869, 11 Ann Cas 23; *Charleston Coop. v. A. W.*

Allen & Bros. (1912) 40 U 575, 123 P 578, Ann Cas 1914D 1092.

Who may complain.

One who was not a creditor at the time of the transfer of machinery from debtor corporation to a subsidiary, and who alleged no fraud with relation thereto, but relied upon contention that there was in fact no change of possession at time of sale (25-1-14) has no standing in court to attack validity of sale under former section 60-2-10. *Boston Acme Mines Development Co. v. Clawson* (1925) 66 U 103, 240 P 165.

70A-2-403. Power to transfer — Good faith purchase of goods — “Entrusting.”

- (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
 - (a) the transferor was deceived as to the identity of the purchaser, or
 - (b) the delivery was in exchange for a check which is later dishonored, or
 - (c) it was agreed that the transaction was to be a “cash sale,” or
 - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
- (3) “Entrusting” includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of

whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

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

History: L. 1965, ch. 154, § 2-403.

Cross-References.

Bulk transfers, 70A-6-101 to 70A-6-111.
 "Buyer in ordinary course of business" defined, 70A-1-201 (9).
 "Merchant" defined, 70A-2-104.
 "Person in the position of a seller" defined, 70A-2-707.
 Protection of buyers of goods, 70A-9-307.
 "Purchase" defined, 70A-1-201 (32).
 Rules of construction, 70A-1-102.
 Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.
 Seller's creditors, rights against sold goods, 70A-2-402.
 Supplementary general principles of law applicable, 70A-1-103.
 Title under warehouse receipt, when defeated, 70A-7-205.
 Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Inapplicable to livestock auction.

In replevin action by livestock grower to recover cattle sold at auction, this section did not govern sale in view of 70A-2-102 which provides that chapter does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of

buyers." Pugh v. Stratton (1969) 22 U 2d 190, 450 P 2d 463.

Collateral References.

Estoppel ⇔ 75; Sales ⇔ 234 et seq.
 31 CJS Estoppel § 106; 77 CJS Sales § 288 et seq.
 67 AmJur 2d 397 to 416, Sales §§ 262 to 276.

Delivery of key as satisfying condition of immediate delivery and actual or continued change of possession to uphold sale of personal property against subsequent purchaser or third persons generally, 56 ALR 518.

Estoppel of owner of tangible personal property who permits another to have possession of evidences of title, endorsed in blank, or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 ALR 690.

Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 ALR 393.

Right of purchaser from party to conditional sale as affected by actual or apparent authority in party to sell property, 88 ALR 109.

Right of purchaser of stolen bonds, 1 ALR 717, 85 ALR 357, 102 ALR 28.

DECISIONS UNDER FORMER LAW

Property attained by theft or fraud.

One who acquires property by theft, or one who by fraud acquires possession of personal property for a particular purpose with the intention of appropriating the property to his own use, and without an intention on part of owner to transfer title to him, cannot transfer a good title. This doctrine has been applied to a special agent for sale of an automobile on commission, who obtained possession thereof by trick. Swartz v. White (1932) 80 U 150, 13 P 2d 643.

Even an innocent purchaser for value cannot acquire title to property obtained by seller from the true owner by theft, trickery and the like. Swartz v. White (1932) 80 U 150, 13 P 2d 643.

Notice of previous sale.

Whether a defendant had notice or knowledge of a bill of sale or conditional sales contract involving property in the possession of the seller under the conditional sales contract before he had loaned money secured by chattel mortgages, raised a genuine issue of fact on a material matter, precluding entry of a summary judgment. Martin Machinery v. Strevell-Paterson Finance Co. (1958) 7 U 2d 316, 324 P 2d 776.

Waiver and estoppel.

The owner may estop himself from asserting his superior title. But merely delivering possession of automobile to broker to sell same, and at same time delivering to him certificate of ownership signed in blank, does not estop owner as against one buying car

from such broker. *Swartz v. White* (1932) 80 U 150, 13 P 2d 643.

Where plaintiffs, experienced wholesale used car distributors from out of state, willingly turned automobiles over to a licensed used car retail dealer in Utah, knowing that he was a licensed used car retail dealer and that he would take the automobiles directly to his place of business for the purpose of

resale, it was the granting of more than mere possession. Such conduct on the part of the plaintiffs clothed the Utah retail dealer with an apparent ownership or authority to sell said cars in the ordinary course of business to the buying public which would preclude the original sellers from reclaiming the automobiles from bona fide purchasers. *Heaston v. Martinez* (1955) 3 U 2d 259, 282 P 2d 833.

PART 5

PERFORMANCE

Section

- 70A-2-501. Insurable interest in goods — Manner of identification of goods.
- 70A-2-502. Buyer's right to goods on seller's insolvency.
- 70A-2-503. Manner of seller's tender of delivery.
- 70A-2-504. Shipment by seller.
- 70A-2-505. Seller's shipment under reservation.
- 70A-2-506. Rights of financing agency.
- 70A-2-507. Effect of seller's tender — Delivery on condition.
- 70A-2-508. Cure by seller of improper tender or delivery — Replacement.
- 70A-2-509. Risk of loss in the absence of breach.
- 70A-2-510. Effect of breach on risk of loss.
- 70A-2-511. Tender of payment by buyer — Payment by check.
- 70A-2-512. Payment by buyer before inspection.
- 70A-2-513. Buyer's right to inspection of goods.
- 70A-2-514. When documents deliverable on acceptance — When on payment.
- 70A-2-515. Preserving evidence of goods in dispute.

70A-2-501. Insurable interest in goods — Manner of identification of goods.

- (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs
 - (a) when the contract is made if it is for the sale of goods already existing and identified;
 - (b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;
 - (c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.
- (2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the

identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

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

History: L. 1965, ch. 154, § 2-501.

Cross-References.

Absence of specific place for delivery, 70A-2-308.

Buyer's right to goods on seller's insolvency, 70A-2-502.

Contract for sale of goods to be severed from realty, 70A-2-107.

Effect of breach on risk of loss, 70A-2-510.

"Goods" defined, 70A-2-105.

Risk of loss in absence of breach of contract, 70A-2-509.

Seller's creditors, rights against sold goods, 70A-2-402.

Seller's remedies in general, 70A-2-703.

Tender of delivery by seller, 70A-2-503.

Collateral References.

Insurance ⇔ 115 (6).

45 CJS Insurance § 175 et seq.

43 AmJur 2d 523, Insurance § 488; 67 AmJur 2d 274, 360 to 364, Sales §§ 158, 233 to 235.

70A-2-502. Buyer's right to goods on seller's insolvency.

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

History: L. 1965, ch. 154, § 2-502.

Cross-References.

Insolvency proceedings, 70A-1-201 (22).

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Seller's remedies on discovery of buyer's insolvency, 70A-2-702.

Collateral References.

Sales ⇔ 230.

77 CJS Sales § 281.

67 AmJur 2d 914, Sales § 707.

70A-2-503. Manner of seller's tender of delivery.

- (1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular
- (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but
- (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

- (2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.
- (3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.
- (4) Where goods are in the possession of a bailee and are to be delivered without being moved
 - (a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but
 - (b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.
- (5) Where the contract requires the seller to deliver documents
 - (a) he must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set (subsection (2) of section 70A-2-323); and
 - (b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

History: L. 1965, ch. 154, § 2-503.

Cross-References.

Absence of specific time or place for delivery, 70A-2-308, 70A-2-309.

Authority to ship under reservation, 70A-2-310.

Buyer's right to inspection of goods, 70A-2-513.

Course of dealing and usage of trade, 70A-1-205.

Delivery in single or several lots, 70A-2-307.

Delivery on condition, 70A-2-507.

General obligation of parties, 70A-2-301.

Installment contract, 70A-2-612.

Open time for payment or running of credit, 70A-2-310.

Options and cooperation respecting performance, 70A-2-311.

Output, requirements and exclusive dealings, 70A-2-306.

Risk of loss in absence of breach, 70A-2-509.

Seller's tender of delivery, effect, 70A-2-507.

Shipment by seller, 70A-2-504.

Substituted performance, 70A-2-614.

Tender of payment by buyer, 70A-2-511.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Warranties, express or implied, 70A-2-312 to 70A-2-317, 70A-2-321.

Collateral References.

Sales ⇔ 153 et seq.

77 CJS Sales § 141 et seq.

67 AmJur 2d 456 to 469, Sales §§ 319 to 329.

May delivery which will support gift be predicated upon deposit in mail, filing of telegram, or delivery to carrier? 126 ALR 924.

Presumption and burden of proof as to consignee's title to or interest in respect of goods comprising shipment, in consignee's

action against carrier for loss, damage, delay, nondelivery, or conversion, 135 ALR 456.

What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person, 4 ALR 2d 213.

DECISIONS UNDER FORMER LAW

What constitutes sufficient delivery.

Delivery to a person appointed by buyer to receive the goods, or to any third person at

buyer's request or with his consent, is sufficient delivery to buyer. *Holloway v. Wetzel* (1935) 86 U 387, 45 P 2d 565, 98 ALR 1006.

70A-2-504. Shipment by seller. Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

- (a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and
- (b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and
- (c) promptly notify the buyer of the shipment. Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

History: L. 1965, ch. 154, § 2-504.

Cross-References.

C.I.F. and C.&F. terms, 70A-2-320.
 F.O.B. and F.A.S. terms, 70A-2-319.
 Improper delivery, buyer's rights, 70A-2-601.
 Obligation of good faith, 70A-1-203.
 Options and cooperation respecting performance, 70A-2-311.
 Overseas shipment, form of bill of lading required, 70A-2-323.
 Substituted performance, 70A-2-614.
 Tender of delivery by seller, 70A-2-503.

Collateral References.

Sales ⇄ 83, 161.
 77 CJS Sales § 165.
 67 AmJur 2d 478 to 480, Sales §§ 338, 339.
 Failure to ship by carrier designated by buyer as affecting passing of title, 31 ALR 955.
 Misrouting as affecting duty of the buyer to accept goods, 46 ALR 1120.
 Right of shipper or consignee to divert shipment, 61 ALR 1309.
 Railroad carrier's liability where goods were allegedly damaged by failure to properly refrigerate, 4 ALR 3d 994.

70A-2-505. Seller's shipment under reservation.

- (1) Where the seller has identified goods to the contract by or before shipment:
 - (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's

expectation of transferring that interest to the person named.

- (b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of section 70A-2-507) a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.
- (2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

History: L. 1965, ch. 154, § 2-505.

Cross-References.

Authority to ship under reservation, 70A-2-310.
 C.I.F. and C.&F. terms, 70A-2-320 (4).
 Delivery on condition, 70A-2-507 (2).
 F.O.B. and F.A.S. terms, 70A-2-319 (4).
 Good faith purchase of goods, 70A-2-403.
 Insurable interest in goods, 70A-2-501.
 "Security interest" defined, 70A-1-201 (37).
 Seller's insolvency, buyer's right to goods, 70A-2-502.

Seller's stoppage of delivery, 70A-2-705.

Shipment by seller, 70A-2-504.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Carriers ⇌ 54 et seq.; Sales ⇌ 300 et seq.

13 CJS Carriers § 128 et seq.; 78 CJS Sales § 390 et seq.

67 AmJur 2d 484 to 487, Sales §§ 343, 344.

70A-2-506. Rights of financing agency.

- (1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.
- (2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

History: L. 1965, ch. 154, § 2-506.

Cross-References.

Bank deposits and collections, 70A-4-101 to 70A-4-504.
 Collection of documentary drafts, 70A-4-501 to 70A-4-504.
 "Financing agency" defined, 70A-2-104 (2).
 Insurable interest in goods, 70A-2-501.
 Letters of credit, 70A-5-101 to 70A-5-117.

Seller's insolvency, buyer's right to goods, 70A-2-502.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Sales ⇌ 292, 309.

78 CJS Sales §§ 398, 406.

67 AmJur 2d 487, Sales § 345.

70A-2-507. Effect of seller's tender — Delivery on condition.

- (1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.
- (2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

History: L. 1965, ch. 154, § 2-507.

Passing of title, reservation for security, 70A-2-401.

Cross-References.

Authority to ship under reservation, 70A-2-310.

Seller's remedies on discovery of buyer's insolvency, 70A-2-702.

Buyer's remedies for nondelivery or repudiation, 70A-2-711 to 70A-2-713.

Substituted performance, 70A-2-614.

"Contract" defined, 70A-1-201 (11).

Tender of payment by buyer, 70A-2-511.

Good faith purchase of goods, 70A-2-403.

Improper delivery, buyer's rights, 70A-2-601.

Collateral References.

Sales ⇌ 153.

Manner of seller's tender of delivery, 70A-2-503.

77 CJS Sales § 141.

67 AmJur 2d 459, 460, Sales §§ 321, 322.

70A-2-508. Cure by seller of improper tender or delivery — Replacement.

- (1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
- (2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

History: L. 1965, ch. 154, § 2-508.

Unconscionable contract or clause, 70A-2-302.

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Remedies for fraud, 70A-2-721.

Tender of payment by buyer, 70A-2-511.

Collateral References.

Sales ⇌ 153.

77 CJS Sales § 141.

67 AmJur 2d 509, Sales § 361.

70A-2-509. Risk of loss in the absence of breach.

- (1) Where the contract requires or authorizes the seller to ship the goods by carrier
 - (a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (section 70A-2-505); but

- (b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.
- (2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer
- (a) on his receipt of a negotiable document of title covering the goods; or
- (b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or
- (c) after his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in subsection (4) (b) of section 70A-2-503.
- (3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.
- (4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (section 70A-2-327) and on effect of breach on risk of loss (section 70A-2-510).

History: L. 1965, ch. 154, § 2-509.

Cross-References.

"Agreement" defined, 70A-1-201 (3).
 Effect of breach on risk of loss, 70A-2-510.
 Manner of seller's tender of delivery, 70A-2-503.

"Merchant" defined, 70A-2-104.
 Shipment by seller, 70A-2-504.

Collateral References.

Sales ⇄ 197, 224, 232.
 77 CJS Sales §§ 286, 287.
 67 AmJur 2d 381 to 387, Sales §§ 248 to 252.

Delay in delivery placing goods at the risk of the party at fault, 38 ALR 2d 658.

Liability for loss of or damage to property delivered on trial or with privilege of return, 31 ALR 1365.

Upon whom loss from theft or the like falls, where seller turns over goods at buyer's premises, 50 ALR 2d 330.

Who bears loss incidentally to destruction of goods sold conditionally, 38 ALR 1319.

Who bears risk of loss of goods under UCC §§ 2-509, 2-510, 66 ALR 3d 145.

DECISIONS UNDER FORMER LAW

Sales f. o. b.

Ordinarily, both under Uniform Sales Act and at common law, title to f. o. b. sale passes on delivery to carrier. However, there was no f. o. b. sale at time shipment left starting point in Louisiana since sale took place thereafter when buyer accepted seller's offer. Ernest E. Fadler Co. v. Hesser (1948) 166 F 2d 904.

In the case of sales of coal f. o. b., title to the coal passes when it is delivered f. o. b. to the carriers at the coal companies' mines. Union Portland Cement Co. v. State Tax Comm. (1946) 110 U 135, 170 P 2d 164, modified on rehearing 110 U 152, 176 P 2d 879.

Necessary implication of f. o. b. contract is that buyer shall bear all risk of loss after goods are delivered free on board. Whitmore Oxygen Co. v. State Tax Comm. (1948) 114 U 1, 196 P 2d 976.

70A-2-510. Effect of breach on risk of loss.

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

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

History: L. 1965, ch. 154, § 2-510.

Cross-References.

Risk of loss in absence of breach,
70A-2-509.

Collateral References.

Sales ⇔ 197, 217, 224, 232.
77 CJS Sales §§ 286, 287.
67 AmJur 2d 388, Sales § 253.

Who bears risk of loss of goods under UCC
§§ 2-509, 2-510, 66 ALR 3d 145.

70A-2-511. Tender of payment by buyer — Payment by check.

- (1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.
- (2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.
- (3) Subject to the provisions of this act on the effect of an instrument on an obligation (section 70A-3-802), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

History: L. 1965, ch. 154, § 2-511.

Cross-References.

Buyer's right to inspection of goods,
70A-2-513.

Certification of a check, 70A-3-411.

C.I.F. and C.&F. terms, 70A-2-320.

Commercial paper, 70A-3-101 to 70A-3-805.

Delivery "ex-ship," 70A-2-322.

Delivery in single or several lots,
70A-2-307.

Effect of instrument on obligation for
which it is given, 70A-3-802.

Effect of letter of credit, 70A-2-325 (2).

F.O.B. and F.A.S. terms, 70A-2-319.

Manner of seller's tender of delivery,
70A-2-503.

Open time for payment or running of
credit, 70A-2-310.

Right to adequate assurance of perfor-
mance, 70A-2-609.

Seller's remedies on discovery of buyer's
insolvency, 70A-2-702.

Shipment by seller, 70A-2-504.

Substituted performance, 70A-2-614.

Tender of delivery by seller, effect,
70A-2-507.

Valid tender.

To constitute valid tender, there must be actual and bona fide offer to pay whole amount of money due, and plaintiff's tender of \$30,384.25 when amount due totaled \$36,677.71, did not constitute a valid tender. *Timpanogos Highlands, Inc. v. Harper* (1975) 544 P 2d 481.

Collateral References.

Payment ⇔ 8 et seq.; Sales ⇔ 82, 183 et
seq.; Tender ⇔ 13.

70 CJS Payment § 13 et seq.; 77 CJS Sales
§ 229 et seq.; 86 CJS Tender § 21 et seq.

67 AmJur 2d 559 to 566, Sales §§ 402 to 407.

Authority of agent to receive payment for
commodities which he is authorized to sell,
or for which he is to find market, 8 ALR 203,
105 ALR 718.

Option to pay purchase price in cash or on
terms, 36 ALR 857.

Place, in absence of written provision in
sales contract, where cash consideration for
goods purchased is payable, 49 ALR 2d 1350.

Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 ALR 1309.

Right of purchaser to opportunity to pay in cash where tender has been made in other medium, 23 ALR 630, 46 ALR 914.

70A-2-512. Payment by buyer before inspection.

- (1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless
 - (a) the nonconformity appears without inspection; or
 - (b) despite tender of the required documents the circumstances would justify injunction against honor under the provisions of this act (section 70A-5-114).
- (2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

History: L. 1965, ch. 154, § 2-512.

Performance or acceptance under reservation of rights, 70A-1-207.

Cross-References.

Buyer's right to inspection of goods, 70A-2-513.

Letters of credit, 70A-5-101 to 70A-5-117.

Collateral References.

Sales ⇄ 168 (2), 195, 288 (2).

77 CJS Sales §§ 189, 218, 231.

67 AmJur 2d 530, 559, Sales §§ 379, 402.

70A-2-513. Buyer's right to inspection of goods.

- (1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.
- (2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.
- (3) Unless otherwise agreed and subject to the provisions of this chapter on C.I.F. contracts (subsection (3) of section 70A-2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides
 - (a) for delivery "C.O.D." or on other like terms; or
 - (b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.
- (4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was

clearly intended as an indispensable condition failure of which avoids the contract.

History: L. 1965, ch. 154, § 2-513.

Cross-References.

Acceptance of goods, 70A-2-606 to 70A-2-608.

Buyer's incidental and consequential damages, 70A-2-715.

Exclusion or modification of warranties, 70A-2-316.

Insurable interest in goods, 70A-2-501.

Payment on or after arrival, 70A-2-321 (3).

Reasonable time, 70A-1-204.

Seller's insolvency, buyer's right to goods, 70A-2-502.

Shipment under reservation, 70A-2-310.

Collateral References.

Sales ⇔ 168.

77 CJS Sales § 189 et seq.

67 AmJur 2d 522 to 532, Sales §§ 372 to 380.

Buyer's right to inspect at destination where goods are delivered to carrier, 27 ALR 524.

Effect of opportunity to inspect on question of implied warranty, 52 ALR 1543.

Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, 52 ALR 2d 900.

DECISIONS UNDER FORMER LAW

Defect after inspection and acceptance.

In action to recover purchase price of carload of rice, where buyer inspected and in fact accepted rice, it was bound to pay purchase price without right to recoup damages for any defect in quality which might have been discovered after inspection and acceptance. *Wall Rice Milling Co. v. Continental Supply Co.* (1909) 36 U 121, 103 P 242, 140 Am St Rep 815.

Intention of parties.

Where sale was by sample and there was no express warranty upon which buyer could rely, and for breach of which it could recover

in proper action, right of inspection must have been intended by parties as condition precedent to passing of title. *Wall Rice Milling Co. v. Continental Supply Co.* (1909) 36 U 121, 103 P 242, 140 Am St Rep 815.

Contract for purchase of fruit f. o. b. loading point and requiring prompt payment of draft with bill of lading attached upon inspection and acceptance, when considered with construction thereof by parties as evidenced by conduct, warranted conclusion that purchaser had right of inspection and acceptance or rejection at point of delivery rather than point of loading. *Heichemer v. Peterson* (1929) 75 U 107, 283 P 435.

70A-2-514. When documents deliverable on acceptance — When on payment. Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

History: L. 1965, ch. 154, § 2-514.

Cross-References.

Acceptance of goods, effect, 70A-2-607.

Buyer's right to inspection of goods, 70A-2-513.

Collection of documentary drafts, responsibility of presenting bank for documents and goods, 70A-4-503.

Delivery on condition, 70A-2-507 (2).

Letters of credit, honor or rejection, 70A-5-112.

Payment by buyer before inspection, 70A-2-512.

Seller's insolvency, buyer's right to goods, 70A-2-502.

Seller's shipment under reservation, 70A-2-505.

Collateral References.

Sales ⇔ 191, 202 (6).

77 CJS Sales §§ 238, 275.

67 AmJur 2d 485, Sales § 344.

Damages for bank's breach of duty in surrendering attached bill of lading before payment of draft held for collection, 19 ALR 555, 67 ALR 1511.

70A-2-515. Preserving evidence of goods in dispute. In furtherance of the adjustment of any claim or dispute

- (a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and
- (b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

History: L. 1965, ch. 154, § 2-515.

Prima facie evidence by third-party documents, 70A-1-202.

Cross-References.

Buyer's remedies, 70A-2-711 (2).
Buyer's right to inspection of goods, 70A-2-513 (3).

Letters of credit, 70A-5-101 to 70A-5-117.
Performance or acceptance under reservation of rights, 70A-1-207.

Resale of goods by seller, 70A-2-706.

Collateral References.

Sales ⇔ 72 (5), 85 (3), 168, 188.
77 CJS Sales § 191 et seq.
67 AmJur 2d 531, Sales § 380.

PART 6

BREACH, REPUDIATION AND EXCUSE

Section

- 70A-2-601. Buyer's rights on improper delivery.
70A-2-602. Manner and effect of rightful rejection.
70A-2-603. Merchant buyer's duties as to rightfully rejected goods.
70A-2-604. Buyer's options as to salvage of rightfully rejected goods.
70A-2-605. Waiver of buyer's objections by failure to particularize.
70A-2-606. What constitutes acceptance of goods.
70A-2-607. Effect of acceptance — Notice of breach — Burden of establishing breach after acceptance — Notice of claim or litigation to person answerable over.
70A-2-608. Revocation of acceptance in whole or in part.
70A-2-609. Right to adequate assurance of performance.
70A-2-610. Anticipatory repudiation.
70A-2-611. Retraction of anticipatory repudiation.
70A-2-612. "Installment contract" — Breach.
70A-2-613. Casualty to identified goods.
70A-2-614. Substituted performance.
70A-2-615. Excuse by failure of presupposed conditions.
70A-2-616. Procedure on notice claiming excuse.

70A-2-601. Buyer's rights on improper delivery. Subject to the provisions of this chapter on breach in installment contracts (section 70A-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 70A-2-718 and 70A-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
(b) accept the whole; or
(c) accept any commercial unit or units and reject the rest.

History: L. 1965, ch. 154, § 2-601.

Installment contract, 70A-2-612.

Cross-References.

Contractual modification or limitation of remedy, 70A-2-719.

Liquidation or limitation of damages, 70A-2-718.

Manner and effect of rightful rejection, 70A-2-602.

Collateral References.

Sales ⇌ 164, 177.

77 CJS Sales §§ 168, 184, 218.

67 AmJur 2d 540 to 545, Sales §§ 386 to 389.

70A-2-602. Manner and effect of rightful rejection.

- (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
- (2) Subject to the provisions of the two following sections on rejected goods (sections 70A-2-603 and 70A-2-604),
 - (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
 - (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of section 70A-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
 - (c) the buyer has no further obligations with regard to goods rightfully rejected.
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (section 70A-2-703).

History: L. 1965, ch. 154, § 2-602.

Seller's remedies in general, 70A-2-703.

Cross-References.

Buyer's right to inspection of goods, 70A-2-513.

Improper delivery, buyer's rights, 70A-2-601.

Merchant buyer's duties as to rightfully rejected goods, 70A-2-603.

Notice or notification, 70A-1-201.

Payment by buyer before inspection, 70A-2-512.

Reasonable time, 70A-1-204.

Collateral References.

Sales ⇌ 177, 178 (2).

77 CJS Sales §§ 220, 224, 342.

67 AmJur 2d 546 to 554, Sales §§ 391 to 397.

Duty of purchaser of goods "on trial" or "on approval" regarding notice of rejection, 78 ALR 533.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

70A-2-603. Merchant buyer's duties as to rightfully rejected goods.

- (1) Subject to any security interest in the buyer (subsection (3) of section 70A-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
- (2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses

include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent on the gross proceeds.

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

History: L. 1965, ch. 154, § 2-603; 1977, ch. 272, § 5.

Compiler's Notes.

The 1977 amendment added subsec. (3), relating to good faith conduct.

Cross-References.

Collection of documentary drafts, responsibility of presenting bank for documents and goods, 70A-4-503.

Letters of credit, honor or rejection, 70A-5-112.

Remedies liberally administered, 70A-1-106.

Resale by seller, 70A-2-706.

Collateral References.

Sales ⇔ 287.

77 CJS Sales § 342.

67 AmJur 2d 552, Sales § 397.

70A-2-604. Buyer's options as to salvage of rightfully rejected goods. Subject to the provisions of the immediately preceding section on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

History: L. 1965, ch. 154, § 2-604.

Cross-References.

Manner and effect of rightful rejection, 70A-2-602.

Merchant buyer's duties as to rightfully rejected goods, 70A-2-603.

Resale by seller, 70A-2-706.

Storage fees.

Manufacturer who informed wholesaler that he would pick up shipment of defective

and unsaleable fishing boats, but failed to do so, is properly charged storage costs. Pacific Marine Schwabacher, Inc. v. Hydroswift Corp. (1974) 525 P 2d 615.

Collateral References.

Sales ⇔ 287.

77 CJS Sales § 342.

67 AmJur 2d 554, Sales § 398.

70A-2-605. Waiver of buyer's objections by failure to particularize.

- (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach
- (a) where the seller could have cured it if stated seasonably; or
- (b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.
- (2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

History: L. 1965, ch. 154, § 2-605.

Cross-References.

Acceptance of goods, effect, 70A-2-606, 70A-2-607.

Cure by seller of improper tender or delivery, 70A-2-508.
 Payment by buyer before inspection, 70A-2-512.

Collateral References.
 Sales ⇔ 285, 288 (4), (5).
 77 CJS Sales § 346.
 67 AmJur 2d 548, Sales § 393.

70A-2-606. What constitutes acceptance of goods.

- (1) Acceptance of goods occurs when the buyer
 - (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
 - (b) fails to make an effective rejection (subsection (1) of section 70A-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
 - (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.
- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

History: L. 1965, ch. 154, § 2-606.

Cross-References.

Effect of acceptance, 70A-2-607.
 Passing of title, reservation for security, 70A-2-401.
 Remedies for breach of contract, 70A-2-701 to 70A-2-725.
 Revocation of acceptance in whole or in part, 70A-2-608.
 Rightfully rejected goods, rights and duties of buyer, 70A-2-601 to 70A-2-604.
 Risk of loss, effect of breach of contract, 70A-2-510.
 Risk of loss in absence of breach of contract, 70A-2-509.

Acceptance.

Buyer of mobile home cannot recover for breach of implied warranty of fitness after

living in mobile home for two years. Chrysler Credit Corp. v. Burns (1974) 527 P 2d 655.

Collateral References.

Sales ⇔ 178.
 77 CJS Sales § 222 et seq.
 67 AmJur 2d 532 to 540, Sales §§ 381 to 385.

Buyer's acceptance of delayed installment of goods as waiver of similar default as to later installments, 32 ALR 2d 1128.

Contractual provision making acceptance conditional on approval by, or satisfaction of, third person, 46 ALR 864.

Use of goods by buyer as constituting acceptance under UCC § 2-606 (1) (c), 67 ALR 3d 363.

DECISIONS UNDER FORMER LAW

Sufficiency of acts of acceptance.

In action to recover purchase price of carload of rice, which was sold by sample without express warranty, where right of inspection was intended as condition precedent to passing of title, it was held that buyer did not accept rice by removing it from car to make inspection. Wall Rice Milling Co. v. Continental Supply Co. (1909) 36 U 121, 103 P 242, 140 Am St Rep 815.

Where purchaser of stoves placed advertisement in newspapers offering such stoves for sale and naming dates upon which demonstrations would be made upon such stoves,

executed trade acceptance for purchase price, and sent letter to seller that it was attempting to settle for stoves and would pay for them as soon as sold, such acts constituted acceptance within meaning of former section 60-3-8. Detroit Vapor Stove Co. v. Farmers' Cash Union (1923) 61 U 567, 216 P 1075.

Transfer of title to machinery from corporation to newly organized operational subsidiary in exchange for all of subsidiary's capital stock was sufficient acceptance of machinery by subsidiary. Boston Acme Mines Development Co. v. Clawson (1925) 66 U 103, 240 P 165.

70A-2-607. Effect of acceptance — Notice of breach — Burden of establishing breach after acceptance — Notice of claim or litigation to person answerable over.

- (1) The buyer must pay at the contract rate for any goods accepted.
- (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.
- (3) Where a tender has been accepted
 - (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and
 - (b) if the claim is one for infringement or the like (subsection (3) of section 70A-2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.
- (4) The burden is on the buyer to establish any breach with respect to the goods accepted.
- (5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over
 - (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.
 - (b) if the claim is one for infringement or the like (subsection (3) of section 70A-2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after reasonable receipt of the demand does turn over control the buyer is so barred.
- (6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of section 70A-2-312).

History: L. 1965, ch. 154, § 2-607.

Cross-References.

Commercial paper, notice to third party, 70A-3-803.

Deduction of damages from the price, 70A-2-717.

Notice and notification, 70A-1-201.

Performance or acceptance under reservation of rights, 70A-1-207.

Reasonable time, 70A-1-204.

Revocation of acceptance in whole or in part, 70A-2-608.

Waiver of buyer's objections by failure to particularize, 70A-2-605.

Warranty against infringement, 70A-2-312.

"Reasonable time."

Where purchasers of a motor home, upon finding a number of defects in the vehicle, sought to rescind the contract the day after it was entered, but were persuaded by the seller to retain the vehicle and take it on a planned trip to California, during which time the already noted problems persisted and new ones became manifest so that the day after they returned home purchasers again attempted rescission, they acted within a "reasonable time" within the meaning of this section. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Collateral References.

Indemnity ⇐ 10, 12; Sales ⇐ 179, 285, 288 (2), 427.

42 CJS Indemnity § 15; 77 CJS Sales §§ 218, 225, 339, 346; 78 CJS Sales § 520.

67 AmJur 2d 554 to 559, Sales §§ 399 to 401.

Acceptance after agreed time of delivery as waiver of damages on account of seller's delay, 80 ALR 322.

Buyer's acceptance of delayed installment of goods as waiver of similar default as to later installments, 32 ALR 2d 1128.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR 2d 270.

Misrouting as affecting duty of the buyer to accept goods, 46 ALR 1120.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 ALR 2d 511.

Right of seller as condition of delivery to insist on or resort to means not provided by contract to assure payment, 44 ALR 443.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations, 24 ALR 2d 717.

Sufficiency and timeliness of buyer's notice under UCC § 2-607 of seller's breach of warranty, 93 ALR 3d 363.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 41 ALR 2d 1173.

DECISIONS UNDER FORMER LAW

Counterclaim of buyer.

Breach of promise or agreement on part of seller to furnish demonstrator does not defeat the right of seller to recover for goods sold, but saves to the purchaser the right to offset by way of counterclaim for any damages which may have been sustained by reason of the failure of the seller to perform that part of its agreement. *Detroit Vapor Stove Co. v. Farmers' Cash Union* (1923) 61 U 567, 216 P 1075.

Proffer return of goods by buyer.

Where a horse was bought with the knowledge of both parties that he was to be used for breeding purposes and the horse proved to be sterile but died before it could be returned, buyer was not barred from recovery by his failure to proffer the return of the carcass nor could seller raise his own good faith as a defense where no fraud was claimed or shown as it was assumed by the court that both parties acted in good faith in respect to the defective horse. *Erickson v. Poulsen* (1964) 15 U 2d 190, 389 P 2d 739.

70A-2-608. Revocation of acceptance in whole or in part.

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
 - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

- (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
- (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

History: L. 1965, ch. 154, § 2-608.

Cross-References.

Effect of acceptance, 70A-2-607.

Improper delivery, buyer's rights, 70A-2-601.

Proof of market price, 70A-2-723.

Reasonable time, 70A-1-204.

Rightful rejection, manner and effect, 70A-2-602.

Waiver of buyer's objections by failure to particularize, 70A-2-605.

"Reasonable time."

What constitutes a "reasonable time" for revocation of acceptance under this section is usually a question of fact to be determined in light of the circumstances of the particular case, and the supreme court upon review will not disturb a finding on the issue unless there is no reasonable basis in the evidence to sustain it. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Where purchasers of a motor home, upon finding a number of defects in the vehicle, sought to rescind the contract the day after

it was entered, but were persuaded by the seller to retain the vehicle and take it on a planned trip to California, during which time the already noted problems persisted and new ones became manifest so that the day after they returned home purchasers again attempted rescission, they acted within a "reasonable time" within the meaning of this section. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Collateral References.

Sales ⇄ 179, 427.

77 CJS Sales § 225; 78 CJS Sales § 520.

67 AmJur 2d 919 to 926, Sales §§ 710 to 716.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608 (1), 65 ALR 3d 388.

Time for revocation of acceptance of goods under UCC § 2-608 (2), 65 ALR 3d 354.

What constitutes "substantial impairment" entitling buyer to revoke his acceptance of goods under UCC § 2-608, 98 ALR 3d 1183.

70A-2-609. Right to adequate assurance of performance.

- (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
- (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
- (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

- (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

History: L. 1965, ch. 154, § 2-609.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Cross-References.

Commercial paper, 70A-3-101 to 70A-3-805.
Obligation of good faith, 70A-1-203.
Option to accelerate at will, 70A-1-208.
Retraction of anticipatory repudiation, 70A-2-611.

Collateral References.

Sales ⇔ 190, 288 ½.
77 CJS Sales § 241.
67 AmJur 2d 453 to 456, Sales §§ 315 to 318.

70A-2-610. Anticipatory repudiation. When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy for breach (section 70A-2-703 or section 70A-2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and
- (c) in either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (section 70A-2-704).

History: L. 1965, ch. 154, § 2-610.

Collateral References.

Cross-References.

Installment contract, 70A-2-612.
Obligation of good faith, 70A-1-203.
Right to adequate assurance of performance, 70A-2-609.

Sales ⇔ 84, 98, 116, 370, 405.
77 CJS Sales §§ 79, 98-100; 78 CJS Sales §§ 464, 520.
67 AmJur 2d 449, 698 to 701, Sales §§ 311, 519, 520.

70A-2-611. Retraction of anticipatory repudiation.

- (1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final.
- (2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (section 70A-2-609).
- (3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History: L. 1965, ch. 154, § 2-611.

Cross-References.

Right to adequate assurance of performance, 70A-2-609.

Collateral References.

Sales ⇄ 84, 107, 127.

77 CJS Sales §§ 79, 111 et seq.

67 AmJur 2d 701, Sales § 521.

70A-2-612. "Installment contract" — Breach.

- (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
- (2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
- (3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

History: L. 1965, ch. 154, § 2-612.**Collateral References.**

Sales ⇄ 62, 163.

77 CJS Sales §§ 77, 167.

67 AmJur 2d 573 to 585, Sales §§ 416 to 424.

Cross-References.

Anticipatory repudiation, 70A-2-610.

Course of performance or practical construction, 70A-2-208.

Delivery in single or several lots, 70A-2-307.

Effect of acceptance, 70A-2-607.

Obligation of good faith, 70A-1-203.

Right to adequate assurance of performance, 70A-2-609.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Right of seller to rescind or refuse further deliveries on buyer's failure to pay for installments, 75 ALR 609.

Right, upon buyer's default in payment of installment due, to recover amount not due, in absence of acceleration clause, 57 ALR 825.

70A-2-613. Casualty to identified goods. Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (section 70A-2-324) then

- (a) if the loss is total the contract is avoided; and
- (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

History: L. 1965, ch. 154, § 2-613.**Cross-References.**

"No arrival, no sale" term, effect, 70A-2-324.

Collateral References.

Sales ⇄ 11, 119, 197, 224, 232.

77 CJS Sales §§ 14, 98, 286, 287.

67 AmJur 2d 508, 509, Sales §§ 359, 360.

70A-2-614. Substituted performance.

- (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.
- (2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

History: L. 1965, ch. 154, § 2-614.**Collateral References.**

Sales ⇄ 83, 190.

77 CJS Sales §§ 165, 237.

67 AmJur 2d 521, Sales § 371.

Cross-References.

Letters of credit, 70A-5-101 to 70A-5-117.

70A-2-615. Excuse by failure of presupposed conditions. Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

History: L. 1965, ch. 154, § 2-615.

Obligation of good faith, 70A-1-203.

Output, requirements and exclusive dealings, 70A-2-306.

Cross-References.

Casualty to identified goods, 70A-2-613.

Notice and notification, 70A-1-201.

Procedure on notice claiming excuse, 70A-2-616.

Right to adequate assurance of performance, 70A-2-609.

Rules of construction, variation by agreement, 70A-1-102.

Substituted performance, 70A-2-614.

Unconscionable contract or clause, 70A-2-302.

Collateral References.

Sales ⇔ 85 (2), 172.

77 CJS Sales § 206.

67 AmJur 2d 511 to 521, Sales §§ 362 to 370.

Impracticability of performance of sales contract as defense under UCC § 2-615, 93 ALR 3d 584.

Labor disputes as excusing, under UCC § 2-615, failure to deliver goods sold, 70 ALR 3d 1266.

Nature, construction, and effect of "lay away" or "will call" plan or system, 10 ALR 3d 456.

70A-2-616. Procedure on notice claiming excuse.

- (1) Where the buyer receives notification of a material or indefinite delay or an allocation justified under the preceding section he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this chapter relating to breach of installment contracts (section 70A-2-612), then also as to the whole,
 - (a) terminate and thereby discharge any unexecuted portion of the contract; or
 - (b) modify the contract by agreeing to take his available quota in substitution.
- (2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty days the contract lapses with respect to any deliveries affected.
- (3) The provisions of this section may not be negated by agreement except in so far as the seller has assumed a greater obligation under the preceding section.

History: L. 1965, ch. 154, § 2-616.

Modification, rescission and waiver, 70A-2-209.

Cross-References.

Excuse by failure of presupposed conditions, 70A-2-615.

Collateral References.

Sales ⇔ 89, 116 et seq.

77 CJS Sales §§ 83, 100.

67 AmJur 2d 521, Sales § 370.

PART 7
REMEDIES

Section

70A-2-701. Remedies for breach of collateral contracts not impaired.

70A-2-702. Seller's remedies on discovery of buyer's insolvency.

70A-2-703. Seller's remedies in general.

70A-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

70A-2-705. Seller's stoppage of delivery in transit or otherwise.

70A-2-706. Seller's resale including contract for resale.

70A-2-707. "Person in the position of a seller."

70A-2-708. Seller's damages for nonacceptance or repudiation.

70A-2-709. Action for the price.

- 70A-2-710. Seller's incidental damages.
- 70A-2-711. Buyer's remedies in general — Buyer's security interest in rejected goods.
- 70A-2-712. "Cover" — Buyer's procurement of substitute goods.
- 70A-2-713. Buyer's damages for nondelivery or repudiation.
- 70A-2-714. Buyer's damages for breach in regard to accepted goods.
- 70A-2-715. Buyer's incidental and consequential damages.
- 70A-2-716. Buyer's right to specific performance or replevin.
- 70A-2-717. Deduction of damages from the price.
- 70A-2-718. Liquidation or limitation of damages — Deposits.
- 70A-2-719. Contractual modification or limitation of remedy.
- 70A-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.
- 70A-2-721. Remedies for fraud.
- 70A-2-722. Who can sue third parties for injury to goods.
- 70A-2-723. Proof of market price — Time and place.
- 70A-2-724. Admissibility of market quotations.
- 70A-2-725. Statute of limitations in contracts for sale.

70A-2-701. Remedies for breach of collateral contracts not impaired. Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this chapter.

History: L. 1965, ch. 154, § 2-701.

Freight charges.

Where seller was financially unable to pay freight charges, trucking company had no right to demand payment from buyer who had prepaid freight charges to the seller. Delivery to buyer without demand for payment, under section 223 of the Federal Motor Carriers Act, deprived the buyer of the

means of protecting himself from paying twice. *E. L. Murphy Trucking Co. v. Climate Control, Inc.* (1974) 523 P 2d 1224.

Collateral References.

Sales ⇔ 369, 409, 425.
 77 CJS Sales § 349; 78 CJS Sales §§ 462, 520.
 67 AmJur 2d 694, Sales § 515.

70A-2-702. Seller's remedies on discovery of buyer's insolvency.

- (1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this chapter (section 70A-2-705).
- (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
- (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this chapter (section 70A-2-403). Successful reclamation of goods excludes all other remedies with respect to them.

History: L. 1965, ch. 154, § 2-702.

Cross-References.

Buyer's right to goods on seller's insolvency, 70A-2-502.

Passing of title, reservation for security, 70A-2-401.

Seller's stoppage of delivery, 70A-2-705.

Buyer's failure to make payment after delivery.

Seller had no right to damages incidental to resale where buyer failed to make payment after delivery and seller had retained no security interest in the goods nor had any right to repossess by means of self-help. *Bullock v. Joe Bailey Auction Co.* (1978) 580 P 2d 225.

Collateral References.

Sales ⇌ 289 et seq.

78 CJS Sales § 403 et seq.

67 AmJur 2d 767 to 771, Sales §§ 574 to 576.

Buyer's insolvency as affecting rights and obligations of parties to sale of goods on credit before delivery thereof, 117 ALR 1105.

Seller's rights in respect of the property, or its proceeds, upon dishonor of draft or check for purchase price, on a cash sale, 54 ALR 526.

70A-2-703. Seller's remedies in general. Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (section 70A-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (section 70a-2-705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (section 70a-2-706);
- (e) recover damages for nonacceptance (section 70A-2-708) or in a proper case the price (section 70A-2-709);
- (f) cancel.

History: L. 1965, ch. 154, § 2-703.

Cross-References.

Installment contract, breach, 70A-2-612.

Letter of credit, failure to furnish, 70A-2-325.

Remedies liberally administered, 70A-1-106.

Collateral References.

Sales ⇌ 289 et seq.

78 CJS Sales § 387 et seq.

Entirety or divisibility of contract as affecting seller's remedies, 27 ALR 1230.

Return of chattel after delivery as reviving seller's lien, 118 ALR 564.

Rights of seller on cash basis in respect of the property or its proceeds upon dishonor of draft or check, 31 ALR 578, 54 ALR 526.

Right to enforce vendor's lien against property purchased by municipality, 76 ALR 695.

Right to sell property in enforcement of lien of seller after having sued for the purchase price, 38 ALR 1432.

Seller's duty to notify buyer who has refused to accept goods for resale, 44 ALR 296, 119 ALR 1141.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

Law Reviews.

A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared, Robert J. Harris, 18 Stan. L. Rev. 66.

DECISIONS UNDER FORMER LAW

Choice of remedies by seller prior to Uniform Sales Act.

The various remedies of the seller given by former section 60-4-2 (lien for unpaid purchase price, stoppage of delivery in transit, resale of goods or rescission of sale) existed

even in the absence of statute. *I. X. L. Stores Co. v. Moon* (1916) 49 U 262, 162 P 622, distinguished in 76 U 281, 289 P 130.

Prior to Uniform Sales Act a conditional vendor could unconditionally repossess himself of the property and retain it, but he was held to waive all other remedies by so doing. *I. X. L. Stores Co. v. Moon* (1916) 49 U 262, 162 P 622, distinguished in 76 U 281, 289 P 130.

Election of remedies.

What constitutes an election of remedies is a matter of general law. *Cook v. Covey-Ballard Motor Co.* (1927) 69 U 161, 253 P 196.

Employee stock purchase plan.

Where, upon becoming employee, he purchased stock of hotel corporation subject to repurchase agreement at agreed price if employee left employment or was discharged, upon discharge title to stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed

price. *Davies v. Semloh Hotel, Inc.* (1935) 86 U 318, 44 P 2d 689.

Receivership.

In seller's action to recover possession, court, after appointing and subsequently discharging receiver before judgment, may turn property over to seller, under sureties, and such order, being within jurisdiction, is not reviewable by certiorari. *Sammis v. Marks* (1926) 69 U 26, 252 P 270.

Right of action by seller.

If buyer refuses to complete his contract, seller may treat contract as broken and sue at once. *Cazier v. Stack* (1914) 45 U 124, 143 P 133.

Where seller did not have title to salt claimed to have been sold, and agreement of sale was mere attempt on part of seller to authorize buyer to commit trespass on lands of another and take that to which he had no title, and that which was never in his possession, seller could not recover. *Thomas v. Farrell* (1933) 82 U 535, 26 P 2d 328.

70A-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

- (1) An aggrieved seller under the preceding section may
 - (a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;
 - (b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.
- (2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resale for scrap or salvage value or proceed in any other reasonable manner.

History: L. 1965, ch. 154, § 2-704.

Cross-References.

Resale of goods by seller, 70A-2-706.
Seller's remedies in general, 70A-2-703.

Collateral References.

Sales ⇔ 332 et seq.
78 CJS Sales § 426 et seq.
67 AmJur 2d 814 to 817, Sales §§ 619 to 621.

70A-2-705. Seller's stoppage of delivery in transit or otherwise.

- (1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (section 70A-2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

- (2) As against such buyer the seller may stop delivery until
- (a) receipt of the goods by the buyer; or
 - (b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or
 - (c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or
 - (d) negotiation to the buyer of any negotiable document of title covering the goods.
- (3) (a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.
- (b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.
 - (c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.
 - (d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

History: L. 1965, ch. 154, § 2-705.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Cross-References.

Discovery of buyer's insolvency, seller's remedies, 70A-2-702.

Manner of seller's tender of delivery, 70A-2-503.

Receipt of goods by buyer, 70A-2-103.

Right to adequate assurance of performance, 70A-2-609.

Seller's remedies in general, 70A-2-703.

Collateral References.

Sales ⇔ 289 et seq.

78 CJS Sales § 403 et seq.

67 AmJur 2d 771 to 793, Sales §§ 577 to 597.

When right of stoppage in transitu terminates, 7 ALR 1374.

70A-2-706. Seller's resale including contract for resale.

- (1) Under the conditions stated in section 70A-2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (section 70A-2-710), but less expenses saved in consequence of the buyer's breach.
- (2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as

referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

- (3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.
- (4) Where the resale is at public sale
 - (a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and
 - (b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and
 - (c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and
 - (d) the seller may buy.
- (5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.
- (6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (section 70a-2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of section 70A-2-711).

History: L. 1965, ch. 154, § 2-706.

Sale by auction, 70A-2-328.

Seller's incidental damages, 70A-2-710.

Seller's remedies in general, 70A-2-703.

Cross-References.

Anticipatory repudiation, 70A-2-610.

Buyer's security interest in rejected goods, 70A-2-711 (3).

Discovery of buyer's insolvency, seller's remedies, 70A-2-702.

"Good faith" defined, 70A-1-201 (19).

Nonacceptance or repudiation by buyer, seller's damages, 70A-2-708.

Notice and notification, 70A-1-201.

Passing of title, 70A-2-401.

Person in the position of a seller, 70A-2-707.

Collateral References.

Sales ⇔ 299, 332 et seq.

78 CJS Sales §§ 411, 426 et seq.

67 AmJur 2d 797 to 814, Sales §§ 602 to 618.

Resale of property as affecting measure of seller's damages under executory contract, 44 ALR 296, 119 ALR 1141.

Seller's right to recover for expenses of caring for personal property prior to its resale, 29 ALR 61.

DECISIONS UNDER FORMER LAW

Manner of resale.

No particular manner or method of resale is necessary. It may be at public auction or privately. *Growers' Exchange v. John A. Eck Co.* (1925) 66 U 340, 242 P 391.

In action by seller to recover for loss on resale of refused shipment, burden was on

defendant, under circumstances of case, to prove that resale was not made with reasonable care and judgment, it appearing that buyer was notified of intention to resell. *Growers' Exchange v. John A. Eck Co.* (1925) 66 U 340, 242 P 391.

It is a conditional seller's duty to exercise reasonable diligence and effort to make a resale of repossessed property within a reasonable time, to procure the best possible price therefor, and to credit the buyer with the proceeds as specified in the contract. *Knudsen Music Co. v. Masterson* (1952) 121 U 252, 240 P 2d 973.

Where repossessed goods were sold prior to the time of trial, a conditional buyer suffered no prejudice from the fact that it did not

appear that they had been sold at the time the complaint was filed. *Knudsen Music Co. v. Masterson* (1952) 121 U 252, 240 P 2d 973.

Perishable goods.

Resale of perishable shipment refused by buyer, when made with reasonable care and judgment, is evidence of market value, but under provisions of former section 60-4-9 it was doubtful whether market value need be proved. *Growers' Exchange v. John A. Eck Co.* (1925) 66 U 340, 242 P 391.

70A-2-707. "Person in the position of a seller."

- (1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.
- (2) A person in the position of a seller may as provided in this chapter withhold or stop delivery (section 70A-2-705) and resell (section 70A-2-706) and recover incidental damages (section 70A-2-710).

History: L. 1965, ch. 154, § 2-707.

Cross-References.

Letters of credit, 70A-5-101 to 70A-5-117.
Rights of financing agency, 70A-2-506.

Collateral References.

Sales ⇔ 300.
67 AmJur 2d 745, Sales § 554.

Factor's liability based on delay in marketing and selling principal's goods, 3 ALR 3d 815.

70A-2-708. Seller's damages for nonacceptance or repudiation.

- (1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (section 70A-2-710), but less expenses saved in consequence of the buyer's breach.
- (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (section 70A-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

History: L. 1965, ch. 154, § 2-708.

Cross-References.

Action for the price, 70A-2-709.
Admissibility of market quotations, 70A-2-724.

Delivery terms, effect, 70A-2-319 to 70A-2-324.

Manner of seller's tender of delivery, 70A-2-503.

Proof of market price, time and place, 70A-2-723.

Seller's incidental damages, 70A-2-710.

Collateral References.

Sales ⇔ 370, 384.
78 CJS Sales § 477 et seq.

Damages as affected by anticipatory breach of contract by buyer, 34 ALR 114.

Fraud of buyer in ordering more than his business requires as entitling one selling to extent of buyer's requirements to maintain action for damages, 7 ALR 498, 26 ALR 2d 1099.

Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 ALR 2d 1388.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 ALR 2d 1008.

Measure of damages for buyer's repudiation of or failure to accept goods under executory contract, 108 ALR 1482.

Presumption and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods, 130 ALR 1336.

Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property, 68 ALR 2d 1229.

Stipulation as to damages in case of breach of contract for purchase of goods to be manufactured by other party, as penalty or liquidated damages, 79 ALR 188.

Uniform Commercial Code: measure of recovery where buyer repudiates contract for goods to be manufactured to special order, before completion of manufacture, 42 ALR 3d 182.

Unjustified refusal of buyer to accept goods as affecting recovery of down payment, 11 ALR 2d 701.

DECISIONS UNDER FORMER LAW**Indefinite contract.**

Where the terms of a contract for the sale of carpeting and the testimony of plaintiff-seller in attempting to enforce it were indefinite as to quantity and type of carpeting ordered, the colors, and the time and place of delivery, jury verdict recognizing the contract but refusing to award any damages for defendant's breach was not overturned or modified on appeal. *Efco Distributing Inc. v. Perrin* (1966) 17 U 2d 375, 412 P 2d 615.

Measure of damages.

Where purchaser breached contract to purchase automobile, dealer was not limited to

difference between contract price and market price but could recover, as damages, the profit he otherwise would have made on the sale. *Stewart v. Hansen* (1923) 62 U 281, 218 P 959, 44 ALR 340.

In action by seller of perishable shipment against buyer refusing same, measure of damages is difference between contract price and market value at time of breach, and price obtained upon a proper resale under former section 60-4-9 is evidence of market value, but not conclusive. *Growers' Exchange v. John A. Eck Co.* (1925) 66 U 340, 242 P 391.

70A-2-709. Action for the price.

- (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
 - (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
 - (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
- (2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

- (3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 70A-2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for non-acceptance under the preceding section.

History: L. 1965, ch. 154, § 2-709.

Cross-References.

Insurable interest in goods, 70A-2-501.

Nonacceptance or repudiation by buyer, seller's damages, 70A-2-708.

Remedies liberally administered, 70A-1-106.

Risk of loss, 70A-2-509, 70A-2-510.

Seller's right to identify goods to the contract notwithstanding breach, 70A-2-704.

Collateral References.

Sales ⇔ 340 et seq.

78 CJS Sales § 436 et seq.

67 AmJur 2d 817 to 824, Sales §§ 622 to 628.

Contract requiring seller to look to property loan for payment as affecting action for purchase price, 17 ALR 714.

Presumptions and burden of proof as to market price or value of goods in action by

seller against buyer who refuses to accept goods, 130 ALR 1336.

Repudiation of contract by buyer as affecting seller's right to ship goods and bring action to recover purchase price, 27 ALR 1231.

Right of action to recover purchase price under sale of corporate stock where title has not passed as affected by provisions of sales act, 9 ALR 275.

Right of purchaser in making tender to deduct from agreed purchase price amount of obligations which it is the vendor's duty to satisfy, 173 ALR 1309.

Right to recover installments not due upon buyer's default in payment of installment due, in absence of acceleration clause, 57 ALR 825.

Seller's recovery of price of goods from buyer under UCC § 2-709, 90 ALR 3d 1141.

DECISIONS UNDER FORMER LAW

Burden of proof.

Where recovery is sought upon an executory contract to purchase material, and contract is denied, plaintiff is required to prove every element of the contract, but law supplies by implication the necessary promise to pay where it is conceded that material is delivered, accepted and used, and that amount sued for is correct. *Davis v. Utah Const. Co.* (1924) 64 U 460, 231 P 816.

One relying upon contract has burden of proving it a complete contract in all its essential terms. *Hi-Way Motor Co. v. Service Motor Co.* (1926) 68 U 65, 249 P 133.

Counterclaim by buyer.

Where demurrer to defendant's counterclaim in action on contract for purchase of stoves, on ground that plaintiff did not assist defendant in disposing of stoves as promised, was sustained, and defendant sought to amend counterclaim so that it would allege the giving of notice of the failure to perform such promise, court's refusal to allow such amendment was prejudicial error. *Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co.* (1923) 61 U 503, 215 P 995, 29 ALR 659.

Employee stock purchase plan.

Plaintiff, upon becoming employee, purchased stock of hotel corporation subject to

repurchase agreement at agreed price if employee left employment or was discharged, upon discharge, title to stock passed to corporation, and upon corporation's refusal to accept and pay for stock when tendered, employee could maintain action for agreed price. *Davies v. Semloh Hotel, Inc.* (1935) 86 U 318, 44 P 2d 689.

Measure of damages.

The measure of damages, in action by seller to recover price of goods sold, is a matter of general law. *Holland-Cook Mfg. Co. v. Consolidated Wagon & Machine Co.* (1916) 49 U 43, 161 P 922.

Waiver and estoppel.

In action by seller of harvesting machine to recover purchase price, wherein defendant contended that machine did not fulfill terms of warranty, seller, having refused to receive machine back upon any conditions, and in constantly claiming full benefit of sale and delivery of harvester and insisting upon payment of full purchase price, waived return of machine. *Consolidated Wagon & Machine Co. v. Wright* (1920) 56 U 382, 190 P 937, distinguished in 75 U 124, 283 P 731.

In action by seller of harvesting machine to recover purchase price, wherein defendant contended that machine did not fulfill terms

of warranty, signing of satisfaction card by defendant without reading its contents, on representation of seller's agent that it only contained statement that agent was present, did not estop defendant from denying state-

ment of satisfaction in card. Consolidated Wagon & Machine Co. v. Wright (1920) 56 U 382, 190 P 937, distinguished in 75 U 124, 283 P 731.

70A-2-710. Seller's incidental damages. Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

History: L. 1965, ch. 154, § 2-710.

Bullock v. Joe Bailey Auction Co. (1978) 580 P 2d 225.

Damages incidental to resale.

Seller had no right to damages incidental to resale where buyer failed to make payment after delivery and seller had retained no security interest in the goods nor had any right to repossess by means of self-help.

Collateral References.

Sales ⇔ 370, 384, 391 (1).

78 CJS Sales § 477 et seq.

67 AmJur 2d 751, 810, Sales §§ 560, 613.

70A-2-711. Buyer's remedies in general — Buyer's security interest in rejected goods.

- (1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 70A-2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
 - (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
 - (b) recover damages for nondelivery as provided in this chapter (section 70A-2-713).
- (2) Where the seller fails to deliver or repudiates the buyer may also
 - (a) if the goods have been identified recover them as provided in this chapter (section 70A-2-502); or
 - (b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (section 70A-2-716).
- (3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (section 70A-2-706).

History: L. 1965, ch. 154, § 2-711.

Buyer's rights on improper delivery, 70A-2-601.

Cross-References.

Buyer's damages for breach in regard to accepted goods, 70A-2-714.

Cure by seller of improper tender or delivery, 70A-2-508.

Installment contract, 70A-2-612.

Remedies liberally administered, 70A-1-106.

Resale by seller, 70A-2-706.

Revocation of acceptance in whole or in part, 70A-2-608.

Rightfully rejected goods, merchant buyer's duties, 70A-2-603.

Collateral References.

Sales ⇄ 113, 390 et seq.

77 CJS Sales § 94; 78 CJS Sales § 486 et seq.

67 AmJur 2d 860 to 862, 880 to 885, 890 to 894, 896, Sales §§ 664, 665, 681 to 684, 689, 690, 693.

DECISIONS UNDER FORMER LAW

Answer and counterclaim of buyer.

Fact that, in seller's action for balance of purchase price due under contract of sale, buyer went to trial and was awarded judgment on basis of rescission of contract by him, although he had not pleaded rescission thereof, held not to have defeated his right, on new trial ordered by Supreme Court on its reversal of judgment, to amend his answer and counterclaim so as to ask damages for contract's violation. *Detroit Heating & Lighting Co. v. Stevens* (1899) 20 U 241, 58 P 193.

Buyer, instead of bringing independent action for breach of warranty, may interpose counterclaim in action by seller for purchase price. *Detroit Vapor Stove Co. v. J. C. Weeter Lumber Co.* (1923) 61 U 503, 215 P 995, 29 ALR 659; *Detroit Vapor Stove Co. v. Farmers' Cash Union* (1923) 61 U 567, 216 P 1075.

Choice of remedies.

Instead of suing for breach of either an express or implied warranty of quality, buyer may bring action for damages for the tort or wrong. *Wright v. Howe* (1915) 46 U 588, 150 P 956, LRA 1916B 1104.

Though on breach of warranty of an automobile the buyer might have sued for the difference between the value of the car in the condition warranted and its value in the condition in which it was sold, he might rescind instead and recover back the purchase price. *Studebaker Bros. Co. v. Anderson* (1917) 50 U 319, 167 P 663.

Purchaser of automobile on installment contract involving trading in of old car, if defrauded, may elect to affirm contract and sue for damages or he may repudiate or rescind contract and sue to recover old car or what he had paid out on contract, but he cannot do both, since remedies are alternate and inconsistent, and commencement of action, with knowledge of facts, is conclusive of election notwithstanding remedy chosen may

Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for the property, 68 ALR 2d 1229.

Law Reviews.

Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code; A Roadmap for Article Two, Ellen A. Peters, 73 Yale L. J. 199.

prove unsatisfactory. *Cook v. Covey-Ballard Motor Co.* (1927) 69 U 161, 253 P 196.

Defense of breach of warranty.

It is elementary that stipulations in warranties are conditions precedent to reliance upon breach in action by seller for purchase price. Stipulations with regard to return of article must be complied with. *Consolidated Wagon & Machine Co. v. Barben* (1915) 46 U 377, 150 P 949, distinguished in 93 U 414, 73 P 2d 1272.

Substantial change of condition not due to breach of warranty is complete, and not pro tanto, defense to action by purchaser for rescission of contract and recovery of purchase price. *Summers v. Provo Foundry & Machine Co.* (1919) 53 U 320, 178 P 916.

In action by seller of harvesting machine to recover purchase price, contention that defendant gave machine more than five days' trial, and for that reason breached terms of warranty, was not tenable, where it appeared that harvester was not operated after seller's employees had left defendant's ranch, and if trial of harvester was continued for more than during period of five days, it was through seller's own efforts and by its consent. *Consolidated Wagon & Machine Co. v. Wright* (1920) 56 U 382, 190 P 937.

Lien of buyer.

Buyer has no lien on goods for amount of purchase price paid thereon unless there has been a breach of warranty (express or implied) on the part of the seller. *Sammis v. Marks* (1926) 69 U 26, 252 P 270.

False representations of seller as to past earnings of hotel, wherein buyer was to use furniture purchased, was not breach of warranty such as would give buyer lien on property for amount paid on purchase price. *Sammis v. Marks* (1926) 69 U 26, 252 P 270.

Measure of damages.

Where brick was sold by sample, constituting express warranty, measure of damages

was the loss resulting in the ordinary course of events from the breach of warranty. *Jorgensen v. Gessell Pressed Brick Co.* (1914) 45 U 31, 141 P 460, Ann Cas 1917C 309.

Where defendant sold to plaintiff, in exchange for a tract of land, a number of sheep, which he agreed to have registered, and defendant failed to register some of the sheep, the legal measure of plaintiff's damages was the difference between the agreed value of the land and the reasonable market value of the unregistered sheep. It was error for the lower court to find that plaintiff's damages were a sum equal to the amount for which he compromised with buyers of the sheep, where there was no finding as to the number of sheep which were not registered or the market value of unregistered sheep. *Duggins v. Colby* (1915) 45 U 335, 145 P 1042, distinguished in 4 U 2d 344, 294 P 2d 689.

Representatives of processor of live turkeys induced purchase of turkey poults by grower to raise them for market. Diseased poults were delivered to purchaser and processor, on being notified, advised retention by grower and prescribed medical treatment. Damages recoverable by purchaser for breach of warranty as to fitness of poults should have included expense of reducing loss from disease and profit lost by purchaser. *Nephi Processing Plant, Inc. v. Talbott* (1957) 247 F 2d 771, 773.

Notice of breach of warranty.

Notice of breach of warranty must be given in manner provided by contract, as it is condition precedent to reliance on warranty. Notice to agent was held not to be notice to seller. *Consolidated Wagon & Machine Co. v. Barben* (1915) 46 U 377, 150 P 949; *Advance-Rumely Thresher Co., Inc. v. Stohl* (1929) 75 U 124, 283 P 731, cases distinguished in 93 U 414, 73 P 2d 1272.

Where seller of machine through its experts takes whole matter of assembling and trying it out into its own hands and superintend and direct operation of machine, notice provided for in warranty in case machine fails to fulfill warranty need not be given by buyer. *Consolidated Wagon & Machine Co. v. Wright* (1920) 56 U 382, 190 P 937; *Advance-Rumely Thresher Co., Inc. v. Stohl* (1929) 75 U 124, 283 P 731, distinguished in 93 U 414, 73 P 2d 1272.

Rescission.

Buyer must exercise his right of rescission within a reasonable time. *Smith v. Columbus Buggy Co.* (1912) 40 U 580, 123 P 580.

Former sections 60-5-7 and 60-1-12 did not change action for rescission from equitable

to law action. *Summers v. Provo Foundry & Machine Co.* (1919) 53 U 320, 178 P 916.

The return of property in substantially same condition in which it was received is condition precedent to rescission, unless changed condition be result of breach of warranty. *Summers v. Provo Foundry & Machine Co.* (1919) 53 U 320, 178 P 916.

Upon rescission, buyer is entitled to return of all payments made. *Heichemer v. Peterson* (1929) 75 U 107, 283 P 435.

Buyer must strictly comply with terms of contract before he may exercise right of rescission. If place of return of goods is stipulated, this must be complied with. *Advance-Rumely Thresher Co., Inc. v. Stohl* (1929) 75 U 124, 283 P 731, distinguished in 93 U 414, 73 P 2d 1272.

Whether there has been a rescission is a question of fact. *Knudsen Music Co. v. Masterson* (1952) 121 U 252, 240 P 2d 973.

If a buyer wishes to rescind the contract, he must manifest his election to do so without undue delay or the right will be lost. *Knudsen Music Co. v. Masterson* (1952) 121 U 252, 240 P 2d 973.

Ordinarily a buyer waives his right to rescission where he continues to use a defective machine to derive benefits therefrom. *Knudsen Music Co. v. Masterson* (1952) 121 U 252, 240 P 2d 973.

Under Uniform Sales Act, buyer may rescind executed sale for breach of warranty. *Ernest E. Fadler Co. v. Hesser* (1948) 166 F 2d 904.

Where goods are in conformity with contract and title has passed to buyer, he cannot thrust them back upon seller, but if buyer promptly notifies seller that he rejects goods on ground they do not meet conditions of implied warranty and tenders goods back to seller, and seller takes goods back without making it clear that he is receiving them merely to dispose of them on account of buyer to mitigate damages and without making it clear that he is not assenting to rescission, inference from taking goods back and resuming dominion over them is assent to rescission and discharge of original sale. *Ernest E. Fadler Co. v. Hesser* (1948) 166 F 2d 904, citing cases from other jurisdictions as well as *Williston, Sales, Vol. 2, 2d Ed., § 497, p. 1296.*

Where buyer, upon inspection of vegetables at Salt Lake City shipped from Louisiana, promptly notified seller that he rejected vegetables because of their unmerchantable condition and requested instructions from seller as to their disposition, and seller instructed buyer to dispose of vegetables at best price obtainable and, after resale in

accordance therewith, accepted net proceeds therefrom without qualification, seller assented to proposed rescission and discharge of original sale, so that judgment setting aside reparation order in proceeding under Federal Perishable Agricultural Commodities Act of 1930 was affirmed on appeal. *Ernest E. Fadler Co. v. Hesser* (1948) 166 F 2d 904.

Waiver.

A buyer did not waive his right to rescind the purchase of an automobile for breach of

warranty that it would run by repeatedly taking it back for adjustment and repairs, where nothing more was intended than to offer the seller ample opportunity to put the car in condition so that it would run. *Studebaker Bros. Co. v. Anderson* (1917) 50 U 319, 167 P 663.

Buyer may waive his right to rescind by conduct inconsistent with exercise of such right. *Advance-Rumely Thresher Co., Inc. v. Stohl* (1929) 75 U 124, 283 P 731, distinguished in 93 U 414, 73 P 2d 1272.

70A-2-712. "Cover" — Buyer's procurement of substitute goods.

- (1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
- (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (section 70a-2-715), but less expenses saved in consequence of the seller's breach.
- (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

History: L. 1965, ch. 154, § 2-712.

Resale by seller, 70A-2-706.

Cross-References.

Buyer's damages for nondelivery or repudiation, 70A-2-713.

Buyer's incidental and consequential damages, 70A-2-715.

Buyer's right to specific performance or replevin, 70A-2-716.

Obligation of good faith, 70A-1-203.

Reasonable time, 70A-1-204.

Collateral References.

Sales ⇔ 418 (7).

78 CJS Sales § 548.

67 AmJur 2d 890 to 894, Sales §§ 689 to 691.

Buyer's right to "cover" by purchasing goods elsewhere on seller's breach under UCC § 2-712, 64 ALR 3d 246.

70A-2-713. Buyer's damages for nondelivery or repudiation.

- (1) Subject to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (section 70A-2-715), but less expenses saved in consequence of the seller's breach.
- (2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

History: L. 1965, ch. 154, § 2-713.

Cross-References.

Buyer's procurement of substitute goods, 70A-2-712.

Buyer's right to specific performance or replevin, 70A-2-716.

Proof of market price, time and place, 70A-2-723.

Remedies liberally administered, 70A-1-106.

Collateral References.

Sales ⇐ 418.

78 CJS Sales § 540 et seq.

67 AmJur 2d 883 to 888, 892 to 894, 897, 900, 905 to 909, Sales §§ 684 to 686, 690, 691, 694, 696, 700 to 702.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Inability of a seller of a commodity manufactured or produced by a third person to obtain the same from the latter as a defense to an action by the buyer for breach of contract, 80 ALR 1177.

Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 ALR 2d 1388.

Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Loss of, or damage to, crops as element of damages for breach of contract of sale of agricultural machinery or fertilizer, 69 ALR 748.

Necessity that buyer, relying on market price as measure of damages for seller's breach of sales contract, show that goods in question were available for market at the price shown, 20 ALR 2d 819.

Preparatory expenses for installation as recoverable by buyer, 17 ALR 2d 1342.

Recovery for expenses caused by delay in delivery where article was for special use, 17 ALR 2d 111.

DECISIONS UNDER FORMER LAW

Choice of remedies.

Where seller failed to deliver piano, it breached contract providing that piano would be delivered upon demand, and purchaser could sue for restitution, specific performance, or damages. *Mollerup v. Daynes-Beebe Music Co.* (1933) 82 U 299, 24 P 2d 306.

Measure of damages.

Where defendant, in action for breach of contract to deliver hay, breached contract as of the date upon which delivery should have been made, but subsequent negotiations were entered into between the parties, and defendant agreed to make delivery on a future date, measure of damages for such nondelivery was the difference between the contract price and the market price on the date when delivery was refused as agreed upon in subsequent negotiations. *Teuscher v. Utah-Idaho Flour & Grain Co.* (1923) 63 U 76, 221 P 1096.

The measure of damages for failure of seller to deliver the goods is difference between contract price and market price at delivery, and fact that total sum is specified in the contract does not obviate necessity of showing market value of product, nor take case out of general rule. *Monaghan v. Alexander* (1930) 76 U 81, 287 P 908.

Even though buyer had contracted with third persons for resale of stock at specified

price which was less than the market price at the time of seller's refusal to deliver, the proper measure of damages is the difference between the contract price and the market price at the time of the refusal to deliver. *Coombs & Co. of Ogden v. Reed* (1956) 5 U 2d 419, 303 P 2d 1097.

Passage of title.

Title passes according to the intention of the parties and, in an action for conversion of a new automobile, there was no passage of title to the buyer where the sale documents clearly indicated the intention that title not pass until manufacturer was paid in cash. *Reeder v. General Motors Corp.* (1957) 6 U 2d 216, 310 P 2d 401.

Terms of contract incomplete.

Automobile dealer agreeing to sell customer's car, and credit price on new car to be sold customer under contract incomplete as to terms of payment, cannot maintain action against another dealer for conversion of customer's car where customer authorized said dealer to repossess car for subsequent deal, notwithstanding first dealer had been given possession of car and had found buyer for it, since terms of contract were incomplete and no action for breach thereof nor for conversion was maintainable. *Hi-Way Motor Co. v. Service Motor Co.* (1926) 68 U 65, 249 P 133.

70A-2-714. Buyer's damages for breach in regard to accepted goods.

- (1) Where the buyer has accepted goods and given notification (subsection (3) of section 70A-2-607) he may recover as damages for any

nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

- (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
- (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

History: L. 1965, ch. 154, § 2-714.

67 AmJur 2d 933 to 937, Sales §§ 722 to 724.

Cross-References.

Burden of establishing breach after acceptance, 70A-2-607.

Buyer's damages for nondelivery or repudiation, 70A-2-713.

Buyer's incidental and consequential damages, 70A-2-715.

Buyer's remedies in general, 70A-2-711.

Deduction of damages from the price, 70A-2-717.

Goods or conduct "conforming" to contract, 70A-2-106 (2).

Revocation of acceptance in whole or in part, 70A-2-608.

Determination of damages in "reasonable" manner.

Purchaser counterclaiming for breach of warranty against seller who sued on open account proved its damages in a "reasonable" way where it submitted a summary of expenditures made in reliance upon seller's development of product even though there was not specific testimony as to each of the hundreds of items involved. *Aluminum Co. of America v. Electro Flo Corp.* (1971) 451 F 2d 1115.

Fraud and deceit.

The unpaid purchase price is not offset against damages for breach of warranty, in the sale of a breeding bull, where the complaint alleges fraud and deceit; under the benefit of the bargain rule, the defrauded party is compensated for the loss of his bargain, and is not confined to out-of-pocket damages. *Lamb v. Bangart* (1974) 525 P 2d 602.

Collateral References.

Sales ⇐ 418, 427.

78 CJS Sales §§ 520, 540 et seq.

Barred claim of breach of warranty as subject of setoff, counterclaim, or cross action, 1 ALR 2d 671, 684.

Breach of warranty as to title as within statutory provision requiring notice of breach of warranty on sale of goods, 114 ALR 707.

Buyer's return of subject of sale and acceptance of return of or credit for the purchase price as affecting right to recover special damages for breach of warranty, 157 ALR 1077.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR 2d 270.

Measure in elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty, 35 ALR 2d 1273.

Measure of damages in action for breach of warranty of title to personal property as the value of the property or the price plus interest, 13 ALR 2d 1372.

Measure of damages in action for breach of warranty of title to personal property under UCC § 2-714, 94 ALR 3d 583.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 ALR 2d 511.

Right of dealer against his vendor in case of breach of warranty as to article, 22 ALR 133 and 64 ALR 883.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty, 41 ALR 812.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 77 ALR 1165, 41 ALR 2d 1173.

70A-2-715. Buyer's incidental and consequential damages.

- (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation

and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

- (2) Consequential damages resulting from the seller's breach include
 - (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
 - (b) injury to person or property proximately resulting from any breach of warranty.

History: L. 1965, ch. 154, § 2-715.

67 AmJur 2d 964, Sales § 745.

Cross-References.

Contractual modification or limitation of remedy, 70A-2-719.

Excuse by failure of presupposed conditions, 70A-2-615.

Obligation of good faith, 70A-1-203.

Remedies liberally administered, 70A-1-106.

Revocation of acceptance in whole or in part, 70A-2-608.

Collateral References.

Sales ⇄ 391 (1), 418, 427.

78 CJS Sales §§ 520, 540 et seq.

Buyer's incidental and consequential damages from seller's breach under UCC § 2-715, 96 ALR 3d 299.

Damages for breach of warranty of title as value, or price plus interest, 13 ALR 2d 1372.

Interest as element of damages recoverable in action for breach of contract for the sale of a commodity, 4 ALR 2d 1388.

Loss of anticipated profits as damages for breach of seller's contract as to machine for buyer's use, 32 ALR 120.

Preparatory expenses as recoverable in action for defects in seed, 17 ALR 2d 1344.

DECISIONS UNDER FORMER LAW

Action for money paid.

Automobile dealer repudiating contract for sale of new car, insofar as it related to trade-in allowance on customer's old car, was subject to suit in quasi-contract for reasonable value of old car traded to dealer, but attorney's fee and rental value of car, while retained by dealer, were not recoverable by customer in such action. *Jordan v. Madsen* (1926) 69 U 112, 252 P 570.

Interest in case of installment contracts.

In action by plaintiff to recover purchase price in which defendant buyer interposed counterclaim, interest should be allowed defendant only from date that last payment on installment contract with his customers fell due. *Schwab Safe & Lock Co. v. Snow* (1915) 47 U 199, 152 P 171.

Loss of resale profits.

Where manufacturer-seller was unable to deliver entire order of brake shoes by promised date, and buyer lost his resale order as a result, seller was liable for buyer's lost resale profits notwithstanding a provision in the contract exempting seller from liability for special or consequential damages, since such provision appeared at the end of a paragraph relating to catastrophic incidents beyond seller's control and was restricted by the court to those occurrences only. *Seal v. Tayco, Inc.* (1965) 16 U 2d 323, 400 P 2d 503.

Damages to buyer for loss of resale contract due to seller's failure to deliver goods to buyer by promised date are measured by the difference between the contract price and the price buyer was to receive upon resale. *Seal v. Tayco, Inc.* (1965) 16 U 2d 323, 400 P 2d 503.

70A-2-716. Buyer's right to specific performance or replevin.

- (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
- (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

- (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

History: L. 1965, ch. 154, § 2-716.

Cross-References.

Action for the price, 70A-2-709.

Buyer's right to goods on seller's insolvency, 70A-2-502.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Sales ⇔ 399 et seq.; Specific Performance ⇔ 69.

78 CJS Sales § 514; 81 CJS Specific Performance § 80 et seq.

67 AmJur 2d 912 to 914, Sales §§ 705, 706.

Specific performance, or injunction against breach, of contract for sale of tangible personal property, 152 ALR 4.

DECISIONS UNDER FORMER LAW

Equitable remedies of buyer.

Where seller failed to deliver piano, it breached contract providing that piano would

be delivered upon demand, and purchaser could sue for restitution, specific performance, or damages. *Mollerup v. Daynes-Beebe Music Co.* (1933) 82 U 299, 24 P 2d 306.

70A-2-717. Deduction of damages from the price. The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

History: L. 1965, ch. 154, § 2-717.

Cross-References.

Right to adequate assurance of performance, 70A-2-609.

Collateral References.

Sales ⇔ 188, 427.

78 CJS Sales § 520.

67 AmJur 2d 935, Sales § 723.

DECISIONS UNDER FORMER LAW

Low quality of product.

While carpet retailer (buyer) was allowed to set off a certain amount against wholesaler's billing price for carpets which

were of low quality, the retailer could not set off a \$270 allowance granted to its apartment house customer when it used the wrong carpets in supplying certain units. *Seal v. Carpets, Inc.* (1966) 17 U 2d 270, 409 P 2d 384.

70A-2-718. Liquidation or limitation of damages — Deposits.

- (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.
- (2) Where the seller justifiably withholds a delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

- (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or
 - (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller.
- (3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes
- (a) a right to recover damages under the provisions of this chapter other than subsection (1), and
 - (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.
- (4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this chapter on resale by an aggrieved seller (section 70A-2-706).

History: L. 1965, ch. 154, § 2-718.

67 AmJur 2d 707 to 714, Sales §§ 526 to 531.

Cross-References.

Resale by seller, 70A-2-706.

Unconscionable contract or clause,
70A-2-302.

Contractual liquidated damages provisions
under UCC article 2, 98 ALR 3d 586.

Law Reviews.

Restitution on Default and Article Two of
the Uniform Commercial Code, Robert J.
Nordstrom, 19 Vanderbilt L. Rev. 1143.

Collateral References.

Damages ⇔ 78 (6) et seq.
25 CJS Damages § 113.

70A-2-719. Contractual modification or limitation of remedy.

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
- (a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
 - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods

is prima facie unconscionable but limitation of damages where the loss is commercial is not.

History: L. 1965, ch. 154, § 2-719.

Cross-References.

Exclusion or modification of warranties, 70A-2-316.

Unconscionable contract or clause, 70A-2-302.

Failure of remedy.

Contractual remedy failed in the case of the death of a breeding bull because of

seller's fraudulent representation that he had a certain quantity of semen on hand. *Lamb v. Bangart* (1974) 525 P 2d 602.

Collateral References.

Sales ⇔ 28.

77 CJS Sales § 62; 78 CJS Sales § 387.

67 AmJur 2d 714 to 721, Sales §§ 532 to 535.

70A-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach. Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

History: L. 1965, ch. 154, § 2-720.

Cross-References.

Waiver or renunciation of claim or right after breach, 70A-1-107.

Collateral References.

Sales ⇔ 94.

77 CJS Sales § 115 et seq.

67 AmJur 2d 695, Sales § 516.

70A-2-721. Remedies for fraud. Remedies for material misrepresentation or fraud include all remedies available under this chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

History: L. 1965, ch. 154, § 2-721.

Unpaid purchase price.

Plaintiffs are entitled to breach of warranty damages without offset for remaining unpaid purchase price of a breeding bull,

where complaint alleges fraud and deceit. *Lamb v. Bangart* (1974) 525 P 2d 602.

Collateral References.

Sales ⇔ 38 (9).

77 CJS Sales § 40.

67 AmJur 2d 852, 984, Sales §§ 655, 761.

70A-2-722. Who can sue third parties for injury to goods. Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

- (a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;
- (b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery,

his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

- (c) either party may with the consent of the other sue for the benefit of whom it may concern.

History: L. 1965, ch. 154, § 2-722.

77 CJS Sales § 285.

67 AmJur 2d 364, Sales § 236.

Collateral References.

Sales ⇔ 224, 232.

70A-2-723. Proof of market price — Time and place.

- (1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (section 70A-2-708 or section 70A-2-713) shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.
- (2) If evidence of a price prevailing at the times or places described in this chapter is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.
- (3) Evidence of a relevant price prevailing at a time or place other than the one described in this chapter offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

History: L. 1965, ch. 154, § 2-723.

78 CJS Sales §§ 484, 546.

67 AmJur 2d 704 to 707, Sales §§ 523 to 525.

Collateral References.

Sales ⇔ 384 (2), 418 (2).

70A-2-724. Admissibility of market quotations. Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

History: L. 1965, ch. 154, § 2-724.

32 CJS Evidence §§ 593 (4), 593 (5); 78 CJS Sales §§ 452, 453.

67 AmJur 2d 703, Sales § 522.

Collateral References.

Sales ⇔ 382, 383.

70A-2-725. Statute of limitations in contracts for sale.

- (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

- (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
- (3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.
- (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective.

History: L. 1965, ch. 154, § 2-725.

67 AmJur 2d 722 to 727, Sales §§ 536 to 540.

Collateral References.

Sales ⇔ 394, 409.
78 CJS Sales §§ 419, 505, 524.

What constitutes warranty explicitly extending to "future performance" for purposes of UCC § 2-725 (2), 93 ALR 3d 690.

CHAPTER 3

COMMERCIAL PAPER

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. Advice of international sight draft.
8. Miscellaneous.

PART 1

SHORT TITLE, FORM AND INTERPRETATION

Section

- 70A-3-101. Short title.
70A-3-102. Definitions and index of definitions.
70A-3-103. Limitations on scope of chapter.
70A-3-104. Form of negotiable instruments — "Draft" — "Check" — "Certificate of deposit" — "Note."
70A-3-105. When promise or order unconditional.
70A-3-106. Sum certain.
70A-3-107. Money.
70A-3-108. Payable on demand.
70A-3-109. Definite time.
70A-3-110. Payable to order.

- 70A-3-111. Payable to bearer.
- 70A-3-112. Terms and omissions not affecting negotiability.
- 70A-3-113. Seal.
- 70A-3-114. Date, antedating, postdating.
- 70A-3-115. Incomplete instruments.
- 70A-3-116. Instruments payable to two or more persons.
- 70A-3-117. Instruments payable with words of description.
- 70A-3-118. Ambiguous terms and rules of construction.
- 70A-3-119. Other writings affecting instrument.
- 70A-3-120. Instruments "payable through" bank.
- 70A-3-121. Instruments payable at bank.
- 70A-3-122. Accrual of cause of action.

70A-3-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Commercial Paper.

History: L. 1965, ch. 154, § 3-101.

Law Reviews.

The Uniform Commercial Code in Utah,
Ronald N. Boyce, 9 Utah L. Rev. 904, 919.

Collateral References.

Construction and effect of UCC art. 3, dealing with commercial paper, 23 ALR 3d 932.

70A-3-102. Definitions and index of definitions.

- (1) In this chapter unless the context otherwise requires
 - (a) "Issue" means the first delivery of an instrument to a holder or a remitter.
 - (b) An "order" is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession.
 - (c) A "promise" is an undertaking to pay and must be more than an acknowledgment of an obligation.
 - (d) "Secondary party" means a drawer or indorser.
 - (e) "Instrument" means a negotiable instrument.
- (2) Other definitions applying to this chapter and the sections in which they appear are:
 - "Acceptance." Section 70A-3-410.
 - "Accommodation party." Section 70A-3-415.
 - "Alteration." Section 70A-3-407.
 - "Certificate of deposit." Section 70A-3-104.
 - "Certification." Section 70A-3-411.
 - "Check." Section 70A-3-104.
 - "Definite time." Section 70A-3-109.
 - "Dishonor." Section 70A-3-507.
 - "Draft." Section 70A-3-104.
 - "Holder in due course." Section 70A-3-302.
 - "Negotiation." Section 70A-3-202.
 - "Note." Section 70A-3-104.
 - "Notice of dishonor." Section 70A-3-508.

- "On demand." Section 70A-3-108.
 "Presentment." Section 70A-3-504.
 "Protest." Section 70A-3-509.
 "Restrictive Indorsement." Section 70A-3-205.
 "Signature." Section 70A-3-401.

(3) The following definitions in other chapters apply to this chapter:

- "Account." Section 70A-4-104.
 "Banking Day." Section 70A-4-104.
 "Clearinghouse." Section 70A-4-104.
 "Collecting bank." Section 70A-4-105.
 "Customer." Section 70A-4-104.
 "Depository Bank." Section 70A-4-105.
 "Documentary Draft." Section 70A-4-104.
 "Intermediary Bank." Section 70A-4-105.
 "Item." Section 70A-4-104.
 "Midnight deadline." Section 70A-4-104.
 "Payor bank." Section 70A-4-105.

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

History: L. 1965, ch. 154, § 3-102.

11 AmJur 2d 73, Bills and Notes § 48.

Cross-References.

Presentment, how made, 70A-3-504.

Collateral References.

Bills and Notes ⇔ 116, 146; Statutes ⇔ 179.
 10 CJS Bills and Notes §§ 5 to 9, 42; 82 CJS Statutes § 315.

Law Reviews.

Comparison of the Proposed Commercial Code, Article 3, and the Negotiable Instruments Law, F. K. Buetel, 30 Neb. L. Rev. 531.

Endorsements for Collection — Under Negotiable Instruments Law and Uniform Commercial Code, A. L. Taylor, 1950 Wash. U. L. Q. 55.

70A-3-103. Limitations on scope of chapter.

- (1) This chapter does not apply to money, documents of title or investment securities.
 (2) The provisions of this chapter are subject to the provisions of the chapter on Bank Deposits and Collections (chapter 4) and Secured Transactions (chapter 9).

History: L. 1965, ch. 154, § 3-103.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Cross-References.

Bank deposits and collections, 70A-4-101 to 70A-4-504.

Instrument payable in money, 70A-3-107.

Investment securities, 70A-8-101 to 70A-8-406.

"Money" defined, 70A-1-201 (24).

Negotiable instruments, form of, 70A-3-104.

"Security" defined, 70A-8-102 (1) (a).

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Bills and Notes ⇔ 146.

10 CJS Bills and Notes §§ 10, 12, 13, 15.

11 AmJur 2d 71, Bills and Notes § 47.

70A-3-104. Form of negotiable instruments — "Draft" — "Check" — "Certificate of deposit" — "Note."

- (1) Any writing to be a negotiable instrument within this chapter must
 - (a) be signed by the maker or drawer; and
 - (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and
 - (c) be payable on demand or at a definite time; and
 - (d) be payable to order or to bearer.
- (2) A writing which complies with the requirements of this section is
 - (a) a "draft" ("bill of exchange") if it is an order;
 - (b) a "check" if it is a draft drawn on a bank and payable on demand;
 - (c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
 - (d) a "note" if it is a promise other than a certificate of deposit.
- (3) As used in other chapters of this act, and as the context may require, the terms "draft," "check," "certificate of deposit" and "note" may refer to instruments which are not negotiable within this chapter as well as to instruments which are so negotiable.

History: L. 1965, ch. 154, § 3-104.

Cross-References.

Definite time, 70A-3-109.
 Instrument payable in money, 70A-3-107.
 Limitations on scope of chapter, 70A-3-103.
 Payable on demand, 70A-3-108.
 Payable to order or bearer or otherwise, 70A-3-110, 70A-3-111, 70A-3-805.
 Promise or order, when unconditional, 70A-3-105.
 Signature, requirements, effect, 70A-3-401 to 70A-3-403.
 Sum payable is a sum certain, 70A-3-106.
 Telegraph, negotiable instruments drawn by, 69-1-3.
 Terms and omissions not affecting negotiability, 70A-3-112.

Collateral References.

Bills and Notes ⇔ 15, 28, 144 et seq.
 10 CJS Bills and Notes §§ 5 to 15, 70, 82 et seq.
 10 AmJur 2d 427, 514, Banks §§ 457, 538; 11 AmJur 2d 36, 43, 45, 83, Bills and Notes §§ 6, 14, 16, 58.

Negotiability as affected by option of maker to pay or of holder to require something in lieu of payment of money, 100 ALR 824.

Negotiability as affected by provisions for extension of time, 77 ALR 1085.

Negotiability as affected by provisions of instrument in relation to collateral other than mortgage, 102 ALR 1095.

Negotiability of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, 44 ALR 2d 57.

Negotiability of instrument payable in "current funds," or "currency," 36 ALR 1358.

Negotiability of notes and bona fides of holder as affected by attachment of paper indicating origin or consideration, 38 ALR 351.

Negotiability of title-retaining note, 44 ALR 1397; 44 ALR 2d 8, 71.

Option of maker to pay or of holder to require something in lieu of payment of money as affecting negotiability, 100 ALR 824.

Reference to extrinsic agreement as affecting negotiability of bill, note, or trade acceptance, 104 ALR 1378.

Signature, place of, 20 ALR 394.

Validity and effect of note payable to maker without words of negotiability, 42 ALR 1067, 50 ALR 426.

What constitutes unconditional promise to pay under Uniform Commercial Code § 3-104 (1) (b), 88 ALR 3d 1100.

DECISIONS UNDER FORMER LAW

The Negotiable Instruments Law was in force in this state. Utah Lake Irr. Co. v.

In general.

Allen (1924) 64 U 511, 231 P 818, 37 ALR 651. The Uniform Law was adopted in 1899 (Laws of Utah 1899, ch. 83, p. 122).

Identification of drawer.

The person who signs a draft may be treated as the drawer, though name of someone else may appear in upper and left-hand corner. *Merchants' Bank v. Goodfellow* (1914) 44 U 349, 140 P 759.

Time certain.

Note was not rendered nonnegotiable by insertion of provision that the note could be extended in whole or in part without consent of makers and indorsers. *McCornick & Co. v. Nielson* (1925) 64 U 605, 233 P 122.

A provision in a note that "the makers and indorsers agree that this note may be extended in whole or in part without their consent," does not destroy its negotiability. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

70A-3-105. When promise or order unconditional.

- (1) A promise or order otherwise unconditional is not made conditional by the fact that the instrument
 - (a) is subject to implied or constructive conditions; or
 - (b) states its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or
 - (c) refers to or states that it arises out of a separate agreement or refers to a separate agreement for rights as to prepayment or acceleration; or
 - (d) states that it is drawn under a letter of credit; or
 - (e) states that it is secured, whether by mortgage, reservation of title or otherwise; or
 - (f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or
 - (g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or
 - (h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.
- (2) A promise or order is not unconditional if the instrument
 - (a) states that it is subject to or governed by any other agreement; or
 - (b) states that it is to be paid only out of a particular fund or source except as provided in this section.

History: L. 1965, ch. 154, § 3-105.

11 AmJur 2d 179, 189, 193, Bills and Notes §§ 141, 147, 151.

Cross-References.

Negotiable instruments, form of, 70A-3-104.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 105 ALR 1346.

Collateral References.

Bills and Notes ⇔ 44, 152, 155, 164.
10 CJS Bills and Notes §§ 23, 85 et seq., 96, 97.

Reference to extrinsic agreement as affecting negotiability of bill or note, 61 ALR 815, 104 ALR 1378.

DECISIONS UNDER FORMER LAW

History of transaction.

Statement on face or in body of note that it is part of another agreement does not

affect or destroy its negotiability, when negotiable in form. *Utah Lake Irr. Co. v. Allen* (1924) 64 U 511, 231 P 818, 37 ALR 651.

70A-3-106. Sum certain.

- (1) The sum payable is a sum certain even though it is to be paid
 - (a) with stated interest or by stated installments; or
 - (b) with stated different rates of interest before and after default or a specified date; or
 - (c) with a stated discount or addition if paid before or after the date fixed for payment; or
 - (d) with exchange or less exchange, whether at a fixed rate or at the current rate; or
 - (e) with costs of collection or an attorney's fee or both upon default.
- (2) Nothing in this section shall validate any term which is otherwise illegal.

History: L. 1965, ch. 154, § 3-106.

Cross-References.

Definite time, 70A-3-109.

Negotiable instruments, form of, 70A-3-104.

Collateral References.

Bills and Notes ⇔ 157 et seq.

10 CJS Bills and Notes § 105 et seq.

11 AmJur 2d 198, 199, 201, 203, Bills and Notes §§ 159, 161, 163, 165; 17 AmJur 2d 517, Contracts § 164.

Negotiability as affected by provision in relation to interest or discount, 2 ALR 139, 51 ALR 294, 58 ALR 1281.

Provision for attorney's fee as affecting negotiability under Uniform Negotiable Instruments Act, 91 ALR 693.

Validity and effect of anticipatory provision in contract in relation to rate of interest in the event of default, 12 ALR 367.

Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and cost of collection, of specified percentage of note, 17 ALR 2d 288.

DECISIONS UNDER FORMER LAW

Acceleration of maturity.

Stipulation in note that where interest is not paid as stipulated, the legal holder of note may declare principal due and proceed to recover both interest and principal, does not destroy its negotiability. *Smith v. Williamson* (1892) 8 U 219, 30 P 753; *Jensen v. Lichtenstein* (1915) 45 U 320, 145 P 1036.

Holder of note is not required to give notice of election to declare note due as condition precedent to bringing action for its collection. *Thomas v. Foulger* (1928) 71 U 274, 264 P 975.

Attorney's fee.

Provision in negotiable promissory note for payment of reasonable attorney's fee in case of suit does not destroy negotiability by making amount to be paid uncertain. *McCornick v. Swem* (1909) 36 U 6, 102 P 626,

20 Ann Cas 1368; *Utah Banking Co. v. Newman* (1914) 44 U 194, 138 P 1146.

Where amount is left blank in attorney's fee clause in note, it is tantamount to promise to pay reasonable sum as an attorney's fee. *McCornick v. Swem* (1909) 36 U 6, 102 P 626, 20 Ann Cas 1368.

In action on note which contained attorney's fee clause, plaintiff, who had employed attorney to recover on note, was not required to prove that there was express agreement between him and attorney with regard to fee, or that he had paid attorney specified amount before suit was commenced. *McCornick v. Swem* (1909) 36 U 6, 102 P 626, 20 Ann Cas 1368.

What is reasonable attorney's fee within terms of note is jury question notwithstanding defendant's liability on note may be

established as matter of law. A general denial by defendant puts at issue amount of attorney's fee claim. *Miller v. Stuart* (1927) 69 U 250, 253 P 900.

Certificate of deposit.

A certificate of deposit, if negotiable in form, is a negotiable instrument. *Verdi v. Helper State Bank* (1921) 57 U 502, 196 P 225, 15 ALR 641.

70A-3-107. Money.

- (1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" is payable in money.
- (2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

History: L. 1965, ch. 154, § 3-107.

Cross-References.

Bank deposits and collections, charge back or refund, 70A-4-212 (6).

"Money" defined, 70A-1-201 (24).

Negotiable instruments, form of, 70A-3-104.

Collateral References.

Bills and Notes ⇨ 162.

10 CJS Bills and Notes § 93 et seq.

11 AmJur 2d 193, 1026, Bills and Notes §§ 152-154, 976, 977.

Negotiability of instrument payable in "current funds," "currency," etc., 36 ALR 1358.

70A-3-108. Payable on demand. Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

History: L. 1965, ch. 154, § 3-108.

Cross-References.

Holder in due course, 70A-3-302.

Indorsement after maturity, presentment of instrument, notice of dishonor, nor protest necessary to charge indorser, 70A-3-501 (4).

Negotiable instruments, form of, 70A-3-104.

Collateral References.

Bills and Notes ⇨ 36, 129 (3), 155.

10 CJS Bills and Notes §§ 96, 247.

11 AmJur 2d 203, Bills and Notes § 167.

Transferee of demand note as a purchaser before maturity, 50 ALR 649.

DECISIONS UNDER FORMER LAW

Demand and overdue notes.

Under former section 44-1-8, the indorsement and transfer of an overdue note, as to the indorser, became a demand note and not

an overdue note until reasonable length of time after indorsement. The rule was the same under the law merchant. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

70A-3-109. Definite time.

- (1) An instrument is payable at a definite time if by its terms it is payable

- (a) on or before a stated date or at a fixed period after a stated date; or
 - (b) at a fixed period after sight; or
 - (c) at a definite time subject to any acceleration; or
 - (d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.
- (2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

History: L. 1965, ch. 154, § 3-109.

Cross-References.

Consent to extension, 70A-3-118 (f).
 Delay in presentment, protest, or notice of dishonor, when excused, 70A-3-511 (1).
 Incomplete instruments, 70A-3-115.
 Negotiable instruments, form of, 70A-3-104.
 Notice to purchaser, 70A-3-304 (3).
 Option to accelerate at will, 70A-1-208.

Collateral References.

Bills and Notes ⇐ 155.
 10 CJS Bills and Notes § 96.
 11 AmJur 2d 205, 208, 212, 221, Bills and Notes §§ 169, 171, 173, 178, 186.

Negotiability as affected by provisions for extension of time, 77 ALR 1085.

Negotiability as affected by reservation of obligor's right to anticipate time of payments, 81 ALR 396.

Negotiability of instrument as affected by incompleteness of the attempt to fix due date, 19 ALR 508.

Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract, 1 ALR 2d 1219.

Validity of instrument for payment of money as affected by mere fact that payment is postponed until death, 2 ALR 1471.

70A-3-110. Payable to order.

- (1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names of payee. It may be payable to the order of
- (a) the maker or drawer; or
 - (b) the drawee; or
 - (c) a payee who is not maker, drawer or drawee; or
 - (d) two or more payees together or in the alternative; or
 - (e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors; or
 - (f) an office, or an officer by his title as such in which case it is payable to the principal but the incumbent of the office or his successors may act as if he or they were the holder; or
 - (g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

- (2) An instrument not payable to order is not made so payable by such words as "payable upon return of this instrument properly indorsed."
- (3) An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.

History: L. 1965, ch. 154, § 3-110.

11 AmJur 2d 144, 153, Bills and Notes §§ 105-107, 116-118.

Cross-References.

Negotiable instruments, form of, 70A-3-104.

Payable to bearer, 70A-3-111.

Payable to two or more persons, 70A-3-116.

Payable with words of description, 70A-3-117.

Presumption from possession or ownership of unendorsed note payable to order on issue between rival claimants, 30 ALR 1492.

Validity and effect of note payable by its terms to maker or order and not endorsed by maker, 126 ALR 1309.

Collateral References.

Bills and Notes ⇌ 153.

10 CJS Bills and Notes § 123.

When instrument deemed payable to order within Uniform Negotiable Instruments Act, 58 ALR 1005.

70A-3-111. Payable to bearer. An instrument is payable to bearer when by its terms it is payable to

- (a) bearer or the order of bearer; or
- (b) a specified person or bearer; or
- (c) "cash" or the order of "cash," or any other indication which does not purport to designate a specific payee.

History: L. 1965, ch. 154, § 3-111.

10 CJS Bills and Notes § 123.

11 AmJur 2d 145, Bills and Notes § 106.

Cross-References.

Blank indorsement, 70A-3-204.

Impostors, signature in name of payee, 70A-3-405.

Incomplete instruments, 70A-3-115.

Negotiable instruments, form of, 70A-3-104.

Payable to order, 70A-3-110.

Instrument payable to "estate" as within rule that an instrument payable to order of fictitious or nonexistent person is payable to bearer, 60 ALR 610.

Rights and obligations between depositor and bank which pays forged check, as affected by provisions of Negotiable Instruments Act, 146 ALR 840.

Collateral References.

Bills and Notes ⇌ 153.

70A-3-112. Terms and omissions not affecting negotiability.

- (1) The negotiability of an instrument is not affected by
 - (a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or
 - (b) a statement that collateral has been given to secure obligations either on the instrument or otherwise of an obligor on the instrument or that in the case of default on those obligations the holder may realize on or dispose of the collateral; or
 - (c) a promise or power to maintain or protect collateral or to give additional collateral; or
 - (d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

- (e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or
 - (f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or
 - (g) a statement in a draft drawn in a set of parts (section 70a-3-801) to the effect that the order is effective only if no other part has been honored.
- (2) Nothing in this section shall validate any term which is otherwise illegal.

History: L. 1965, ch. 154, § 3-112.

Cross-References.

Acceleration of time, 70A-3-109 (1) (c).
 Negotiable instruments, form of, 70A-3-104.
 Option to accelerate at will, 70A-1-208.
 Promise or order, when unconditional, 70A-3-105.

Collateral References.

Bills and Notes ⇔ 144 et seq.
 10 CJS Bills and Notes §§ 15, 83, 89, 111.

Confession of judgment, negotiability of bill or note as affected by provision authorizing, 117 ALR 673.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 ALR 3d 426.

Judgment: necessity, in order to enter judgment by confession on instrument containing warrant of attorney, that original note or other instrument and original warrant be produced or filed, 68 ALR 2d 1156.

Negotiability of note as affected by provision therein, or in mortgage securing the same, for payment of taxes, assessments, or insurance, 45 ALR 1074.

Negotiability of paper as affected by provisions therein relating to future contingent fund or security for its payment, 134 ALR 946.

Negotiable Instruments Law as affecting defense of usury, 95 ALR 735.

Reference to extrinsic agreements as affecting negotiability of bill or note, 14 ALR 1126, 33 ALR 1174, 37 ALR 655, 61 ALR 815, 104 ALR 1378.

Validity and effect of note payable to maker without words of negotiability, 42 ALR 1067, 50 ALR 426.

DECISIONS UNDER FORMER LAW

History of transaction.

Statement that note was part of a certain agreement did not affect or destroy its

negotiability. Utah Lake Irr. Co. v. Allen (1924) 64 U 511, 231 P 818, 37 ALR 651.

70A-3-113. Seal. An instrument otherwise negotiable is within this chapter even though it is under a seal.

History: L. 1965, ch. 154, § 3-113.

Cross-References.

Negotiable instruments, form of, 70A-3-104.

10 CJS Bills and Notes §§ 13, 75.

11 AmJur 2d 242, 265, Bills and Notes §§ 213, 238.

Collateral References.

Bills and Notes ⇔ 16, 43, 144, 148.

Seal as affecting validity, 53 ALR 1173, 97 ALR 617.

70A-3-114. Date, antedating, postdating.

- (1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

- (2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.
- (3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

History: L. 1965, ch. 154, § 3-114.

Cross-References.

Burden of establishing signatures, defenses and due course, 70A-3-307.

Definite time for payment, 70A-3-109.

Incomplete instruments, 70A-3-115.

Indorsement after maturity, presentment of instrument, notice of dishonor, nor protest necessary to charge indorser, 70A-3-501 (4).

"Presumed" defined, 70A-1-201 (31).

Rights of one not holder in due course, 70A-3-306.

Collateral References.

Bills and Notes ⇔ 8, 28, 34, 116, 129, 144 et seq., 491, 492.

10 CJS Bills and Notes §§ 13, 42, 70, 72, 245 et seq.; 11 CJS Bills and Notes §§ 651, 657.

10 AmJur 2d 526, Banks § 553; 11 AmJur 2d 119, 237, Bills and Notes §§ 88, 208.

Bank's liability for paying postdated check, 76 ALR 2d 1301.

Right of transferee of postdated check, 21 ALR 234.

DECISIONS UNDER FORMER LAW

Postdated check.

Whether or not certain defenses could be interposed against postdated check which were not available against check payable at

date of issue, held purposely left undecided because of unsatisfactory condition of record. Pingree Nat. Bank of Ogden v. McFarland (1921) 57 U 410, 195 P 313.

70A-3-115. Incomplete instruments.

- (1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.
- (2) If the completion is unauthorized the rules as to material alteration apply (section 70A-3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

History: L. 1965, ch. 154, § 3-115.

Cross-References.

Alteration of instrument, 70A-3-407.

"Burden of establishing" a fact, 70A-1-201 (8).

Date, antedating, postdating, 70A-3-114.

Depository bank paying item in good faith, charging customer's account, 70A-4-401.

Payable on demand, 70A-3-108.

Rights of a holder in due course, 70A-3-305, 70A-3-407 (3).

words were omitted by clerical error and mistake at time note was signed. A. M. Castle & Co. v. Bagley (1970) 24 U 2d 136, 467 P 2d 408.

Collateral References.

Alteration of Instruments ⇔ 7, 12; Bills and Notes ⇔ 60.

3A CJS Alteration of Instruments § 73 et seq.; 10 CJS Bills and Notes §§ 72, 120, 136.

11 AmJur 2d 101, Bills and Notes §§ 73-88.

Judicial reformation.

In action on promissory note, where note contained amount in numerals, but blank for designation of amount by words was not filled in, trial court did not err in reforming instrument pursuant to this section, since

Effect of payee of bill or note, executed in blank as to amount, filling it in for an amount in excess of that authorized, 75 ALR 1389.

Liability of one who signs commercial paper in blank to be used for his own benefit

where it is wrongfully used by an agent or employee, 43 ALR 198.

Rights and obligations between depositor and bank which pays forged check, as

affected by provisions of Negotiable Instruments Act, 146 ALR 840.

DECISIONS UNDER FORMER LAW

Express authority.

Mortgagors ratified manner in which mortgage broker completed blank note by executing four extensions of original note after they acquired actual knowledge that they had been given a one-year construction loan rather than a twenty-year loan; the question of express authority to complete note became irrelevant and they were not entitled to reformation and broker was entitled to foreclosure. *Doxey-Layton Co. v. Holbrook* (1971) 25 U 2d 194, 479 P 2d 348.

Interest.

A payee who is to determine, within reason, the amount to be charged as interest may fill in the blank in the interest clause, without explicit direction by the maker.

Plescia v. Humphries (1952) 121 U 355, 241 P 2d 1124.

Name of payee.

Where defendants signed notes with name of payee left blank for purpose of raising money for certain corporation and notes were not used for that purpose, of which fact plaintiff had knowledge, and later president of corporation gave one of the notes to plaintiff to secure a past due indebtedness, defendants were not liable on the note, since anyone with knowledge in accepting an instrument in an incomplete condition is bound to know that it is completed in accordance with the intent and instruction of the maker before being clothed with the legal right to enforce payment against the maker. *Cache Valley Comm. Co. v. Genter Sales Co.* (1924) 63 U 574, 228 P 203.

70A-3-116. Instruments payable to two or more persons. An instrument payable to the order of two or more persons

- (a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;
- (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

History: L. 1965, ch. 154, § 3-116.

Cross-References.

"Holder" defined, 70A-1-201 (20).

Collateral References.

Bills and Notes ⇔ 120, 153, 181, 182, 196.
10 CJS Bills and Notes §§ 128, 194, 204, 206, 220.
11 AmJur 2d 153, Bills and Notes § 117.

Check payable to two payees.

Check payable to order of two payees must be endorsed by each payee and accepting bank and drawee bank who took check endorsed by only one of joint payees were both liable for conversion to nonendorsing joint payee. *Pacific Metals Co. v. Tracy-Collins Bank & Trust Co.* (1968) 21 U 2d 400, 446 P 2d 303.

Endorsement by one of several joint payees or endorsees not partners, 38 ALR 799.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Necessity of express agreement between endorsers to be jointly and not successively liable in order to give a right of contribution as between themselves, 90 ALR 305.

70A-3-117. Instruments payable with words of description. An instrument made payable to a named person with the addition of words describing him

- (a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder;

- (b) as any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;
- (c) in any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

History: L. 1965, ch. 154, § 3-117.

Cross-References.

Notice to purchaser, 70A-3-304 (2).

Collateral References.

Bills and Notes ⇔ 123, 153, 181.
 10 CJS Bills and Notes § 121 et seq.
 11 AmJur 2d 152, 351, 948, Bills and Notes
 §§ 115, 330, 902.

70A-3-118. Ambiguous terms and rules of construction. The following rules apply to every instrument:

- (a) Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note.
- (b) Handwritten terms control typewritten and printed terms, and typewritten control printed.
- (c) Words control figures except that if the words are ambiguous figures control.
- (d) Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.
- (e) Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as "I promise to pay."
- (f) Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with section 70A-3-604 tenders full payment when the instrument is due.

History: L. 1965, ch. 154, § 3-118.

11 AmJur 2d 89, Bills and Notes § 63.

Cross-References.

Date, antedating, postdating, 70A-3-114.
 Definite time, 70A-3-109.
 Impairment of recourse or of collateral,
 70A-3-606.
 Signature in ambiguous capacity,
 70A-3-402.
 Tender of full payment when instrument is
 due, 70A-3-604.

Collateral References.

Bills and Notes ⇔ 116 et seq.
 10 CJS Bills and Notes § 42 et seq.

Admissibility of parol evidence to show that a bill or note was conditional, or given for a special purpose, 20 ALR 421, 54 ALR 702, 75 ALR 1519, 105 ALR 1346.

Date, determination of in typewritten document, 106 ALR 732.

Figures showing amount of commercial paper, alteration of without altering written words, 64 ALR 2d 1029.

Validity and effect of note payable to maker without words of negotiability, 50 ALR 426.

70A-3-119. Other writings affecting instrument.

- (1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.
- (2) A separate agreement does not affect the negotiability of an instrument.

History: L. 1965, ch. 154, § 3-119.

Promise or order, when unconditional,
70A-3-105.

Cross-References.

Notice to purchaser of a defense or claim,
70A-3-304 (4).

Collateral References.

11 AmJur 2d 94, 189, Bills and Notes
§§ 70-72, 147.

70A-3-120. Instruments "payable through" bank. An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

History: L. 1965, ch. 154, § 3-120.

9 CJS Banks and Banking § 216 et seq.; 10
CJS Bills and Notes § 32 et seq.

Collateral References.

Banks and Banking ⇔ 158 et seq.; Bills
and Notes ⇔ 6, 32, 119, 153.

10 AmJur 2d 464, 680, Banks §§ 495, 710; 11
AmJur 2d 150, Bills and Notes, § 111.

70A-3-121. Instruments payable at bank. A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

History: L. 1965, ch. 154, § 3-121.

Cross-References.

Presentment or notice of dishonor, unex-
cused delay, discharge, 70A-3-502.

Compiler's Notes.

The Uniform Code provides an optional
subsection designated as (a), omitted herein.

Collateral References.

Banks and Banking ⇔ 144.
9 CJS Banks and Banking §§ 225, 350.
10 AmJur 2d 464, Banks § 495.

70A-3-122. Accrual of cause of action.

- (1) A cause of action against a maker or an acceptor accrues
 - (a) in the case of a time instrument on the day after maturity;
 - (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.
- (2) A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.
- (3) A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

- (4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment
- (a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;
 - (b) in all other cases from the date of accrual of the cause of action.

History: L. 1965, ch. 154, § 3-122.

Cross-References.

Ambiguous terms and rules of construction, 70A-3-118.

Contract of indorser, order of liability, 70A-3-414.

Contract of maker, drawer and acceptor, 70A-3-413.

When presentment, notice of dishonor, and protest necessary or permissible, 70A-3-501.

Collateral References.

Bills and Notes ⇄ 129, 445; Interest ⇄ 39, 46.

10 CJS Bills and Notes §§ 245 et seq., 529; 47 CJS Interest § 41 et seq.

10 AmJur 2d 436, 567, Banks §§ 466, 602; 11 AmJur 2d 311, Bills and Notes, § 286.

Rate of interest after maturity of obligation which fixes rate of interest expressly until maturity, 16 ALR 2d 902.

Time for which interest is recoverable on demand note or like demand instrument containing no provision as to interest, 45 ALR 2d 1202.

DECISIONS UNDER FORMER LAW

Burden of proof of delivery.

If defendant, when sued on a note, denies delivery, plaintiff has burden of proving delivery. *Pingree Nat. Bank of Ogden v. McFarland* (1921) 57 U 410, 195 P 313; *Pettit v. Clawson* (1921) 57 U 419, 195 P 199.

Conditional delivery.

Maker of note, when sued by payee, may show by parol evidence that note was delivered on condition, and that condition has not been complied with, thereby defeating recovery. *Martineau v. Hanson* (1916) 47 U 549, 155 P 432.

As between the original parties it may always be shown that a promissory note was delivered upon condition, or that it was made without consideration, or that the consideration had failed in whole or in part. *Smith v. Brown* (1917) 50 U 27, 165 P 468, applying Negotiable Instruments Act 1899, ch. 83.

Where defendant in action on note had aided plaintiff in purchase of mining property, and plaintiff, in consideration of such services, gave defendant a certificate of stock but induced defendant to sign note sued on representing that it was matter of routine and that contract to effect that plaintiff

would carry all obligations arising out of the issuance of the stock until sale of stock or property should realize a profit to defendant would be attached to the note, defendant was entitled to show that note was conditional note under former section 44-1-17. *Hanson v. Greenleaf* (1923) 62 U 168, 218 P 969.

Sufficiency of delivery.

Payee's delivery of note to attorney for plaintiff for purposes of suing thereon, held a sufficient delivery to plaintiff to authorize an action on the note in his own name, notwithstanding plaintiff had never seen the note. *Leitzell v. Peter* (1938) 96 U 152, 84 P 2d 416.

Third person's rights.

Where note payable to defendant was given to bank as security for loan, and defendant assigned all right and interest in such note to third person by written instrument prior to garnishment proceeding instituted against bank on judgment against defendant for proceeds of note, third person was entitled to proceeds as against judgment creditor notwithstanding that note was not delivered to third person. *Johnson v. Beickey* (1924) 64 U 43, 228 P 189.

PART 2

TRANSFER AND NEGOTIATION

Section

70A-3-201. Transfer — Right to indorsement.

70A-3-202. Negotiation.

- 70A-3-203. Wrong or misspelled name.
- 70A-3-204. Special indorsement — Blank indorsement.
- 70A-3-205. Restrictive indorsements.
- 70A-3-206. Effect of restrictive indorsement.
- 70A-3-207. Negotiation effective although it may be rescinded.
- 70A-3-208. Reacquisition.

70A-3-201. Transfer — Right to indorsement.

- (1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.
- (2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.
- (3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

History: L. 1965, ch. 154, § 3-201.

Cross-References.

Burden of establishing signatures, defenses and due course, 70A-3-307.
 Contract of guarantor, 70A-3-416.
 Holder in due course, 70A-3-302.
 Negotiation of instrument, 70A-3-202.
 Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Collateral References.

Bills and Notes ⇐ 203, 220, 313, 348, 362.
 10 CJS Bills and Notes §§ 232 et seq., 304.
 11 AmJur 2d 400, Bills and Notes § 375.

Construction, applicability, and effect of provisions of Negotiable Instruments Law as

to delivery of order paper without endorsement, 87 ALR 1178.

Gift of note to maker by delivery or surrender of instrument, 63 ALR 2d 264.

Limitation of action: when statute begins to run against note payable on demand, 71 ALR 2d 284.

Necessity of endorsement by all payees before maturity to make a transferee a bona fide holder, 25 ALR 163.

Law Reviews.

New Mexico's Uniform Commercial Code; Presentment Warranties and the Myth of the "Shelter Provision," 4 Natural Resources J. 398.

DECISIONS UNDER FORMER LAW

Compelling indorsement.

Under § 49 of the Uniform Negotiable Instruments Law transferee could compel transferor to indorse note where such was agreement on latter's part. *Ackerman v. Bramwell Inv. Co.* (1932) 80 U 52, 12 P 2d 623, distinguished in 13 U 2d 256, 372 P 2d 346.

Gifts.

It is generally held that where a written assignment of a promissory note is delivered to the donee, the gift is valid although the donee has not obtained actual possession of the note. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

An assignment of such part of the principal of a promissory note as did not become due, and was not paid, during the lifetime of the assignor was not invalid as an attempted

testamentary disposition of property, where the language of the assignment revealed a clear and unequivocal intention to make a present gift. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

The fact that the payee of a promissory note who made an assignment as a gift reserved to himself the right to receive principal installments becoming due during his lifetime together with "all amounts in excess of the amounts periodically becoming due thereon which the maker thereof under the terms of said note may choose to pay on said principal during the lifetime of the assignor" does not constitute a reservation of complete dominion over the principal of the gift, and therefore does not require the court to defeat the expressed intention of the donor to make a present gift of the interest becoming due on the note in his lifetime and of whatever principal remained owing at the time of his death. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

Transfer by assignment and delivery.

A bill or note may be transferred by assignment or by mere delivery with the usual incidents of such a transfer; and this rule is not changed by the Negotiable Instrument Law. The assignment may be by a separate instrument. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

Where the payee executed and delivered to the assignees a written assignment of a part

interest in the promissory note, but reserved to himself the right to receive installments of principal falling due in his lifetime, he should be considered to be holding the note for himself and the assignees, and to have made a constructive delivery to them so as to satisfy the requirements of former section 44-1-17. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

Transfer without indorsement.

Without indorsement and delivery of check, transferee stood in no better position than payee, and every defense available against payee was available against transferee. *Pingree Nat. Bank of Ogden v. McFarland* (1921) 57 U 410, 195 P 313.

Where the purchasers of a home made a separate assignment of a note and mortgage to the vendor and the vendor accepted the assignment in partial payment for the home and did not object to the subsequent indorsement of the note by the purchasers without recourse, and where the vendor was aware of the emphasis which the purchasers placed on their refusal to commit themselves to personal liability, the circumstances were sufficient to negate an unqualified indorsement and § 49 of the Uniform Negotiable Instruments Law is not apropos in such a case. *American Sav. & Loan Assn. v. Anderson* (1962) 13 U 2d 256, 372 P 2d 346.

70A-3-202. Negotiation.

- (1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.
- (2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.
- (3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.
- (4) Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.

History: L. 1965, ch. 154, § 3-202.

Cross-References.

Blank indorsement, 70A-3-204.

Contract of guarantor, 70A-3-416.

Fiduciaries, transfer of negotiable instruments and checks drawn by or to, 22-1-4 to 22-1-6.

"Holder" defined, 70A-1-201 (20).

Special indorsement, 70A-3-204.

Transfer, right to indorsement, 70A-3-201.

Warranties on presentment and transfer of instrument, 70A-3-417.

Collateral References.

Bills and Notes ⇐ 144, 146, 176, 181, 183, 188.

10 CJS Bills and Notes §§ 10, 13, 197, 204, 207, 208, 212.

11 AmJur 2d 340, Bills and Notes § 315 et seq.

Authority of bank cashier to endorse and transfer commercial paper, 37 ALR 2d 508.

Authority of corporate officers to endorse and transfer commercial paper, 37 ALR 2d 523.

Construction and application of provision of Negotiable Instruments Law in respect to indorsements which purport to transfer only part of amount payable, 63 ALR 499.

Construction, application, and effect of provision of Negotiable Instruments Law

that an endorsement which purports to transfer the instrument to two or more endorsees severally does not operate as a negotiation, 149 ALR 1055.

Effect of assignment endorsed on back of commercial paper, 44 ALR 1353.

Endorsement of bill or note in form of guaranty of payment, 21 ALR 1375, 33 ALR 97, 46 ALR 1516.

Indorsement of negotiable instrument by writing not on instrument itself, 19 ALR 3d 1297.

Production of paper purporting to be endorsed in blank by payee or by a special endorsee, as prima facie evidence of plaintiff's title, 11 ALR 952, 85 ALR 304.

Words of negotiability, endorsement without, of note payable to maker, as affecting its validity and effect, 42 ALR 1067, 50 ALR 426.

DECISIONS UNDER FORMER LAW**Assignment of part of note.**

Former section 44-1-33 did not prevent the assignment of only a part of a promissory note. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

Burden of proof of indorsement and delivery.

Under former section 44-1-31 the burden was on the plaintiff to prove indorsement and delivery as alleged. *Pingree Nat. Bank of Ogden v. McFarland* (1921) 57 U 410, 195 P 313.

Delivery.

Former section 44-1-17 was not intended to impair well-recognized rules by which delivery would be implied either from authority actually conferred by the maker or holder upon an agent, or from conduct which should estop them from claiming that they had not delivered or authorized delivery of the instrument. *Johnson v. Beickey* (1924) 64 U 43, 228 P 189.

Transferee of note cannot sue maker thereof until there has been a delivery of it by the transferor, but such delivery may be constructive. *Leitzell v. Peter* (1938) 96 U 152, 84 P 2d 416.

Payee's delivery of note to attorney for plaintiff for purposes of suing thereon, held a sufficient delivery to plaintiff to authorize an action on the note in his own name, notwithstanding plaintiff had never seen the note. *Leitzell v. Peter* (1938) 96 U 152, 84 P 2d 416.

Where the payee executed and delivered to the assignees a written assignment of a part interest in the promissory note, but reserved to himself the right to receive installments of principal falling due in his lifetime, he

should be considered to be holding the note for himself and the assignees, and to have made a constructive delivery to them so as to satisfy the statute. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

Former section 44-1-17, relating to effectual delivery of negotiable instrument, should have been construed with former section 44-4-1 defining delivery. *Thatcher v. Merriam* (1952) 121 U 191, 240 P 2d 266.

Effect of indorsement.

Signing of name upon back of note guaranteeing payment thereof, waiving demand, protest, and notice of protest, operates as a transfer of note, and as an indorsement thereof with enlarged liability. *National Bank of the Republic v. Price* (1923) 65 U 57, 234 P 231, overruled on other grounds in 69 U 250, 253 P 900.

Indorsement and assignment distinguished.

Indorsement is not merely a transfer of title, but a new and substantive contract by which the indorser becomes a party to the instrument and liable, on certain conditions, for its payment, whereas assignment means transfer of title but it neither includes nor implies becoming in any way a party to the payment, or responsible for the insolvency or default of the maker. *Johnson v. Beickey* (1924) 64 U 43, 228 P 189.

Law merchant.

It was the rule under the law merchant that a note payable to order, while transferable by sale and delivery without indorsement, did not in such case carry with it any of its otherwise negotiable features, and pur-

chaser took subject to equities. *Lebcher v. Lambert* (1900) 23 U 1, 63 P 628, citing *Norton on Bills and Notes*; *Pingree Nat. Bank of Ogden v. McFarland* (1921) 57 U 410, 195 P 313.

Separate instrument.

Separate writing does not constitute an indorsement where not attached to the note. *Ackerman v. Bramwell Inv. Co.* (1932) 80 U 52, 12 P 2d 623, distinguished in 13 U 2d 256, 372 P 2d 346.

Even though there was no negotiation of a note in accordance with the provisions of the

Negotiable Instruments Law, this would not prevent a legally effective transfer of rights under the note and mortgage by a separate instrument in writing. *Continental Bank & Trust Co. v. Cunningham* (1960) 10 U 2d 329, 353 P 2d 168.

Typewritten indorsement.

Typewritten indorsement of check complied with former section 44-1-32. *Pingree Nat. Bank of Ogden v. McFarland* (1921) 57 U 410, 195 P 313.

70A-3-203. Wrong or misspelled name. Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

History: L. 1965, ch. 154, § 3-203.

Cross-References.

Signature appearing on instrument, 70A-3-401 (2).

Collateral References.

Bills and Notes ⇔ 181, 183.
10 CJS Bills and Notes §§ 204, 208.
11 AmJur 2d 372, Bills and Notes § 352.

Construction and application of provision of Negotiable Instruments Law regarding indorsement of instrument by payee or endorsee whose name is wrongly designated or misspelled, 153 ALR 598.

Mistake in name in indorsement of check, preventing payment thereof before failure of drawee, 21 ALR 1556.

70A-3-204. Special indorsement — Blank indorsement.

- (1) A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.
- (2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.
- (3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

History: L. 1965, ch. 154, § 3-204.

Cross-References.

Negotiation of instrument, 70A-3-202.

Collateral References.

Bills and Notes ⇔ 188-190.
10 CJS Bills and Notes §§ 212-214.
11 AmJur 2d 382, 423, Bills and Notes §§ 360, 361, 395.

DECISIONS UNDER FORMER LAW

Effect of blank indorsement.

A note indorsed in blank is as though it had been originally made payable to bearer. *Karren v. Bair* (1924) 63 U 344, 225 P 1094.

70A-3-205. Restrictive indorsements. An indorsement is restrictive which either

- (a) is conditional; or
- (b) purports to prohibit further transfer of the instrument; or
- (c) includes the words "for collection," "for deposit," "pay any bank," or like terms signifying a purpose of deposit or collection; or
- (d) otherwise states that it is for the benefit or use of the indorser or of another person.

History: L. 1965, ch. 154, § 3-205.

Cross-References.

Conversion of instruments, 70A-3-419, 70A-4-203.

Depository bank taking item for collection may supply missing indorsement, 70A-4-205.

Effect of restrictive indorsement, 70A-3-206.

Negotiation of instrument, 70A-3-202.

Notice to purchaser, 70A-3-304.

Payment or satisfaction of instrument, 70A-3-603.

Collateral References.

Bills and Notes ⇔ 190.

10 CJS Bills and Notes § 214.

11 AmJur 2d 384, Bills and Notes § 362.

Endorsement, "to the order of any bank or banker," as a restrictive endorsement, 10 ALR 709.

Undertaking of one who endorses a note without recourse, 2 ALR 216, 91 ALR 399.

DECISIONS UNDER FORMER LAW

Conditional delivery.

Indorsement of a note before delivery to the payee may be conditional, but to be binding on the payee such conditions must be accepted by him, made with notice to him or knowledge on his part before or accompanying delivery, and these facts must be pleaded and proved. *Farmers' & Stockgrowers' Bank v. Pahvant Valley Land Co.* (1917) 50 U 35, 165 P 462.

Effect of recitals in deposit slip.

Where check is deposited at a bank, the deposit slip of which contains usual recitals that such bank acts merely as the agent for collection, and not as a purchaser thereof, title to check does not pass to said bank; nor does fact that the drawee bank credited bank of deposit with the check in controversy preclude depositor from prevailing as a preferred creditor upon the insolvency of latter bank. *Western Creamery Co. v. Malia* (1936) 89 U 422, 57 P 2d 743, distinguished in 11 U 2d 89, 355 P 2d 210.

70A-3-206. Effect of restrictive indorsement.

- (1) No restrictive indorsement prevents further transfer or negotiation of the instrument.
- (2) An intermediary bank, or a payor bank which is not the depository bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor or the person presenting for payment.
- (3) Except for an intermediary bank, any transferee under an indorsement which is conditional or includes the words "for collection," "for deposit," "pay any bank," or like terms (subparagraphs (a) and (c) of section 70A-3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of section 70A-3-302 on what constitutes a holder in due course.

- (4) The first taker under an indorsement for the benefit of the indorser or another person (subparagraph (d) of section 70A-3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsement and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of section 70A-3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsement unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (subsection (2) of section 70A-3-304).

History: L. 1965, ch. 154, § 3-206.

11 AmJur 2d 435, Bills and Notes § 408.

Cross-References.

Conversion of instrument, 70A-3-419, 70A-4-203.

Depository bank taking item for collection may supply missing indorsement, 70A-4-205.

Effect of discharge against holder in due course, 70A-3-602.

Intermediary bank and payor bank, notice from prior indorsement, 70A-3-102 (3), 70A-4-105, 70A-4-205.

Item indorsed "pay any bank," effect, 70A-4-201.

Notice to purchaser, 70A-3-304.

Payment or satisfaction of instrument, 70A-3-603.

Restrictive indorsements, 70A-3-205.

Rights of one not holder in due course, 70A-3-306.

Collateral References.

Bills and Notes ⇔ 190, 199, 250, 290 et seq., 330.

10 CJS Bills and Notes §§ 39, 214 et seq., 220.

Endorsement "for deposit only" as affecting right of holder of paper against drawer or maker who would have a good defense as against payee, 75 ALR 1415.

Endorsement, "To the order of any bank or banker," as a restrictive endorsement, 10 ALR 709.

For deposit only, endorser's liability on endorsement to original, or subsequent, endorsee, 60 ALR 866.

Maker's endorsement of note payable to himself without words of negotiability, 42 ALR 1067, 50 ALR 426.

Sale or negotiation for value of commercial paper after it has been endorsed by the holder with a restrictive endorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course, 149 ALR 318.

Law Reviews.

Restrictive Indorsement Under the Uniform Commercial Code, 24 U. Pittsburgh L. Rev. 616.

70A-3-207. Negotiation effective although it may be rescinded.

- (1) Negotiation is effective to transfer the instrument although the negotiation is
- (a) made by an infant, a corporation exceeding its powers, or any other person without capacity; or
 - (b) obtained by fraud, duress or mistake of any kind; or
 - (c) part of an illegal transaction; or
 - (d) made in breach of duty.
- (2) Except as against a subsequent holder in due course such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

History: L. 1965, ch. 154, § 3-207.

Cross-References.

Burden of establishing signatures, defenses and due course, 70A-3-307.

"Delivery" defined, 70A-1-201 (14).
 "Holder" defined, 70A-1-201 (20).
 Negotiation of instrument, 70A-3-202.
 Rights of a holder in due course, 70A-3-305.
 Rights of one not holder in due course,
 70A-3-306.

Collateral References.

Bills and Notes ⇔ 182, 279, 327, 366, 367,
 381, 497 (1); Corporations ⇔ 466, 487 (2);
 Infants ⇔ 52.

10 CJS Bills and Notes §§ 206, 220, 301, 506;
 11 CJS Bills and Notes § 654; 19 CJS Corpora-
 tions § 1227; 43 CJS Infants § 177.
 11 AmJur 2d 355, Bills and Notes § 333.

Construction and effect of provision of
 Negotiable Instruments Law as to endorse-
 ment or assignment of instrument by infant
 or corporation, 73 ALR 172.

DECISIONS UNDER FORMER LAW

Failure of consideration.

A failure of consideration does not consti-
 tute a defective title. *Christensen v. Finan-
 cial Service Co.* (1963) 14 U 2d 101, 377 P 2d
 1010, 2 ALR 3d 1144.

Ultra vires transaction.

The plain effect of former section 44-1-23
 was that the maker of a note could not defeat
 an action thereon upon the grounds that the
 payee or some subsequent holder who was a
 corporation negotiated the same in an ultra
vires transaction. *Chesney v. Pioneer Sugar
 Co.* (1929) 73 U 293, 273 P 760.

70A-3-208. Reacquisition. Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been canceled is discharged as against subsequent holders in due course as well.

History: L. 1965, ch. 154, § 3-208.

Cross-References.

Cancellation and renunciation of instru-
 ment, 70A-3-605.
 Effect of discharge against holder in due
 course, 70A-3-602.
 Fiduciaries, transfer by, 22-1-4 et seq.
 Payment or satisfaction of instrument,
 70A-3-603.

Collateral References.

Bills and Notes ⇔ 144, 193, 202, 256, 264,
 301, 308, 440.
 10 CJS Bills and Notes §§ 13, 39, 215, 220,
 222, 466, 470, 516, 517.
 11 AmJur 2d 341, 588, Bills and Notes
 §§ 319, 529.

Effect of endorsement and delivery of note
 to comakers, 51 ALR 936.

Liability of intermediate endorser where
 negotiable instrument is reacquired and
 renegotiated by prior party, 169 ALR 1410.

PART 3

RIGHTS OF A HOLDER

Section

70A-3-301. Rights of a holder.
 70A-3-302. Holder in due course.
 70A-3-303. Taking for value.
 70A-3-304. Notice to purchaser.
 70A-3-305. Rights of a holder in due course.
 70A-3-306. Rights of one not holder in due course.
 70A-3-307. Burden of establishing signatures, defenses and due course.

70A-3-301. Rights of a holder. The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise

provided in section 70A-3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

History: L. 1965, ch. 154, § 3-301.

Cross-References.

Burden of establishing signatures, defenses and due course, 70A-3-307.

"Holder" defined, 70A-1-201 (20).

Payment or satisfaction of instrument, 70A-3-603.

Collateral References.

Bills and Notes ⇐ 182, 206, 347, 427 (1), 437, 443.

10 CJS Bills and Notes §§ 206, 224, 452, 471, 472, 534.

11 AmJur 2d 349, 394, Bills and Notes §§ 328, 370, 371.

Amount paid by holder as limiting recovery against accommodation party, 69 ALR 1313.

Foreign corporation: rights of assignee or subsequent holder of negotiable paper executed to foreign corporation doing business in state without compliance with local requirements, 80 ALR 2d 465.

Possession of bill or note as essential to maintain action thereon as "holder," 102 ALR 460.

Right of pledgor of commercial paper to maintain action thereon in his own name, 43 ALR 3d 824.

Right of transferee of note to sue on original claim for which note was given, 11 ALR 449.

70A-3-302. Holder in due course.

- (1) A holder in due course is a holder who takes the instrument
 - (a) for value; and
 - (b) in good faith; and
 - (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.
- (2) A payee may be a holder in due course.
- (3) A holder does not become a holder in due course of an instrument:
 - (a) by purchase of it at judicial sale or by taking it under legal process; or
 - (b) by acquiring it in taking over an estate; or
 - (c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.
- (4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

History: L. 1965, ch. 154, § 3-302.

Cross-References.

"Holder" defined, 70A-1-201 (20).

Notice to purchaser, 70A-3-304.

"Purchase" defined, 70A-1-201 (33).

Rights of a holder in due course, 70A-3-305.

Rights of one not holder in due course, 70A-3-306.

Taking for value, 70A-3-303.

Transfer, right to indorsement, 70A-3-201.

Duty of one taking instrument.

When one who takes a negotiable instrument is aware of any fact which should alert him that there is a defense, he cannot close his eyes and ignore it. He must act in good faith and exercise such caution as a reason-

able person would under those circumstances and is chargeable with knowledge of such facts as reasonable inquiry would disclose. *Jaeger & Branch, Inc. v. Pappas* (1967) 20 U 2d 100, 433 P 2d 605.

Collateral References.

Bills and Notes ⇐ 327 et seq.

10 CJS Bills and Notes § 301 et seq.

11 AmJur 2d 424, 440, 444, 453, 550, 562, 563, Bills and Notes §§ 397, 414, 418, 419, 424, 486, 495, 498.

Crediting the proceeds of negotiable paper to holder's deposit account as constituting bank a holder in due course, 6 ALR 252, 59 ALR 2d 1173.

Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due course, 18 ALR 18, 34 ALR 300, 57 ALR 1083.

Exchange of negotiable paper as supporting status as holder in due course of one who at time of exchange had no notice of infirmity or defect in paper received, 69 ALR 408.

Executed consideration, endorsee of bill or note based on, who knows of circumstances which might result in rescission as between original parties, as holder in due course, 59 ALR 1026.

Maturity of one or more of installments of notes payable in installments as affecting status of purchaser as holder in due course, 170 ALR 1029.

Notice which has been forgotten as affecting status as holder in due course, 89 ALR 2d 1104.

One taking bill or note as a gift or in consideration of love and affection as a holder for value or in due course protected against defenses between prior parties, 48 ALR 237.

Payee as holder in due course under Negotiable Instruments Law, 15 ALR 437, 21 ALR

1365, 26 ALR 769, 32 ALR 289, 68 ALR 962, 97 ALR 1215, 2 ALR 2d 1151.

Sale or negotiation for value of commercial paper after it has been endorsed by the holder with a restrictive endorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course, 147 ALR 309.

Taking negotiable paper as collateral security for or in payment of preexisting indebtedness as sustaining one's character as holder in due course under Uniform Negotiable Instruments Act, 80 ALR 670.

Transferee of commercial paper given by purchaser of a chattel and secured by conditional sale, retention of title, or chattel mortgage as having status of holder in due course, 44 ALR 2d 97.

What constitutes, under the Uniform Negotiable Instruments Law or Commercial Code, a reasonable time for taking a demand instrument, so as to support the taker's status as a holder in due course, 10 ALR 3d 1199.

DECISIONS UNDER FORMER LAW

Apparent alterations.

The transferee of a negotiable instrument which on its face shows apparent alterations is not a holder in due course, because such an instrument is not "regular upon its face." Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co. (1929) 74 U 24, 276 P 659, 68 ALR 969.

Findings.

A finding that indorsee of a note was a holder in due course for a valuable consideration paid before maturity was held to be sufficient, though in nature of a conclusion. This is not, however, strictly in compliance with the Code respecting findings. Miller v. Marks (1914) 46 U 257, 148 P 412.

Fraud.

Upon proof of fraud in inception of note, one suing on note has not only mere duty or burden of proceeding or of going forward, but burden of establishing existence of facts showing that he, or some person under whom he claims, acquired title as holder in due course. Leavitt v. Thurston (1911) 38 U 351, 113 P 77.

Pleadings generally.

Allegation in answer setting up defense that "the plaintiff is not an innocent holder for value of said note," states a mere legal conclusion; a naked assertion. Voorhees v. Fisher (1893) 9 U 303, 34 P 64.

Objection that complaint does not allege that plaintiff is a holder in due course of instrument sued upon cannot be raised for first time on appeal. Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co. (1929) 74 U 24, 276 P 659, 68 ALR 969.

Pledgee.

Pledgee of unmatured collateral note held holder in due course. Interstate Trust Co. v. Headlund (1918) 51 U 543, 171 P 515.

Renewal of note for payment of which collateral securities had been pledged does not extinguish debt for which original note was given, unless parties expressly agree that giving of note should be deemed payment. Interstate Trust Co. v. Headlund (1918) 51 U 543, 171 P 515.

Preexisting debt payment.

Where a note is given in payment or discharge of a preexisting debt, the payee is holder for value. Helper State Bank v. Jackson (1916) 48 U 430, 160 P 287.

Purchaser of note.

In order to constitute alleged purchaser of note bona fide holder thereof in due course, both indorsement and delivery of note by payee to her before maturity were necessary. Lebcher v. Lambert (1900) 23 U 1, 11, 63 P 628, applying RS 1898, § 1582.

Where plaintiff gave his check in payment of a note made by defendant, and before check was paid was notified of an infirmity in

the note, plaintiff was nevertheless a holder in due course, and was not bound to stop payment of check. *Miller v. Marks* (1914) 46 U 257, 148 P 412.

In suit by corporation to cancel mortgage upon ground that it was authorized by only three of five directors constituting board of directors, wherein it appeared that corporation had delivered note and mortgage to bank

which assigned to defendant stockholder for value and before maturity, held, stockholder was holder in due course, and she did not take note and mortgage subject to any defenses that corporation or a stockholder might have had against original payee. *Huntington Roller Mills & Mfg. Co. v. Miller* (1922) 60 U 236, 208 P 531.

70A-3-303. Taking for value. A holder takes the instrument for value

- (a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or
- (b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or
- (c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

History: L. 1965, ch. 154, § 3-303.

Cross-References.

Consideration for instrument, 70A-3-408.

Contract of accommodation party, 70A-3-415.

Holder in due course, 70A-3-302.

Warranties on presentment and transfer, 70A-3-417.

Collateral References.

Bills and Notes ⇐ 92, 94 (1), 352 et seq., 497 (1).

10 CJS Bills and Notes §§ 148, 150, 315 et seq.; 11 CJS Bills and Notes §§ 654, 742.

11 AmJur 2d 355, 368, Bills and Notes §§ 334-339, 347, 348.

Cross notes, bills, or checks as consideration for each other, 7 ALR 1569.

Exchange of negotiable paper as supporting status as holder in due course, 60 ALR 408.

Forbearance to sue on original obligation as consideration for note payable on demand, 141 ALR 1481.

Gift, one taking bill or note as, or in consideration of love and affection, as a holder for value, 48 ALR 237.

Past services by relative or member of family as consideration for note or other executory obligation, 140 ALR 491.

Right to follow chattel into hands of purchaser who took in payment of pre-existing debt, 11 ALR 3d 1028.

Unperformed obligation as value, as regards one's status as a bona fide purchaser freed from prior equities, 124 ALR 1259.

Validity of promise conditioned upon forbearance or nonexercise of right, without an agreement or other original consideration by promisee, 74 ALR 293.

Who is holder of instrument for "value" under UCC § 3-303, 97 ALR 3d 1114.

DECISIONS UNDER FORMER LAW

Evidence.

In action on promissory note by indorsee, defense of partial failure of consideration was properly not considered where presumption that plaintiff was indorsee, before maturity, for value, and in good faith, was not overcome by any evidence adduced or offered by defendants. *McCornick v. Swem* (1909) 36 U 6, 102 P 626, 20 Ann Cas 1368.

Material alterations.

Under former section 44-1-27 holder of note merely as collateral, materially altered without consent of maker, is limited to recov-

ery from maker of amount of loan. Accordingly, there must be finding that loan was actually made and as to the amount of the loan. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

Preexisting debt.

Even though the instrument is transferred merely as collateral security for preexisting debt, this is for "value" within meaning of former section 44-1-26. *Felt v. Bush* (1912) 41 U 462, 126 P 688, followed in *Helper State Bank v. Jackson* (1916) 48 U 430, 160 P 287.

Preexisting indebtedness was a sufficient consideration for maker's obligation under note. *Dern Inv. Co. v. Carbon County Land Co.* (1938) 94 U 76, 75 P 2d 660.

Preexisting debt furnished value for indorsement of note by payee to another. *Dern Inv. Co. v. Carbon County Land Co.* (1938) 94 U 76, 75 P 2d 660.

The extinguishment of a preexisting, valid debt is a sufficient consideration for a check. *Great American Indemnity Co. v. Berryessa* (1952) 122 U 243, 248 P 2d 367.

What constitutes consideration.

Where cashier and president of bank agreed to put up certain amounts of money to make up loss which bank had sustained, and avert ruin with which institution was threatened, and defendant cashier executed note and president advanced cash, held, execution of note was based on sufficient consideration to support action by bank on note. *Utah Nat. Bank of Salt Lake City v. Nelson* (1910) 38 U 169, 111 P 907.

Promise to pay debt from which promisor has been discharged in bankruptcy is suffi-

cient consideration for note. *Merchants' Bank v. Goodfellow* (1914) 44 U 349, 140 P 759; *Merchants' Protective Assn. v. Popper* (1922) 59 U 470, 204 P 107.

The consideration need not be cash; checks are the equivalent. Payment may consist of anything constituting a valid consideration of sufficient value. *Miller v. Marks* (1914) 46 U 257, 148 P 412.

Extension of time by payee is sufficient consideration. *Assets Realization Co. v. Cardon* (1928) 72 U 597, 604, 272 P 204.

Where wife owned substantial interest in joint bank account, and husband executed note to wife at her request upon withdrawing substantial sum from such account to invest in hazardous business, and when it became due husband executed renewal note secured by mortgage on undivided one-half interest in property owned by them jointly, original note was supported by valuable consideration, and hence, mortgage was not fraudulent as to creditors. *Williams v. Peterson* (1935) 86 U 526, 46 P 2d 674.

70A-3-304. Notice to purchaser.

- (1) The purchaser has notice of a claim or defense if
 - (a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or
 - (b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.
- (2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.
- (3) The purchaser has notice that an instrument is overdue if he has reason to know
 - (a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or
 - (b) that acceleration of the instrument has been made; or
 - (c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty days.
- (4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim

- (a) that the instrument is antedated or postdated;
 - (b) that it was issued or negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;
 - (c) that any party has signed for accommodation;
 - (d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;
 - (e) that any person negotiating the instrument is or was a fiduciary;
 - (f) that there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.
- (5) The filing or recording of a document does not of itself constitute notice within the provisions of this chapter to a person who would otherwise be a holder in due course.
- (6) To be effective notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

History: L. 1965, ch. 154, § 3-304.

Jaeger & Branch, Inc. v. Pappas (1967) 20 U 2d 100, 433 P 2d 605.

Cross-References.

Alteration of instrument, 70A-3-407.
 Effect of discharge against holder in due course, 70A-3-602.
 Holder in due course, 70A-3-302.
 Notice to person or organization, 70A-1-201.
 Other writings affecting instrument, 70A-3-119.
 "Presumption" defined, 70A-1-201 (31).
 Promise or order, when unconditional, 70A-3-105.
 Restrictive indorsement, effect of, 70A-3-206.
 Transfer, right to indorsement, 70A-3-201.

Collateral References.

Bills and Notes ⇄ 332 et seq.
 10 CJS Bills and Notes § 321 et seq.
 11 AmJur 2d 453, Bills and Notes § 424 et seq.

Addition of word indicating representative or fiduciary capacity after name of payee, endorser, or endorsee on commercial paper as charging transferee with notice of trust in favor of third parties or of defenses in maker, 61 ALR 1389.

Endorsement without recourse as affecting character of endorsee or subsequent holder as holder in due course, 77 ALR 487.

High rate of discount on sale as affecting status as holder in due course, 91 ALR 1139.

Notation or memorandum on bill or note as affecting one's character as holder in due course, 34 ALR 1377.

Notation or memorandum on bill or note as notice, 56 ALR 1373.

Notice which has been forgotten as affecting status as holder in due course, 89 ALR 2d 1330.

Public records as affecting one's character as a holder in due course of negotiable paper, 37 ALR 860.

Renewal of note after notice of defense as destroying bona fide character of holder, 35 ALR 1294.

Transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mort-

Duty of purchaser.

To impose upon one who is offered commercial paper the duty of inquiring in each instance whether obligations have been satisfactorily performed by prior holders would so burden such transactions as to create insuperable impedimenta to the free exchange of negotiable paper, which is an indispensable part of modern business. Jaeger & Branch, Inc. v. Pappas (1967) 20 U 2d 100, 433 P 2d 605.

Presumption of good faith.

In the absence of anything to warn him to the contrary one who takes a negotiable instrument as a holder in due course may assume that persons with whom he deals are themselves acting honestly and in good faith.

gage, as subject to defenses which chattel purchaser could assert against seller, 44 ALR 2d 84.

What constitutes, under the uniform negotiable instruments law or commercial code, a

reasonable time for taking a demand instrument, so as to support the taker's status as holder in due course, 10 ALR 3d 1199.

DECISIONS UNDER FORMER LAW

Burden of proof.

In action by indorsee on note defended by maker on ground of partial failure of consideration between maker and payee, held burden was on defendant to establish such defense, and to show notice of plaintiff of failure of consideration. *Cole Banking Co. v. Sinclair* (1908) 34 U 454, 98 P 411, 131 Am St Rep 885.

Demand note.

A demand note does not become overdue note until lapse of reasonable time after indorsement. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

Duress.

Note and mortgage executed by bank cashier and his wife under threats of criminal prosecution, held properly annulled on ground of duress. *Payson Building & Loan Society v. Taylor* (1935) 87 U 302, 48 P 2d 894.

Findings.

A finding that indorsee of a note was innocent purchaser for value, without knowledge of any defect in or defense to the note, and acted in good faith in the transaction, has been held to be sufficient, though in nature of a conclusion. This is not, however, strictly in compliance with the Code respecting findings. *Miller v. Marks* (1914) 46 U 257, 148 P 412.

Fraud.

Payee who obtains promissory note by fraudulent representations and sale of worthless animal to maker, and under oral agreement not to negotiate same, receives defective title thereto, but subsequent holder in due course may enforce same against maker. *Utah Bond & Share Co. v. Chappel* (1926) 68 U 530, 251 P 354.

Plaintiff, a minor, was properly considered a holder in due course of note given as a result of dealings of plaintiff's father with defendant corporation, on which plaintiff brought suit where delivery was made by a party to the transaction resulting in the note, although not by the maker, where there was no showing of fraud in the transaction. *Christensen v. Financial Service Co.* (1963) 14 U 2d 101, 377 P 2d 1010, 2 ALR 3d 1144.

Notice before full amount paid.

Former section 44-1-55, relating to notice before full amount paid, was not intended to have, nor did it have, any bearing on rights of an indorsee who received negotiable paper before maturity in due course, and without notice of infirmities. All that section was intended to accomplish was to limit the indorsee's recovery to the amount he had advanced before obtaining notice of some infirmity in the paper, and not to affect his fundamental relation to the debtor. *Felt v. Bush* (1912) 41 U 462, 126 P 688.

Under former section 44-1-55 an indorsee of a note who, in due course, and without notice of any defect therein, gave his check to indorser in payment thereof, but before payment of check received notice of infirmity in the note, and check was duly paid, such indorsee acquired note in due course, without notice, and was not bound to stop payment of check. *Miller v. Marks* (1914) 46 U 257, 148 P 412.

Notice of breach of executory agreement.

Notice of breach of terms of executory contract in pursuance of which note was given does not affect bona fide purchaser without notice. *Stephens v. Doxey* (1921) 58 U 196, 198 P 261; *Karren v. Bair* (1924) 63 U 344, 225 P 1094.

Where negotiable note is consideration for executory contract and note is negotiated before the breach of the contract, breach of contract is not a defense to note in hands of holder in due course even if holder knew of the contract, since, for such defense to be available, holder must have known about the breach before purchasing the note. *Karren v. Bair* (1924) 63 U 344, 225 P 1094.

Notice of claim or defense.

Transferee who came into possession of note with knowledge that it was fully intended by makers that note should be held by trust company in escrow without delivery until makers were relieved of their obligation to pay another note, held not an innocent purchaser for value, and not entitled to recover on note. *De Garmo v. Kay* (1918) 52 U 231, 173 P 129.

In suit by corporation to cancel mortgage upon ground that it was authorized by only three of five directors constituting board of directors, wherein it appeared that corpora-

tion had delivered note and mortgage to bank which assigned to defendant stockholder for value and before maturity, held, stockholder was holder in due course, and she did not take note and mortgage subject to any defenses that corporation or stockholder might have had against original payee. *Huntington Roller Mills & Mfg. Co. v. Miller* (1922) 60 U 236, 208 P 531.

Bad faith is not established by showing that altered note was taken. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

Notice of defects or conditions.

Merely because indorsee of a note for \$2,500 paid \$2,100 or \$2,300 therefor raises no presumption of knowledge on his part of some infirmity in note. *Miller v. Marks* (1914) 46 U 257, 148 P 412.

70A-3-305. Rights of a holder in due course. To the extent that a holder is a holder in due course he takes the instrument free from

- (1) all claims to it on the part of any person; and
- (2) all defenses of any party to the instrument with whom the holder has not dealt except
 - (a) infancy, to the extent that it is a defense to a simple contract; and
 - (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
 - (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
 - (d) discharge in insolvency proceedings; and
 - (e) any other discharge of which the holder has notice when he takes the instrument.

History: L. 1965, ch. 154, § 3-305.

Cross-References.

- Alteration of instrument, 70A-3-407.
 Burden of establishing signatures, defenses and due course, 70A-3-307.
 Effect of discharge against holder in due course, 70A-3-602.
 Incomplete instruments, 70A-3-115.
 Notice of claim or defense, 70A-3-304 (1)
 (b).
 Reacquisition of instrument, 70A-3-208.
 Rights of one not holder in due course, 70A-3-306.
 Transfer, right to indorsement, 70A-3-201.

Respecting knowledge of defective title to negotiable instrument, fact that two corporations have same officers does not necessarily result in imputation of knowledge of one to other as subsequent holder, where interests of two are adverse with respect to instrument; but where one corporation is mere agent or instrumentality of other, knowledge is imputable. *Utah Bond & Share Co. v. Chappel* (1926) 68 U 530, 251 P 354.

Suspicious circumstances or negligence, without more, are insufficient to charge purchaser with notice of defect, since actual knowledge of facts concerning defect or bad faith must be shown; but suspicious circumstances may be admitted in evidence as bearing on good faith. *National Bank of the Republic v. Beckstead* (1926) 68 U 421, 250 P 1033, overruling in part *National Bank of the Republic v. Price* (1923) 65 U 57, 234 P 231.

Recovery by holder of check.

Where the maker of a bank check attempted to get a shipment of carpet from payee to him released by the creditor of the payee through the use of said check, and after such purpose had been accomplished the maker sought to renege on his commitment to the payee's creditor by stopping payment on the check, the payee's creditor was entitled to recover from the maker as a holder in due course. *Jaeger & Branch, Inc. v. Pappas* (1967) 20 U 2d 100, 433 P 2d 605.

Collateral References.

- Bills and Notes ⇨ 327, 363 et seq.
 10 CJS Bills and Notes §§ 301, 482 et seq.
 11 AmJur 2d 426, 714, 732, 737, Bills and Notes §§ 398, 652, 666, 690.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 ALR 1295.

Fraud in the inducement and fraud in the factum as defenses under UCC § 3-305 against holder in due course, 78 ALR 3d 1020.

Necessity of possession and exhibition of paper at time of demand in order to make a valid presentment, 11 ALR 969, 50 ALR 1200.

DECISIONS UNDER FORMER LAW

Deriving title through exchange.

A bank may acquire negotiable instruments in exchange for other such instruments rather than cash, and if exchange is in good faith and in regular course of business, bank is protected as holder in due course. *National Bank of the Republic v. Beckstead* (1926) 68 U 421, 250 P 1033, overruling in part *National Bank of the Republic v. Price* (1923) 65 U 57, 234 P 231.

Failure of consideration.

In action on promissory note by indorsee, defense of partial failure of consideration was properly not considered where presumption that plaintiff was indorsee, before maturity, for value, and in good faith, was not overcome by any evidence adduced or offered by defendants. *McCornick v. Swem* (1909) 36 U 6, 102 P 626, 20 Ann Cas 1368.

A payee may be a holder in due course, at least where he is not a party to the transaction, if he otherwise qualifies; where plaintiff, a minor, was the holder of note in due course, neither failure of consideration nor any offset which the maker, the defendant corporation, might have had against plaintiff's father was available as a defense against plaintiff. *Christensen v. Financial Service Co.* (1963) 14 U 2d 101, 377 P 2d 1010, 2 ALR 3d 1144.

Presumption.

Where a person procures a negotiable instrument before it becomes due, his possession raises a prima facie presumption that he holds it lawfully and in good faith. He is not obliged to show that he paid value for it until the defendant has proved, under proper pleadings, that he procured it for an illegal consideration, or that it was a fraudulent transaction in its inception, or that it came wrongfully into his possession. *Voorhees v. Fisher* (1893) 9 U 303, 34 P 64.

Where there was no evidence of fraud, duress, or other infirmity in the inception of a note, a subsequent holder was entitled to rely on statutory presumption that he was holder in due course. *Karren v. Bair* (1924) 63 U 344, 225 P 1094.

Sufficiency of delivery.

In an action on a note made payable to the plaintiff, a minor, and given as a result of dealings of plaintiff's father with defendant corporation, plaintiff was properly considered a holder in due course of the note where delivery was made by a party to the transaction, who was not the maker, resulting in the note. Although plaintiff, the payee, gave no value to the maker, there was no fraud involved in the transaction. *Christensen v. Financial Service Co.* (1963) 14 U 2d 101, 377 P 2d 1010, 2 ALR 3d 1144.

70A-3-306. Rights of one not holder in due course. Unless he has the rights of a holder in due course any person takes the instrument subject to

- (a) all valid claims to it on the part of any person; and
- (b) all defenses of any party which would be available in an action on a simple contract; and
- (c) the defenses of want or failure of consideration, nonperformance of any condition precedent, nondelivery, or delivery for a special purpose (section 70A-3-408); and
- (d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is

not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

History: L. 1965, ch. 154, § 3-306.

Cross-References.

Burden of establishing signatures, defenses and due course, 70A-3-307.

Holder in due course, rights of, 70A-3-302, 70A-3-305.

Negotiation effective although it may be rescinded, 70A-3-207.

Notice to third party, 70A-3-803.

Transfer, right to indorsement, 70A-3-201.

Collateral References.

Bills and Notes ⇌ 96, 314-322, 327, 451, 453.

10 CJS Bills and Notes §§ 301, 479, 481 et seq.; 11 CJS Bills and Notes § 739.

11 AmJur 2d 396, 716, 732, Bills and Notes §§ 372, 653, 666.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper, 160 ALR 1295.

Effect of Negotiable Instruments Law on statute invalidating instrument given for gambling consideration, 11 ALR 211, 37 ALR 698, 46 ALR 959.

Holder in due course of commercial paper given by purchaser of chattel as secured by conditional sale, retention of title, or chattel mortgage, as subject to defense of failure of consideration which chattel purchaser could assert against seller, 44 ALR 2d 35.

Insanity of maker, drawer, or endorser as defense against holder in due course, 24 ALR 2d 1380.

Negotiable Instruments Law as affecting defense of usury, 5 ALR 1447, 95 ALR 735.

Rights of bona fide purchaser of note given to cover gambling loan, 53 ALR 2d 376.

DECISIONS UNDER FORMER LAW

Deriving title from foreign corporation.

Under former statute, providing that all contracts and obligations by foreign corporation made without obtaining permit shall be null and void, bona fide holder for value and without notice could not enforce note payable to bearer and delivered to noncomplying foreign corporation. *First Nat. Bank of Price v. Parker* (1920) 57 U 290, 194 P 661, 12 ALR 1373, distinguished in 94 U 43, 72 P 2d 1056.

Deriving title from thief or finder.

Although robber or finder of negotiable instrument can acquire no title against real owner, if instrument is indorsed in blank, or payable or indorsed to bearer, third party acquiring it from robber or finder bona fide for valuable consideration, and before maturity without notice of loss, may retain it against true owner. *Warren v. Smith* (1909) 35 U 455, 100 P 1069, 136 Am St Rep 1071.

Purchase after maturity.

One acquiring negotiable instrument after maturity took it subject to its alleged

infirmities of want of consideration and that transactions of which execution of note formed part were against public policy. *Manson v. Harris* (1918) 51 U 396, 170 P 970.

Taking with notice of infirmities.

An innocent purchaser of a note may recover thereon, though it was without consideration, but where transferee of note had knowledge of fact that maker received nothing therefor, he cannot rely on presumption that note imports consideration, and recover as innocent purchaser. *Utah Commercial & Savings Bank v. Fox* (1911) 40 U 205, 120 P 840.

Transferee who came into possession of note with knowledge that it was fully intended by makers that note should be held by trust company in escrow without delivery until makers were relieved of their obligation to pay another note, held not an innocent purchaser for value, and not entitled to recover on note. *De Garmo v. Kay* (1918) 52 U 231, 173 P 129.

70A-3-307. Burden of establishing signatures, defenses and due course.

- (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue
 - (a) the burden of establishing it is on the party claiming under the signature; but

- (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.
- (2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.
- (3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

History: L. 1965, ch. 154, § 3-307.

Cross-References.

- Burden of establishing a fact, 70A-1-201 (8).
 "Holder" defined, 70A-1-201 (20).
 Holder in due course, rights of, 70A-3-302, 70A-3-305.
 Rights of one not holder in due course, 70A-3-306.
 Signature, authorized representative, 70A-3-401, 70A-3-403.
 Transfer, right to indorsement, 70A-3-201.
 Unauthorized signatures, 70A-3-404.

Duty of maker to establish defense.

Introduction of check by holder in a suit against maker who admitted having executed and issued it, made prima facie case of genuineness and that holder was holder in due course, thereby shifting burden of establishing defense to maker; and since maker failed to establish defense, holder was entitled to recover on check as holder in due course. *Jaeger & Branch, Inc. v. Pappas* (1967) 20 U 2d 100, 433 P 2d 605.

Where maker sets up lack of consideration as a defense against payment on promissory note, the allegation constitutes a defense, which he must prove by a preponderance of the evidence. *Alexander v. DeLaCruz* (1976) 545 P 2d 518.

Holder in due course.

Admission that note and security agreement were executed and assigned to plaintiff established prima facie that plaintiff was holder in due course and entitled to recover on note; it cast burden on defendants of proving their contention that plaintiff was not a holder in due course. *John Deere Co. of*

Moline v. Behling (1971) 26 U 2d 30, 484 P 2d 170.

Production of instrument.

The introduction of a check, admittedly executed and issued by the defendant drawer, makes out a prima facie case of its genuineness and that the plaintiff was a holder in due course, and causes the burden of establishing his defense to the contrary to shift to the defendant (drawer). *Jaeger & Branch, Inc. v. Pappas* (1967) 20 U 2d 100, 433 P 2d 605.

Collateral References.

- Bills and Notes ⇔ 489 et seq.
 11 CJS Bills and Notes § 644 et seq.

Breach of agreement to return a note to maker as fraud which casts upon an indorsee the burden of showing his bona fide character, 6 ALR 1687.

Direction of verdict based on testimony of party or interested witness as to good faith of holder, 72 ALR 61.

Effect of fraud in the inception of a bill or note to throw upon a subsequent holder the burden of proving that he is a holder in due course, 57 ALR 1083.

Necessity of proof of title by one in possession of a negotiable instrument bearing his endorsement, 30 ALR 328.

Proof or admission that title to negotiable paper was defective as between intermediate holders as affecting presumption that subsequent holder was a holder in due course, 70 ALR 1228.

Taking negotiable paper in payment of pre-existing indebtedness as sustaining one's character as holder in due course, 80 ALR 671.

DECISIONS UNDER FORMER LAW

Bad faith.

Acquisition by bank of considerable number of promissory notes in exchange for notes held by bank which were of 5% more

face value than total of those received is not a suspicious circumstance such as would be evidence of bad faith where notes transferred by bank were considered "slow" assets and involved probability that bank might be required to make further advances to said debtors if it continued to hold their notes. *National Bank of the Republic v. Beckstead* (1926) 68 U 421, 250 P 1033, overruling in part *National Bank of the Republic v. Price* (1923) 65 U 57, 234 P 231.

Burden of proof.

Whether plaintiff has discharged the burden cast upon him by former section 44-1-60 was a matter for the trial court. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

Defective Title.

In action by indorsee on a note, where defective title of indorser is shown, plaintiff must prove that he is holder in due course, in good faith for value, without notice of any infirmity in instrument or defect in indorser's title. But if plaintiff's title is indisputably shown, it is harmless error to place on maker burden of proving that plaintiff was not holder in due course. *Miller v. Marks* (1914) 46 U 257, 148 P 412.

Failure of consideration.

In action by indorsee on note defended by maker on ground of partial failure of consideration between maker and payee, held burden was on defendant to establish such defense, and to show notice of plaintiff of failure of consideration. *Cole Banking Co. v. Sinclair* (1908) 34 U 454, 98 P 411, 131 Am St Rep 885.

In action on promissory note by indorsee, defense of partial failure of consideration was properly not considered where presumption that plaintiff was indorsee, before maturity, for value, and in good faith, was not overcome by any evidence adduced or offered by defendants. *McCornick v. Swem* (1909) 36 U 6, 102 P 626, 20 Ann Cas 1368.

Fraud.

Upon proof of fraud in inception of note, one suing on note has not only mere duty or burden of proceeding or of going forward, but has the burden of establishing existence of facts showing that he, or some person under whom he claims, acquired title as holder in due course. *Leavitt v. Thurston* (1911) 38 U 351, 113 P 77.

Evidence that prior holder had procured note by fraud, shifts burden upon one claiming to be holder in due course, to prove by a preponderance of the evidence that he had no knowledge of fraud or of any circumstances amounting to bad faith. *Utah Bond & Share Co. v. Chappel* (1926) 68 U 530, 251 P 354.

Lost instrument.

Where loss by original owner of negotiable instrument or theft from him is proven, burden of proof shifts, and holder must show that he acquired it bona fide for value and before maturity, or from someone who had perfect title. *Warren v. Smith* (1909) 35 U 455, 100 P 1069, 136 Am St Rep 1071.

Pleading and proof.

In accordance with well-settled general rules, in pleading fraud specific acts which constitute it must be pleaded; mere legal conclusions will not suffice. *Voorhees v. Fisher* (1893) 9 U 303, 34 P 64.

PART 4

LIABILITY OF PARTIES

Section

- 70A-3-401. Signature.
- 70A-3-402. Signature in ambiguous capacity.
- 70A-3-403. Signature by authorized representative.
- 70A-3-404. Unauthorized signatures.
- 70A-3-405. Impostors — Signature in name of payee.
- 70A-3-406. Negligence contributing to alteration or unauthorized signature.
- 70A-3-407. Alteration.
- 70A-3-408. Consideration.
- 70A-3-409. Draft not an assignment.
- 70A-3-410. Definition and operation of acceptance.
- 70A-3-411. Certification of a check.
- 70A-3-412. Acceptance varying draft.
- 70A-3-413. Contract of maker, drawer and acceptor.
- 70A-3-414. Contract of indorser — Order of liability.
- 70A-3-415. Contract of accommodation party.

- 70A-3-416. Contract of guarantor.
 70A-3-417. Warranties on presentment and transfer.
 70A-3-418. Finality of payment or acceptance.
 70A-3-419. Conversion of instrument — Innocent representative.

70A-3-401. Signature.

- (1) No person is liable on an instrument unless his signature appears thereon.
- (2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

History: L. 1965, ch. 154, § 3-401.

Cross-References.

- Acceptance of draft, 70A-3-410.
 Ambiguous capacity, signature in, 70A-3-402.
 Authorized representative, signature by, 70A-3-403.
 Impostors, signature in name of payee, 70A-3-405.
 Indorsement of instrument, 70A-3-202 (2).
 Unauthorized signatures, negligence contributing to, 70A-3-404, 70A-3-406.
 Wrong or misspelled name, 70A-3-203.

Check requiring two signatures.

Drawee bank must not disburse funds except upon checks or orders signed properly by drawer in accordance with the bank's agreement with him and bank was thus liable to corporation for funds disbursed on checks signed only by president thereof under agreement that bank would honor

70A-3-402. Signature in ambiguous capacity. Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

History: L. 1965, ch. 154, § 3-402.

Cross-References.

Signature, how made, 70A-3-401.

Collateral References.

- Bills and Notes ⇔ 116, 119, 223, 248, 267, 294, 496 (3).
 10 CJS Bills and Notes §§ 38 et seq., 42; 11 CJS Bills and Notes § 661.
 11 AmJur 2d 241, 381, Bills and Notes §§ 212, 358.

checks of corporation only upon signature of both president and vice-president. *Movie Films, Inc. v. First Security Bank of Utah* (1968) 22 U 2d 1, 447 P 2d 38.

Collateral References.

- Bills and Notes ⇔ 54, 59; Signatures ⇔ 1 et seq.
 10 CJS Bills and Notes §§ 34, 73 et seq.; 80 CJS Signatures § 1 et seq.
 11 AmJur 2d 237, Bills and Notes §§ 209, 210.

Construction and effect of statutes as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested, 42 ALR 2d 516.

Place of maker's signature on bill or note, 20 ALR 394.

Sufficiency of signing or endorsing a bill or note by printing or stamping, 7 ALR 672, 46 ALR 1498.

Admissibility of parol evidence to explain contract implied from regular endorsement of bill or note, 92 ALR 721.

Endorsement of bill or note in form of guaranty of payment, 21 ALR 1375, 33 ALR 97, 46 ALR 1516.

Law regarding notice as condition of holding endorser as applied to bill or note with acceleration clause, or payable in installments, 104 ALR 1331.

Rights of transferee after maturity of accommodation paper, 48 ALR 1280.

DECISIONS UNDER FORMER LAW

Who is indorser.

Payee "assigning" all right, title, and interest in promissory note deemed indorser

without restriction or qualification, words used being merely what law implies from blank or general indorsement. *Prichard v.*

Strike (1926) 66 U 394, 243 P 114, 44 ALR 1348, distinguished in 13 U 2d 256, 372 P 2d 346.

70A-3-403. Signature by authorized representative.

- (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.
- (2) An authorized representative who signs his own name to an instrument
 - (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
 - (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.
- (3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

History: L. 1965, ch. 154, § 3-403.

Cross-References.

Impostors, signature in name of payee, 70A-3-405.

"Representative" defined, 70A-1-201 (35).

Signature, appearance on instrument required, 70A-3-401 (1).

Unauthorized signatures, 70A-3-404.

Collateral References.

Bills and Notes ⇔ 54, 123; Principal and Agent ⇔ 109, 126 (3).

2A CJS Agency §§ 198 to 203; 10 CJS Bills and Notes §§ 32, 73, 114.

11 AmJur 2d 615, Bills and Notes § 550 et seq.

Admissibility of oral or extrinsic evidence on question of liability on bill of exchange, promissory note, or other contract where signature is followed by word or abbreviation which may be either descriptive or indicative of contracting character, 113 ALR 1364.

Admissibility of parol or extrinsic evidence for purpose of relieving from personal liability one to whose signature is added words indicating his agency or representative capacity, where name of his principal does not appear on face of instrument, 111 ALR 650.

Authority of agent to endorse and transfer commercial paper, 12 ALR 111, 37 ALR 2d 453.

Authority of corporate officers to endorse and transfer commercial paper, 37 ALR 2d 523.

Authority of officer or agent of bank to endorse and transfer commercial paper, 37 ALR 2d 505.

Buying goods, authority as to, as including authority to execute bill or note, 55 ALR 2d 92.

Capacity in which one endorses commercial paper of corporation without qualification, 82 ALR 2d 424.

Construction and application of UCC § 3-403 (2) dealing with personal liability of authorized representative who signs negotiable instrument in his own name, 97 ALR 3d 798.

Deposit to individual account of checks or notes drawn or endorsed by agent or fiduciary as charging bank with notice of misappropriation, 106 ALR 836, 115 ALR 648.

General authority under power of attorney to execute or endorse commercial paper as extending to accommodation paper, 35 ALR 467.

Liability of principal for overdraft drawn by agent and paid by bank, 58 ALR 816.

Sufficiency of execution of instrument by agent or attorney in fact in name of principal without his own name appearing, 96 ALR 1251.

DECISIONS UNDER FORMER LAW

Proof of intent.

There is no ground for admission of extraneous evidence to show intent with

which agent signed instrument, where agent's name does not appear ambiguously. *Starley v. Deseret Foods Corp.* (1938) 93 U 577, 74 P 2d 1221.

70A-3-404. Unauthorized signatures.

- (1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.
- (2) Any unauthorized signature may be ratified for all purposes of this chapter. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

History: L. 1965, ch. 154, § 3-404.

11 AmJur 2d 789, 794, Bills and Notes §§ 709, 713, 714.

Cross-References.

Burden of establishing signatures, 70A-3-307.

Forgery in general, 76-6-501 et seq.

Impostors, signature in name of payee, 70A-3-405.

Negligence contributing to unauthorized signature, 70A-3-406.

Signature, authorized representative, 70A-3-401, 70A-3-403.

"Unauthorized" signature or indorsement defined, 70A-1-201 (43).

Estoppel by delay after knowledge in disclosing forgery of commercial paper, 50 ALR 1374.

Payment of check upon forged or unauthorized endorsement as affecting the right of true owner against the bank, 14 ALR 764, 69 ALR 1076, 137 ALR 874.

Ratification of forged or unauthorized signature on negotiable instrument under the provision of the Negotiable Instruments Act negating effect of such signature unless the party against whom it is sought to enforce a right thereunder is precluded from setting up the forgery or want of authority, 150 ALR 978.

Right of drawee of forged check or draft to recover amount paid thereon, 121 ALR 1056.

Rights and obligations between depositor and bank which pays forged check, as affected by provisions of Negotiable Instruments Act, 146 ALR 840.

What constitutes ratification of unauthorized signature under UCC § 3-404, 93 ALR 3d 967.

When depositor-drawer of check is "precluded" under Negotiable Instruments Law § 23, from setting up forgery of endorsement or want of authority against drawee bank, 39 ALR 2d 641.

Check requiring two signatures.

Drawee bank must not disburse funds except upon checks or orders signed properly by drawer in accordance with the bank's agreement with him and bank was thus liable to corporation for funds disbursed on checks signed only by the president thereof under agreement that bank would honor checks of corporation only upon signature of both president and the vice-president. *Movie Films, Inc. v. First Security Bank of Utah* (1968) 22 U 2d 1, 447 P 2d 38.

Collateral References.

Bills and Notes ⇔ 54, 123, 201, 377.

10 CJS Bills and Notes §§ 73, 493.

DECISIONS UNDER FORMER LAW

Forged indorsement.

What constitutes a forged indorsement is a matter of general law. *Heavy v. Commercial*

Nat. Bank of Ogden City (1904) 27 U 222, 75 P 727, 101 Am St Rep 966.

A forged indorsement does not pass title to commercial paper negotiable only by indorse-

ment. *Simpson v. Denver & R. G. R. Co.* (1913) 43 U 105, 134 P 883, 46 LRA (NS) 1164, explained in 103 F 2d 190.

Finance company, as drawer of checks, had no cause of action against defendant bank, as drawee, to obtain recredit of drawer's account for the amount of two checks which financed the purchase of an auto, where the funds represented by the check reached the intended party, and the plaintiff-finance company received security for the loan it had made, even though one of the payee names the finance company placed on the checks was a nonexistent person, and the indorsement by such person was a forgery.

Blomquist v. Zions First Nat. Bank (1966) 18 U 2d 65, 415 P 2d 213.

Rights of bona fide holder.

A bona fide holder without notice acquires no title to a negotiable instrument under a forged indorsement. The general rules applicable to bona fide holders for value do not apply in such a case. *Warren v. Smith* (1909) 35 U 455, 100 P 1069, 136 Am St Rep 1071.

An action of trover lies without previous demand and refusal against one who possesses himself improperly of bill stolen from plaintiff or against one who receives payment even in good faith of such stolen bill under forged indorsement. *Warren v. Smith* (1909) 35 U 455, 100 P 1069, 136 Am St Rep 1071.

70A-3-405. Impostors — Signature in name of payee.

- (1) An indorsement by any person in the name of a named payee is effective if
 - (a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or
 - (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or
 - (c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.
- (2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

History: L. 1965, ch. 154, § 3-405.

Cross-References.

Signature, authorized representative, 70A-3-401, 70A-3-403.

Unauthorized signature, negligence contributing to, 70A-3-404, 70A-3-406.

Collateral References.

Bills and Notes ⇐ 6, 32, 182, 279.

10 CJS Bills and Notes §§ 129, 192, 220.

10 AmJur 2d 606-610, Banks §§ 638-640.

Bills and notes: nominal payee rule of UCC § 3-405 (1) (b), 92 ALR 3d 268.

Construction and application of UCC § 3-405 (1) (a) involving issuance of nego-

tiable instrument induced by impostor, 92 ALR 3d 608.

Payee as holder in due course, 2 ALR 3d 1115.

Right of drawee of forged check or draft to recover amount paid thereon, 12 ALR 1089, 71 ALR 337, 121 ALR 1056.

Right of previous holder of check paid by bank to take advantage of depositor's failure to examine vouchers, 17 ALR 956.

Who must bear loss as between drawer or endorser, who delivers check to an impostor and one who purchases, cashes, or pays it upon the impostor's endorsement, 22 ALR 1228, 81 ALR 2d 1365.

70A-3-406. Negligence contributing to alteration or unauthorized signature. Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who

pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

History: L. 1965, ch. 154, § 3-406.

10 AmJur 2d 589, Banks § 624; 11 AmJur 2d 413, 789, Bills and Notes §§ 386, 710.

Cross-References.

Alteration of instrument, 70A-3-407.

"Good faith" defined, 70A-1-201 (19).

Signature, how made, 70A-3-401.

"Unauthorized" signature or indorsement defined, 70A-1-201 (43).

Unauthorized signatures, effect, 70A-3-404.

Commercial paper: what amounts to "negligence contributing to alteration or unauthorized signature" under U. C. C. § 3-406, 67 ALR 3d 144.

Negligence in drawing check which facilitates alteration as to amount as affecting drawee's bank's liability, 42 ALR 2d 1070.

Payee's prior negligence facilitating forging of endorsement as precluding recovery from bank paying check, 87 ALR 2d 638.

Collateral References.

Alteration of Instruments ⇔ 22; Bills and Notes ⇔ 115, 453.

3A CJS Alteration of Instruments § 80; 10 CJS Bills and Notes § 484.

70A-3-407. Alteration.

- (1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in
 - (a) the number or relations of the parties; or
 - (b) an incomplete instrument, by completing it otherwise than as authorized; or
 - (c) the writing as signed, by adding to it or by removing any part of it.
- (2) As against any person other than a subsequent holder in due course
 - (a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;
 - (b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.
- (3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

History: L. 1965, ch. 154, § 3-407.

Collateral References.

Alteration of Instruments ⇔ 2 et seq.; Bills and Notes ⇔ 378.

3A CJS Alteration of Instruments § 5 et seq.; 10 CJS Bills and Notes § 486.

4 AmJur 2d 6 to 9, Alteration of Instruments §§ 4 to 6; 11 AmJur 2d 108, Bills and Notes § 78.

Cross-References.

Bank may charge customer's account in case of altered instrument, 70A-4-401.

Burden of establishing signatures, defenses and due course, 70A-3-307.

Effect of discharge against holder in due course, 70A-3-602.

Holder in due course, rights of, 70A-3-305.

Incomplete instruments, 70A-3-115.

Notice to purchaser, 70A-3-304.

Rights of one not holder in due course, 70A-3-306.

Alteration in check or other instrument of name of branch of bank as material, 174 ALR 299.

Alteration of commercial paper by reducing the amount, 9 ALR 1087.

Alteration of instrument by agent as binding on principal, 51 ALR 1229.

Alteration of note before delivery to payee as affecting parties who do not personally consent, 44 ALR 1244.

Detachment of paper used to conceal the nature or terms of a bill or note which one signed or endorsed, as an alteration, 34 ALR 582.

Erasing endorsement of payment as an alteration of instrument, 44 ALR 1540.

Figures showing amount of commercial paper, alteration of, without altering written words, 64 ALR 2d 1029.

Indication of alteration as affecting transferee's character as a holder in due course, 171 ALR 798.

Liability of party to commercial paper so drawn as to be easily alterable as to amount, 22 ALR 1139, 36 ALR 327, 39 ALR 1380.

Material alteration which avoids note, as affecting debt for which note was given, or security therefor, 127 ALR 343.

Memorandum on negotiable instrument as an alteration, 96 ALR 1102.

Rights and liabilities of bank with respect to certified check or draft fraudulently altered, 22 ALR 1157.

Rights and liabilities of drawee bank, as to persons other than drawer, with respect to uncertified check which was altered, 75 ALR 2d 611.

Rights and obligations between depositor and bank which pays forged check as affected by provisions of Negotiable Instruments Law, 146 ALR 840.

What constitutes "fraudulent and material" alteration of negotiable instrument under UCC § 3-407 (2) (a), 88 ALR 3d 905.

DECISIONS UNDER FORMER LAW

Authorized alterations.

A payee who is to determine, within reason, the amount to be charged as interest may fill in the blank in the interest clause, without explicit direction by the maker. *Plescia v. Humphries* (1952) 121 U 355, 241 P 2d 1124.

Where a payee writes the due date on a note pursuant to a definite understanding as to the due date thereof, the fact that the maker gave no explicit direction to the payee to write the due date on the note is immaterial. *Plescia v. Humphries* (1952) 121 U 355, 241 P 2d 1124.

Effect of alteration.

An altered note is avoided in hands of one not a due course holder. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

While a material alteration of a note is a defense to an action on the instrument itself, in order that such an alteration may be a bar to recovery on the original debt or consideration, it must appear that the alteration was made with fraudulent intent. *Idaho State Bank of Twin Falls, Idaho v. Hooper Sugar Co.* (1929) 74 U 24, 276 P 659, 68 ALR 969.

Express authority.

Mortgagors ratified manner in which mortgage broker completed blank note by executing four extensions of original note after they acquired actual knowledge that they had been given a one-year construction loan rather than a twenty-year loan; the question of express authority to complete note became irrelevant and they were not entitled to reformation and broker was entitled to

foreclose. *Doxey-Layton Co. v. Holbrook* (1971) 25 U 2d 194, 479 P 2d 348.

Pleading and proof.

The general rule of pleading alteration of a written instrument requires that, where the instrument is declared upon in its altered form, the answer should be in the form of a general denial of all the material allegations of the complaint, or a specific denial of the execution of the instrument or a specific statement of the facts relied upon for a defense. *Farmers' & Stockgrowers' Bank v. Pahvant Valley Land Co.* (1917) 50 U 35, 165 P 462.

Where defendants made payment of interest after maturity on the note so stamped, their answer should allege that the alteration was made without their consent or knowledge but with privity or knowledge on the part of plaintiff before delivery, and that they had not since ratified the alteration. *Farmers' & Stockgrowers' Bank v. Pahvant Valley Land Co.* (1917) 50 U 35, 165 P 462.

Presumptions.

Where it is alleged that the words "Notice and protest waived, and for value received payment of within note guaranteed by" were stamped over signatures of indorsers after they signed, but all appeared to be regular on face of paper, it will be presumed that stamping was properly made on the note before delivery to plaintiff. *Farmers' & Stockgrowers' Bank v. Pahvant Valley Land Co.* (1917) 50 U 35, 165 P 462.

What constitutes material alteration.

Under former section 44-1-127 alteration of name of payee and rate of interest was a material alteration. *Idaho State Bank of*

Twin Falls, Idaho v. Hooper Sugar Co. (1929) 74 U 24, 276 P 659, 68 ALR 969.

Where notes on their faces called for 7% interest, "8%" written above word seven, which was not scratched out, was not an alteration, and as to parties liable thereon who had not consented to the change, the notes still called for 7% as originally agreed

upon. Garner v. Thomas (1938) 94 U 287, 75 P 2d 168.

A date written by the payee in the upper right-hand corner of a note for his convenience to indicate the date when the note was delivered to him, and not purporting to be a part of the body of the note, does not constitute a material alteration of the note. Plescia v. Humphries (1952) 121 U 355, 241 P 2d 1124.

70A-3-408. Consideration. Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (section 70A-3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this act under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount.

History: L. 1965, ch. 154, § 3-408.

Cross-References.

Burden of establishing signatures, defenses and due course, 70A-3-307.

Rights of one not holder in due course, 70A-3-306 (c).

Taking for value, 70A-3-303.

Antecedent obligation.

Consideration was not required to support promissory note given by defendant as security for an antecedent obligation of the corporation in which he had invested and, even so, plaintiff's forbearance in not bringing an action against the corporation or attaching its accounts receivable constituted adequate consideration. A. M. Castle & Co. v. Bagley (1970) 24 U 2d 136, 467 P 2d 408.

Pleading and proof.

Where evidence showed that creditors paid off debtor's obligation to a third party in exchange for his promissory note in the amount of the obligation satisfied, note was given for consideration and defendant was bound by it. Alexander v. DeLaCruz (1976) 545 P 2d 518.

Collateral References.

Bills and Notes ⇔ 90, 97, 315, 370, 452 (3), 493 (1), 497 (1).

10 CJS Bills and Notes §§ 143, 152, 153, 517; 11 CJS Bills and Notes §§ 654, 655, 755.

11 AmJur 2d 243, 264, 721, Bills and Notes §§ 215, 216, 237, 238, 657.

Bona fides of purchaser of bill or note on an executory consideration, 3 ALR 987, 100 ALR 1357.

Burden of proof as to consideration when plaintiff not protected as holder in due course, 35 ALR 1370, 65 ALR 904, 127 ALR 1003.

Consideration for note or other obligation given to make good depletion of capital or assets of bank, 95 ALR 534.

Cross notes, bills, or checks as consideration for each other, 7 ALR 1569.

Moral obligation as consideration for executory promise, 17 ALR 1299, 79 ALR 1346, 8 ALR 2d 787.

Renewal as affecting defense of failure of consideration, 35 ALR 1258, 72 ALR 600.

Renunciation of rights as affected by consideration, 65 ALR 2d 593.

Right of maker, or other party to transfer to make the defense that paper was transferred on a gambling consideration, 56 ALR 1322.

Right of recovery by bona fide purchaser of note or other instrument given to cover gambling loan, 53 ALR 2d 376.

Surrender of claim against insolvent as consideration for promise by third person, 59 ALR 315.

DECISIONS UNDER FORMER LAW

Burden of proof.

In action by indorsee on note defended by maker on ground of partial failure of consideration between maker and payee, held bur-

den was on defendant to establish such defense, and to show notice to plaintiff of failure of consideration. *Cole Banking Co. v. Sinclair* (1908) 34 U 454, 98 P 411, 131 Am St Rep 885.

The production of the note and proof of the signature make a prima facie case of a valuable consideration, placing burden on defendant of producing evidence to overcome such case, but when such evidence is produced, the burden is then on plaintiff to show by a fair preponderance of all the evidence a legal and valuable consideration. *Hudson v. Moon* (1913) 42 U 377, 130 P 774, distinguished in 47 U 549, 155 P 432.

Note was deemed prima facie to have been issued for a valuable consideration, and person who signed it was deemed to have done so for value, and burden of showing that there was no consideration for part of principal amount of note was held not to have been sustained. *Dern Inv. Co. v. Carbon County Land Co.* (1938) 94 U 76, 75 P 2d 660.

In action by administratrix to recover on negotiable note, note was presumed, under former section 44-1-25, to have been given for a valuable consideration, and where there was insufficient evidence to cast a doubt on this presumption, burden of proving consideration could not be shifted upon administratrix. *Burk v. Peter* (1949) 115 U 58, 202 P 2d 543.

Face value.

While measure of damages for conversion of negotiable instruments is actual rather than face value, in absence of proof of actual value they will be deemed of face value; and no inference arises that they are worthless merely because no evidence of actual value is adduced. *Mulliner v. McCornick & Co., Bankers* (1927) 69 U 557, 257 P 658.

Failure of consideration.

Where drawer and payee of check entered into oral agreement for sale of real property for which check was given as part of negotiations, but payee failed to perform or tender performance of his part of agreement and was not ready, able and willing to perform, drawer was entitled to judgment in action by payee to recover on check upon which drawer had stopped payment, since there was failure of consideration. *Harris v. Wilstead* (1949) 114 U 496, 201 P 2d 491.

Foreign corporation.

Where negotiable note which was indorsed by defendant was made payable to, and indorsed by maker, and was given to foreign corporation for purchase of stock, and such corporation never complied with laws of this

state before commencing to do business, defendant-indorser of note was liable to holder in due course notwithstanding that maker was not liable, because corporation was doing business within state without complying with laws, since indorsement implied valuable consideration, and contract of indorser was distinct from that of maker. *Farmers' & Merchants' Sav. Bank v. Hudson* (1923) 62 U 131, 218 P 93.

Illegal consideration.

A note given to suppress a criminal prosecution is against public policy, and it is not enforceable between the parties. *Great American Indemnity Co. v. Berryessa* (1952) 122 U 243, 248 P 2d 367.

Pleading and proof.

In action on note, it is not necessary for plaintiff either to plead or prove consideration in order to make out prima facie case. *Utah Nat. Bank of Salt Lake City v. Nelson* (1910) 38 U 169, 111 P 907.

In action on note, where it was alleged in answer, in general terms, that note in question was without consideration, and that no consideration whatever passed or was given for promissory note, held, general finding that note was executed for valuable consideration received by defendant negated affirmative allegation of answer and was therefore sufficient. *Utah Nat. Bank of Salt Lake City v. Nelson* (1910) 38 U 169, 111 P 907.

In action by payee on note, want or failure of consideration may be shown if presented by averments contained in answer, by showing any arrangement entered into between the parties that is not illegal or unreasonable. *Smith v. Brown* (1917) 50 U 27, 165 P 468, followed in *Harris v. Wilstead* (1949) 114 U 496, 201 P 2d 491.

Defense of want of consideration for a promissory note may be set up against purchaser after maturity. *Manson v. Harris* (1918) 51 U 396, 170 P 970.

Statement in an answer that "the legal consideration for said note failed," states a mere legal conclusion. *Willis v. Kronendonk* (1921) 58 U 592, 200 P 1025, 18 ALR 947.

Consideration for a negotiable instrument was to be presumed under former section 44-1-25; allegation of consideration was unnecessary. *Vietti v. Jeffries* (1931) 77 U 498, 297 P 1012.

Absence of finding as to consideration in action on negotiable note did not prejudice rights of joint maker and hence did not require reversal. *Parowan Mercantile Co. v. Gurr* (1934) 83 U 463, 30 P 2d 207.

A negotiable note which recited that it was given for a valuable consideration was an admission by payor of that fact. *Burk v. Peter* (1949) 115 U 58, 202 P 2d 543.

Preexisting debt.

A first mortgage on real property and underlying note given in consideration of antecedent indebtedness to mortgagee and for an additional advance of cash, being supported by an adequate consideration, had priority over second mortgage. *Abraham v. Abraham* (1964) 15 U 2d 430, 394 P 2d 385.

Presumptions.

Note, negotiable in form, is presumed to be based upon good and valuable consideration. *Niles v. United States Ozocerite Co.* (1911) 38 U 367, 113 P 1038.

Where negotiable notes are sold at buyer's special instance and request, and nothing is said about price to be paid, the law implies that the buyer agrees to pay a reasonable price, as in like sale of any other personal property. *Mulliner v. McCornick & Co., Bankers* (1927) 69 U 557, 257 P 658.

70A-3-409. Draft not an assignment.

- (1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.
- (2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

History: L. 1965, ch. 154, § 3-409.

Cross-References.

Acceptance varying draft, 70A-3-412.

Certification of check, 70A-3-411.

Checks drawn by or payable to fiduciaries, 22-1-6.

Contract of accommodation party, 70A-3-415.

Definition and operation of acceptance, 70A-3-410.

Payor bank's responsibility for late return of item, 70A-4-302.

Assignment by check.

The assignor and the assignee may by agreement make an assignment by means of a check. *State Bank of Southern Utah v. Stallings* (1967) 19 U 2d 146, 427 P 2d 744.

In order for a check to constitute an assignment of funds from the drawer to the payee it must be certified so that the drawer transfers a present interest in the check to the payee and at the same time parts with the power of control over the check. *State Bank of Southern Utah v. Stallings* (1967) 19 U 2d 146, 427 P 2d 744.

Where the drawer's account in the drawee bank has been garnished prior to presentment by the payee of check drawn on drawee bank, the payee is not entitled to priority over the garnishment because the drawer retained the power to stop payment on the check before presentment and the payee could not show an assignment thereby. *State Bank of Southern Utah v. Stallings* (1967) 19 U 2d 146, 427 P 2d 744.

Priority between garnishment and outstanding check.

Check is not an assignment of funds in drawer's account, in absence of specific agreement to that effect, so that garnishment served before check was presented for payment takes priority over check. *State Bank of Southern Utah v. Stallings* (1967) 19 U 2d 146, 427 P 2d 744.

Collateral References.

Assignments ⇌ 49; Banks and Banking ⇌ 140 (3), 145; Bills and Notes ⇌ 23, 66.

6A CJS Assignments § 55; 9 CJS Banks and Banking §§ 366, 373; 10 CJS Bills and Notes §§ 35, 171.

10 AmJur 2d 531, 538, Banks §§ 562, 563, 568; 11 AmJur 2d 142, Bills and Notes § 104.

70A-3-410. Definition and operation of acceptance.

- (1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

- (2) A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored.
- (3) Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

History: L. 1965, ch. 154, § 3-410.

Cross-References.

- Acceptance varying draft, 70A-3-412.
 Certification of check, 70A-3-411.
 Conversion of instrument, 70A-3-419.
 Finality of payment or acceptance, 70A-3-418.
 Liability of drawee in contract, tort or otherwise arising from obligation or representation, which is not an acceptance, unaffected, 70A-3-409 (2).
 Signature must appear on instrument, 70A-3-401 (1).
 Warranties on presentment and transfer, 70A-3-417.

Collateral References.

- Bills and Notes ⇐ 68 et seq.
 10 CJS Bills and Notes § 170 et seq.
 11 AmJur 2d 565, Bills and Notes § 500 et seq.

Acceptance of cashier's check from debtor as absolute or conditional payment, 36 ALR 470, 42 ALR 1353, 45 ALR 1487.

Acceptance of checks by telegraph or telephone, 2 ALR 1146, 13 ALR 989.

Bank's acceptance of check as affected by attempt to pay it otherwise than in cash, 38 ALR 185.

Clearinghouse transactions as payment or acceptance of checks, 12 ALR 998, 30 ALR 1028.

Construction and effect of provision of Negotiable Instruments Law regarding destruction of or refusal to return bill as an acceptance, 63 ALR 1138.

Discharge of drawer or endorser of check by holder's acceptance thereof of something other than money, 52 ALR 994, 87 ALR 442.

Drawee's mere writing of his name on bill as an acceptance thereof, 48 ALR 760.

Indorsement of negotiable instrument by writing not on instrument itself, 19 ALR 3d 1297.

Ratification by corporation of unauthorized acceptance of commercial paper by officer by acceptance and retention of benefits, 7 ALR 1472.

Rights of transferee after maturity of accommodation paper, 48 ALR 1280.

Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 ALR 3d 714.

Variance between description of goods in letter of credit and documents accompanying draft as affecting duty to accept draft, 30 ALR 353.

What amounts to acceptance extrinsic to check, 26 ALR 312.

DECISIONS UNDER FORMER LAW

Construction.

The reason for the rule requiring acceptance in writing is that sound policy requires some substantial and tangible evidence of the contract, more reliable in its nature than the statements or recollection of witnesses. *Farmers & Merchants Bank v. Universal C. I. T. Credit Corp.* (1955) 4 U 2d 155, 289 P 2d 1045.

Right of action.

Even though drawee cannot be sued because of a noncompliance with former section 44-2-7, holder of check may sue drawer, maker, indorser or others than drawee. *National Copper Bank v. Davis County Bank* (1915) 47 U 236, 152 P 1180.

Verbal agreement.

Where bank had been accepting drafts against the drawee under a verbal agree-

ment, and the drawee told the bank not to accept any more drafts for wholesale financing but the bank did continue to accept such checks contending that their authority was enlarged because the drawee had stated that checks for wholesale and retail could be distinguished generally by the amounts and the round figures, it was held that the bank cannot hold the drawee responsible for refusing to honor the drafts. The bank was held to a high position of trust and because of their knowledge of business affairs were not warranted in relying upon the statement as to how to distinguish between wholesale and retail drafts. The bank elected to engage in a course of dealing ignoring the Negotiable Instruments Law rule and when circumstances arose which put it on notice that to continue on the same basis was hazardous to

itself and the finance company it continued Universal C. I. T. Credit Corp. (1955) 4 U 2d
at its peril. Farmers & Merchants Bank v. 155, 289 P 2d 1045.

70A-3-411. Certification of a check.

- (1) Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.
- (2) Unless otherwise agreed a bank has no obligation to certify a check.
- (3) A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

History: L. 1965, ch. 154, § 3-411.

Cross-References.

Acceptance of draft, 70A-3-410 (2).
Acceptance varying draft, 70A-3-412.
Contract of maker, drawer and acceptor, 70A-3-413.
Draft not an assignment, 70A-3-409 (1).
Finality of payment or acceptance, 70A-3-418.
Warranties on presentment and transfer, 70A-3-417.

Collateral References.

Banks and Banking ⇔ 145; Bills and Notes ⇔ 68, 256, 301, 437.
9 CJS Banks and Banking § 370 et seq.; 10 CJS Bills and Notes §§ 39, 217, 468, 472.
10 AmJur 2d 556, 566, Banks §§ 588-590, 600.

Avoidance of bank's certification secured by fraud, 100 ALR 2d 1197.

Cancellation or revocation of certification because mistake as to drawer's account, 29 ALR 140.

Collecting bank's acceptance of certification of check instead of payment, 61 ALR 748, 89 ALR 1336.

Delay in presenting certified or accepted check for payment as affecting liability of drawee bank, 42 ALR 1138.

Discharge of drawer or endorser of check by holder's acceptance of certification thereof as payment, 52 ALR 1001, 87 ALR 442.

Effect of certification of check upon presentment by one other than the owner or drawer, 12 ALR 992.

Refusal to certify check by drawee bank as equivalent to dishonor, excusing presentment, for purposes of drawer's liability, 62 ALR 377.

Right of drawer to stop payment of certified check, 35 ALR 942.

70A-3-412. Acceptance varying draft.

- (1) Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance canceled.
- (2) The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at such bank or place.
- (3) Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

History: L. 1965, ch. 154, § 3-412.

Presentment of draft accepted by bank in continental United States, 70A-3-504 (4).

Cross-References.

Contract of maker, drawer and acceptor, 70A-3-413.
Operation of acceptance, 70A-3-410.

Collateral References.

Bills and Notes ⇔ 83, 256, 301.
10 CJS Bills and Notes §§ 39, 180, 217.
11 AmJur 2d 577, Bills and Notes § 517.

70A-3-413. Contract of maker, drawer and acceptor.

- (1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to section 70A-3-115 on incomplete instruments.

- (2) The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.
- (3) By making, drawing or accepting the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.

History: L. 1965, ch. 154, § 3-413.

Cross-References.

Acceptance varying draft, 70A-3-412.
 Alteration of instrument, 70A-3-407.
 Finality of payment or acceptance, 70A-3-418.
 Incomplete instruments, 70A-3-115.
 Negligence contributing to alteration or unauthorized signature, 70A-3-406.
 Warranties on presentment and transfer, 70A-3-417.

Collateral References.

Bills and Notes ⇄ 23, 26, 27, 48, 74 et seq.
 10 CJS Bills and Notes §§ 35 et seq., 183.
 11 AmJur 2d 653, 657, 662, Bills and Notes §§ 586, 589, 593.

Admissibility of parol evidence that one signed negotiable paper for purpose other than assuming an obligation thereon, 75 ALR 1519.

Conflict of laws as regards title to commercial paper and right of holder to enforce it as against drawer or primary obligor, 95 ALR 658.

Effect of death of one of joint payees of bill or note, 57 ALR 600.

Insanity of drawer or endorser as defense against holder in due course, 24 ALR 2d 1380.

Parol evidence as to whether one whose name appears on the face of a note signed as a witness or as maker, 15 ALR 197.

Rights and obligations between depositor and bank which pays forged check, as affected by provisions of Negotiable Instruments Law, 146 ALR 840.

DECISIONS UNDER FORMER LAW

Drunkenness.

Drunkenness of the maker is no defense, especially where he ratified the contract after he became sober. *Smith v. Williamson* (1892) 8 U 219, 30 P 753.

Noncomplying foreign corporation.

Under 16-8-3 (since repealed), providing that all contracts and obligations by foreign

corporation, made without obtaining permit, shall be null and void, bona fide holder for value and without notice could not enforce note payable to bearer and delivered to non-complying foreign corporation. *First Nat. Bank of Price v. Parker* (1920) 57 U 290, 194 P 661, 12 ALR 1373, distinguished in 82 U 267, 17 P 2d 209; 94 U 43, 72 P 2d 1056.

70A-3-414. Contract of indorser — Order of liability.

- (1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.
- (2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

History: L. 1965, ch. 154, § 3-414.

Cross-References.

Ambiguous terms and rules of construction, 70A-3-118 (e).

Contract of maker, drawer and acceptor, 70A-3-413.

Warranties on presentment and transfer, 70A-3-417.

When presentment, notice of dishonor and protest necessary or permissible, 70A-3-501.

Collateral References.

Bills and Notes \Leftrightarrow 181, 188, 190, 223, 241 et seq., 280 et seq., 396 et seq.

10 CJS Bills and Notes §§ 38, 39, 204, 207, 212, 214, 217 et seq.; 11 CJS Bills and Notes § 675.

11 AmJur 2d 667, 672, 683, 692, Bills and Notes §§ 598, 599, 607, 618, 628, 629.

Addition of word indicating representative or fiduciary capacity after name of payee, endorser, or endorsee on commercial paper as charging transferee with notice of trust in favor of third parties or of defense of maker, 61 ALR 1389.

Admissibility of parol evidence to vary or explain the contract implied from the regular endorsement of a bill or note, 4 ALR 764, 11 ALR 637, 22 ALR 527, 35 ALR 1120, 54 ALR 999, 92 ALR 721.

Authority of agent to endorse and transfer commercial paper, 37 ALR 2d 453.

Endorsement of bill or note in form of guaranty as transferring title, 21 ALR 1375, 33 ALR 97, 46 ALR 1516.

Endorsement without recourse as affecting character of endorsee or subsequent holder as holder in due course, 77 ALR 487.

General authority under power of attorney to execute or endorse commercial paper as extending to accommodation paper, 35 ALR 467.

Insanity of endorser as defense against holder in due course, 24 ALR 2d 1390.

Necessity of express agreement between endorsers to be jointly and not successively liable, in order to give a right of contribution as between themselves, 11 ALR 1332, 90 ALR 305.

Undertaking of one who endorses a note without recourse, 2 ALR 216, 91 ALR 399.

DECISIONS UNDER FORMER LAW

Contract of indorser.

Where negotiable note which was indorsed by defendant was made payable to, and indorsed by, maker, and was given to foreign corporation for purchase of stock, and such corporation had not complied with laws of this state before commencing to do business, defendant who indorsed note was liable to holder in due course notwithstanding that maker was not liable because corporation was doing business without complying with laws relating thereto, since indorsement implied consideration, and contract of indorser was distinct from that of maker. *Farmers' & Merchants' Sav. Bank v. Hudson* (1923) 62 U 131, 218 P 93.

Effect of indorsement.

The effect of indorsement without recourse is merely to qualify duties, obligations, and responsibilities of indorser, and it cannot be considered as evidentiary of notice of any infirmity of instrument. *Leavitt v. Thurston* (1911) 38 U 351, 113 P 77.

Indorser without recourse.

Notes payable to bearer and not indorsed by seller, or where last indorsement is in blank, are transferable by delivery, and seller's status is that of indorser without recourse. *Mulliner v. McCornick & Co., Bankers* (1927) 69 U 557, 257 P 658.

What constitutes qualified indorsement.

One indorsing negotiable promissory note and desiring to disclaim responsibility of an indorser must, by appropriate words, clearly indicate such intention or an intention to be bound in some other capacity and indorsement by payee of note, purporting to "assign" all his right, title, and interest therein, is not a qualified indorsement and does not constitute indorser a mere assignor of the instrument, words used being nothing more than law implies from a blank or general indorsement. *Prichard v. Strike* (1926) 66 U 394, 243 P 114, 44 ALR 1348, distinguished in 13 U 2d 256, 372 P 2d 346.

70A-3-415. Contract of accommodation party.

- (1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.
- (2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.
- (3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give

the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

- (4) An indorsement which shows that it is not in the chain of title is notice of its accommodation character.
- (5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

History: L. 1965, ch. 154, § 3-415.

Cross-References.

Consideration for an instrument, 70A-3-408.

Impairment of recourse or of collateral, 70A-3-606.

Payment or satisfaction of instrument, 70A-3-603.

Rights of holder in due course, 70A-3-305.

Tender of payment, 70A-3-604.

Right of recourse against party accommodated.

The principles of contribution among coobligors are not applicable between an accommodation party and the accommodated party; accommodation party who pays a judgment on an instrument is entitled to judgment against the accommodated party for the full amount he was required to pay. *Kennedy v. Bank of Ephraim* (1979) 594 P 2d 881.

Collateral References.

Bills and Notes ⇐ 48-52, 96, 122, 237 et seq., 371.

10 CJS Bills and Notes §§ 39, 482; 11 CJS Bills and Notes § 737 et seq.

11 AmJur 2d 269, 588, 602, 609, 692, Bills and Notes §§ 241, 530, 539-541, 546-549, 628.

Amount paid for paper by holder as limiting recovery against accommodation party, 69 ALR 1313.

Authority of bank officer or employee to bind bank by endorsement or guaranty of paper for accommodation of third person, 37 ALR 1373.

Construction, application, and effect of provision of Negotiable Instruments Law to effect that accommodation party is liable to

holder for value notwithstanding that latter knew of accommodation character, 95 ALR 964.

Discharge of accommodation maker by release of mortgage or other security given for note, 2 ALR 2d 260.

Evasion of law, liability of bank on accommodation paper given for, 64 ALR 595.

Failure of accommodation maker or endorser to disaffirm transaction, or his continued recognition of note after learning of use for purpose other than intended as ratification of the diversion, 105 ALR 437.

Liability of insane accommodation endorser of negotiable instrument, 24 ALR 2d 1391.

Note given to make good depletion of capital or assets of bank as one for accommodation, 95 ALR 541.

Original consideration as supporting obligation of accommodation parties who became such after the contract had been delivered and accepted, 74 ALR 1097.

Parol evidence to vary or explain endorsement of bill or note given for accommodation, 4 ALR 764, 11 ALR 637, 22 ALR 527, 35 ALR 1120, 54 ALR 999, 92 ALR 721.

Pre-existing indebtedness, one taking accommodation paper as collateral security for, as bona fide holder, 80 ALR 682.

Right of accommodation party to bill or note to revoke his signature, 22 ALR 1348.

Rights and remedies of accommodation party to paper as against accommodated party after payment, 36 ALR 553, 77 ALR 668.

Rights of transferee after maturity of accommodation paper, 48 ALR 1280.

Who is accommodation party under Uniform Commercial Code § 3-415, 90 ALR 3d 342.

DECISIONS UNDER FORMER LAW

Agreements between maker and indorser.

Accommodation indorser transferring securities to maker of note to enable him to pay several notes, including one indorsed for accommodation, cannot show agreement between him and maker, in action by holder,

in absence of latter's knowledge of agreement to pay particular note with securities. *Utah State Nat. Bank v. Livingston* (1927) 69 U 284, 254 P 781.

Maker of note is not agent of holder in procuring securities from accommodation indorser, so as to charge holder with knowl-

edge of agreement between maker and indorser that particular note was to be paid from securities. *Utah State Nat. Bank v. Livingston* (1927) 69 U 284, 254 P 781.

Discharge of maker or indorser.

One who signed note as accommodation maker held not discharged from liability by extension of time of payment of note by maker without his knowledge. *Wolstenholme v. Smith* (1908) 34 U 300, 97 P 329.

Accommodation indorser is not discharged because of failure of payee to exercise due diligence in pursuing person or security primarily liable. *Felkner v. Smith* (1931) 77 U 410, 296 P 776, 74 ALR 124.

Knowledge of accommodation.

Knowledge of holder of note that maker merely signed for accommodation of others does not relieve maker of liability. *Miller v. Stuart* (1927) 69 U 250, 253 P 900.

The mere fact that payee knew that one of the makers of the note in question was an accommodation maker did not defeat his right to recover against such maker. *Assets Realization Co. v. Cardon* (1928) 72 U 597, 272 P 204.

Rights of purchaser.

While person accommodated cannot recover from accommodating parties on negotiable instrument, purchaser of accommodation paper may recover when only defense is that accommodated party to instrument agreed to pay same. *Miller v. White* (1927) 70 U 145, 258 P 565.

Where evidence showed that accommodating parties signed note for purpose of lending their credit, purchaser of note was entitled to directed verdict for amount of note and reasonable attorney's fee as provided in note. *Miller v. White* (1927) 70 U 145, 258 P 565.

70A-3-416. Contract of guarantor.

- (1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.
- (2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.
- (3) Words of guaranty which do not otherwise specify guarantee payment.
- (4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.
- (5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.
- (6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

History: L. 1965, ch. 154, § 3-416.

Cross-References.

Contract of accommodation party, 70A-3-415.
Guaranty of indorsement, 70A-3-202 (4).

Collateral References.

Bills and Notes ⇄ 246, 284; Frauds, Statute of ⇄ 28; Guaranty ⇄ 35, 36 (3).
10 CJS Bills and Notes §§ 39, 209 et seq.; 37 CJS Frauds, Statute of § 30; 38 CJS Guaranty § 46.

11 AmJur 2d 156, 596, Bills and Notes §§ 120, 534.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 ALR 2d 734.

Guaranty of payment as covering principal debtor's liability as an endorser on third person's note or other negotiable instrument, 85 ALR 2d 1183.

Necessity of creditor giving guarantor notice of acceptance of guaranty, 6 ALR 3d 355.

70A-3-417. Warranties on presentment and transfer.

- (1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that
 - (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
 - (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith
 - (i) to a maker with respect to the maker's own signature; or
 - (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
 - (iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and
 - (c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith
 - (i) to the maker of a note; or
 - (ii) to the drawer of a draft whether or not the drawer is also the drawee; or
 - (iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or
 - (iv) to the acceptor of a draft with respect to an alteration made after the acceptance.
- (2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that
 - (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
 - (b) all signatures are genuine or authorized; and

- (c) the instrument has not been materially altered; and
 - (d) no defense of any party is good against him; and
 - (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.
- (3) By transferring "without recourse" the transferor limits the obligation stated in subsection (2) (d) to a warranty that he has no knowledge of such a defense.
- (4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority.

History: L. 1965, ch. 154, § 3-417.

Cross-References.

Contract of indorser, order of liability, 70A-3-414.

Finality of payment or acceptance, 70A-3-418.

Holder in due course, 70A-3-302.

Impostors, signature in name of payee, 70A-3-405.

"Insolvency proceedings" defined, 70A-1-201 (22).

Negligence contributing to alteration or unauthorized signature, 70A-3-406.

Transfer, right to indorsement, 70A-3-201.

Unauthorized signatures, 70A-3-404.

Warranties of customer and collecting bank on transfer or presentment of items, 70A-4-207.

Warranty as between accepting bank and drawee bank.

Drawee bank was not liable to accepting bank on check endorsed by only one of two joint payees, since accepting bank unqualifiedly endorsed the check prior to delivery to drawee bank and under statute, prior endorsers are guarantors of check as to their transferees; accepting bank's argument that even if it were liable for paying check without other joint payee's endorsement, drawee bank should have immediately refused to honor check and notified accepting bank not to pay on it did not change result. *Pacific Metals Co. v. Tracy-Collins Bank & Trust Co.* (1968) 21 U 2d 400, 446 P 2d 303.

Collateral References.

Bills and Notes ⇐ 74, 293, 296, 326, 434; Principal and Agent ⇐ 146 (1).

10 CJS Bills and Notes §§ 183, 214, 237 et seq., 467.

11 AmJur 2d 709, 712, Bills and Notes §§ 646, 649, 650.

DECISIONS UNDER FORMER LAW

Partnership contracts.

An action at law was maintainable on notes executed by the individual members of one firm to the individual members of the

other, although the two firms had a common member, where such common member did not join in the execution of the notes and had no interest therein. *Jungk v. Reed* (1893) 9 U 49, 33 P 236.

70A-3-418. Finality of payment or acceptance. Except for recovery of bank payments as provided in the chapter on Bank Deposits and Collections (chapter 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

History: L. 1965, ch. 154, § 3-418.

Cross-References.

Final payment of item by payor bank, 70A-4-213.

"Good faith" defined, 70A-1-201 (19).

Holder in due course, 70A-3-302.
 Notice to purchaser, 70A-3-304.
 Payor bank, recovery of payment by return of items, 70A-4-301.
 Taking for value, 70A-3-303.
 Transfer, right to indorsement, 70A-3-201.

10 CJS Bills and Notes §§ 183, 467.
 11 AmJur 2d 712, Bills and Notes §§ 649, 650.

What constitutes change of position by payee so as to preclude recovery of payment made under mistake, 40 ALR 2d 997.

Collateral References.

Bills and Notes ⇔ 74, 425, 434, 440.

70A-3-419. Conversion of instrument — Innocent representative.

- (1) An instrument is converted when
 - (a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or
 - (b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or
 - (c) it is paid on a forged indorsement.
- (2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.
- (3) Subject to the provisions of this act concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.
- (4) An intermediary bank or payor bank which is not a depository bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (sections 70A-3-205 and 70A-3-206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

History: L. 1965, ch. 154, § 3-419.

Collateral References.

Cross-References.

Certification of check, 70A-3-411.
 Draft not an assignment, 70A-3-409.
 Operation of acceptance, 70A-3-410.
 Payment or satisfaction of instrument, 70A-3-603.
 "Presumed" defined, 70A-1-201 (31).
 Restrictive indorsements, 70A-3-205, 70A-3-206.
 Warranties on presentment and transfer, 70A-3-417.

Banks and Banking ⇔ 156 et seq.; Bills and Notes ⇔ 25, 53, 70, 434; Trover and Conversion ⇔ 2 et seq.

9 CJS Banks and Banking § 212 et seq.; 10 CJS Bills and Notes §§ 36, 37, 176, 184, 467; 89 CJS Trover and Conversion § 13.

11 AmJur 2d 572, Bills and Notes § 510; 18 AmJur 2d 182, 226, Conversion §§ 43, 113.

Promissory notes as subject of conversion, 44 ALR 2d 931.

PART 5

PRESENTMENT, NOTICE OF DISHONOR AND PROTEST

Section

70A-3-501. When presentment, notice of dishonor, and protest necessary or permissible.

- 70A-3-502. Unexcused delay — Discharge.
- 70A-3-503. Time of presentment.
- 70A-3-504. How presentment made.
- 70A-3-505. Rights of party to whom presentment is made.
- 70A-3-506. Time allowed for acceptance or payment.
- 70A-3-507. Dishonor — Holder's right of recourse — Term allowing representment.
- 70A-3-508. Notice of dishonor.
- 70A-3-509. Protest - Noting for protest.
- 70A-3-510. Evidence of dishonor and notice of dishonor.
- 70A-3-511. Waived or excused presentment, protest or notice of dishonor or delay therein.

70A-3-501. When presentment, notice of dishonor, and protest necessary or permissible.

- (1) Unless excused (section 70A-3-511) presentment is necessary to charge secondary parties as follows:
 - (a) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;
 - (b) presentment for payment is necessary to charge any indorser;
 - (c) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in section 70A-3-502 (1) (b).
- (2) Unless excused (section 70A-3-511)
 - (a) notice of any dishonor is necessary to charge any indorser;
 - (b) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in section 70A-3-502 (1) (b).
- (3) Unless excused (section 70A-3-511) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.
- (4) Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity.

History: L. 1965, ch. 154, § 3-501.

Cross-References.

Contract of indorser, order of liability, 70A-3-414.

Contract of maker, drawer and acceptor, 70A-3-413.

Dishonor of instrument, effect, 70A-3-507.

Evidence of dishonor and notice of dishonor, 70A-3-510.

Instruments payable on demand, 70A-3-108.

Notice of dishonor, 70A-3-508.

Presentment, how made, 70A-3-504.

Protest, noting for protest, 70A-3-509.

Rights of party to whom presentment is made, 70A-3-505.

Time allowed for acceptance or payment, 70A-3-506.

Time of presentment, 70A-3-503.

Unexcused delay, discharge, 70A-3-502.

Waived or excused presentment, protest or notice of dishonor or delay therein, 70A-3-511.

Collateral References.

Bills and Notes ⇔ 385 et seq.

10 CJS Bills and Notes § 343 et seq.

11 AmJur 2d 868, Bills and Notes § 789 et seq.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 ALR 2d 1296.

Duty of collecting bank as to notices of protest or dishonor which it receives from its correspondent, 4 ALR 534.

Duty of holder as regards presentation of check to drawee bank as affected by run on bank or other indications of impending closing of doors, 88 ALR 479.

Insolvency or bankruptcy of party primarily liable on commercial paper, as excusing

demand and notice of dishonor, 25 ALR 962, 87 ALR 1394.

Law regarding notice as condition of holding endorser as applied to bill or note with acceleration clause, or payable in installments, 104 ALR 1331.

Necessity of notice of nonpayment of note or bill upon which corporation is primary obligor, in order to hold officer, director, or stockholder as endorser, 123 ALR 1367.

Necessity of pleading that maker or drawer of check was given notice of its dishonor by bank, 6 ALR 2d 985.

Necessity of protest and notice as between coendorsers of negotiable paper, 9 ALR 1188, 32 ALR 190.

Presentment and notice of dishonor as condition of holding one who appears on paper as endorser but was in fact primarily liable, 62 ALR 116.

Right of notary who protests paper to change or contradict his certificate, 28 ALR 543.

Stopping payment as affecting necessity of presentment of check, 14 ALR 562.

Taxes, effect of delay in presentation of check given for payment of, 44 ALR 1236, 124 ALR 1155.

Time within which check must be presented to prevent discharge of drawer in event of bank's insolvency, 91 ALR 1181.

Waiver of demand and notice as affecting endorsers other than the one above whose name it immediately appears, 110 ALR 1228.

Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 ALR 1381.

DECISIONS UNDER FORMER LAW

Foreign bills.

Section 152 of the Uniform Negotiable Instruments Law pertains to bills that appear as foreign bills on their face and where a check did not appear on its face to be a foreign bill, protest of dishonor was unnecessary. *Moffat County State Bank v. Pinder* (1960) 11 U 2d 89, 355 P 2d 210.

Necessity for notice.

If notice of dishonor is not waived, failure to give same releases and discharges indorser. *Burnham, Hanna, Munger & Co. v. McCornick* (1898) 18 U 42, 55 P 77.

Necessity for presentment.

In action on trade acceptance against drawee and acceptor, who is primarily liable, presentment was not necessary. *California Pine Box Distributors v. Burton Lumber Co.* (1925) 65 U 332, 236 P 1105; *Gray's Harbor*

Lumber Co. v. Burton Lumber Co. (1925) 65 U 333, 236 P 1102.

Presentment for payment and notice of nonpayment was waived by promise of indorser to pay note after it became due. *Flekner v. Smith* (1931) 77 U 410, 296 P 776, 74 ALR 124.

Pleading and proof.

Complaint alleging that due and legal notice of dishonor and nonpayment was given a defendant who is sued as indorser of the note is sufficient, where judgment has been taken by default on failure to answer. *Smith v. McEvoy* (1892) 8 U 58, 29 P 1030.

Sufficiency of notice.

Payee, sought to be held as indorser on note made by corporation of which he was president, having full knowledge of presentment, demand, and nonpayment, and who was told holder looked to him for payment,

had sufficient notice. *Prichard v. Strike* (1926) 66 U 394, 243 P 114, 44 ALR 1348, distinguished in 13 U 2d 258, 372 P 2d 985.

70A-3-502. Unexcused delay — Discharge.

- (1) Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due
 - (a) any indorser is discharged; and
 - (b) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.
- (2) Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

History: L. 1965, ch. 154, § 3-502.

10 CJS Bills and Notes §§ 293 et seq., 367 et seq.

Cross-References.

Delay in presentment, protest or notice of dishonor, when excused, 70A-3-511 (1).

Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Protest, noting for protest, 70A-3-509.

11 AmJur 2d 842, Bills and Notes § 763.

Discharge of drawer by delay in presenting check as affected by insufficiency of funds during time within which check should have been presented, or subsequent insufficiency occasioned by their withdrawal, 160 ALR 1069.

Collateral References.

Bills and Notes ⇄ 52, 254, 299, 385 et seq.

Discharge of endorser by delay in presenting check, 11 ALR 1028.

70A-3-503. Time of presentment.

- (1) Unless a different time is expressed in the instrument the time for any presentment is determined as follows:
 - (a) where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;
 - (b) where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;
 - (c) where an instrument shows the date on which it is payable presentment for payment is due on that date;
 - (d) where an instrument is accelerated presentment for payment is due within a reasonable time after the acceleration;
 - (e) with respect to the liability of any secondary party presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.
- (2) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of the

particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:

- (a) with respect to the liability of the drawer, thirty days after date or issue whichever is later; and
 - (b) with respect to the liability of an indorser, seven days after his indorsement.
- (3) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.
- (4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

History: L. 1965, ch. 154, § 3-503.

Cross-References.

"Banking day" defined, 70A-4-104 (1) (c).

Holidays, 68-13-2.

Notice to purchaser, 70A-3-304 (3) (c).

Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

"Presumed" defined, 70A-1-201 (31).

Rights of party to whom presentment is made, 70A-3-505.

Time allowed for acceptance or payment, 70A-3-506.

Time, computation of, 68-3-7, 68-3-8.

Unexcused delay, discharge, 70A-3-502.

Waived or excused presentment, protest or notice of dishonor or delay therein, 70A-3-511.

Collateral References.

Bills and Notes ⇄ 129 (1), (3), 390, 391, 394-396, 399, 401-405.

10 CJS Bills and Notes §§ 169, 246, 247, 343-345, 352 et seq.

11 AmJur 2d 846, 940, Bills and Notes §§ 764, 888, 889.

Bank failure, who must bear loss of funds where failure occurs during delay in presenting note, 2 ALR 1381.

Construction, application, and effect of provision of Uniform Negotiable Instruments Law, or other statute, relating to maturity or time for presentment of negotiable paper

which falls due on Saturday, Sunday or holiday, 102 ALR 437.

Discharge of drawer by delay in presenting check as affected by insufficiency of funds during time within which check should have been presented, or subsequent insufficiency occasioned by their withdrawal, 160 ALR 1069.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 ALR 2d 1296.

Duty of bank when several checks which, in the aggregate, exceed the depositor's balance, are presented at the same time, 26 ALR 1486.

Loss from insolvency of bank before presentment of bank draft as falling upon purchaser of draft or upon subsequent holder, 56 ALR 494.

Priority as between checks simultaneously presented to drawee bank for payment, 61 ALR 960.

Taxes, effect of delay in presentment of draft given in payment of, 44 ALR 1236, 124 ALR 1155.

Time for presentment of negotiable instrument falling due on Saturday, Sunday or holiday, 102 ALR 437.

What is essential to exercise of option to accelerate maturity of bill or note, 5 ALR 2d 968.

Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 ALR 1381.

DECISIONS UNDER FORMER LAW

Delay in presentment.

Prior to Uniform Negotiable Instruments Law, it was held that reasonableness of delay

in presenting a note for payment was a question of law for the court. *Durnell v. Sowden* (1887) 5 U 216, 14 P 334.

70A-3-504. How presentment made.

- (1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.
- (2) Presentment may be made
 - (a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or
 - (b) through a clearinghouse; or
 - (c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.
- (3) It may be made
 - (a) to any one of two or more makers, acceptors, drawees or other payors; or
 - (b) to any person who has authority to make or refuse the acceptance or payment.
- (4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.
- (5) In the cases described in section 70A-4-210 presentment may be made in the manner and with the result stated in that section.

History: L. 1965, ch. 154, § 3-504.

Cross-References.

Acceptance varying draft, 70A-3-412.

Collecting bank, presentment by notice of item not payable by, through, or at a bank, 70A-4-210.

Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Rights of party to whom presentment is made, 70A-3-505.

Unexcused delay, discharge, 70A-3-502.

Waived or excused presentment, protest or notice of dishonor or delay therein, 70A-3-511.

Presentment for payment.

Inquiry by payee's secretary as to whether a check not yet endorsed would be paid did not constitute a presentment for payment,

and drawee bank's statement that check had been drawn against uncollected funds did not constitute a dishonor amounting to a failure of consideration. *Estate of Kohlhepp v. Mason* (1970) 25 U 2d 155, 478 P 2d 339.

Collateral References.

Bills and Notes ⇔ 391, 399, 401-405.

10 CJS Bills and Notes §§ 169, 343, 358, 359, 361, 364, 366.

10 AmJur 2d 680, 806, Banks §§ 710, 838; 11 AmJur 2d 941, Bills and Notes §§ 890, 891.

Conduct of holder of check at time of presentation for payment as affecting drawer's liability, 4 ALR 1233.

What amounts to presentation to charge parties secondarily liable on paper payable in a certain town or city, without further specification of place, 39 ALR 918.

DECISIONS UNDER FORMER LAW

Place of presentment.

Prior to Uniform Negotiable Instruments Law, it was held that where note secured by mortgage was sold, and both payee and note were out of the state and could not be found

after exercise of due diligence, purchaser should have made a valid tender at place of business or residence of maker. *McCauley v. Leavitt* (1894) 10 U 91, 37 P 164, applying 2 Comp. Laws 1888, § 2851.

If no place of payment is specified, it is payable at residence or place of business of maker. *Overland Gold Min. Co. v. McMaster* (1899) 19 U 177, 56 P 977, applying RS 1898, § 1563.

The presumption is that a note, dated at a certain place, is payable there, if no other place of payment is expressed. *Overland Gold Min. Co. v. McMaster* (1899) 19 U 177, 56 P 977.

70A-3-505. Rights of party to whom presentment is made.

- (1) The party to whom presentment is made may without dishonor require
 - (a) exhibition of the instrument; and
 - (b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and
 - (c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and
 - (d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.
- (2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

History: L. 1965, ch. 154, § 3-505.

10 CJS Bills and Notes §§ 169, 360 et seq.

Cross-References.

Presentment, how made, 70A-3-504.
Time allowed for acceptance or payment, 70A-3-506.

10 AmJur 2d 680, Banks § 710; 11 AmJur 2d 942, Bills and Notes § 891.

Necessity of possession and exhibition of paper at time of demand in order to make a valid presentment, 50 ALR 1200.

Collateral References.

Bills and Notes ⇔ 391, 405, 440.

70A-3-506. Time allowed for acceptance or payment.

- (1) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.
- (2) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

History: L. 1965, ch. 154, § 3-506.

Payor bank, recovery of payment by return of items, 70A-4-301.

Cross-References.

Drafts drawn under letter of credit, 70A-5-112.

Collateral References.

Bills and Notes ⇔ 25, 66, 68, 70, 129, 392.

10 CJS Bills and Notes §§ 36, 171, 173, 174,
462.

11 AmJur 2d 942, Bills and Notes § 892.

—
Destruction of or refusal to return bill as
an acceptance, 63 ALR 1138.

70A-3-507. Dishonor — Holder's right of recourse — Term allowing representation.

- (1) An instrument is dishonored when
 - (a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (section 70a-4-301); or
 - (b) presentment is excused and the instrument is not duly accepted or paid.
- (2) Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.
- (3) Return of an instrument for lack of proper indorsement is not dishonor.
- (4) A term in a draft or an indorsement thereof allowing a stated time for re-presentation in the event of any dishonor of the draft by nonacceptance if a time draft or by nonpayment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

History: L. 1965, ch. 154, § 3-507.

Cross-References.

Certification of check before returning it for lack of proper indorsement, effect, 70A-3-411 (3).

Notice of dishonor, 70A-3-508.

Payor bank, recovery of payment by return of items, 70A-4-301.

Presentment, how made, 70A-3-504.

Time allowed for acceptance or payment, 70A-3-506.

Time of presentment, 70A-3-503.

Collateral References.

Bills and Notes ⇔ 24-27, 217, 241, 252, 297, 385, 394.

10 CJS Bills and Notes §§ 35, 36, 39, 184, 217, 343, 346, 367.

11 AmJur 2d 943, Bills and Notes §§ 893, 894.

—
Duty of bank when several checks which, in the aggregate, exceed the depositor's balance, are presented at the same time, 26 ALR 1486.

Liability of bank to depositor for dishonoring check, 126 ALR 206.

Rights and remedies of holder of draft issued under letter of credit which is dishonored, 53 ALR 57.

70A-3-508. Notice of dishonor.

- (1) Notice of dishonor may be given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal

or customer or to another agent or bank from which the instrument was received.

- (2) Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonor or receipt on notice of dishonor.
- (3) Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.
- (4) Written notice is given when sent although it is not received.
- (5) Notice to one partner is notice to each although the firm has been dissolved.
- (6) When any party is in insolvency proceedings instituted after the issue of the instrument notice may be given either to the party or to the representative of his estate.
- (7) When any party is dead or incompetent notice may be sent to his last known address or given to his personal representative.
- (8) Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

History: L. 1965, ch. 154, § 3-508.

11 AmJur 2d 943, Bills and Notes §§ 895, 896.

Cross-References.

Collecting bank, right of charge-back or refund, 70A-4-212.

Dishonor, holder's right of recourse, 70A-3-507.

Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Waived or excused presentment, protest or notice of dishonor or delay therein, 70A-3-511.

Collateral References.

Bills and Notes ⇔ 411 et seq.; Partnership ⇔ 159.

10 CJS Bills and Notes § 379 et seq.; 68 CJS Partnership § 175.

Insolvency or bankruptcy of party primarily liable on commercial paper as excusing demand and notice of dishonor, 25 ALR 962, 87 ALR 1394.

Necessity of pleading that maker or drawer of check was given notice of its dishonor by bank, 6 ALR 2d 985.

Necessity of protest and notice as between coendosers of negotiable paper, 9 ALR 1188, 32 ALR 190.

Promise to pay at future time by party to whom presentment is made as excusing immediate notice of dishonor, 62 ALR 295.

To whom should notice of protest or of dishonor of commercial paper be given in event of death of the party entitled thereto, 1 ALR 474.

70A-3-509. Protest - Noting for protest.

- (1) A protest is a certificate of dishonor made under the hand and seal of the United States consul or vice consul or a notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs. It may be made upon information satisfactory to such person.
- (2) The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused

and that the instrument has been dishonored by nonacceptance or nonpayment.

- (3) The protest may also certify that notice of dishonor has been given to all parties or to specified parties.
- (4) Subject to subsection (5) any necessary protest is due by the time that notice of dishonor is due.
- (5) If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

History: L. 1965, ch. 154, § 3-509.

Time for notice of dishonor, 70A-3-508 (2).

Cross-References.

Evidence of dishonor and notice of dishonor, 70A-3-510 (a).

Lost, destroyed or stolen instruments, 70A-3-804.

Notaries, fees for protests, 21-4-1.

Notaries, power to make protests, records of protests, 46-1-5, 46-1-6.

Protest of any dishonor necessary to charge drawer and indorsers of any draft, 70A-3-501 (3).

Waived or excused presentment, protest or notice of dishonor or delay therein, 70A-3-511.

Collateral References.

Bills and Notes ⇔ 408.

10 CJS Bills and Notes § 368 et seq.

11 AmJur 2d 866, 944, Bills and Notes §§ 789, 897-899.

70A-3-510. Evidence of dishonor and notice of dishonor. The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

- (a) a document regular in form as provided in the preceding section which purports to be a protest;
- (b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;
- (c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

History: L. 1965, ch. 154, § 3-510.

"Presumption" defined, 70A-1-201 (31).

Cross-References.

Notice of dishonor, 70A-3-508.

Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Collateral References.

Bills and Notes ⇔ 410, 510.

11 CJS Bills and Notes § 677.

12 AmJur 2d 269, Bills and Notes § 1239.

70A-3-511. Waived or excused presentment, protest or notice of dishonor or delay therein.

- (1) Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.
- (2) Presentment or notice or protest as the case may be is entirely excused when

- (a) the party to be charged has waived it expressly or by implication either before or after it is due; or
 - (b) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or
 - (c) by reasonable diligence the presentment or protest cannot be made or the notice given.
- (3) Presentment is also entirely excused when
- (a) the maker, acceptor or drawee of any instrument except a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or
 - (b) acceptance or payment is refused but not for want of proper presentment.
- (4) Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted.
- (5) A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.
- (6) Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

History: L. 1965, ch. 154, § 3-511.

Cross-References.

Dishonor, holder's right of recourse, 70A-3-507.

Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Protest, noting for protest, 70A-3-509.

Time for presentment, 70A-3-503.

Unexcused delay, discharge, 70A-3-502.

Collateral References.

Bills and Notes ⇐ 66, 394, 396, 397, 404, 406, 408, 422.

10 CJS Bills and Notes §§ 30, 171, 345, 346, 348, 350, 352, 368, 369, 417, 418, 435.

11 AmJur 2d 945, Bills and Notes §§ 899, 900.

Construction and application of provision of Uniform Negotiable Instruments Act that waiver embodied in instrument itself is binding upon all parties, 140 ALR 1253.

Endorsement of renewal note, or offer or promise to renew, as waiver by endorser of

presentment and notice of nonpayment, 110 ALR 1149.

Endorser who was in fact primarily liable, necessity of notice to, 62 ALR 116.

Insolvency or bankruptcy of party primarily liable on commercial paper as excusing demand and notice of dishonor, 25 ALR 962, 87 ALR 1394.

Law regarding notice as condition of holding endorser as applied to bill or note with acceleration clause, or payable in installments, 104 ALR 1331.

Necessity of notice of nonpayment of note or bill upon which corporation is primary obligor, in order to hold officer, director, or stockholder as endorser, 123 ALR 1367.

Necessity of pleading that maker or drawer of check was given notice of its dishonor by bank, 6 ALR 2d 985.

Necessity of protest and notice as between coendorsers of negotiable paper, 9 ALR 1188, 32 ALR 190.

Waiver of demand and notice as affecting endorsers other than the one above whose name it immediately appears, 21 ALR 1396, 110 ALR 1228.

DECISIONS UNDER FORMER LAW

Countermanding payment.

Allegation in action against maker of check sufficiently sets out that payment

thereof had been countermanded, where check was set forth, with indorsement across its face, "Pyt stopped." *National Copper Bank v. Davis County Bank* (1915) 47 U 236, 152 P 1180.

Failure of consideration.

Where drawer and payee of check entered into oral agreement for sale of real property for which check was given as part of negotiations, but payee failed to perform or tender performance of his part of agreement and was not ready, able and willing to perform, drawer was entitled to judgment in action by

payee to recover on check upon which drawer had stopped payment, since there was failure of consideration. *Harris v. Wilstead* (1949) 114 U 496, 201 P 2d 491.

Sufficiency of notice.

Payee, sought to be held as indorser on note made by corporation of which he was president, having full knowledge of presentment, demand, and nonpayment, and who was told holder looked to him for payment, had sufficient notice. *Prichard v. Strike* (1926) 66 U 394, 243 P 114, 44 ALR 1348, distinguished in 13 U 2d 256, 372 P 2d 346.

PART 6

DISCHARGE

Section

- 70A-3-601. Discharge of parties.
 70A-3-602. Effect of discharge against holder in due course.
 70A-3-603. Payment or satisfaction.
 70A-3-604. Tender of payment.
 70A-3-605. Cancellation and renunciation.
 70A-3-606. Impairment of recourse or of collateral.

70A-3-601. Discharge of parties.

- (1) The extent of the discharge of any party from liability on an instrument is governed by the sections on
 - (a) payment or satisfaction (section 70A-3-603); or
 - (b) tender of payment (section 70A-3-604); or
 - (c) cancellation or renunciation (section 70A-3-605); or
 - (d) impairment of right of recourse or of collateral (section 70a-3-606); or
 - (e) reacquisition of the instrument by a prior party (section 70a-3-208); or
 - (f) fraudulent and material alteration (section 70A-3-407); or
 - (g) certification of a check (section 70A-3-411); or
 - (h) acceptance varying a draft (section 70A-3-412); or
 - (i) unexcused delay in presentment or notice of dishonor or protest (section 70A-3-502).
- (2) Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.
- (3) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument
 - (a) reacquires the instrument in his own right; or
 - (b) is discharged under any provision of this chapter, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (section 70A-3-606).

History: L. 1965, ch. 154, § 3-601.

Cross-References.

Acceptance varying draft, 70A-3-412.

Burden of establishing signatures, defenses and due course, 70A-3-307.

Cancellation and renunciation of instrument, 70A-3-605.

Certification of a check, 70A-3-411.

Contract of accommodation party, 70A-3-415.

Holder in due course, effect of discharge against, 70A-3-602.

Holder in due course, rights of, 70A-3-305.

Impairment of recourse or of collateral, 70A-3-606.

Negligence contributing to alteration or unauthorized signature, 70A-3-406.

Payment or satisfaction of instrument, 70A-3-603.

Protest, noting for protest, 70A-3-509.

Reacquisition of instrument by prior party, 70A-3-208.

Rights of one not holder in due course, 70A-3-306.

Tender of payment to holder, 70A-3-604.

Consideration for discharge.

Statute providing that negotiable instrument is discharged by any other act which would discharge simple contract for payment of money did not apply where maker of note being sued by assignee claimed that payee had released him from obligation since agreement was not supported by consideration. *Olsen v. Chappell* (1967) 20 U 2d 115, 433 P 2d 1011.

Collateral References.

Bills and Notes ⇔ 256, 301, 425 et seq.

10 CJS Bills and Notes § 438 et seq.

11 AmJur 2d 947, Bills and Notes § 901 et seq.

Acceptance of something other than money as discharging drawer or endorser of check, 87 ALR 442.

Agreement by holder with principal not to put paper in course of collection for a specified time as releasing endorser, 63 ALR 1532.

Consent of party secondarily liable to release of party primarily liable as affecting release of former, 169 ALR 753.

Discharge of accommodation maker by release of mortgage or other security given for note, 2 ALR 2d 260.

Discharge of accommodation maker or surety by extension of time or release of collateral security, 108 ALR 1088.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 ALR 477.

Failure or delay by holder of note to enforce collateral security as releasing endorser, 74 ALR 129.

Mortgagee's purchase of equity of redemption as releasing endorser on secured note, 82 ALR 764.

Payment voidable under bankruptcy act as discharge of surety, guarantor, or endorser, 56 ALR 1363.

Provision of law that a negotiable instrument is discharged when the principal debtor becomes holder of instrument, as applicable where one primarily liable on instrument by its terms is in fact a surety, 72 ALR 1063.

Release of party primarily liable with consent of party secondarily liable as releasing latter under Negotiable Instruments Law, 169 ALR 753.

Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 ALR 1014.

Renewal note as discharging original obligation of indebtedness, 52 ALR 1416.

Taking of demand note in renewal as releasing surety or endorser, 48 ALR 1222.

DECISIONS UNDER FORMER LAW

Extension of time.

One who signed note as accommodation maker held not discharged from liability by extension of time of payment of note by maker without his consent. *Wolstenholme v. Smith* (1908) 34 U 300, 97 P 329.

Impairment of collateral.

Holder's surrender of securities pledged releases indorser only pro tanto, to extent of impairment of security. *Utah State Nat. Bank v. Livingston* (1927) 69 U 284, 254 P 781.

Payment.

70A-3-602. Effect of discharge against holder in due course. No discharge of any party provided by this chapter is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

History: L. 1965, ch. 154, § 3-602.

Cross-References.

Discharge of parties, 70A-3-601.

Holder in due course, rights of, 70A-3-302,
70A-3-305.
Notice to purchaser, 70A-3-304.

Collateral References.

Bills and Notes ⇔ 383, 440.
10 CJS Bills and Notes §§ 438 et seq., 510.
11 AmJur 2d 735, Bills and Notes § 670.

70A-3-603. Payment or satisfaction.

- (1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not, however, result in the discharge of the liability
- (a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or
- (b) of a party (other than an intermediary bank or a payor bank which is not a depository bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.
- (2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument Surrender of the instrument to such a person gives him the rights of a transferee (section 70A-3-201).

History: L. 1965, ch. 154, § 3-603.

Cross-References.

Discharge of parties, 70A-3-601.
Impairment of recourse or of collateral,
70A-3-606.
Payment by accommodation party, effect,
70A-3-415 (5).
Reacquisition of instrument by prior party,
70A-3-208.
Restrictive indorsements, 70A-3-205.
Rights of one not holder in due course,
70A-3-306 (d).
Tender of payment, 70A-3-604.
Transfer, right to indorsement, 70A-3-201.

Collateral References.

Bills and Notes ⇔ 408, 426 et seq.
10 CJS Bills and Notes § 438 et seq.
11 AmJur 2d 1015, Bills and Notes § 963 et
seq.

Acceptance of renewal note made or
indorsed by personal representative of obli-

gor in original paper as payment or novation
of that paper, 12 ALR 1546.

Accord and satisfaction by endorsement
and transfer of commercial paper by agent
having no authority to compromise, 46 ALR
1523.

Discharge of accommodation maker by
release of mortgage or other security given
for note, 2 ALR 2d 260.

Failure or delay by holder of note to
enforce collateral security as releasing
endorser, surety, or guarantor, 74 ALR 129.

Presumption as to payment or discharge of
obligation from obligor's possession of paper
evidencing it, 156 ALR 777.

Renewal note as discharging original obli-
gation or indebtedness, 52 ALR 1416.

Rights and remedies of accommodation
party to paper as against accommodated
party after payment, 36 ALR 553, 77 ALR
668.

Right to have usurious payments made on
previous obligation applied as payment of
principal on renewal, 13 ALR 1244.

70A-3-604. Tender of payment.

- (1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.
- (2) The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.
- (3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

History: L. 1965, ch. 154, § 3-604.

Unexcused delay, discharge, 70A-3-502.

Cross-References.

Discharge of parties, 70A-3-601.
 Presentment, how made, 70A-3-504.
 Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Collateral References.

Bills and Notes ⇔ 385, 394, 429, 437; Costs ⇔ 42; Interest ⇔ 50; Tender ⇔ 19.
 10 CJS Bills and Notes §§ 343, 345, 442, 468;
 20 CJS Costs § 76 et seq.; 47 CJS Interest § 52; 86 CJS Tender § 50 et seq.
 11 AmJur 2d 981, Bills and Notes § 938.

70A-3-605. Cancellation and renunciation.

- (1) The holder of an instrument may even without consideration discharge any party
 - (a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally canceling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or
 - (b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.
- (2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

History: L. 1965, ch. 154, § 3-605.

Collateral References.

Bills and Notes ⇔ 52, 193, 256, 301, 425, 437 et seq.
 10 CJS Bills and Notes §§ 215, 438, 468 et seq.; 11 CJS Bills and Notes § 662.
 11 AmJur 2d 999, Bills and Notes § 948 et seq.

Cross-References.

Discharge of parties, 70A-3-601.
 Effect of discharge against holder in due course, 70A-3-602.

Verbal discharge agreement.

Maker of note was liable to assignee where there was no written instrument of release, no consideration for release agreement, and note was never delivered to maker, despite maker's claim that payee of note had released him from obligation to pay. Olsen v. Chappell (1967) 20 U 2d 115, 433 P 2d 1011.

Scope and effect of provision of Negotiable Instruments Law as to renunciation of rights, 65 ALR 2d 593.

What constitutes renunciation by surrender of negotiable instrument under UCC § 3-605, 96 ALR 3d 1144.

70A-3-606. Impairment of recourse or of collateral.

- (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

- (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or
 - (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.
- (2) By express reservation of rights against a party with a right of recourse the holder preserves
- (a) all his rights against such party as of the time when the instrument was originally due; and
 - (b) the right of the party to pay the instrument as of that time; and
 - (c) all rights of such party to recourse against others.

History: L. 1965, ch. 154, § 3-606.

Cross-References.

Rights and duties when collateral is in secured party's possession, 70A-9-207.

Collateral References.

Bills and Notes ⇔ 256, 301, 437.
 10 CJS Bills and Notes §§ 468, 472 et seq.
 11 AmJur 2d 981, Bills and Notes § 939.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 ALR 2d 260.

What constitutes unjustifiable impairment of collateral, discharging parties to negotiable instrument, under UCC § 3-606 (1) (b), 95 ALR 3d 962.

Who is "party" discharged on negotiable instrument to extent of holder's unjustifiable impairment of collateral, under UCC § 3-606 (1) (b), 93 ALR 3d 1283.

PART 7

ADVICE OF INTERNATIONAL SIGHT DRAFT

Section

70A-3-701. Letter of advice of international sight draft.

70A-3-701. Letter of advice of international sight draft.

- (1) A "letter of advice" is a drawer's communication to the drawee that a described draft has been drawn.
- (2) Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer's account and stop the running of interest pro tanto. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.

- (3) Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawee, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but if it does so and the draft is genuine, may appropriately debit the drawer's account.

History: L. 1965, ch. 154, § 3-701.

Collateral References.

Banks and Banking ⇄ 137 et seq., 191.
 9 CJS Banks and Banking §§ 174 et seq.,
 330 et seq.
 10 AmJur 2d 462, Banks § 494; 11 AmJur
 2d 85, Bills and Notes § 60.

Cross-References.

Draft not an assignment, 70A-3-409 (1).

PART 8

MISCELLANEOUS

Section

- 70A-3-801. Drafts in a set.
 70A-3-802. Effect of instrument on obligation for which it is given.
 70A-3-803. Notice to third party.
 70A-3-804. Lost, destroyed or stolen instruments.
 70A-3-805. Instruments not payable to order or to bearer.

70A-3-801. Drafts in a set.

- (1) Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.
- (2) Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.
- (3) As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft to acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under subsection (2). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order (section 70a-4-407).
- (4) Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

History: L. 1965, ch. 154, § 3-801.

Statement in draft that order is effective only if no other part has been honored does not affect negotiability, 70A-3-112 (g).

Cross-References.

Payor bank's right to subrogation on improper payments, 70A-4-407.

Collateral References.

Bills and Notes ⇄ 14, 68, 233, 267, 383, 437.

10 CJS Bills and Notes §§ 6, 38, 174, 211, 510; 11 CJS Bills and Notes §§ 731, 736.

11 AmJur 2d 84, 404, 569, 970, Bills and Notes §§ 59, 378, 505, 925.

Maturity of one or more of series of notes as affecting status of purchaser as holder in due course, 64 ALR 457.

70A-3-802. Effect of instrument on obligation for which it is given.

- (1) Unless otherwise agreed where an instrument is taken for an underlying obligation
 - (a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and
 - (b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.
- (2) The taking in good faith of a check which is not postdated does not of itself so extend the time on the original obligation as to discharge a surety.

History: L. 1965, ch. 154, § 3-802.

Kohlhepp v. Mason (1970) 25 U 2d 155, 478 P 2d 339.

Cross-References.

Certification of a check, 70A-3-411.

Discharge of parties, 70A-3-601.

Time of presentment, 70A-3-503.

Collateral References.

Banks and Banking ⇄ 189; Payment ⇄ 16 et seq.; Principal and Surety ⇄ 103 et seq.

9 CJS Banks and Banking § 173; 70 CJS Payment § 23 et seq.; 72 CJS Principal and Surety § 161 et seq.

Suspension of obligation.

Delivery of a check, though not certified, satisfied the requirement of a court order requiring payment by a designated time and it suspended the obligation until presentment of the check for payment; presentment was not accomplished by an inquiry by the payee's secretary, without endorsement, as to whether the check would be paid. Estate of

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 ALR 3d 1427.

70A-3-803. Notice to third party. Where a defendant is sued for breach of an obligation for which a third person is answerable over under this chapter he may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over to him under this chapter. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will in any action against him by the person giving the notice be bound by any determination of fact common to the two litigations, then unless after reasonable receipt of the notice the person notified does come in and defend he is so bound.

History: L. 1965, ch. 154, § 3-803.

Cross-References.

Notice of claim or litigation to person answerable over, 70A-2-607.

Collateral References.
Bills and Notes ⇔ 460.

10 CJS Bills and Notes § 554.
12 AmJur 2d 124, Bills and Notes § 1094.

70A-3-804. Lost, destroyed or stolen instruments. The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

History: L. 1965, ch. 154, § 3-804.

Collateral References.

Cross-References.
Burden of establishing signatures,
70A-3-307.

Lost Instruments ⇔ 16, 18.
54 CJS Lost Instruments §§ 19, 20.

Measure of damages for conversion or loss
of commercial paper, 85 ALR 2d 1349.

70A-3-805. Instruments not payable to order or to bearer. This chapter applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this chapter but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

History: L. 1965, ch. 154, § 3-805.

Collateral References.

Cross-References.
Form of negotiable instruments, 70A-3-104.

Bills and Notes ⇔ 6, 32, 146.
10 CJS Bills and Notes § 12.
11 AmJur 2d 37, 71, Bills and Notes §§ 7,
47.

CHAPTER 4

BANK DEPOSITS AND COLLECTIONS

Part

1. General provisions and definitions.
2. Collection of items — Depositary and collecting banks.
3. Collection of items — Payor banks.
4. Relationship between payor bank and its customer.
5. Collection of documentary drafts.

PART 1

GENERAL PROVISIONS AND DEFINITIONS

Section

- 70A-4-101. Short title.
70A-4-102. Applicability.
70A-4-103. Variation by agreement — Measure of damages — Certain action constituting ordinary care.
70A-4-104. Definitions and index of definitions.
70A-4-105. "Depositary bank" — "Intermediary bank" — "Collecting bank" — "Payor bank" — "Presenting bank" — "Remitting bank."
70A-4-106. Separate office of a bank.
70A-4-107. Time of receipt of items.

- 70A-4-108. Delays.
70A-4-109. Process of posting.

70A-4-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Bank Deposits and Collections.

History: L. 1965, ch. 154, § 4-101.

Cross-References.

Consumer funds transfer facilities, 7-16.

Collateral References.

Banks and Banking ⇔ 119 et seq.
9 CJS Banks and Banking § 212 et seq.
10 AmJur 2d 662, Banks § 694 et seq.

Construction and effect of UCC art. 4, dealing with bank deposits and collections, 18 ALR 3d 1376.

Law Reviews.

Banking and Uniform Commercial Code, A. E. Sutherland, 72 Banking L. J. 609.
Bank Deposits and Collections in Illinois Under the Proposed Uniform Commercial Code, W. M. Trumbull, 55 Nw. U. L. Rev. 253.
The Uniform Commercial Code in Utah, Ronald N. Boyce, 9 Utah L. Rev. 904, 927.

70A-4-102. Applicability.

- (1) To the extent that items within this chapter are also within the scope of chapters 3 and 8, they are subject to the provisions of those chapters. In the event of conflict the provisions of this chapter govern those of chapter 3 but the provisions of chapter 8 govern those of this chapter.
- (2) The liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of action or nonaction by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

History: L. 1965, ch. 154, § 4-102.

Cross-References.

Commercial paper, law governing, 70A-3-103 (2).

Letter of credit, time allowed for honor or rejection, 70A-5-112.

Notice to purchaser of security of adverse claim, 70A-8-304.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Territorial application of act, 70A-1-105.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Warranties on presentment and transfer of securities, 70A-8-306.

Notice of dishonor.

Although chapter 3 of the Uniform Commercial Code permits notice of dishonor to be given either orally or in writing, the provisions of chapter 4 seem to require notice of dishonor to be given in writing, and such requirements will control as to transactions between banks. Valley Bank & Trust Co. v. First Security Bank of Utah, N. A. (1975) 538 P 2d 298.

Collateral References.

Banks and Banking ⇔ 156.

9 CJS Banks and Banking § 214.

10 AmJur 2d 662, 671, Banks §§ 694, 700.

70A-4-103. Variation by agreement — Measure of damages — Certain action constituting ordinary care.

- (1) The effect of the provisions of this chapter may be varied by agreement except that no agreement can disclaim a bank's responsibility

for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

- (2) Federal Reserve regulations and operating letters, clearinghouse rules, and the like, have the effect of agreements under subsection (1), whether or not specifically assented to by all parties interested in items handled.
- (3) Action or nonaction approved by this chapter or pursuant to Federal Reserve regulations or operating letters constitutes the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearinghouse rules and the like or with a general banking usage not disapproved by this chapter, prima facie constitutes the exercise of ordinary care.
- (4) The specification or approval of certain procedures by this chapter does not constitute disapproval of other procedures which may be reasonable under the circumstances.
- (5) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount which could not have been realized by the use of ordinary care, and where there is bad faith it includes other damages, if any, suffered by the party as a proximate consequence.

History: L. 1965, ch. 154, § 4-103.

dealing with checks and other items, 8 ALR 2d 446.

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Obligation of good faith, 70A-1-203.

Responsibility of collecting bank, 70A-4-202.

Rules of construction, variation by agreement, 70A-1-102 (3).

Arrangement or course of dealing between forwarding bank and collecting bank as affecting relations or rights as between depositor of collection item and the collecting bank, 118 ALR 363.

Effect on bank depositor's rights and those of bank, of printed rules in passbook not expressly accepted, 60 ALR 2d 708.

Collateral References.

Banks and Banking ⇔ 156 et seq.

9 CJS Banks and Banking § 216 et seq.

10 AmJur 2d 536, 674, 702, 806, Banks §§ 567, 702, 737, 838, 839.

Liability of collecting bank to third persons in respect of proceeds of paper drawn by another, where bank was charged with notice from paper, or otherwise, that the transaction was on account of former, 125 ALR 1194.

Admissibility, in action for negligence against bank by depositor, of evidence as to custom of banks in locality in handling and

Measure of damages for breach of duty by bank in respect of collection of commercial paper, 19 ALR 555, 67 ALR 1511.

70A-4-104. Definitions and index of definitions.

- (1) In this chapter unless the context otherwise requires
 - (a) "Account" means any account with a bank and includes a checking, time, interest or savings account;
 - (b) "Afternoon" means the period of a day between noon and midnight;

- (c) "Banking day" means that part of any day on which a bank is open to the public for carrying on substantially all of its banking functions;
 - (d) "Clearinghouse" means any association of banks or other payors regularly clearing items;
 - (e) "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank;
 - (f) "Documentary draft" means any negotiable or nonnegotiable draft with accompanying documents, securities or other papers to be delivered against honor of the draft;
 - (g) "Item" means any instrument for the payment of money even though it is not negotiable but does not include money;
 - (h) "Midnight deadline" with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later;
 - (i) "Properly payable" includes the availability of funds for payment at the time of decision to pay or dishonor;
 - (j) "Settle" means to pay in cash, by clearinghouse settlement, in a charge or credit or by remittance, or otherwise as instructed. A settlement may be either provisional or final;
 - (k) "Suspends payments" with respect to a bank means that it has been closed by order of the supervisory authorities, that a public officer has been appointed to take it over or that it ceases or refuses to make payments in the ordinary course of business.
- (2) Other definitions applying to this chapter and the sections in which they appear are:
- "Collecting bank" Section 70A-4-105.
 - "Depositary bank" Section 70A-4-105.
 - "Intermediary bank" Section 70A-4-105.
 - "Payor bank" Section 70A-4-105.
 - "Presenting bank" Section 70A-4-105.
 - "Remitting bank" Section 70A-4-105.
- (3) The following definitions in other chapters apply to this chapter:
- "Acceptance" Section 70A-3-410.
 - "Certificate of deposit" Section 70A-3-104.
 - "Certification" Section 70A-3-411.
 - "Check" Section 70A-3-104.
 - "Draft" Section 70A-3-104.
 - "Holder in due course" Section 70A-3-302.
 - "Notice of dishonor" Section 70A-3-508.
 - "Presentment" Section 70A-3-504.
 - "Protest" Section 70A-3-509.

"Secondary party" Section 70A-3-102.

- (4) In addition chapter 1 contain general definitions and principles of construction and interpretation applicable throughout this chapter.

History: L. 1965, ch. 154, § 4-104.

chapter 4 require notice of dishonor to be given in writing, and such requirements will control in transactions between banks. Valley Bank & Trust Co. v. First Security Bank of Utah, N. A. (1975) 538 P 2d 298.

Cross-References.

Contractual waiver of Uniform Commercial Code provisions inconsistent with functioning of consumer funds transfer facilities, 7-16-10.

Collateral References.

Banks and Banking ⇌ 86 et seq.; Statutes ⇌ 179.

Notice of dishonor.

Although chapter 3 of the Uniform Commercial Code permits notice of dishonor to be given orally or in writing, the provisions of

9 CJS Banks and Banking § 1; 82 CJS Statutes § 315.

70A-4-105. "Depository bank" — "Intermediary bank" — "Collecting bank" — "Payor bank" — "Presenting bank" — "Remitting bank." In this chapter unless the context otherwise requires:

- (a) "Depository bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;
- (b) "Payor bank" means a bank by which an item is payable as drawn or accepted;
- (c) "Intermediary bank" means any bank to which an item is transferred in course of collection except the depository or payor bank;
- (d) "Collecting bank" means any bank handling the item for collection except the payor bank;
- (e) "Presenting bank" means any bank presenting an item except a payor bank;
- (f) "Remitting bank" means any payor or intermediary bank remitting for an item.

History: L. 1965, ch. 154, § 4-105.

Collateral References.

Banks and Banking ⇌ 149, 161 et seq.; Statutes ⇌ 179.

Cross-References.

Commercial paper, 70A-3-101 to 70A-3-805.
Instruments payable at or through bank, 70A-3-120, 70A-3-121.

9 CJS Banks and Banking §§ 1, 212; 82 CJS Statutes § 315.

Construction of UCC § 4-105, which defines "payor bank," "collecting bank," and the like, 84 ALR 3d 1073.

70A-4-106. Separate office of a bank. A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this chapter and under chapter 3.

History: L. 1965, ch. 154, § 4-106.

Presentment of instrument at bank, 70A-3-504 (4).

Cross-References.

Liability of branch or separate office of bank for action or nonaction, law governing, 70A-4-102 (2).

Collateral References.

Banks and Banking ⇌ 33, 156 et seq.

9 CJS Banks and Banking §§ 55, 212 et seq.

10 AmJur 2d 290, Banks § 326.

70A-4-107. Time of receipt of items.

- (1) For the purpose of allowing time to process items, prove balances and make the necessary entries on the books to determine its position for the day, a bank may fix an afternoon hour of two p.m. or later as a cutoff hour for the handling of money and items and the making of entries on its books.
- (2) Any item or deposit of money received on any day after a cutoff hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

History: L. 1965, ch. 154, § 4-107.

10 AmJur 2d 668, Banks § 699.

Collateral References.

Banks and Banking ⇌ 121, 158.
9 CJS Banks and Banking §§ 219, 269.

Liability of bank in connection with night depository service, 77 ALR 3d 597.

70A-4-108. Delays.

- (1) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment may, in the case of specific items and with or without the approval of any person involved, waive, modify or extend time limits imposed or permitted by this act for a period not in excess of an additional banking day without discharge of secondary parties and without liability to its transferor or any prior party.
- (2) Delay by a collecting bank or payor bank beyond time limits prescribed or permitted by this act or by instructions is excused if caused by interruption of communication facilities, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the bank provided it exercises such diligence as the circumstances require.

History: L. 1965, ch. 154, § 4-108.

Seasonable action by collecting bank, 70A-4-202 (2), 70A-4-212.

Cross-References.

Commercial paper, law governing, 70A-3-103 (2), 70A-4-102 (1).

Final payment of item by payor bank, 70A-4-213.

Law governing bank deposits and collections, 70A-4-102 (1).

Payor bank, recovery of payment by return of items, 70A-4-301.

Payor bank's responsibility for late return of item, 70A-4-302.

Time allowed for acceptance or payment of instrument, 70A-3-506.

Time limits, variation by agreement, 70A-4-103.

Time of presentment of instrument, 70A-3-503.

Collateral References.

Banks and Banking ⇌ 161 et seq.

9 CJS Banks and Banking § 237 et seq.

10 AmJur 2d 682, Banks § 711.

70A-4-109. Process of posting. The "process of posting" means the usual procedure followed by a payor bank in determining to pay an item and in recording the payment including one or more of the following or other steps as determined by the bank:

- (a) verification of any signature;
- (b) ascertaining that sufficient funds are available;
- (c) affixing a "paid" or other stamp;
- (d) entering a charge or entry to a customer's account;
- (e) correcting or reversing an entry or erroneous action with respect to the item.

History: L. 1965, ch. 154, § 4-109.

Collateral References.

10 AmJur 2d 462, 668, Banks §§ 494, 699.

PART 2

COLLECTION OF ITEMS — DEPOSITARY AND COLLECTING BANKS

Section

- 70A-4-201. Presumption and duration of agency status of collecting banks and provisional status of credits — Applicability of chapter — Item indorsed "pay any bank."
- 70A-4-202. Responsibility for collection — When action seasonable.
- 70A-4-203. Effect of instructions.
- 70A-4-204. Methods of sending and presenting — Sending direct to payor bank.
- 70A-4-205. Supplying missing indorsement — No notice from prior indorsement.
- 70A-4-206. Transfer between banks.
- 70A-4-207. Warranties of customer and collecting bank on transfer or presentment of items — Time for claims.
- 70A-4-208. Security interest of collecting bank in items, accompanying documents and proceeds.
- 70A-4-209. When bank gives value for purposes of holder in due course.
- 70A-4-210. Presentment by notice of item not payable by, through or at a bank — Liability of secondary parties.
- 70A-4-211. Media of remittance — Provisional and final settlement in remittance cases.
- 70A-4-212. Right of charge-back or refund.
- 70A-4-213. Final payment of item by payor bank — When provisional debits and credits become final — When certain credits become available for withdrawal.
- 70A-4-214. Insolvency and preference.

70A-4-201. Presumption and duration of agency status of collecting banks and provisional status of credits — Applicability of chapter — Item indorsed "pay any bank."

- (1) Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final (subsection (3) of section 70A-4-211 and sections 70a-4-212 and 70A-4-213) the bank is an agent or subagent of the owner of the item and any settlement given for the item is provisional. This provision applies regardless of the form of indorsement or lack of indorsement and even though credit given for the item is subject to immediate withdrawal as of right or is in fact withdrawn; but the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the item are subject to rights of a collecting bank such as those resulting from outstanding advances on the item and valid rights of setoff. When an item is handled by banks for purposes of presentment, payment and collection, the relevant provisions of this chapter apply even though

action of parties clearly establishes that a particular bank has purchased the item and is the owner of it.

- (2) After an item has been indorsed with the words "pay any bank" or the like, only a bank may acquire the rights of a holder
 - (a) until the item has been returned to the customer initiating collection; or
 - (b) until the item has been specially indorsed by a bank to a person who is not a bank.

History: L. 1965, ch. 154, § 4-201.

Cross-References.

Final payment of item by payor bank, 70A-4-213.

Insolvency and preference, 70A-4-214.

Measure of damages for failure to exercise ordinary care in handling an item, 70A-4-103 (5).

Payor bank's responsibility for late return of item, 70A-4-302.

Reacquisition of instrument by prior party, 70A-3-208.

Restrictive indorsement, effect of, 70A-3-206.

Right of charge-back or refund, 70A-4-212.

Transfer of items between banks, 70A-4-206.

Right of charge-back.

Although this section establishes presumption that collecting bank acts as agent for its depositors, where bank was negligent in its duty to give depositor timely notice that check had been dishonored, as required by 70A-4-212 (1), and evidence was sufficient to sustain finding that agreement which had been entered into between bank and depositor at time of closing of sale of depositor's

business constituted an accord and satisfaction, bank forfeited its right to charge-back dishonored check to depositor pursuant to 70A-4-212 and was responsible for resulting loss. First Security Bank of Utah, Nat. Assn. v. Ezra C. Lundahl, Inc. (1969) 22 U 2d 433, 454 P 2d 886.

Collateral References.

Banks and Banking ⇌ 149, 157, 161 et seq.

9 CJS Banks and Banking §§ 215, 218 et seq., 358.

10 AmJur 2d 662, Banks § 694 et seq.

Authority of officer or agent to bind bank as guarantor or surety, 34 ALR 2d 299.

Bank to which paper is sent for collection of principal or interest as agent of obligor, 55 ALR 1168.

Correspondent bank's liability to owner of collection items where credit originally extended to forwarding bank is canceled, 10 ALR 2d 462.

Title to commercial paper deposited with bank for collection, 11 ALR 1043, 1046, 16 ALR 1084, 42 ALR 492, 68 ALR 725, 99 ALR 486.

70A-4-202. Responsibility for collection — When action seasonable.

- (1) A collecting bank must use ordinary care in
 - (a) presenting an item or sending it for presentment; and
 - (b) sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor or directly to the depositary bank under subsection (2) of section 70A-4-212 after learning that the item has not been paid or accepted, as the case may be; and
 - (c) settling for an item when the bank receives final settlement; and
 - (d) making or providing for any necessary protest; and
 - (e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.
- (2) A collecting bank taking proper action before its midnight deadline following receipt of an item, notice or payment acts seasonably;

taking proper action within a reasonably longer time may be reasonable but the bank has the burden of so establishing.

- (3) Subject to subsection (1) (a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank or person or for loss or destruction of an item in transit or in the possession of others.

History: L. 1965, ch. 154, § 4-202.

Cross-References.

Delays by collecting or payor banks, 70A-4-108.

Obligation of good faith, 70A-1-203.

Payor bank's responsibility for late return of item, 70A-4-302.

Recovery of payment by return of items, 70A-4-301.

Time of receipt of items, 70A-4-107.

Variation by agreement, 70A-4-103.

Collateral References.

Banks and Banking ⇔ 149, 161 et seq.

9 CJS Banks and Banking §§ 218 et seq., 235 et seq., 358.

10 AmJur 2d 672, Banks § 701 et seq.

Duties of collecting bank with respect to presenting draft or bill of exchange for acceptance, 39 ALR 2d 1296.

Duty of collecting bank as to notices of protest or dishonor which it receives from its correspondents, 4 ALR 534.

Liability of bank taking commercial paper for collection for default of correspondent, 36 ALR 1308, 44 ALR 1430, 80 ALR 815.

Liability of collecting bank for loss of funds through attachment thereof, 36 ALR 742.

Liability of collecting bank for loss of paper, 50 ALR 1422.

Liability of collecting bank which extends time of payment or accepts renewal, 101 ALR 593.

Negligence action against bank by depositor, admissibility of evidence of custom of banks in locality in handling and dealing with checks and other items involved, 8 ALR 2d 446.

Right and remedy of drawer of check against collecting bank which receives it on forged endorsement and collects it from drawer bank, 99 ALR 2d 637.

70A-4-203. Effect of instructions. Subject to the provisions of chapter 3 concerning conversion of instruments (section 70A-3-419) and the provisions of both chapter 3 and this chapter concerning restrictive indorsements only a collecting bank's transferor can give instructions which affect the bank or constitute notice to it and a collecting bank is not liable to prior parties for any action taken pursuant to such instructions or in accordance with any agreement with its transferor.

History: L. 1965, ch. 154, § 4-203.

Cross-References.

Conversion of instrument, 70A-3-419.

Payment or satisfaction of instrument, 70A-3-603.

Restrictive indorsements, effect, 70A-3-205, 70A-3-206.

Supplying missing indorsement, 70A-4-205.

Variations by agreement, 70A-4-103 (1).

Collateral References.

Banks and Banking ⇔ 161 et seq.

9 CJS Banks and Banking § 223 et seq.

10 AmJur 2d 675, Banks § 703.

Trust or preference in assets of insolvent bank in respect of proceeds of collection as affected by notice or instructions with respect to collection, 90 ALR 6.

What conduct by drawee of check, before receipt of stop-payment order, renders order ineffectual, 10 ALR 2d 428.

70A-4-204. Methods of sending and presenting — Sending direct to payor bank.

- (1) A collecting bank must send items by reasonably prompt method taking into consideration any relevant instructions, the nature of

the item, the number of such items on hand, and the cost of collection involved and the method generally used by it or others to present such items.

- (2) A collecting bank may send
 - (a) any item direct to the payor bank;
 - (b) any item to any nonbank payor if authorized by its transferor; and
 - (c) any item other than documentary drafts to any nonbank payor, if authorized by Federal Reserve regulation or operating letter, clearinghouse rule or the like.
- (3) Presentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made.

History: L. 1965, ch. 154, § 4-204.

Collateral References.

Cross-References.

Documentary drafts, handling of,
70A-4-501, 70A-4-502.
Presentment, how made, 70A-3-504.

Banks and Banking ⇔ 161 et seq., 171 (3)
9 CJS Banks and Banking §§ 242 et seq.,
247.
10 AmJur 2d 680, 689, Banks §§ 710, 720.

70A-4-205. Supplying missing indorsement — No notice from prior indorsement.

- (1) A depository bank which has taken an item for collection may supply any indorsement of the customer which is necessary to title unless the item contains the words "payee's indorsement required" or the like. In the absence of such a requirement a statement placed on the item by the depository bank to the effect that the item was deposited by a customer or credited to his account is effective as the customer's indorsement.
- (2) An intermediary bank, or payor bank which is not a depository bank, is neither given notice nor otherwise affected by a restrictive indorsement of any person except the bank's immediate transferor.

History: L. 1965, ch. 154, § 4-205.

Restrictive indorsements, effect, 70A-3-205,
70A-3-206.

Cross-References.

Conversion of instrument, 70A-3-419.
Instructions, effect of, 70A-4-203.
Payment or satisfaction of instrument,
70A-3-603.

Collateral References.

Banks and Banking ⇔ 161 et seq.
9 CJS Banks and Banking § 235 et seq.
10 AmJur 2d 671, Banks § 700.

70A-4-206. Transfer between banks. Any agreed method which identifies the transferor bank is sufficient for the item's further transfer to another bank.

History: L. 1965, ch. 154, § 4-206.

Collateral References.

Cross-References.

Transfer and negotiation, right to indorsement, 70A-3-201, 70A-3-202.

Banks and Banking ⇔ 161 et seq.
9 CJS Banks and Banking § 235 et seq.
10 AmJur 2d 374, 671, Banks §§ 403, 700.

70A-4-207. Warranties of customer and collecting bank on transfer or presentment of items — Time for claims.

- (1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that
 - (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
 - (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith
 - (i) to a maker with respect to the maker's own signature; or
 - (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
 - (iii) to an acceptor of an item if the holder in due course took the item after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and
 - (c) the item has not been materially altered, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith
 - (i) to the maker of a note; or
 - (ii) to the drawer of a draft whether or not the drawer is also the drawee; or
 - (iii) to the acceptor of an item with respect to an alteration made prior to the acceptance if the holder in due course took the item after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or
 - (iv) to the acceptor of an item with respect to an alteration made after the acceptance.
- (2) Each customer and collecting bank who transfers an item and receives a settlement or other consideration for it warrants to his transferee and to any subsequent collecting bank who takes the item in good faith that
 - (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
 - (b) all signatures are genuine or authorized; and
 - (c) the item has not been materially altered; and
 - (d) no defense of any party is good against him; and
 - (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted item. In addition each customer and collecting

bank so transferring an item and receiving a settlement or other consideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

- (3) The warranties and the engagement to honor set forth in the two preceding subsections arise notwithstanding the absence of indorsement or words of guaranty or warranty in the transfer or presentment and a collecting bank remains liable for their breach despite remittance to its transferor. Damages for breach of such warranties or engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any.
- (4) Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim.

History: L. 1965, ch. 154, § 4-207.

Cross-References.

Contract of indorser, order of liability, 70A-3-414.

Customer's duty to discover and report unauthorized signature or alteration, 70A-4-406.

Finality of payment or acceptance, 70A-3-418.

Security interest of collecting bank in items, accompanying documents and proceeds, 70A-4-208.

Transfer between banks, 70A-4-206.

Transfer, right to indorsement, 70A-3-201.

Warranties on presentment and transfer of commercial paper, 70A-3-417.

When bank gives value for purpose of holder in due course, 70A-4-209.

Collateral References.

Banks and Banking ⇔ 149, 172 et seq.

9 CJS Banks and Banking §§ 254, 358.

10 AmJur 2d 374, 680, Banks §§ 403, 710; 11 AmJur 2d 709, 712, Bills and Notes §§ 640, 649.

70A-4-208. Security interest of collecting bank in items, accompanying documents and proceeds.

- (1) A bank has a security interest in an item and any accompanying documents or the proceeds of either
 - (a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;
 - (b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge-back; or
 - (c) if it makes an advance on or against the item.
- (2) When credit which has been given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.
- (3) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying

documents and proceeds. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues and is subject to the provisions of chapter 9 except that

- (a) no security agreement is necessary to make the security interest enforceable (subsection (1) (b) of section 70a-9-203); and
- (b) no filing is required to perfect the security interest; and
- (c) the security interest has priority over conflicting perfected security interests in the item, accompanying documents or proceeds.

History: L. 1965, ch. 154, § 4-208.

When bank gives value for purpose of holder in due course, 70A-4-209.

Cross-References.

Agency status of collecting banks, 70A-4-201.

Enforceability of security interest, 70A-9-203 (1) (b).

Holder in due course, 70A-3-302, 70A-4-209.

Perfection of security interest, when filing required, 70A-9-302.

Taking for value, 70A-3-303, 70A-4-209.

Collateral References.

Banks and Banking ⇔ 159, 165.

9 CJS Banks and Banking § 250.

11 AmJur 2d 361, Bills and Notes § 339.

Lien of bank upon commercial paper delivered to it by debtor for collection, 22 ALR 2d 478.

70A-4-209. When bank gives value for purposes of holder in due course. For purposes of determining its status as a holder in due course, the bank has given value to the extent that it has a security interest in an item provided that the bank otherwise complies with the requirements of section 70A-3-302 on what constitutes a holder in due course.

History: L. 1965, ch. 154, § 4-209.

Collateral References.

Banks and Banking ⇔ 159 et seq.; Bills and Notes ⇔ 353, 356.

9 CJS Banks and Banking § 218 et seq.; 10 CJS Bills and Notes § 316.

11 AmJur 2d 360 to 363, Bills and Notes §§ 337 to 339.

Cross-References.

Holder in due course, 70A-3-302.

Security interest of collecting bank in items, accompanying documents and proceeds, 70A-4-208.

Value, taking for, 70A-1-201 (44), 70A-3-303.

Crediting proceeds of negotiable paper to depositor's account as constituting bank a holder in due course, 59 ALR 2d 1173.

70A-4-210. Presentment by notice of item not payable by, through or at a bank — Liability of secondary parties.

- (1) Unless otherwise instructed, a collecting bank may present an item not payable by, through or at a bank by sending to the party to accept or pay a written notice that the bank holds the item for acceptance or payment. The notice must be sent in time to be received on or before the day when presentment is due and the bank must meet any requirement of the party to accept or pay

under section 70A-3-505 by the close of the bank's next banking day after it knows of the requirement.

- (2) Where presentment is made by notice and neither honor nor request for compliance with a requirement under section 70A-3-505 is received by the close of business on the day after maturity or in the case of demand items by the close of business on the third banking day after notice was sent, the presenting bank may treat the item as dishonored and charge any secondary party by sending him notice of the facts.

History: L. 1965, ch. 154, § 4-210.

Cross-References.

Dishonor, notice of, 70A-3-507, 70A-3-508.
 Documentary drafts, handling of, 70A-4-501, 70A-4-502.
 Presentment, how made, 70A-3-504.
 Presentment, notice of dishonor and protest, when necessary or permissible, 70A-3-501.

Rights of party to whom presentment is made, 70A-3-505.

Time allowed for acceptance or payment, 70A-3-506.

Time of presentment, 70A-3-503.

Unexcused delay, discharge, 70A-3-502.

Collateral References.

Banks and Banking § 160 et seq.

9 CJS Banks and Banking § 235 et seq.

10 AmJur 2d 680, Banks § 710.

70A-4-211. Media of remittance — Provisional and final settlement in remittance cases.

- (1) A collecting bank may take in settlement of an item
- (a) a check of the remitting bank or of another bank on any bank except the remitting bank; or
 - (b) a cashier's check or similar primary obligation of a remitting bank which is a member of or clears through a member of the same clearinghouse or group as the collecting bank; or
 - (c) appropriate authority to charge an account of the remitting bank or of another bank with the collecting bank; or
 - (d) if the item is drawn upon or payable by a person other than a bank, a cashier's check, certified check or other bank check or obligation.
- (2) If before its midnight deadline the collecting bank properly dishonors a remittance check or authorization to charge on itself or presents or forwards for collection a remittance instrument of or on another bank which is of a kind approved by subsection (1) or has not been authorized by it, the collecting bank is not liable to prior parties in the event of the dishonor of such check, instrument or authorization.
- (3) A settlement for an item by means of a remittance instrument or authorization to charge is or becomes a final settlement as to both the person making and the person receiving the settlement
- (a) if the remittance instrument or authorization to charge is of a kind approved by subsection (1) or has not been authorized by the person receiving the settlement and in either case the person receiving the settlement acts seasonably before its

midnight deadline in presenting, forwarding for collection or paying the instrument or authorization, — at the time the remittance instrument or authorization is finally paid by the payor by which it is payable;

- (b) if the person receiving the settlement has authorized remittance by a nonbank check or obligation or by a cashier's check or similar primary obligation of or a check upon the payor or other remitting bank which is not of a kind approved by subsection (1) (b), — at the time of the receipt of such remittance check or obligation; or
- (c) if in a case not covered by subparagraphs (a) or (b) the person receiving the settlement fails to seasonably present, forward for collection, pay or return a remittance instrument or authorization to it to charge before its midnight deadline, — at such midnight deadline.

History: L. 1965, ch. 154, § 4-211.

Collateral References.

Cross-References.

Final payment of item by payor bank,
70A-4-213.

Banks and Banking ⇔ 161 (3) et seq.
9 CJS Banks and Banking § 243 et seq.
10 AmJur 2d 692, Banks § 724.

Check on bank as payment of debt held by
bank for collection, 18 ALR 537, 65 ALR 1151.

70A-4-212. Right of charge-back or refund.

- (1) If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge-back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final (subsection (3) of section 70A-4-211 and subsections (2) and (3) of section 70A-4-213).
- (2) Within the time and manner prescribed by this section and section 70A-4-301, an intermediary or payor bank, as the case may be, may return an unpaid item directly to the depository bank and may send for collection a draft on the depository bank and obtain reimbursement. In such case, if the depository bank has received provisional settlement for the item, it must reimburse the bank drawing the draft and any provisional credits for the item between banks shall become and remain final.
- (3) A depository bank which is also the payor may charge back the amount of an item to its customer's account or obtain refund in

accordance with the section governing return of an item received by a payor bank for credit on its books (section 70A-4-301).

- (4) The right to charge-back is not affected by
 - (a) prior use of the credit given for the item; or
 - (b) failure by any bank to exercise ordinary care with respect to the item but any bank so failing remains liable.
- (5) A failure to charge-back or claim refund does not affect other rights of the bank against the customer or any other party.
- (6) If credit is given in dollars as the equivalent of the value of an item payable in a foreign currency the dollar amount of any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

History: L. 1965, ch. 154, § 4-212.

Cross-References.

Bank's liability to customer for wrongful dishonor, 70A-4-402.

Final settlement in remittance cases, 70A-4-211 (3).

Item payable in foreign currency, 70A-3-107 (2).

Obligation of good faith, 70A-1-203.

Variation by agreement, 70A-4-103.

When provisional debits and credits become final, 70A-4-213 (2), (3).

Failure to indorse check.

Depositor who negligently failed to indorse check which she was depositing into pass-book savings account and who had reasonable belief that check was drawn on insufficient funds was unable to allege negligence on the part of the bank through its failure to exercise reasonable care in forwarding a check for collection without an adequate indorsement. *Madsen v. Walker Bank & Trust Co.* (1972) 28 U 2d 438, 503 P 2d 1213.

Forfeiture of right.

Where bank was negligent in its duty to give depositor timely notice that check had been dishonored and evidence was sufficient to sustain finding that agreement which had been entered into between bank and depositor at time of closing of sale of depositor's

business constituted an accord and satisfaction, bank forfeited its right to charge-back dishonored check to depositor pursuant to this section and was responsible for resulting loss. *First Security Bank of Utah, Nat. Assn. v. Ezra C. Lundahl, Inc.* (1969) 22 U 2d 433, 454 P 2d 886.

Notice of dishonor.

Where intermediary bank, in lieu of its regular notice procedures, telephoned notice of dishonored check to depositary bank, but gave no written notice or confirmation until six months later, the telephone call did not constitute notice. *Valley Bank & Trust Co. v. First Security Bank of Utah, N. A.* (1975) 538 P 2d 298.

Collateral References.

Banks and Banking ⇔ 158 et seq.

9 CJS Banks and Banking § 220 et seq.

10 AmJur 2d 376, 668, Banks §§ 404, 699.

Right of bank which includes in its remittance to correspondent bank amount of a check drawn on itself which is not good, or other uncollectible item, to recall payment by deducting the amount in next remittance to correspondent, 10 ALR 2d 349.

Setoff or counterclaim, in action against bank to recover partnership deposit, of debt of individual partner, 39 ALR 2d 301.

70A-4-213. Final payment of item by payor bank — When provisional debits and credits become final — When certain credits become available for withdrawal.

- (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
 - (a) paid the item in cash; or

- (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearinghouse rule or agreement; or
- (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
- (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearinghouse rule or agreement

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

- (2) If provisional settlement for an item between the presenting and payor banks is made through a clearinghouse or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.
- (3) If a collecting bank receives a settlement for an item which is or becomes final (subsection (3) of section 70A-4-211, subsection (2) of section 70A-4-213) the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.
- (4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right
 - (a) in any case where the bank has received a provisional settlement for the item, — when such settlement becomes final and the bank has had a reasonable time to learn that the settlement is final;
 - (b) in any case where the bank is both a depository bank and a payor bank and the item is finally paid, — at the opening of the bank's second banking day following receipt of the item.
- (5) A deposit of money in a bank is final when made but, subject to any right of the bank to apply the deposit to an obligation of the customer, the deposit becomes available for withdrawal as of right at the opening of the bank's next banking day following receipt of the deposit.

History: L. 1965, ch. 154, § 4-213.

Cross-References.

Agency status of collecting banks, 70A-4-201.

Finality of payment or acceptance, 70A-3-418.

Insolvency and preference, 70A-4-214.

Payor banks, collection of items, 70A-4-301 to 70A-4-303.

Provisional and final settlement in remittance cases, 70A-4-211.

Right of charge-back or refund, 70A-4-212.

Time of receipt of items, 70A-4-107.

Collateral References.

Banks and Banking ⇔ 158, 163.

9 CJS Banks and Banking §§ 220, 245.

10 AmJur 2d 668, Banks § 699.

70A-4-214. Insolvency and preference.

- (1) Any item in or coming into the possession of a payor or collecting bank which suspends payment and which item is not finally paid shall be returned by the receiver, trustee or agent in charge of the closed bank to the presenting bank or the closed bank's customer.
- (2) If a payor bank finally pays an item and suspends payments without making a settlement for the time with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.
- (3) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement becoming final if such finality occurs automatically upon the lapse of certain time or the happening of certain events (subsection (3) of section 70A-4-211, subsections (1) (d), (2) and (3) of section 70a-4-213).
- (4) If a collecting bank receives from subsequent parties settlement for an item which settlement is or becomes final and suspends payments without making a settlement for the item with its customer which is or becomes final, the owner of the item has a preferred claim against such collecting bank.

History: L. 1965, ch. 154, § 4-214.Separability of provisions of act,
70A-1-108.**Cross-References.**Final payment of item by payor bank,
70A-4-213.Final settlement in remittance cases,
70A-4-211 (3).**Collateral References.**Banks and Banking ⇐ 73 et seq., 166, 167.
9 CJS Banks and Banking §§ 251-253, 487 et
seq.
10 AmJur 2d 675, 711, 719, Banks §§ 704,
748, 756.

PART 3

COLLECTION OF ITEMS — PAYOR BANKS

Section

70A-4-301. Deferred posting — Recovery of payment by return of items — Time of dishonor.

70A-4-302. Payor bank's responsibility for late return of item.

70A-4-303. When items subject to notice, stop order, legal process or setoff — Order in which items may be charged or certified.

70A-4-301. Deferred posting — Recovery of payment by return of items — Time of dishonor.

- (1) Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the

settlement and recover any payment if before it has made final payment (subsection (1) of section 70A-4-213) and before its midnight deadline it

- (a) returns the item; or
 - (b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return.
- (2) If a demand item is received by a payor bank for credit on its books it may return such item or send notice of dishonor and may revoke any credit given or recover the amount thereof withdrawn by its customer, if it acts within the time limit and in the manner specified in the preceding subsection.
- (3) Unless previous notice of dishonor has been sent an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.
- (4) An item is returned:
- (a) as to an item received through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with its rules; or
 - (b) in all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to his instructions.

History: L. 1965, ch. 154, § 4-301.

Payor bank's responsibility for late return of item, 70A-4-302.

Cross-References.

Final payment of item by payor bank, 70A-4-213.
Notice of dishonor, 70A-3-508.

Collateral References.

Banks and Banking ⇔ 163, 168 et seq.
9 CJS Banks and Banking § 245 et seq.
10 AmJur 2d 668, 809, Banks §§ 699, 841.

70A-4-302. Payor bank's responsibility for late return of item. In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of section 70A-4-207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of

- (a) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depository bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depository bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or
- (b) any other properly payable item unless within the time allowed for acceptance or payment of that item the bank either accepts or pays the item or returns it and accompanying documents.

History: L. 1965, ch. 154, § 4-302.

Collateral References.

Banks and Banking ⇔ 137-149, 169 et seq.
9 CJS Banks and Banking §§ 245, 330 et seq.
10 AmJur 2d 765, Banks § 704.

Cross-References.

Time within which payor bank must take action, 70A-4-301.

70A-4-303. When items subject to notice, stop order, legal process or setoff — Order in which items may be charged or certified.

- (1) Any knowledge, notice or stop order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:
- (a) accepted or certified the item;
 - (b) paid the item in cash;
 - (c) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearinghouse rule or agreement;
 - (d) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith or otherwise has evidenced by examination of such indicated account and by action its decision to pay the item; or
 - (e) become accountable for the amount of the item under subsection (1) (d) of section 70A-4-213 and section 70A-4-302 dealing with the payor bank's responsibility for late return of items
- (2) Subject to the provisions of subsection (1) items may be accepted, paid, certified or charged to the indicated account of its customer in any order convenient to the bank.

History: L. 1965, ch. 154, § 4-303.

10 AmJur 2d 462, 516, 612, Banks §§ 494, 542, 641.

Cross-References.

Certification of a check, 70A-3-411.

Final payment of item by payor bank, 70A-4-213 (1).

Operation of acceptance, 70A-3-410.

Payor bank's responsibility for late return of item, 70A-4-302.

Recovery of payment by return of items, 70A-4-301.

Bank's liability for payment of check drawn by one depositor after stop-payment order by joint depositor, 55 ALR 2d 975.

Stipulation relieving bank from, or limiting its liability for disregard of, stop-payment order, 1 ALR 2d 1155.

Uniform Commercial Code: bank's right to stop payment on its own uncertified check or money order, 97 ALR 3d 714.

What conduct by drawee of check, before receipt of stop-payment order, renders order ineffectual, 10 ALR 2d 428.

Collateral References.

Banks and Banking ↔ 139 et seq.

9 CJS Banks and Banking § 344 et seq.

PART 4

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

Section

70A-4-401. When bank may charge customer's account.

70A-4-402. Bank's liability to customer for wrongful dishonor.

- 70A-4-403. Customer's right to stop payment — Burden of proof of loss.
 70A-4-404. Bank not obligated to pay check more than six months old.
 70A-4-405. Death or incompetence of customer.
 70A-4-406. Customer's duty to discover and report unauthorized signature or alteration.
 70A-4-407. Payor bank's right to subrogation on improper payment.

70A-4-401. When bank may charge customer's account.

- (1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.
- (2) A bank which in good faith makes payment to a holder may charge the indicated account of its customer according to
 - (a) the original tenor of his altered item; or
 - (b) the tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

History: L. 1965, ch. 154, § 4-401.

Cross-References.

Alteration of instrument, 70A-3-407.
 Incomplete instruments, 70A-3-115.

Collateral References.

Banks and Banking ⇔ 142.
 9 CJS Banks and Banking § 352 et seq.
 10 AmJur 2d 462, Banks § 494.

Bank's liability for paying postdated check, 76 ALR 2d 1301.

Bank's right to apply third person's funds, deposited in debtor's name, on debtor's obligation, 8 ALR 3d 235.

Effect on bank depositor's rights and those of bank of printed rules in passbook not expressly accepted, 60 ALR 2d 708.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 ALR 3d 719.

70A-4-402. Bank's liability to customer for wrongful dishonor. A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

History: L. 1965, ch. 154, § 4-402.

9 CJS Banks and Banking § 359.

10 AmJur 2d 545, Banks §§ 575, 576.

Collateral References.

Banks and Banking ⇔ 143.

70A-4-403. Customer's right to stop payment — Burden of proof of loss.

- (1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in section 70A-4-303.

- (2) No revocation, countermand or stop payment order relating to the payment of any check against an account of a depositor in any bank or trust company doing business in this state shall remain in effect for more than six months after the service thereof on the bank, unless the same is renewed. Renewals shall be in writing and shall be in effect for not more than six months from date of service thereof on the bank or trust company, but such renewals may be made from time to time. No order stopping payment on a check shall be valid unless the same be in writing specifically describing the check ordered stopped.
- (3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer.

History: L. 1965, ch. 154, § 4-403.

When items subject to notice, stop order, legal process or setoff, 70A-4-303.

Compiler's Notes.

Subsection (2) of the Uniform Code reads: "(2) An oral order is binding upon a bank only for fourteen calendar days unless confirmed in writing within that period. A written order is effective for only six months unless renewed in writing."

Collateral References.

Banks and Banking ⇔ 139.
9 CJS Banks and Banking § 344.
10 AmJur 2d 612, 617, 624, Banks §§ 641, 645, 653.

Cross-References.

Certification of a check, 70A-3-411.
Contract of maker, drawer and acceptor, 70A-3-413.
Death or incompetency of customer, 70A-4-405.
Finality of payment or acceptance, 70A-3-418.
Holder in due course, rights of, 70A-3-305.
Improper payment, payor bank's right to subrogation, 70A-4-407.
Instrument payable at bank, 70A-3-121.
Payment or satisfaction of instrument, 70A-3-603.
Variation by agreement, 70A-4-103.

Bank's right to recover back money paid on stopped check, 39 ALR 1239.

Liability of bank for payment of check drawn by one depositor after stop-payment order by joint depositor, 55 ALR 2d 975.

Liability of drawer who stops payment of check, 14 ALR 562.

Right to countermand, or stop payment on, cashier's check, 56 ALR 532, 107 ALR 1463.

Stipulation relieving bank from, or limiting its liability for, disregard of stop-payment order, 1 ALR 2d 1155.

What conduct by drawee of a check, before receipt of stop-payment order renders order ineffectual, 10 ALR 2d 428.

70A-4-404. Bank not obligated to pay check more than six months old. A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

History: L. 1965, ch. 154, § 4-404.

Collateral References.

Banks and Banking ⇔ 138 et seq.
9 CJS Banks and Banking § 342 et seq.
10 AmJur 2d 326, Banks § 552.

Cross-References.

Certification of a check, 70A-3-411.
Contract of maker, drawer and acceptor, 70A-3-413.

70A-4-405. Death or incompetence of customer.

- (1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of

either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

- (2) Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account, and section 7-3-50, Utah Code Annotated, 1953, shall not be applicable to the stop payment order of such person.

History: L. 1965, ch. 154, § 4-405.

10 AmJur 2d 529, 620, Banks §§ 559, 648.

Collateral References.

Banks and Banking ⇄ 139, 156.
9 CJS Banks and Banking §§ 217, 344.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 ALR 3d 908.

70A-4-406. Customer's duty to discover and report unauthorized signature or alteration.

- (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
- (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
- (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and
 - (b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.
- (3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).
- (4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any

alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

- (5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

History: L. 1965, ch. 154, § 4-406.

Cross-References.

Forgery, 76-6-501.
 Impostors, signature in name of payee, 70A-3-405.
 Unauthorized signature or alteration, 70A-3-404, 70A-3-406, 70A-3-407.
 Warranties on presentment and transfer, 70A-3-417, 70A-4-207.

Bank's duty of care.

Where bank paid five-month-old check, known to bear unauthorized signature, depositor was entitled to recover amount paid; notwithstanding that purpose of this section is to provide overall limitation of six months after which check is regarded as "stale" and need not be paid, it does not "authorize" payment of check up to six months of age, nor does it otherwise affect duty of bank to exercise ordinary and reasonable care in paying checks presented to it. *W. P. Harlin Constr. Co. v. Continental Bank & Trust Co.* (1970) 23 U 2d 422, 464 P 2d 585.

Collateral References.

Banks and Banking ⇌ 148 (3).
 9 CJS Banks and Banking § 356.
 10 AmJur 2d 484-490, Banks §§ 515-519.

Certification of forged check as affecting drawee's rights to recover back amount paid thereon, 110 ALR 1109.

Construction and effect of statutes relieving bank from its liability to depositor for

payment of forged or raised check unless within a specified time after the return of a voucher representing payment he notifies the bank as to the forgery or raising, 50 ALR 2d 1115.

Depositor's right against bank charging forged checks to his account as affected by his seeking restitution from the forger or third person, 118 ALR 570, 144 ALR 1448.

Duty of depositor to turn over to bank forged checks, or checks with forged endorsements, which have been paid by bank, 60 ALR 527.

Negligence in drawing check which facilitates alteration as to payee as affecting bank's liability in cashing check, 64 ALR 1108.

Negotiable Instruments Act as affecting rights and obligations between depositor and bank which pays forged checks, 146 ALR 840.

Payment of check upon forged or unauthorized endorsement as affecting the right of the true owner against the bank, 14 ALR 764, 69 ALR 1076, 137 ALR 874.

Right of drawee bank to charge back a credit given on a forged check, 5 ALR 1566.

Right of drawee of forged check or draft to recover amount paid thereon, 12 ALR 1089, 71 ALR 337, 121 ALR 1056.

Right of third person to be subrogated to depositor's claim against bank on account of the latter's payment of forged or raised check, 77 ALR 1057.

Rights and liabilities of bank with respect to certified check or draft fraudulently altered, 22 ALR 1157.

DECISIONS UNDER FORMER LAW

Effect of payment of forged check.

Even in absence of statute, a payment of a forged check is not a payment to order of the

payee. *Brixen v. Deseret Nat. Bank of Salt Lake City* (1888) 5 U 504, 511, 18 P 43.

70A-4-407. Payor bank's right to subrogation on improper payment.
 If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for

objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights

- (a) of any holder in due course on the item against the drawer or maker; and
- (b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and
- (c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

History: L. 1965, ch. 154, § 4-407.

Cross-References.

Customer's right to stop payment, 70A-4-403.

Computer error.

Stop-payment request by wife for check written by husband on their joint bank account was valid; payor bank which failed to

honor request due to computer error cannot recover amount of check from husband. Valley Bank & Trust Co. v. Weyerman Feathers (1973) 30 U 2d 161, 514 P 2d 1282.

Collateral References.

Subrogation ⇔ 4.
83 CJS Subrogation § 22.
10 AmJur 2d 624, Banks § 654.

PART 5

COLLECTION OF DOCUMENTARY DRAFTS

Section

- 70A-4-501. Handling of documentary drafts - Duty to send for presentment and to notify customer of dishonor.
- 70A-4-502. Presentment of "on arrival" drafts.
- 70A-4-503. Responsibility of presenting bank for documents and goods — Report of reasons for dishonor — Referee in case of need.
- 70A-4-504. Privilege of presenting bank to deal with goods — Security interest for expenses.

70A-4-501. Handling of documentary drafts - Duty to send for presentment and to notify customer of dishonor. A bank which takes a documentary draft for collection must present or send the draft and accompanying documents for presentment and upon learning that the draft has not been paid or accepted in due course must seasonably notify its customer of such fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

History: L. 1965, ch. 154, § 4-501.

Cross-References.

Agency status of collecting banks, 70A-4-201.

Availability of credit, 70A-5-110 to 70A-5-113.

Instructions to collecting bank, effect of, 70A-4-203.

Responsibility of collecting bank, 70A-4-202.

Sending and presenting, 70A-4-204, 70A-4-210.

Collateral References.

Banks and Banking ⇔ 161.
9 CJS Banks and Banking § 241.
10 AmJur 2d 684, Banks § 713.

Duties of collecting bank with respect to presenting draft for acceptance, 39 ALR 2d 1296.

Law Reviews.

Documentary Drafts Under the Uniform Commercial Code, E. A. Farnsworth, 22 Business Lawyer 479.

70A-4-502. Presentment of "on arrival" drafts. When a draft or the relevant instructions require presentment "on arrival," "when goods arrive" or the like, the collecting bank need not present until in its judgment a reasonable time for arrival of the goods has expired. Refusal to pay or accept because the goods have not arrived is not dishonor; the bank must notify its transferor of such refusal but need not present the draft again until it is instructed to do so or learns of the arrival of the goods.

History: L. 1965, ch. 154, § 4-502.

Time allowed for honor or rejection when presented under a credit, 70A-5-112.

Cross-References.

Instructions to collecting bank, effect of, 70A-4-203.

Responsibility of collecting bank, 70A-4-202.

Collateral References.

Banks and Banking ⇌ 140, 161 et seq.
9 CJS Banks and Banking §§ 241 et seq., 342.

10 AmJur 2d 684, Banks § 713.

70A-4-503. Responsibility of presenting bank for documents and goods — Report of reasons for dishonor — Referee in case of need. Unless otherwise instructed and except as provided in chapter 5 a bank presenting a documentary draft

- (a) must deliver the documents to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment; and
- (b) upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or if the presenting bank does not choose to utilize his services it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor and must request instructions.

But the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity for such expenses.

History: L. 1965, ch. 154, § 4-503.

Letters of credit, 70A-5-101 to 70A-5-117.
Privilege of presenting bank to deal with goods, 70A-4-504.

Cross-References.

Availability of credit, 70A-5-110 to 70A-5-113.

Documents deliverable on acceptance or payment, 70A-2-514.

Issuing credit, obligation of issuer to its customer, duty and privilege to honor, 70A-5-109, 70A-5-114.

Collateral References.

Banks and Banking ⇌ 161 et seq.; Bills and Notes ⇌ 1, 3, 6.

9 CJS Banks and Banking § 241 et seq.; 10 CJS Bills and Notes §§ 4, 32, 112.

10 AmJur 2d 677, 685, Banks §§ 706, 713.

70A-4-504. Privilege of presenting bank to deal with goods — Security interest for expenses.

- (1) A presenting bank which, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive

them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

- (2) For its reasonable expenses incurred by action under subsection (1) the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

History: L. 1965, ch. 154, § 4-504.

Sale of goods, 70A-2-706.

Cross-References.

Responsibility of presenting bank for documents and goods, 70A-4-503.

Collateral References.

Banks and Banking ⇔ 161 et seq.
9 CJS Banks and Banking § 241 et seq.
10 AmJur 2d 677, Banks § 706.

CHAPTER 5

LETTERS OF CREDIT

Section

- 70A-5-101. Short title.
70A-5-102. Scope.
70A-5-103. Definitions.
70A-5-104. Formal requirements — Signing.
70A-5-105. Consideration.
70A-5-106. Time and effect of establishment of credit.
70A-5-107. Advice of credit — Confirmation — Error in statement of terms.
70A-5-108. "Notation credit" — Exhaustion of credit.
70A-5-109. Issuer's obligation to its customer.
70A-5-110. Availability of credit in portions — Presenter's reservation of lien or claim.
70A-5-111. Warranties on transfer and presentment.
70A-5-112. Time allowed for honor or rejection — Withholding honor or rejection by consent — "Presenter."
70A-5-113. Indemnities.
70A-5-114. Issuer's duty and privilege to honor — Right to reimbursement.
70A-5-115. Remedy for improper dishonor or anticipatory repudiation.
70A-5-116. Transfer and assignment.
70A-5-117. Insolvency of bank holding funds for documentary credit.

70A-5-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Letters of Credit.

History: L. 1965, ch. 154, § 5-101.

Construction and effect of UCC art. 5, dealing with letters of credit, 35 ALR 3d 1404.

Collateral References.

Banks and Banking ⇔ 191.
9 CJS Banks and Banking § 174 et seq.
50 AmJur 2d 399, Letters of Credit, and Credit Cards § 2.

Law Reviews.

The Uniform Commercial Code in Utah, Ronald N. Boyce, 9 Utah L. Rev. 904, 931.

70A-5-102. Scope.

- (1) This chapter applies
- (a) to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment; and
 - (b) to a credit issued by a person other than a bank if the credit requires that the draft or demand for payment be accompanied by a document of title; and

- (c) to a credit issued by a bank or other person if the credit is not within subparagraphs (a) or (b) but conspicuously states that it is a letter of credit or is conspicuously so entitled.
- (2) Unless the engagement meets the requirements of subsection (1), this chapter does not apply to engagements to make advances or to honor drafts or demands for payment, to authorities to pay or purchase, to guarantees or to general agreements.
- (3) This chapter deals with some but not all of the rules and concepts of letters of credit as such rules or concepts have developed prior to this act or may hereafter develop. The fact that this chapter states a rule does not by itself require, imply or negate application of the same or a converse rule to a situation not provided for or to a person not specified by this chapter.

History: L. 1965, ch. 154, § 5-102.

Collateral References.

Cross-References.

Purposes of act, 70A-1-102.

Banks and Banking ⇔ 191.
 9 CJS Banks and Banking § 174 et seq.
 50 AmJur 2d 399, Letters of Credit, and
 Credit Cards § 2.

70A-5-103. Definitions.

- (1) In this chapter unless the context otherwise requires
 - (a) "credit" or "letter of credit" means an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this chapter (section 70A-5-102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement may be either an agreement to honor or a statement that the bank or other person is authorized to honor.
 - (b) A "documentary draft" or a "documentary demand for payment" is one honor of which is conditioned upon the presentation of a document or documents. "Document" means any paper including document of title, security, invoice, certificate, notice of default and the like.
 - (c) An "issuer" is a bank or other person issuing a credit.
 - (d) A "beneficiary" of a credit is a person who is entitled under its terms to draw or demand payment.
 - (e) An "advising bank" is a bank which gives notification of the issuance of a credit by another bank.
 - (f) A "confirming bank" is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank.
 - (g) A "customer" is a buyer or other person who causes an issuer to issue a credit. The term also includes a bank which procures issuance or confirmation on behalf of that bank's customer.

- (2) Other definitions applying to this chapter and the sections in which they appear are:
 "Notation of Credit." Section 70A-5-108.
 "Presenter." Section 70A-5-112 (3).
- (3) Definitions in other chapters applying to this chapter and the sections in which they appear are:
 "Accept" or "Acceptance." Section 70A-3-410.
 "Contract for sale." Section 70A-2-106.
 "Draft." Section 70A-3-104.
 "Holder in due course." Section 70A-3-302.
 "Midnight deadline." Section 70A-4-104.
 "Security." Section 70A-8-102.
- (4) In addition, chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: L. 1965, ch. 154, § 5-103.

Cross-References.

Advice of credit, 70A-5-107.
 Commercial paper, 70A-3-101 to 70A-3-805.
 Contract for sale, letter of credit, effect, 70A-2-325.
 Course of dealing and usage of trade, 70A-1-205.
 "Document" defined, 70A-9-105 (1) (e).
 "Document of title" defined, 70A-1-201 (15).
 Investment securities, 70A-8-101 to 70A-8-406.
 Issuer of credit, obligation to customer, 70A-5-109.
 Scope of chapter, 70A-5-102.
 Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Supplementary general principles of law applicable, 70A-1-103.

Time and effect of establishment of credit, 70A-5-106.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Banks and Banking ⇐ 191; Guaranty ⇐ 1, 27, 38 (1-3); Statutes ⇐ 179.

9 CJS Banks and Banking §§ 174-183; 38 CJS Guaranty §§ 1, 7, 38; 82 CJS Statutes § 315.

50 AmJur 2d 400, Letters of Credit, and Credit Cards § 3.

What constitutes letter of credit, 30 ALR 1310.

70A-5-104. Formal requirements — Signing.

- (1) Except as otherwise required in subsection (1) (c) of section 70a-5-102 on scope, no particular form of phrasing is required for a credit. A credit must be in writing and signed by the issuer and a confirmation must be in writing and signed by the confirming bank. A modification of the terms of a credit or confirmation must be signed by the issuer or confirming bank.
- (2) A telegram may be a sufficient signed writing if it identifies its sender by an authorized authentication. The authentication may be in code and the authorized naming of the issuer in an advice of credit is a sufficient signing.

History: L. 1965, ch. 154, § 5-104.

"Signed" defined, 70A-1-201 (39).

Supplementary general principles of law applicable, 70A-1-103.

Cross-References.

Modification, rescission and waiver, 70A-2-209, 70A-5-106.
 Scope of chapter, 70A-5-102.

Collateral References.

Banks and Banking ⇐ 191.

9 CJS Banks and Banking § 174 et seq.

50 AmJur 2d 406, Letters of Credit, and
Credit Cards § 10.

70A-5-105. Consideration. No consideration is necessary to establish a credit or to enlarge or otherwise modify its terms.

History: L. 1965, ch. 154, § 5-105.

9 CJS Banks and Banking § 174 et seq.

Collateral References.

Banks and Banking ⇔ 191.

50 AmJur 2d 407, Letters of Credit, and
Credit Cards § 11.

70A-5-106. Time and effect of establishment of credit.

- (1) Unless otherwise agreed a credit is established
 - (a) as regards the customer as soon as a letter of credit is sent to him or the letter of credit or an authorized written advice of its issuance is sent to the beneficiary; and
 - (b) as regards the beneficiary when he receives a letter of credit or an authorized written advice of its issuance.
- (2) Unless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.
- (3) Unless otherwise agreed after a revocable credit is established it may be modified or revoked by the issuer without notice to or consent from the customer or beneficiary.
- (4) Notwithstanding any modification or revocation of a revocable credit any person authorized to honor or negotiate under the terms of the original credit is entitled to reimbursement for or honor of any draft or demand for payment duly honored or negotiated before receipt of notice of the modification or revocation and the issuer in turn is entitled to reimbursement from its customer.

History: L. 1965, ch. 154, § 5-106.

Issuance of credit, duty and privilege of
issuer to honor draft, 70A-5-114.

Cross-References.

Advice of credit, 70A-5-107.

Contract for sale, letter of credit, effect,
70A-2-325.

Collateral References.

Banks and Banking ⇔ 191.

9 CJS Banks and Banking § 178 et seq.

50 AmJur 2d 411, Letters of Credit, and
Credit Cards § 15.

70A-5-107. Advice of credit — Confirmation — Error in statement of terms.

- (1) Unless otherwise specified an advising bank by advising a credit issued by another bank does not assume any obligation to honor drafts drawn or demands for payment made under the credit but it does assume obligation for the accuracy of its own statement.
- (2) A confirming bank by confirming a credit becomes directly obligated on the credit to the extent of its confirmation as though it were its issuer and acquires the rights of an issuer.
- (3) Even though an advising bank incorrectly advises the terms of a credit it has been authorized to advise the credit is established as against the issuer to the extent of its original terms.

- (4) Unless otherwise specified the customer bears as against the issuer all risks of transmission and reasonable translation or interpretation of any message relating to a credit.

History: L. 1965, ch. 154, § 5-107.

Collateral References.

Cross-References.

"Advising bank" defined, 70A-5-103 (1) (e).
Issuer of credit, obligation to its customer,
70A-5-109.

Banks and Banking ⇔ 191.
9 CJS Banks and Banking § 174 et seq.
50 AmJur 2d 410, Letters of Credit, and
Credit Cards § 14.

70A-5-108. "Notation credit" — Exhaustion of credit.

- (1) A credit which specifies that any person purchasing or paying drafts drawn or demands for payment made under it must note the amount of the draft or demand on the letter or advice of credit is a "notation credit."
- (2) Under a notation credit
- (a) a person paying the beneficiary or purchasing a draft or demand for payment from him acquires a right to honor only if the appropriate notation is made and by transferring or forwarding for honor the documents under the credit such a person warrants to the issuer that the notation has been made; and
- (b) unless the credit or a signed statement that an appropriate notation has been made accompanies the draft or demand for payment the issuer may delay honor until evidence of notation has been procured which is satisfactory to it but its obligation and that of its customer continue for a reasonable time not exceeding thirty days to obtain such evidence.
- (3) If the credit is not a notation credit
- (a) the issuer may honor complying drafts or demands for payment presented to it in the order in which they are presented and is discharged pro tanto by honor of any such draft or demand;
- (b) as between competing good faith purchasers of complying drafts or demands the person first purchasing has priority over a subsequent purchaser even though the later purchased draft or demand has been first honored.

History: L. 1965, ch. 154, § 5-108.

Collateral References.

Cross-References.

Availability of credit in portions,
70A-5-110.
Drafts in a set, 70A-3-801.

Banks and Banking ⇔ 191.
9 CJS Banks and Banking § 174 et seq.
50 AmJur 2d 400, 422, 426, 427, Letters of
Credit, and Credit Cards §§ 3, 29, 35, 36.

70A-5-109. Issuer's obligation to its customer.

- (1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility

- (a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or
 - (b) for any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or
 - (c) based on knowledge or lack of knowledge of any usage of any particular trade.
- (2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.
- (3) A nonbank issuer is not bound by any banking usage of which it has no knowledge.

History: L. 1965, ch. 154, § 5-109.

Purposes of act, 70A-1-102.

Cross-References.

Advice of credit, 70A-5-107.

"Agreement" defined, 70A-1-201 (3).

Course of dealing and usage of trade, 70A-1-205.

Issuance of credit, duty and privilege of issuer to honor draft, 70A-5-114.

Obligation of good faith, 70A-1-203.

Collateral References.

Banks and Banking ⇔ 191.

9 CJS Banks and Banking § 179.

50 AmJur 2d 414 to 416, Letters of Credit, and Credit Cards §§ 19, 20.

Construction of provision for letter of credit in contract of sale, 38 ALR 608.

70A-5-110. Availability of credit in portions — Presenter's reservation of lien or claim.

- (1) Unless otherwise specified a credit may be used in portions in the discretion of the beneficiary.
- (2) Unless otherwise specified a person by presenting a documentary draft or demand for payment under a credit relinquishes upon its honor all claims to the documents and a person by transferring such draft or demand or causing such presentment authorizes such relinquishment. An explicit reservation of claim makes the draft or demand noncomplying.

History: L. 1965, ch. 154, § 5-110.

Notation credit, 70A-5-108.

Cross-References.

Contract for sale, letter of credit, effect, 70A-2-325.

Exhaustion of credit, 70A-5-108.

Issuance of credit, issuer's duty and privilege to honor draft, 70A-5-114.

Collateral References.

Banks and Banking ⇔ 191.

9 CJS Banks and Banking § 178 et seq.

50 AmJur 2d 424, 425, Letters of Credit, and Credit Cards §§ 32, 33.

70A-5-111. Warranties on transfer and presentment.

- (1) Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under chapters 3, 4, 7 and 8.

- (2) Unless otherwise agreed a negotiating, advising, confirming, collecting or issuing bank presenting or transferring a draft or demand for payment under a credit warrants only the matters warranted by a collecting bank under chapter 4 and any such bank transferring a document warrants only the matters warranted by an intermediary under chapters 7 and 8.

History: L. 1965, ch. 154, § 5-111.

Investment securities, warranties on presentment and transfer, 70A-8-306.

Warehouse receipts, warranties on negotiation or transfer, 70A-7-507.

Cross-References.

Bills of lading, warranties on negotiation and transfer, 70A-7-507.

Commercial paper, warranties on presentment and transfer, 70A-3-417.

Customer and collecting bank, warranties on transfer or presentment of items, 70A-4-207.

Documents of title, warranties of collecting bank, 70A-7-508.

Collateral References.

Banks and Banking ⇔ 191.

9 CJS Banks and Banking § 178 et seq.

50 AmJur 2d 424, Letters of Credit, and Credit Cards § 31.

70A-5-112. Time allowed for honor or rejection — Withholding honor or rejection by consent — “Presenter.”

- (1) A bank to which a documentary draft or demand for payment is presented under a credit may without dishonor of the draft, demand or credit
- (a) defer honor until the close of the third banking day following receipt of the documents; and
- (b) further defer honor if the presenter has expressly or impliedly consented thereto.

Failure to honor within the time here specified constitutes dishonor of the draft or demand and of the credit except as otherwise provided in subsection (4) of section 70A-5-114 on conditional payment.

- (2) Upon dishonor the bank may unless otherwise instructed fulfill its duty to return the draft or demand and the documents by holding them at the disposal of the presenter and sending him an advice to that effect.
- (3) “Presenter” means any person presenting a draft or demand for payment for honor under a credit even though that person is a confirming bank or other correspondent which is acting under an issuer’s authorization.

History: L. 1965, ch. 154, § 5-112.

Privilege of presenting bank to deal with goods, 70A-4-504.

Responsibility of collecting bank, 70A-4-202.

Responsibility of presenting bank for documents and goods, 70A-4-503.

Cross-References.

Bank deposits and collections, 70A-4-101 to 70A-4-504.

Commercial paper, time allowed for acceptance or payment, 70A-3-506.

Dishonor of commercial paper, 70A-3-507.

Issuance of credit, duties of issuer, 70A-5-109, 70A-5-114, 70A-5-115.

Payor bank’s responsibility for late return of item, 70A-4-302.

Collateral References.

Banks and Banking ⇔ 191.

9 CJS Banks and Banking § 178 et seq.

50 AmJur 2d 426, Letters of Credit, and Credit Cards § 35.

70A-5-113. Indemnities.

- (1) A bank seeking to obtain (whether for itself or another) honor, negotiation or reimbursement under a credit may give an indemnity to induce such honor, negotiation or reimbursement.
- (2) An indemnity agreement inducing honor, negotiation or reimbursement
 - (a) unless otherwise explicitly agreed applies to defects in the documents but not in the goods; and
 - (b) unless a longer time is explicitly agreed expires at the end of ten business days following receipt of the documents by the ultimate customer unless notice of objection is sent before such expiration date. The ultimate customer may send notice of objection to the person from whom he received the documents and any bank receiving such notice is under a duty to send notice to its transferor before its midnight deadline.

History: L. 1965, ch. 154, § 5-113.

Payment against documents without reservation of rights precludes recovery for defects on face of documents, 70A-2-605 (2).

Cross-References.

Course of dealing and usage of trade, 70A-1-205.

Issuance of credit, issuer's obligation to its customer, 70A-5-109.

Collateral References.

Indemnity ⇔ 1 et seq.

42 CJS Indemnity § 1 et seq.

50 AmJur 2d 425, Letters of Credit, and Credit Cards § 34.

70A-5-114. Issuer's duty and privilege to honor — Right to reimbursement.

- (1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified documents must be satisfactory to it.
- (2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (section 70A-7-507) or of a security (section 70a-8-306) or is forged or fraudulent or there is fraud in the transaction
 - (a) the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (section 70A-3-302) and in an appropriate case would make it a person to whom a document of

title has been duly negotiated (section 70a-7-502) or a bona fide purchaser of a security (section 70A-8-302); and

- (b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.
- (3) Unless otherwise agreed an issuer which has duly honored a draft or demand for payment is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.
- (4) When a credit provides for payment by the issuer on receipt of notice that the required documents are in the possession of a correspondent or other agent of the issuer
- (a) any payment made on receipt of such notice is conditional; and
- (b) the issuer may reject documents which do not comply with the credit if it does so within three banking days following its receipt of the documents; and
- (c) in the event of such rejection, the issuer is entitled by charge back or otherwise to return of the payment made.
- (5) In the case covered by subsection (4) failure to reject documents within the time specified in subparagraph (b) constitutes acceptance of the documents and makes the payment final in favor of the beneficiary.

History: L. 1965, ch. 154, § 5-114.

Reliance on procedures.

Bank that issued letters of credit to customer agreeing to pay all collection drafts, but actually honored the letters upon presentation of invoices, cannot later refuse to honor their letter of credit by demanding collection drafts, where they neglected to return the unpaid invoices until after the expiration of the letter of credit. *Titanium Metals Corp. of America v. Space Metals, Inc.* (1974) 529 P 2d 431.

Collateral References.

Banks and Banking ⇐ 191.
9 CJS Banks and Banking § 178 et seq.
50 AmJur 2d 417, 418, 420, Letters of Credit, and Credit Cards §§ 22, 23, 29.

Cross-References.

Commercial paper, 70A-3-101 to 70A-3-805.
Investment securities, 70A-8-101 to 70A-8-406.

Issuance of credit, issuer's obligation to its customer, 70A-5-109.

Time and effect of establishing credit, 70A-5-106.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Warranties of beneficiary of credit on transfer and presentment of draft, 70A-5-111.

70A-5-115. Remedy for improper dishonor or anticipatory repudiation.

- (1) When an issuer wrongfully dishonors a draft or demand for payment presented under a credit the person entitled to honor has with respect to any documents the rights of a person in the position of a seller (section 70A-2-707) and may recover from the issuer the

face amount of the draft or demand together with incidental damages under section 70A-2-710 on seller's incidental damages and interest but less any amount realized by resale or other use or disposition of the subject matter of the transaction. In the event no resale or other utilization is made the documents, goods or other subject matter involved in the transaction must be turned over to the issuer on payment of judgment.

- (2) When an issuer wrongfully cancels or otherwise repudiates a credit before presentment of a draft or demand for payment drawn under it the beneficiary has the rights of a seller after anticipatory repudiation by the buyer under section 70A-2-610 if he learns of the repudiation in time reasonably to avoid procurement of the required documents. Otherwise the beneficiary has an immediate right of action for wrongful dishonor.

History: L. 1965, ch. 154, § 5-115.

Cross-References.

Contract for sale, anticipatory repudiation, 70A-2-610, 70A-2-611.

Issuance of credit, duty and privilege of issuer to honor draft, 70A-5-114.

Remedies of seller of goods for breach of contract, 70A-2-703 to 70A-2-707, 70A-2-710.

Time allowed for honor or rejection of draft presented under credit, 70A-5-112.

Time and effect of establishment of credit, 70A-5-106.

Transfer and assignment of credit, 70A-5-116.

Collateral References.

Banks and Banking ⇔ 191.

9 CJS Banks and Banking § 178 et seq.

50 AmJur 2d 427, Letters of Credit, and Credit Cards § 37.

Dishonor of draft issued under letter of credit, rights and remedies of holder, 53 ALR 57.

70A-5-116. Transfer and assignment.

- (1) The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable.
- (2) Even though the credit specifically states that it is nontransferable or nonassignable the beneficiary may before performance of the conditions of the credit assign his right to proceeds. Such an assignment is an assignment of an account under chapter 9 on Secured Transactions and is governed by that chapter except that
- (a) the assignment is ineffective until the letter of credit or advice of credit is delivered to the assignee which delivery constitutes perfection of the security interest under chapter 9; and
 - (b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and
 - (c) after what reasonably appears to be such a notification has been received the issuer may without dishonor refuse to accept or pay even to a person otherwise entitled to honor

until the letter of credit or advice of credit is exhibited to the issuer.

- (3) Except where the beneficiary has effectively assigned his right to draw or his right to proceeds, nothing in this section limits his right to transfer or negotiate drafts or demands drawn under the credit.

History: L. 1965, ch. 154, § 5-116; 1977, ch. 272, § 6.

Compiler's Notes.

The 1977 amendment substituted "an account" for "a contract right" in the middle of the second sentence of subsec. (2).

Cross-References.

Assignment of contract or rights under sales contract, 70A-2-210.

Sales of accounts, defenses against assignee, 70A-9-318.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Collateral References.

Assignments ⇌ 1 et seq.; Banks and Banking ⇌ 191.

6A CJS Assignments § 1 et seq.; 9 CJS Banks and Banking § 174 et seq.

50 AmJur 2d 411, Letters of Credit, and Credit Cards § 17.

70A-5-117. Insolvency of bank holding funds for documentary credit.

- (1) Where an issuer or an advising or confirming bank or a bank which has for a customer procured issuance of a credit by another bank becomes insolvent before final payment under the credit and the credit is one to which this chapter is made applicable by paragraphs (a) or (b) of section 70A-5-102 (1) on scope, the receipt or allocation of funds or collateral to secure or meet obligations under the credit shall have the following results:
- (a) to the extent of any funds or collateral turned over after or before the insolvency as indemnity against or specifically for the purpose of payment of drafts or demands for payment drawn under the designated credit, the drafts or demands are entitled to payment in preference over depositors or other general creditors of the issuer or bank; and
 - (b) on expiration of the credit or surrender of the beneficiary's rights under it unused any person who has given such funds or collateral is similarly entitled to return thereof; and
 - (c) a change (charge) to a general or current account with a bank if specifically consented to for the purpose of indemnity against or payment of drafts or demands for payment drawn under the designated credit falls under the same rules as if the funds had been drawn out in cash and then turned over with specific instructions.
- (2) After honor or reimbursement under this section the customer or other person for whose account the insolvent bank has acted is entitled to receive the documents involved.

History: L. 1965, ch. 154, § 5-117.

Compiler's Notes.

The bracketed word in subd. (c) was inserted by the compiler.

Cross-References.

Bank deposits and collections, insolvency and preference, 70A-4-214.

50 AmJur 2d 413, Letters of Credit, and Credit Cards § 18.

Collateral References.

Banks and Banking ⇔ 73 et seq., 191.
9 CJS Banks and Banking §§ 178-183, 488 et seq.

Insolvency of bank issuing letter before payment of draft, rights and remedies of parties to letter of credit or draft issued thereunder, 80 ALR 803.

CHAPTER 6**BULK TRANSFERS****Section**

- 70A-6-101. Short title.
70A-6-102. "Bulk transfers" — Transfers of equipment — Enterprises subject to this chapter — Bulk transfers subject to this chapter.
70A-6-103. Transfers excepted from this chapter.
70A-6-104. Schedule of property — List of creditors.
70A-6-105. Notice to creditors.
70A-6-106. Application of the proceeds.
70A-6-107. The notice.
70A-6-108. Auction sales — "Auctioneer."
70A-6-109. What creditors protected — Credit for payment to particular creditors.
70A-6-110. Subsequent transfers.
70A-6-111. Limitation of actions and levies.

70A-6-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Bulk Transfers.

History: L. 1965, ch. 154, § 6-101.

37 AmJur 2d 891, Fraudulent Conveyances § 238 et seq.

Cross-References.

- Auction sales, 70A-6-108.
"Bulk transfer" defined, 70A-6-102.
Creditors, protection of, 70A-6-109.
List of creditors and schedule of property, 70A-6-104.
Notice to creditors, 70A-6-105, 70A-6-107.
Transfers excepted from chapter, 70A-6-103.

Law Reviews.

Article 6 of the Uniform Commercial Code: Problems and Pitfalls in Conducting Bulk Sales, D. J. Rapson, 63 Com. L. J. 226.
The Uniform Commercial Code in Utah, Ronald N. Boyce, 9 Utah L. Rev. 904, 934.
Note, Dividing the Bulk Sales Stew in Utah: Hot Potatoes to the Courts, the Federal Government's Share, and Other Problems under the Uniform Commercial Code — Bulk Transfers, 1972 Utah L. Rev. 71.

Collateral References.

- Fraudulent Conveyances ⇔ 2 et seq.
37 CJS Fraudulent Conveyances § 471 et seq.

70A-6-102. "Bulk transfers" — Transfers of equipment — Enterprises subject to this chapter — Bulk transfers subject to this chapter.

- (1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (section 70a-9-109) of an enterprise subject to this chapter.
- (2) A transfer of a substantial part of the equipment (section 70a-9-109) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

- (3) The enterprises subject to this chapter are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.
- (4) Except as limited by the following section all bulk transfers of goods located within this state are subject to this chapter.

History: L. 1965, ch. 154, § 6-102.

Cross-References.

Bank deposits and collections, 70A-4-101 to 70A-4-504.

Commercial paper, transfer and negotiation, 70A-3-201 to 70A-3-208.

Investment securities, transfer, 70A-8-101 to 70A-8-406.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Territorial application of act, 70A-1-105.

Transfers excepted from chapter, 70A-6-103.

Transfer among subsidiaries.

The transfer of assets from subsidiary corporation which was engaged in manufacturing to subsidiary corporation engaged in sale of merchandise was not a bulk transfer as contemplated by this section. *First Security Bank of Utah v. Zions First Nat. Bank* (1975) 537 P 2d 1024.

Collateral References.

Fraudulent Conveyances ⇐ 47.

37 CJS Fraudulent Conveyances §§ 479 to 481.

37 AmJur 2d 898 to 913, Fraudulent Conveyances §§ 245 to 259.

Branch or department of business, sale of entire stock of as within Bulk Sales Law, 33 ALR 62.

Business or sellers subject to bulk sales statute, 168 ALR 735.

Chattel mortgages and sales thereunder, applicability of Bulk Sales Law, 9 ALR 473, 14 ALR 753, 57 ALR 1049.

Corporation or partnership organized to take over a business, applicability of Bulk Sales Law to transfer to, 96 ALR 1213.

Defenses to attack on sale in bulk on ground of violation of Bulk Sales Law, 15 ALR 2d 937.

Fixtures as within contemplation of Bulk Sales Law or Bulk Mortgage Act, 118 ALR 847.

Garnishment as remedy in case of violation of Bulk Sales Law, 155 ALR 1061.

Interest in property, sale to one already having, as within Bulk Sales Law, 51 ALR 403.

Necessity of participation by the grantee or transferee in the fraud of the grantor or transferor in order to avoid a voluntary conveyance or transfer as against creditors, 17 ALR 728.

Parties to sale in violation of Bulk Sales Law, rights between, 5 ALR 1517.

Presumption of fraud under Bulk Sales Law as prima facie or conclusive, 75 ALR 674.

Return of merchandise to original seller in satisfaction of purchase price as transfer violating Bulk Sales Law, 59 ALR 2d 1115.

Right of purchaser to decline performance of contract for sale of business or goods because of seller's failure to comply with Bulk Sales Law, 24 ALR 2d 1030.

Sales of "off season" or "obsolete" merchandise as within scope of Bulk Sales Law, 36 ALR 2d 1141.

Transfer of property contrary to Bulk Sales Law as affecting status of transferee or person whom he represents, as a creditor, or his rights to preference as such, 102 ALR 686.

DECISIONS UNDER FORMER LAW

Assignment for benefit of creditors.

An assignment for the benefit of creditors by the insolvent buyers of a mercantile business to the seller who was to liquidate the business and, after deducting the expenses of liquidation and satisfying his own claim, was to pay the remaining balance of the proceeds realized from the liquidation to the buyers'

creditors was not a transaction within the purview of the Bulk Sales Law. *Branham v. Jackson* (1961) 12 U 2d 399, 367 P 2d 187.

Equipment not articles kept for sale.

Machinery, motor, tools, cash register and showcase of shoe repair shop are not articles or goods which the seller keeps for sale. *Swanson v. DeVine* (1916) 49 U 1, 160 P 872.

70A-6-103. Transfers excepted from this chapter. The following transfers are not subject to this chapter:

- (1) Those made to give security for the performance of an obligation;
- (2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;
- (3) Transfers in settlement or realization of a lien or other security interest;
- (4) Sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process;
- (5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent to the creditors of the corporation pursuant to order of the court or administrative agency;
- (6) Transfers to a person maintaining a known place of business in this state who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound;
- (7) A transfer to a new business enterprise organized to take over and continue the business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors;
- (8) Transfers of property which is exempt from execution.

Public notice under subsection (6) or subsection (7) may be given by publishing once a week for two consecutive weeks in a newspaper of general circulation where the transferor had its principal place of business in this state an advertisement including the names and addresses of the transferor and transferee and the effective date of the transfer.

History: L. 1965, ch. 154, § 6-103.

Cross-References.

Auction sales, 70A-6-108.

"Bulk transfer" defined, 70A-6-102, 70A-9-111.

Creditors, protection of, 70A-6-109.

List of creditors, schedule of property, 70A-6-104.

Notice to creditors, 70A-6-105, 70A-6-107.

Secured transactions, sales of accounts, contract rights and chattel paper, 70A-9-101 to 70A-9-507.

Collateral References.

Fraudulent Conveyances ⇔ 47.

37 CJS Fraudulent Conveyances § 481.

37 AmJur 2d 900, Fraudulent Conveyances § 481.

70A-6-104. Schedule of property — List of creditors.

- (1) Except as provided with respect to auction sales (section 70a-6-108), a bulk transfer subject to this chapter is ineffective against any creditor of the transferor unless:
 - (a) The transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this section; and
 - (b) The parties prepare a schedule of the property transferred sufficient to identify it; and
 - (c) The transferee preserves the list and schedule for six months next following the transfer and permits inspection of either or both and copying therefrom at all reasonable hours by

any creditor of the transferor, or files the list and schedule in the county recorder's office.

- (2) The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed. If the transferor is the obligor of an outstanding issue of bonds, debentures or the like as to which there is an indenture trustee, the list of creditors need include only the name and address of the indenture trustee and the aggregate outstanding principal amount of the issue.
- (3) Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge.

History: L. 1965, ch. 154, § 6-104.

Cross-References.

Auction sales, 70A-6-108.
 Creditors, protection of, 70A-6-109.
 Notice to creditors, 70A-6-105, 70A-6-107.
 Subsequent transfers, 70A-6-110.

Collateral References.

Fraudulent Conveyances ⇔ 47.
 37 CJS Fraudulent Conveyances § 482.
 37 AmJur 2d 921, Fraudulent Conveyances § 270.

Character or class of creditors within contemplation of Bulk Sales Law, 84 ALR 1406, 85 ALR 2d 1211.

Extent of duty of transferee of bulk sale to investigate regarding seller's creditors under Uniform Commercial Code Article 6, 67 ALR 3d 1056.

Omission of name of creditor from list of creditors which seller is required by Bulk Sales Law to furnish to purchaser, as affecting rights and remedies under that law, 83 ALR 1140.

Stockholders of corporation which transfers its assets as creditors within Bulk Sales Law, 16 ALR 2d 1315.

70A-6-105. Notice to creditors. In addition to the requirements of the preceding section, any bulk transfer subject to this chapter except one made by auction sale (section 70A-6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (section 70A-6-107).

History: L. 1965, ch. 154, § 6-105.

Cross-References.

Creditors, protection of, 70A-6-109.
 Form of notice to creditors, 70A-6-107.
 List of creditors, schedule of property, 70A-6-104.

Negligent mismanagement.

Creditor had no right of action, either under Uniform Commercial Code or Bulk Sales Act (now repealed), against officers and

directors of debtor corporation for alleged negligent mismanagement of its affairs in allegedly unlawful sale of corporation; this section protected him if sale was subsequent to repeal of Bulk Sales Act and in violation of chapter 6 of the Uniform Commercial Code. *Equitable Life & Casualty Ins. Co. v. Inland Printing Co.* (1971) 26 U 2d 19, 484 P 2d 162.

Collateral References.

Fraudulent Conveyances ⇔ 47.

37 CJS Fraudulent Conveyances § 482.

37 AmJur 2d 921, Fraudulent Conveyances § 270.

70A-6-106. Application of the proceeds. In addition to the requirements of the two preceding sections:

- (1) Upon every bulk transfer subject to this chapter for which new consideration becomes payable except those made by sale at auction it is the duty of the transferee to assure that such consideration is applied so far as necessary to pay those debts of the transferor which are either shown on the list furnished by the transferor (section 70A-6-104) or filed in writing in the place stated in the notice (section 70A-6-107) within thirty days after the mailing of such notice. This duty of the transferee runs to all the holders of such debts, and may be enforced by any of them for the benefit of all.
- (2) If any of said debts are in dispute the necessary sum may be withheld from distribution until the dispute is settled or adjudicated.
- (3) If the consideration payable is not enough to pay all of the said debts in full distribution shall be made pro rata.
- (4) The transferee may within ten days after he takes possession of the goods pay the consideration into the (specify court) in the county where the transferor had its principal place of business in this state and thereafter may discharge his duty under this section by giving notice by registered or certified mail to all the persons to whom the duty runs that the consideration has been paid into that court and that they should file their claims there. On motion of any interested party, the court may order the distribution of the consideration to the persons entitled to it.

History: L. 1965, ch. 154, § 6-106.

Collateral References.

Cross-References.

Auction sales, 70A-6-108.
 Creditors, protection of, 70A-6-109.
 Transfers excepted from chapter,
 70A-6-103 (6), (7).

Fraudulent Conveyances ⇔ 47.
 37 CJS Fraudulent Conveyances § 484.
 37 AmJur 2d 922, Fraudulent Conveyances § 271.

70A-6-107. The notice.

- (1) The notice to creditors (section 70A-6-105) shall state:
 - (a) that a bulk transfer is about to be made; and
 - (b) the names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within three years last past so far as known to the transferee; and
 - (c) whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

- (2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:
- (a) the location and general description of the property to be transferred and the estimated total of the transferor's debts;
 - (b) the address where the schedule of property and list of creditors (section 70A-6-104) may be inspected;
 - (c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;
 - (d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment; and
 - (e) if for new consideration the time and place where creditors of the transferor are to file their claims.
- (3) The notice in any case shall be delivered personally or sent by registered or certified mail to all the persons shown on the list of creditors furnished by the transferor (section 70A-6-104) and to all other persons who are known to the transferee to hold or assert claims against the transferor.

History: L. 1965, ch. 154, § 6-107.

Collateral References.

Fraudulent Conveyances ⇔ 47.

37 CJS Fraudulent Conveyances § 482.

37 AmJur 2d 921, Fraudulent Conveyances § 270.

Cross-References.

Creditors, protection of, 70A-6-109.

Notice to creditors, 70A-6-105.

70A-6-108. Auction sales — "Auctioneer."

- (1) A bulk transfer is subject to this chapter even though it is by sale at auction, but only in the manner and with the results stated in this section.
- (2) The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (section 70A-6-104).
- (3) The person or persons other than the transferor who direct, control or are responsible for the auction are collectively called the "auctioneer." The auctioneer shall:
 - (a) receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this chapter (section 70A-6-104);
 - (b) give notice of the auction personally or by registered or certified mail at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor; and
 - (c) assure that the net proceeds of the auction are applied as provided in this chapter (section 70A-6-106).
- (4) Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but if

the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several.

History: L. 1965, ch. 154, § 6-108.

Collateral References.

Cross-References.

List of creditors, schedule of property,
70A-6-104.
Notice to creditors, 70A-6-105, 70A-6-107.

Fraudulent Conveyances ⇔ 47.
37 CJS Fraudulent Conveyances § 481.
37 AmJur 2d 904, Fraudulent Conveyances
§ 251.

70A-6-109. What creditors protected — Credit for payment to particular creditors.

- (1) The creditors of the transferor mentioned in this chapter are those holding claims based on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (sections 70A-6-105 and 70A-6-107) are not entitled to notice.
- (2) Against the aggregate obligation imposed by the provisions of this chapter concerning the application of the proceeds (section 70a-6-106 and subsection (3) (c) of 70A-6-108) the transferee or auctioneer is entitled to credit for sums paid to particular creditors of the transferor, not exceeding the sums believed in good faith at the time of the payment to be properly payable to such creditors.

History: L. 1965, ch. 154, § 6-109.

37 CJS Fraudulent Conveyances § 483 et seq.

Cross-References.

Auction sales, 70A-6-108.
List of creditors, schedule of property,
70A-6-104.
Notice to creditors, 70A-6-105, 70A-6-107.

37 AmJur 2d 913 to 916, Fraudulent Conveyances §§ 260 to 264.

Judgment for value of goods against transferee in violation of Bulk Sales Law, right of creditor to, 41 ALR 1478, 61 ALR 364.

Collateral References.

Fraudulent Conveyances ⇔ 47.

Subrogation of purchaser at sale contrary to Bulk Sales Law to rights of creditors, 80 ALR 712.

70A-6-110. Subsequent transfers. When the title of a transferee to property is subject to a defect by reason of his noncompliance with the requirements of this chapter, then:

- (1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such noncompliance takes subject to such defect, but
- (2) a purchaser for value in good faith and without such notice takes free of such defect.

History: L. 1965, ch. 154, § 6-110.

Transfers excepted from chapter,
70A-6-103.

Cross-References.

"Bulk transfer" defined, 70A-6-102.

Collateral References.

Fraudulent Conveyances ⇔ 47.

37 CJS Fraudulent Conveyances § 486.

37 AmJur 2d 928, Fraudulent Conveyances § 275.

70A-6-111. Limitation of actions and levies. No action under this chapter shall be brought nor levy prior to judgment made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.

History: L. 1965, ch. 154, § 6-111.

37 AmJur 2d 929, Fraudulent Conveyances § 277.

Collateral References.

Fraudulent Conveyances ⇔ 47, 248;
Limitation of Actions ⇔ 104.

37 CJS Fraudulent Conveyances § 496; 54
CJS Limitations of Actions § 206.

What statute of limitations governs creditor's action against purchaser under Bulk Sales Law, 61 ALR 2d 935.

CHAPTER 7**WAREHOUSE RECEIPTS, BILLS OF LADING AND
OTHER DOCUMENTS OF TITLE****Part**

1. General.
2. Warehouse receipts — Special provisions.
3. Bills of lading — Special provisions.
4. Warehouse receipts and bills of lading — General obligations.
5. Warehouse receipts and bills of lading — Negotiation and transfer.
6. Warehouse receipts and bills of lading — Miscellaneous provisions.

PART 1**GENERAL****Section**

- 70A-7-101. Short title.
- 70A-7-102. Definitions and index of definitions.
- 70A-7-103. Relation of chapter to treaty, statute, tariff, classification or regulation.
- 70A-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.
- 70A-7-105. Construction against negative implication.

70A-7-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Documents of Title.

History: L. 1965, ch. 154, § 7-101.

Collateral References.

Carriers ⇔ 54-59; Shipping ⇔ 106;
Warehousemen ⇔ 2.

13 CJS Carriers § 128; 80 CJS Shipping §§ 111-114; 93 CJS Warehousemen and Safe Depositaries §§ 3, 4.

15A AmJur 2d 487, Commercial Code § 38.

Construction and effect of UCC art. 7, dealing with warehouse receipts, bills of lading, and other documents of title, 21 ALR 3d 1339.

Law Reviews.

The Uniform Commercial Code in Utah, Ronald N. Bovee, 1966 Utah L. Rev. 31.

70A-7-102. Definitions and index of definitions.

- (1) In this chapter, unless the context otherwise requires:

- (a) "Bailee" means the person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them.
 - (b) "Consignee" means the person named in a bill to whom or to whose order the bill promises delivery.
 - (c) "Consignor" means the person named in a bill as the person from whom the goods have been received for shipment.
 - (d) "Delivery order" means a written order to deliver goods directed to a warehouseman, carrier or other person who in the ordinary course of business issues warehouse receipts or bills of lading.
 - (e) "Document" means document of title as defined in the general definitions in chapter 1 (section 70A-1-201).
 - (f) "Goods" means all things which are treated as movable for the purposes of a contract of storage or transportation.
 - (g) "Issuer" means a bailee who issues a document except that in relation to an unaccepted delivery order it means the person who orders the possessor of goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, notwithstanding that the issuer received no goods or that the goods were misdescribed or that in any other respect the agent or employee violated his instructions.
 - (h) "Warehouseman" is a person engaged in the business of storing goods for hire.
- (2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:
"Duly negotiate." Section 70A-7-501.
"Person entitled under the document." Section 70A-7-403 (4).
 - (3) Definitions in other chapters applying to this chapter and the sections in which they appear are:
"Contract for sale." Section 70A-2-106.
"Overseas." Section 70A-2-323.
"Receipt of goods." Section 70A-2-103.
 - (4) In addition chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: L. 1965, ch. 154, § 7-102.

Cross-References.

Liability of bailee in case of nonreceipt of goods, 70A-7-203, 70A-7-301.
"Warehouse receipt" defined, 70A-1-201 (45).

Collateral References.

Carriers ⇔ 54-59; Shipping ⇔ 106; Statutes ⇔ 179; Warehousemen ⇔ 2, 11 et seq. 13 CJS Carriers § 128; 80 CJS Shipping §§ 111-114; 82 CJS Statutes § 315; 93 CJS Warehousemen and Safe Depositaries §§ 1, 16 et seq. 13 AmJur 2d 771, Carriers § 265; 15A AmJur 2d 488, Commercial Code § 39; 78 AmJur 2d 199, Warehouses § 41.

70A-7-103. Relation of chapter to treaty, statute, tariff, classification or regulation. To the extent that any treaty or statute of the United States, regulatory statute of this state or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this chapter are subject thereto.

History: L. 1965, ch. 154, § 7-103.

Warehouseman's liability, 70A-7-204, 70A-7-401, 70A-7-403.

Cross-References.

Bill of lading, carrier's liability, 70A-7-309, 70A-7-401, 70A-7-403.

Form of warehouse receipt, 70A-7-202.

Termination of storage at option of warehouseman, 70A-7-206.

Warehouse receipt, who may issue, 70A-7-201.

Collateral References.

Treaties ⇔ 11.

87 CJS Treaties § 19.

15A AmJur 2d 487, Commercial Code § 38.

70A-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.

- (1) A warehouse receipt, bill of lading or other document of title is negotiable
 - (a) if by its terms the goods are to be delivered to bearer or to the order of a named person; or
 - (b) where recognized in overseas trade, if it runs to a named person or assigns.
- (2) Any other document is nonnegotiable. A bill of lading in which it is stated that the goods are consigned to a named person is not made negotiable by a provision that the goods are to be delivered only against a written order signed by the same or another named person.

History: L. 1965, ch. 154, § 7-104.

13 CJS Carriers § 128; 80 CJS Shipping §§ 111-114; 93 CJS Warehousemen and Safe Depositaries § 25 et seq.

Cross-References.

Rights acquired by due negotiation of document of title, 70A-7-502.

13 AmJur 2d 771, Carriers § 265; 15A AmJur 2d 503 to 505, Commercial Code §§ 56, 57; 78 AmJur 2d 213, Warehouses § 59.

Collateral References.

Carriers ⇔ 54-59; Shipping ⇔ 106; Warehousemen ⇔ 15.

70A-7-105. Construction against negative implication. The omission from either part 2 or part 3 of this chapter of a provision corresponding to a provision made in the other part does not imply that a corresponding rule of law is not applicable.

History: L. 1965, ch. 154, § 7-105.

Warehouse receipts, special provisions, 70A-7-201 to 70A-7-210.

Cross-References.

Bills of lading, special provisions, 70A-7-301 to 70A-7-309.

Collateral References.

Statutes ⇔ 231.

82 CJS Statutes §§ 366, 385.

PART 2

WAREHOUSE RECEIPTS — SPECIAL PROVISIONS

Section

70A-7-201. Who may issue a warehouse receipt — Storage under government bond.

- 70A-7-202. Form of warehouse receipt — Essential terms — Optional terms.
- 70A-7-203. Liability for nonreceipt or misdescription.
- 70A-7-204. Duty of care — Contractual limitation of warehouseman's liability.
- 70A-7-205. Title under warehouse receipt defeated in certain cases.
- 70A-7-206. Termination of storage at warehouseman's option.
- 70A-7-207. Goods must be kept separate — Fungible goods.
- 70A-7-208. Altered warehouse receipts.
- 70A-7-209. Lien of warehouseman.
- 70A-7-210. Enforcement of warehouseman's lien.

70A-7-201. Who may issue a warehouse receipt — Storage under government bond.

- (1) A warehouse receipt may be issued by any warehouseman.
- (2) Where goods including distilled spirits and agricultural commodities are stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, a receipt issued for the goods has like effect as a warehouse receipt even though issued by a person who is the owner of the goods and is not a warehouseman.

History: L. 1965, ch. 154, § 7-201.

Cross-References.

Irregularities in issue of receipt or conduct of issuer, 70A-7-401.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Collateral References.

Warehousemen ⇔ 13 et seq.

93 CJS Warehousemen and Safe Depositaries §§ 15, 17 et seq.

78 AmJur 2d 200, Warehouses § 42.

Legal effect of transaction by which grain or other commodity is received for storage by

one who has not complied with statutory conditions necessary to become a public warehouseman, 108 ALR 928.

Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 ALR 1502.

Statutory warehousing as determined by character of property stored, 132 ALR 532.

Validity as against third persons of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing), 133 ALR 209.

Warehouseman's liability for loss occasioned by failure to issue a proper receipt to depositor, 168 ALR 945.

70A-7-202. Form of warehouse receipt — Essential terms — Optional terms.

- (1) A warehouse receipt need not be in any particular form.
- (2) Unless a warehouse receipt embodies within its written or printed terms each of the following, the warehouseman is liable for damages caused by the omission to a person injured thereby:
 - (a) the location of the warehouse where the goods are stored;
 - (b) the date of issue of the receipt;
 - (c) the consecutive number of the receipt;
 - (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
 - (e) the rate of storage and handling charges, except that where goods are stored under a field warehousing arrangement a statement of that fact is sufficient on a nonnegotiable receipt;

- (f) a description of the goods or of the packages containing them;
 - (g) the signature of the warehouseman, which may be made by his authorized agent;
 - (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; and
 - (i) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien or security interest (section 70A-7-209). If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.
- (3) A warehouseman may insert in his receipt any other terms which are not contrary to the provisions of this act and do not impair his obligation of delivery (section 70A-7-403) or his duty of care (section 70A-7-204). Any contrary provisions shall be ineffective.

History: L. 1965, ch. 154, § 7-202.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

Cross-References.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Storage contract as a bailment of chattels or lease of place where chattels are stored, 138 ALR 1137.

Collateral References.

Warehousemen ⇔ 11-14.
93 CJS Warehousemen and Safe Depositaries §§ 20-22, 24.
78 AmJur 2d 202, Warehouses § 44.

Validity and applicability of stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility, 142 ALR 776.

"Warehouse purchase receipt" as bailment or contract of sale, 91 ALR 907.

Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 ALR 266.

70A-7-203. Liability for nonreceipt or misdescription. A party to or purchaser for value in good faith of a document of title other than a bill of lading relying in either case upon the description therein of the goods may recover from the issuer damages caused by the nonreceipt or misdescription of the goods, except to the extent that the document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity or condition, or the receipt or description is qualified by "contents, condition and quality unknown," "said to contain" or the like, if such indication be true, or the party or purchaser otherwise has notice.

History: L. 1965, ch. 154, § 7-203.

Cross-References.

Bill of lading, liability of carrier for nonreceipt or misdescription of goods, 70A-7-301.

Collateral References.

Bailment ⇔ 21; Warehousemen ⇔ 16, 17.

8 CJS Bailments § 40; 93 CJS Warehousemen and Safe Depositaries § 27.
78 AmJur 2d 206, Warehouses § 48.

70A-7-204. Duty of care — Contractual limitation of warehouseman's liability.

- (1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.
- (2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.
- (3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.
- (4) This section does not impair or repeal any statute which imposes a higher responsibility upon a warehouseman or invalidates permissible contractual limitations allowable under this chapter.

History: L. 1965, ch. 154, § 7-204.

Cross-References.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Collateral References.

Warehousemen ⇔ 24.

93 CJS Warehousemen and Safe Depositaries § 29 et seq.

78 AmJur 2d 269 to 272, 336 to 340, Warehouses §§ 139, 140, 234 to 237.

Insurance policy taken out by warehouseman, right of owner to sue on, 61 ALR 720.

Interest on damages for warehouseman's refusal to deliver property, or for injury to, or loss of, property, 96 ALR 18, 36 ALR 2d 337.

Liability of bailee for loss of or injury to goods kept at a place other than that originally intended, 12 ALR 1322, 17 ALR 979.

Liability of warehouseman for breach of contract by failure to maintain proper temperature resulting in injury to stored goods, 92 ALR 2d 1315.

Liability of warehouseman for damage to or destruction of property by fire, 16 ALR 280.

Liability of warehouseman for theft of property in his care, 26 ALR 223, 48 ALR 378.

Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 ALR 1112.

Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 ALR 266.

Storage charges collectible by warehouseman guilty of negligence causing injury to, or destruction of, goods of a perishable nature, 32 ALR 2d 918.

Tort liability of warehouseman for theft by servant, 15 ALR 2d 847.

Validity and applicability of stipulation in warehouseman's receipt fixing valuation of property as basis of responsibility, 142 ALR 776.

Warehouseman's bond as covering warehouse receipts issued by warehouse to itself or for its own property, 61 ALR 331.

Warehouseman's liability for injury to or destruction of stored goods from floods, heavy rains or the like, 60 ALR 2d 1097.

DECISIONS UNDER FORMER LAW

Limitation of actions.

A breach of a storage contract providing that the liability of the warehouseman is limited to the "diligence and care required by law" is a breach of the statutory duty, and is

thus tortious; and an action or claim for injuries to personal property resulting from that breach is barred by the three-year statute. *Utah Poultry & Farmers Coop. v. Utah Ice & Storage Co.* (1951) 187 F 2d 652, 23 ALR 2d 1461.

70A-7-205. Title under warehouse receipt defeated in certain cases.

A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

History: L. 1965, ch. 154, § 7-205.

Collateral References.

Confusion of Goods ⇔ 1 et seq.; Warehousemen ⇔ 16, 17, 20.

15A CJS Confusion of Goods § 1 et seq.; 93 CJS Warehousemen and Safe Depositories § 14.

78 AmJur 2d 226, Warehouses § 76.

Cross-References.

Purchaser of goods, power to transfer, 70A-2-403.

Secured transactions, protection of buyers of goods, 70A-9-307.

70A-7-206. Termination of storage at warehouseman's option.

- (1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than thirty days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of this section on enforcement of a warehouseman's lien (section 70A-7-210).
- (2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in subsection (1) for notification, advertisement and sale, the warehouseman may specify in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than one week after a single advertisement or posting.
- (3) If as a result of a quality or condition of the goods of which the warehouseman had no notice at the time of deposit the goods are a hazard to other property or to the warehouse or to persons, the warehouseman may sell the goods at public or private sale without

advertisement on reasonable notification to all persons known to claim an interest in the goods. If the warehouseman after a reasonable effort is unable to sell the goods he may dispose of them in any lawful manner and shall incur no liability by reason of such disposition.

- (4) The warehouseman must deliver the goods to any person entitled to them under this chapter upon due demand made at any time prior to sale or other disposition under this section.
- (5) The warehouseman may satisfy his lien from the proceeds of any sale or disposition under this section but must hold the balance for delivery on the demand of any person to whom he would have been bound to deliver the goods.

History: L. 1965, ch. 154, § 7-206.

Collateral References.

Cross-References.

Obligation of warehouseman or carrier to deliver, 70A-7-403.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Warehousemen ⇔ 10, 25.

93 CJS Warehousemen and Safe Depositaries §§ 12, 47 et seq.

78 AmJur 2d 330 to 332, Warehouses §§ 226, 227.

70A-7-207. Goods must be kept separate — Fungible goods.

- (1) Unless the warehouse receipt otherwise provides, a warehouseman must keep separate the goods covered by each receipt so as to permit at all times identification and delivery of those goods except that different lots of fungible goods may be commingled.
- (2) Fungible goods so commingled are owned in common by the persons entitled thereto and the warehouseman is severally liable to each owner for that owner's share. Where because of overissue a mass of fungible goods is insufficient to meet all the receipts which the warehouseman has issued against it, the persons entitled include all holders to whom overissued receipts have been duly negotiated.

History: L. 1965, ch. 154, § 7-207.

Collateral References.

Warehousemen ⇔ 19, 20.

93 CJS Warehousemen and Safe Depositaries §§ 13, 14.

78 AmJur 2d 300, 301, 332, Warehouses §§ 179, 181, 228.

Deposit of grain without obligation to return identical grain as a bailment or a sale, 54 ALR 1166.

Statutory warehousing as determined by character of property stored, 132 ALR 532.

DECISIONS UNDER FORMER LAW

Sale, and passage of title.

The fact that sugar under contract of sale was stored in different warehouses used in operation of business did not render inappli-

cable ordinary rules respecting sale and passage of title to part of fungible property without separation or segregation. *United States v. Amalgamated Sugar Co.* (1934) 72 F 2d 755.

70A-7-208. Altered warehouse receipts. Where a blank in a negotiable warehouse receipt has been filled in without authority, a purchaser

for value and without notice of the want of authority may treat the insertion as authorized. Any other unauthorized alteration leaves any receipt enforceable against the issuer according to its original tenor.

History: L. 1965, ch. 154, § 7-208.

78 AmJur 2d 207, Warehouses § 50.

Collateral References.

Alteration of Instruments ⇄ 1 et seq.;
Warehousemen ⇄ 15-17.

3A CJS Alteration of Instruments § 65; 93
CJS Warehousemen and Safe Depositories
§§ 25, 27.

Rights of purchaser of forged or altered
receipt as against warehouseman, 38 ALR
1206.

70A-7-209. Lien of warehouseman.

- (1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.
- (2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the chapter on Secured Transactions (chapter 9).
- (3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 70A-7-503.
- (4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History: L. 1965, ch. 154, § 7-209.

Cross-References.

Document of title to goods, when defeated,
70A-7-503.

Obligation of warehouseman or carrier to deliver, 70A-7-403.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Sale of goods in possession of bailee, 70A-2-503 (4).

Statutory liens, secured transactions, 70A-9-102 (2), 70A-9-310.

Warehouseman's lien in aid of carrier's lien, 38-4-4.

Collateral References.

Warehousemen ⇐ 29-33.

93 CJS Warehousemen and Safe Depositaries §§ 63-69.

78 AmJur 2d 255 to 260, Warehouses §§ 116 to 121.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

Storage charges collectible by warehousemen guilty of negligence causing injury to, or destruction of, goods of a perishable nature, 32 ALR 2d 918.

Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 ALR 949.

Waiver of warehouseman's lien by filing claim against decedent's estate as an unsecured one, 2 ALR 1132.

DECISIONS UNDER FORMER LAW

History of statutory lien.

Prior to adoption of the Uniform Warehouse Receipts Act, a warehouseman was

likewise given a lien for reasonable charges for storing personal property. *Howard v. J. P. Paulson Co.* (1912) 41 U 490, 127 P 284, applying Comp. Laws 1907.

70A-7-210. Enforcement of warehouseman's lien.

- (1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.
- (2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:
 - (a) All persons known to claim an interest in the goods must be notified.
 - (b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.
 - (c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a

demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

- (d) The sale must conform to the terms of the notification.
 - (e) The sale must be held at the nearest suitable place to that where the goods are held or stored.
 - (f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.
- (3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this chapter.
 - (4) The warehouseman may buy at any public sale pursuant to this section.
 - (5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.
 - (6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.
 - (7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.
 - (8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).
 - (9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

History: L. 1965, ch. 154, § 7-210.

Cross-References.

Obligation of warehouseman or carrier to deliver, 70A-7-403.

Constitutionality.

Warehouseman's proposed sale of evicted tenants' goods entrusted to him for storage was not "state action" in violation of 14th Amendment rights and thus did not give rise to an action under 42 U.S.C. § 1983; self-help provision did not delegate an exclusive prerogative of the state to the warehouseman; state's mere acquiescence in a private action did not convert that conduct into an action of the state. *Flagg Bros., Inc. v. Brooks* (1978) 436 U. S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729, construing New York equivalent to this section.

Collateral References.

Warehousemen ⇔ 33.
93 CJS Warehousemen and Safe Depositaries § 69.
78 AmJur 2d 260 to 264, Warehouses §§ 122 to 126.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 ALR 1155.

Law Reviews.

Note, *Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies*, 1974 Utah L. Rev. 536.

DECISIONS UNDER FORMER LAW**Advertisement and sale.**

Enforcement of the warehouseman's lien by advertisement and sale was also provided for prior to adoption of the Uniform Warehouse Receipts Act. *Howard v. J. P. Paulson Co.* (1912) 41 U 490, 127 P 284, applying Comp. Laws 1907.

Counterclaim in replevin action.

The lien may be enforced to the extent of amount found due, by way of counterclaim in replevin action brought to recover property. *Howard v. J. P. Paulson Co.* (1912) 41 U 490, 127 P 284.

Cumulative remedies.

Statutory remedies given the warehouseman are, it would seem, merely cumulative. *Howard v. J. P. Paulson Co.* (1912) 41 U 490, 127 P 284, construing Comp. Laws 1907.

Former section 72-2-9 gave the lien claimant what were known as concurrent or cumulative remedies, and then claimant could pursue either without in any way waiving the other, except that he could not receive more

than satisfaction of his claim. Such a lien was foreclosed in an equitable action. *Howard v. J. P. Paulson Co.* (1912) 41 U 490, 494, 127 P 284, applying Comp. Laws 1907, repealed by Laws 1911, ch. 139.

Election of remedies.

Prior to adoption of Uniform Warehouse Receipts Act, it was held that a warehouseman, by presenting a claim against an estate for storage charges without mentioning his lien, and, after rejection of claim, by suing thereon to recover amount thereof, which action was dismissed, does not make an election of remedies so as to bar assertion of his warehouseman's lien by way of counterclaim, in a subsequent action by executor to recover the property. *Howard v. J. P. Paulson Co.* (1912) 41 U 490, 127 P 284, applying Comp. Laws 1907, § 1406.

Private sale of goods.

Private sale of goods may be arranged by stipulation between the parties. *Warner v. Tyng Warehouse Co.* (1912) 70 U 303, 265 P 748.

PART 3**BILLS OF LADING — SPECIAL PROVISIONS****Section**

- 70A-7-301. Liability for nonreceipt or misdescription — "Said to contain" — "Shipper's load and count" — Improper handling.
70A-7-302. Through bills of lading and similar documents.
70A-7-303. Diversion — Reconsignment — Change of instructions.
70A-7-304. Bills of lading in a set.
70A-7-305. Destination bills.
70A-7-306. Altered bills of lading.
70A-7-307. Lien of carrier.
70A-7-308. Enforcement of carrier's lien.
70A-7-309. Duty of care — Contractual limitation of carrier's liability.

70A-7-301. Liability for nonreceipt or misdescription — "Said to contain" — "Shipper's load and count" — Improper handling.

- (1) A consignee of a nonnegotiable bill who has given value in good faith or a holder to whom a negotiable bill has been duly negotiated relying in either case upon the description therein of the goods, or upon the date therein shown, may recover from the issuer damages caused by the misdating of the bill or the nonreceipt or misdescription of the goods, except to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description, as where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load and count" or the like, if such indication be true.
- (2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load and count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.
- (3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases "shipper's weight" or other words of like purport are ineffective.
- (4) The issuer may by inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.
- (5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

History: L. 1965, ch. 154, § 7-301.

Cross-References.

Duty of care, contractual limitation of carrier's liability, 70A-7-309.

Liability of warehouseman for nonreceipt or misdescription of goods, 70A-7-203.

Collateral References.

Carriers ⇌ 57; Shipping ⇌ 106.

13 CJS Carriers § 128; 80 CJS Shipping § 113 et seq.

13 AmJur 2d 792, 793, Carriers §§ 291, 292.

Carrier's issuance of bill of lading or shipping receipt, without notation thereon of visible damage or defects in shipment, as creating presumption or prima facie case of good condition when received, 33 ALR 2d 867.

Conclusiveness of receipt clause in bill of lading, 67 ALR 2d 1028.

Emergency, validity of special contract in, 5 ALR 1120.

Means of transportation contemplated by provisions relating to "freight rates" in contract, 83 ALR 1306.

Provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 ALR 2d 770.

Question for court or jury as to construction of transportation contract, 65 ALR 648.

Rail or motor carrier of freight, liability for loss through weight deficiency of goods shipped, 39 ALR 2d 325.

Right of carrier as against transferee of bill of lading issued for interstate shipment since Federal Bill of Lading Act to deny receipt of goods, 130 ALR 1315.

Shipper's misdescription of goods as affecting carrier's liability for loss or damage, 1 ALR 3d 736.

Validity of agreement of carrier to collect freight at destination and reimburse consignor for prepayment required by tariff schedule, 35 ALR 486.

70A-7-302. Through bills of lading and similar documents.

- (1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.
- (2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.
- (3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action brought by anyone entitled to recover on the document therefor.

History: L. 1965, ch. 154, § 7-302.

Collateral References.

Carriers ⇄ 57 et seq., 172 et seq.; Shipping ⇄ 106 et seq.

13 CJS Carriers §§ 128, 401 et seq.; 80 CJS Shipping § 113 et seq.

14 AmJur 2d 203, Carriers § 710.

Right of connecting carrier to benefit of stipulation in bill of lading limiting time for bringing suit or giving notice of loss, 60 ALR 1250.

Strike on connecting line as defense to carrier's liability for delay, or damages incident to delay in transportation, 28 ALR 509, 45 ALR 919.

70A-7-303. Diversion — Reconsignment — Change of instructions.

- (1) Unless the bill of lading otherwise provides, the carrier may deliver the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from
 - (a) the holder of a negotiable bill; or
 - (b) the consignor on a nonnegotiable bill notwithstanding contrary instructions from the consignee; or
 - (c) the consignee on a nonnegotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or
 - (d) the consignee on a nonnegotiable bill if he is entitled as against the consignor to dispose of them.
- (2) Unless such instructions are noted on a negotiable bill of lading, a person to whom the bill is duly negotiated can hold the bailee according to the original terms.

History: L. 1965, ch. 154, § 7-303.

Collateral References.

Carriers ⇌ 86 et seq.; Shipping ⇌ 113 et seq.

Cross-References.

Effect of diversion, 70A-7-504 (3).

Obligation of warehouseman or carrier to deliver, 70A-7-403.

13 CJS Carriers § 163 et seq.; 80 CJS Shipping § 119.

13 AmJur 2d 877, Carriers § 394.

70A-7-304. Bills of lading in a set.

- (1) Except where customary in overseas transportation, a bill of lading must not be issued in a set of parts. The issuer is liable for damages caused by violation of this subsection.
- (2) Where a bill of lading is lawfully drawn in a set of parts, each of which is numbered and expressed to be valid only if the goods have not been delivered against any other part, the whole of the parts constitute one bill.
- (3) Where a bill of lading is lawfully issued in a set of parts and different parts are negotiated to different persons, the title of the holder to whom the first due negotiation is made prevails as to both the document and the goods even though any later holder may have received the goods from the carrier in good faith and discharge the carrier's obligation by surrender of his part.
- (4) Any person who negotiates or transfers a single part of a bill of lading drawn in a set is liable to holders of that part as if it were the whole set.
- (5) The bailee is obliged to deliver in accordance with part 4 of this chapter against the first presented part of a bill of lading lawfully drawn in a set. Such delivery discharges the bailee's obligation on the whole bill.

History: L. 1965, ch. 154, § 7-304.

Collateral References.

Carriers ⇌ 49 et seq.; Shipping ⇌ 106 (1) et seq.

13 CJS Carriers § 124 et seq.; 80 CJS Shipping § 113 et seq.

13 AmJur 2d 774, 812, Carriers §§ 268, 314.

70A-7-305. Destination bills.

- (1) Instead of issuing a bill of lading to the consignor at the place of shipment a carrier may at the request of the consignor procure the bill to be issued at destination or at any other place designated in the request.
- (2) Upon request of anyone entitled as against the carrier to control the goods while in transit and on surrender of any outstanding bill of lading or other receipt covering such goods, the issuer may procure a substitute bill to be issued at any place designated in the request.

History: L. 1965, ch. 154, § 7-305.

13 CJS Carriers § 124 et seq.; 80 CJS Shipping § 113 et seq.

Collateral References.

Carriers ⇌ 49 et seq.; Shipping ⇌ 106 (1) et seq.

13 AmJur 2d 777, Carriers § 272.

70A-7-306. Altered bills of lading. An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according to its original tenor.

History: L. 1965, ch. 154, § 7-306.

3A CJS Alteration of Instruments § 7; 13 CJS Carriers § 124.

Collateral References.

Alteration of Instruments ⇌ 16; Carriers ⇌ 49.

13 AmJur 2d 776, Carriers § 270.

70A-7-307. Lien of carrier.

- (1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge.
- (2) A lien for charges and expenses under subsection (1) on goods which the carrier was required by law to receive for transportation is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to such charges and expenses. Any other lien under subsection (1) is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked such authority.

- (3) A carrier loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History: L. 1965, ch. 154, § 7-307.

Collateral References.

Cross-References.

Lien of warehouseman, 70A-7-209.
Statutory liens, secured transactions,
70A-9-102 (2), 70A-9-310.

Carriers ⇌ 197; Shipping ⇌ 154.
13 CJS Carriers § 324 et seq.; 80 CJS Ship-
ping § 170.
13 AmJur 2d 961, Carriers § 497 et seq.

70A-7-308. Enforcement of carrier's lien.

- (1) A carrier's lien may be enforced by public or private sale of the goods, in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.
- (2) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the carrier subject to the terms of the bill and this chapter.
- (3) The carrier may buy at any public sale pursuant to this section.
- (4) A purchaser in good faith of goods sold to enforce a carrier's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the carrier with the requirements of this section.
- (5) The carrier may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.
- (6) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.
- (7) A carrier's lien may be enforced in accordance with either subsection (1) or the procedure set forth in subsection (2) of section 70A-7-210.

- (8) The carrier is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

History: L. 1965, ch. 154, § 7-308.

13 CJS Carriers § 324 et seq.; 80 CJS Shipping § 170.

Cross-References.

Enforcement of warehouseman's lien, 70A-7-210.

13 AmJur 2d 966, Carriers § 506.

Law Reviews.

Note, Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies, 1974 Utah L. Rev. 536.

Collateral References.

Carriers ⇄ 197; Shipping ⇄ 154.

70A-7-309. Duty of care — Contractual limitation of carrier's liability.

- (1) A carrier who issues a bill of lading whether negotiable or non-negotiable must exercise the degree of care in relation to the goods which a reasonably careful man would exercise under like circumstances. This subsection does not repeal or change any law or rule of law which imposes liability upon a common carrier for damages not caused by its negligence.
- (2) Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use.
- (3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the shipment may be included in a bill of lading or tariff.

History: L. 1965, ch. 154, § 7-309.

Collateral References.

Cross-References.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Carriers ⇄ 107 et seq., 147 et seq.; Shipping ⇄ 120 et seq.

13 CJS Carriers §§ 71 et seq., 88 et seq.; 80 CJS Shipping § 125 et seq.

PART 4

WAREHOUSE RECEIPTS AND BILLS OF LADING — GENERAL OBLIGATIONS

Section

70A-7-401. Irregularities in issue of receipt or bill or conduct of issuer.

70A-7-402. Duplicate receipt or bill — Overissue.

70A-7-403. Obligation of warehouseman or carrier to deliver — Excuse.

70A-7-404. No liability for good faith delivery pursuant to receipt or bill.

70A-7-401. Irregularities in issue of receipt or bill or conduct of issuer. The obligations imposed by this chapter on an issuer apply to a document of title regardless of the fact that

- (a) the document may not comply with the requirements of this chapter or of any other law or regulation regarding its issue, form or content; or
- (b) the issuer may have violated laws regulating the conduct of his business; or
- (c) the goods covered by the document were owned by the bailee at the time the document was issued; or
- (d) the person issuing the document does not come within the definition of warehouseman if it purports to be a warehouse receipt.

History: L. 1965, ch. 154, § 7-401.

Collateral References.

Carriers ⇌ 51 et seq.; Shipping ⇌ 106;
 Warehousemen ⇌ 12 et seq.
 13 CJS Carriers § 126 et seq.; 80 CJS Shipping § 111 et seq.; 93 CJS Warehousemen and Safe Depositaries § 20 et seq.
 78 AmJur 2d 198, Warehouses § 40.

Cross-References.

Duty of care, contractual limitation of liability, 70A-7-204, 70A-7-309.
 Liability for nonreceipt or misdescription of goods, 70A-7-203, 70A-7-301.
 Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

70A-7-402. Duplicate receipt or bill — Overissue. Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents. But the issuer is liable for damages caused by his overissue or failure to identify a duplicate document as such by conspicuous notation on its face.

History: L. 1965, ch. 154, § 7-402.

Collateral References.

Carriers ⇌ 51 et seq.; Shipping ⇌ 106;
 Warehousemen ⇌ 12 et seq.
 13 CJS Carriers § 129; 80 CJS Shipping § 111 et seq.; 93 CJS Warehousemen and Safe Depositaries § 23.
 13 AmJur 2d 774, Carriers § 268; 78 AmJur 2d 204, Warehouses § 45.

Cross-References.

Bills of lading in a set, 70A-7-304.
 Document of title to goods, when defeated, 70A-7-503.
 Goods kept separate in warehouse, 70A-7-207.
 Lost and missing documents, 70A-7-601.

70A-7-403. Obligation of warehouseman or carrier to deliver — Excuse.

- (1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:
 - (a) delivery of the goods to a person whose receipt was rightful as against the claimant;
 - (b) damage to or delay, loss or destruction of the goods for which the bailee is not liable;
 - (c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

- (d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the chapter on Sales (section 70A-2-705);
 - (e) a diversion, reconsignment or other disposition pursuant to the provisions of this chapter (section 70A-7-303) or tariff regulating such right;
 - (f) release, satisfaction or any other fact affording a personal defense against the claimant;
 - (g) any other lawful excuse.
- (2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.
- (3) Unless the person claiming is one against whom the document confers no right under section 70A-7-503 (1), he must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods, and the bailee must cancel the document or conspicuously note the partial delivery thereon or be liable to any person to whom the document is duly negotiated.
- (4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a nonnegotiable document.

History: L. 1965, ch. 154, § 7-403.

Cross-References.

Document of title to goods, when defeated, 70A-7-503.

Duty of care, contractual limitation of liability, 70A-7-204, 70A-7-309.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Rights acquired by due negotiation, 70A-7-502.

Collateral References.

Carriers ⇄ 49, 57, 77, 82, 83, 85, 93, 197; Shipping ⇄ 106, 154; Warehousemen ⇄ 16, 31.

13 CJS Carriers §§ 124, 126, 128, 159, 160, 172-174, 329; 80 CJS Shipping §§ 113, 170; 93 CJS Warehousemen and Safe Depositaries §§ 27, 47-54, 64.

13 AmJur 2d 896, 898, 910, Carriers §§ 417, 419, 436; 78 AmJur 2d 313, Warehouses § 201 et seq.

Carrier's liability for conversion by delivery in violation of provision in bill of lading prohibiting or limiting consignee's right to inspect goods shipped, 25 ALR 2d 770.

Consignee's refusal to accept delivery at place specified in the contract, or carrier's inability to make delivery at that place, as

terminating its liability as carrier, 149 ALR 1118.

Delay in transportation or delivery as affecting carrier's liability for loss of or damages to goods by act of God, 46 ALR 302.

Delay, or damages incident to delay, in transportation, due to strike, liability of carrier, 28 ALR 503, 45 ALR 919.

Delivery by warehouseman of property to impostor, 54 ALR 1335.

Delivery, duty of carrier to deliver goods on siding or private track of consignee, 1 ALR 1425.

Delivery, duty to notify consignor when consignee, or person to be notified, refuses to accept goods, 4 ALR 1285.

Delivery of goods to one whose authority to act for consignee has ceased, 2 ALR 279.

Delivery without collecting charge as stipulated or directed as affecting liability, 24 ALR 1163, 78 ALR 926, 129 ALR 213.

Diverting shipment, right of shipper or consignee, 61 ALR 1309.

Duty of warehouseman to take up and cancel negotiable receipt upon delivering goods as delegable or nondelegable, 139 ALR 1488.

Interest on damages for warehouseman's refusal to deliver property, or for injury to, or loss of property, 96 ALR 18, 36 ALR 2d 337.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 ALR 1155.

Lost or mislaid property, respective rights of carrier or one in similar relation to owner and finder, 9 ALR 1388, 170 ALR 706.

Presumption and burden of proof as to carrier's responsibility for goods received in good condition and delivered to consignee in bad condition, 106 ALR 1156.

Provision in warehouseman's receipt limiting liability as applicable where warehouseman converts property, 99 ALR 266.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

Shipper's ratification of carrier's unauthorized delivery or misdelivery, 15 ALR 2d 807.

Warehouseman's liability for loss occasioned by failure to issue a proper receipt to depositor, 168 ALR 945.

What constitutes delivery to carriers of goods in warehouse, 22 ALR 985, 113 ALR 1459.

When carrier put upon notice that delay in transportation or delivery will cause special damages, 166 ALR 1034.

DECISIONS UNDER FORMER LAW

Liability for care of goods.

Where warehouse receipt did not create any duty beyond the legal duty imposed upon warehousemen by statute, but specifically limited liability to diligence and care required by law, action to recover for deterioration of eggs in storage sounded in tort, and would be governed by three-year statute of limitations. *Utah Poultry & Farmers Coop. v. Utah Ice & Storage Co.* (1951) 187 F 2d 652, 23 ALR 2d 1461.

Liability for conversion.

Warehouseman issuing receipt to one other than consignee in bill of lading, without authority, and upon request of person presenting bill of lading, is guilty of conversion in delivering goods to holder of receipt. *Gibbs v. Redman Fireproof Storage Co.* (1926) 68 U 298, 249 P 1032.

A warehouseman who issues a receipt to one not the owner and delivers goods to such person is released from liability to owner by agreement between owner and holder of warehouse receipt releasing latter from liability; since latter and warehouseman were jointly and severally liable for conversion,

the release of one released both. *Gibbs v. Redman Fireproof Storage Co.* (1926) 68 U 298, 249 P 1032.

Where a warehouseman could not have made delivery of the goods if demand had been made and the refusal to deliver was based on grounds other than an unsatisfied warehouseman's lien, the holder of nonnegotiable warehouse receipts could sue for conversion of the goods without having made demand for delivery. *Walker Bank & Trust Co. v. New York Terminal Warehouse Co.* (1960) 10 U 2d 210, 350 P 2d 626.

Where plaintiff bank loaned money to a dealer and as security received nonnegotiable warehouse receipts from defendant warehouseman against appliances stored by dealer and where warehouseman was to deliver appliances only on written authorization from the bank and this agreement was not modified, the warehouseman was liable for the conversion of appliances delivered without authorization from the bank. *Walker Bank & Trust Co. v. New York Terminal Warehouse Co.* (1960) 10 U 2d 210, 350 P 2d 626.

70A-7-404. No liability for good faith delivery pursuant to receipt or bill. A bailee who in good faith including observance of reasonable commercial standards has received goods and delivered or otherwise disposed of them according to the terms of the document of title or pursuant to this chapter is not liable therefor. This rule applies even though the person from whom he received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom he delivered the goods had no authority to receive them.

History: L. 1965, ch. 154, § 7-404.

Collateral References.

Carriers ⇌ 57, 93; Shipping ⇌ 106; Warehousemen ⇌ 16, 25 (5).

13 CJS Carriers §§ 126, 173, 174; 80 CJS Shipping § 113; 93 CJS Warehousemen and Safe Depositaries §§ 27, 49.

13 AmJur 2d 910, Carriers § 436; 78 AmJur 2d 313, 317, Warehouses §§ 201, 204.

PART 5

WAREHOUSE RECEIPTS AND BILLS OF LADING — NEGOTIATION
AND TRANSFER

Section

- 70A-7-501. Form of negotiation and requirements of "due negotiation."
 70A-7-502. Rights acquired by due negotiation.
 70A-7-503. Document of title to goods defeated in certain cases.
 70A-7-504. Rights acquired in the absence of due negotiation — Effect of diversion — Seller's stoppage of delivery.
 70A-7-505. Indorser not a guarantor for other parties.
 70A-7-506. Delivery without indorsement — Right to compel indorsement.
 70A-7-507. Warranties on negotiation or transfer of receipt or bill.
 70A-7-508. Warranties of collecting bank as to documents.
 70A-7-509. Receipt or bill — When adequate compliance with commercial contract.

70A-7-501. Form of negotiation and requirements of "due negotiation."

- (1) A negotiable document of title running to the order of a named person is negotiated by his indorsement and delivery. After his indorsement in blank or to bearer any person can negotiate it by delivery alone.
- (2) (a) A negotiable document of title is also negotiated by delivery alone when by its original terms it runs to bearer.
 (b) When a document running to the order of a named person is delivered to him the effect is the same as if the document had been negotiated.
- (3) Negotiation of a negotiable document of title after it has been indorsed to a specified person requires indorsement by the special indorsee as well as delivery.
- (4) A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.
- (5) Indorsement of a nonnegotiable document neither makes it negotiable nor adds to the transferee's rights.
- (6) The naming in a negotiable bill of a person to be notified of the arrival of the goods does not limit the negotiability of the bill nor constitute notice to a purchaser thereof of any interest of such person in the goods.

History: L. 1965, ch. 154, § 7-501.

Collateral References.**Cross-References.**

Document of title to goods, when defeated,

70A-7-503.

Rights acquired by due negotiation,

70A-7-502.

Carriers ⇄ 55; Shipping ⇄ 106 (5);
 Warehousemen ⇄ 15.

13 CJS Carriers § 128; 80 CJS Shipping
 § 114; 93 CJS Warehousemen and Safe Depos-
 itaries § 25 et seq.

13 AmJur 2d 801, 802, Carriers §§ 303 to 305; 15A AmJur 2d 504 to 512, Commercial Code §§ 57 to 65; 78 AmJur 2d 216 to 220, Warehouses §§ 63 to 67.

Lack of endorsement or irregular endorsement of warehouse receipt as affecting pledge of goods, 18 ALR 588.

Pledge of nonnegotiable warehouse receipts, 53 ALR 2d 1406.

DECISIONS UNDER FORMER LAW

Consideration for transfer of receipt.

Past due note is valuable consideration for transfer and delivery of warehouse receipt as

security for note. Warner v. Tyng Warehouse Co. (1928) 71 U 303, 265 P 748.

70A-7-502. Rights acquired by due negotiation.

- (1) Subject to the following section and to the provisions of section 70A-7-205 on fungible goods, a holder to whom a negotiable document of title has been duly negotiated acquires thereby:
 - (a) title to the document;
 - (b) title to the goods;
 - (c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and
 - (d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this chapter. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee.
- (2) Subject to the following section, title and rights so acquired are not defeated by any stoppage of the goods represented by the document or by surrender of such goods by the bailee, and are not impaired even though the negotiation or any prior negotiation constituted a breach of duty or even though any person has been deprived of possession of the document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion, or even though a previous sale or other transfer of the goods or document has been made to a third person.

History: L. 1965, ch. 154, § 7-502.

Collateral References.

Carriers ⇔ 57, 58; Sales ⇔ 289; Shipping ⇔ 106 (5); Warehousemen ⇔ 15 et seq.

13 CJS Carriers § 128; 78 CJS Sales § 403; 80 CJS Shipping § 114; 93 CJS Warehousemen and Safe Depositaries § 25 et seq.

13 AmJur 2d 809, 811, Carriers §§ 312, 313; 15A AmJur 2d 511, 512, Commercial Code §§ 65, 66; 78 AmJur 2d 221 to 224, Warehouses §§ 68 to 73.

Cross-References.

Document of title to goods, when defeated, 70A-7-503.

Obligation of warehouseman or carrier to deliver, 70A-7-403.

Relation of chapter to treaty, statute, tariff, classification or regulation, 70A-7-103.

Title under warehouse receipt, when defeated, 70A-7-205.

Estoppel of owner of tangible personal property who knowingly or voluntarily per-

mits another to have possession of warehouse receipts, endorsed in blank or otherwise showing ownership in possessor, to deny latter's authority to sell, mortgage, pledge, or otherwise deal with, the property, 151 ALR 696.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

Time and place of passage of title to goods shipped under bill of lading, with draft attached, consigning them to shipper's order, 60 ALR 677 to 693.

Uniform Warehouse Receipts Act as affecting liens on the property represented by the receipts, 61 ALR 949.

70A-7-503. Document of title to goods defeated in certain cases.

- (1) A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who neither
 - (a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, store or sell or with power to obtain delivery under this chapter (section 70A-7-403) or with power of disposition under this act (sections 70A-2-403 and 70A-9-307) or other statute or rule of law; nor
 - (b) acquiesced in the procurement by the bailor or his nominee of any document of title.
- (2) Title to goods based upon an unaccepted delivery order is subject to the rights of anyone to whom a negotiable warehouse receipt or bill of lading covering the goods has been duly negotiated. Such a title may be defeated under the next section to the same extent as the rights of the issuer or a transferee from the issuer.
- (3) Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with part 4 of this chapter pursuant to its own bill of lading discharges the carrier's obligation to deliver.

History: L. 1965, ch. 154, § 7-503.

Secured transactions, protection of buyers, 70A-9-307.

Cross-References.

Bailee not liable for good faith delivery pursuant to receipt or bill, 70A-7-404.

Due negotiation, requirements, 70A-7-501.

Duplicate receipt or bill, 70A-7-402.

Form of negotiation, 70A-7-501.

Good faith purchase of goods, 70A-2-403.

Obligation of warehouseman or carrier to deliver, 70A-7-403.

Purchasers of instruments and documents, protection, 70A-9-309.

Rights acquired in absence of due negotiation, 70A-7-504.

Title under warehouse receipt, when defeated, 70A-7-205.

Collateral References.

Carriers ⇄ 51, 57-59; Shipping ⇄ 106; Warehousemen ⇄ 14 et seq.

13 CJS Carriers §§ 126, 128; 80 CJS Shipping §§ 113, 114; 93 CJS Warehousemen and Safe Depositories § 24 et seq.

15A AmJur 2d 514, Commercial Code § 67; 78 AmJur 2d 224, 228, Warehouses §§ 74, 78.

70A-7-504. Rights acquired in the absence of due negotiation — Effect of diversion — Seller's stoppage of delivery.

- (1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated,

acquires the title and rights which his transferor had or had actual authority to convey.

- (2) In the case of a nonnegotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated
- (a) by those creditors of the transferor who could treat the sale as void under section 70A-2-402; or
 - (b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or
 - (c) as against the bailee by good faith dealings of the bailee with the transferor.
- (3) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.
- (4) Delivery pursuant to a nonnegotiable document may be stopped by a seller under section 70A-2-705, and subject to the requirement of due notification there provided. A bailee honoring the seller's instructions is entitled to be indemnified by the seller against any resulting loss or expense.

History: L. 1965, ch. 154, § 7-504.

Cross-References.

Delivery of negotiable document without indorsement, 70A-7-506.

Diversion by carrier, change of instructions, 70A-7-303.

Good faith purchase of goods, 70A-2-403.

Obligation of warehouseman or carrier to deliver, 70A-7-403.

Seller's stoppage of delivery of goods in transit or otherwise, 70A-2-705.

Collateral References.

Carriers ⇄ 51, 57-59; Shipping ⇄ 106; Warehousemen ⇄ 14 et seq.

13 CJS Carriers §§ 126, 128; 80 CJS Shipping §§ 113, 114; 93 CJS Warehousemen and Safe Depositaries § 24 et seq.

13 AmJur 2d 804, Carriers § 307; 15A AmJur 2d 516, 517, Commercial Code §§ 68, 69; 78 AmJur 2d 222, 230, Warehouses §§ 69, 81.

Effectiveness, as pledge, of transfer of warehouse receipt or bill of lading, 53 ALR 2d 1406.

Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 ALR 1116.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

70A-7-505. Indorser not a guarantor for other parties. The indorsement of a document of title issued by a bailee does not make the indorser liable for any default by the bailee or by previous indorsers.

History: L. 1965, ch. 154, § 7-505.

Cross-References.

Rights acquired by due negotiation, 70A-7-502.

Collateral References.

Carriers ⇄ 58; Shipping ⇄ 106; Warehousemen ⇄ 15 et seq.

13 CJS Carriers § 128; 80 CJS Shipping § 113; 93 CJS Warehousemen and Safe Depositaries § 26.

15A AmJur 2d 518, Commercial Code § 70.

70A-7-506. Delivery without indorsement — Right to compel indorsement. The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied.

History: L. 1965, ch. 154, § 7-506.

Cross-References.

Due negotiation of document of title, 70A-7-501 (4).

Indorser not a guarantor for other parties, 70A-7-505.

Satisfaction of bailee's lien, 70A-7-403 (2).

Collateral References.

Assignments ⇔ 42; Carriers ⇔ 56; Shipping ⇔ 106 (5); Warehousemen ⇔ 15 (1), 16.

6A CJS Assignments § 50; 13 CJS Carriers § 128; 80 CJS Shipping § 114; 93 CJS Warehousemen and Safe Depositaries §§ 16, 25, 27.

13 AmJur 2d 801 to 803, Carriers §§ 304, 305; 15A AmJur 2d 507, Commercial Code § 61; 78 AmJur 2d 218, Warehouses § 65.

Lack of endorsement or irregular endorsement of warehouse receipt or bill of lading as affecting pledge of goods, 18 ALR 588.

Passing of title to goods by acceptance of draft for purchase price, with warehouse receipt attached, or by transfer of draft with receipt, 55 ALR 1116.

Rights of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

70A-7-507. Warranties on negotiation or transfer of receipt or bill. Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods

- (a) that the document is genuine; and
- (b) that he has no knowledge of any fact which would impair its validity or worth; and
- (c) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

History: L. 1965, ch. 154, § 7-507.

Cross-References.

Warranties in contract for sale, 70A-2-312 to 70A-2-317.

Warranties of collecting bank as to documents, 70A-7-508.

Collateral References.

Carriers ⇔ 58; Shipping ⇔ 106 (5); Warehousemen ⇔ 15 (2), 16.

13 CJS Carriers § 128; 80 CJS Shipping § 114; 93 CJS Warehousemen and Safe Depositaries §§ 26, 27.

13 AmJur 2d 805, Carriers § 308; 15A AmJur 2d 519, Commercial Code § 71; 78 AmJur 2d 223, Warehouses § 71.

70A-7-508. Warranties of collecting bank as to documents. A collecting bank or other intermediary known to be entrusted with documents on behalf of another or with collection of a draft or other claim against delivery of documents warrants by such delivery of the documents only its own good faith and authority. This rule applies even though the intermediary has purchased or made advances against the claim or draft to be collected.

History: L. 1965, ch. 154, § 7-508.

Cross-References.

Collection of documentary drafts, 70A-4-501 to 70A-4-504.

Instructions from collecting bank's transferor, effect, 70A-4-203.

Warranties on negotiation or transfer of documents of title, 70A-7-507.

Collateral References.

Banks and Banking ⇔ 161 (1).
9 CJS Banks and Banking § 241.
15A AmJur 2d 520, Commercial Code § 72.

70A-7-509. Receipt or bill — When adequate compliance with commercial contract. The question whether a document is adequate to fulfill the obligations of a contract for sale or the conditions of a credit is governed by the chapters on Sales (chapter 2) and on Letters of Credit (chapter 5).

History: L. 1965, ch. 154, § 7-509.

Contract for sale, document adequate to fulfill obligations of, 70A-2-101 to 70A-2-725.

Cross-References.

Conditions of a credit, document adequate to fulfill obligations of, 70A-5-101 to 70A-5-117.

PART 6

WAREHOUSE RECEIPTS AND BILLS OF LADING — MISCELLANEOUS PROVISIONS

Section

70A-7-601. Lost and missing documents.

70A-7-602. Attachment of goods covered by a negotiable document.

70A-7-603. Conflicting claims — Interpleader.

70A-7-601. Lost and missing documents.

- (1) If a document has been lost, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. If the document was negotiable the claimant must post security approved by the court to indemnify any person who may suffer loss as a result of nonsurrender of the document. If the document was not negotiable, such security may be required at the discretion of the court. The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees.
- (2) A bailee who without court order delivers goods to a person claiming under a missing negotiable document is liable to any person injured thereby, and if the delivery is not in good faith becomes liable for conversion. Delivery in good faith is not conversion if made in accordance with a filed classification or tariff or, where no classification or tariff is filed, if the claimant posts security with the bailee in an amount at least double the value of the goods at the time of posting to indemnify any person injured by the delivery who files a notice of claim within one year after the delivery.

History: L. 1965, ch. 154, § 7-601.

13 CJS Carriers §§ 128, 172; 54 CJS Lost Instruments § 2 et seq.; 93 CJS Warehousemen and Safe Depositaries § 27.

Collateral References.

Carriers ⇔ 77 et seq.; Lost Instruments ⇔ 1 et seq.; Warehousemen ⇔ 25 (1), (2).

13 AmJur 2d 900, Carriers § 421; 15A AmJur 2d 491, Commercial Code § 42; 78 AmJur 326, Warehouses § 220.

Rights of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

70A-7-602. Attachment of goods covered by a negotiable document. Except where the document was originally issued upon delivery of the goods by a person who had no power to dispose of them, no lien attaches by virtue of any judicial process to goods in the possession of a bailee for which a negotiable document of title is outstanding unless the document be first surrendered to the bailee or its negotiation enjoined, and the bailee shall not be compelled to deliver the goods pursuant to process until the document is surrendered to him or impounded by the court. One who purchases the document for value without notice of the process or injunction takes free of the lien imposed by judicial process.

History: L. 1965, ch. 154, § 7-602.

7 CJS Attachment § 219 et seq.; 33 CJS Executions §§ 128, 129; 93 CJS Warehousemen and Safe Depositaries § 27.

Cross-References.

Document of title to goods, when defeated, 70A-7-503.

Attachment or garnishment of goods covered by negotiable warehouse receipt, 40 ALR 969.

Collateral References.

Attachment ⇄ 180, 182; Execution ⇄ 113, 115; Warehousemen ⇄ 24, 25.

Lien on property stored by officer who had seized it under attachment or execution, 95 ALR 1529.

DECISIONS UNDER FORMER LAW

Construction of section.

The Supreme Court of this state has referred to *Kershaw v. Booth Fisheries Co.*, 177 Ill. App. 117 for a construction of former

section 72-1-25 providing for attachment or levy upon goods for which negotiable warehouse receipts had been issued. *Warner v. Tyng Warehouse Co.* (1928) 71 U 303, 265 P 748.

70A-7-603. Conflicting claims — Interpleader. If more than one person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for nondelivery of the goods, or by original action, whichever is appropriate.

History: L. 1965, ch. 154, § 7-603.

48 CJS Interpleader §§ 10, 17; 93 CJS Warehousemen and Safe Depositaries §§ 53, 74.

Cross-References.

Interpleader, Rules of Civil Procedure, Rule 22.

13 AmJur 2d 914, Carriers § 441; 45 AmJur 2d 448, Interpleader § 21; 78 AmJur 2d 328, 353, Warehouses §§ 221, 264

Collateral References.

Interpleader ⇄ 11, 13; Warehousemen ⇄ 25 (1), (2).

Warehouseman's right to interplead rival claimants of goods stored or their proceeds, 100 ALR 425.

CHAPTER 8

INVESTMENT SECURITIES

Part

1. Short title and general matters.

2. Issue — Issuer.
3. Purchase.
4. Registration.

PART 1

SHORT TITLE AND GENERAL MATTERS

Section

- 70A-8-101. Short title.
 70A-8-102. Definitions and index of definitions.
 70A-8-103. Issuer's lien.
 70A-8-104. Effect of overissue — "Overissue."
 70A-8-105. Securities negotiable — Presumptions.
 70A-8-106. Applicability.
 70A-8-107. Securities deliverable — Action for price.

70A-8-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Investment Securities.

History: L. 1965, ch. 154, § 8-101.

15A AmJur 2d 521, Commercial Code § 73.

Collateral References.

Bonds ⇔ 74 et seq.; Corporations ⇔ 111 et seq., 469 et seq.; Municipal Corporations ⇔ 938 et seq.; States ⇔ 162 et seq.

11 CJS Bonds § 62 et seq.; 18 CJS Corporations § 388 et seq.; 19 CJS Corporations § 1146 et seq.; 64 CJS Municipal Corporations § 1950; 81A CJS States § 258 et seq.

Construction and effect of UCC art. 8, dealing with investment securities, 21 ALR 3d 964.

Law Reviews.

The Uniform Commercial Code in Utah, Ronald N. Boyce, 1966 Utah L. Rev. 31, 38.

70A-8-102. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires

- (a) A "security" is an instrument which
 - (i) is issued in bearer or registered form; and
 - (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
 - (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
 - (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.
- (b) A writing which is a security is governed by this chapter and not by Uniform Commercial Code — Commercial Paper even though it also meets the requirements of that chapter. This chapter does not apply to money.
- (c) A security is in "registered form" when it specifies a person entitled to the security or to the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer or the security so states.

- (d) A security is in "bearer form" when it runs to bearer according to its terms and not by reason of any indorsement.
- (2) A "subsequent purchaser" is a person who takes other than by original issue.
- (3) A "clearing corporation" is a corporation:
- (a) At least 90% of the capital stock of which is held by or for one or more persons (other than individuals), each of whom
 - (i) is subject to supervision or regulation pursuant to the provisions of federal or state banking laws or state insurance laws, or
 - (ii) is a broker or dealer or investment company registered under the Securities Exchange Act of 1934 or the Investment Company Act of 1940, or
 - (iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934, and none of whom, other than a national securities exchange or association, holds in excess of 20% of the capital stock of such corporation; and
 - (b) Any remaining capital stock which is held by individuals who have purchased the capital stock at or prior to the time of their taking office as directors of the corporation and who have purchased only so much of the capital stock as may be necessary to permit them to qualify as directors.
- (4) A "custodian bank" is any bank or trust company which is supervised and examined by state or federal authority having supervision over banks and which is acting as custodian for a clearing corporation.
- (5) Other definitions applying to this chapter or to specified parts thereof and the sections in which they appear are:
- "Adverse claim." Section 70A-8-301.
- "Bona fide purchaser." Section 70A-8-302.
- "Broker." Section 70A-8-303.
- "Guarantee of the signature." Section 70A-8-402.
- "Intermediary bank." Section 70A-4-105.
- "Issuer." Section 70A-8-201.
- "Overissue." Section 70A-8-104.
- (6) In addition chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: L. 1965, ch. 154, § 8-102; 1973 (1st S. S.), ch. 10, § 1.

Compiler's Notes.

The 1973 (1st S. S.) amendment rewrote the definition of "clearing corporation" in subsec. (3) which prior to amendment, read: "A 'clearing corporation' is a corporation all of the capital stock of which is held by or for

a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934."

Cross-References.

Commercial paper, law governing, 70A-3-103.

Secured transactions, "instrument" defined, 70A-9-105. 15A AmJur 2d 523, Commercial Code § 74.

Law Reviews.

Utah Legislative Survey — 1974, 1974 Utah L. Rev. 622.

Collateral References.

Statutes ⇔ 179.
82 CJS Statutes § 315.

70A-8-103. Issuer's lien. A lien upon a security in favor of an issuer thereof is valid against a purchaser only if the right of the issuer to such lien is noted conspicuously on the security.

History: L. 1965, ch. 154, § 8-103.

Collateral References.**Cross-References.**

Effect of issuer's restrictions on transfer, 70A-8-204.

Corporations ⇔ 167.
18 CJS Corporations § 450.
15A AmJur 2d 538, Commercial Code § 87.

70A-8-104. Effect of overissue — "Overissue."

- (1) The provisions of this chapter which validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in overissue; but
 - (a) if an identical security which does not constitute an overissue is reasonably available for purchase, the person entitled to issue or validation may compel the issuer to purchase and deliver such a security to him against surrender of the security, if any, which he holds; or
 - (b) if a security is not so available for purchase, the person entitled to issue or validation may recover from the issuer the price he or the last purchaser for value paid for it with interest from the date of his demand.
- (2) "Overissue" means the issue of securities in excess of the amount which the issuer has corporate power to issue.

History: L. 1965, ch. 154, § 8-104.

Unauthorized indorsement, effect of, 70A-8-311.

Cross-References.

Alteration of instrument, 70A-8-206.
Completion of instrument, 70A-8-206.
Issuer's responsibility and defenses, 70A-8-202.

Unauthorized signature on issue, effect of, 70A-8-205.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

Signature of authenticating trustee, registrar or transfer agent, effect of, 70A-8-208.

Collateral References.

Corporations ⇔ 61 et seq., 102.
18 CJS Corporations §§ 197 et seq., 209; 19 CJS Corporations § 1147 et seq.
15A AmJur 2d 540, Commercial Code § 89; 18 AmJur 2d 757, Corporations § 230 et seq.

DECISIONS UNDER FORMER LAW**Burden of proof in suit to rescind issuance.**

Where plaintiff seeks to rescind an issuance of stock to him as being void as an issue beyond the amount authorized in the charter of the corporation, he made out a prima facie case by showing that all authorized stock had been issued before the issuance of plaintiff's

stock and then the defendant gave evidence that some stock was surrendered to the corporation prior to the reissue, it was then up to the plaintiff to produce evidence that the stock was not surrendered. The burden of proof is used in two significances: First, as the risk of nonpersuasion, and second, as the duty of producing evidence. The party having the risk of nonpersuasion is naturally the one

upon whom first falls the duty of going forward with the evidence. Upon meeting their duty of going forward with evidence that all authorized stock had been issued before the issuance of plaintiffs' stock certificate, plaintiffs made out a prima facie case. Thereupon the burden, in the second meaning of the phrase, shifted to the defendants, but the risk of nonpersuasion, which never shifts,

remained with the plaintiffs. *Kartchner v. Horne* (1953) 1 U 2d 112, 262 P 2d 749.

Delivery of stock by mutual mistake of fact.

Where a corporation delivered too many shares of stock to the underwriter, and the underwriter sold the stock, the corporation was entitled to relief under the doctrine of restitution. *Wyoming Uranium Co. v. Reed* (1958) 7 U 2d 417, 326 P 2d 710.

70A-8-105. Securities negotiable — Presumptions.

- (1) Securities governed by this chapter are negotiable instruments.
- (2) In any action on a security
 - (a) unless specifically denied in the pleadings, each signature on the security or in a necessary indorsement is admitted;
 - (b) when the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under the signature but the signature is presumed to be genuine or authorized;
 - (c) when signatures are admitted or established production of the instrument entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the security; and
 - (d) after it is shown that a defense or defect exists the plaintiff has the burden of establishing that he or some person under whom he claims is a person against whom the defense or defect is ineffective (section 70A-8-202).

History: L. 1965, ch. 154, § 8-105.

Cross-References.

Burden of establishing signatures and defenses, 70A-3-307.

Commercial paper, law governing, 70A-3-103.

Issuer's responsibility and defenses, 70A-8-202.

Rights acquired by purchaser, 70A-8-301.

Collateral References.

Bonds ⇌ 74 et seq.; Corporations ⇌ 149, 463 et seq.; Municipal Corporations ⇌ 938 et seq.; States ⇌ 162 et seq.

11 CJS Bonds § 62 et seq.; 18 CJS Corporations § 444; 19 CJS Corporations § 1147 et seq.; 64 CJS Municipal Corporations § 1950 et seq.; 81A CJS States § 258 et seq.

15A AmJur 2d 526, Commercial Code § 75; 18 AmJur 2d 887, Corporations § 380.

DECISIONS UNDER FORMER LAW

Purpose of act.

The Uniform Stock Transfer Act was adopted to give stock certificates some mea-

sure of negotiability. *Untermeyer v. State Tax Comm.* (1942) 102 U 214, 129 P 2d 881.

70A-8-106. Applicability. The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law (including the conflict of laws rules) of the jurisdiction of the organization of the issuer.)

History: C. 1953, 70A-8-106, enacted by L. 1977, ch. 272, § 7.

Cross-References.

Issuer's responsibility and defenses, 70A-8-202.

Parties' power to choose applicable law,
70A-1-105.

Registration of transfer of security,
70A-8-401 to 70A-8-406.
Territorial application of act, 70A-1-105.

70A-8-107. Securities deliverable — Action for price.

- (1) Unless otherwise agreed and subject to any applicable law or regulation respecting short sales, a person obligated to deliver securities may deliver any security of the specified issue in bearer form or registered in the name of the transferee or indorsed to him or in blank.
- (2) When the buyer fails to pay the price as it comes due under a contract of sale the seller may recover the price
 - (a) of securities accepted by the buyer; and
 - (b) of other securities if efforts at their resale would be unduly burdensome or if there is no readily available market for their resale.

History: L. 1965, ch. 154, § 8-107.

Collateral References.

15A AmJur 2d 563, 570, Commercial Code §§ 106, 112.

PART 2

ISSUE — ISSUER

Section

- 70A-8-201. "Issuer."
 70A-8-202. Issuer's responsibility and defenses — Notice of defect or defense.
 70A-8-203. Staleness as notice of defects or defenses.
 70A-8-204. Effect of issuer's restrictions on transfer.
 70A-8-205. Effect of unauthorized signature on issue.
 70A-8-206. Completion or alteration of instrument.
 70A-8-207. Rights of issuer with respect to registered owners.
 70A-8-208. Effect of signature of authenticating trustee, registrar or transfer agent.

70A-8-201. "Issuer."

- (1) With respect to obligations on or defenses to a security "issuer" includes a person who
 - (a) places or authorizes the placing of his name on a security (otherwise than as authenticating trustee, registrar, transfer agent or the like) to evidence that it represents a share, participation or other interest in his property or in an enterprise or to evidence his duty to perform an obligation evidenced by the security; or
 - (b) directly or indirectly creates fractional interests in his rights or property which fractional interests are evidenced by securities; or
 - (c) becomes responsible for or in place of any other person described as an issuer in this section.
- (2) With respect to obligations on or defenses to a security a guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security.

- (3) With respect to registration of transfer (part 4 of this chapter) "issuer" means a person on whose behalf transfer books are maintained.

History: L. 1965, ch. 154, § 8-201.

Cross-References.

Issuer's responsibility and defenses, 70A-8-202.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

"Security" defined, 70A-8-102 (1).

Collateral References.

Corporations ⇌ 111 et seq., 469 et seq.;
Municipal Corporations ⇌ 938 et seq.;
States ⇌ 162 et seq.

18 CJS Corporations § 388 et seq.; 19 CJS
Corporations § 1146 et seq.; 64 CJS Municipal
Corporations § 1950 et seq.

15A AmJur 2d 528, Commercial Code § 77.

Assumption of payment or guaranty of
corporation's indebtedness as consideration
for transfer of its stock, 103 ALR 1417.

70A-8-202. Issuer's responsibility and defenses — Notice of defect or defense.

- (1) Even against a purchaser for value and without notice, the terms of a security include those stated on the security and those made part of the security by reference to another instrument, indenture or document or to a constitution, statute, ordinance, rule, regulation, order or the like to the extent that the terms so referred to do not conflict with the stated terms. Such a reference does not of itself charge a purchaser for value with notice of a defect going to the validity of the security even though the security expressly states that a person accepting it admits such notice.
- (2) (a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.
- (b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.
- (3) Except as otherwise provided in the case of certain unauthorized signatures on issue (section 70A-8-205), lack of genuineness of a security is a complete defense even against a purchaser for value and without notice.
- (4) All other defenses of the issuer including nondelivery and conditional delivery of the security are ineffective against a purchaser for value who has taken without notice of the particular defense.

- (5) Nothing in this section shall be construed to affect the right of a party to a “when, as and if issued” or a “when distributed” contract to cancel the contract in the event of a material change in the character of the security which is the subject of the contract or in the plan or arrangement pursuant to which such security is to be issued or distributed.

History: L. 1965, ch. 154, § 8-202.

Unauthorized signature on issue, effect of, 70A-8-205.

Cross-References.

Alteration of instrument, 70A-8-206.
 Completion of instrument, 70A-8-206.
 Notice or notification, 70A-1-201.
 Overissue, effect of, 70A-8-104.
 Staleness as notice of defects or defenses, 70A-8-203.
 “Subsequent purchaser” defined, 70A-8-102
 (2).

Collateral References.

Bonds ⇔ 100; Corporations ⇔ 111 et seq., 469 et seq.; Municipal Corporations ⇔ 948; States ⇔ 163.
 11 CJS Bonds § 81 et seq.; 18 CJS Corporations § 388 et seq.; 19 CJS Corporations § 1146 et seq.; 64 CJS Municipal Corporations §§ 1970, 1971; 81A CJS States § 262.
 15A AmJur 2d 529 to 531, Commercial Code §§ 78 to 80.

70A-8-203. Staleness as notice of defects or defenses.

- (1) After an act or event which creates a right to immediate performance of the principal obligation evidenced by the security or which sets a date on or after which the security is to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in its issue or defense of the issuer
- (a) if the act or event is one requiring the payment of money or the delivery of securities or both on presentation or surrender of the security and such funds or securities are available on the date set for payment or exchange and he takes the security more than one year after that date; and
- (b) if the act or event is not covered by paragraph (a) and he takes the security more than two years after the date set for surrender or presentation or the date on which such performance became due.
- (2) A call which has been revoked is not within subsection (1).

History: L. 1965, ch. 154, § 8-203.

Collateral References.

Cross-References.

Issuer’s responsibility and defenses, 70A-8-202.
 Overissue, effect of, 70A-8-104.
 Staleness as notice of adverse claim, 70A-8-305.

Bonds ⇔ 96; Corporations ⇔ 108, 149, 466 et seq.; Municipal Corporations ⇔ 940 et seq.; States ⇔ 163.
 11 CJS Bonds § 81 et seq.; 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1227 et seq.; 64 CJS Municipal Corporations § 1965; 81A CJS States § 258.
 15A AmJur 2d 531, Commercial Code § 81.

70A-8-204. Effect of issuer’s restrictions on transfer. Unless noted conspicuously on the security a restriction on transfer imposed by the

issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it.

History: L. 1965, ch. 154, § 8-204.

15A AmJur 2d 533, Commercial Code § 83; 18 AmJur 2d 894, Corporations § 386.

Cross-References.

Issuer's lien, 70A-8-103.
Registration of transfer of security, 70A-8-401 to 70A-8-406.

Construction and application of provision restricting sale or transfer of corporate stock, 2 ALR 2d 745.

Collateral References.

Bonds ⇔ 74 et seq.; Corporations ⇔ 113, 472, 473; Municipal Corporations ⇔ 938 et seq.; States ⇔ 162 et seq.

Construction and effect of restriction on transfer of stock unless such restriction is stated on the certificate, 29 ALR 2d 1146.

11 CJS Bonds § 66 et seq.; 18 CJS Corporations § 391; 19 CJS Corporations § 1148; 64 CJS Municipal Corporations §§ 1950 et seq., 1968; 81A CJS States § 258.

Validity of provision of voting trust against transfer of beneficiary's interest, 11 ALR 2d 1000.

Validity of restrictions on alienation or transfer of corporate stock, 65 ALR 1159, 61 ALR 2d 1318.

DECISIONS UNDER FORMER LAW

Appraisalment of stock.

Bylaws of corporation were not invalid as an unreasonable restraint on alienation in

providing for appraisalment of values of capital stock of stockholder desiring to sell or transfer it. *Shumaker v. Utex Exploration Co.* (1957) 157 F Supp 68, 73.

70A-8-205. Effect of unauthorized signature on issue. An unauthorized signature placed on a security prior to or in the course of issue is ineffective except that the signature is effective in favor of a purchaser for value and without notice of the lack of authority if the signing has been done by

- (a) an authenticating trustee, registrar, transfer agent or other person entrusted by the issuer with the signing of the security or of similar securities or their immediate preparation for signing; or
- (b) an employee of the issuer or of any of the foregoing entrusted with responsible handling of the security.

History: L. 1965, ch. 154, § 8-205.

Collateral References.

Cross-References.

Lack of genuineness of security, 70A-8-202 (3).
Unauthorized indorsement, effect of, 70A-8-311.

Bonds ⇔ 100; Corporations ⇔ 100 et seq., 465 et seq.; Municipal Corporations ⇔ 948; States ⇔ 163.

11 CJS Bonds § 81 et seq.; 18 CJS Corporations § 253 et seq.; 19 CJS Corporations § 1150 et seq.; 64 CJS Municipal Corporations §§ 1970, 1971; 81A CJS States § 262.

15A AmJur 2d 532, Commercial Code § 82; 18 AmJur 2d 775 to 778, Corporations §§ 252 to 255.

70A-8-206. Completion or alteration of instrument.

- (1) Where a security contains the signatures necessary to its issue or transfer but is incomplete in any other respect
 - (a) any person may complete it by filling in the blanks as authorized; and

- (b) even though the blanks are incorrectly filled in, the security as completed is enforceable by a purchaser who took it for value and without notice of such incorrectness.
- (2) A complete security which has been improperly altered even though fraudulently remains enforceable but only according to its original terms.

History: L. 1965, ch. 154, § 8-206.

Collateral References.

Alteration of Instruments ⇔ 1 et seq.; Bonds ⇔ 86 et seq.; Corporations ⇔ 100, 465 et seq.; Municipal Corporations ⇔ 939 et seq.; States ⇔ 163.

3A CJS Alteration of Instruments § 1 et seq.; 11 CJS Bonds § 75 et seq.; 18 CJS Corporations § 208; 19 CJS Corporations § 1138 et seq.; 64 CJS Municipal Corporations §§ 1970, 1971; 81A CJS States § 262.

15A AmJur 2d 835, 836, Commercial Code §§ 84, 85.

Cross-References.

Indorsement of security, 70A-8-308.

Overissue of security, effect of, 70A-8-104.

Purchaser for value without notice, defenses ineffective against, 70A-8-202 (4).

Rights acquired by purchaser, 70A-8-301.

Unauthorized indorsement, effect of, 70A-8-311.

Unauthorized signature on issue, effect of, 70A-8-205.

70A-8-207. Rights of issuer with respect to registered owners.

- (1) Prior to due presentment for registration of transfer of a security in registered form the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications and otherwise to exercise all the rights and powers of an owner.
- (2) Nothing in this chapter shall be construed to affect the liability of the registered owner of a security for calls, assessments or the like.

History: L. 1965, ch. 154, § 8-207.

Cross-References.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

Collateral References.

Corporations ⇔ 128-136, 143, 466 et seq.

18 CJS Corporations §§ 434-441; 19 CJS Corporations § 1154 et seq.

15A AmJur 2d 537, Commercial Code § 86.

Corporate stock, implied obligation of purchaser of, to indemnify vendor against future calls or assessments, 45 ALR 168, 141 ALR 1351.

Failure to enter transfer of stock on corporate books as affecting liability of transferor for calls or assessments, 45 ALR 137, 104 ALR 638.

Illegally issued stock, right of corporation as against bona fide transferee, to refuse transfer of, on books, 73 ALR 1435.

Infants or incompetents, rights, duties, and liability of corporation in connection with transfer of stock, 3 ALR 2d 881.

Life estate, liabilities and duties of corporation in respect to sale or transfer of corporate stock held by one having, 126 ALR 1298.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 ALR 2d 12.

Right of corporation to refuse to register transfer of stock because of stockholder's indebtedness to it, where transfer is by operation of law, 65 ALR 220.

Rights, duties, and liability in connection with transfer of stock of decedent, 7 ALR 2d 1240.

Trustee or other fiduciary, duty of corporation upon presentation for transfer of stock standing in one's name as, 56 ALR 1199.

DECISIONS UNDER FORMER LAW

Presumption of ownership.

Presumptively one in whose name stock stands on the company's books is the owner

thereof. *Rasmussen v. Sevier Valley Canal Co.* (1916) 48 U 490, 160 P 444.

Holder of stock certificate is not required to examine company's books to ascertain

validity of the transfer; he need not look beyond recitals of certificate in regard to his title. *Brown v. Wright* (1916) 48 U 633, 161 P 448.

70A-8-208. Effect of signature of authenticating trustee, registrar or transfer agent.

- (1) A person placing his signature upon a security as authenticating trustee, registrar, transfer agent or the like warrants to a purchaser for value without notice of the particular defect that
 - (a) the security is genuine; and
 - (b) his own participation in the issue of the security is within his capacity and within the scope of the authorization received by him from the issuer; and
 - (c) he has reasonable grounds to believe that the security is in the form and within the amount the issuer is authorized to issue.
- (2) Unless otherwise agreed, a person by so placing his signature does not assume responsibility for the validity of the security in other respects.

History: L. 1965, ch. 154, § 8-208.

Cross-References.

Proper form of security, 70A-8-102.

Collateral References.

Corporations \Leftrightarrow 108, 149, 466 et seq.
 18 CJS Corporations §§ 253 et seq., 444; 19
 CJS Corporations § 1162 et seq.
 15A AmJur 2d 538, Commercial Code § 88.

PART 3
PURCHASE

Section

- 70A-8-301. Rights acquired by purchaser — “Adverse claim” — Title acquired by bona fide purchaser.
- 70A-8-302. “Bona fide purchaser.”
- 70A-8-303. “Broker.”
- 70A-8-304. Notice to purchaser of adverse claims.
- 70A-8-305. Staleness as notice of adverse claims.
- 70A-8-306. Warranties on presentment and transfer.
- 70A-8-307. Effect of delivery without indorsement — Right to compel indorsement.
- 70A-8-308. Indorsement, how made — Special indorsement — Indorser not a guarantor — Partial assignment.
- 70A-8-309. Effect of indorsement without delivery.
- 70A-8-310. Indorsement of security in bearer form.
- 70A-8-311. Effect of unauthorized indorsement.
- 70A-8-312. Effect of guaranteeing signature or indorsement.
- 70A-8-313. When delivery to the purchaser occurs — Purchaser’s broker as holder.
- 70A-8-314. Duty to deliver, when completed.
- 70A-8-315. Action against purchaser based upon wrongful transfer.
- 70A-8-316. Purchaser’s right to requisites for registration of transfer on books.
- 70A-8-317. Attachment or levy upon security.
- 70A-8-318. No conversion by good faith delivery.
- 70A-8-319. Statute of frauds.
- 70A-8-320. Transfer or pledge within a central depository system.

70A-8-301. Rights acquired by purchaser — “Adverse claim” — Title acquired by bona fide purchaser.

- (1) Upon delivery of a security the purchaser acquires the rights in the security which his transferor had or had actual authority to convey except that a purchaser who has himself been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim cannot improve his position by taking from a later bona fide purchaser. "Adverse claim" includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.
- (2) A bona fide purchaser in addition to acquiring the rights of a purchaser also acquires the security free of any adverse claim.
- (3) A purchaser of a limited interest acquires rights only to the extent of the interest purchased.

History: L. 1965, ch. 154, § 8-301.

Cross-References.

Issuance of security, 70A-8-201 to 70A-8-208.

Issuer's restrictions on transfer, effect of, 70A-8-204.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

Bankruptcy.

Where transferee was bona fide purchaser under § 70A-8-302, but transfer was null and void as to transferor's trustee in bankruptcy under bankruptcy provisions, the trustee succeeded to the transferee's status as a bona fide purchaser thus taking the securities free of an adverse claim of a security interest. *Prisbrey v. Noble* (1974) 505 F 2d 170.

Collateral References.

Bonds ⇌ 74 et seq.; Corporations ⇌ 108, 149, 466 et seq.; Municipal Corporations ⇌ 938 et seq.; States ⇌ 162 et seq.

11 CJS Bonds § 62 et seq.; 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1162 et seq.; 64 CJS Municipal Corporations § 1960 et seq.; 81A CJS States § 258 et seq.

15A AmJur 2d 544, Commercial Code § 92; 18 AmJur 2d 909, 913, Corporations §§ 400, 405.

Right of pledgee of corporate stock in respect of dividends declared thereon, 67 ALR 485, 103 ALR 849.

Rights of seller and purchaser of stock to dividends declared thereon, 60 ALR 703.

Rights, powers, and duties in respect of sale or transfer of corporate stock in which one holds a legal life estate as affected by Uniform Stock Transfer Act, 126 ALR 1302.

DECISIONS UNDER FORMER LAW

Compelling issuance of certificate.

If company's officers wrongfully refuse on demand to issue certificate to person entitled thereto, complaint will lie to compel its issuance, and the form of action is not material in this state. *Coray v. Perry Irr. Co.* (1917) 50 U 70, 166 P 672, following *Kuhn v. McAllister* (1875) 1 U 273.

Even prior to adoption of Uniform Stock Transfer Act, the wrongful withholding of a certificate of stock was equivalent to a conversion of the stock itself, and might be so treated by the owner. *Coray v. Perry Irr. Co.* (1917) 50 U 70, 166 P 672.

A complaint against a corporation to compel the issuance of a certificate of treasury stock should, among other essential elements, allege in specific terms that plaintiff was entitled to the said shares, the character and amount of the consideration paid therefor, and that he was entitled to the certificate

demand. *Coray v. Perry Irr. Co.* (1917) 50 U 70, 166 P 672, setting out form of complaint.

Certificate which was mere evidence of contract by which holder agreed to become stockholder in building and loan association, upon terms and conditions stated therein, was not a certificate of stock within meaning of that term as used in Uniform Stock Transfer Act so as to require indorsement on the certificate on transfer thereof, a symbolical delivery being sufficient to effect the transfer. *Harrington v. Inter-State Fidelity Bldg. & Loan Assn.* (1933) 91 U 74, 63 P 2d 577.

Election of remedies.

If corporation makes a wrongful transfer of stock, this renders it liable in conversion, or it may be compelled to restore said stockholder to his rights as such. That is to say, the corporation may be compelled to purchase an equal amount of stock and register it for the benefit of the wronged stockholder, or plaintiff may treat registration of the

invalid transfer as a conversion of his shares by defendant company and claim damages. This election is with plaintiff and not with defendant. *West v. Tintic Standard Min. Co.* (1928) 71 U. 158, 263 P 490, 56 ALR 1190.

If defendant company, when sued by stockholder whose stock has been wrongfully transferred, has sufficient of its capital stock in the treasury from which reinstatement of plaintiff as a stockholder can well be effected without requiring defendant to go into the market and acquire shares for him, plaintiff may elect this remedy rather than action for damages. *West v. Tintic Standard Min. Co.* (1928) 71 U 158, 263 P 490, 56 ALR 1190.

Estoppel.

While a stock certificate is not a negotiable instrument, an owner of such stock, who entrusts another with his stock certificate indorsed or signed in blank, clothes the party to whom the certificate is entrusted with such indicia of ownership that an unauthorized sale or pledge of the certificate by the latter to an innocent purchaser or pledgee for value is binding upon the true owner and prevents him from asserting a paramount interest in the shares. *Adams v. Silver Shield Min. & Mill. Co.* (1933) 82 U 586, 21 P 2d 886.

Where husband obtained certificate of stock in connection with an option to purchase which was never exercised, and wife

received such certificate in connection with property settlement in divorce proceedings, wife was not purchaser for value as against claim of original owner to the stock. *Adams v. Silver Shield Min. & Mill. Co.* (1933) 82 U 586, 21 P 2d 886.

Inheritance Tax Law.

The Uniform Stock Transfer Act dealt with the rights and duties of the transferor and transferee of a stock certificate as against each other and against all other claimants, including creditors or persons who seek to obtain or reach the stock by legal process. It was simply a procedural statute dealing with the methods and process of determining or obtaining title to the stock. It did not affect state's right to tax transfer or devolution of stock under Inheritance Tax Law, even though neither the owner nor the certificate was within its borders. *Untermeyer v. State Tax Comm.* (1942) 102 U 214, 129 P 2d 881.

Transfer of interest in stock before certificates issued.

A subscriber to stock who, before certificates were issued, assigned all his interest in his shares of stock to another subscriber was entitled to recover the balance due on the written contract of sale, even though no certificates were delivered. *Van Noy v. Gibbs* (1957) 7 U 2d 70, 318 P 2d 351.

70A-8-302. "Bona fide purchaser." A "bona fide purchaser" is a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a security in bearer form or of one in registered form issued to him or indorsed to him or in blank.

History: L. 1965, ch. 154, § 8-302.

Bankruptcy.

Although father-in-law could not qualify as a bona fide purchaser under the Federal Bankruptcy Act, he qualified as a bona fide purchaser under the law of Utah, because he accepted transfer of stock shares as security for contingent liability under joint indemnity agreement, and the shares were delivered to him endorsed in blank. *Prisbrey v. Noble* (1974) 505 F 2d 170.

Burden of proof.

Company that sold bearer stock which had been loaned to executive employee to satisfy indebtedness of the employee had the burden of proving that it took possession of the shares for value without knowing, or having reason to know, of any adverse claim. *Strand v. Prince-Covey & Co.* (1975) 534 P 2d 892.

Collateral References.

Bonds ⇐ 93; Corporations ⇐ 108, 149, 466 et seq.; Municipal Corporations ⇐ 941; States ⇐ 163.

11 CJS Bonds § 81; 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1162 et seq.; 64 CJS Municipal Corporations § 1962; 81A CJS States § 262.

15A AmJur 2d 542, Commercial Code § 91; 18 AmJur 2d 913, Corporations § 405.

Effect of entrusting another with stock certificate endorsed or assigned in blank to estop owner as against a bona fide purchaser or pledgee for value, 73 ALR 1405.

Pledgee of corporate stock as security for an antecedent debt as a bona fide purchaser within the rule which protects such purchasers against the equities of third persons, 9 ALR 1619.

Who is "bona fide purchaser" of investment security under UCC § 8-302, 88 ALR 3d 949.

70A-8-303. "Broker." "Broker" means a person engaged for all or part of his time in the business of buying and selling securities, who in the transaction concerned acts for, or buys a security from or sells a security to a customer. Nothing in this chapter determines the capacity in which a person acts for purposes of any other statute or rule to which such person is subject.

History: L. 1965, ch. 154, § 8-303.

12 CJS Brokers § 1.

15A AmJur 2d 541, Commercial Code § 90.

Collateral References.

Brokers ⇔ 2.

70A-8-304. Notice to purchaser of adverse claims.

- (1) A purchaser (including a broker for the seller or buyer but excluding an intermediary bank) of a security is charged with notice of adverse claims if
 - (a) the security whether in bearer or registered form has been indorsed "for collection" or "for surrender" or for some other purpose not involving transfer; or
 - (b) the security is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor. The mere writing of a name on a security is not such a statement.
- (2) The fact that the purchaser (including a broker for the seller or buyer) has notice that the security is held for a third person or is registered in the name of or indorsed by a fiduciary does not create a duty of inquiry into the rightfulness of the transfer or constitute notice of adverse claims. If, however, the purchaser (excluding an intermediary bank) has knowledge that the proceeds are being used or that the transaction is for the individual benefit of the fiduciary or otherwise in breach of duty, the purchaser is charged with notice of adverse claims.

History: L. 1965, ch. 154, § 8-304.

Collateral References.

Bonds ⇔ 94, 95; Corporations ⇔ 108, 149, 466 et seq.; Municipal Corporations ⇔ 942 et seq.; States ⇔ 163.

11 CJS Bonds § 86; 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1162 et seq.; 64 CJS Municipal Corporations § 1966 et seq.; 81A CJS States § 262.

15A AmJur 2d 546, Commercial Code § 93; 18 AmJur 2d 913, Corporations § 405.

Cross-References.

"Bona fide purchaser" defined, 70A-8-302.

Indorsement of security, 70A-8-308.

Overissue of security, effect of, 70A-8-104.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

Staleness as notice of adverse claim, 70A-8-305.

70A-8-305. Staleness as notice of adverse claims. An act or event which creates a right to immediate performance of the principal obligation evidenced by the security or which sets a date on or after which the security is to be presented or surrendered for redemption or exchange does not of itself constitute any notice of adverse claims except in the case of a purchase

- (a) after one year from any date set for such presentment or surrender for redemption or exchange; or
- (b) after six months from any date set for payment of money against presentation or surrender of the security if funds are available for payment on that date.

History: L. 1965, ch. 154, § 8-305.

Cross-References.

Issuer's lien, 70A-8-103.
 Notice to purchaser of adverse claims, 70A-8-304.
 Staleness as notice of defects or defenses, 70A-8-203.

Collateral References.

Bonds ⇔ 94 et seq.; Corporations ⇔ 108, 149, 466 et seq.; Municipal Corporations ⇔ 940 et seq.; States ⇔ 163.
 11 CJS Bonds § 86; 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1162 et seq.; 64 CJS Municipal Corporations § 1965 et seq.; 81A CJS States § 262.
 15A AmJur 2d 547, Commercial Code § 94.

70A-8-306. Warranties on presentment and transfer.

- (1) A person who presents a security for registration of transfer or for payment or exchange warrants to the issuer that he is entitled to the registration, payment or exchange. But a purchaser for value without notice of adverse claims who receives a new, reissued or reregistered security on registration of transfer warrants only that he has no knowledge of any unauthorized signature (section 70a-8-311) in a necessary indorsement.
- (2) A person by transferring a security to a purchaser for value warrants only that
 - (a) his transfer is effective and rightful; and
 - (b) the security is genuine and has not been materially altered; and
 - (c) he knows no fact which might impair the validity of the security.
- (3) Where a security is delivered by an intermediary known to be entrusted with delivery of the security on behalf of another or with collection of a draft or other claim against such delivery, the intermediary by such delivery warrants only his own good faith and authority even though he has purchased or made advances against the claim to be collected against the delivery.
- (4) A pledgee or other holder for security who redelivers the security received, or after payment and on order of the debtor delivers that security to a third person makes only the warranties of an intermediary under subsection (3).
- (5) A broker gives to his customer and to the issuer and a purchaser the warranties provided in this section and has the rights and privileges of a purchaser under this section. The warranties of and in favor of the broker acting as an agent are in addition to applicable warranties given by and in favor of his customer.

History: L. 1965, ch. 154, § 8-306.

Cross-References.

Issuer's lien, 70A-8-103.

Lost, destroyed and stolen securities, 70A-8-405.

Unauthorized indorsement, effect of, 70A-8-311.

Variation by agreement, 70A-1-102 (3).

Collateral References.

Bonds ⇄ 91; Brokers ⇄ 19 et seq., 95; Corporations ⇄ 108, 149, 466 et seq.; Munic-

ipal Corporations ⇄ 939 et seq.; States ⇄ 162 et seq.

11 CJS Bonds § 79; 12 CJS Brokers §§ 23 et seq., 145; 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1162 et seq.; 64 CJS Municipal Corporations § 1956 et seq.; 81A CJS States § 258.

15A AmJur 2d 548 to 550, Commercial Code §§ 95 to 97; 18 AmJur 2d 914, 915, Corporations §§ 406, 407.

70A-8-307. Effect of delivery without indorsement — Right to compel indorsement. Where a security in registered form has been delivered to a purchaser without a necessary indorsement he may become a bona fide purchaser only as of the time the indorsement is supplied, but against the transferor the transfer is complete upon delivery and the purchaser has a specifically enforceable right to have any necessary indorsement supplied.

History: L. 1965, ch. 154, § 8-307.

Cross-References.

"Bona fide purchaser" defined, 70A-8-302.

Documents of title, delivery without indorsement, right to compel indorsement, 70A-7-506.

Indorsement of security, effect without delivery, 70A-8-308, 70A-8-309.

Issuer's responsibility and defenses, 70A-8-202.

Purchaser's right to requisites for registration of transfer of security, 70A-8-316.

Collateral References.

Corporations ⇄ 108, 125, 149, 466 et seq. 18 CJS Corporations §§ 253 et seq., 444; 19 CJS Corporations § 1162 et seq.

15A AmJur 2d 553, Commercial Code § 101; 18 AmJur 2d 904, Corporations § 395.

DECISIONS UNDER FORMER LAW

Construction and application.

Former section 16-3-9 contemplated that one who received an unindorsed certificate from owner with intent of latter to transfer certificate and shares represented thereby acquired an interest in both and could require legal transfer by paying or tendering amount of purchase price; and by granting holder of unindorsed certificate the right to specifically enforce an indorsement, legislature acknowledged the possibility of acquiring interest in certificate by sale or otherwise without a completed indorsement.

Taylor v. Daynes (1950) 118 U 61, 218 P 2d 1069.

Failure to indorse certificate.

"A seller of stock should be at liberty to protect his certificate from passing into the hands of innocent third parties until such time as payment is tendered and if the certificate is delivered unconditionally but indorsement is withheld for security reasons, the failure to indorse does not evidence an intention not to complete the sale." Taylor v. Daynes (1950) 118 U 61, 218 P 2d 1069.

70A-8-308. Indorsement, how made — Special indorsement — Indorser not a guarantor — Partial assignment.

- (1) An indorsement of a security in registered form is made when an appropriate person signs on it or on a separate document an assignment or transfer of the security or a power to assign or transfer it or when the signature of such person is written without more upon the back of the security.
- (2) An indorsement may be in blank or special. An indorsement in blank includes an indorsement to bearer. A special indorsement

specifies the person to whom the security is to be transferred, or who has power to transfer it. A holder may convert a blank indorsement into a special indorsement.

- (3) "An appropriate person" in subsection (1) means
- (a) the person specified by the security or by special indorsement to be entitled to the security; or
 - (b) where the person so specified is described as a fiduciary but is no longer serving in the described capacity, — either that person or his successor; or
 - (c) where the security or indorsement so specifies more than one person as fiduciaries and one or more are no longer serving in the described capacity, — the remaining fiduciary or fiduciaries, whether or not a successor has been appointed or qualified; or
 - (d) where the person so specified is an individual and is without capacity to act by virtue of death, incompetence, infancy or otherwise, — his executor, administrator, guardian or like fiduciary; or
 - (e) where the security or indorsement so specifies more than one person as tenants by the entirety or with right of survivorship and by reason of death all cannot sign, — the survivor or survivors; or
 - (f) a person having power to sign under applicable law or controlling instrument; or
 - (g) to the extent that any of the foregoing persons may act through an agent, — his authorized agent.
- (4) Unless otherwise agreed the indorser by his indorsement assumes no obligation that the security will be honored by the issuer.
- (5) An indorsement purporting to be only of part of a security representing units intended by the issuer to be separately transferable is effective to the extent of the indorsement.
- (6) Whether the person signing is appropriate is determined as of the date of signing and an indorsement by such a person does not become unauthorized for the purposes of this chapter by virtue of any subsequent change of circumstances.
- (7) Failure of a fiduciary to comply with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer, does not render his indorsement unauthorized for the purposes of this chapter.

History: L. 1965, ch. 154, § 8-308.

Cross-References.

"Bona fide purchaser" defined, 70A-8-302.
 Delivery without indorsement, effect of, 70A-8-307.

Guaranteeing signature or indorsement, effect of, 70A-8-312.

Indorsement without delivery, effect of, 70A-8-309.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

Rights acquired by purchaser, 70A-8-301.

Warranties on presentment and transfer, 70A-8-306.

Collateral References.

Bonds ⇐ 81; Corporations ⇐ 125 et seq., 466 et seq.; Municipal Corporations ⇐ 938; States ⇐ 162.

11 CJS Bonds § 67; 18 CJS Corporations § 395 et seq.; 19 CJS Corporations § 1159 et

seq.; 64 CJS Municipal Corporations § 1952; 81A CJS States § 258.

15A AmJur 2d 550 to 553, Commercial Code §§ 98 to 100; 18 AmJur 2d 902, Corporations § 394 et seq.

Conflict of laws as to title and transfer of corporate stock, 131 ALR 192.

DECISIONS UNDER FORMER LAW

Authority of agent.

In order to transfer stock certificates, signature of owner must be indorsed thereon, or written authority of agent must accompany certificate, and the absence of both is a warning to others to deal at arm's length, and the presentation of a certificate otherwise indorsed is a warning that all is not well, that there may be some limitation on agent's authority so far as use of stock is concerned. *Malia v. Giles* (1941) 100 U 562, 114 P 2d 208.

Where husband was engaged in conducting wife's business affairs and borrowed money from bank, signing the notes himself and pledging certificate of wife's stock indorsed with her name but not in her handwriting, bank was put on notice that husband's act might not be within his powers, and it could not accept the certificate except at its peril. *Malia v. Giles* (1941) 100 U 562, 114 P 2d 208.

Building and loan association account.

Building and loan association certificate entitling holder to stock upon payment of purchase price was not stock certificate to which Uniform Stock Transfer Act applied and delivery without writing was sufficient. *Harrington v. Inter-State Fidelity Bldg. & Loan Assn.* (1933) 91 U 74, 63 P 2d 577.

Indorsement in blank.

A stock certificate indorsed in blank containing a power of attorney is general, and the holder may fill in the name of anyone to whom he decides to transfer the certificate.

Howard v. National Copper Bank (1933) 81 U 493, 20 P 2d 610.

Where owner of stock transferred it to indorsee as security for loan which was paid, certificate not being returned, and son of indorsee who had power of attorney to manage indorsee's business affairs pledged stock to bank for personal loan, held, bank had notice that son was not empowered to do so, and hence it had no title to certificate as against original indorser. *Howard v. National Copper Bank* (1933) 81 U 493, 20 P 2d 610.

While a stock certificate is not a negotiable instrument, an owner of such stock who entrusts another with his stock certificate indorsed or signed in blank clothes the party to whom the certificate is entrusted with such indicia of ownership that an unauthorized sale or pledge of the certificate by the latter to an innocent purchaser or pledgee for value is binding upon the true owner and prevents him from asserting a paramount interest in the shares. *Adams v. Silver Shield Min. & Mill. Co.* (1933) 82 U 586, 21 P 2d 886.

What puts company on inquiry.

Company is put on notice where stock stands in name of "trustee," and mere bailee may not transfer stock, as, for example, a person to whom certificates were entrusted for safekeeping. *West v. Tintic Standard Min. Co.* (1928) 71 U 158, 263 P 490, 56 ALR 1190; *State v. Jenson* (1929) 74 U 527, 280 P 1046.

70A-8-309. Effect of indorsement without delivery. An indorsement of a security whether special or in blank does not constitute a transfer until delivery of the security on which it appears or if the indorsement is on a separate document until delivery of both the document and the security.

History: L. 1965, ch. 154, § 8-309.

Cross-References.

Delivery without indorsement, effect of, 70A-8-307.

Purchaser for value without notice, defenses ineffective against, 70A-8-202 (4).

When delivery to purchaser occurs, 70A-8-313.

Collateral References.

Bonds ⇐ 81; Corporations ⇐ 114, 125, 466 et seq.; Municipal Corporations ⇐ 938; States ⇐ 162.

11 CJS Bonds § 67; 18 CJS Corporations §§ 392, 395; 19 CJS Corporations § 1159 et seq.; 64 CJS Municipal Corporations § 1952; 81A CJS States § 258.

15A AmJur 2d 553, Commercial Code § 101.

Necessity of delivery of stock certificate to complete valid gift of stock, 23 ALR 2d 1171.

DECISIONS UNDER FORMER LAW

In general.

The word "owner" in the former statute was held to mean not only the actual and legal owner, but also the apparent owner named and designated as such on the face of the certificate and the holder thereof in due and regular course of business. Corporation may also be estopped to deny ownership of certificate. *Brown v. Wright* (1916) 48 U 633, 161 P 448, applying Comp. Laws 1907, § 330.

There is no longer any question as to validity of transfer by mere indorsement and delivery of certificate; that was sufficient even before adoption of Uniform Stock Transfer Act. A "written transfer" did not

require assignment and transfer. *Brown v. Wright* (1916) 48 U 633, 161 P 448.

It was held, prior to adoption of Uniform Stock Transfer Act, that the statutory requirement for delivery of the certificate together with written transfer should be read into a contract for the sale of corporate stock. *Makris v. Melis* (1917) 50 U 544, 167 P 802, applying Comp. Laws 1907, § 330, distinguished in 7 U 2d 70, 318 P 2d 351.

Even prior to adoption of Uniform Stock Transfer Act, title could be transferred to purchaser by delivery of stock certificate, together with a written transfer of the same signed by the owner, without transfer on company's books. *Gowans v. Rockport Irr. Co.* (1930) 77 U 198, 293 P 4.

70A-8-310. Indorsement of security in bearer form. An indorsement of a security in bearer form may give notice of adverse claims (section 70A-8-304) but does not otherwise affect any right to registration the holder may possess.

History: L. 1965, ch. 154, § 8-310.

Cross-References.

Indorsement, how made, 70A-8-308.

Notice to purchaser of adverse claims, 70A-8-304.

Collateral References.

Corporations ⇔ 131, 149, 473 et seq.

18 CJS Corporations §§ 436, 444; 19 CJS Corporations § 1162 et seq.

15A AmJur 2d 553, Commercial Code § 100.

70A-8-311. Effect of unauthorized indorsement. Unless the owner has ratified an unauthorized indorsement or is otherwise precluded from asserting its ineffectiveness

- (a) he may assert its ineffectiveness against the issuer or any purchaser other than a purchaser for value and without notice of adverse claims who has in good faith received a new, reissued or reregistered security on registration of transfer; and
- (b) an issuer who registers the transfer of a security upon the unauthorized indorsement is subject to liability for improper registration (section 70A-8-404).

History: L. 1965, ch. 154, § 8-311.

Cross-References.

Guaranteeing signature or indorsement, effect of, 70A-8-312.

Overissue of security, effect of, 70A-8-104.

Registration of transfer of security, 70A-8-401 to 70A-8-406.

Warranties on presentment of security, 70A-8-306 (1).

Collateral References.

Bonds ⇔ 86 et seq.; Corporations ⇔ 134, 466 et seq.; Municipal Corporations ⇔ 939; States ⇔ 162 et seq.

11 CJS Bonds § 70 et seq.; 18 CJS Corporations § 439; 19 CJS Corporations § 1159 et seq.; 64 CJS Municipal Corporations § 1956 et seq.; 81A CJS States § 258.

15A AmJur 2d 556, Commercial Code § 102; 18 AmJur 2d 911, Corporations § 403.

Respective rights of owner of certificate of stock who entrusts it to a third person and a purchaser from the latter under a forged transfer or endorsement, 54 ALR 353.

70A-8-312. Effect of guaranteeing signature or indorsement.

- (1) Any person guaranteeing a signature of an indorser of a security warrants that at the time of signing
 - (a) the signature was genuine; and
 - (b) the signer was an appropriate person to indorse (section 70a-8-308; and
 - (c) the signer had legal capacity to sign.
 But the guarantor does not otherwise warrant the rightfulness of the particular transfer.
- (2) Any person may guarantee an indorsement of a security and by so doing warrants not only the signature (subsection 1) but also the rightfulness of the particular transfer in all respects. But no issuer may require a guarantee of indorsement as a condition to registration of transfer.
- (3) The foregoing warranties are made to any person taking or dealing with the security in reliance on the guarantee and the guarantor is liable to such person for any loss resulting from breach of the warranties.

History: L. 1965, ch. 154, § 8-312.

Collateral References.

Cross-References.

Indorsement, how made, 70A-8-308.
 Registration of transfer of security,
 70A-8-401 to 70A-8-406.

Guaranty ⇔ 27 et seq.
 38 CJS Guaranty § 44 et seq.
 15A AmJur 2d 557, Commercial Code § 103.

70A-8-313. When delivery to the purchaser occurs — Purchaser's broker as holder.

- (1) Delivery to a purchaser occurs when
 - (a) he or a person designated by him acquires possession of a security; or
 - (b) his broker acquires possession of a security specially indorsed to or issued in the name of the purchaser; or
 - (c) his broker sends him confirmation of the purchase and also by book entry or otherwise identifies a specific security in the broker's possession as belonging to the purchaser; or
 - (d) with respect to an identified security to be delivered while still in the possession of a third person when that person acknowledges that he holds for the purchaser; or
 - (e) appropriate entries on the books of a clearing corporation are made under section 70A-8-320.
- (2) The purchaser is the owner of a security held for him by his broker, but is not the holder except as specified in subparagraphs (b), (c) and (e) of subsection (1). Where a security is part of a fungible bulk

the purchaser is the owner of a proportionate property interest in the fungible bulk.

- (3) Notice of an adverse claim received by the broker or by the purchaser after the broker takes delivery as a holder for value is not effective either as to the broker or as to the purchaser. However, as between the broker and the purchaser the purchaser may demand delivery of an equivalent security as to which no notice of an adverse claim has been received.

History: L. 1965, ch. 154, § 8-313.

Cross-References.

Overissue of security, effect of, 70A-8-104.
Rights acquired by purchaser, 70A-8-301.
Sale of security, duty to deliver, when completed, 70A-8-314.
Unauthorized indorsement, effect of, 70A-8-311.
Wrongful transfer, action against purchaser based upon, 70A-8-315.

Collateral References.

Brokers ⇔ 16, 94 et seq.; Confusion of Goods ⇔ 1 et seq.; Corporations ⇔ 93, 114, 466 et seq.; Sales ⇔ 197 et seq.
12 CJS Brokers §§ 21, 124 et seq.; 15A CJS Confusion of Goods § 1 et seq.; 18 CJS Corporations §§ 262, 392; 19 CJS Corporations § 1157 et seq.; 77 CJS Sales § 245 et seq.
15A AmJur 2d 559, Commercial Code § 104; 18 AmJur 2d 905, Corporations § 397.

70A-8-314. Duty to deliver, when completed.

- (1) Unless otherwise agreed where a sale of a security is made on an exchange or otherwise through brokers
- (a) the selling customer fulfills his duty to deliver when he places such a security in the possession of the selling broker or of a person designated by the broker or if requested causes an acknowledgment to be made to the selling broker that it is held for him; and
 - (b) the selling broker including a correspondent broker acting for a selling customer fulfills his duty to deliver by placing the security or a like security in the possession of the buying broker or a person designated by him or by effecting clearance of the sale in accordance with the rules of the exchange on which the transaction took place.
- (2) Except as otherwise provided in this section and unless otherwise agreed, a transferor's duty to deliver a security under a contract of purchase is not fulfilled until he places the security in form to be negotiated by the purchaser in the possession of the purchaser or of a person designated by him or at the purchaser's request causes an acknowledgment to be made to the purchaser that it is held for him. Unless made on an exchange a sale to a broker purchasing for his own account is within this subsection and not within subsection (1).

History: L. 1965, ch. 154, § 8-314.

Cross-References.

"Broker" defined, 70A-8-303.
Warranties on presentment and transfer, 70A-8-306.

When delivery to purchaser occurs, 70A-8-313.

Collateral References.

Bonds ⇔ 84; Corporations ⇔ 93, 114, 118, 466 et seq.; Municipal Corporations ⇔ 938; States ⇔ 162 et seq.

11 CJS Bonds § 69; 18 CJS Corporations §§ 262, 392; 19 CJS Corporations § 1157 et seq.; 64 CJS Municipal Corporations § 1948; 81A CJS States § 258.
15A AmJur 2d 562, Commercial Code § 105.

70A-8-315. Action against purchaser based upon wrongful transfer.

- (1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or have damages.
- (2) If the transfer is wrongful because of an unauthorized indorsement, the owner may also reclaim or obtain possession of the security or new security even from a bona fide purchaser if the ineffectiveness of the purported indorsement can be asserted against him under the provisions of this chapter on unauthorized indorsements (section 70A-8-311).
- (3) The right to obtain or reclaim possession of a security may be specifically enforced and its transfer enjoined and the security impounded pending the litigation.

History: L. 1965, ch. 154, § 8-315.

Collateral References.

Cross-References.

Good faith delivery, no conversion by, 70A-8-318.

Unauthorized indorsement, effect of, 70A-8-311.

Corporations ⇔ 134, 148, 466 et seq.

18 CJS Corporations § 439; 19 CJS Corporations § 1159 et seq.

15A AmJur 2d 565, Commercial Code § 108.

70A-8-316. Purchaser's right to requisites for registration of transfer on books. Unless otherwise agreed the transferor must on due demand supply his purchaser with any proof of his authority to transfer or with any other requisite which may be necessary to obtain registration of the transfer of the security but if the transfer is not for value a transferor need not do so unless the purchaser furnishes the necessary expenses. Failure to comply with a demand made within a reasonable time gives the purchaser the right to reject or rescind the transfer.

History: L. 1965, ch. 154, § 8-316.

Collateral References.

Corporations ⇔ 130 et seq., 466 et seq.

18 CJS Corporations § 435 et seq.; 19 CJS Corporations § 1159 et seq.

15A AmJur 2d 567, Commercial Code § 109.

Cross-References.

Delivery without indorsement, effect of, right to compel indorsement, 70A-8-307.

70A-8-317. Attachment or levy upon security.

- (1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.
- (2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction

or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary equal process.

History: L. 1965, ch. 154, § 8-317.

Cross-References.

Water stock, apportionment upon sale of land, redemption from mortgage foreclosure, 78-37-6.

Writs of attachment, Rules of Civil Procedure, Rule 64C.

Collateral References.

Attachment ⇔ 165, 166; Creditors' Suit ⇔ 8; Execution ⇔ 131, 132.

7 CJS Attachment § 182; 21 CJS Creditors' Suits § 14; 33 CJS Executions §§ 98, 99.

6 AmJur 2d 589, 775, Attachment and Garnishment §§ 39, 305; 15A AmJur 2d 568, Commercial Code § 110; 18 AmJur 2d 921, Corporations § 415.

Situs of corporate stock (or stock in joint stock company) for purpose of attachment, garnishment or execution, 122 ALR 338.

DECISIONS UNDER FORMER LAW

Construction and application.

Attachment or garnishment of corporate stock at common law and under the statute was discussed in *Untermeyer v. State Tax Comm.* (1942) 102 U 214, 129 P 2d 881.

Notice to corporation.

Former section 16-3-13 providing for attachment or levy upon corporate stock did not supersede that part of Rule 64C (e) (5) requiring the giving of notice to the corporation or company at the time of attachment or levy. *Glenn v. Ferrell* (1956) 5 U 2d 439, 304 P 2d 380.

70A-8-318. No conversion by good faith delivery. An agent or bailee who in good faith (including observance of reasonable commercial standards if he is in the business of buying, selling or otherwise dealing with securities) has received securities and sold, pledged or delivered them according to the instructions of his principal is not liable for conversion or for participation in breach of fiduciary duty although the principal had no right to dispose of them.

History: L. 1965, ch. 154, § 8-318.

Cross-References.

Bailee not liable for good faith delivery pursuant to warehouse receipt or bill of lading, 70A-7-404.

Collateral References.

Bailment ⇔ 21; Brokers ⇔ 100 et seq.; Principal and Agent ⇔ 159 (2).

2A CJS Agency § 221; 8 CJS Bailments § 40; 12 CJS Brokers § 129 et seq.

15A AmJur 2d 569, Commercial Code § 111.

DECISIONS UNDER FORMER LAW

Bailment.

A mere bailee has no authority to transfer the certificate. *State v. Jenson* (1929) 74 U 527, 280 P 1046.

70A-8-319. Statute of frauds. A contract for the sale of securities is not enforceable by way of action or defense unless

- (a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

- (b) delivery of the security has been accepted or payment has been made but the contract is enforceable under this provision only to the extent of such delivery or payment; or
- (c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or.
- (d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

History: L. 1965, ch. 154, § 8-319.

Cross-References.

Contract for sale of goods, statute of frauds, 70A-2-201.

Oral c.o.d. arrangement.

Oral c.o.d. arrangement whereby buyer of stocks paid broker only when stock was delivered to buyer is not void where within 24 hours after each transaction, broker sent

to buyer written confirmation thereof; and broker never received a written objection from buyer. *Prince-Covey & Co., Inc. v. Strand* (1973) 29 U 2d 224, 507 P 2d 708.

Collateral References.

Frauds, Statute of \Leftrightarrow 82, 87.
 37 CJS Frauds, Statute of §§ 142, 143.
 15A AmJur 2d 571 to 580, Commercial Code §§ 113 to 115.

70A-8-320. Transfer or pledge within a central depository system.

- (1) If a security
 - (a) is in the custody of a clearing corporation or of a custodian bank or a nominee of either subject to the instructions of the clearing corporation; and
 - (b) is in bearer form or indorsed in blank by an appropriate person or registered in the name of the clearing corporation or custodian bank or a nominee of either; and
 - (c) is shown on the account of a transferor or pledgor on the books of the clearing corporation;
 then, in addition to other methods, a transfer or pledge of the security or any interest therein may be effected by the making of appropriate entries on the books of the clearing corporation reducing the account of the transferor or pledgor and increasing the account of the transferee or pledgee by the amount of the obligation or the number of shares or rights transferred or pledged.
- (2) Under this section entries may be with respect to like securities or interests therein as a part of a fungible bulk and may refer merely to a quantity of a particular security without reference to the name of the registered owner, certificate or bond number or the like and, in appropriate cases, may be on a net basis taking into account other transfers or pledges of the same security.
- (3) A transfer or pledge under this section has the effect of a delivery of a security in bearer form or duly indorsed in blank (section

70A-8-301) representing the amount of the obligation or the number of shares or rights transferred or pledged. If a pledge or the creation of a security interest is intended, the making of entries has the effect of a taking of delivery by the pledgee or a secured party (sections 70A-9-304 and 70A-9-305). A transferee or pledgee under this section is a holder.

- (4) A transfer or pledge under this section does not constitute a registration of transfer under part 4 of this chapter.
- (5) That entries made on the books of the clearing corporation as provided in subsection (1) are not appropriate does not affect the validity or effect of the entries nor the liabilities or obligations of the clearing corporation to any person adversely affected thereby.

History: L. 1965, ch. 154, § 8-320.

Collateral References.

15A AmJur 2d 564, Commercial Code § 107.

PART 4 REGISTRATION

Section

- 70A-8-401. Duty of issuer to register transfer.
 70A-8-402. Assurance that indorsements are effective.
 70A-8-403. Limited duty of inquiry.
 70A-8-404. Liability and nonliability for registration.
 70A-8-405. Lost, destroyed and stolen securities.
 70A-8-406. Duty of authenticating trustee, transfer agent or registrar.

70A-8-401. Duty of issuer to register transfer.

- (1) Where a security in registered form is presented to the issuer with a request to register transfer, the issuer is under a duty to register the transfer as requested if
 - (a) the security is indorsed by the appropriate person or persons (section 70A-8-308); and
 - (b) reasonable assurance is given that those indorsements are genuine and effective (section 70A-8-402); and
 - (c) the issuer has no duty to inquire into adverse claims or has discharged any such duty (section 70A-8-403); and
 - (d) any applicable law relating to the collection of taxes has been complied with; and
 - (e) the transfer is in fact rightful or is to a bona fide purchaser.
- (2) Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

History: L. 1965, ch. 154, § 8-401.

Closing of transfer books and fixing record date, 16-10-28.

Cross-References.

Authenticating trustee, transfer agent or registrar, duty of, 70A-8-406.

Fiduciary security transfers, 22-5-1 et seq.
 Indorsement, how made, 70A-8-308.
 "Issuer" defined, 70A-8-201 (3).

Issuer's restrictions on transfer, effect of, 70A-8-204.

Rights acquired by purchaser, 70A-8-301.

Unauthorized indorsement, effect of, 70A-8-311.

Collateral References.

Bonds ⇄ 18; Corporations ⇄ 129, 130, 466 et seq.; Municipal Corporations ⇄ 936; States ⇄ 162.

11 CJS Bonds § 17; 18 CJS Corporations §§ 434, 435; 19 CJS Corporations § 1159 et seq.; 64 CJS Municipal Corporations § 1949; 81A CJS States § 258.

15A AmJur 2d 580, Commercial Code § 116; 18 AmJur 2d 915, Corporations § 408.

Conflict of laws as to title and transfer of corporate stock, 131 ALR 192.

Infants or incompetents, rights, duties and liability of corporation in connection with transfer of stock of, 3 ALR 2d 881.

Refusal of corporation to issue, convert, or transfer stock as conversion, 54 ALR 1157.

Remedy for refusal of corporation or its agent to register or effectuate transfer of stock, 22 ALR 12.

Right of pledgee of corporate stock to have it transferred to him on books of company, 116 ALR 571.

Right or duty of corporation to refuse to transfer stock on books to one presenting properly endorsed certificate, because of knowledge or suspicion of conflicting rights of registered holder or of third person, 139 ALR 273, 75 ALR 2d 746.

Rights, duties, and liability of corporation in connection with transfer of stock of decedent, 7 ALR 2d 1240.

Law Reviews.

Negotiation of Stock Certificates by Means of Separate Blank Power, 3 Chicago L. Rev. 508, case note, *Edgerly v. First Nat. Bank*, 292 Mass. 181, 197 N. E. 518.

The Legality of Stock after Grants to Corporate Officers, 49 Colum. L. Rev. 232.

The Transfer Agent's Dilemma — Conflict of Claims to Shares of Stock, *Frank L. Dewey*, 52 Harv. L. Rev. 553.

DECISIONS UNDER FORMER LAW

In general.

Prior to adoption of Uniform Stock Transfer Act, recitals on face of certificate that it was "transferable only on the books of the company by indorsement hereon and surrender of this certificate," did not preclude or restrict the right otherwise to sell, transfer, or pledge certificate by indorsement and

delivery. *Brown v. Wright* (1916) 48 U 633, 161 P 448.

Powers of persons laboring under disabilities.

If stock stands in name of a "trustee," that puts company on notice and inquiry before making transfer. *West v. Tintic Standard Min. Co.* (1928) 71 U 158, 263 P 490, 56 ALR 1190.

70A-8-402. Assurance that indorsements are effective.

- (1) The issuer may require the following assurance that each necessary indorsement (section 70A-8-308) is genuine and effective
 - (a) in all cases, a guarantee of the signature (subsection (1) of section 70A-8-312) of the person indorsing; and
 - (b) where the indorsement is by an agent, appropriate assurance of authority to sign;
 - (c) where the indorsement is by a fiduciary, appropriate evidence of appointment or incumbency;
 - (d) where there is more than one fiduciary, reasonable assurance that all who are required to sign have done so;
 - (e) where the indorsement is by a person not covered by any of the foregoing, assurance appropriate to the case corresponding as nearly as may be to the foregoing.
- (2) A "guarantee of the signature" in subsection (1) means a guarantee signed by or on behalf of a person reasonably believed by the issuer

to be responsible. The issuer may adopt standards with respect to responsibility provided such standards are not manifestly unreasonable.

- (3) "Appropriate evidence of appointment or incumbency" in subsection (1) means
- (a) in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the date of presentation for transfer; or
 - (b) in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the issuer to be responsible or in the absence of such a document or certificate, other evidence reasonably deemed by the issuer to be appropriate. The issuer may adopt standards with respect to such evidence provided such standards are not manifestly unreasonable. The issuer is not charged with notice of the contents of any document obtained pursuant to this paragraph (b) except to the extent that the contents relate directly to the appointment or incumbency.
- (4) The issuer may elect to require reasonable assurance beyond that specified in this section but if it does so and for a purpose other than that specified in subsection 3 (b) both requires and obtains a copy of a will, trust, indenture, articles of copartnership, bylaws or other controlling instrument it is charged with notice of all matters contained therein affecting the transfer.

History: L. 1965, ch. 154, § 8-402.

Unauthorized indorsement, effect of, 70A-8-311.

Cross-References.

Duty of issuer to register transfer, 70A-8-401.

Guaranteeing signature or indorsement, effect of, 70A-8-312.

Indorsement, how made, 70A-8-308.

Liability and nonliability for registration, 70A-8-404.

Limited duty of inquiry by issuer, 70A-8-403.

Obligation of good faith, 70A-1-203.

Collateral References.

Corporations ⇄ 130, 466 et seq.

18 CJS Corporations § 435; 19 CJS Corporations § 1159 et seq.

15A AmJur 2d 583, Commercial Code § 117.

Duty of corporation upon presentation for transfer of stock standing in one's name as trustee or other fiduciary, 56 ALR 1199.

70A-8-403. Limited duty of inquiry.

- (1) An issuer to whom a security is presented for registration is under a duty to inquire into adverse claims if
- (a) a written notification of an adverse claim is received at a time and in a manner which affords the issuer a reasonable opportunity to act on it prior to the issuance of a new, reissued or reregistered security and the notification identifies the claimant, the registered owner and the issue of which the

- security is a part and provides an address for communications directed to the claimant; or
- (b) the issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under subsection (4) of section 70A-8-402.
- (2) The issuer may discharge any duty of inquiry by any reasonable means, including notifying an adverse claimant by registered or certified mail at the address furnished by him or if there be no such address at his residence or regular place of business that the security has been presented for registration of transfer by a named person, and that the transfer will be registered unless within thirty days from the date of mailing the notification, either
- (a) an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction; or
 - (b) an indemnity bond sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar or other agent of the issuer involved, from any loss which it or they may suffer by complying with the adverse claim is filed with the issuer.
- (3) Unless an issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under subsection (4) of section 70A-8-402 or receives notification of an adverse claim under subsection (1) of this section, where a security presented for registration is indorsed by the appropriate person or persons the issuer is under no duty to inquire into adverse claims.
- In particular
- (a) an issuer registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship and thereafter the issuer may assume without inquiry that the newly registered owner continues to be the fiduciary until the issuer receives written notice that the fiduciary is no longer acting as such with respect to the particular security;
 - (b) an issuer registering transfer on an indorsement by a fiduciary is not bound to inquire whether the transfer is made in compliance with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer;
 - (c) the issuer is not charged with notice of the contents of any court record or file or other recorded or unrecorded document even though the document is in its possession and even though the transfer is made on the indorsement of a fiduciary to the fiduciary himself or to his nominee; and

- (d) an issuer registering a transfer of a security upon an indorsement by a corporation, either individually or as fiduciary, in whose name the security is registered, is not bound to inquire whether the indorsement is within the authority of the indorsing officer, or to obtain any corporate resolution or supporting paper pertaining thereto, and may assume without inquiry that the indorsement is within the authority of the indorsing officer or officers; that each person who executes the indorsement is an incumbent of the office in which capacity he purports to sign; and that if more than one officer is required to execute the indorsement, all who must execute it have done so.

History: L. 1965, ch. 154, § 8-403; 1977, ch. 273, § 1.

Compiler's Notes.

The 1977 amendment added subd. (3) (d); and made minor changes in phraseology and punctuation.

Cross-References.

Assurance that indorsements are effective, 70A-8-402.

Duty of issuer to register transfer, 70A-8-401.

Liability and nonliability for registration, 70A-8-404.

Lost, destroyed and stolen securities, 70A-8-405.

Notice to purchaser of adverse claims, 70A-8-304.

Obligation of good faith, 70A-1-203.

Collateral References.

Corporations ⇌ 130, 466 et seq.

18 CJS Corporations § 435; 19 CJS Corporations § 1159 et seq.

15A AmJur 2d 585, Commercial Code § 118.

70A-8-404. Liability and nonliability for registration.

- (1) Except as otherwise provided in any law relating to the collection of taxes, the issuer is not liable to the owner or any other person suffering loss as a result of the registration of a transfer of a security if
- (a) there were on or with the security the necessary indorsements (section 70A-8-308); and
 - (b) the issuer had no duty to inquire into adverse claims or has discharged any such duty (section 70A-8-403).
- (2) Where an issuer has registered a transfer of a security to a person not entitled to it the issuer on demand must deliver a like security to the true owner unless
- (a) the registration was pursuant to subsection (1); or
 - (b) the owner is precluded from asserting any claim for registering the transfer under subsection (1) of the following section; or
 - (c) such delivery would result in overissue, in which case the issuer's liability is governed by section 70A-8-104.

History: L. 1965, ch. 154, § 8-404.

Cross-References.

Assurance that indorsements are effective, 70A-8-402.

Indorsement, how made, 70A-8-308.

Limited duty of inquiry by issuer, 70A-8-403.

Lost, destroyed and stolen instruments, 70A-8-405.

Overissue of security, effect of, 70A-8-104.

18 CJS Corporations § 438 et seq.; 19 CJS Corporations § 1159 et seq.

Collateral References.

Corporations ⇔ 130, 466 et seq.

15A AmJur 2d 587, Commercial Code § 119.

70A-8-405. Lost, destroyed and stolen securities.

- (1) Where a security has been lost, apparently destroyed or wrongfully taken and the owner fails to notify the issuer of that fact within a reasonable time after he has notice of it and the issuer registers a transfer of the security before receiving such a notification, the owner is precluded from asserting against the issuer any claim for registering the transfer under the preceding section or any claim to a new security under this section.
- (2) Where the owner of a security claims that the security has been lost, destroyed or wrongfully taken, the issuer must issue a new security in place of the original security if the owner
 - (a) so requests before the issuer has notice that the security has been acquired by a bona fide purchaser; and
 - (b) files with the issuer a sufficient indemnity bond; and
 - (c) satisfies any other reasonable requirements imposed by the issuer.
- (3) If, after the issue of a new security, a bona fide purchaser of the original security presents it for registration of transfer, the issuer must register the transfer unless registration would result in over-issue, in which event the issuer's liability is governed by section 70A-8-104. In addition to any rights on the indemnity bond, the issuer may recover the new security from the person to whom it was issued or any person taking under him except a bona fide purchaser.

History: L. 1965, ch. 154, § 8-405.

Cross-References.

Assurance that indorsements are effective, 70A-8-402.

Guaranteeing signature or indorsement, effect of, 70A-8-312.

Liability and nonliability for registration, 70A-8-404.

Limited duty of inquiry by issuer, 70A-8-403.

Overissue of security, effect of, 70A-8-104.

Unauthorized indorsement, effect of, 70A-8-311.

Collateral References.

Bonds ⇔ 102; Corporations ⇔ 109, 133, 147; Lost Instruments ⇔ 1.

11 CJS Bonds § 82; 18 CJS Corporations §§ 266, 438 et seq.; 54 CJS Lost Instruments § 2.

15A AmJur 2d 589, Commercial Code § 121; 18 AmJur 2d 910, 912, Corporations §§ 401, 402, 404.

Constitutionality, construction and application of statute relating to lost, destroyed, or stolen certificate of corporate stock, 125 ALR 997.

Degree or quantum of evidence necessary to establish a lost instrument and its contents, 148 ALR 400.

Rights of owner and bona fide purchaser of lost or stolen stock certificates, 52 ALR 947.

70A-8-406. Duty of authenticating trustee, transfer agent or registrar.

- (1) Where a person acts as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities or in the cancellation of surrendered securities
 - (a) he is under a duty to the issuer to exercise good faith and due diligence in performing his functions; and
 - (b) he has with regard to the particular functions he performs the same obligation to the holder or owner of the security and has the same rights and privileges as the issuer has in regard to those functions.
- (2) Notice to an authenticating trustee, transfer agent, registrar or other such agent is notice to the issuer with respect (to) the functions performed by the agent.

History: L. 1965, ch. 154, § 8-406.

Compiler's Notes.

The bracketed word in subsec. (2) was inserted by the compiler.

Cross-References.

Assurance that indorsements are effective, 70A-8-402.

Duty of issuer to register transfer, 70A-8-401.

Guaranteeing signature or indorsement, effect of, 70A-8-312.

Liability and nonliability for registration, 70A-8-404.

Limited duty of inquiry by issuer, 70A-8-403.

Lost, destroyed or stolen securities, 70A-8-405.

Signature of authenticating trustee, registrar or transfer agent, effect of, 70A-8-208.

Collateral References.

Corporations ⇔ 133 et seq.; Principal and Agent ⇔ 61 et seq.; Trusts ⇔ 207 et seq.

18 CJS Corporations § 438 et seq.; 90 CJS Trusts § 310 et seq.

15A AmJur 2d 588, Commercial Code § 120.

Law Reviews.

Duties and Liabilities of the Stock Transfer Agent under the Uniform Commercial Code, 103 U. Pa. L. Rev. 209.

CHAPTER 9

SECURED TRANSACTIONS — SALES OF ACCOUNTS, CONTRACT RIGHTS AND CHATTEL PAPER

Part

1. Short title, applicability and definitions.
2. Validity of security agreement and rights of parties thereto.
3. Rights of third parties — Perfected and unperfected security interests — Rules of priority.
4. Filing.
5. Default.

PART 1

SHORT TITLE, APPLICABILITY AND DEFINITIONS

Section

- 70A-9-101. Short title.
- 70A-9-102. Policy and subject matter of chapter.
- 70A-9-103. Perfection of security interests in multiple state transactions.
- 70A-9-104. Transactions excluded from chapter.
- 70A-9-105. Definitions and index of definitions.
- 70A-9-106. Definitions — "Account" — "General intangibles."

- 70A-9-107. Definitions — "Purchase money security interest."
 70A-9-108. When after-acquired collateral not security for antecedent debt.
 70A-9-109. Classification of goods — "Consumer goods" — "Equipment" — "Farm products" — "Inventory."
 70A-9-110. Sufficiency of description.
 70A-9-111. Applicability of bulk transfer laws.
 70A-9-112. Where collateral is not owned by debtor.
 70A-9-113. Security interests arising under chapter on Sales.
 70A-9-114. Consignment.

70A-9-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code — Secured Transactions.

History: L. 1965, ch. 154, § 9-101.

Collateral References.

Secured Transactions ⇔ 8, 9.
 79 CJS Supp. Secured Transactions § 2.
 68 AmJur 2d 810, 871, Secured Transactions §§ 5, 47.

Construction and effect of UCC art. 9, dealing with secured transactions, sales of accounts, contract rights, and chattel paper, 30 ALR 3d 9.

Law Reviews.

Commercial Lending under the Uniform Commercial Code, 73 Banking L. J. 77; 11 Business Lawyer 66.

Secured Loans under the Uniform Commercial Code, S. Stidham, 75 Banking L. J. 475.

Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety, W. E. Hogan, 38 Boston U. L. Rev. 571.

Operating under Article 9 of the Uniform Commercial Code without Help or Hindrance of the "Floating Lien," P. F. Coogan, 15 Business Lawyer 373.

Some Observations on Article 9 of the Uniform Commercial Code, J. G. Robinson and E. W. Marsh, 63 Dick. L. Rev. 45.

Secured Transactions, P. F. Coogan, 72 Harv. L. Rev. 838.

Effect of the Uniform Commercial Code upon Receivables Financing — Some Answers and Some Unresolved Problems, P. F. Coogan, N. L. Gordon, 76 Harv. L. Rev. 1529.

Effect of Article 9 of the Uniform Commercial Code upon Chattel Mortgages in Kentucky, 47 Ky. L. J. 94.

The Uniform Commercial Code in Utah, Ronald N. Boyce, 1966 Utah L. Rev. 31, 48.

Priority Problems in Secured Financing under the Uniform Commercial Code, 68 Yale L. J. 751.

70A-9-102. Policy and subject matter of chapter.

- (1) Except as otherwise provided in section 70A-9-104 on excluded transactions, this chapter applies
 - (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also
 - (b) to any sale of accounts or chattel paper.
- (2) This chapter applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This chapter does not apply to statutory liens except as provided in section 70A-9-310.
- (3) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself

secured by a transaction or interest to which this chapter does not apply.

History: L. 1965, ch. 154, § 9-102; 1977, ch. 272, § 8.

Compiler's Notes.

The 1977 amendment substituted "subject matter" for "scope" in the caption; deleted a reference to section 70A-9-103 on multiple state transactions after "provided in" near the beginning of the first sentence; deleted a reference to personal property and fixtures within the jurisdiction of the state at the end of the first paragraph of subsec. (1); substituted "chattel paper or accounts" near the end of subd. (1) (a) for "chattel paper, accounts or contract rights"; and deleted "contract rights" after "accounts" in subd. (1) (b).

Cross-References.

Excluded transactions, 70A-9-103, 70A-9-104.

Parties' power to choose applicable law, 70A-1-105.

Sale or return of goods, 70A-2-326 (3) (c).

Territorial application of act, 70A-1-105.

Application of article.

The Uniform Commercial Code's provisions concerning secured transactions do not supersede the Utah Fraudulent Conveyance Act, chapter 25-1. *Meyer v. General American Corp.* (1977) 569 P 2d 1094.

Lease as security interest.

Lease with an option to purchase was intended as a security interest where the

consideration to exercise the option was a nominal 10% of the original cost of the property, and only 6% of the total lease payments, and at the time the option was to be exercised the property still had a useful life so as to leave the lessee with no sensible alternative but to purchase the property. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Collateral References.

Secured Transactions ⇐ 1, 2, 10, 19, 21 to 26.

79 CJS Supp. Secured Transactions §§ 1, 7 to 11.

68 AmJur 2d 824, 871, 982, Secured Transactions §§ 15 et seq., 47 et seq., 135 et seq.

Bill of sale, absolute on its face, as a chattel mortgage, 33 ALR 2d 364.

Constitutionality, construction and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 ALR 2d 447.

Effectiveness, as pledge, of transfer of non-negotiable instruments which represent obligation, 53 ALR 2d 1396.

Lease of real estate for term of years as subject of chattel mortgage, 33 ALR 2d 1277.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 ALR 3d 1006.

Title and rights incident to trust receipts generally, 168 ALR 366.

DECISIONS UNDER FORMER LAW

Chattel mortgage executed outside state.

The *lex loci contractus* governs a chattel mortgage executed in another state by a resident thereof. *American Oak Leather Co. v. Standard Gig Saddle Co.* (1893) 9 U 87, 33 P 246; *Blyth & Fargo Co. v. Houtz* (1901) 24 U 62, 68, 66 P 611.

Trust receipts.

The application of the Uniform Trust Receipts Act was conditioned upon the delivery of goods, documents, or instruments to the trustee. *Reeder v. General Motors Corp.* (1957) 6 U 2d 216, 310 P 2d 401.

70A-9-103. Perfection of security interests in multiple state transactions.

- (1) Documents, instruments and ordinary goods.
 - (a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3) and minerals described in subsection (5).
 - (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security

interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

- (c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or nonperfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.
 - (d) When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by part 3 of this chapter to perfect the security interest,
 - (i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;
 - (ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;
 - (iii) for the purpose of priority over a buyer of consumer goods (subsection (2) of section 70A-9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii).
- (2) Certificate of title.
- (a) This subsection applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.
 - (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or nonperfection of the security interest are governed by the laws (including the conflict of law rules) of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction and thereafter until the goods are registered in another

jurisdiction, but in any event not beyond surrender of the certificate. After the expiration of that period, the goods are not covered by the certificate of title within the meaning of this section.

- (c) Except with respect to the rights of a buyer described in the next paragraph, a security interest, perfected in another jurisdiction otherwise than by notation on a certificate of title, in goods brought into this state and thereafter covered by a certificate of title issued by this state is subject to the rules stated in paragraph (d) of subsection (1).
 - (d) If goods are brought into this state while a security interest therein is perfected in any manner under the law of the jurisdiction from which the goods are removed and a certificate of title is issued by this state and the certificate does not show that the goods are subject to the security interest or that they may be subject to security interests not shown on the certificate, the security interest is subordinate to the rights of a buyer of the goods who is not in the business of selling goods of that kind to the extent that he gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest.
- (3) Accounts, general intangibles and mobile goods.
- (a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others and are not covered by a certificate of title described in subsection (2).
 - (b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest.
 - (c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and

the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

- (d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the federal aviation act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.
- (e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.
- (4) Chattel paper. The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a nonpossessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.
- (5) Minerals. Perfection and the effect of perfection or nonperfection of a security interest which is created by a debtor who has an interest in minerals or the like (including oil and gas) before extraction and which attaches thereto as extracted, or which attaches to an account resulting from the sale thereof at the wellhead or minehead are governed by the law (including the conflict of laws rules) of the jurisdiction wherein the wellhead or minehead is located.

History: C. 1953, 70A-9-103, enacted by L. 1977, ch. 272, § 9.

Compiler's Notes.

Laws 1977, ch. 272, § 9 repealed old section 70A-9-103 (L. 1965, ch. 154, § 9-103), relating to accounts, contract rights, general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest, and enacted a new section 70A-9-103.

Cross-References.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Financing statement covering accounts, recording and indexing, 70A-9-403.

Formal requisites of financing statement, 70A-9-402.

Parties' power to choose applicable law, 70A-1-105.

Persons taking priority over unperfected security interest, 70A-9-301.

Policy and subject matter of chapter, 70A-9-102.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Required filings, 70A-11-106.

Rolling stock deemed personalty, Const., Art. XII, § 14.

Security interest, assignment, duties of filing officer, 70A-9-405.

Territorial application of act, 70A-1-105.

Collateral References.

Secured Transactions ⇔ 3 to 7, 136, 137, 148 to 150.

79 CJS Supp. Secured Transactions § 5.

68 AmJur 2d 827 to 834, 839 to 846, Secured Transactions §§ 17 to 20, 23 to 27.

Automobiles: priorities as between vendor's lien and subsequent title or security interest obtained in another state to which vehicle was removed, 42 ALR 3d 1168.

Conflict of laws as to chattel mortgages and conditional sales of chattels, 13 ALR 2d 1312.

Constitutionality, construction, and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 ALR 2d 447.

Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states, 10 ALR 2d 764.

Refiling when goods are removed from district where contract is filed, 68 ALR 554.

Sale of contractual rights; defect in written record as ground for avoiding sale, 10 ALR 2d 728.

DECISIONS UNDER FORMER LAW

Conditional sale of locomotive.

Formerly a conditional sale of a locomotive was valid, as against vendee's creditors,

though it was not executed and recorded as chattel mortgages are required to be. *Lima Machine Works v. Parsons* (1894) 10 U 105, 37 P 244, applying 2 Comp. Laws 1888, § 2814.

70A-9-104. Transactions excluded from chapter. This chapter does not apply

- (a) to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or
- (b) to a landlord's lien; or
- (c) to a lien given by statute or other rule of law for services or materials except as provided in section 70A-9-310 on priority of such liens; or
- (d) to a transfer of a claim for wages, salary or other compensation of an employee; or
- (e) to a transfer by a government or governmental subdivision or agency; or
- (f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness; or
- (g) to a transfer of an interest or claim in or under any policy of insurance or any contract for an annuity (including a variable annuity), except as provided with respect to proceeds (section 70A-9-306) and priorities in proceeds (section 70A-9-312); or
- (h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

- (i) to any right of setoff; or
- (j) except to the extent that provision is made for fixtures in section 70A-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or
- (k) to a transfer in whole or in part of any claim arising out of tort; or
- (l) to a transfer of interest in any deposit account (subsection (1) of section 70A-9-105), except as provided with respect to proceeds (section 70A-9-306) and priorities in proceeds (section 70A-9-312).

History: L. 1965, ch. 154, § 9-104; 1977, ch. 272, § 10.

Priority of security interests in fixtures, 70A-9-313.

Compiler's Notes.

The 1977 amendment deleted "such as the Ship Mortgage Act, 1920" after "United States" in subsec. (a); substituted present subsec. (e) for "(e) to an equipment trust covering railway rolling stock; or"; substituted present subsec. (f) for "(f) to a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract; or"; added the exceptions at the end of subsecs. (g) and (h); substituted present subsec. (k) for "(k) to a transfer in whole or in part of any of the following: any claim arising out of tort; any deposit, savings, pass-book or like account maintained with a bank, savings and loan association, credit union or like organization"; added present subsec. (1); and made minor changes in phraseology and punctuation.

Cross-References.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Policy and subject matter of chapter, 70A-9-102.

Priority of certain liens arising by operation of law, 70A-9-310.

Assignment of contract rights.

Absolute assignment of contract right to past-due obligation to pay money constituted a security interest within the meaning of this section. *Consolidated Film Industries v. United States* (1975) 403 F Supp 1279, reversed on other grounds in 547 F 2d 533.

Collateral References.

79 CJS Supp. Secured Transactions § 2.

68 AmJur 2d 847 to 856, Secured Transactions §§ 28 to 32.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanic's lien, 3 ALR 3d 573.

Debtor's transfer of assets to representative of creditors as effectuating release of unsecured claims, in absence of express agreement to that effect, 8 ALR 3d 903.

Mechanic's lien, taking or negotiation of unsecured note of owner or contractor as waiver of, 91 ALR 2d 425.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 ALR 3d 1006.

What constitutes "commencement of building or improvement" for purposes of determining accrual of lien, 1 ALR 3d 822.

70A-9-105. Definitions and index of definitions.

- (1) In this chapter unless the context otherwise requires:
 - (a) "Account debtor" means the person who is obligated on an account, chattel paper or general intangible;
 - (b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments,

- the group of writings taken together constitutes chattel paper;
- (c) "Collateral" means the property subject to a security interest, and includes accounts and chattel paper which have been sold;
 - (d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;
 - (e) "Deposit account" means a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit;
 - (f) "Document" means document of title as defined in the general definitions of chapter 1 (section 70A-1-201), and a receipt of the kind described in subsection (2) of section 70A-7-201;
 - (g) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests;
 - (h) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (section 70A-9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also include standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals and growing crops;
 - (i) "Instrument" means a negotiable instrument (defined in section 70A-3-104), or a security (defined in section 70A-8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment;
 - (j) "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate or the like;
 - (k) An advance is made "pursuant to commitment" if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation;

- (l) "Security agreement" means an agreement which creates or provides for a security interest;
 - (m) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party;
 - (n) "Transmitting utility" means any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or the production and transmission of electricity, steam, gas or water, or the provision of sewer service.
- (2) Other definitions applying to this chapter and the sections in which they appear are:
- "Account." Section 70A-9-106.
 - "Attach." Section 70A-9-203.
 - "Construction mortgage." Section 70A-9-313 (1).
 - "Consumer goods." Section 70A-9-109(1).
 - "Equipment." Section 70A-9-109(2).
 - "Farm products." Section 70A-9-109(3).
 - "Fixture." Section 70A-9-313.
 - "Fixture filing." Section 70A-9-313.
 - "General intangibles." Section 70A-9-106.
 - "Inventory." Section 70A-9-109(4).
 - "Lien creditor." Section 70A-9-301(3).
 - "Proceeds." Section 70A-9-306(1).
 - "Purchase money security interest." Section 70A-9-107.
 - "United States." Section 70A-9-103.
- (3) The following definitions in other chapters apply to this chapter:
- "Check." Section 70A-3-104.
 - "Contract for sale." Section 70A-2-106.
 - "Holder in due course." Section 70A-3-302.
 - "Note." Section 70A-3-104.
 - "Sale." Section 70A-2-106.
- (4) In addition chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: L. 1965, ch. 154, § 9-105; 1977, ch. 272, § 11.

Compiler's Notes.

The 1977 amendment deleted "contract right" from subd. (1) (a); added the exception clause at the end of the first sentence of subd. (1) (b); deleted "contract rights" after

"accounts" in subds. (1) (c), (d), and (m); added subds. (1) (e), (g), (j), (k) and (n) and redesignated other subds.; added language relating to a receipt at the end of subd. (1) (f); substituted "or minerals or the like (including oil and gas) before extraction" in the first sentence of subd. (1) (h) for "contract rights and other things in action";

inserted language relating to standing timber in the second sentence of subd. (1) (h); deleted "contract right" in subsec. (2); inserted references to "attach," "construction mortgage," "fixture," "fixture filing," and "United States" in subsec. (2); and made minor changes in punctuation.

Cross-References.

Classification of goods, 70A-9-109.

Collateral owned by person not owing debt, 70A-9-112.

Goods, contract for sale, severing from realty, 70A-2-105, 70A-2-107.

Priority among security interests, 70A-9-313.

Purchase of chattel paper and instruments, 70A-9-308.

Transactions excluded from chapter, 70A-9-104.

Collateral References.

79 CJS Supp. Secured Transactions § 6.

68 AmJur 2d 809 to 814, Secured Transactions §§ 4 to 7.

70A-9-106. Definitions — "Account" — "General intangibles." "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

History: L. 1965, ch. 154, § 9-106; 1977, ch. 272, § 12.

Compiler's Notes.

The 1977 amendment deleted "Contract right" from the caption; added "whether or not it has been earned by performance" at the end of the first sentence; deleted the second sentence, which read: "'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper"; deleted "contract rights" after "accounts" in, and added "and money" at the end of, the present second sentence; added the last sentence; and made minor changes in phraseology and punctuation.

Cross-References.

Assignment, defenses against assignee, 70A-9-318.

Excluded transactions, 70A-9-103, 70A-9-104.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Collateral References.

79 CJS Supp. Secured Transactions § 6.

What constitutes "accounts receivable" under contracts selling, assigning, pledging, or reserving such items, 41 ALR 2d 1395.

Law Reviews.

Intangibles as Collateral under the Uniform Commercial Code, P. F. Coogan, 77 Harv. L. Rev. 997.

Suggestions for Clarifying Article 9: Intangibles, Proceeds, and Priorities, Homer Kripke, 41 New York U. L. Rev. 687.

70A-9-107. Definitions — "Purchase money security interest." A security interest is a "purchase money security interest" to the extent that it is

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

History: L. 1965, ch. 154, § 9-107.

Cross-References.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Persons who take priority over unperfected security interests, 70A-9-301.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

When after-acquired collateral not security for antecedent debt, 70A-9-108.

Collateral References.

79 CJS Supp. Secured Transactions § 8.

68 AmJur 2d 943, Secured Transactions § 108.

70A-9-108. When after-acquired collateral not security for antecedent debt. Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

History: L. 1965, ch. 154, § 9-108.

Cross-References.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Purchase money security interest, 70A-9-107.

Security interest, when attaches, 70A-9-203.

Collateral References.

Secured Transactions ¶ 13, 113, 116.

79 CJS Supp. Secured Transactions § 13.

68 AmJur 2d 1037, 1042, Secured Transactions §§ 179, 184.

Law Reviews.

Section 9-108 of the Uniform Commercial Code: Does It Insulate the Security Interest from Attack by a Trustee in Bankruptcy, Lawrence P. King, 114 U. P. L. Rev. 1117.

70A-9-109. Classification of goods — “Consumer goods” — “Equipment” — “Farm products” — “Inventory.” Goods are

- (1) “consumer goods” if they are used or bought for use primarily for personal, family or household purposes;
- (2) “equipment” if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;
- (3) “farm products” if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;
- (4) “inventory” if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process

or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

History: L. 1965, ch. 154, § 9-109.

Cross-References.

Default under security agreement, 70A-9-501 to 70A-9-507.

Financing statement, place of filing, 70A-9-401.

Policy and subject matter of chapter, 70A-9-102.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Protection of buyers of goods, 70A-9-307.

Inventory.

Inventory which is subject to security interest is looked upon not as a collection of individual items, but as a single entity or floating mass, the component elements of

which may be constantly changing without affecting the identity of the rest. *Inter Mountain Assn. of Credit Men v. Villager, Inc.* (1974) 527 P 2d 664.

Collateral References.

Secured Transactions ⇔ 14 to 18.

79 CJS Supp. Secured Transactions §§ 14 to 17.

68 AmJur 2d 984, 989, Secured Transactions §§ 137, 142 et seq.

Secured transactions: what constitutes "consumer goods" under UCC § 9-109 (1), 77 ALR 3d 1225.

Secured transactions: what constitutes "inventory" under UCC § 9-109 (4), 77 ALR 3d 1266.

70A-9-110. Sufficiency of description. For the purposes of this chapter any description of personal property or, except as otherwise required by subsection (1) of section 70a-9-402 relating to the contents of a financing statement, real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

History: L. 1965, ch. 154, § 9-110.

Cross-References.

Enforceability of security interest, 70A-9-203.

Formal requisites of financing statement, 70A-9-402.

Financing statement.

Financing statement in which a boat was described as a "Seaflite 2200 Offshore # D.M.F.A. 0082 M-75L," when in fact the number of the boat was D.M.F.A. 0082 M-74L, but which contained a correct description of the craft and the serial number for the boat's engine, was not so defective as to defeat security interest in the boat. *Adams v. Nuffer* (1976) 550 P 2d 181.

Collateral References.

Secured Transactions ⇔ 43 to 45, 94.

79 CJS Supp. Secured Transactions § 20.

69 AmJur 2d 125 to 131, Secured Transactions §§ 292 to 295.

Effect of supplying description of property conveyed after manual delivery of mortgage, 11 ALR 2d 1372.

Sale of contractual rights; defect in written record as ground for avoiding sale, 10 ALR 2d 728.

Sufficiency of description in chattel mortgage as covering all property of a particular kind, 2 ALR 3d 839.

Sufficiency of description of property, as against third person, in chattel mortgage on farm equipment, machinery, implements, and the like, 32 ALR 2d 929.

70A-9-111. Applicability of bulk transfer laws. The creation of a security interest is not a bulk transfer under chapter 6 (see section 70A-6-103).

History: L. 1965, ch. 154, § 9-111.

Cross-References.

Bulk transfers, excepted transfers, 70A-6-103 (1).

Collateral References.

Fraudulent Conveyances ⇔ 47.

37 CJS Fraudulent Conveyances § 481.

68 AmJur 2d 820, 856, Secured Transactions §§ 12, 33.

70A-9-112. Where collateral is not owned by debtor. Unless otherwise agreed, when a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral is entitled to receive from the secured party any surplus under section 70A-9-502 (2) or under section 70A-9-504 (1), and is not liable for the debt or for any deficiency after resale, and he has the same right as the debtor

- (a) to receive statements under section 70A-9-208;
- (b) to receive notice of and to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under section 70A-9-505;
- (c) to redeem the collateral under section 70A-9-506;
- (d) to obtain injunctive or other relief under section 70A-9-507 (1); and
- (e) to recover losses caused to him under section 70A-9-208 (2)

History: L. 1965, ch. 154, § 9-112.

Request for statement of account or list of collateral, 70A-9-208.

Cross-References.

"Debtor" defined, 70A-9-105 (1) (d).
Default under security agreement, 70A-9-501 to 70A-9-507.

Collateral References.

Secured Transactions ⇔ 12, 162, 225, 239 to 241.
69 AmJur 2d 42, Secured Transactions § 219.

70A-9-113. Security interests arising under chapter on Sales. A security interest arising solely under the chapter on Sales (chapter 2) is subject to the provisions of this chapter except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

- (a) no security agreement is necessary to make the security interest enforceable; and
- (b) no filing is required to perfect the security interest; and
- (c) the rights of the secured party on default by the debtor are governed by the chapter on Sales (chapter 2).

History: L. 1965, ch. 154, § 9-113.

Policy and subject matter of chapter, 70A-9-102.

Cross-References.

Buyer's security interest in rejected goods, 70A-2-711 (3).
Contract for sale of goods, passing of title, 70A-2-401, 70A-2-501.
Default under security agreement, 70A-9-501 to 70A-9-507.
Enforceability of security interest, 70A-9-203.
Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.
Financing agency paying or purchasing draft, rights of, 70A-2-506.

Rejection of goods by buyer, seller's resale, 70A-2-706.

Secured party taking possession of collateral, perfection of security interest without filing, 70A-9-305.

Security interest of collecting bank in items, accompanying documents and proceeds, 70A-4-208.

Seller's shipment of goods under reservation, 70A-2-505.

Seller's stoppage of delivery in transit or otherwise, 70A-2-705.

When security interest attaches, 70A-9-203.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

"Person in the position of a seller" of goods, 70A-2-707.

Collateral References.

Sales ⇔ 300 et seq., 391 ½.

78 CJS Sales §§ 390 et seq., 488.
68 AmJur 2d 856, Secured Transactions § 33.

Conditional sale contract as affected by seller's acceptance of chattel mortgage from buyer covering same property, 95 ALR 332.

Admissibility of parol evidence to show whether particular word or phrase was intended to connote a chattel mortgage or conditional sale, 101 ALR 625.

Rights as between conditional seller and one claiming under or through sale or mortgage by buyer which is subject to the seller's reservation of title, 87 ALR 941.

70A-9-114. Consignment.

- (1) A person who delivers goods under a consignment which is not a security interest and who would be required to file under this chapter by paragraph (3) (c) of section 70A-2-326 has priority over a secured party who is or becomes a creditor of the consignee and who would have a perfected security interest in the goods if they were the property of the consignee, and also has priority with respect to identifiable cash proceeds received on or before delivery of the goods to a buyer, if
 - (a) the consignor complies with the filing provision of the chapter on sales with respect to consignments (paragraph (3) (c) of section 70A-2-326) before the consignee receives possession of the goods; and
 - (b) the consignor give notification in writing to the holder of the security interest if the holder has filed a financing statement covering the same types of goods before the date of the filing made by the consignor; and
 - (c) the holder of the security interest receives the notification within five years before the consignee receives possession of the goods; and
 - (d) the notification states that the consignor expects to deliver goods on consignment to the consignee, describing the goods by item or type.
- (2) In the case of a consignment which is not a security interest and in which the requirements of the preceding subsection have not been met, a person who delivers goods to another is subordinate to a person who would have a perfected security interest in the goods if they were the property of the debtor.

History: C. 1953, 70A-9-114, enacted by L. 1977, ch. 272, § 13.

Collateral References.

68 AmJur 2d 952, Secured Transactions § 115.

Cross-References.

Conflicting security interests, priorities, 70A-9-312.

PART 2

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO

Section

70A-9-201. General validity of security agreement.

70A-9-202. Title to collateral immaterial.

- 70A-9-203. Attachment and enforceability of security interest — Proceeds, formal requisites.
 70A-9-204. After-acquired property — Future advances.
 70A-9-205. Use or disposition of collateral without accounting permissible.
 70A-9-206. Agreement not to assert defenses against assignee — Modification of sales warranties where security agreement exists.
 70A-9-207. Rights and duties when collateral is in secured party's possession.
 70A-9-208. Request for statement of account or list of collateral.

70A-9-201. General validity of security agreement. Except as otherwise provided by this act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this chapter validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

History: L. 1965, ch. 154, § 9-201.

Cross-References.

- County recorder's fees, 21-2-3.
 Index of chattel mortgages, county recorder to keep, 17-21-6.
 Lessors' liens, 38-3-1 et seq.
 Livestock, liens on, 38-2-1.
 Persons who take priority over unperfected security interests, 70A-9-301.
 Priorities among conflicting security interests in the same collateral, 70A-9-312.
 Protection of buyers of goods, 70A-9-307.
 Variation by agreement, 70A-1-102 (3).

Transfer of assets.

Security agreement covering present and subsequently acquired inventory and personal property did not include assets acquired by debtor without consideration, by bookkeeping transfer among subsidiaries of parent corporation, when such assets were subject to a valid security agreement with creditor of transferor company. *First Security Bank of Utah v. Zions First Nat. Bank* (1975) 537 P 2d 1024.

Collateral References.

- Secured Transactions ⇔ 61 to 67.
 79 CJS Supp. Secured Transactions § 22.
 69 AmJur 2d 108, 123, Secured Transactions §§ 276, 290.

Usury as affected by mistake in amount of calculation of interest or service charges for loan, 11 ALR 3d 1498.

Usury: Liability for the statutory penalty of persons other than the offending lender in a usurious loan transaction, 4 ALR 3d 650.

Validity, construction, and application of insecurity clause in chattel mortgage, 125 ALR 313.

Validity of chattel mortgage on stock of goods which mortgagor has right to sell where mortgagee takes possession of goods before third person's rights attach, 71 ALR 2d 1416.

Validity of unfiled chattel mortgage as against persons with actual notice, 68 ALR 274.

What is "compound interest" within meaning of statutes prohibiting the charging of such interest, 10 ALR 3d 421.

DECISIONS UNDER FORMER LAW

Affidavits accompanying mortgage.

Substantial compliance with statute in matter of affidavit is all that is required. *Petrovitzky v. Brigham* (1897) 14 U 472, 47 P 666.

Affidavit held not defective because it denied design to "delay or defraud" creditors of mortgagor instead of denying design to "hinder or delay" them. *Petrovitzky v. Brigham* (1897) 14 U 472, 47 P 666.

Fact that mortgage was accompanied only by affidavit of mortgagor, and was not recorded or accompanied by an affidavit of mortgagee, did not render it void as between

the parties or the mortgagor and the assignee of the mortgage, where no rights of others, by purchase, attachment or otherwise, had intervened. *Johnson v. Hibbard* (1904) 27 U 342, 75 P 737.

Where notarial signature and seal are attached to both the affidavits of the mortgagor and the mortgagee, mortgagor's denial that they were sworn to before an officer or that any such officer was present, will not be accepted. *Bonneville Lumber Co. v. J. G. Peppard Seed Co.* (1928) 72 U 463, 271 P 226.

Chattel mortgage or conditional sale.

Attestation of chattel mortgage by assistant credit man of mortgage company who, in discharge of his duty to secure and collect claims of company, procured and recorded mortgage, held proper. *Johnson-Baillie Shoe Co. v. Bradsley, Elmer & Nichols* (1916) 237 F 763, 768.

Unless an instrument intended to secure an indebtedness and called a chattel mortgage is executed in the manner required by former section 9-1-1 it was not valid, except as to the parties thereto. *American Oak Leather Co. v. Standard Gig Saddle Co.* (1893) 9 U 87, 33 P 246, setting out form of assignment of account stated and applying act of March 13, 1884, 2 Comp. Laws 1888, § 2801.

Where contract for purchase of certain chattels provided that title to goods would remain in vendor until vendee had paid full purchase price, it was held that instrument constituted conditional contract of sale, and not chattel mortgage. *Passow v. Emery* (1910) 37 U 49, 106 P 935.

Soda fountain and bar used in candy store and soft drink establishment were not exempt from execution and joinder of mortgagor's wife in execution of chattel mortgage was not necessary to its validity. *Lindquist v. Clayton* (1919) 54 U 79, 179 P 655.

Title retaining note is neither in fact nor in law a chattel mortgage; it has none of characteristics, indicia, or elements of chattel mortgage, except that of security. *Stillman v. Lynch* (1920) 56 U 540, 192 P 272, 12 ALR 552.

Conditional sales contract is not a mortgage. *Stillman v. Lynch* (1920) 56 U 540, 192 P 272, 12 ALR 552.

Filing of mortgage.

Under former section 9-1-1 filing was the equivalent of taking possession by mortgagee, and mortgage was valid as against all who became creditors of mortgagor after such filing, unless it could be declared invalid upon ground of fraud or for some reason other than that it was not filed. *Volker Lumber Co. v. Utah & Oregon Lumber Co.* (1915) 45 U 603, 148 P 365, Ann Cas 1917D 1158.

A mortgage, although not filed was also valid against all persons who had claims against the mortgagor which accrued before the mortgage was executed and delivered, unless such person acquired a lien by attachment or otherwise against the property mortgaged before same was filed as provided by former section 9-1-1. *Volker Lumber Co. v.*

Utah & Oregon Lumber Co. (1915) 45 U 603, 148 P 365, Ann Cas 1917D 1158.

The words "rights and interests of any person other than the parties thereto," as used in former section 9-1-1 included all persons with claims against mortgagor at any time while mortgaged goods and chattels remained in his possession. *Volker Lumber Co. v. Utah & Oregon Lumber Co.* (1915) 45 U 603, 148 P 365, Ann Cas 1917D 1158.

Former section 9-1-1 suspended the effect of the mortgage as to those persons only who extended credit while the mortgage subsisted but before possession of mortgaged property was taken, or before mortgage was filed, provided they had no notice of the existence of the mortgage. *Volker Lumber Co. v. Utah & Oregon Lumber Co.* (1915) 45 U 603, 148 P 365, Ann Cas 1917D 1158.

Under former section 9-1-1 a chattel mortgage was, as a matter of law, invalid as against all persons who, without notice or knowledge of the mortgage, extended credit to mortgagor at any time after mortgage was executed and delivered and before it was filed. *Volker Lumber Co. v. Utah & Oregon Lumber Co.* (1915) 45 U 603, 148 P 365, Ann Cas 1917D 1158.

A mortgage cannot be assailed by one creditor merely because another is preferred. The mortgage is good as against all claims which exist when mortgage is given unless it can be assailed upon other grounds than that it was not filed. It is therefore valid as against the claims that existed when mortgage was given and which remained unpaid at time it was filed. *Volker Lumber Co. v. Utah & Oregon Lumber Co.* (1915) 45 U 603, 148 P 365, Ann Cas 1917D 1158.

In the absence of fraud or superior equities on behalf of a creditor the claim of a mortgagee in an unrecorded mortgage, or, as in this case, a vendor in a conditional sale agreement, is superior to the right of a general creditor who has not acquired a lien by attachment or otherwise prior to the recording of such mortgage or agreement of conditional sale. *Hansen v. Daniels* (1928) 73 U 142, 272 P 941.

Date of filing mortgage was not material as to one not claiming any interest, acquired or coming into existence, after date of mortgage. *Hansen v. Daniels* (1928) 73 U 142, 147, 272 P 941.

Under former sections 9-1-1 and 9-1-2 any creditor, whether antecedent or subsequent to the mortgage, could attack the same because not filed or filed as required by law. *Wasatch Livestock Loan Co. v. Nielson* (1936) 90 U 307, 56 P 2d 613, modified as to other issues 90 U 331, 61 P 2d 616.

One of the principal reasons why a general creditor may not question an unrecorded mortgage executed by his debtor until a lien is fastened thereon is that the mortgagor, even though insolvent, is at liberty to dispose of his property as he desires so long as the transaction is bona fide. However, upon death of debtor, no one succeeds to his right to sell or otherwise dispose of his estate, for thereupon all the estate's unencumbered property is placed in custodia legis and remains so until disposed of under court's direction. *Wasatch Livestock Loan Co. v. Nielson* (1936) 90 U 307, 56 P 2d 613, modified as to other issues 90 U 331, 61 P 2d 616.

Chattel mortgage must be properly filed as required by former section 9-1-1 in order to give notice to lessor under 38-3-2, relating to lessor's lien. *Eason v. Wheelock* (1941) 101 U 162, 120 P 2d 319.

Fraudulent mortgage.

Mortgage on stock of merchandise held fraudulent as to judgment creditor of mortgagor, where mortgagor remained in possession of mortgaged property and continued to sell it in usual course of business pursuant to merely verbal agreement with mortgagee, which agreement contemplated that mortgage was not to be paid on its due date but was to be extended from time to time. *McKibbon v. Brigham* (1898) 18 U 78, 55 P 66.

Under former section 9-1-1 chattel mortgage executed in fraud of creditors was void.

Nelden-Judson Drug Co. v. Commercial Nat. Bank of Ogden (1903) 27 U 59, 74 P 195.

Mortgage of farm crops.

A mortgage of farm crops duly filed and appearing on its face to have been duly executed, is constructive notice to purchaser of crop from mortgagor and to all the world of existence of mortgage. *Bonneville Lumber Co. v. J. G. Peppard Seed Co.* (1928) 72 U 463, 271 P 226.

Parties to mortgage.

Failure to record or file a mortgage or to file an affidavit of renewal does not affect the rights of the parties thereto. *Johnson v. Hibbard* (1904) 27 U 342, 75 P 737; *Wasatch Livestock Loan Co. v. Nielson* (1936) 90 U 307, 56 P 2d 613, modified as to other issues 90 U 331, 61 P 2d 616.

Where mortgage was signed by husband and wife, but neither by the mortgage nor otherwise did the wife agree to pay the indebtedness, no deficiency judgment could properly be rendered against the wife. *Consolidated Wagon & Mach. Co. v. Kay* (1933) 81 U 595, 21 P 2d 836.

Trust receipts.

The application of the Uniform Trust Receipts Act was conditioned upon the delivery of goods, documents, or instruments to the trustee. *Reeder v. General Motors Corp.* (1957) 6 U 2d 216, 310 P 2d 401.

70A-9-202. Title to collateral immaterial. Each provision of this chapter with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.

History: L. 1965, ch. 154, § 9-202.

Cross-References.

Contract for sale of goods, passing of title, reservation for security, 70A-2-401.

Tender and delivery of goods by seller, 70A-2-507.

Collateral References.

Secured Transactions ⇔ 12, 117 to 119.

79 CJS Supp. Secured Transactions § 12.

68 AmJur 2d 1054, Secured Transactions § 197.

70A-9-203. Attachment and enforceability of security interest — Proceeds, formal requisites.

- (1) Subject to the provisions of section 70A-4-208 on the security interest of a collecting bank and section 70A-9-113 on a security interest arising under the chapter on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless
 - (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and

in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and

- (b) value has been given; and
 - (c) the debtor has rights in the collateral.
- (2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.
- (3) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by section 70A-9-306.
- (4) A transaction, although subject to this chapter, is also subject to the Utah Uniform Consumer Credit Code, and in the case of conflict between the provisions of this chapter and the Utah Uniform Consumer Credit Code, the provisions of the latter statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

History: L. 1965, ch. 154, § 9-203; 1969, ch. 18, § 9.103 (2) (b); 1977, ch. 272, § 14.

Compiler's Notes.

The 1969 amendment, in subsec. (2), substituted "The Utah Consumer Credit Code" for "Title 7, chapters 8 and 9 and section 15-1-2a, Utah Code Annotated, 1953," where it first appears, and for "any such statute," where it appears the second time, and substituted "the latter statute" for "such statute."

The 1977 amendment inserted "Attachment and" in the caption; inserted "with respect to the collateral and does not attach" near the end of the first paragraph of subsec. (1); added "pursuant to agreement" at the end of the former language of subd. (1) (a); combined former subd. (1) (b) with subd. (1) (a); substituted "crops growing or to be grown or timber to be cut" near the end of subd. (1) (a) for "crops or oil, gas or minerals to be extracted or timber to be cut" in former subd. (1) (b); deleted a sentence at the end of former subd. (1) (b), which read: "In describing collateral, the word 'proceeds' is sufficient without further description to cover proceeds of any character"; added subds. (1) (b) and (1) (c) and subsecs. (2) and (3); redesignated subsec. (2) as subsec. (4); and made minor changes in phraseology and punctuation.

Cross-References.

Default in security agreement, 70A-9-501 to 70A-9-507.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Persons who take priority over unperfected security interest, 70A-9-301.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Secured party's rights on disposition of collateral, 70A-9-306.

Security interest of collecting bank in items, accompanying documents and proceeds, 70A-4-208.

Security interests arising under chapter on sales, 70A-9-113.

Sufficiency of description of property, 70A-9-110.

Appointment of receiver.

Obligations incurred by debtor before the order of receivership, including attorney's fees, are subordinate to the claims of a secured creditor; but obligations incurred after the order of receivership have priority over a secured claim. *Alexander Dawson, Inc. v. Hydroponics, Inc.* (1974) 523 P 2d 861.

Perfected security interest.

Bank which loaned money on home furnishings sold on approval acquired a perfected security interest since acceptance is implied by the fact that the buyers had been using the furniture for two months and the draperies and carpet had been tailored to fit the house. *Valley Bank & Trust Co. v. Gerber* (1974) 526 P 2d 1121.

Collateral References.

Secured Transactions ⇔ 41 to 51.
79 CJS Supp. Secured Transactions § 24.
69 AmJur 2d 166, Secured Transactions § 332.

Necessity that mortgage covering oil and gas lease be recorded as real estate mortgage, and/or filed or recorded as chattel mortgage, 34 ALR 2d 902.

Sufficiency of description of crops under U.C.C. §§ 9-203 (b) and 9-402 (1), 67 ALR 3d 308.

70A-9-204. After-acquired property — Future advances.

- (1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.
- (2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (section 70A-9-314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.
- (3) Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment (subsection (1) of section 70A-9-105).

History: C. 1953, 70A-9-204, enacted by L. 1977, ch. 272, § 15.

Compiler's Notes.

Laws 1977, ch. 272, § 15 repealed old section 70A-9-204 (L. 1965, ch. 154, § 9-204), relating to the time that a security interest attaches, the effect of an after-acquired property clause, and the inclusion of future advances in secured obligations, and enacted a new section 70A-9-204.

Cross-References.

Accessions, interest in, 70A-9-314.
 Classification of goods, 70A-9-109.
 Enforceability of security interest, 70A-9-203.
 Sufficiency of description of property, 70A-9-110.
 When after-acquired collateral not security for antecedent debt, 70A-9-108.

Collateral References.

Secured Transactions ⇐ 12, 13, 20, 114, 116.
 79 CJS Supp. Secured Transactions §§ 13, 18.
 68 AmJur 2d 1037, Secured Transactions § 179; 69 AmJur 2d 149 to 152, 166 to 180, Secured Transactions §§ 315, 316, 332 to 344.

Chattel mortgage on livestock as covering animals subsequently acquired by means other than natural increase by generation, 1 ALR 554.

Joining in subsequent instrument as ratification or estoppel as to prior ineffective mortgage, deed of trust or similar encumbrance, 7 ALR 2d 333.

Record of instrument without or having insufficient acknowledgment as notice, 59 ALR 2d 1299.

Sufficiency of chattel mortgagee's affidavit as to statement of consideration, 45 ALR 2d 629.

DECISIONS UNDER FORMER LAW

Crops.

Former provision of this section prohibiting the attachment of security interests to crops which become such more than one year

after the agreement is executed took preference over general provision of § 70A-9-403 making security agreements effective for five years. First Security Bank of Utah, N. A. v. Wright (1974) 521 P 2d 563.

70A-9-205. Use or disposition of collateral without accounting permissible. A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts or chattel paper, or to accept the return

of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.

History: L. 1965, ch. 154, § 9-205; 1977, ch. 272, § 16.

Compiler's Notes.

The 1977 amendment deleted "contract rights" after "accounts" in the middle of the first sentence; and made a minor change in punctuation.

Cross-References.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Insolvency proceedings by or against debtor, perfected security interest in proceeds, 70A-9-306 (4).

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Possession of collateral by secured party, perfection of security interest without filing, 70A-9-305.

Security agreement, general validity of, 70A-9-201.

When security interest attaches, 70A-9-204.

Collateral References.

Secured Transactions ⇐ 89, 132.

79 CJS Supp. Secured Transactions § 57.

69 AmJur 2d 27 to 31, Secured Transactions §§ 205 to 209.

70A-9-206. Agreement not to assert defenses against assignee — Modification of sales warranties where security agreement exists.

- (1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the chapter on Commercial Paper (chapter 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.
- (2) When a seller retains a purchase money security interest in goods the chapter on Sales (chapter 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties.

History: L. 1965, ch. 154, § 9-206.

Cross-References.

Commercial paper, rights of a holder in due course, 70A-3-305.

Contract for sale, exclusion or modification of warranties, 70A-2-316.

Defenses against assignee, 70A-9-318.

Enforceability of security interest, 70A-9-203.

Security transactions excluded from chapter on sales, 70A-2-102.

Waiver of defense clause.

Covenants against asserting defenses are enforceable in sales "primarily for an agricultural purpose" absent some persuasive reason for avoiding them; no such reason was established by the fact that the assignee of the note and security agreement was the manufacturer of the farm equipment sold and had approved buyer's credit application by telephone and financed the sale. *John Deere Co. of Moline v. Behling* (1971) 26 U 2d 30, 484 P 2d 170.

Collateral References.

Secured Transactions ⇔ 186, 189 to 191.

79 CJS Supp. Secured Transactions § 93.

69 AmJur 2d 303, Secured Transactions § 452.

70A-9-207. Rights and duties when collateral is in secured party's possession.

- (1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.
- (2) Unless otherwise agreed, when collateral is in the secured party's possession
 - (a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use or operation of the collateral are chargeable to the debtor and are secured by the collateral;
 - (b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage;
 - (c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;
 - (d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;
 - (e) the secured party may repledge the collateral upon terms which do not impair the debtor's right to redeem it.
- (3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.
- (4) A secured party may use or operate the collateral for the purpose of preserving the collateral or its value or pursuant to the order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

History: L. 1965, ch. 154, § 9-207.**Profits from security held by creditor.****Cross-References.**

Commercial paper, transfer, right to indorsement, 70A-3-201.

Default under security agreement, 70A-9-501 to 70A-9-507.

Document of title, delivery without indorsement, right to compel indorsement, 70A-7-506.

Investment securities, delivery without indorsement, right to compel indorsement, 70A-8-307.

Variation by agreement, 70A-1-102 (3).

Creditor-trustee under a deed of trust which conveyed to it real property and provided, as additional security, that debtor would make monthly "budget payments" equal to one-twelfth the annual taxes and insurance premiums payable on the real property held such payments as a pledge, and was required by this section to apply any profits from investment of the money as additional security for the loan. *Madsen v. Prudential Federal Savings & Loan Assn.* (1977) 558 P 2d 1337.

Collateral References.

Secured Transactions ⇐ 163 to 165, 170, 171.

79 CJS Supp. Secured Transactions § 78.

69 AmJur 2d 45, Secured Transactions § 221 et seq.

Duty of pledgee of commercial paper as to its enforcement or collection, 45 ALR 3d 248.

Duty of pledgee of stocks, bonds, or similar securities to protect their value during period of pledge, under UCC § 9-207, 68 ALR 3d 657.

Purchase by pledgee of subject of pledge as conversion, 37 ALR 2d 1386, 1393.

70A-9-208. Request for statement of account or list of collateral.

- (1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.
- (2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.
- (3) A debtor is entitled to such a statement once every six months without charge. The secured party may require payment of a charge not exceeding \$10 for each additional statement furnished.

History: L. 1965, ch. 154, § 9-208.

Collateral References.

Secured Transactions ⇐ 162, 171.

79 CJS Supp. Secured Transactions § 76.

69 AmJur 2d 287, Secured Transactions § 439.

Cross-References.

Financing statement, formal requisites, 70A-9-402.

PART 3**RIGHTS OF THIRD PARTIES — PERFECTED AND UNPERFECTED SECURITY INTERESTS — RULES OF PRIORITY****Section**

70A-9-301. Persons who take priority over unperfected security interests — “Right of lien creditor.”

- 70A-9-302. When filing is required to perfect security interest — Security interests to which filing provisions of this chapter do not apply.
- 70A-9-303. When security interest is perfected — Continuity of perfection.
- 70A-9-304. Perfection of security interest in instruments, documents, and goods covered by documents — Perfection by permissive filing — Temporary perfection without filing or transfer of possession.
- 70A-9-305. When possession by secured party perfects security interest without filing.
- 70A-9-306. “Proceeds” — Secured party’s rights on disposition of collateral.
- 70A-9-307. Protection of buyers of goods.
- 70A-9-308. Purchase of chattel paper and instruments.
- 70A-9-309. Protection of purchasers of instruments and documents.
- 70A-9-310. Priority of certain liens arising by operation of law.
- 70A-9-311. Alienability of debtor’s rights — Judicial process.
- 70A-9-312. Priorities among conflicting security interests in the same collateral.
- 70A-9-313. Priority of security interests in fixtures.
- 70A-9-314. Accessions.
- 70A-9-315. Priority when goods are commingled or processed.
- 70A-9-316. Priority subject to subordination.
- 70A-9-317. Secured party not obligated on contract of debtor.
- 70A-9-318. Defenses against assignee — Modification of contract after notification of assignment — Term prohibiting assignment ineffective — Identification and proof of assignment.

70A-9-301. Persons who take priority over unperfected security interests — “Right of lien creditor.”

- (1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of
 - (a) persons entitled to priority under section 70A-9-312;
 - (b) a person who becomes a lien creditor before the security interest is perfected;
 - (c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business, or is a buyer of farm products in ordinary course of business, to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;
 - (d) in the case of accounts and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.
- (2) If the secured party files with respect to a purchase money security interest before or within ten days after the debtor receives possession of the collateral, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.
- (3) A “lien creditor” means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

- (4) A person who becomes a lien creditor while a security interest is perfected takes subject to the security interest only to the extent that it secures advances made before he becomes a lien creditor or within 45 days thereafter or made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

History: L. 1965, ch. 154, § 9-301; 1977, ch. 272, § 17.

Compiler's Notes.

The 1977 amendment substituted "Right of lien creditor" in the caption for "Lien creditor"; substituted "creditor before the security interest is perfected" at the end of subd. (1) (b) for "creditor without knowledge of the security interest and before it is perfected"; inserted "or is a buyer of farm products in ordinary course of business" in the middle of subd. (1) (c); deleted "contract rights" after "accounts" near the beginning of subd. (1) (d); substituted "ten days after the debtor receives possession of the collateral" near the beginning of subsec. (2) for "ten days after the collateral comes into possession of the debtor"; deleted the second sentence of subsec. (3), which read: "Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest"; added subsec. (4); and made minor changes in punctuation.

Cross-References.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Possession of collateral by secured party, perfection of security interest without filing, 70A-9-305.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Secured party's rights on disposition of collateral, 70A-9-306.

Security interest, when perfected, 70A-9-303.

Filing in another state.

Creditor perfecting its security interest by filing financing statement in Arizona does not have a perfected security interest in the state of Utah. *Inter Mountain Assn. of Credit Men v. Villager, Inc.* (1974) 527 P 2d 664.

Inventory and proceeds.

Secured creditor under perfected security agreement covering debtor's inventory and

the proceeds thereof, together with all other items of collateral of the same class acquired after execution of the agreement, had a perfected security interest in the inventory of the corporation into which debtor merged; and also in the inventory assigned for the benefit of creditors, although items of inventory from creditor's original security agreement had never been a part of the property of the corporation nor of the assignment for the benefit of creditors. *Inter Mountain Assn. of Credit Men v. Villager, Inc.* (1974) 527 P 2d 664.

Collateral References.

Secured Transactions ⇄ 138 to 140.

79 CJS Supp. Secured Transactions §§ 59, 60.

69 AmJur 2d 343 to 353, Secured Transactions §§ 479 to 485.

Coverage of "nonrecording" or "nonfiling" insurance against loss from failure to record chattel mortgage, conditional sale, or other security instrument, 51 ALR 2d 325.

Creditor levying upon subject of unfiled conditional sales contract under prior judgment, 55 ALR 1137.

Priority as between artisan's lien and chattel mortgage, as affected by statutory provisions for recording mortgage, 36 ALR 2d 240.

Priority, as between holder of unfiled or unrecorded chattel mortgage who secures possession of goods or chattels, and subsequent purchaser or encumbrancer, 53 ALR 2d 936.

Priority as between lien for repairs and the like, and the right of seller under conditional sales contract, as affected by statutory provisions for recording contract, 36 ALR 2d 207.

Receiver of conditional vendee, right of, to avail himself of defects in filing contract, 61 ALR 975.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 ALR 3d 1006.

Law Reviews.

Confusion of the Present Law of Assignment of Accounts Receivable, the Impact of

the Bankruptcy Act, and the Need for Uniform Legislation, Maximillian Koessler, 33 Calif. L. Rev. 40.

Motion Picture Secured Transactions under the Uniform Commercial Code: Problems in

Perfection, Gary O. Concoff, 13 U.C.L.A. L. Rev. 1214.

Uniform Commercial Code Section 9-301 (1) and Accounts, Contract Rights, and Chattel Paper: The Non-existent Priorities, 41 Wash. L. Rev. 895.

70A-9-302. When filing is required to perfect security interest — Security interests to which filing provisions of this chapter do not apply.

- (1) A financing statement must be filed to perfect all security interests except the following:
 - (a) a security interest in collateral in possession of the secured party under section 70A-9-305;
 - (b) a security interest temporarily perfected in instruments or documents without delivery under section 70A-9-304 or in proceeds for a ten-day period under section 70A-9-306;
 - (c) a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;
 - (d) a purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in section 70A-9-313;
 - (e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor;
 - (f) a security interest of a collecting bank (section 70A-4-208) or arising under the chapter on Sales (see section 70A-9-113) or covered in subsection (3) of this section;
 - (g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder.
- (2) If a secured party assigns a perfected security interest, no filing under this chapter is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.
- (3) The filing of a financing statement otherwise required by this chapter is not necessary or effective to perfect a security interest in property subject to
 - (a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this chapter for filing of the security interest; or

- (b) those statutes of this state which provide for the indication of security interests on certificates of title as a condition of the perfection of such security interests, but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this chapter (part 4) apply to a security interest in that collateral created by him as debtor; or
 - (c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (subsection (2) of section 70A-9-103).
- (4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this chapter, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in section 70A-9-103 on multiple state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects the security interest is subject to this chapter.

History: L. 1965, ch. 154, § 9-302; 1977, ch. 272, § 18.

Compiler's Notes.

The 1977 amendment substituted present subd. (1) (c) for "(c) a purchase money security interest in farm equipment having a purchase price not in excess of \$2500; but filing is required for a fixture under section 70A-9-313 or for a motor vehicle required to be licensed"; substituted "required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in section 70A-9-313" at the end of subd. (1) (d) for "required for a fixture under section 70A-9-313 or for a motor vehicle required to be licensed"; deleted "or contract rights" after "assignment of accounts" and after "outstanding accounts" in subd. (1) (e); added subd. (1) (g); substituted present subsecs. (3) and (4) for former subsecs. (3), (4) and (5) which read: "(3) The filing provisions of this chapter do not apply to a security interest in property subject to a statute (a) of the United States which provides for a national registration or filing of all security interests in such property; or (b) of this state which provides for central filing of security interests in such property, or in a motor vehicle which is not inventory held for sale for which a certificate of title is required under the statutes of this state if a notation of such a security interest can be indicated

by a public official on a certificate or a duplicate thereof. (4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official. (5) Except as provided in this subsection, the filing provisions of this chapter do not apply to a security interest in property, which is a part of any real estate mortgage created by a public utility, but the mortgage shall be recorded and filed in accordance with the following requirements: (a) the mortgage shall be recorded in the office of the county recorder of each county in this state in which any real estate described in the mortgage is situated; and (b) the mortgage shall be filed in the office of the secretary of state if the mortgage includes any personal property;" and made a minor change in punctuation.

Cross-References.

Filing to perfect security interest, place of, 70A-9-401.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Policy and scope of chapter, 70A-9-102.

Possession of collateral by secured party, perfection of security interest without filing, 70A-9-305.

Protection of buyers of goods, 70A-9-307.

Required filings, 70A-11-106.

Security interest of collecting bank in items, accompanying documents and proceeds, 70A-4-208.

Security interest, when perfected, 70A-9-303.

Security interests arising under chapter on sales, 70A-9-113.

Security interests in inventory, vehicles held for sale, 41-1-80.

Transactions excluded from chapter, 70A-9-104.

Exemption — Substantiality of assignment.

Assignee claiming exemption under subd. (1) (e) from the filing requirement imposed by this section bears the burden of proving that the property assigned is an insignificant part of the outstanding accounts or contract rights of the assignor, at least where the amount of the assignment is apparently substantial. Consolidated Film Industries v. United States (1977) 547 F 2d 533, reversing 403 F Supp 1279.

Filing priority.

Security interest of bank which provided funds to conditional buyer of cattle had priority over conditional seller's security interest where bank filed financing statement prior to conditional buyer's possession of cattle, and conditional seller did not file financing statement until after conditional buyer had taken possession. Walker Bank & Trust Co. v. Burrows (1973) 29 U 2d 218, 507 P 2d 384.

Transfer of possession.

Agreement to "release all cattle to buyer," coupled with transfer of physical possession, clearly indicated intent to transfer possession of cattle to buyer so that buyer's chattel mortgage given to bank was valid and bank's security interest took priority where its financing statement was filed before that covering conditional vendors' security interest. Wilson v. Burrows (1972) 27 U 2d 436, 497 P 2d 240.

Collateral References.

Secured Transactions ⇔ 81 to 89.

79 CJS Supp. Secured Transactions §§ 27 to 33.

69 AmJur 2d 180, Secured Transactions § 345 et seq.

Assignee for creditors as within protection of statute requiring filing of chattel mortgage, 71 ALR 981.

Construction and application of statutory provisions respecting registration of conditional sale contracts in case of residents of other states, 10 ALR 2d 764.

Determination of purchase price of farm equipment for purposes of UCC § 9-302 (1) (c) excusing filing of financing statement, 85 ALR 3d 1037.

Executor or administrator of insolvent estate, right of, to take advantage of failure to file mortgage executed by his decedent, 91 ALR 299.

Filing or recording as factor in determining relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 ALR 2d 351.

Lease of real property purporting to give lessor lien on lessee's chattels as within statutes requiring filing of chattel mortgages, 64 ALR 627.

Lease or contract which reserves title to crops in lessor, necessity of filing, 14 ALR 1362.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other unrecorded mortgage, 18 ALR 2d 813.

Necessity that mortgage covering oil and gas lease be recorded as real estate mortgage, and/or filed or recorded as a chattel mortgage, 34 ALR 2d 902.

Notice, validity of unfiled chattel mortgage as against persons with actual notice thereof, 68 ALR 274.

Priority as between artisan's lien and chattel mortgage, as affected by statutory provision for recording mortgage, 36 ALR 2d 240.

Priority as between landlord's lien and chattel mortgage as affected by failure to file mortgage, 37 ALR 400, 52 ALR 935.

Purchase money mortgage as within provision of statute defeating or postponing lien of unrecorded or unfiled mortgage, 137 ALR 571, 168 ALR 1164.

Rights of seller of motor vehicle with respect to purchase price or security on failure to comply with statute requiring registration or notation of lien, 58 ALR 2d 1358.

Trust receipts as conditional sale within filing statute, 25 ALR 332, 49 ALR 282, 87 ALR 302, 101 ALR 453, 168 ALR 559.

What constitutes "security interest" as to which financing statement must be filed under Uniform Commercial Code § 9-302, 11 ALR 3d 1231.

When is filing financing statement necessary to perfect an assignment of accounts under UCC § 9-302 (1) (e), 85 ALR 3d 1050.

Law Reviews.

Comment, In re Littlejohn: Equitable Departure from State Certificate of Title Act Filing Requirements, 1975 Utah L. Rev. 726.

70A-9-303. When security interest is perfected — Continuity of perfection.

- (1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections 70A-9-302, 70A-9-304 70a-9-305 and 70A-9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.
- (2) If a security interest is originally perfected in any way permitted under this chapter and is subsequently perfected in some other way under this chapter, without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this chapter.

History: L. 1965, ch. 154, § 9-303.

Cross-References.

Collateral brought into state subject to security interest perfected in another state, 70A-9-103 (3).

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Persons who take priority over unperfected security interests, 70A-9-301.

Possession of collateral by secured party, perfection of security interest without filing, 70A-9-305.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Secured party's rights on disposition of collateral, 70A-9-306.

Security interest, when attaches, 70A-9-203.

Merger.

A debtor cannot destroy the perfected security interest of a secured party by changing its name or corporate structure. Inter Mountain Assn. of Credit Men v. Villager, Inc. (1974) 527 P 2d 664.

Collateral References.

Secured Transactions ⇐ 134, 135.

79 CJS Supp. Secured Transactions §§ 25 to 27.

68 AmJur 2d 863, Secured Transactions § 38; 69 AmJur 2d Secured Transactions 345, 357, 358, Secured Transactions §§ 180, 194, 195.

70A-9-304. Perfection of security interest in instruments, documents, and goods covered by documents — Perfection by permissive filing — Temporary perfection without filing or transfer of possession.

- (1) A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession, except as provided in subsections (4) and (5) of this section and subsections (2) and (3) of section 70A-9-306 on proceeds.
- (2) During the period that goods are in the possession of the issuer of a negotiable document therefor, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto.

- (3) A security interest in goods in the possession of a bailee other than one who has issued a negotiable document therefor is perfected by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest or by filing as to the goods.
- (4) A security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of 21 days from the time it attaches to the extent that it arises for new value given under a written security agreement.
- (5) A security interest remains perfected for a period of 21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor
 - (a) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing or otherwise dealing with them in a manner preliminary to their sale or exchange, but priority between conflicting security interests in the goods is subject to subsection (3) of section 70A-9-312; or
 - (b) delivers the instrument to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.
- (6) After the 21-day period in subsections (4) and (5) perfection depends upon compliance with applicable provisions of this chapter.

History: L. 1965, ch. 154, § 9-304; 1977, ch. 272, § 19.

Compiler's Notes.

The 1977 amendment inserted "money or" near the beginning of the second sentence of subsec. (1); added "of this section and subsections (2) and (3) of section 70A-9-306 on proceeds" at the end of subsec. (1); added "but priority between conflicting security interests in the goods is subject to subsection (3) of section 70A-9-312" at the end of subd. (5) (a); and made minor changes in punctuation.

Cross-References.

Possession of collateral by secured party, perfection of security interest without filing, 70A-9-305.

Security interest, when perfected, 70A-9-303.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Secured Transactions ⇐ 88.

79 CJS Supp. Secured Transactions § 34.

69 AmJur 2d 206, 207, Secured Transactions §§ 368, 369.

70A-9-305. When possession by secured party perfects security interest without filing. A security interest in letters of credit and advices of credit (subsection (2) (a) of section 70A-5-116), goods, instruments, money negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the

secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

History: L. 1965, ch. 154, § 9-305; 1977, ch. 272, § 20.

Compiler's Notes.

The 1977 amendment inserted "money" in the middle of the first sentence.

Cross-References.

Credit, right to draw under, transfer and assignment, 70A-5-116.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Security interest, when perfected, 70A-9-303.

When security interest attaches, 70A-9-203.

Collateral References.

Secured Transactions ⇔ 89.

79 CJS Supp. Secured Transactions § 35.

69 AmJur 2d 182, Secured Transactions § 348.

70A-9-306. "Proceeds" — Secured party's rights on disposition of collateral.

- (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."
- (2) Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.
- (3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless
 - (a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds; or
 - (b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds; or

- (c) the security interest in the proceeds is perfected before the expiration of the ten-day period. Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this chapter for original collateral of the same type.
- (4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:
- (a) in identifiable noncash proceeds and in separate deposit accounts containing only proceeds;
 - (b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;
 - (c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and
 - (d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is
 - (i) subject to any right of setoff; and
 - (ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).
- (5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:
- (a) If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.
 - (b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security

- interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under section 70A-9-308.
- (c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).
- (d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

History: L. 1965, ch. 154, § 9-306; 1977, ch. 272, § 21.

Compiler's Notes.

The 1977 amendment rewrote the first two sentences of subsec. (1) which read: "Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right"; inserted "deposit accounts" near the beginning of the third sentence of subsec. (1); substituted "other disposition thereof unless the disposition was authorized" in the middle of subsec. (2) for "other disposition thereof by the debtor unless his action was authorized"; deleted subd. (3) (a) which read: "a filed financing statement covering the original collateral also covers proceeds"; inserted new subds. (3) (a) and (3) (b); redesignated subd. (3) (b) as (3) (c); added a sentence at the end of subsec. (3) relating to security interests in proceeds; added "only in the following proceeds" at the end of the first paragraph of subsec. (4); added "and in separate deposit accounts containing only proceeds" at the end of subd. (4) (a); substituted "deposit" for "bank" near the end of subd. (4) (b), in the middle of subd. (4) (c), and near the beginning of subd. (4) (d); substituted "accounts of the debtor in which proceeds have been commingled with other funds" in the middle of subd. (4) (d) for "accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account"; substituted "less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4)" at the end of subd. (4) (d) (ii) for "and commingled or deposited in a bank account prior to the

insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten-day period"; and made minor changes in phraseology and punctuation.

Cross-References.

- Attachment and enforceability of security interest, 70A-9-203.
 Course of dealing and usage of trade, 70A-1-205.
 Default, collection rights of secured party, 70A-9-502.
 Entrusting possession of goods to merchant, power to transfer rights of entruster, 70A-2-403 (2).
 Filing, when required to perfect security interest, 70A-9-302.
 Formal requisites of financing statement, 70A-9-402.
 Persons who take priority over unperfected security interests, 70A-9-301.
 Priorities among conflicting security interests in the same collateral, 70A-9-312.
 Protection of buyers of goods, 70A-9-307.
 Protection of purchasers of instruments and documents, 70A-9-309.
 Purchase of chattel paper and nonnegotiable instruments, 70A-9-308.
 Security interest in money or instruments, perfection, 70A-9-304.
 Transfer of insurance policy, exclusion from chapter, 70A-9-104.
 Use or disposition of collateral without accounting permissible, 70A-9-205.

Cash sale.

Assignee for benefit of creditors was not authorized to make a credit sale and, thus, secured party has priority to cash proceeds under terms of the assignment. *Inter Mountain Assn. of Credit Men v. Villager, Inc.* (1974) 527 P 2d 664.

Collateral References.

Secured Transactions ⇌ 168.

79 CJS Supp. Secured Transactions §§ 81, 82.
68 AmJur 2d Secured Transactions §§ 186 to 191.

debtor's name, identity, or business structure, 99 ALR 3d 1194.

Validity of chattel mortgage where mortgagor is given right to sell, 73 ALR 236.

Effectiveness of original financing statement under UCC article 9 after change in

DECISIONS UNDER FORMER LAW

Removal of automobile from state.

Mortgagor who removes mortgaged property out of the state contrary to terms of mortgage, is guilty of "conversion" within meaning of that term in automobile insurance policy. *Miller v. Manhattan Fire & Marine Ins. Co.* (1930) 76 U 540, 290 P 937.

property by mortgagor, to the effect that one so disposing of the property without written consent shall be deemed guilty, when taken in the light of all the other wording of the statute and its purpose, does not connote absolute liability for failing to do an act required by the statute, but on the contrary calls for a construction making for criminal accountability only where both the letter and the spirit of the act have been violated. *Tanner v. Pillsbury Mills* (1955) 3 U 2d 196, 281 P 2d 391.

Wrongful disposition of property by mortgagor.

The wording of former section 9-1-13, prescribing penalty for wrongful disposition of

70A-9-307. Protection of buyers of goods.

- (1) A buyer in ordinary course of business (subsection (9) of section 70A-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.
- (2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.
- (3) A buyer other than a buyer in ordinary course of business (subsection (1) of this section) takes free of a security interest to the extent that it secures future advances made after the secured party acquires knowledge of the purchase, or more than 45 days after the purchase, whichever first occurs, unless made pursuant to a commitment entered into without knowledge of the purchase and before the expiration of the 45-day period.

History: L. 1965, ch. 154, § 9-307; 1977, ch. 272, § 22.

Compiler's Notes.

The 1977 amendment deleted "and in the case of farm equipment having an original purchase price not in excess of \$2500 (other than fixtures, see section 70A-9-313)" after "consumer goods" near the beginning of subsec. (2); deleted "or his own farming operations" after "purposes" near the end of subsec. (2); and added subsec. (3).

Cross-References.

Buyers of vehicles taking free of security interests, 41-1-80.

Filing, when required to perfect security interest, 70A-9-302.

Good faith purchase of goods, power to transfer, 70A-2-403.

Persons who take priority over unperfected security interests, 70A-9-301.

Priority of security interests in fixtures, 70A-9-313.

Secured party's rights on disposition of collateral, 70A-9-306.

Collateral References.

Secured Transactions ⇐ 141.

79 CJS Supp. Secured Transactions §§ 61 to 63.

69 AmJur 2d 325 to 336, Secured Transactions §§ 468 to 472.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reli-

ance by subsequent purchaser or mortgagee without actual notice of other recorded mortgage, 18 ALR 2d 813.

Right to follow chattel into hands of purchaser who took in payment of preexisting debt, 11 ALR 3d 1028.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201 (9) defining buyer in ordinary course of business for purposes of UCC § 9-307 (1), 73 ALR 3d 338.

70A-9-308. Purchase of chattel paper and instruments. A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

- (1) Which is perfected under section 70A-9-304 (permissive filing and temporary perfection) or under section 70A-9-306 (perfection as to proceeds) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or
- (2) Which is claimed merely as proceeds of inventory subject to a security interest (section 70A-9-306) even though he knows that the specific paper or instrument is subject to the security interest.

History: C. 1953, 70A-9-308, enacted by L. 1977, ch. 272, § 23.

Compiler's Notes.

Laws 1977, ch. 272, § 23 repealed old section 70A-9-308 (L. 1965, ch. 154, § 9-308), relating to the purchase of chattel paper and nonnegotiable instruments, and enacted a new section 70A-9-308.

Cross-References.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Possession of collateral by secured party, perfection of security interest without filing, 70A-9-305.

Secured party's rights on disposition of collateral, 70A-9-306.

Collateral References.

Secured Transactions ⇐ 142.

69 AmJur 2d 336, Secured Transactions § 473.

70A-9-309. Protection of purchasers of instruments and documents. Nothing in this chapter limits the rights of a holder in due course of a negotiable instrument (section 70A-3-302) or a holder to whom a negotiable document of title has been duly negotiated (section 70a-7-501) or a bona fide purchaser of a security (section 70a-8-301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this chapter does not constitute notice of the security interest to such holders or purchasers.

History: L. 1965, ch. 154, § 9-309.

Cross-References.

Commercial paper, 70A-3-101 to 70A-3-805.
Investment securities, 70A-8-101 to 70A-8-406.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Warehouse receipts, bills of lading and other documents of title, 70A-7-101 to 70A-7-603.

Collateral References.

Secured Transactions ⇔ 143.

69 AmJur 2d 338, Secured Transactions § 474.

70A-9-310. Priority of certain liens arising by operation of law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

History: L. 1965, ch. 154, § 9-310.

79 CJS Supp. 72, 73, Secured Transactions §§ 66, 67.

Cross-References.

Liens for services or materials, exclusion from chapter, 70A-9-104 (c).

Policy and subject matter of chapter, 70A-9-102.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

69 AmJur 2d 387 to 395, Secured Transactions §§ 508 to 512.

Priority as between lien for repairs and the like, and right of seller under conditional sales contract, 36 ALR 2d 198.

Secured transactions: priorities as between previously perfected security interest and repairman's lien on motor vehicle under Uniform Commercial Code, 69 ALR 3d 1162.

Collateral References.

Secured Transactions ⇔ 144.

70A-9-311. Alienability of debtor's rights — Judicial process. The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

History: L. 1965, ch. 154, § 9-311.

79 CJS Supp. Secured Transactions §§ 79, 80.

Collateral References.

Secured Transactions ⇔ 166, 167.

69 AmJur 2d 33, 34, Secured Transactions §§ 211, 212.

70A-9-312. Priorities among conflicting security interests in the same collateral.

- (1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: section 70A-4-208 with respect to the security interests of collecting banks in items being collected, accompanying documents and proceeds; section 70A-9-103 on security interests related to other jurisdictions; section 70A-9-114 on consignments.
- (2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the

- person giving new value had knowledge of the earlier security interest.
- (3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if
 - (a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and
 - (b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the purchase money secured party, or (ii) before the beginning of the 21-day period where the purchase money security interest is temporarily perfected without filing or possession (subsection 5 of section 70A-9-304); and
 - (c) the holder of the conflicting security interest receives notification within five years before the debtor receives possession of the inventory; and
 - (d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.
 - (4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.
 - (5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:
 - (a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.
 - (b) So long as conflicting security interests are unperfected, the first to attach has priority.
 - (6) For the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.
 - (7) If future advances are made while a security interest is perfected by filing or the taking of possession, the security interest has the

same priority for the purposes of subsection (5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

History: L. 1965, ch. 154, § 9-312; 1977, ch. 272, § 24.

Compiler's Notes.

The 1977 amendment substituted present subsection (1) for "(1) The rules of priority stated in the following sections shall govern where applicable: section 70A-4-208 with respect to the security interest of collecting banks in items being collected, accompanying documents and proceeds; section 70A-9-301 on certain priorities; section 70A-9-304 on goods covered by documents; section 70A-9-306 on proceeds and repossessions; section 70A-9-307 on buyers of goods; section 70A-9-308 on possessory against nonpossessory interests in chattel paper or nonnegotiable instruments; section 70A-9-309 on security interests in negotiable instruments, documents or securities; section 70A-9-310 on priorities between perfected security interests and liens by operation of law; section 70A-9-313 on security interests in fixtures as against interests in real estate; section 70A-9-314 on security interests in accessions as against interest in goods; section 70A-9-315 on conflicting security interests where goods lose their identity or become part of a product; and section 70A-9-316 on contractual subordination"; substituted present subsec. (3) for "(3) A purchase money security interest in inventory collateral has priority over a conflicting security interest in the same collateral if (a) the purchase money security interest is perfected at the time the debtor receives possession of the collateral; and (b) any secured party whose security interest is known to the holder of the purchase money security interest or who, prior to the date of the filing made by the holder of the purchase money security interest, had filed a financing statement covering the same items or type of inventory, has received notification of the purchase money security interest before the debtor receives possession of the collateral covered by the purchase money security interest; and (c) such notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type"; inserted "or its

proceeds" in the middle of subsec. (4); substituted "according to the following rules" before subd. (5) (a) for "as follows"; substituted present subds. (5) (a) and (5) (b) for "(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under section 70A-9-204 (1) and whether it attached before or after filing; (b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under section 70A-9-204 (1) and, in the case of a filed security interest, whether it attached before or after filing; and (c) in the order of attachment under section 70A-9-204 (1) so long as neither is perfected"; substituted present subsec. (6) for "(6) For the purpose of the priority rules of the immediately preceding subsection, a continuously perfected security interest shall be treated at all times as if perfected by filing if it was originally so perfected and it shall be treated at all times as if perfected otherwise than by filing if it was originally perfected otherwise than by filing"; added subsec. (7); and made minor changes in phraseology.

Cross-References.

Accessions, security interest, 70A-9-314.
 Financing statement, formal requisites, 70A-9-402.
 Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.
 Persons who take priority over unperfected security interests, 70A-9-301.
 Priority of certain liens arising by operation of law, 70A-9-310.
 Priority of security interests in fixtures, 70A-9-313.
 Priority subject to subordination, 70A-9-316.
 Priority when goods are commingled or processed, 70A-9-315.
 Protection of buyers of goods, 70A-9-307.
 Protection of purchasers of instruments and documents, 70A-9-309.
 Purchase of chattel paper and nonnegotiable instruments, 70A-9-308.
 Secured party's rights on disposition of collateral, 70A-9-306.

Security interest of collecting bank in items, accompanying documents and proceeds, 70A-4-208.

Security interest, when perfected, 70A-9-303.

When after-acquired collateral not security for antecedent debt, 70A-9-108.

When security interest attaches, 70A-9-204.

Transfer of insurance policy, exclusion from chapter, 70A-9-104.

Federal tax levy.

Because of the mobile nature of the property and numerous buyers, levy and sale by Internal Revenue Service of taxpayer's prop-

erty, consisting of materials and tools for construction of small boats, effectively extinguished the rights of secured party claimant to recover from the purchasers; such claimant has a right to bring action for wrongful levy if the priority of his claim is established. *Empire Corp. v. United States Internal Revenue Service* (1974) 377 F Supp 948.

Collateral References.

Secured Transactions ⇐ 138, 145, 146.

79 CJS Supp. Secured Transactions §§ 68 to 71.

69 AmJur 2d 353 to 371, Secured Transactions §§ 486 to 495.

70A-9-313. Priority of security interests in fixtures.

- (1) In this section and in the provisions of part 4 of this chapter referring to fixture filing, unless the context otherwise requires
 - (a) goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law
 - (b) a "fixture filing" is the filing in the office of the county recorder in each county in this state in which any mortgage on the real estate would be recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of section 70A-9-402
 - (c) a mortgage is a "construction mortgage" to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.
- (2) A security interest under this chapter may be created in goods which are fixtures or may continue in goods which become fixtures, but no security interest exists under this chapter in ordinary building materials incorporated into an improvement on land.
- (3) This chapter does not prevent creation of an encumbrance upon fixtures pursuant to real estate law.
- (4) A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where
 - (a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
 - (b) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the

- security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate; or
- (c) the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this chapter; or
 - (d) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this chapter.
- (5) A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where
- (a) the encumbrancer or owner has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures; or
 - (b) the debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.
- (6) Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.
- (7) In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.
- (8) When the secured party has priority over all owners and encumbrancers of the real estate, he may, on default, subject to the provisions of part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

History: C. 1953, 70A-9-313, enacted by L. 1977, ch. 272, § 25.

Compiler's Notes.

Laws 1977, ch. 272, § 25 repealed old section 70A-9-313 (L. 1965, ch. 154, § 9-313),

relating to the priority of security interests in fixtures, and enacted a new section 70A-9-313.

79 CJS Supp. Secured Transactions § 58.
69 AmJur 2d 371 to 376, Secured Transactions §§ 496 to 498.

Cross-References.

Default under security agreement, 70A-9-501 to 70A-9-507.

Filing to perfect security interest, 70A-9-302, 70A-9-401.

Financing statement, formal requisites, 70A-9-402.

Fixtures deemed as goods, 70A-9-105.

Policy and subject matter of chapter, 70A-9-102.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Security interest, when perfected, 70A-9-303.

Transactions excluded from chapter, 70A-9-104.

When security interest attaches, 70A-9-203.

Collateral References.

Fixtures ⇨ 9 et seq.

Air conditioning plant, equipment, apparatus, or the like, as fixture, 43 ALR 2d 1378.

Electronic computing equipment as fixture, 6 ALR 3d 497.

Plumbing, appliances, accessories, pipes, or other articles connected with, as fixtures, 52 ALR 2d 222.

Sprinkling system as fixture, 19 ALR 2d 1300.

Law Reviews.

Fixtures under the Uniform Commercial Code, H. Kripka, 64 Colum. L. Rev. 44.

The Uniform Commercial Code: Some New Mexico Problems and Proposed Legislative Solutions, David H. Vernon, 3 Natural Resources J. 487.

Fixtures and the Uniform Commercial Code in New Mexico, 4 Natural Resources J. 109.

70A-9-314. Accessions.

- (1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section "accessions") over the claims of all persons to the whole except as stated in subsection (3) and subject to section 70A-9-315 (1).
- (2) A security interest which attaches to goods after they become part of a whole is valid against all persons subsequently acquiring interests in the whole except as stated in subsection (3) but is invalid against any person with an interest in the whole at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as part of the whole.
- (3) The security interests described in subsections (1) and (2) do not take priority over
 - (a) a subsequent purchaser for value of any interest in the whole; or
 - (b) a creditor with a lien on the whole subsequently obtained by judicial proceedings; or
 - (c) a creditor with a prior perfected security interest in the whole to the extent that he makes subsequent advances
 if the subsequent purchase is made, the lien by judicial proceedings obtained or the subsequent advance under the prior perfected security interest is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the whole at a foreclosure sale other than the holder of a perfected

security interest purchasing at his own foreclosure sale is a subsequent purchaser within this section.

- (4) When under subsections (1) or (2) and (3) a secured party has an interest in accessions which has priority over the claims of all persons who have interests in the whole, he may on default subject to the provisions of part 5 remove his collateral from the whole but he must reimburse any encumbrancer or owner of the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the security party gives adequate security for the performance of this obligation.

History: L. 1965, ch. 154, § 9-314.

Cross-References.

Default under security agreement, 70A-9-501 to 70A-9-507.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Priority of security interests in fixtures, 70A-9-313.

Priority when goods are commingled or processed, 70A-9-315.

Security interest, when perfected, 70A-9-303.

When security interest attaches, 70A-9-203.

Collateral References.

Accession ⇔ 2.

79 CJS Supp. Secured Transactions § 105.

69 AmJur 2d 376 to 379, Secured Transactions §§ 499 to 501.

70A-9-315. Priority when goods are commingled or processed.

- (1) If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interest continues in the product or mass if
 - (a) the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass; or
 - (b) a financing statement covering the original goods also covers the product into which the goods have been manufactured, processed or assembled.

In a case to which paragraph (b) applies, no separate security interest in that part of the original goods which has been manufactured, processed or assembled into the product may be claimed under section 70A-9-314.

- (2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

History: L. 1965, ch. 154, § 9-315.

Cross-References.

Accessions, security interest, 70A-9-314.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Security interest, when perfected, 70A-9-303.

When security interest attaches, 70A-9-203.

Promissory note.

Security interest of plaintiff in assets transferred pursuant to bookkeeping entries between two subsidiary corporations was not extinguished by the secured creditor's acceptance of a promissory note from the transferee, and such creditor was entitled to trace its security interest and the proceeds there-

from to recover the debt. First Security Bank of Utah v. Zions First Nat. Bank (1975) 537 P 2d 1024.

Collateral References.

Confusion of Goods ⇔ 8, 9, 11.
15A CJS Confusion of Goods §§ 3-9.
69 AmJur 2d 378, Secured Transactions § 501.

70A-9-316. Priority subject to subordination. Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

History: L. 1965, ch. 154, § 9-316.

Collateral References.**Cross-References.**

Priorities among conflicting security interests in the same collateral, 70A-9-312.
Variation by agreement, 70A-1-102 (3).

Secured Transactions ⇔ 147.
79 CJS Supp. Secured Transactions § 72.
69 AmJur 2d 342, Secured Transactions § 478.

70A-9-317. Secured party not obligated on contract of debtor. The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

History: L. 1965, ch. 154, § 9-317.

Collateral References.**Cross-References.**

Assignment of rights, contract for sale, 70A-2-210.

Secured Transactions ⇔ 169.
79 CJS Supp. Secured Transactions § 83.
69 AmJur 2d 28, 321, 339, Secured Transactions §§ 205, 465, 475.

70A-9-318. Defenses against assignee — Modification of contract after notification of assignment — Term prohibiting assignment ineffective — Identification and proof of assignment.

- (1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in section 70A-9-206 the rights of an assignee are subject to
 - (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and
 - (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.
- (2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.
- (3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to

become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

- (4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

History: L. 1965, ch. 154, § 9-318; 1977, ch. 272, § 26.

Compiler's Notes.

The 1977 amendment substituted "payment or a part thereof under an assigned contract has not been fully earned by performance" near the beginning of subsec. (2) for "payment under an assigned contract right has not already become an account"; substituted "that the amount due or to become due" in the middle of the first sentence of subsec. (3) for "that the account"; substituted "is ineffective if it prohibits assignment of an account" near the beginning of subsec. (4) for "which prohibits assignment of an account or contract right to which they are parties is ineffective"; added "or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest" at the end of subsec. (4); and made a minor change in punctuation.

Cross-References.

Agreement not to assert defenses against assignee, 70A-9-206.

Assignment of rights, contract for sale, 70A-2-210.

Credit, right to draw under, transfer and assignment, 70A-5-116.

Purchase of chattel paper and instruments, 70A-9-308.

Use or disposition of collateral without accounting permissible, 70A-9-205.

Insufficient notice of assignment.

Where bank did not deal directly with purchaser, but relied on an officer of seller's corporation who procured signatures on letters acknowledging assignment by delivering them personally to an unauthorized employee of purchaser who worked at a different building than the address printed on the invoices, the bank had not taken such steps as were reasonably required to inform purchaser of the assignments. *Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints* (1975) 534 P 2d 887.

Collateral References.

Secured Transactions ⇔ 181, 185, 187 to 191.

79 CJS Supp. Secured Transactions §§ 88 to 96.

69 AmJur 2d 293 to 311, Secured Transactions §§ 444 to 457.

PART 4

FILING

Section

70A-9-401. Place of filing — Erroneous filing — Removal of collateral.

70A-9-402. Formal requisites of financing statement — Amendments — Mortgage as financing statement.

70A-9-403. What constitutes filing — Required statement — Duration of filing — Effect of lapsed filing — Duties of filing officer.

70A-9-404. Termination statement.

70A-9-405. Assignment of security interest — Duties of filing officer — Fees.

70A-9-406. Release of collateral — Duties of filing officer — Fees.

70A-9-407. Information from filing officer.

70A-9-408. Financing statements covering consigned or leased goods.

70A-9-409. Destruction of old records.

70A-9-401. Place of filing — Erroneous filing — Removal of collateral.

- (1) The proper place to file in order to perfect a security interest is as follows:
 - (a) (i) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 70A-9-103, or when the financing statement is filed as a fixture filing (section 70A-9-313) and the collateral is goods which are or are to become fixtures, then in the office of the county recorder in each county in this state in which any mortgage on the real estate would be recorded; and
 - (ii) if the secured party is a seller or purchase money lender of the collateral, in the office of the secretary of state;
 - (b) in all other cases, in the office of the secretary of state.
- (2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this chapter and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of or notice of the contents of such financing statement.
- (3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.
- (4) The rules stated in section 70A-9-103 determine whether filing is necessary in this state.
- (5) Notwithstanding the preceding subsections, and subject to subsection (3) of section 70A-9-302, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the secretary of state. This filing constitutes a fixture filing (section 70A-9-313) as to the collateral described therein which is or is to become fixtures.
- (6) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business.

History: L. 1965, ch. 154, § 9-401; 1977, ch. 272, § 27.

Compiler's Notes.

The 1977 amendment redesignated subd. (1) (a) as subd. (1) (a) (i); substituted "when the collateral is timber * * * the real estate would be recorded" in subd. (1) (a) (i) for "when the collateral is goods which at the

time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded"; added subd. (1) (a) (ii) relating to the secretary of state; inserted "or notice of" near the end of subsec. (2); deleted "if collateral is brought into this state from another jurisdiction" from the beginning of subsec. (4); added subsecs. (5)

and (6); and made minor changes in phraseology and punctuation.

Cross-References.

Change of location between states, 70A-9-103 (3).

Filing, when required to perfect security interest, 70A-9-302.

Perfection of security interest in instruments, documents and goods covered by documents, 70A-9-304.

Priority of security interests in fixtures, 70A-9-313.

Protection of buyers of goods, 70A-9-307.

Required filings, 70A-11-106.

Collateral References.

Secured Transactions \Leftrightarrow 90, 99.

79 CJS Supp. Secured Transactions § 46.

69 AmJur 2d 250 to 263, Secured Transactions §§ 407 to 415.

Construction and application of statutory provisions respecting registration of mort-

gages on personal property in case of residents of other states, 10 ALR 2d 764.

Effectiveness of original financing statement under UCC article 9 after change in debtor's name, identity, or business structure, 99 ALR 3d 1194.

Recording statutes as affecting chattel mortgages of lease of realty for term of years, 33 ALR 2d 1277.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 ALR 3d 1006.

Law Reviews.

The Uniform Commercial Code: Some New Mexico Problems and Proposed Legislative Solutions, David H. Vernon, 3 Natural Resources J. 487.

Fixtures and the Uniform Commercial Code in New Mexico, 4 Natural Resources J. 109.

Fraudulent Financial Statements and Section 17 of the Bankruptcy Act — The Creditor's Dilemma, 1967 Utah L. Rev. 281.

70A-9-402. Formal requisites of financing statement — Amendments — Mortgage as financing statement.

- (1) A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. To facilitate the indexing of financing statements, persons filing financing statements are urged to supply either separately or as a part of the financing statement the social security number of the debtor or the federal income tax employer's identification number if the debtor is not an individual. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a legal description of the real estate concerned and the name of the record owner. When the financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 70A-9-103, or when the financing statement is filed as a fixture filing (section 70A-9-313) and the collateral is goods which are or are to become fixtures, the statement must also comply with subsection (5). A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement

if the security agreement so provides or if the original has been filed in this state.

- (2) A financing statement which otherwise complies with subsection (1) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in
- (a) collateral already subject to a security interest in another jurisdiction when it is brought into this state, or when the debtor's location is changed to this state. Such a financing statement must state that the collateral was brought into this state or that the debtor's location was changed to this state under such circumstances; or
 - (b) proceeds under section 70A-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or
 - (c) collateral as to which the filing has lapsed; or
 - (d) collateral acquired after a change of name, identity or corporate structure of the debtor (subsection (7)).
- (3) A form substantially as follows is sufficient to comply with subsection (1):

Name of debtor (or assignor) _____

Address _____

Debtors Social Security number or employers identification number _____

Name of secured party (or assignee) _____

Address _____

1. This financing statement covers the following types (or items) of property:
(Describe) _____
2. (If collateral is crops) The above-described crops are growing or are to be grown on:
(Describe real estate and specify name of record owner) _____
3. (If applicable) The above goods are to become fixtures on (Provide legal description of real estate) and this financing statement is to be recorded in the real estate records of the county recorder. (If the debtor does not have an interest of record.) The name of the record owner is _____
4. (If products of collateral are claimed) Products of the collateral are also covered.

(Use

whichever

is

applicable)

Signature of Debtor (or Assignor)

Signature of Secured Party
(or Assignee)

- (4) A financing statement may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not

extend the period of effectiveness of a financing statement. If any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment. In this chapter, unless the context otherwise requires, the term "financing statement" means the original financing statement and any amendments.

- (5) A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 70A-9-103, or a financing statement filed as a fixture filing (section 70A-9-313) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be recorded in the real estate records of the county recorder, and the financing statement (and any amendments of financing statements, continuation statements, termination statements, statements of assignment, or statements of release covering the same collateral) must contain a legal description of the real estate and must specify the name of the record owner.
- (6) A financing statement shall contain (a) a statement that the secured party is not a seller or purchase money lender of the collateral covered by the financing statement, or (b) if the secured party is a seller or purchase money lender of the collateral covered by the financing statement, a statement of the gross amount of the sales price in dollars, the amount of any sales or use taxes paid in connection with the sale and the state or states to which such taxes were paid.
- (7) A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if (a) the goods are described in the mortgage by item or type, (b) the goods are or are to become fixtures related to the real estate described in the mortgage, (c) the mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records, and (d) the mortgage is duly recorded. No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.
- (8) A financing statement sufficiently shows the name of the debtor if it gives the individual, partnership or corporate name of the debtor, whether or not it adds other trade names or the names of partners. Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time. A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.

- (9) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.
- (10) If the security agreement and the financing statement cover after-acquired collateral and if the secured party is financing a series of transactions for the debtor or is lending against a changing pool of collateral, then subsection (6) shall not apply to any after-acquired collateral as to which the sales price or the sales or use taxes to be paid are not known at the time the financing statement is filed.

History: L. 1965, ch. 154, § 9-402; 1971, ch. 185, § 1; 1973, ch. 187, § 1; 1977, ch. 272, § 28.

Compiler's Notes.

The 1971 amendment added subsec. (6) relating to a financing statement by a seller or purchase money lender.

The 1973 amendment inserted the second sentence in subsec. (1) and inserted the provision for entering the "Debtors Social Security number or employer's identification number" in the form in subsec. (3).

The 1977 amendment added "Mortgage as financing statement" to the caption; inserted "gives the names of the debtor and the secured party" near the beginning of subsec. (1); deleted "or goods which are or are to become fixtures" after "grown" in the fourth sentence of subsec. (1); inserted "legal" before "description" near the end of the fourth sentence of subsec. (1); inserted the present fifth sentence in subsec. (1); substituted "the debtor" for "both parties" at the end of the present sixth sentence of subsec. (1); added the last sentence of subsec. (1); substituted "signed by the secured party instead of the debtor" in the middle of the first paragraph of subsec. (2) for "signed only by the secured party"; added "or when the debtor's location is changed to this state" at the end of the first sentence in subd. (2) (a); inserted "or that the debtor's location was changed to this state" near the end of subd. (2) (a); added subds. (2) (c) and (2) (d); substituted "(If applicable) The above goods * * * the record owner is" in subd. (3) 3. for "(If collateral is goods which are or are to become fixtures) The above described goods are affixed or are to be affixed to: (Describe real estate and specify name of record owner)"; substituted "(If products of collateral are claimed)" at the beginning of subd. (3) 4. for "(If proceeds or products of collateral are claimed) Proceeds"; inserted "(Use whichever is applicable)" in the middle of subd. (3) 4.; substituted "A financing state-

ment may be amended by filing a writing signed by both the debtor and the secured party. An amendment does not extend the period of effectiveness of a financing statement" at the beginning of subsec. (4) for "The term 'financing statement' as used in this chapter means the original financing statement and any amendments"; added the last sentence in subsec. (4); rewrote subsec. (5), which read: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading"; added subsecs. (7) through (10); and made minor changes in phraseology and punctuation.

Cross-References.

Financing statement, filing imparts notice of contents, 57-3-2.

Financing statement, filing when collateral brought into state, 70A-9-103.

Fixtures, priority of security interests, 70A-9-313.

Mortgage record, effective date as fixture filing, 70A-11-105.

Place of filing, 70A-9-401.

Request for statement of account or list of collateral, 70A-9-208.

Secured party's rights on disposition of collateral, 70A-9-306.

Sufficiency of description of property, 70A-9-110.

Address of secured party.

The address of the secured party listed on the financing statement is sufficient if it would enable a prudent person using reasonable care to locate the secured party; a post office box address is not insufficient as a matter of law. *Wall Inv. Co. v. Garden Gate Distributing, Inc.* (1979) 593 P 2d 542.

Collateral References.

Secured Transactions ⇔ 92 to 95.

79 CJS Supp. Secured Transactions §§ 38 to 45.

69 AmJur 2d 228 to 250, Secured Transactions §§ 385 to 406.

Animals, sufficiency of description of property in mortgage on, 124 ALR 944.

Effect of supplying description of property conveyed after manual delivery of mortgage, 11 ALR 2d 1272.

Effectiveness of original financing statement under UCC article 9 after change in debtor's name, identity, or business structure, 99 ALR 3d 1194.

Omission of amount of debt in chattel mortgage (including general description without stating amount, effect of), 145 ALR 369.

Partnership, chattel mortgage to, in firm name, 1 ALR 564, 8 ALR 493.

Sale of contractual rights; defect in written record as ground for avoiding sale, 10 ALR 2d 728.

Sufficiency of address of debtor in financing statement required by UCC § 9-402 (1), 99 ALR 3d 807.

Sufficiency of address of secured party in financing statement required under UCC § 9-402 (1), 99 ALR 3d 1080.

Sufficiency of chattel mortgagee's affidavit as to statement of consideration, 45 ALR 2d 629.

Sufficiency of description of crops under U.C.C. §§ 9-203 (b) and 9-402 (1), 67 ALR 3d 308.

Sufficiency of description of property as against third persons, in chattel mortgage on farm equipment, machinery, implements, and the like, 32 ALR 2d 929.

Sufficiency of designation of debtor or secured party in security agreement or financing statement under UCC § 9-402, 99 ALR 3d 478.

Variance from statute of wording of affidavit required by it to accompany chattel mortgage, 143 ALR 1254.

70A-9-403. What constitutes filing — Required statement — Duration of filing — Effect of lapsed filing — Duties of filing officer.

- (1) Presentation for filing by the secretary of state, or for recording, indexing, and abstracting by tract by the county recorder of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this chapter. The secretary of state shall refuse and the county recorder may refuse to accept the financing statement for filing unless it either contains the statement referred to in subsection (6) of section 70A-9-402 or is accompanied by a statement signed by either the secured party or the debtor setting forth the statements referred to in said subsection (6).
- (2) Except as provided in subsection (6) a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse. If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until expiration of the five year period, whichever occurs later. Upon lapse the security interest becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected as against a person who became a purchaser or lien creditor before lapse.
- (3) A continuation statement may be filed by the secured party within six months prior to the expiration of the five year period specified in subsection (2). Any such continuation statement must be signed

by the secured party, identify the original statement by file number or by entry numbers and book and page numbers and state that the original statement is still effective. A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of section 70A-9-405, including payment of the required fee. Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for five years after the last date to which the filing was effective whereupon it lapses in the same manner as provided in subsection (2) unless another continuation statement is filed prior to such lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original statement. Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse. The filing officer shall so arrange matters by physical annexation of financing statements to continuation statement or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under subsection (6) shall be retained.

- (4) Except as provided in subsection (7) a filing officer shall mark each statement with a file number and with the date and hour of filing and shall hold the statement or a microfilm or other photographic copy thereof for public inspection. In addition the filing officer shall index the statements according to the name of the debtor and shall note in the index the file number and the address of the debtor given in the statement.
- (5) The fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be \$2 if the statement is in the standard form prescribed by the secretary of state and includes the social security number of the debtor or the employer's identification number if the debtor is not an individual, and otherwise shall be \$10, plus in each case, if the financing statement is subject to subsection (5) of section 70A-9-402, \$2. The fee for each name more than one required to be indexed shall be \$2. The secured party may at his option show a trade name for any person and an extra indexing fee of \$2 shall be paid with respect thereto.
- (6) If the debtor is a transmitting utility (subsection (5) of section 70A-9-401) and a filed financing statement so states, it is effective

until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under subsection (6) of section 70A-9-402 remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

- (7) When a financing statement covers timber to be cut or covers minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 70A-9-103, or is recorded as a fixture filing, the county recorder shall record and index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description record and index it in the same fashion as if the financing statement were a mortgage of the real estate described. Original statements, once duly marked and recorded by the county recorder, may be returned to the party making the filing. Except as provided in subsection 70A-9-404 (3), filings made in the office of the county recorder shall be subject to the provisions of section 21-2-3 in lieu of the fees provided in this chapter.

History: L. 1965, ch. 154, § 9-403; 1971, ch. 185, § 2; 1973, ch. 187, § 2; 1977, ch. 272, § 29.

Compiler's Notes.

The 1971 amendment added the second sentence of subsec. (1) relating to the required statement in the financing statement.

The 1973 amendment added the proviso at the end of subsec. (5) and made a minor change in phraseology.

The 1977 amendment substituted "Presentation for filing by the secretary of state, or for recording, indexing, and abstracting by tract by the county recorder" at the beginning of subsec. (1) for "Presentation for filing or recording"; substituted "the secretary of state shall refuse and the county recorder may refuse" in the middle of subsec. (1) for "the filing officer shall refuse"; substituted "Except as provided in subsection (6) a filed financing statement is effective" at the beginning of subsec. (2) for "A filed financing statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed financing statement is effective"; rewrote the last three sentences of subsec. (2), which read: "The effectiveness of a filed financing statement lapses on the expiration of such sixty-day period after a stated maturity date or on the expiration of such five-

year period, as the case may be, unless a continuation statement is filed prior to the lapse. Upon such lapse the security interest becomes unperfected. A filed financing statement which states that the obligation secured is payable on demand is effective for five years from the date of filing"; deleted "(i) within six months before the sixty days after a stated maturity date of five years or less, and (ii) otherwise" after "party" near the beginning of subsec. (3); inserted "or by entry numbers and book and page numbers" near the end of the second sentence of subsec. (3); added the third sentence of subsec. (3); added "immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse" at the end of the present sixth sentence of subsec. (3); added the last sentence of subsec. (3); rewrote the first sentence of subsec. (4), which read: "A filing officer shall mark each statement with a consecutive file number and with the date and hour of filing and shall hold the statement for public inspection"; rewrote subsec. (5), which read: "The uniform fee for filing, indexing and furnishing filing data for an original or a continuation statement shall be \$2.00; provided the fee for filing an original financing statement which does not contain the social security number of the debtor or the employer's identification number if the debtor is not an individual, shall be \$10.00"; added subsecs.

(6) and (7); and made minor changes in punctuation.

69 AmJur 2d 263 to 278, Secured Transactions §§ 416 to 430.

Cross-References.

Fees of county recorder for filing instruments, 21-2-3.

Financing statement, filing when collateral brought into state, 70A-9-103.

Persons who take priority over unperfected security interests, 70A-9-301.

Priorities among conflicting security interests in the same collateral, 70A-9-312.

Required filings, 70A-11-106.

Construction.

Former subsection 70A-9-204 (4) (a), which dealt specifically with crops, had preference over this section which is general in nature. First Security Bank of Utah, N. A. v. Wright (1974) 521 P 2d 563.

Collateral References.

Secured Transactions ⇔ 96 to 98.

79 CJS Supp. Secured Transactions §§ 45, 48.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure, 150 ALR 134.

Effectiveness of original financing statement under UCC article 9 after change in debtor's name, identity, or business structure, 99 ALR 3d 1194.

Inclusion or exclusion of first and last days in computing time for filing renewal of chattel mortgage which must take place a certain number of days before a known future date, 98 ALR 2d 1433.

Record of instrument without or having insufficient acknowledgment as notice, 59 ALR 2d 1299.

Sufficiency of chattel mortgagee's affidavit as to statement of consideration, on refileing or extension of mortgage, 45 ALR 2d 678.

70A-9-404. Termination statement.

- (1) If a financing statement covering consumer goods is filed on or after July 1, 1977, then within one month or within ten days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must file with each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number or by entry number and book and page numbers. In other cases whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor, for each filing officer with whom the financing statement was filed, a termination statement to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number or by entry number and book and page numbers. A termination statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record complying with subsection (2) of section 70A-9-405, including payment of the required fee. If the affected secured party fails to file such a termination statement as required by this subsection, or to send such a termination statement within ten days after proper demand therefor he shall be liable to the debtor for one hundred dollars, and in addition for any loss caused to the debtor by such failure.

- (2) On presentation to the filing officer of such a termination statement he must duly file the same. If he has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof. If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement.
- (3) No fee shall be charged for filing and indexing a termination statement including sending or delivering the financing statement.

History: L. 1965, ch. 154, § 9-404; 1973, ch. 187, § 3; 1977, ch. 272, § 30.

Compiler's Notes.

The 1973 amendment rewrote subsec. (3) which formerly provided a fee of \$3 for filing and indexing a termination statement.

The 1977 amendment inserted a new first sentence at the beginning of subsec. (1); rewrote the next sentence, which read: "Whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party must on written demand by the debtor send the debtor a statement that he no longer claims a security interest under the financing statement, which shall be identified by file number"; substituted "must be accompanied by a separate written statement of assignment signed by the secured party of record complying with subsection (2) of section 70A-9-405, including payment of the required fee" at the end of the present third sentence of subsec. (1) for "must include or be accompanied by the assignment or a statement by the secured party of record that he has

assigned the security interest to the signer of the termination statement"; deleted the third sentence, which established a filing and indexing fee for assignments and statements thereof of \$2.00; inserted "file such a termination statement as required by this subsection, or to" near the beginning of the last sentence of subsec. (1); rewrote subsec. (2), which read: "On presentation to the filing officer of such a termination statement he must note it in the index. The filing officer shall remove from the files, mark 'terminated' and send or deliver to the secured party the financing statement and any continuation statement, statement of assignment or statement of release pertaining thereto"; and made minor changes in punctuation.

Cross-References.

Financing statement, formal requisites, 70A-9-402.

Collateral References.

Secured Transactions ⇐ 100.

79 CJS Supp. Secured Transactions § 85.

69 AmJur 2d 289 to 293, Secured Transactions §§ 440 to 443.

DECISIONS UNDER FORMER LAW

Failure to release chattel mortgages and real estate mortgages.

Where there are both chattel mortgages and real estate mortgages which are not released it is not incumbent that the person damaged separate and prove separately his damages. One whose credit is damaged by the wrongful failure to release both real estate and chattel mortgages may, in exceptional cases, be able to satisfactorily prove elements of damage proximately caused by a

particular unreleased mortgage. Generally, however, such itemized proof will not be available for it is the combination of apparent indebtedness that destroys credit. Such difficulty of proof does not inure to the benefit of the wrongdoer to the extent of defeating the cause of action. The court should apply the rule that when either of two statutory penalties is equally applicable to a given set of facts the lesser of such penalties must be applied. *Nalder v. Kellogg Sales Co.* (1955) 4 U 2d 117, 288 P 2d 456.

70A-9-405. Assignment of security interest — Duties of filing officer — Fees.

- (1) A financing statement may disclose an assignment of a security interest in the collateral described in the financing statement by indication in the financing statement of the name and address of the assignee or by an assignment itself or a copy thereof on the face or back of the statement. On presentation to the filing officer of such a financing statement the filing officer shall mark the same as provided in section 70A-9-403 (4). The fee for filing, indexing and furnishing filing data for a financing statement so indicating an assignment shall be \$2 if the statement is in the standard form prescribed by the secretary of state and otherwise shall be \$10, plus in each case an additional fee of \$2 for each name more than one against which the financing statement is required to be indexed.
- (2) A secured party may assign of record all or a part of his rights under a financing statement by the filing in the place where the original financing statement was filed of a separate written statement of assignment signed by the secured party of record and setting forth the name of the secured party of record and the debtor, the file number or the entry number and book and page numbers and the date of filing of the financing statement and the name and address of the assignee and containing a description of the collateral assigned. A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in the case of a fixture filing, or a filing covering timber to be cut, or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of section 70A-9-103, he shall index the assignment under the name of the assignor as grantor and he shall index the assignment of the financing statement under the name of the assignee. The fee for filing, indexing and furnishing filing data about such a separate statement of assignment shall be \$2 if the statement is in the standard form prescribed by the secretary of state and otherwise shall be \$10, plus in each case an additional fee of \$2 for each name more than one against which the statement of assignment is required to be indexed. Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (6) of section 70A-9-402) may be made only by an assignment of the mortgage in the manner provided by the law of this state other than this act.

- (3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.

History: L. 1965, ch. 154, § 9-405; 1977, ch. 272, § 31.

Compiler's Notes.

The 1977 amendment substituted "the financing statement by indication in the financing statement" in the middle of the first sentence of subsec. (1) for "the statement by indication in the statement"; deleted the second sentence of subsec. (1), which read: "Either the original secured party or the assignee may sign this statement as the secured party"; deleted "uniform" before "fee" near the beginning of the last sentence of subsec. (1); substituted "\$2 if the statement is in the standard form * * * the financing statement is required to be indexed" at the end of subsec. (1) for "\$2.00"; inserted "in the place where the original financing statement was filed" near the beginning of the first sentence of subsec. (2); inserted "or the entry number and book and page numbers" near the end of the first sentence of subsec. (2); inserted the second and third clauses of the fourth sentence of subsec. (2), relating to the indexing of the

assignment of a financing statement under the name of the assignee; deleted "uniform" before "fee" near the beginning of the fifth sentence of subsec. (2); substituted "\$2 if the statement is in the standard form * * * is required to be indexed" at the end of the fifth sentence of subsec. (2) for "\$2.00"; added the last sentence of subsec. (2); and made minor changes in punctuation.

Cross-References.

Assignment by secured party of perfected security interest, 70A-9-302 (2).

Filing, duration of, 70A-9-403.

Financing statement, formal requisites, 70A-9-402.

Lapsed filing, effect of, 70A-9-403.

Release of collateral, duties of filing officer, 70A-9-406.

Termination statement, 70A-9-404.

Collateral References.

Secured Transactions ⇔ 182, 183.

79 CJS Supp. Secured Transactions § 89.

69 AmJur 2d 278 to 282, Secured Transactions §§ 431 to 433.

70A-9-406. Release of collateral — Duties of filing officer — Fees.

A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of section 70A-9-405, including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The fee for filing and noting such a statement of release shall be \$2 if the statement is in the standard form prescribed by the secretary of state and otherwise shall be \$10, plus in each case an additional fee of \$2 for each name more than one against which the statement of release is required to be indexed.

History: L. 1965, ch. 154, § 9-406; 1977, ch. 272, § 32.

Compiler's Notes.

The 1977 amendment inserted the third sentence relating to a statement of assignment; inserted "of release" near the beginning of the present fourth sentence; deleted

"uniform" before "fee" near the beginning of the last sentence; and substituted "\$2 if the statement is in the standard form * * * required to be indexed" at the end of the section for "\$2.00."

Cross-References.

Real estate mortgage, failure to discharge after satisfaction, 57-3-8.

Termination statement, 70A-9-404.

Collateral References.

Secured Transactions ⇄ 205 to 207.

79 CJS Supp. Secured Transactions § 85.

69 AmJur 2d 283, Secured Transactions § 434.

70A-9-407. Information from filing officer.

- (1) If the person filing any financing statement, termination statement, statement of assignment, or statement of release, furnishes the filing officer a copy thereof, the filing officer shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person.
- (2) Upon request of any person, the secretary of state shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein. The fee for such a certificate shall be 50¢ per page plus \$1 for each financing statement and for each statement of assignment reported therein if the request for the certificate is in the standard form prescribed by the secretary of state and otherwise shall be \$3 plus \$1 for each financing statement and for each statement of assignment reported therein. Upon request the secretary of state shall furnish a copy of any filed financing statement or statement of assignment for a fee of 50¢ per page.

History: L. 1965, ch. 154, § 9-407; 1977, ch. 272, § 33.

Compiler's Notes.

The 1977 amendment substituted "secretary of state" for "filing officer" near the beginning of the first sentence of subsec. (2); deleted "uniform" before "fee" near the beginning of the second sentence of subsec. (2); added "if the request for the certificate is in the standard form prescribed by the secretary of state and otherwise shall be \$3 plus \$1 for each financing statement and for each statement of assignment reported therein" to

the second sentence of subsec. (2); substituted "the secretary of state shall furnish a copy of any filed financing statement or statement of assignment for a fee" in the middle of the last sentence of subsec. (2) for "the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee"; and made a minor change in style.

Cross-References.

Financing statement, filing, 70A-9-403 (1).

Place of filing to perfect security interest, 70A-9-401.

70A-9-408. Financing statements covering consigned or leased goods. A consignor or lessor of goods may file a financing statement using the terms "consignor," "consignee," "lessor," "lessee" or the like instead of the terms specified in section 70A-9-402. The provisions of this part shall apply as appropriate to such a financing statement but its filing shall not of itself be a factor in determining whether or not the consignment or lease

is intended as security (section 70A-1-201(37)). However, if it is determined for other reasons that the consignment or lease is so intended, a security interest of the consignor or lessor which attaches to the consigned or leased goods is perfected by such filing.

History: C. 1953, 70A-9-408, enacted by L. 1977, ch. 272, § 34. relating to the destruction of old records by the filing officer, and enacted a new section 70A-9-408.

Compiler's Notes.

Laws 1977, ch. 272, § 34 repealed old section 70A-9-408 (L. 1965, ch. 154, § 9-408),

70A-9-409. Destruction of old records. Unless a filing officer has notice of an action pending relative thereto, he may remove from the file and destroy

- (1) a lapsed financing statement, a lapsed continuation statement, a statement of assignment or release relating to either, and any index of any of them, one year or more after lapse; and
- (2) a termination statement and the index on which it is noted, one year or more after the filing of the termination statement.

History: C. 1953, 70A-9-409, enacted by L. 1977, ch. 272, § 35.

PART 5
DEFAULT

Section

- 70A-9-501. Default — Procedure when security agreement covers both real and personal property.
- 70A-9-502. Collection rights of secured party.
- 70A-9-503. Secured party's right to take possession after default.
- 70A-9-504. Secured party's right to dispose of collateral after default — Effect of disposition.
- 70A-9-505. Compulsory disposition of collateral — Acceptance of the collateral as discharge of obligation.
- 70A-9-506. Debtor's right to redeem collateral.
- 70A-9-507. Secured party's liability for failure to comply with this part.

70A-9-501. Default — Procedure when security agreement covers both real and personal property.

- (1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in section 70A-9-207. The rights and remedies referred to in this subsection are cumulative.
- (2) After default, the debtor has the rights and remedies provided in this part, those provided in the security agreement and those provided in section 70A-9-207.

- (3) To the extent that they give rights to the debtor and impose duties on the secured party, the rules stated in the subsections referred to below may not be waived or varied except as provided with respect to compulsory disposition of collateral (subsection (3) of section 70A-9-504 and section 70A-9-505) and with respect to redemption of collateral (section 70A-9-506) but the parties may by agreement determine the standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable:
- (a) subsection (2) of section 70A-9-502 and subsection (2) of section 70A-9-504 in so far as they require accounting for surplus proceeds of collateral;
 - (b) subsection (3) of section 70A-9-504 and subsection (1) of section 70A-9-505 which deal with disposition of collateral;
 - (c) subsection (2) of section 70A-9-505 which deals with acceptance of collateral as discharge of obligation;
 - (d) section 70A-9-506 which deals with redemption of collateral; and
 - (e) subsection (1) of section 70A-9-507 which deals with the secured party's liability for failure to comply with this part.
- (4) If the security agreement covers both real and personal property, the secured party may proceed under this part as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of this part do not apply.
- (5) When a secured party has reduced his claim to judgment the lien of any levy which may be made upon his collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral. A judicial sale, pursuant to such execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and the secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this chapter.

History: L. 1965, ch. 154, § 9-501; 1977, ch. 272, § 36.

Compiler's Notes.

The 1977 amendment substituted "(subsection (3) of section 70A-9-504 and section 70A-9-505)" in the middle of the first paragraph of subsec. (3) for "(subsection (1) of section 70A-9-505)."

Cross-References.

Executions, exemptions from, 78-23-1.

Garnishment, procedure when garnishee is mortgagee or pledgee, Rules of Civil Procedure, Rule 64D (o).

Jurisdiction of circuit courts on foreclosure, 78-4-7.

Policy and subject matter of chapter, 70A-9-102.

Real estate mortgages, foreclosure, 78-37-1 et seq.

Rights and duties when collateral is in secured party's possession, 70A-9-207.

Secured party's right to take possession and dispose of collateral after default, 70A-9-503, 70A-9-504.

Transactions excluded from chapter, 70A-9-104.

Variation by agreement, 70A-1-102 (3).

Remedies available to creditor.

Creditor secured by a pledge of personal property is not required to satisfy its judgment upon default from the pledged security first before proceeding against any other property of the debtor, but may, at its option, ignore the security and satisfy its judgment from other property in the hands of the judgment debtor. *Kennedy v. Bank of Ephraim* (1979) 594 P 2d 881.

Collateral References.

Secured Transactions ⇄ 221 to 224, 226.
79 CJS Supp. Secured Transactions §§ 97 to 100.

69 AmJur 2d 438 to 440, Secured Transactions §§ 551, 552.

Exclusiveness of statutory method of enforcing chattel mortgage, 88 ALR 912.

Failure of chattel mortgagee to pursue proper course after taking possession as affecting personal liability of mortgagor, 47 ALR 582.

Jurisdiction of court of state other than that in which property is located to redeem

from or enforce a chattel mortgage or debt secured thereby, 69 ALR 622.

Necessity and sufficiency of notice of sale to mortgagor where chattel mortgage is sought to be foreclosed without judicial proceedings by sale under power, 30 ALR 2d 539.

Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 ALR 3d 1016.

Purchase by pledgee of subject of pledge, 37 ALR 2d 1381.

Right of chattel mortgagee to take possession of property without legal process, 57 ALR 26.

Law Reviews.

Remedies on Default under the Proposed Uniform Commercial Code as Compared to Remedies under Conditional Sales, 39 Marq. L. Rev. 246.

The Uniform Commercial Code: Some New Mexico Problems and Proposed Legislative Solutions, David H. Vernon, 3 Natural Resources J. 487.

Comment, Peoples Finance & Thrift Co. v. Perry: The Use of Lender Credit to Avoid Consumer Protection Provisions of the UCCC, 1974 Utah L. Rev. 408.

DECISIONS UNDER FORMER LAW

Action to foreclose mortgage.

In case of foreclosure of chattel mortgage by action, it was held that subsequent purchasers and mortgagees were bound by notice of *lis pendens*. *Armstrong v. Broom* (1887) 5 U 176, 13 P 364, *affd.* 137 U S 266, 34 L Ed 648, 11 S Ct 73, explained in 88 U 148, 42 P 2d 990.

Action to foreclose chattel mortgage given as security for payment of promissory notes made payable in Salt Lake County could be properly maintained in Salt Lake County, although mortgaged property was not situated in such county and defendant resided in another county. *Emerson-Brantingham Implement Co. v. Giles* (1918) 53 U 539, 174 P 181.

In action to foreclose chattel mortgage, court's dismissal of jury and trying issues raised by affirmative legal defenses was not error. *Consolidated Wagon & Machine Co. v. Kay* (1933) 81 U 595, 21 P 2d 836.

Advertisement and sale.

The purpose of former section 9-1-6, relating to mortgagor's right to enjoin foreclosure by advertisement and sale, was merely to transfer the whole matter to a court of equity where complete justice could be administered in accordance with the legal or equitable rights of both parties to the trans-

action and district judge could be compelled by *mandamus*, upon application of mortgagor, to comply with former section, notwithstanding the refusal to comply therewith was not a direct one; nor was it a defense to issuance of writ that property had been sold under foreclosure, where proceeds of sale were available. *Watts v. Greenwood* (1916) 49 U 118, 162 P 72.

The mortgagor and the mortgagee can agree upon the manner of sale, and, if the property is sold pursuant to the agreement at a fair price, no one, not even one who claimed a subsequent lien upon the property, can legally object. *Utah Assn. of Credit Men v. Jones* (1917) 49 U 519, 164 P 1029.

Notice mailed to nonresident creditors who had listed their claims with railroad company's receiver, which notice was also published in newspaper once weekly for six consecutive weeks before sale by receiver of company's property, held to constitute reasonable notice for service by publication. *Chapman v. Schiller* (1938) 95 U 514, 83 P 2d 249, 120 ALR 906.

Attachment of mortgaged property.

Taking the mortgaged property without paying or tendering amount of mortgage debt, or depositing amount thereof with the county recorder is wrongful, and in law con-

stitutes a conversion. *Whittler v. Sharp* (1913) 43 U 419, 135 P 112, 49 LRA (NS) 931.

The taking of the property by the sheriff without complying with former section 9-1-3 does not render the officer liable to pay the debt, but makes him liable in tort for the damages sustained thereby, the levy being unauthorized and the seizure a trespass. The mortgagee may, however, be entitled to recover only nominal damages, where property is returned in same condition as before conversion. *Whittler v. Sharp* (1913) 43 U 419, 135 P 112, 49 LRA (NS) 931.

The mortgagee does not waive his rights under the mortgage by either attaching or levying an execution on the mortgaged property, applying Comp. Laws 1907, § 157, and especially where the right to the lien is expressly reserved and the property is sold to satisfy the mortgage lien and nothing else. *Utah Assn. of Credit Men v. Jones* (1917) 49 U 519, 164 P 1029.

Burden is on one claiming chattel mortgage to prove that property attached for rent was subject to mortgage. *Grover v. Cash* (First Nat. Bank of Brigham City, Intervener) (1927) 69 U 194, 253 P 676.

Tender to lien holder is unnecessary when attachment is for superior lien for rent, which is made a prior lien under 38-3-2, with exceptions. *Grover v. Cash* (First Nat. Bank of Brigham City, Intervener) (1927) 69 U 194, 253 P 676.

Chattel mortgagee is entitled to all proceeds of sale of mortgaged property wrongfully attached by sheriff upon suit of landlord for rent, without deduction for expenses of sale and care of attached property by sheriff, such expenses being chargeable to party instigating wrongful attachment. *Grover v. Cash* (First Nat. Bank of Brigham City, Intervener) (1927) 69 U 194, 253 P 676.

Nature of foreclosure proceeding.

Foreclosure of chattel mortgage is equitable proceeding. *Consolidated Wagon & Machine Co. v. Kay* (1933) 81 U 595, 21 P 2d 836.

Remedies.

A mortgagee could foreclose his mortgage upon chattels by an action in equity, or advertise and sell the mortgaged property at public auction, where power to sell was given in mortgage. Therefore a sale under confession of judgment to him by the mortgagor was unobjectionable. *Utah Assn. of Credit Men v. Jones* (1917) 49 U 519, 164 P 1029.

The remedy by foreclosure prescribed by former law requiring judgment and sale on execution was the only one to which a creditor could resort in order to enforce his lien, unless the mortgage contained a power of sale as provided in former section 9-1-5. Former section 9-1-7 provided the method of advertisement, and former section 9-1-9 prescribed the manner of sale. *Morgan v. Layton* (1922) 60 U 280, 208 P 505.

70A-9-502. Collection rights of secured party.

- (1) When so agreed and in any event on default the secured party is entitled to notify an account debtor or the obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral, and also to take control of any proceeds to which he is entitled under section 70A-9-306.
- (2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

History: L. 1965, ch. 154, § 9-502; 1977, ch. 272, § 37.

Compiler's Notes.

The 1977 amendment deleted "contract rights" after "accounts" near the beginning

of the last sentence of subsec. (2); and made minor changes in punctuation.

Cross-References.

Liability of secured party for failure to comply with part 5 of this chapter, 70A-9-507.

Policy and scope of chapter, 70A-9-102.

Secured party's rights on disposition of collateral, 70A-9-306.

Secured party's right to dispose of collateral after default, 70A-9-504.

Transactions excluded from chapter, 70A-9-104.

Use or disposition of collateral without accounting permissible, 70A-9-205.

Collateral References.

Secured Transactions ⇔ 227.

79 CJS Supp. Secured Transactions § 104.

69 AmJur 2d 469 to 473, Secured Transactions §§ 580 to 582.

70A-9-503. Secured party's right to take possession after default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 70A-9-504. If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.

History: L. 1965, ch. 154, § 9-503.

Cross-References.

Secured party's right to dispose of collateral after default, 70A-9-504.

Collateral References.

Secured Transactions ⇔ 228.

79 CJS Supp. Secured Transactions § 105.

69 AmJur 2d 473 to 497, Secured Transactions §§ 583 to 599.

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503, 75 ALR 3d 1061.

Law Reviews.

Breach of the Peace and New Mexico's Uniform Commercial Code, 4 Natural Resources J. 85.

Note, Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies, 1974 Utah L. Rev. 536.

DECISIONS UNDER FORMER LAW

Replevin.

Where chattel mortgage provided that in event default was made in payment of debt mortgagee could take possession of property and proceed to foreclose mortgage, mort-

gagee could maintain action in claim and delivery to recover such possession after default, remedy by foreclosing mortgage not being exclusive. *Morgan v. Layton* (1922) 60 U 280, 208 P 505.

70A-9-504. Secured party's right to dispose of collateral after default — Effect of disposition.

- (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the chapter on Sales (chapter 2). The proceeds of disposition shall be applied in the order following to

- (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
 - (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
 - (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.
- (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.
- (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.
- (4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The

purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

- (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
- (b) in any other case, if the purchaser acts in good faith.
- (5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

History: L. 1965, ch. 154, § 9-504; 1977, ch. 272, § 38.

Compiler's Notes.

The 1977 amendment inserted "or lease" near the beginning of subd. (1) (a); added the second sentence of subsec. (2) relating to a sale of accounts or chattel paper; substituted "if he has not signed after default a statement renouncing or modifying his right to notification of sale" at the end of the third sentence of subsec. (3) for "and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral"; and inserted the fourth sentence of subsec. (3) relating to notification of other secured parties.

Cross-References.

Collateral not owned by debtor, 70A-9-112.
 Compulsory disposition of collateral, 70A-9-505.
 Contract for sale of goods, breach by buyer, resale by seller, 70A-2-706.
 Policy and subject matter of chapter, 70A-9-102.
 Secured party's liability for failure to comply with part 5 of this chapter, 70A-9-507.

Notice of disposition.

Secured party is barred from obtaining a deficiency judgment after a disposition of the property securing the debt where no notice of the disposition was given the debtor and the disposition was not conducted in a commercially reasonable manner. FMA Financial Corp. v. Pro-Printers (1979) 590 P 2d 803.

Notice of sale.

Secured party should give notice of time and place of sale of the collateral to a guarantor of the debt. Zions First Nat. Bank v. Hurst (1977) 570 P 2d 1031.

Collateral References.

Secured Transactions ⇔ 229 to 237, 240.
 79 CJS Supp. Secured Transactions §§ 106 to 113.
 69 AmJur 2d 499 to 532, Secured Transactions §§ 602 to 624.

Rights and duties of parties to conditional sales contract as to resale of repossessed property, 49 ALR 2d 15.

Uniform Commercial Code: burden of proof as to commercially reasonable disposition of collateral, 59 ALR 3d 369.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment, 59 ALR 3d 401.

What constitutes a "public sale," 4 ALR 2d 575.

DECISIONS UNDER FORMER LAW

Foreclosure by advertisement or sale — Perishable property or livestock.

In proceeding under former section 9-1-6, relating to mortgagor's right to enjoin foreclosure by advertisement and sale, court had

power, where it appeared that mortgaged property was perishable, or that it was livestock and that cost of feeding and keeping it pending action would be great, to call on mortgagor to consent to sale or furnish indemnity bond to hold mortgagee harmless.

Watts v. Greenwood (1916) 49 U 118, 162 P 72.

Repairs to and protection of property.

Chattel mortgagee in possession should be allowed costs of ordinary and reasonably

necessary repairs, and expenses reasonably necessary to proper management and protection of property. Stockyards Nat. Bank v. Bragg (1925) 67 U 60, 245 P 966.

70A-9-505. Compulsory disposition of collateral — Acceptance of the collateral as discharge of obligation.

- (1) If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under section 70A-9-504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under section 70A-9-507 (1) on secured party's liability.
- (2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under section 70A-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.
- (3) The above subsection shall not apply to pledgees receiving pledged property in the regular course of business where the consideration received by the pledgor for the property pledged is less than \$100.

History: L. 1965, ch. 154, § 9-505; 1967, ch. 191, § 1; 1977, ch. 272, § 39.

Compiler's Notes.

The 1967 amendment added subsec. (3).

The 1977 amendment substituted the present second through fifth sentences of subsec. (2) for "Written notice of such proposal shall be sent to the debtor and except in the case of consumer goods to any other secured party who has a security interest in the collateral and who duly filed a financing statement indexed in the name of the debtor

in this state or is known by the secured party in possession to have a security interest in it. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification or if any other secured party objects in writing within thirty days after the secured party obtains possession the secured party must dispose of the collateral under section 70A-9-504"; inserted the present third and fourth sentences of subsec. (2); and made a minor change in phraseology.

Cross-References.

Secured party's liability for failure to comply with part 5 of this chapter, 70A-9-507.

Secured party's right to dispose of collateral after default, 70A-9-504.

79 CJS Supp. Secured Transactions §§ 114, 115.

69 AmJur 2d 532 to 537, Secured Transactions §§ 625 to 627.

Collateral References.

Secured Transactions ⇔ 238, 239.

Construction and operation of UCC § 9-505 (2) authorizing secured party in possession of collateral to retain it in satisfaction of obligation, 55 ALR 3d 651.

70A-9-506. Debtor's right to redeem collateral. At any time before the secured party has disposed of collateral or entered into a contract for its disposition under section 70A-9-504 or before the obligation has been discharged under section 70A-9-505 (2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorney's fees and legal expenses.

History: L. 1965, ch. 154, § 9-506.

Collateral References.

Secured Transactions ⇔ 241.

79 CJS Supp. Secured Transactions § 118.

69 AmJur 2d 550 to 559, Secured Transactions §§ 639 to 648.

Cross-References.

Compulsory disposition of collateral, 70A-9-505.

Secured party's right to dispose of collateral, 70A-9-504.

70A-9-507. Secured party's liability for failure to comply with this part.

- (1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.
- (2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the

type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

History: L. 1965, ch. 154, § 9-507.

Cross-References.

Obligation of good faith, 70A-1-203.

Secured party's right to dispose of collateral after default, 70A-9-504.

Title to collateral immaterial, 70A-9-202.

Deficiency judgment.

Secured party is barred from obtaining a deficiency judgment after a disposition, pursuant to 70A-9-504, of the property securing the debt where no notice of the disposition was given the debtor and the disposition was not conducted in a commercially reasonable manner. *FMA Financial Corp. v. Pro-Printers* (1979) 590 P 2d 803.

Disposition not made in commercially reasonable manner.

Secured party's disposition of the collateral was not made in a commercially reasonable manner, and secured party was liable to debtor for the value of debtor's equity in the

collateral, where secured party failed to give debtor notice of the disposition and sold the collateral for a price equal to the balance due on the promissory note when the fair market value of the collateral was more than four times that amount. *Maas v. Allred* (1978) 577 P 2d 127.

Failure to give notice of sale of collateral.

Failure by secured party to give debtor notice of time and place of sale of the collateral does not release debtor from his obligation to pay any deficiency debt still existing after the sale; but debtor can recover for any loss caused by the failure to so notify. *Zions First Nat. Bank v. Hurst* (1977) 570 P 2d 1031.

Collateral References.

Secured Transactions ⇐ 225, 242, 243.

79 CJS Supp. Secured Transactions § 119.

69 AmJur 2d 559 to 567, Secured Transactions §§ 647 to 653.

CHAPTER 10

EFFECTIVE DATE AND REPEALER

Section

70A-10-101. Effective date.

70A-10-102. Specific repealer — Provision for transition.

70A-10-103. General repealer.

70A-10-104. Laws not repealed.

70A-10-101. Effective date. This act shall become effective at midnight on December 31st, 1965. It applies to transactions entered into and events occurring after that date.

History: L. 1965, ch. 154, § 10-101.

70A-10-102. Specific repealer — Provision for transition.

(1) The following acts and all other acts and parts of acts inconsistent herewith are hereby repealed:

Uniform Negotiable Instruments Act, Title 44, U.C.A., 1953;

Uniform Warehouse Receipts Act, Title 72, U.C.A., 1953;
 Uniform Sales Act, Title 60, U.C.A., 1953;
 Uniform Stock Transfer Act, Title 16, chapter 3, U.C.A., 1953;
 Uniform Trust Receipts Act, Title 9, chapter 2, U.C.A., 1953;
 Title 9, chapter 1, U.C.A., 1953;
 Title 9, chapter 3, U.C.A., 1953;
 Title 25, chapter 2, U.C.A., 1953;
 Title 25, chapter 3, U.C.A., 1953;
 Title 25, chapter 4, U.C.A., 1953;
 Section 7-3-48; 7-3-49; 7-3-52; 7-3-63; 7-3-64; 7-3-65; 11-6-2; 56-1-23;
 56-1-24, U.C.A., 1953.

- (2) Transactions validly entered into before the effective date specified in section 70A-10-101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred.

History: L. 1965, ch. 154, § 10-102.

Cross-References.

Preservation of transition provision,
 70A-11-102.

70A-10-103. General repealer. Except as provided in the following section, all acts and parts of acts inconsistent with this act are hereby repealed.

History: L. 1965, ch. 154, § 10-103.

70A-10-104. Laws not repealed.

- (1) The chapter on Documents of Title (chapter 7) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (section 70A-1-201).
- (2) This act does not repeal Title 22, chapter 5, U.C.A., 1953, cited as the Uniform Act for the Simplification of Fiduciary Security Transfers, and if in any respect there is any inconsistency between that act and the chapter of this act on investment securities (chapter 8) the provisions of the former act shall control.

History: L. 1965, ch. 154, § 10-104.

CHAPTER 11

CORRECTED UNIFORM COMMERCIAL CODE — EFFECTIVE DATE AND TRANSITION PROVISIONS

Section

70A-11-101. Effective date.

- 70A-11-102. Preservation of old transition provision.
- 70A-11-103. Transition to corrected Uniform Commercial Code — General rule.
- 70A-11-104. Transition provision on change of requirement of filing.
- 70A-11-105. Transition provision on change of place of filing.
- 70A-11-106. Required refilings.
- 70A-11-107. Transition provisions as to priorities.
- 70A-11-108. Presumption that rule of law continues unchanged.

70A-11-101. Effective date. This act shall become effective at 12:01 a.m. on July 1, 1977.

History: C. 1953, 70A-11-101, enacted by L. 1977, ch. 272, § 40.

70A-11-102. Preservation of old transition provision. The provisions of 70A-10-102 (2) shall continue to apply to the corrected Uniform Commercial Code and for this purpose the old Uniform Commercial Code and corrected Uniform Commercial Code shall be considered one continuous statute.

History: C. 1953, 70A-11-102, enacted by L. 1977, ch. 272, § 41.

70A-11-103. Transition to corrected Uniform Commercial Code — General rule. Transactions validly entered into after December 31, 1965 and before July 1, 1977, and which are subject to the provisions of the old Uniform Commercial Code and which would be subject to this act as amended if they had been entered into after the effective date of the corrected Uniform Commercial Code and the rights, duties and interests flowing from such transactions remain valid after the latter date and may be terminated, completed, consummated or enforced as required or permitted by the corrected Uniform Commercial Code. Security interests arising out of such transactions which are perfected when the corrected Uniform Commercial Code becomes effective shall remain perfected until they lapse as provided in the corrected Uniform Commercial Code, and may be continued as permitted by the corrected Uniform Commercial Code, except as stated in section 70A-11-105.

History: C. 1953, 70A-11-103, enacted by L. 1977, ch. 272, § 42.

70A-11-104. Transition provision on change of requirement of filing. A security interest for the perfection of which filing or the taking of possession was required under the old Uniform Commercial Code and which attached prior to the effective date of the corrected Uniform Commercial Code but was not perfected shall be deemed perfected on the effective date of the corrected Uniform Commercial Code if the corrected Uniform Commercial Code permits perfection without filing or authorizes filing in the office or offices where a prior ineffective filing was made.

History: C. 1953, 70A-11-104, enacted by L. 1977, ch. 272, § 43.

70A-11-105. Transition provision on change of place of filing.

- (1) A financing statement or continuation statement filed prior to July 1, 1977 which shall not have lapsed prior to July 1, 1977 shall remain effective for the period provided in the old Uniform Commercial Code, but not less than five years after the filing.
- (2) With respect to any collateral acquired by the debtor subsequent to the effective date of the corrected Uniform Commercial Code, any effective financing statement or continuation statement described in this section shall apply only if the filing or filings are in the office or offices that would be appropriate to perfect the security interests in the new collateral under the corrected Uniform Commercial Code.
- (3) The effectiveness of any financing statement or continuation statement filed prior to July 1, 1977 may be continued by a continuation statement as permitted by the corrected Uniform Commercial Code, except that if the corrected Uniform Commercial Code requires a filing in an office where there was no previous financing statement, a new financing statement conforming to section 70A-11-106 shall be filed in that office.
- (4) If the record of a mortgage of real estate would have been effective as a fixture filing of goods described therein if the corrected Uniform Commercial Code had been in effect on the date of recording the mortgage, the mortgage shall be deemed effective as a fixture filing as to such goods under subsection (6) of section 70A-9-402 of the corrected Uniform Commercial Code on the effective date of the corrected Uniform Commercial Code.

History: C. 1953, 70A-11-105, enacted by L. 1977, ch. 272, § 44.

70A-11-106. Required refilings.

- (1) If a security interest is perfected or has priority when this act takes effect as to all persons or as to certain persons without any filing or recording, and if the filing of a financing statement would be required for the perfection or priority of the security interest against those persons under the corrected Uniform Commercial Code, the perfection and priority rights of the security interest continue until three years after the effective date of the corrected Uniform Commercial Code. The perfection will then lapse unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.
- (2) If a security interest is perfected when the corrected Uniform Commercial Code takes effect under a law other than the Uniform Commercial Code which requires no further filing, refiling or recording to continue its perfection, perfection continues until and will lapse three years after the corrected Uniform Commercial Code takes

effect, unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing, or unless under subsection (3) of section 70A-9-302 the other law continues to govern filing.

- (3) If a security interest is perfected by a filing, refiling or recording under a law repealed by this act which required further filing, refiling or recording to continue its perfection, perfection continues and will lapse on the date provided by the law so repealed for such further filing, refiling or recording unless a financing statement is filed as provided in subsection (4) or unless the security interest is perfected otherwise than by filing.
- (4) A financing statement may be filed within six months before the perfection of a security interest would otherwise lapse. Any such financing statement may be signed by either the debtor or the secured party. It must identify the security agreement, statement or notice (however denominated in any statute or other law repealed or modified by this act), state the office where and the date when the last filing, refiling or recording, if any, was made with respect thereto, and the filing number, if any, or book and page, if any, of recording and further state that the security agreement, statement or notice, however denominated, in another filing office under the Uniform Commercial Code or under any statute or other law repealed or modified by this act is still effective. Section 70A-9-401 and section 70A-9-103 determine the proper place to file such a financing statement. Except as specified in this subsection, the provisions of section 70A-9-403(3) for continuation statements apply to such a financing statement.

History: C. 1953, 70A-11-106, enacted by L. 1977, ch. 272, § 45.

70A-11-107. Transition provisions as to priorities. Except as otherwise provided in chapter 11, the old Uniform Commercial Code shall apply to any questions of priority if the positions of the parties were fixed prior to the effective date of the corrected Uniform Commercial Code. In other cases questions of priority shall be determined by the corrected Uniform Commercial Code.

History: C. 1953, 70A-11-107, enacted by L. 1977, ch. 272, § 46.

70A-11-108. Presumption that rule of law continues unchanged. Unless a change in law has clearly been made, the provisions of the corrected Uniform Commercial Code shall be deemed declaratory of the meaning of the old Uniform Commercial Code.

History: C. 1953, 70A-11-108, enacted by L. 1977, ch. 272, § 47.