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Symposium

THE NEBRASKA UNIFORM COMMERCIAL CODE:
AN INTRODUCTION AND ARTICLES 1 AND 2*

By William B. Davenport **

On July 5, 1963, the development of commercial law in Nebraska received a gigantic forward thrust—a thrust necessary to bring that development even with the jet age. On that date Governor Frank Morrison approved Legislative Bill No. 49 of the 73rd Session of the Nebraska Legislature enacting the Uniform Commercial Code. In one sweep of the pen¹ Nebraska had law (or would, in September, 1965,² have law) in areas where none has existed previously—either in statutory or decisional form, law which it had taken even the most important commercial states and the British common law jurisdictions hundreds of years to develop.

Drafting Bodies

The Uniform Commercial Code is undoubtedly the most monumental single piece of legislation ever conceived and drafted. It

*The author expresses his deep appreciation to the staff of the Nebraska Law Review for their cooperation and assistance in the preparation of this article. The author is indebted particularly to Mr. Vincent L. Dowding for his research of Nebraska decisions and statutes in the areas covered by this article. Without this invaluable assistance the author, a practicing Illinois lawyer, would never have sought to endeavor to tell Nebraska lawyers how the Uniform Commercial Code affected the law of their state in the covered areas. The opinions and conclusions expressed are solely those of the author.

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¹ The phrase, as used here, is probably only a figure of speech. Governors (like presidents) are noted for their use of a multiplicity of pens when it comes to signing bills embodying key legislation—in which category the Code clearly falls.

² Nebraska U.C.C. § 10-101. The Code will be published in a separate chapter and volume, which may be cited as follows: NEB. REV. STAT. §§ 90-1-101 to 90-10-104 (1964). The Code will be cited herein, *e.g.*, as U.C.C. § 1-105, except in the few instances where there is a Nebraska variation of the Uniform Code, in which instance the citation will read "Nebraska U.C.C."

was, so to speak, 18 years on the drawing boards—from the time of the original proposal of the idea of a comprehensive commercial code in 1940 by William A. Schnader, then president of the National Conference of Commissioners on Uniform State Laws, until the publication of the 1958 Official Text. The magnitude of the Code project was such that the National Conference requested and obtained the participation of the American Law Institute, the body which had proposed and promulgated the Restatements of the Law which have received such widespread acceptance by the courts. These two bodies are the joint draftsmen and sponsors of the Code.

Enactment by Majority of States

Nebraska became the 28th state to adopt the Code. By the time it becomes effective in Nebraska (September 2, 1965) it will have become the governing law in 27 other states and the District of Columbia. Undoubtedly it will also have been adopted by several more of the states, since the trend is to make it uniform in fact as well as in name.³ As was the case in several of the prior states in which the Code has been adopted, the Nebraska Legislature enacted the Code without a dissenting vote.⁴

Coverage

The panorama of the Code is the coverage of a commercial transaction involving any kind of personal property from beginning to end. Its scope will more fully appear from a perusal of this and subsequent articles in this symposium. Since the background of the Code has been adequately covered in prior legal literature, the writer will say no more other than to refer the interested reader to background articles.⁵

³ The court took judicial note of this trend in *Churchill Motors, Inc. v. A. C. Lohman, Inc.*, 16 App. Div. 2d 560, 563, 229 N.Y.S.2d 570, 574 (4th Dep't 1962).

⁴ The vote on final passage of the Code bill in the Nebraska Legislature was 28-0. Fifteen members did not vote. In Illinois the Code was passed by both houses of the General Assembly without a dissenting vote at any stage of the legislative proceedings. Other states in which the Code was enacted unanimously include Connecticut, Kentucky and Pennsylvania.

⁵ Schnader, *Pennsylvania and the Uniform Commercial Code*, 37 TEMP. L.Q. 265 (1964); Schnader, *The New Movement Toward Uniformity in Commercial Law—The Uniform Commercial Code Marches On*, 13 BUS. LAW. 646 (1958); Malcolm, *The Uniform Commercial Code: Review, Assessment, Prospect—November, 1959*, 15 BUS. LAW. 348 (1960).

Delayed Effective Date

The delayed effective date serves to give the banking and business community ample time in which to prepare to operate under the Code. The Nebraska Legislature, like those of Oregon and New York,⁶ has given more than ample time in this respect. Members of the Nebraska Bar, however, need not, and indeed should not, wait so long to become familiar with the Code. The Code is presently the governing law of twenty-one states,⁷ including several commercially important states. Undoubtedly numerous transactions of the clients of Nebraska lawyers will have a Code nexus. Further, it is not at all unlikely that the Supreme Court of Nebraska, as other courts have done, may apply to a pre-Code transaction a rule set forth in the Code either on the basis that the Code is a sound restatement of current commercial law or a declaration of current legislative policy.⁸ The Code represents

⁶In Oregon the Code bill was approved by the governor on June 2, 1961, and the Code became effective on September 1, 1963. In New York the Code bill was approved by the governor on April 18, 1962 and becomes effective September 27, 1964. The legislatures of the three states have thus delayed the effective date more than two years, longer than in any of the other 25 states which have enacted the Code. The purpose, of course, is to permit a subsequent session of the legislature to remove any defects that are discovered in the interim before the effective date.

⁷The twenty-one states in which the Code is presently effective are Alaska, Arkansas, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, West Virginia and Wyoming. The remaining jurisdictions, in addition to Nebraska, where it will take effect at later dates are California, District of Columbia, Maine, Missouri, Montana, New York, Virginia and Wisconsin.

⁸In *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817 (3rd Cir. 1951), the court applied a Code rule to a transaction in Delaware (which still has not adopted the Code) with the observation: "We think provisions of the Uniform Commercial Code which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatements, has the stamp of approval of a large body of American scholarship." *Id.* at 822, n.9.

In *Gresham State Bank v. O and K Constr. Co.*, 231 Ore. 106, 370 P.2d 726, 732 (1962), *clarified on rehearing*, 372 P.2d 187 (1962), the court followed a principle set forth in § 3-406 of the Code on the ground that it conformed "to the view taken, at least tentatively, by the 1961 Legislative Assembly in adopting [the Code] with a postponed effective date." The Code was also cited as authority for conclusions reached in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); and in *The Matter of Doughboy Indus., Inc. and Pantasote Co.*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1962).

current thinking in commercial law and is a body of law with which practitioners in all jurisdictions should be familiar, irrespective of whether it has been enacted or is the currently governing law.

Nebraska Variations from Uniform Code

The Nebraska Legislature adopted the 1958 Official Text of the Code with four intentional variations.⁹ Since publication of the 1958 Official Text by the joint sponsors, the Permanent Editorial Board¹⁰ has promulgated its Report No. 1 in 1962 recommending enactment of several uniform amendments. The sponsors of the Code have now published the 1962 Official Text, a consolidation of the 1958 Official Text and the amendments recommended in the 1962 Report of the Permanent Editorial Board.

Organization

One of the key assets of the Code is its organization. It is divided into ten articles. Each article, except 5, 6 and 10, is further subdivided into parts. Each article, part and section are appropri-

⁹ The intentional Nebraska variations from the 1958 Official Text are four in number: §§ 1-201(26), 9-302(3)(b), 9-401(1), and 9-403, which contains a subsection (6) not found in the Official Text.

¹⁰ On August 5, 1961, the joint sponsors of the Code created a Permanent Editorial Board for the Uniform Commercial Code for the purpose of expressing opinions on unauthorized amendments which had been incorporated in codes already enacted or proposing amendments suggested by its members or by others. Amendments may be approved and promulgated by the Board when

“(a) It has been shown by experience under the Code that a particular provision is unworkable or for any other reason obviously requires amendment; or

(b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt; or

(c) New commercial practices shall have rendered any provisions of the Code obsolete or have rendered new provisions desirable; or

(d) An amendment or a group of amendments would, in the opinion of the Board after investigation, lead to the wider acceptance of the Code by states which have not as yet enacted it, and would likely be enacted by those states which have already adopted the Code.”

In its REPORT No. 1, referred to in the text, the Board recommended uniform amendments to the 1958 Official Text of the Code, disapproved prior non-uniform amendments made in the various states, and amended the Official Comments to several sections. For further information on the work of the Board and current problems see Braucher, *The Uniform Commercial Code—A Third Look?*, 14 W. RES. L. REV. 7 (1962).

ately captioned. The first two numbers of each section refer respectively to the article and part in which the section may be found. Numerous parenthetical cross-references, both in the text of the Code and in the definitional cross-references in the Official Comments, make it relatively easy quickly to find the pertinent provision of the Code which the practitioner is seeking. The organization and content of the Code will appear in substantially complete range from this and subsequent articles in this symposium.

In the light of this comparatively brief background, it will be the purpose of this article to consider the content of Articles 1 and 2 of the Code and their impact upon prior Nebraska commercial law.

ARTICLE 1

GENERAL PROVISIONS

Article 1 coordinates and integrates the eight substantive Articles (2-9) into a code. A possible danger to the general practitioner is a tendency to overlook Article 1 by the very reason of its generality. The practitioner may feel that an article so entitled probably contains no more than a statement of purposes, rules of construction, general definitions and the like. Article 1 does contain these; but it also contains important rules of general application to commercial transactions which the practitioner cannot afford to overlook. Along with whatever article or articles the general practitioner may be working in his everyday practice under the Code,¹¹ he should be thoroughly familiar with Article 1.

For the greater part Article 1 represents a continuation of or an addition to pre-Code Nebraska commercial law. Only in two instances, apparently, are prior well settled rules reversed in Article 1.

Article 1 is divided into two parts entitled:

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

¹¹ The Articles which every general practitioner will meet regularly in his everyday practice are 2-Sales, 6-Bulk Transfers, and 9-Secured Transactions. Institutes on continuing legal education of the members of the bar have emphasized Articles 9 and 6 in that order as the "bread and butter" Articles. However, Article 2 is receiving, and properly, increased recognition as a "bread and butter" Article. The general practitioner will be concerned less frequently with problems under Articles 3 and 7 and part 4 of Article 4. Articles 3, 4, 5, 7 and 8 are of interest to lawyers for financial institutions in particular.

Part 2—General Definitions and Principles of Interpretation.

The Article thus contains general statements and rules of construction concerning the Code itself and general substantive rules applicable to transactions within the scope of the Code. For convenience the text will consider the Article under these latter two groupings.

General Statements and Rules of Construction

Article 1 contains the general provisions that one would expect to find in any Code: the title,¹² a statement of purposes,¹³ rules of construction,¹⁴ a severability provision¹⁵ and general definitions used throughout the Code.¹⁶

One of the purposes of the Code is to make uniform commercial law among the various jurisdictions.¹⁷ In view of the interpretation

¹² U.C.C. § 1-101. This is the convenient, short title by which the Code may be known rather than the lengthy title which appears at the beginning of all Code bills. While the Nebraska Constitution, in Article 3, § 14, provides, "No bill shall contain more than one subject, and the same shall be clearly expressed in the title," no constitutional problem under this clause is forecast. As have most other state courts of last resort, the Supreme Court of Nebraska has given the title provision a liberal construction. *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 203, 113 N.W.2d 63, 68-69 (1962). Perhaps the most liberal decision along this line is *Fidelity & Columbia Trust Co. v. Meek*, 294 Ky. 122, 171 S.W.2d 41 (1943) (constitutionality of single act revising all statute laws of Kentucky was sustained on ground that revision of all the statutes was a single subject).

¹³ U.C.C. § 1-102(2).

¹⁴ U.C.C. §§ 1-102(1), (4) and (5); 1-104 and 1-106. Section 1-102(4) eliminates concern over the use in numerous Code sections of the words "unless otherwise agreed" by providing that their absence does not imply that the effect of other provisions may not be varied by agreement under subsection (3) of the same section. Section 1-102(5) merely refers to construction matters of number and gender. Section 1-104 states a construction against implicit repeal of any part of the Code. The Nebraska Supreme Court has observed or held, in numerous cases, that repeals by implication are not favored. Illustrative are *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959); *Steeves v. Nispel*, 132 Neb. 597, 273 N.W. 50 (1937); and *Uttley v. Sievers*, 100 Neb. 59, 158 N.W. 373 (1916). The other sections are noted in subsequent text.

¹⁵ U.C.C. § 1-108. In *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 210, 113 N.W.2d 63, 72 (1962), the court gave full effect to a severability clause as an expression of legislative intent.

¹⁶ U.C.C. § 1-201, some of whose definitions are examined in subsequent text. See notes 27 through 48 *infra* and accompanying text.

¹⁷ U.C.C. §§ 1-101, 1-102(2).

of a similar command in the Uniform Sales Act by the Nebraska Supreme Court in *International Milling Co. v. North Platte Flour Mills, Inc.*,¹⁸ the practitioner can be fairly certain that the decisions of courts of last resort of other Code jurisdictions now on the books¹⁹ will be followed in Nebraska.

Among the rules of construction are the admonition that construction of the Code is to be liberal²⁰ and that the administration of remedies provided by the Code is to be liberal.²¹

An initial inquiry with respect to almost every statute is to what extent its provisions may be varied by agreement. One would expect to find, and does find, the answer in Article 1—in section 1-102(3), to be specific. This subsection provides that the effect of Code provisions may be varied by agreement²² (1) except as otherwise provided in the Code²³ and (2) except that the obligations of good faith, diligence, reasonableness and care prescribed by the Code may not be disclaimed by agreement but the parties may determine by agreement reasonable standards by which the per-

¹⁸ 119 Neb. 325, 328-29, 334, 229 N.W. 22, 23-24, 26 (1930). The court followed § 74 of the Uniform Sales Act (USA) in an exemplary manner.

¹⁹ At the date of this writing decisions of state courts of last resort under the Code exist only in Pennsylvania, Kentucky, Massachusetts and Rhode Island. These cases are surprisingly few in number. Indeed, except for the reporting of decisions of courts of original jurisdiction in Pennsylvania, the reported cases would be relatively few. In addition to state trial court decisions, even decisions of referees in bankruptcy in Pennsylvania, not reported in Federal Supplement except when adopted by the reviewing judge as the opinion of the court, are reported in some of the state County Reports. For example, the frequently cited case, *In re Newkirk Mining Co.*, 54 Berks Cy. L. J. 179 (1962), is a well known, unreviewed opinion of Referee Russell Hiller constituting a final decision of the United States District Court for the Eastern District of Pennsylvania.

²⁰ U.C.C. § 1-102(1).

²¹ U.C.C. § 1-106. The section also provides that "neither consequential or special nor penal damages may be had except as specifically provided in this Act, or by other rule of law."

²² In *International Milling Co. v. North Platte Flour Mills, Inc.*, 119 Neb. 325, 229 N.W. 22 (1930), the court upheld a stipulated damage provision in an action for the breach of a contract for the sale of flour in reliance upon USA § 71, which permitted the parties to negative or vary by express agreement (or by a course of dealing or custom) any writing, duty or liability arising under a contract to sell or a sale by implication of law.

²³ Limitations upon the power to vary include §§ 1-105(2), 1-208, 2-210(2), 2-302, 2-318, 2-718, 2-719(3), 4-103, 5-116(2), 9-318(4), 9-501(3).

formance of such obligations is to be measured. Further, when the Code requires action to be taken in a reasonable time, any time not manifestly unreasonable may be fixed by agreement.²⁴

Another section²⁵ establishes the Code as a "displacing" statute. Principles of law and equity supplement the Code provisions and apply to the transaction "unless displaced by" its "particular provisions."

The shortest section in the Code²⁶ makes section captions a part of the Code. Although this provision is somewhat novel, the Nebraska court has recognized that captions may be part of a statute.²⁷

Of key importance are the general definitions contained in section 1-201. Of these forty-six definitions, set forth in as many subsections, twenty-one are derived from prior uniform commercial acts²⁸ and to that extent continue prior Nebraska statutory law. The remaining twenty-five definitions are new. Some of these definitions, although contained in the general section, are primarily concerned with one, two or perhaps three articles and are considered in subsequent articles of this symposium dealing with the Article to which they primarily relate—*e.g.*, bill of lading,²⁹ docu-

²⁴ U.C.C. § 1-204(1).

²⁵ U.C.C. § 1-103.

²⁶ U.C.C. § 1-109.

²⁷ *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, 183 N.W. 92 (1921) (dictum).

²⁸ The seven prior uniform commercial acts were the Uniform Negotiable Instruments Law (NIL), Uniform Sales Act (USA), Uniform Warehouse Receipts Act (UWRA), Uniform Bills of Lading Act (UBLA), Uniform Stock Transfer Act (USTA), Uniform Conditional Sales Act (UCSA), and Uniform Trust Receipts Act (UTRA). All of these but the Uniform Bills of Lading Act and the Uniform Conditional Sales Act were adopted in Nebraska. The twenty-one definitions derived from these prior acts are the following (with parenthetical reference to the appropriate subsection in § 1-201): (1) action, (4) bank, (5) bearer, (6) bill of lading, (9) buyer in ordinary course of business, (13) defendant, (14) delivery, (15) document of title, (16) fault, (17) fungible, (19) good faith, (20) holder, (21) insolvent, (24) money, (30) person, (32) purchase, (33) purchaser, (37) security interest, (44) value, (45) warehouse receipt and (46) written. The prior counterparts of these definitions may be found in NIL § 191, NEB. REV. STAT. § 62-1,191 (Reissue 1958); USA § 76, NEB. REV. STAT. § 69-476 (Reissue 1958); UWRA § 58, NEB. REV. STAT. § 88-158 (Reissue 1958); USTA § 22, NEB. REV. STAT. § 21-222 (Reissue 1962); and UTRA § 1, NEB. REV. STAT. § 69-701 (Reissue 1958).

²⁹ U.C.C. § 1-201(6).

ment of title,³⁰ warehouse receipt,³¹ all of which are primarily concerned with Article 7; buyer in ordinary course of business,³² which is primarily concerned with Articles 2, 7 and 9; holder³³ and bearer,³⁴ which are primarily concerned with Articles 3, 7 and 8; and security interest,³⁵ which is the key term in Article 9.

The more important general definitions³⁶ include "conspicuous," "fungible," "notice," "knowledge," "notify" or "give a notice," "receive a notice," "organization," "person," "send" and "value."

The concept of conspicuousness³⁷ is that of a term or clause so written that a reasonable person against whom it is to operate ought to have noticed it. Certain statutory criteria are provided. A printed heading in capitals is conspicuous; language in the body of a form is conspicuous if in larger or other contrasting type or color. Any term in a telegram is conspicuous. Whether a term or clause is conspicuous is a question for the court.

The prior concept of fungibility—namely, that of goods or securities of which any unit is by nature or usage of trade the equivalent of any other like unit—is extended to include unlike units that are treated as equivalents by agreement.³⁸

³⁰ U.C.C. § 1-201(15).

³¹ U.C.C. § 1-201(45).

³² U.C.C. § 1-201(9).

³³ U.C.C. § 1-201(20).

³⁴ U.C.C. § 1-201(5).

³⁵ U.C.C. § 1-201(37).

³⁶ There is no intention to imply that any of the general definitions are not important. All are fundamental. The definitions not mentioned elsewhere in the text are the following (with parenthetical reference to the appropriate subsection in § 1-201): (2) aggrieved party, (3) agreement, (7) branch, (8) burden of establishing, (11) contract, (12) creditor, (18) genuine, (21) honor, (22) insolvency proceedings, (29) party, (31) presumption, (34) remedy, (35) representative, (36) rights, (39) signed, (40) surety, (41) telegram, (42) term and (43) unauthorized.

³⁷ U.C.C. § 1-201(10). The concept of conspicuousness finds roots in decisions where the courts have commented upon the fine print in or the misleading arrangement of forms in ruling against the party who had prepared them. For example, in *Cox v. Greenlease-Lied Motors*, 134 Neb. 1, 7, 277 N.W. 819, 822 (1938), the court in upholding a claim of breach of warranty, noted that a printed statement that the automobile was "sold under the standard warranty of the manufacturer and the purchaser hereby agrees that no other warranties have been expressed or implied" was "in finer print than the main part of the contract and was off to one side from the order."

³⁸ U.C.C. § 1-201(17).

The definitions of "notice" and "knowledge" and of giving or receiving a notice are of fundamental importance throughout the Code. A person has notice of a fact (a) when he has actual knowledge of it, (b) when he has received a notice or notification of it, or (c) when 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."³⁹ The terms "notice" and "knowledge" under the Code thus refer to actual notice, not constructive notice—such as might be imparted by the filing of a document for public record. A person notifies or gives a notice or notification to another by taking such steps as may reasonably be required to inform the other in ordinary course whether or not the other person actually comes to know of it or not.⁴⁰ A person receives a notice or notification (a) when 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 a place for receipt of such communications, (b) in the event notice or notification cannot be had pursuant to (a), when it is published at least once in a legal newspaper published in, or of general circulation in, the county where the transaction has its situs; or (c) when it comes to his attention.⁴¹ The alternative provision for publication in a legal newspaper is a Nebraska variation from the official text of the Code.⁴² Emphasis is at times given to the giving of notice and at other times to the receipt of notice.⁴³ Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual in the organiza-

³⁹ U.C.C. § 1-201(25).

⁴⁰ U.C.C. § 1-201(26), first sentence.

⁴¹ Nebraska U.C.C. § 1-201(26), second sentence.

⁴² The order of the second sentence of U.C.C. § 1-201(26) is rearranged and an additional provision is added in the Nebraska Code. Paragraph (b) of the Official Text appears as paragraph (a) in the Nebraska Code; and paragraph (a) of the Official Text as paragraph (c) of the Nebraska Code. Paragraph (b), respecting notice by newspaper publication, is an additional provision not in the Official Text. The reason for the variation is not clear to the author, but reportedly it was heavily supported by the Nebraska Press Association.

⁴³ See Official Comment 26 to U.C.C. § 1-201. Compare § 2-201(2) (written confirmation must be received within a reasonable time) with § 2-207(1) (written confirmation must be sent within a reasonable time); and § 6-105 (transferee must give notice of the transfer) with § 9-312(3)(b) (competing secured party financing inventory must have received notification of a subsequent purchase money security interest).

tion 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.⁴⁴ The definition "organization"⁴⁵ embraces every conceivable business entity of any kind. The term "person,"⁴⁶ which includes an individual or organization, is demonstrably all-inclusive.

The term "send"⁴⁷ in connection with any writing or notice refers to a deposit in the mail or to delivery for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed. The receipt of any writing or notice within the time at which it would have arrived if properly sent is given the effect of a proper sending.

The term "value"⁴⁸ is slightly expanded. Except as otherwise provided with respect to negotiable instruments and bank collections, 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 that credit is drawn upon, (b) as security for or in total or in partial satisfaction of a preexisting claim, (c) by accepting delivery pursuant to a preexisting contract for purchase, or (d) in return for any consideration sufficient to support a simple contract. Value is regarded as given in situation (c) by the conversion of a contingent obligation into a fixed one.⁴⁹

The general definitions apply throughout the Code with two qualifications: They are (1) subject to additional definitions in subsequent Articles which apply to specific Articles or Parts thereof, (2) unless the context otherwise requires.

General Rules Applicable to Code Transactions

In addition to rules of construction, general definitions and the other technical provisions contained in every comprehensive statute, Article 1 contains general substantive rules applying to all transactions encompassed by the Code.

Section 1-105 delineates the territorial application of the Code and the power of the parties to choose applicable law. Subsection

⁴⁴ U.C.C. § 1-201(27).

⁴⁵ U.C.C. § 1-201(30).

⁴⁶ U.C.C. § 1-201(28).

⁴⁷ U.C.C. § 1-201(38).

⁴⁸ U.C.C. § 1-201(44).

⁴⁹ Official Comment 44 to U.C.C. § 1-201.

(1) provides that when the transaction bears "a reasonable relation" to Nebraska and also to another state or nation, the parties may agree that the law of Nebraska or such other state or nation shall govern their rights and duties.⁵⁰ This provision is in accord with dicta in a prior Nebraska decision.⁵¹ Limitations upon the power of the parties to stipulate applicable law are set forth in subsection (2).⁵² These limitations primarily involve the rights of third parties affected by the transaction.⁵³ In the absence of express agreement the Code applies to transactions bearing "an appropriate relation" to Nebraska.⁵⁴

By reason of section 1-107 a 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 an "aggrieved party."⁵⁵ This section reverses a rule well established in Nebraska⁵⁶ and in most, if not all, other common law jurisdictions.

⁵⁰ This rule is generally recognized and applied. A recent application is *Consolidated Jewelers, Inc. v. Standard Financial Corp.*, 325 F.2d 31 (6th Cir. 1963). The contract, which had contacts with both Kentucky and New York, provided that New York law was to govern. The court enforced this choice. On the other hand, where the transaction has no apparent relation whatever to the jurisdiction whose law is chosen, the choice has been disregarded. *Owens v. Hagenbeck-Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937).

⁵¹ In *Farm Mortgage & Loan Co. v. Beale*, 113 Neb. 293, 295-96, 202 N.W. 877, 878 (1925), the court observed in dicta, "Where two or more parties, residing in different states, enter into a contract, it is competent for them to select the laws of either state to govern their contract."

⁵² The limitations are with respect to (1) rights of creditors against sold goods (§ 2-402), (2) applicability of Article 4 (§ 4-102), (3) bulk transfers subject to Article 6 (§ 6-102), (4) applicability of Article 8 (§ 8-106), and (5) policy and scope of Article 9 (§§ 9-102 and 9-103).

⁵³ See *Industrial Packaging Products Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 647, 161 A.2d 19, 21 (1960).

⁵⁴ The Massachusetts court followed this provision in applying the Massachusetts Code to a transaction having nexuses in both Massachusetts and Connecticut where the law of neither state had been selected by the parties. *Skinner v. Tober Foreign Motors, Inc.*, 187 N.E.2d 669 (Mass. 1963).

⁵⁵ U.C.C. § 1-201(2).

⁵⁶ The rule established by § 1-107 is clearly contrary to the holdings in *Selig v. Wunderlich Contracting Co.*, 160 Neb. 215, 69 N.W.2d 861 (1955), withdrawing on rehearing 159 Neb. 46, 65 N.W.2d 233 (1954), and *Swanson v. Madsen*, 145 Neb. 815, 18 N.W.2d 217 (1945). It is also contrary to the observation made in *Grimes v. Baker*, 133 Neb. 517, 523, 275 N.W. 860, 863 (1937).

An important change in the law of evidence in commercial litigation is wrought by section 1-202, which makes third party documents *prima facie* evidence. A document in due form purporting to be a bill of lading, a policy or certificate of insurance, an official weigher's or inspector's certificate, a consular invoice or any other document authorized or required by the contract in question to be issued by a third party is *prima facie* evidence of its own authenticity and genuineness and of the facts stated in the document by the third party. Under present Nebraska law an authenticating witness would be necessary to qualify the document for admission.⁵⁷ Of course, a party against whom a document in a Code transaction is introduced in evidence by reason of this section may introduce evidence tending to establish that the third party document is not what it purports to be or is not authentic in some respect, i.e., it is altered. In most cases, of course, the document will be authentic; and to the extent this Code provision permits its introduction without the necessity of an authenticating witness, it reduces the expense of commercial litigation.

The obligation of good faith in performance or enforcement of every contract or duty within the scope of the Code is imposed by section 1-203. In addition, under Article 2⁵⁸ a merchant's duty of good faith means "honesty in fact and observance of reasonable commercial standards of fair dealing in the trade."

What is reasonable and seasonable with respect to time is established by section 1-204. A reasonable time for taking any action depends upon the nature, purpose and circumstances of the action.⁵⁹ An action is taken "seasonably" when it is taken at or within the agreed time or, if no time is agreed, at or within a reasonable time.⁶⁰

Section 1-205 defines a course of dealing and usage of trade, provides that they supplement the terms of the agreement within described limitations and establishes rules of construction. A course of dealing is a sequence of previous conduct between the parties to a particular transaction fairly to be regarded as establishing a common basis of understanding for interpreting their expressions

⁵⁷ See *Imhoff v. Richards*, 48 Neb. 590, 596, 67 N.W. 483, 485 (1896) (proper foundation must be laid for introduction of memorandums); NEB. REV. STAT. § 25-12,109 (Reissue 1956) (record of act, condition or event is competent evidence if custodian testifies to its identity and mode of preparation).

⁵⁸ U.C.C. § 2-104(1) (b).

⁵⁹ U.C.C. § 1-204(2). Accord, *Ansbacher-Siegle Corp. v. Miller Chem. Co.*, 137 Neb. 142, 288 N.W. 538 (1939).

⁶⁰ U.C.C. § 1-204(3).

and other conduct in the transaction in question.⁶¹ It is distinguished from a course of performance under the contract (or transaction) in question.⁶² The term "usage of trade," used but not defined in the Uniform Sales Act,⁶³ refers to a practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify the expectation that it will be observed with respect to the transaction in question.⁶⁴ The existence and scope of the usage are to be established as facts. The express terms of an agreement and an applicable course of dealing or usage of trade are to be construed wherever reasonable as consistent with each other; but in the event of conflict, express terms control both course of dealing and usage of trade, and course of dealing prevails over usage of trade.⁶⁵ An applicable usage of trade in the locality of part of the performance is used in interpreting the agreement as to that part.⁶⁶ The section also establishes a procedural requirement in commercial litigation in that evidence of a relevant usage of trade offered by one party is inadmissible unless he has given the other party fair advance notice thereof.⁶⁷ This important section both continues and supplements prior Nebraska law.⁶⁸

A residual statute of frauds is contained in section 1-206. It covers all kinds of personal property not covered elsewhere. However, because of the virtually complete coverage of the subject matter by sections 2-201 (goods), 8-319 (investment securities) and 9-203 (secured transactions), section 1-206 will probably have only infrequent application.

By reason of section 1-207 performance of duties or an acceptance of performance may be done under a reservation of rights by a party who, with explicit reservation of rights, performs or

⁶¹ U.C.C. § 1-205(1).

⁶² U.C.C. § 2-208. See Official Comment 2 to § 1-205.

⁶³ The term is used in USA §§ 15(5), 18(2) and 44(4). However, Uniform Sales Act § 71 employs the term "custom."

⁶⁴ U.C.C. § 1-205(2).

⁶⁵ U.C.C. § 1-205(4). In accord as to express terms controlling usage of trade (custom) is *James Poultry Co. v. Nebraska City*, 135 Neb. 787, 284 N.W. 273 (1939), *rehearing denied and opinion supplemented* 136 Neb. 456, 286 N.W. 337 (1939).

⁶⁶ U.C.C. § 1-205(5).

⁶⁷ U.C.C. § 1-205(6).

⁶⁸ The rules stated in the section are in accord with *Frankel v. Pitlor*, 166 Neb. 219, 88 N.W.2d 770 (1958); *Andrews v. Dehner*, 147 Neb. 641, 24 N.W.2d 649 (1946); and *James Poultry Co. v. Nebraska City*, 135 Neb. 787, 284 N.W. 273 (1939), *rehearing denied and opinion supplemented*, 136 Neb. 456, 286 N.W. 337 (1939).

promises performance or assents to performance in a manner demanded or offered by the other party. Words like "without prejudice" or "under protest" are statutory examples of sufficiency.

Finally, in section 1-208, Article 1 deals in general terms with the "insecurity clause," which is frequently found in promissory notes, security agreements and the like. A term that one party may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" means that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. This provision embodies the rule followed in pre-Code Nebraska decisions.⁶⁹ However, the burden of establishing a lack of good faith is upon the party against whom the power has been exercised.

ARTICLE 2

SALES

Article 2 replaces the Uniform Sales Act, adopted in Nebraska in 1921.⁷⁰ The Sales Act, as it is frequently referred to, was promulgated by the National Conference of Commissioners on Uniform State Law in 1906. The law which it codified was of an earlier period.⁷¹ Article 2 modernizes the Sales Act—i.e., it brings sales law into tune with present commercial practices and standards and, in the process, expands the content of the Sales Act by more than one half.⁷²

⁶⁹ *Flinn v. Fredrickson*, 89 Neb. 563, 131 N.W. 934 (1911); *NewLean & Hoard v. Olson*, 22 Neb. 717, 36 N.W. 155 (1888). In *Flinn v. Fredrickson*, *supra*, 89 Neb. at 566, 131 N.W. at 935, the court commented: "When he saw the automobile rolling out of his garage with plaintiff in possession, he suddenly felt 'unsafe and insecure,' and rushed out, committed an assault, and took the property. The insecurity clause was never intended to serve such an unreasonable and arbitrary purpose. There must be a cause for feeling insecure."

⁷⁰ NEB. REV. STAT. §§ 69-401 to 69-478 (Reissue 1950). Hereinafter, statutory references will be only to the pertinent section of the Uniform Sales Act—e.g., USA § 76.

⁷¹ See *State of New Jersey Study of the Uniform Commercial Code* 19 (1960). Professor William D. Hawkland, now Dean of the Buffalo School of Law, was the Director of the New Jersey Study and the author of, among other Articles, the comments, on Article 2.

⁷² The Uniform Sales Act contains seventy-nine sections. Of these, fourteen (§§ 27 through 40) pertain to documents of title. These sections are assimilated along with corresponding sections of the Uniform Bills of Lading Act (UBLA) and the Uniform Warehouse Receipts Act (UWRA) in Article 7. Article 2 thus expands the sixty-four sections of the Uniform Sales Act (USA) into 104.

Article 2 proceeds from the premise that sales are laymen's transactions⁷³ and that sales contracts which businessmen reasonably believe they have made with each other should be enforced irrespective of technical common law approaches. While Article 2 is primarily a change of approach or emphasis, it does make some important changes in the law, particularly in the area of contract formation—i.e., offer and acceptance, statute of frauds and consideration. For the most part, however, Article 2 will be principally a continuation of and supplement to existing Nebraska statutory sales law.

Perhaps the most remarkable fact, apparent to one leafing through the pages of the Code, is the length of Article 2. It constitutes more than a quarter of the Code—both from the standpoint of number of sections and of textual content. Article 2 is divided into seven parts: (1) 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.

This organization seems logical and will be followed by the writer in the ensuing discussion. This article can, because of space limitations, consider only the areas of relative importance, while calling attention to other areas. In its course, the article will note most of the more important changes from pre-Code Nebraska law.⁷⁴

(1) GENERAL CONSTRUCTION AND SUBJECT MATTER

Article 2 applies to transactions in goods.⁷⁵ It does not apply to investment securities, which are governed by Article 8, or secured transactions which are governed by Article 9. Article 2 does not repeal or in any wise impair any statute regulating sales to consumers, or any other statute regulating sales to farmers or other designated classes of buyers.⁷⁶

⁷³ Weeks, *Uniform Commercial Code: Article 2—Sales*, 50 ILL. B.J. 494 (1962); Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORNELL L.Q. 1, 2 (1962); see Official Comment to U.C.C. § 2-101.

⁷⁴ The writer cannot, and does not intend within these space limitations to deal exhaustively with all changes in Nebraska sales law. The important changes, of which the practitioner should be mindful, are discussed.

⁷⁵ U.C.C. § 2-102.

⁷⁶ U.C.C. § 2-102.

Definitions

Part 1 of Article 2 supplies definitions applicable to Article 2.⁷⁷ In addition to the fundamental ones of buyer and seller, the terms "goods," "future goods," "sales of part interest," "contract for sale," and "sale" are defined substantially as they were in the Sales Act with one exception.⁷⁸ "Future goods" under the Sales Act were goods manufactured or acquired by the seller after the making of a contract.⁷⁹ Under the Code goods are "future goods" even though the seller may have them in stock at the time of the contract if they are not "identified."⁸⁰

An important innovation of the Code is its distinction between merchant and non-merchant. Merchant is defined as a person who deals in goods of a kind, or otherwise by his occupation holds himself out as having a 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 one holding himself out as possessing that knowledge or skill.⁸¹ The special provisions regarding merchants are confined to Article 2. They are of three kinds: (1) those dealing with problems of contract formation and contract content, which rest on normal business practices and procedures; (2) those dealing with warranties, such as the warranty of merchantability, which is implied only "if the seller is a merchant with goods of that kind;" and (3) those sections applying to persons who are merchants either under the "practices" or the "goods" aspect of the definition of merchant.⁸² The term

⁷⁷ These definitions are, of course, supplemental to the general definitions continued in U.C.C. § 1-201.

⁷⁸ These terms are defined in U.C.C. §§ 2-105 and 2-106. They were defined in USA §§ 1, 6 and 76.

⁷⁹ USA § 76(1).

⁸⁰ U.C.C. § 2-105(2). The term "identified" is defined in U.C.C. § 2-501.

⁸¹ U.C.C. § 2-104(1). The Code concept of a merchant seems to be in line with the observation concerning the parties made by the court in *Richardson v. Waterite Co.*, 169 Neb. 263, 271, 99 N.W. 2d 265, 272 (1959): "It must be noted that both Perkins and Waterite had been engaged in the manufacture and sale of vacuum diatomite filters for swimming-pool use before the contract was entered into. Perkins was an expert in the field and Waterite also had capable engineers and water-filter experts among its officers and employees. Waterite was thoroughly familiar with the design, construction, and function of the Perkins filter, it having manufactured and sold a limited number of such filters before it entered into the contract."

⁸² Official Comment 2 to § 2-104. The practitioner dealing with any part of the Code should be familiar with the Official Comments. They provide valuable, if not indispensable, interpretative background.

"between merchants" is one which applies to a transaction with respect to which both parties are chargeable with the knowledge or skill of "merchants."⁸³

The term "receipt of goods," meaning "taking physical possession of the goods," is a new one.⁸⁴ It is important in the instances, among others, of the buyer's obligation to pay for the goods and of risk of loss in the case of a merchant-seller.⁸⁵

Additional definitions include "financing agency," which includes a bank or other person who by arrangement with either party intervenes in the normal course of commerce between persons who are in the position of buyer and seller with respect to the goods;⁸⁶ "lot," a new definition, meaning a single article which is the subject matter of a separate sale or delivery, whether or not sufficient to perform the contract;⁸⁷ "commercial unit," also a new definition, meaning a unit of goods which by commercial usage is a single whole for purposes of sale and division of which materially impairs its value on the market or in use;⁸⁸ and "termination" and "cancellation," the former of which occurs pursuant to a power created by agreement otherwise than for breach, and the latter of which occurs when either party ends a contract for a breach by the other.⁸⁹

Goods Severed From Realty

Article 2 also covers the subject of goods to be severed from the realty—e.g., timber, minerals or the like, or a structure or its materials. A contract for the sale of one of these is a contract for the sale of goods within Article 2 if they are to be severed by the

⁸³ U.C.C. § 2-104(3).

⁸⁴ U.C.C. § 2-103(1) (c).

⁸⁵ Under U.C.C. § 2-310(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. Thus under an "F.O.B. point of origin" term, the place of shipment usually is the place of delivery, but the buyer's obligation to pay is at the point of destination, where he is to receive the goods. This affords the buyer his preliminary right of inspection. See Official Comment 1 to § 2-310. Under § 2-509(3) the risk of loss is upon a merchant seller until the buyer receives the goods.

⁸⁶ U.C.C. § 2-104(2).

⁸⁷ U.C.C. § 2-105(5).

⁸⁸ U.C.C. § 2-105(6). Illustrations of commercial units are given—e.g., a single article (as a machine); a set of articles (as a suite of furniture or an assortment of sizes); a quantity (as a bale, gross or carload); or any other unit treated in use or in the relevant market as a unitary whole.

⁸⁹ U.C.C. §§ 2-106(3), (4).

seller. However, 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.⁹⁰ If the buyer is to sever, however, the contract is considered as one affecting the real estate, and all the rules applicable thereto govern. In the case of crops or other things attached to the realty and capable of severance without material harm thereto, however, the contract is one for the sale of goods within Article 2 whether severance is to be effected by the buyer or the seller, even though it forms part of the realty at the time of contracting.⁹¹ The provisions of the Code section covering sales of items attached to the realty are subject to rights of any third party provided by the law relating to realty records. If a written contract for sale is executed, it may be recorded as a document transferring an interest in land and from that point on constitutes notice to third parties of the buyer's rights under the contract for sale.⁹²

(2) FORM, FORMATION AND READJUSTMENT OF CONTRACT

The greatest change in the law of sales under the Code is contained in the area of contract formation—an area which the Uniform Sales Act did not occupy, but rather left to the common law. Article 2 reverses several of the more technical common law rules of contract formation because they are not in tune with the current practices of businessmen.

A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract.⁹³ Also an agreement sufficient to constitute a contract for sale may be found even

⁹⁰ The rule is recognized in Nebraska that the removal of minerals is the removal of a component part of real estate itself. While the severance changes the character of the property, it remains real estate until detached. *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918).

⁹¹ The parties can by identification effect a present sale thereof before severance. This appears to be in accord with pre-Code Nebraska decisional law, which treats annual crops growing on land as personalty. *Miles v. Prudential Ins. Co. of America*, 136 Neb. 46, 285 N.W. 90 (1939).

⁹² This section will supplement other Nebraska statutes dealing with the recording of contracts affecting timber, minerals and the like. See, e.g., NEB. REV. STAT. § 57-208 (Reissue 1960), which deals with recording of oil, mineral or gas leases.

⁹³ U.C.C. § 2-204(1). This rule is followed or recognized in Nebraska decisions. See, e.g., *Bendfeldt v. Lewis*, 149 Neb. 107, 30 N.W.2d 293 (1948); *Citizens State Bank v. State Bank of Oelrichs*, 111 Neb. 571, 197 N.W. 607 (1924).

though the precise moment of its making cannot be determined.⁹⁴ A contract does not fail for indefiniteness even though one or more terms are left open, provided the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.⁹⁵

Offer-Acceptance

Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract is construed as inviting an acceptance in any manner and by any medium reasonable in the circumstances.⁹⁶ As before the Code, the offeror can still specify the means of acceptance.⁹⁷ If he does, his intention is clearly, not ambiguously, evidenced.

Occasionally an offer may request performance from an offeree as a mode of acceptance. Circumstances may be such that the offeror will not know of the offeree's commencement of performance and, therefore, his acceptance. Under the Code an offeror in this situation who is not notified of acceptance within a reasonable time may treat the offer as having lapsed.⁹⁸

⁹⁴ U.C.C. § 2-204(2). This may occur where an offer is accepted by an act or acts of the offeree.

⁹⁵ U.C.C. § 2-204(3). The rule of this subsection was stated and applied in *Falstaff Brewing Corp. v. Iowa Fruit & Produce Co.*, 112 F.2d 101 (8th Cir. 1940), which held that a contract of sales agency (rather than one of sale) was not void for indefiniteness by reason of the absence of a definite quantity in the contract.

⁹⁶ U.C.C. § 2-206(1)(a). Thus, as observed in *Anderson v. Stewart*, 149 Neb. 660, 32 N.W.2d 140 (1948), an offer by mail implies authority to communicate the acceptance by mail. Under the Code an acceptance by telegram would also be sufficient.

Paragraph (b) of § 2-206(1) deals with a situation of an order or offer to buy goods for prompt or current shipment. The offer is construed as inviting acceptance either by a prompt promise to ship or by the prompt shipment of conforming or non-conforming goods. However, a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation. Otherwise, the shipment of non-conforming goods constitutes both an acceptance and a breach.

⁹⁷ The Code in no way impinges upon the freedom of the offeror with respect to the conditioning of his offer as recognized in *Kline v. Metcalfe Constr. Co.*, 148 Neb. 357, 361-62, 27 N.W.2d 383, 386 (1947).

⁹⁸ U.C.C. § 2-206(2). In *Standard Oil Co. v. O'Hare*, 126 Neb. 11, 252 N.W. 398 (1934), the court noted the distinction with respect to communication of acceptance as between offers that ask that the offeree do something and those that ask that he promise something, observing that communication was necessary in the latter instance. The Code obliterates the distinction to the extent indicated.

Acceptance Containing Additional or Different Terms

A key section of Article 2 deals with the subjects both of contract formation and of contract content where the parties exchange forms containing additional or conflicting terms.⁹⁹ A "definite and seasonable expression of acceptance" operates as an acceptance even though it states terms additional to or different from those offered, unless acceptance is "expressly made conditional" on assent to the additional or different terms. Prior Nebraska common law,¹⁰⁰ as well as the prior common law of most, if not all, English common law jurisdictions, is changed by this key Code section. Under prior common law an acceptance repeating the terms of an offer was required to match those terms precisely.¹⁰¹

The Code thus treats an acceptance merely containing additional or different terms as an ambiguous acceptance and visits the consequences of the ambiguity upon the offeree by holding him to an acceptance. The offeree, of course, removes the ambiguity where he expressly conditions the acceptance by saying, for example, "I accept the offer upon the express condition that you agree to the following additional [or substitute] terms." An acceptance of this tenor is the Code's counter-offer, which in turn requires an acceptance for formation of a contract.

Having answered the question of contract formation, section 2-207 next answers the question of contract content. As between non-merchants, the additional terms never become part of the contract unless and until the recipient of the acceptance agrees to them. As between merchants, however, the additional terms may become part of the contract by a mere failure to object to them within a reasonable time after receipt of the acceptance. The additional terms do *not* become part of the contract in any of the following three situations: (a) if the offer expressly limited acceptance to the terms of the offer, (b) if the additional terms

⁹⁹ U.C.C. § 2-207. This is one of the problems dealt with by the section. The section is not confined to printed form offers (or orders), acceptances and confirmations.

¹⁰⁰ The Nebraska rule of general contract law is evidenced by statements in the following decisions: *Frankel v. Pitlor*, 166 Neb. 219, 88 N.W.2d 770 (1958); *Anderson v. Stewart*, 149 Neb. 660, 32 N.W.2d 140 (1948); *Kline v. Metcalfe Constr. Co.*, 148 Neb. 357, 27 N.W.2d 383 (1947).

¹⁰¹ This rule has been referred to as the "mirror image", apparently upon the notion that the acceptance was required to rule the terms of the offer precisely. See Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORNELL L. Q. 1, 44 (1962).

would materially alter the contract so formed, and (c) if notice of objection has already been given to them or is given to them within a reasonable time after notice of them is received. The "different" term in the acceptance does not become part of the contract.¹⁰²

Written Confirmations

In addition to the offer-acceptance situation, section 2-207 also covers the written confirmation situation. The written confirmation situation is one in which the parties have made a verbal agreement, generally one within the statute of frauds, and exchanged confirmations reciting the terms of the verbal agreement.¹⁰³ Confirmations (whether on printed forms or not) frequently contain terms additional to those discussed in the conversation resulting in the verbal agreement. The problem here is primarily one of contract content, not contract formation (except as "formation" is used in the sense of "validation"). The recipient of the confirmation must, like the recipient of the acceptance containing additional terms, object within a reasonable time after notice of the additional terms is received. The additional terms in the confirmation (i.e., the terms not discussed in the conversation resulting in the verbal agreement) that differ (i.e., conflict) presumably cancel each other, since each seems notice of objection to the other's term. The term "acceptance" is also used with respect to the written confirmation, but it seems clear that "acceptance" in this connection refers to formation in the sense of validation.¹⁰⁴ The written confirmation must be sent within a reasonable time after the verbal agreement.¹⁰⁵

Finally, section 2-207 specifically covers the situation where the parties may exchange forms (offer and acceptance or con-

¹⁰² The word "different" is omitted from subsection (2) of § 2-207, undoubtedly for the reason that the presence of a conflicting term in the offer constitutes a prior notice of objection under (2) (c). See Official Comment 6 to § 2-207.

¹⁰³ An illustration of crossing written confirmations is found in *Morris Asinof & Sons v. Freudenthal*, 195 App. Div. 79, 85, 186 N.Y. Supp. 383, 387 (1921), *aff'd*, 233 N.Y. 564, 135 N.E. 919 (1922).

¹⁰⁴ See *In the Matter of Doughboy Indus., Inc., and Pantasote Co.*, 17 App. Div. 2d 216, 219, 233 N.Y.S.2d 488, 492 (1962).

¹⁰⁵ U.C.C. § 2-207(1). For purposes of the statute of frauds, § 2-201(2), the confirmation must also be "received" within a reasonable time. The terms "receive" and "send" are defined respectively in U.C.C. § 1-201(26) and (38). Thus, by clear implication a written confirmation sent an unreasonable time after the making of the verbal agreement would not be an "acceptance" under § 2-207 or a "writing" under § 2-201(2).

firmation) with conflicting terms which neither party bothers to read until a dispute arises in the course of performance—i.e., after conduct by both parties recognizing a contract has occurred. In this case the terms of the particular contract consist of those terms on which the writings on the parties agree, together with any other supplementary terms incorporated by any other provision of the Code.¹⁰⁶

The Code, in section 2-207, provides blanket coverage of the problems involved in the exchange of offers and acceptances and confirmations (whether on printed forms or not) which do not match and thereby attempts to solve many of the knotty problems which have plagued the courts for years.

Statute of Frauds

The Code statute of frauds, section 2-201, effects several changes from pre-Code law.

For one thing, it lessens considerably the requirements of section 4 of the Uniform Sales Act as interpreted in prior Nebraska decisions—namely, that the memorandum itself contain every essential term of the contract to be enforced.¹⁰⁷ Section 2-201 requires only (1) that there be a writing sufficient to demonstrate the existence of a real transaction; (2) that the writing be signed by the party against whom it is sought to be enforced or his duly authorized agent; and (3) that the writing state a quantity.¹⁰⁸ The omission or misstatement of a term does not render the writing insufficient except that the contract is not enforceable beyond the quantity stated in the memorandum.

Also, section 2-201 substitutes the objective term “price” for the subjective term “value” in the Uniform Sales Act, although the amount, 500 dollars, is retained.

An important, and very desirable, change in the law is effected in section 2-201(2). As between merchants,¹⁰⁹ if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the receiving party

¹⁰⁶ U.C.C. § 2-207(3). This includes those terms incorporated under § 2-207(1), (2).

¹⁰⁷ Under the Nebraska Uniform Sales Act the memorandum was required to contain every essential term that was the subject of express agreement. *Ord v. Benson*, 163 Neb. 367, 370, 79 N.W.2d 713, 715 (1956).

¹⁰⁸ The quantity term is the heart of the sales contract under the Code. See notes 120 and 121 *infra* and accompanying text.

¹⁰⁹ See note 81 *supra*.

has reason to know its contents, the writing satisfies the requirements of a memorandum under subsection (1) against the recipient unless written notice of objection to its contents is given within ten (10) days after its receipt.¹¹⁰ In theory the only effect of the failure of the recipient to object to the writing is that he is deprived of the right to plead the statute of frauds in defense. He can still deny the making of the contract; and if he does, the sender of the written confirmation must still satisfy the trier of fact of the existence of the contract. If the recipient does object, however, the sender is forewarned of his intention to plead the statute of frauds and can thereby avoid the expense of performance.

Exceptions to the requirement of the statute of frauds are likewise established. The exception in favor of specially manufactured goods contained in the Sales Act is continued with modifications. The statute of frauds is also unavailable if the defendant admits the making of the contract in a pleading or in testimony, but only to the extent of the quantity admitted. The final exception represents a substantial change in the law, including prior Nebraska decisional law.¹¹¹ This exception validates part payment or part acceptance only to the extent thereof. No longer can a part payment or a part acceptance validate a claim for a larger quantity.¹¹²

Parol Evidence Rule

The Code also carves out another area previously occupied by the common law—the parol evidence rule in contracts of sale. The Code's rule, contained in section 2-202, is an inversion of the rule commonly stated in several Nebraska decisions.¹¹³ Terms with

¹¹⁰ The result reached in *J. H. Teasdale Comm'n. Co. v. Keckler*, 84 Neb. 116, 120 N.W. 955 (1909), a pre-Sales Act case, could be sustained under the Code. The merchant, who had received two confirmations (one from the grain broker and one from his principal), made no objection to them until the time for performance, when he made a partial shipment only. The partial shipment was held to take the contract out of the statute of frauds. Absent the written confirmations the result of the case would be reversed by U.C.C. § 2-201(3)(c).

¹¹¹ See note 110 *supra*.

¹¹² U.C.C. § 2-201(3)(c). Acceptance or payment as to the part is still necessary under the Code to validate the contract as to that part, as it was under the Sales Act. *Benes v. Reed*, 158 Neb. 128, 62 N.W.2d 320 (1954) (no allegation of payment or acceptance of cornpicker).

¹¹³ The rule is typified by decisions of the tenor of *Glass v. Nebraska State Bank*, 175 Neb. 673, 122 N.W.2d 882 (1963), involving a dispute between a bank and its customer. Under the rule stated in Nebraska decisions, of which this recent one is typical, the presumption that the

respect to which the writings of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement may not, with respect to the terms that are included therein, be contradicted by evidence of any prior or contemporaneous oral agreement. These terms may, however, be explained or supplemented by a course of dealing, a usage of trade or a course of performance and also by evidence of *consistent* additional terms unless the court finds the writing to have been intended as a "complete and exclusive statement of the terms of the agreement."

Seals-Effect

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 for purposes of the law dealing with sealed instruments.¹¹⁴

Consideration-Removal of Its Necessity in Two Instances

The Code also launches attacks upon the doctrine of consideration in two important situations in which the practice of the business world runs contrary to the course of the common law. The first is the situation of a "firm offer" by a merchant.¹¹⁵ 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 stated time or if no time is stated, within a reasonable time. In no event may the period of irrevocability exceed three months.¹¹⁶ The second situation is that of an

whole agreement of the parties was included in the writing is made to depend upon an inspection of the writing. Under § 2-202 it depends upon other circumstances as well, and the writing may be supplemented by consistent additional terms unless the court finds that the parties intended the writing as a complete and exclusive statement of the agreement. A "merger clause",—i.e., a recital that there is no subject matter of agreement not contained in the document—would be evidence of the parties' intention. See *Cox v. Greenlease-Lied Motors*, 134 Neb. 1, 277 N.W. 819 (1938). It would not, however, necessarily be conclusive. *Air Conditioning Corp. v. Honaker*, 296 Ill. App. 221, 16 N.E.2d 153 (1938).

¹¹⁴ U.C.C. § 2-203.

¹¹⁵ U.C.C. § 2-205. Consideration was required in the case of a "firm offer" by a merchant before the Code. *Poposia Coal Co. v. Nye-Schneider-Fowler Co.*, 106 Neb. 4, 182 N.W. 586 (1921); see *Moise & Co. v. Rock Springs Distilling Co.*, 79 Neb. 124, 112 N.W. 372 (1907).

¹¹⁶ On the facts of *Poposia Coal Co. v. Nye-Schneider-Fowler Co.*, *supra* note 115, a different result might be reached under § 2-205, since the firm offer (or firm price list, although the court did not regard it as such) was accepted within three months.

agreement modifying a sales contract,¹¹⁷ an example of which is that of an agreement reducing the price at which the goods were to be purchased.

Readjustment of Contract: Modification and Assignment

The final two sections of part 2 are concerned with the subject of modification of the original sales contracts by (1) a change in terms of the contract (by modification, rescission or waiver) and (2) change in parties (through assignment or delegation of performance, where permissible).¹¹⁸

(3) GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

As stated in section 2-301, the obligation of the seller is to transfer and deliver the goods and the obligation of the buyer is to accept and pay for them in accordance with the contract. The remainder of part 3, which deals with the principal terms of the sales contract, enlarges these general obligations.

The principal terms¹¹⁹ of a contract of sale are the quantity term, the price term, the delivery term, the payment term and the warranty term.

Quantity

The quantity term must be supplied by the parties expressly.¹²⁰ All other terms can, if necessary, probably be supplied by the Code. That is not to say that it is desirable for businessmen to enter into agreements containing only a quantity term, but is to say that it is conceivable that such an agreement is capable of enforcement.¹²¹

¹¹⁷ U.C.C. § 2-209(1). The rule under this does not change the rule under prior Nebraska decisional law as to modifications in the agreement made before breach, but would change the rule as to modifications made after breach. *Selig v. Wunderlich Contracting Co.*, 160 Neb. 215, 69 N.W.2d 861 (1955); *Moore v. Markel*, 112 Neb. 743, 201 N.W. 147 (1924).

¹¹⁸ U.C.C. §§ 2-209 and 2-210.

¹¹⁹ "Term" is defined in § 1-201(42) as "that portion of an agreement which relates to a particular matter."

¹²⁰ As previously noted (note 108 *supra*), the quantity term is the heart of the sales contract. The quantity is usually stated in terms of a definite amount or number of units except in the case of a requirements, an output or an exclusive dealing contract (§ 2-306), where elasticity is necessarily permissible.

¹²¹ In the case of an agreement stating only a quantity term it is conceivable that the agreement can be enforced with other provisions of part 3 supplying the missing terms: e.g., price (§ 2-305), time of delivery (§ 2-309), single delivery (§ 2-307), place of delivery (§ 2-308), payment (§ 2-310), and warranty (§ 2-314).

Price

As under the Sales Act, the price may be payable in money or property.¹²² If the price is payable in whole or in part in goods, each party is the seller of his own goods. A change from prior law is that the Code applies in transfers involving a sale of goods in which all or part of the price is payable in an interest in realty. The Sales Act did not apply at all if the transfer of an interest in realty constituted the whole or any part of the consideration.¹²³

In accordance with pre-Code Nebraska decisional law,¹²⁴ the Code permits a very liberal open price term.¹²⁵ If the parties so intend, they 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.

Delivery and Shipment

The Code continues, essentially, the provisions of the Sales Act with respect to delivery. The Code, however, adds substantially to the Sales Act by its definition of a number of delivery or shipping terms.

Unless it is 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 a tender.¹²⁶ Also, unless otherwise agreed, the place for delivery of goods is the seller's place of business or, if he has none, his residence; but in a contract for the 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 delivery.¹²⁷ A new provision is that documents of title may be delivered through customary banking channels.¹²⁸ The time for delivery, if not agreed upon, and not otherwise provided in Article 2, is a reasonable time.¹²⁹

¹²² U.C.C. § 2-304.

¹²³ USA § 9(3).

¹²⁴ *Seybolt v. Waters*, 109 Neb. 99, 189 N.W. 980 (1922) (judgment for buyer for failure of seller to offer evidence of reasonable price).

¹²⁵ U.C.C. § 2-305.

¹²⁶ U.C.C. § 2-307. Where, however, 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.

¹²⁷ U.C.C. § 2-308(a) and (b), which restates USA § 43(1).

¹²⁸ U.C.C. § 2-308(c), which merely codifies well established commercial practice.

¹²⁹ U.C.C. § 2-309.

Unlike the Uniform Sales Act, the Code, in sections 2-319 through 2-324, comprehensively defines the obligation of each party under standard delivery or shipping terms: "F.O.B.,"¹³⁰ "F.A.S.,"¹³¹ "C.I.F.,"¹³² "C. & F.,"¹³³ "net landed weights,"¹³⁴ "ex-ship,"¹³⁵ and "no arrival, no sale."¹³⁶ Also outlined are the obligations of the seller with respect to the form of bill of lading required in an overseas shipment.¹³⁷ A shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.¹³⁸ These terms, except for "F.O.B.," are ones generally associated with foreign trade and have been the subject of decisional law principally in the British common law jurisdictions and the seaboard states. The Code codifies the better decisional law and commercial understanding with respect to these terms.

Payment

Unless it is otherwise agreed, 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.¹³⁹ If delivery is authorized and is made by documents of title, payment is due at the time and place at which the buyer is to receive the documents irrespective of where the goods are to be received.¹⁴⁰

Payment may also be effected by means of a letter of credit term in the contract of sale. The failure of the buyer seasonably to furnish an agreed letter of credit is a breach of contract. If a letter of credit is dishonored, the seller may, on seasonable notification to the buyer, require payment directly. The term "letter of credit" means an irrevocable credit issued by a financing agency of good repute or of good international repute.¹⁴¹

¹³⁰ U.C.C. § 2-319.

¹³¹ *Ibid.*

¹³² U.C.C. § 2-320.

¹³³ *Ibid.*

¹³⁴ U.C.C. § 2-321.

¹³⁵ U.C.C. § 2-322.

¹³⁶ U.C.C. § 2-324.

¹³⁷ U.C.C. § 2-323.

¹³⁸ U.C.C. § 2-323(3).

¹³⁹ U.C.C. § 2-310(a).

¹⁴⁰ U.C.C. § 2-310(c).

¹⁴¹ U.C.C. § 2-325.

Warranties

The warranties of the Sales Act have been reclassified and expanded by the Code.

The warranty of title under Uniform Sales Act section 13 is continued in section 2-312.¹⁴² The warranty of quiet possession contained in USA section 13 (2) is abolished, since disturbance of quiet possession is merely one way of establishing breach of warranty of title. Novel to the Code warranty of title is the inclusion of one against claims of infringements in a case of a merchant seller, unless the buyer furnishes the specifications in which case the buyer makes the warranty.¹⁴³

Express warranties are also clarified and broadened. Any affirmation of fact or promise which relates to the goods and becomes part of the basis of the bargain creates an express warranty under the Code,¹⁴⁴ while USA section 12 required the factors of inducement and reliance. Descriptions of goods and samples or models which are made part of the basis of the bargain create express warranties under the Code.¹⁴⁵ Under the Sales Act they created only implied warranties.¹⁴⁶ A clarification is that a sample which is made part of the basis of the bargain creates an express warranty that the "whole" of the goods (rather than the "bulk" of the goods) will conform to the sample.¹⁴⁷ As under prior Nebraska law,¹⁴⁸ it is

¹⁴² Under U.C.C. § 2-312 it makes no difference whether or not the seller was in possession of the goods at the time the contract to sell was made. See Official Comment 1 to § 2-312. While there were apparently no decisions on the subject under the Nebraska Uniform Sales Act, a pre-Sales Act decision appears to emphasize possession as a requisite for implication of the warranty. *Hall v. Aitkin*, 25 Neb. 360, 41 N.W. 192 (1889) (seller in possession held liable on implied warranty).

¹⁴³ U.C.C. § 2-312(3).

¹⁴⁴ U.C.C. § 2-313(1) (a). In *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952), the statement by a seller of a used car that the cylinder block had not been cracked was held an express warranty under the Sales Act.

¹⁴⁵ U.C.C. § 2-313(1) (b). In the case of a sale by sample the rule stated in this subsection appears in accord with a pre-Sales Act Nebraska decision. In *Crawford v. E. B. Weeks Seed Co.*, 110 Neb. 196, 198, 193 N.W. 271, 272 (1923), the court stated, "The general rule of law is that a sale by sample expresses or implies a warranty or condition that the bulk corresponds in kind and quality to the sample."

¹⁴⁶ USA § 14.

¹⁴⁷ This avoids the interpretative problem in connection with the term "bulk". In *F.A.D. Andrea, Inc. v. Dodge*, 15 F.2d 1003 (3d Cir. 1926), the court construed the term in USA §§ 14 and 16 to mean all the goods, not just a very large percentage.

¹⁴⁸ U.C.C. § 2-312(2); *Patrick v. Leach*, 8 Neb. 530, 1 N.W. 853 (1879).

not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or that he have a specific intention to make a warranty. However, as was also the case under prior Nebraska law,¹⁴⁹ an affirmation merely of the value of the goods or a statement purporting to be the seller's opinion or commendation of the goods does not create a warranty.

The implied warranty of merchantability is considerably clarified under the Code. Criteria as to merchantability, established in section 2-314(2), include (1) passing without objection in the trade under the contract description, (2) fitness for the ordinary purposes for which such goods are used, and (3) in the case of fungible goods, quality of fair average within the description.¹⁵⁰ As under the Sales Act, the warranty is implied only in the case of a merchant "dealing in goods of that kind."¹⁵¹ A codification of pre-Code decisional law is that the serving for value of food or drink, whether consumed on the premises or elsewhere, is a sale.¹⁵²

The implied warranty of fitness for a particular purpose is continued in section 2-315 with noteworthy changes. Under section 2-315 the warranty is made where the seller at the time of contracting "has reason to know" of a particular purpose for which

¹⁴⁹ *Brown v. Globe Laboratories, Inc.* 165 Neb. 138, 154, 84 N.W.2d 151, 161 (1957); *Ralston Purina Co. v. Iiams*, 143 Neb. 588, 10 N.W.2d 452 (1943). In *Cooper v. Marr*, 149 Neb. 211, 30 N.W.2d 563 (1948), the court held that a false statement by the seller as to the price which she had paid for goods sold to the buyer was not actionable since it was not material and did not mislead the buyer.

¹⁵⁰ In §§ 2-314 and 2-315 the Code distinguishes between fitness for an ordinary purpose and fitness for a particular purpose. Fitness for an ordinary purpose is one aspect of the warranty of merchantability. The warranty involved with respect to the tractor used in the performance of normal farming tasks in *Springer v. Henthorn*, 169 Neb. 578, 100 N.W.2d 521 (1960), would thus be the warranty of merchantability rather than warranty of fitness for a particular purpose. See Official Comment 2 to § 2-315.

As to the aspect of quality, the Code warranty of merchantability is in accord with prior Nebraska law. In *Adolph Goldmark & Sons v. Simon Bros. Co.*, 110 Neb. 614, 194 N.W. 686 (1923), an action for a breach of contract for the sale of a carload of Madagascar lima beans, the court upheld an instruction to a jury that the term "merchantable" does not require that the article sold shall be of first quality but means only that the article shall be vendible in the market in the ordinary course of business and at the average price of such an article.

¹⁵¹ USA § 15(2) ("goods of that description").

¹⁵² U.C.C. § 2-314(1); *Zorinsky v. The American Legion Omaha Post No. 1*, 163 Neb. 212, 79 N.W.2d 172 (1956) (piece of glass concealed in sherbet injured mouth of patron).

the goods are required and that the buyer is relying upon the seller's skill or judgment to select or furnish suitable goods. Under the Sales Act the seller impliedly warranted fitness for a particular purpose if a buyer either expressly or by implication made known to the seller the particular purpose for which the goods were required and it appeared that the buyer relied on the seller's skill or judgment.¹⁵³ Also, the Code eliminates the exception with respect to goods sold "by a patent or other trade name." Under section 2-315 the existence of a patent or other trade name is only one of several facts to be considered on the question of whether the buyer actually relied upon the seller,¹⁵⁴ a result probably not far different from that reached in a prior Nebraska decision.¹⁵⁵

A seller's warranty, whether express or implied, extends to any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect that such person may use or be affected by the goods or who is injured in person by the breach of warranty.¹⁵⁶ Nebraska decisional law has already transcended this point of development.¹⁵⁷

For the first time in statutory law, the Code covers explicitly the subjects of exclusion or modification of warranties and construction of warranties in the case of cumulation or conflict.¹⁵⁸ New requisites for the effectiveness of disclaimers of implied warranties are established.¹⁵⁹ In order to exclude or modify the implied warranty of merchantability, or any part of it, the language, whether written or oral, must mention merchantability; and if the language is written, the writing must be conspicuous.¹⁶⁰ An exclu-

¹⁵³ USA § 15(1).

¹⁵⁴ See Official Comment 5 to § 2-315.

¹⁵⁵ *Brown v. Globe Laboratories, Inc.* 165 Neb. 138, 84 N.W.2d 151 (1957).

¹⁵⁶ U.C.C. § 2-318.

¹⁵⁷ In *Asher v. Cocal Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961), the court held that a bottler was liable directly to the consumer, notwithstanding want of privity, for damages for ill effects suffered by a consumer in finding a dead mouse in a coke bottle. Section 2-318 in no way affects any remedy the consumer may have on a negligence theory. Cases like *Colvin v. John Powell & Co.*, 163 Neb. 112, 77 N.W.2d 900 (1956), would thus be unaffected.

¹⁵⁸ U.C.C. §§ 2-316, 2-317.

¹⁵⁹ U.C.C. § 2-316(2).

¹⁶⁰ Thus, the disclaimer of warranty as to the productiveness of seed corn held effective against the buyer in *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1945), would probably require revision to meet the requirements of § 2-316(2).

sion or modification of an implied warranty of fitness can be accomplished only by a conspicuous writing. Notwithstanding these requirements, unless circumstances otherwise indicate, all implied warranties are excluded by (1) expressions like "as is," or "with all faults," (2) an examination of the goods by the buyer (or an opportunity to examine the goods rejected by the buyer) before entering into the contract with respect to defects which an examination ought to have revealed to him, or (3) by a course of dealing, a course of performance or a usage of the trade.¹⁶¹ Warranties, whether express or implied, are to be construed as consistent with each other and as cumulative.¹⁶² If this construction is unreasonable, the intention of the parties shall determine which warranty is dominant; and rules are established for determining that intention.

Unconscionability

Another innovation of the Code is its incorporation, in section 2-302, of the concept of unconscionability. It may apply to an entire contract or to a single clause or term. The concept has been recognized by the Nebraska court¹⁶³ and has been applied by courts of other jurisdictions.¹⁶⁴ Decisions dealing with it have involved the elements of oppressiveness or of unfair surprise.¹⁶⁵

Under the Code, if the court, as a matter of law, finds a contract or any clause in it to have been unconscionable at the time it was made, the court may refuse to enforce the contract or may enforce it without the unconscionable clause. When it is claimed, or when it appears to the court, that a contract or any clause thereof may

¹⁶¹ U.C.C. § 2-316(2).

¹⁶² U.C.C. § 2-317. In *Maryland Cas. Co. v. Independent Metal Products Co.*, 99 F.Supp. 862, 870 (D. Neb. 1951), the court held that it would violate the intention of the parties to imply warranties in a sales contract containing express warranties (a guaranty of freedom from defects of workmanship and material for a period of one year with limitation of obligation to repair or replacement), which were in their nature inconsistent with the warranties which would have been implied. The case was affirmed in 203 F.2d 838 (8th Cir. 1953) on a theory of non-reliance.

¹⁶³ *Standard Oil Co. v. O'Hare*, 126 Neb. 11, 15-16, 252 N.W. 398, 400 (1934).

¹⁶⁴ In *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3rd Cir. 1948), the court refused to decree specific performance of a contract between a soup company and carrot growers solely because of unconscionability resting in want of reciprocity. The doctrine has also been applied by the Illinois courts. *Lear v. Chouteau*, 23 Ill. 39 (1859); *Marshall Milling Co. v. Rosenbluth*, 231 Ill. App. 325 (1924).

¹⁶⁵ See cases cited in Official Comment 1 to § 2-302.

be unconscionable, the parties are to be afforded a reasonable opportunity to present evidence as to its commercial purpose and effect.

Options Respecting Cooperation

Another provision of general application in determining the obligation of the parties is that an agreement, otherwise sufficiently definite to be a contract, is not rendered invalid by reason of the fact that it leaves particulars of performance to be specified by one of the parties.¹⁶⁶ Any specification must be made in good faith and within the limits set by commercial reasonableness.

Special Situations

Finally, part 3 deals with the obligations of the parties in special situations with respect to which it is possible, by reason of space limitations, to note only the fact of coverage.

Requirements, output and exclusive dealing contracts are recognized in section 2-306, which adopts the better reasoned common law of the collective jurisdictions, including that of Nebraska.¹⁶⁷

Sales familiarly known as "sale on approval" and "sale or return" are covered comprehensively by sections 2-326 and 2-327. These sections deal with the rights of creditors of both parties and the risk of loss. Section 2-326 also deals with "sales on consignment" or "sales on memorandum" and makes such a sale the equivalent of a "sale or return" with respect to the claims of creditors of the person conducting the business, unless the person making delivery complies with the requirements of the section.

The final section, 2-328, deals with auctions. It is basically a rewriting in expanded form of the Uniform Sales Act Section 21.

(4) TITLE, CREDITORS AND GOOD FAITH PARTNERS

Part 4 deals with the concept of title and the rights of third parties—i.e., creditors and good faith purchasers—with respect to the goods. This grouping is entirely logical in view of the Code's approach to the concept of title.

¹⁶⁶ U.C.C. § 2-311.

¹⁶⁷ *Ansbacher-Siegle Corp v. Miller Chem. Co.*, 137 Neb. 142, 288 N.W. 538 (1939); *C. W. Hull Co. v. Westerfield*, 107 Neb. 705, 186 N.W. 992 (1922).

Title

The Code deals with the sales contract on an issue by issue basis, not on a title or "lump-concept" basis. To illustrate, one possible issue between parties to a sales contract—i.e., the buyer and the seller—is who bore the risk of loss of the goods, particularly an uninsured risk. Two Code sections expressly answer this question.¹⁶⁸ It is not resolved by determining which party held the title to the goods as it would have been under the Sales Act.¹⁶⁹ Similarly, the right of the seller to an action for the price of the goods does not, under the Code, depend upon whether the property has passed to the buyer, as it did primarily under the Sales Act,¹⁷⁰ but on other factors, including whether the buyer has accepted the goods.¹⁷¹ Similarly, the buyer's remedies do not depend upon whether the property has passed to him, but upon whether the Code affords him a remedy in the situation. Accordingly, as section 2-401 states, each provision of Article 2 with regard to the rights, obligations and remedies of the seller, the buyer, the purchaser or third parties applies irrespective of title with the exception of provisions expressly referring to title.

Consequently, in approaching a sales problem under the Code, the practitioner should first determine whether an express Code provision covers the particular issue with which he is concerned. If the issue is between buyer and seller, Article 2 probably deals with that issue. If the issue is one between one of the parties to a contract and a third party, or one between third parties who are strangers to the sales contract, Article 2 may contain a provision covering the situation;¹⁷² but in many, if not most, cases reference to section 2-401, the general section on title, will probably be necessary. Questions such as to whom the goods are taxable, who has an insurable interest in them, and whether there is criminal liability for theft of the goods, may, and probably must, be resolved by reference to section 2-401.

¹⁶⁸ U.C.C. § 2-509, 2-510.

¹⁶⁹ USA §§ 19 and 22. *Goedeker v. Peter Kiewit Sons' Co.*, 171 Neb. 532, 106 N.W.2d 679 (1960), was an action for a declaratory judgment to determine who bore the risk of an insured loss and was resolved by resort to USA § 22(2).

¹⁷⁰ USA § 63.

¹⁷¹ U.C.C. § 2-709.

¹⁷² *E.g.*, in the case of sales on approval, sale or return, and sales on consignment or on memorandum, the risk of loss and the rights of creditors are covered by §§ 2-326 and 2-327.

In general, the rules with respect to passage of title under the Code are restated in subsections (2) and (3) of section 2-401 substantially as they existed under the Sales Act.¹⁷³ Title to the goods can not in any case pass under a contract for sale prior to their identification to the contract.¹⁷⁴ Unless otherwise explicitly agreed, the buyer acquires by identification a special property as limited by the Code.

Creditors

Section 2-402 deals with the rights of the creditors of the seller against goods which he has sold. Only one change from prior law, a desirable one, is made. As under the Sales Act¹⁷⁵ a creditor may treat a sale or an identification of goods to a contract as void if, as against him, a retention of possession by the seller is fraudulent under any rule of Nebraska law.¹⁷⁶ The new exception to this rule is that retention of possession in good faith in the current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

Good Faith Purchasers; Entrusting.

The greatest change from prior law with respect to the rights of third parties in the goods is found in section 2-403. After codifying several decisions (including some Nebraska decisions) dealing with the power of a person with voidable title to transfer good title to a good faith purchaser for value, in situations where the transferor was deceived as to the identity of the purchaser, the delivery was in exchange for a check which was later dishonored,¹⁷⁷ or the transaction was to be a cash sale, or the delivery was procured through fraud punishable as larcenous under the criminal law,¹⁷⁸ the section creates new law with its statement of the concept of entrustment.

¹⁷³ USA § 19.

¹⁷⁴ The concept of identification is outlined in U.C.C. § 2-501.

¹⁷⁵ USA § 26.

¹⁷⁶ U.C.C. § 2-402(2).

¹⁷⁷ The Nebraska court has ruled several times in accord with U.C.C. § 2-403(1) in this situation: *Guckeen Farmers Elevator Co. v. South Soo Grain Co.*, 172 Neb. 426, 109 N.W.2d 728 (1961); *Sullivan Co. v. Larson*, 149 Neb. 97, 30 N.W.2d 460 (1948); *Parr v. Helfrich*, 108 Neb. 801, 189 N.W. 281 (1922) (purported certified check which proved to be forged). The rule of this line of decisions was applied in *Sullivan Co. v. Wells*, 89 F.Supp. 317 (D. Neb. 1950).

¹⁷⁸ The four situations are encompassed in U.C.C. § 2-403(1).

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.¹⁷⁹ Thus, the owner of a precious timepiece who leaves it for repair with a jeweler in the business of selling timepieces enables the jeweler to pass good title to the timepiece to a buyer in ordinary course of business.¹⁸⁰ 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 irrespective of whether the procurement of the entrusting of the possessor's disposition of the goods are larcenous under the criminal law.¹⁸¹ The rule that a thief can not pass good title¹⁸² is, however, not changed.

(5) PERFORMANCE

Part 5 details the manner of performance of the obligations of the buyer and seller as established in part 3.

Identification

Before the seller can perform his obligation, the goods which are the subject of the contract of sale must be identified. The concept of identification is stated in section 2-501. Essentially the term "identified" is a substitution for the terms "ascertained" or "specific" used in the Uniform Sales Act.¹⁸³ Under the Code identification can be made any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs (1) when the contract is made if it is one for the sale of goods already existing and identified or (2) when the goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers, if the contract is for the sale of future goods (other than crops or the unborn young of animals).¹⁸⁴

¹⁷⁹ U.C.C. § 2-403 (2), (3).

¹⁸⁰ The term "buyer in ordinary course of business" is defined in U.C.C. § 1-201 (9).

¹⁸¹ The concept of entrustment has roots in Nebraska decisional law. See *Terry Bros. & Meves v. National Auto Ins. Co.*, 160 Neb. 110, 69 N.W.2d 361 (1955); *Oleson v. Albers*, 130 Neb. 823, 266 N.W. 632 (1936).

¹⁸² *Allstate Ins. Co. v. Enzolera*, 164 Neb. 38, 81 N.W.2d 588 (1957).

¹⁸³ USA §§ 17, 18 and 19.

¹⁸⁴ Also in the case of crops, when the contract is for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting, whichever is longer, when the crops are planted or otherwise become growing crops; and in the case of unborn young of

The buyer obtains a special property and an insurable interest in goods by the identification of existing goods as goods to which the contract refers even though the goods so identified do not conform to the contract and the buyer has an option to return or to reject them. The seller retains an insurable interest in the goods so long as title to or any security interest in them remains in him. Where identification is made by the seller alone, he may, until default, insolvency or notification to the buyer that the identification is final, substitute other goods for those identified.

Buyer's rights to goods on seller's insolvency

Although the subject matter might seem more appropriately covered in Part 7-Remedies,¹⁸⁵ the buyer's right to recover goods upon the insolvency of the seller is established in section 2-502. Even though the goods have not been shipped, a buyer who has paid a part or all of the price of the goods in which he has a special property under section 2-501 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.¹⁸⁶ If the identification creating the special property has been made by the buyer, he

animals to be born within twelve months after contracting, when the young are conceived. Compare this rule with that under pre-Code Nebraska decisional law that a mortgage of crops to be grown, *Cole v. Kerr*, 19 Neb. 553, 26 N.W. 598 (1886), or animals to be acquired, *Battle Creek Valley Bank v. First Nat'l Bank*, 62 Neb. 825, 88 N.W. 145 (1901), is invalid against creditors.

¹⁸⁵ For the reason that part 7, in § 2-702, specifies the seller's remedies on discovery of the buyer's insolvency, one would perhaps expect to find this corresponding right of the buyer upon the seller's insolvency among the sections dealing with the buyer's remedies upon breach (§§ 2-710 through 2-717). However, the draftsmen probably placed it in juxta position to § 2-501, since the buyer's right is necessarily tied to identification—i.e., identification of the goods distinguishes him from a general creditor of the insolvent seller.

¹⁸⁶ This remedy is more likely to be asserted against the seller's trustee in bankruptcy than it is against the seller himself. There is thus a possible conflict between this section and § 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1952). See Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 3*, 14 *RUTGERS L. REV.* 518, 556-59 (1960). As a practical matter, however, if the buyer has not paid the greater portion of the price to the seller he can probably induce the trustee to deliver the goods upon payment of the balance of the purchase price due, since the recovery by the estate in bankruptcy of the unpaid portion of the price will frequently exceed any price offered for the goods at a liquidation bankruptcy sale.

acquires the right to recover the goods only if they conform to the contract.

Tender of delivery and shipment

The details of the seller's obligation of tender of delivery and shipment are specified in sections 2-503, 2-504, 2-505 and 2-507. These sections are mostly an elaboration upon the corresponding provisions of the Sales Act, including the gloss of decisional law upon those provisions.

The basic obligation in the tender of delivery is that the seller place and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.¹⁸⁷ Where shipment of goods is contemplated or required, the rules with respect thereto are detailed.¹⁸⁸ There are explicit rules governing delivery where goods are in the possession of a bailee and are to be delivered without being moved¹⁸⁹ and where the contract requires the seller to deliver documents covering the goods.¹⁹⁰ As under the Sales Act, tender of delivery is a condition precedent prior to the buyer's duty to accept the goods and, unless it is otherwise agreed, to his duty to pay for them.¹⁹¹

Right to cure defective performance

Another novelty of the Code is section 2-508 which gives the seller the right to cure an improper tender of delivery in certain situations both prior to and after the time for performance. While novel to statutory law, the section derives support from decisional law of long standing in several jurisdictions.¹⁹² Because the re-

¹⁸⁷ U.C.C. § 2-503(1); USA § 51.

¹⁸⁸ U.C.C. §§ 2-503(2) and (3), 2-504 and 2-505. The Code treats the "shipment" contract as the regular type and the "destination" contract as the variant type. See Official Comment 5 to § 2-503.

¹⁸⁹ U.C.C. § 2-503(4); USA § 43(3).

¹⁹⁰ U.C.C. § 2-503(5).

¹⁹¹ U.C.C. § 2-507(1); USA §§ 11(2), 41 and 42.

¹⁹² Decisional law dealing with cure before or at the time of performance: *Standard Mfg. Co. v. Slaughter*, 122 Ill. App. 479 (1905); *Wright v. Larsen Bros. Wholesale Grocery Co.*, 115 Kan. 550, 223 Pac. 1108 (1924); *Emerson Shoe Co. v. Neely*, 99 W.Va. 657, 129 S.E. 718 (1925). Decisional law dealing with cure after the time for performance: *Colvin v. Weedman*, 50 Ill. 311 (1869); *Mutual Chem. Co. of America v. Marden, Orth & Hastings Co.*, 235 N.Y. 145, 139 N.E. 221 (1923); *Whitla v. Moore*, 164 Pa. 451, 30 Atl. 257 (1894).

A contractual right of cure may also be provided, as in *Muller v. Keeley*, 165 Neb. 243, 85 N.W. 2d 309 (1957).

quirement of good faith exists with respect to the first tender,¹⁹³ it does not seem that this section is subject to criticism on the ground that it sanctions "deliveries by the trial and error method."¹⁹⁴

Risk of loss

Risk of loss during the process of delivery of the goods is covered comprehensively in sections 2-509 and 2-510. The former section covers the normal (non-breach) situation; the latter, the breach situation. In the normal situation the risk of loss falls upon the same party upon whom it would have fallen under the Sales Act¹⁹⁵ with one important qualification. In cases other than where the contract requires or authorizes the seller to ship the goods by carrier or where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer on receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery. The rationale of the Code rule is that the merchant seller in possession is likely to have insurance coverage.¹⁹⁶ In the breach situation, the risk of loss is upon the breaching party to the extent of any deficiency in effective insurance coverage on the part of the other party.

Tender of payment; inspection

Unless otherwise agreed, tender of payment by the buyer is a condition to the seller's duty to tender or complete delivery.¹⁹⁷ Tender of payment is sufficient when it is 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

¹⁹³ U.C.C. § 1-203.

¹⁹⁴ See *Hageman v. Ule*, 188 Wis. 617, 620, 206 N.W. 842, 843 (1926).

¹⁹⁵ Under Uniform Sales Act § 22 risk of loss followed title. When the property in the goods was transferred to the buyer, the goods were at the buyer's risk whether delivery had been made or not (with qualifications not material here). Thus, for example, under USA § 19, Rule 2, a buyer purchasing a suit from a clothier, the clothier agreeing to make alterations would have the risk of loss of the goods from the time the clothier completed alterations, even though the buyer did not receive the goods until later. Under the Code the risk is not upon the buyer until he receives the goods, for reasons stated in the text.

The same result reached under the Sales Act in *Storz Brewing Co. v. Brown*, 154 Neb. 204, 47 N.W.2d 407 (1951), a loss in transit rendering goods unsalable, should be reached under U.C.C. § 2-503(1).

¹⁹⁶ See Official Comment 3 to § 2-509.

¹⁹⁷ U.C.C. § 2-511(1). This continues the rule under USA § 42.

of time reasonably necessary in which to procure it.¹⁹⁸ Thus, if the seller at the last moment makes a surprise demand for cash, he must give an extension of time for performance reasonably necessary to procure the cash.

Unless otherwise agreed,¹⁹⁹ the buyer has a right, before payment or acceptance of any draft, to inspect tendered goods at any reasonable place and in any reasonable manner.²⁰⁰ In situations where the contract requires payment before inspection, non-conformity of the goods does not excuse the buyer from making payment unless the non-conformity appears without inspection or in the situation where, despite tender of required documents, the circumstances would justify an injunction against honor in cases of a letter of credit involving fraud or forgery.²⁰¹ Payment by the buyer, where he is obligated to pay before inspection, does not constitute an acceptance of goods or impair his right to inspect or any of his remedies.²⁰²

In sales effected through documents, documents against which a draft is drawn are to be delivered to the buyer-drawee directly on acceptance of the draft if it is payable more than three days after presentment; otherwise, the documents are to be delivered only on payment of the draft.²⁰³

Preservation of evidence of goods in dispute

Another novel provision, section 2-515, is that in furtherance of any adjustment of money claim or dispute either party, upon reasonable notification to the other party and for the purpose of ascertaining facts and preserving evidence, has the right to inspect, test and sample goods, including those in the possession or control of the other party. The parties may agree to a third

¹⁹⁸ U.C.C. § 2-511(2). This is a departure from the rule stated and applied in a pre-Sales Act decision, *Behrends v. Beyschlag*, 50 Neb. 304, 69 N.W. 835 (1897) (instruction using "cash" was proper, since it meant coin or currency as opposed to a draft or a check).

¹⁹⁹ I.e., where the transaction is by means of documents, 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. U.C.C. §§ 2-310(c) and 2-513(3).

²⁰⁰ U.C.C. § 2-513(1).

²⁰¹ U.C.C. § 2-512(1), which incorporates by reference the provisions of § 5-114, which deals with an injunction against honor in the described situations.

²⁰² U.C.C. § 2-511(2).

²⁰³ U.C.C. § 2-514, which restates in condensed form the rule in UBLA § 41.

party's inspection of the goods and may also agree that findings of a third party will be binding upon them in any subsequent litigation.

(6) BREACH, REPUDIATION AND EXCUSE

The Code expands considerably the content of the Sales Act dealing with the matter of breach, repudiation and excuse. Two particularly noteworthy changes from prior law are effected.

Buyer's rights on improper delivery

One of these two changes is found in section 2-601, which defines the buyer's rights on improper delivery. Subject to certain other provisions of Article 2,²⁰⁴ if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole, (b) accept the whole, or (c) accept any commercial unit or units and reject the rest. Formerly, if the buyer accepted any commercial units, he ran the risk of being held to an acceptance of the whole.²⁰⁵ The Code should, therefore, diminish the frequency of litigation as to whether or not the contract of sale is divisible. The argument of divisibility of the entire contract was the one the buyer was forced to make if he accepted only part of the units of an entire contract or a delivery prior to the Code and sought to avoid liability for the whole.

If the buyer rejects the goods, he must do so within such a reasonable time after their delivery or tender and seasonably notify the seller.²⁰⁶ A buyer in physical possession and without a security interest in the goods must hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. But, unless the buyer is a merchant,²⁰⁷ he has no further obligation.²⁰⁸

A merchant buyer is under a duty, after rejection, to follow reasonable instructions from the seller with respect to the goods

²⁰⁴ I.e., §§ 2-612 (breach in installment sales) and 2-718 and 2-719 (contractual limitation of remedy).

²⁰⁵ For example, in *Reno Sales Co. v. Prichard Industries, Inc.*, 178 F.2d 279 (7th Cir. 1949), a merchant buyer of wastebaskets shipped in individual sealed cartons in twelve shipments, resold three shipments and was held liable for the price of all twelve shipments notwithstanding a claim of breach of warranty and a retender of six shipments to the seller.

²⁰⁶ U.C.C. § 2-602(1).

²⁰⁷ See note 81 *supra* and accompanying text.

²⁰⁸ U.C.C. § 2-602(2).

and in the absence of such instructions must make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily.²⁰⁹ When the merchant buyer sells goods pursuant to this procedure, he is entitled to reimbursement from the seller out of the proceeds of the sale for reasonable expenses for caring for and selling the goods.²¹⁰ If the seller gives no instructions within a reasonable time after notification of rejection, the buyer may (a) store the rejected goods for the seller's account, (b) reship them to the seller, or (c) resell them for seller's account.²¹¹

The buyer's failure to state, in connection with rejection, a particular defect which was ascertainable by reasonable inspection precludes him from relying upon the unstated defect to justify rejection or to establish breach where the seller could have cured it if the objection had been stated seasonably.²¹² Between merchants²¹³ the buyer's failure to state his objections 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, will likewise preclude him from relying on unstated defects to justify rejection or to establish breach.²¹⁴ The principle is extended to documents. Payment against documents made without reservation of rights precludes recovery for payment for defects apparent on the face of the documents.²¹⁵

Acceptance

Acceptance and its consequences are fully specified.²¹⁶ Acceptance occurs (a) when the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that he will retain them in spite of non-conformity,

²⁰⁹ U.C.C. § 2-603(1), which codifies the well known decision in *Descalzi Fruit Co. v. William S. Sweet & Son, Inc.*, 30 R.I. 320, 75 Atl. 308 (1910). Subsection (3) of this section reinforces the buyer's duty by providing that his good faith action does not constitute acceptance or subject him to damages.

²¹⁰ U.C.C. § 2-603(2). Also, if the expenses include no selling commission, the buyer is entitled to such a commission as is usual in the trade or, if none, to a reasonable sum not exceeding 10% of the gross proceeds.

²¹¹ U.C.C. § 2-604.

²¹² U.C.C. § 2-605(1) (a).

²¹³ See note 81 *supra* and accompanying text.

²¹⁴ U.C.C. § 2-605(1) (b).

²¹⁵ U.C.C. § 2-605(2).

²¹⁶ U.C.C. §§ 2-606 and 2-607.

(b) when the buyer fails to make an effective rejection,²¹⁷ which cannot occur until he has had a reasonable opportunity to inspect the goods, or (c) when the buyer does any action inconsistent with the seller's ownership and the seller ratifies the action as an acceptance.²¹⁸ Acceptance of any part of any commercial unit is an acceptance of that entire unit.²¹⁹

The consequences of acceptance are, as before, that the buyer must pay at the contract rate for any goods accepted.²²⁰ Acceptance by the buyer precludes the rejection of goods accepted; and if acceptance was made with knowledge of a non-conformity, it cannot be revoked because of that non-conformity unless acceptance was upon the reasonable assertion that the non-conformity would be seasonably cured. Acceptance does not of itself, however, impair any other remedy provided by Article 2 for non-conformity—*i.e.*, damages. In the case of accepted goods, the buyer must within a reasonable time after he has accepted the goods notify the seller of any claimed breach or be barred from any further remedy.²²¹ If the claim is one for infringement (under section 2-312) and the buyer is sued as a result of a breach, the buyer must, in addition, notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy for any liability established by the litigation.

As under the Sales Act the burden remains upon the buyer to establish any breach.²²²

Revocation of acceptance

Because of the confusion and the harsh results associated with the doctrine of rescission,²²³ the Code eliminates that word and substitutes for it, in section 2-608, the concept of revocation of acceptance. The buyer may revoke his acceptance of a lot or of a commercial unit whose non-conformity impairs its value sub-

²¹⁷ *I.e.*, he fails to reject within a reasonable time after delivery or tender of the goods or he fails to seasonably notify the seller. U.C.C. § 2-602(1).

²¹⁸ U.C.C. § 2-606(1).

²¹⁹ U.C.C. § 2-606(2). The provision is needed by reason of the option given the buyer in § 2-601(c).

²²⁰ U.C.C. § 2-607(1), which continues the rule of USA § 44.

²²¹ U.C.C. § 2-607(3), which continues the rule of USA § 49 with respect to the requirement of notice to the seller of the claimed breach.

²²² U.C.C. § 2-607(4). See *Dodds v. McCormick Harvesting Mach. Co.*, 62 Neb. 759, 87 N.W. 911 (1901).

²²³ See Official Comment 1 to § 2-608.

stantially if he accepted it upon the reasonable assumption that its non-conformity would be cured but has not been seasonably cured or if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

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 the condition of the goods not caused by their own defects. Notification of the seller of the fact of revocation is necessary.

A buyer who properly revokes has the same rights and duties with respect to the goods as though he had rejected them. Under the Code the buyer may revoke his acceptance of the goods, return them to the seller, and sue for damages.²²⁴ A different result should, therefore, be reached under the Code on the facts in *Henry v. Rudge & Guenzel Co.*²²⁵ in which a purchaser of a pair of ladies' shoes with a defective heel who had returned them to the selling store for credit on the purchase price was held to have rescinded the transaction and thereby to be without a cause of action for personal injury occasioned by the defect.

Right to adequate assurance of performance

Another innovation in the law of sales is introduced in section 2-609—the right of each party that his expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party,²²⁶ the other may in writing demand adequate assurance of due performance, and until he receives it, may, if it is commercially reasonable, suspend any performance for which he has not already received the agreed return. Between merchants reasonableness of grounds for insecurity and the adequacy of any assurance offered

²²⁴ See U.C.C. §§ 2-608, 2-711, 2-715, and 2-720.

²²⁵ 118 Neb. 260, 224 N.W. 294 (1929). The case was decided under the Sales Act and the result was rested squarely upon § 69 (1)(d) and (2). Section 2-608 eliminates USA § 69(2) from the Code.

²²⁶ Reasonable grounds for insecurity are defined by commercial rather than legal standards. Illustrations are cited in Official Comment 3 to § 2-609. A buyer who falls behind in his account with the seller, even though the items involved relate to separate and legally distinct contracts, impairs the seller's expectation of due performance. Also a buyer who requires precision parts which he intends to use immediately upon delivery may have reasonable grounds for insecurity if he learns that his seller is making defective deliveries of such parts to other buyers with similar needs.

are determined according to commercial standards. After receipt of a justified demand from the other party, a failure to provide adequate assurance of due performance within a reasonable time (not exceeding thirty days) constitutes a repudiation.

Repudiation

The common law doctrine of anticipatory repudiation²²⁷ is incorporated into the Code with perhaps one modification. 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 has three alternatives: (a) he may for a commercially reasonable time await performance by the repudiating party; (b) he may resort to any remedy for breach 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 he may suspend his own performance.²²⁸ Prior law is changed to the extent that a commercially reasonable time is, or may be, less than the date of performance.²²⁹

The repudiating party can, however, before his next performance is due, retract his repudiation unless the aggrieved party has since cancelled, changed his position or otherwise indicated that he considers the repudiation final.²³⁰ Retraction may be by any method clearly indicating that the repudiating party intends to perform but must include any adequate assurance of performance justifiably demanded.²³¹ Retraction reinstates the repudiating party's rights under the contract.

Installment contracts

The installment contract breach is one related to the doctrine of anticipatory breach. An installment contract is defined as one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains

²²⁷ *Lang v. Todd*, 148 Neb. 726, 28 N.W.2d 434 (1947); *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 166 N.W. 622 (1918); *J. K. Armsby Co. v. Raymond Bros.-Clarke Co.*, 90 Neb. 553, 134 N.W. 174 (1912).

²²⁸ U.C.C. § 2-610. Accord, as to paragraph (c), *Chermak v. Smolik*, 112 Neb. 54, 198 N.W. 562 (1924) (involving real estate).

²²⁹ See cases cited in note 227 *supra*.

²³⁰ U.C.C. § 2-611.

²³¹ An illustration is *Refrigeradora Del Noroeste S. A. v. Appelbaum*, 248 F.2d 858 (7th Cir. 1957), *cert. denied*, 356 U.S. 901 (1958) (seller withdrew by telegram statement that the contract was at an end).

a clause "each delivery is a separate contract" or its equivalent.²³² The buyer may reject any non-conforming installment if the non-conformity substantially impairs the value of that installment and cannot be cured. Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole.²³⁴ Language of impairment of the value of the whole is thus substituted for language of materiality of breach which appeared in Uniform Sales Act Section 45.

Excuse

The final four sections of part 6 deal with relatively infrequent situations, but ones concerning which the practitioner should be aware.

Casualty to identified goods, where the contract requires for its performance goods identified when the contract is made and the goods thereafter suffer casualty without fault of either party before the risk of loss passes to the buyer, is covered in section 2-613, which gives the buyer a more favorable option than he had under sections 7 and 8 of the Uniform Sales Act.

Substituted performance is required by section 2-614 in certain circumstances where the method of transportation provided in the contract becomes commercially impracticable and a commercially reasonable substitute is available. Also, 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 that is commercially a substantial equivalent.²³⁵

Excuse by failure of presupposed conditions is the matter of the last two sections of part 6.²³⁶ Where a delay in delivery or a non-delivery in whole or in part has been made impracticable by the occurrence of a contingency, the non-occurrence of which was the basic assumption on which the contract was made, or by compliance in good faith with an applicable domestic or foreign govern-

²³² U.C.C. § 2-612(1).

²³³ U.C.C. § 2-612(2).

²³⁴ U.C.C. § 2-612(3).

²³⁵ If delivery has already taken place, payment by means or in the means provided by the regulation discharges the buyer's obligation unless the regulation "is discriminatory, oppressive or predatory". U.C.C. § 2-614(2).

²³⁶ U.C.C. §§ 2-615 and 2-616.

mental regulation, a seller allocating production and deliveries among his customers in a fair and reasonable manner is excused, provided he gives the buyer notice.²³⁷ The buyer may then terminate or modify the contract as to any unexecuted portion.²³⁸

(7) REMEDIES

The final part of Article 2 deals, appropriately enough, with litigation on the sales contract. In addition to expanding the remedies of both the seller and the buyer available under the Uniform Sales Act, Part 7 enlarges the content of the Sales Act by its inclusion of the subject matter of contractual modifications with respect to damages and remedies, rules of evidence and procedure, and a statute of limitations. The practitioner with litigation involving a sales contract must take cognizance of part 7.

Seller's remedies.

The seller's remedies upon breach by the buyer are catalogued in section 2-703. Upon breach²³⁹ by the buyer, the seller may

- (a) withhold delivery of the goods,
- (b) stop delivery by any bailee under section 2-705,
- (c) proceed under section 2-704 respecting goods still unidentified to the contract,
- (d) resell and recover damages under section 2-706,
- (e) recover damages for non-acceptance (section 2-708) or in a proper case the price (section 2-709),
- (f) cancel.²⁴⁰

The seller's right of stoppage in transit is broadened by the Code. The right is extended to breach situations other than insolvency in the case of carload, truckload or planeload, or larger shipments of express or freight. Under the Sales Act the seller's right of stoppage was limited to the insolvency situation.²⁴¹ The

²³⁷ U.C.C. § 2-615.

²³⁸ U.C.C. § 2-616. Upon receipt of the notice required by § 2-615 the buyer may terminate and thereby discharge any unexecuted portion of the contract or modify the contract by agreeing to take his available quota in such situation. If the buyer fails to modify the contract within a reasonable time (not exceeding 30 days) after receipt of the notice, the contract lapses with respect to any deliveries effected.

²³⁹ As stated in § 2-703.

²⁴⁰ The seller had a right to cancel under certain circumstances under USA § 65, phrased in terms of rescission. As to this term, see note 271 *infra* and accompanying text.

²⁴¹ USA § 57.

right is also expanded by extending it from carriers to other bailees.²⁴²

The seller's right to complete manufacture of unfinished goods is also broadened by the Code. In the exercise of reasonable commercial judgment for the purpose of avoiding loss and of effective realization, the seller may either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.²⁴³ The Code thereby permits a more practical result than the Uniform Sales Act.²⁴⁴

Likewise, the seller's remedy of resale is considerably expanded. Under the Sales Act²⁴⁵ an unpaid seller could resell only if the goods were perishable, if the seller had expressly reserved the right of resale or if the buyer had been in default an unreasonable length of time. Under section 2-706 the seller may resell the goods after any breach by a buyer subject only to the criterion that he act in good faith and in a commercially reasonable manner. Compliance with the resale procedure established by section 2-706 sets the measure of the seller's damage (plus any allowable incidental damages). The price realized on resale is, therefore, not merely evidence of that damage.²⁴⁶ Under the Code resale is the seller's primary remedy.

The seller's right to damages for non-acceptance or repudiation, set out in section 2-708, is substantially the same as it was under the Sales Act.²⁴⁷ Also a seller who does not comply with the

²⁴² USA § 58, which, although it uses the term "other bailee" qualifies it with the phrase "for the purpose of transmission to the buyer."

²⁴³ U.C.C. § 2-704.

²⁴⁴ Under USA § 64(4) if, while labor or expense of a material amount was necessary on the part of the seller to enable him to fulfill his obligations under the contract, the buyer repudiated the contract or notified the seller to proceed no further therewith, the buyer was liable to the seller for no greater damages than the seller would have suffered if he had done nothing towards carrying out the contract after receiving notice of the buyer's repudiation or countermand. It was thus clearly risky for a seller to complete manufacture, even though from a commercial standpoint that might have resulted in the greatest salvage.

²⁴⁵ USA § 60.

²⁴⁶ U.C.C. § 2-706(1). See Official Comment 2 to § 2-706. Cf. the pre-Sales Act decision, *Adolph Goldmark & Sons v. Simon Bros. Co.*, 110 Neb. 614, 194 N.W. 686 (1923).

²⁴⁷ USA §§ 64(2), (3). The text is clarified and amplified under the Code.

requirements of section 2-706 on resale and cannot therefore use the measure of damages under that section may recover damages under section 2-708.²⁴⁸

The occasions for the remedy of an action for the price are probably reduced under the Code. Under the Sales Act an action for the price would lie if title to the goods had passed or an appointed day for payment of the price had been made.²⁴⁹ Under section 2-709 an action for the price lies where (a) the goods have been accepted, (b) a commercially reasonable time has passed after the risk of loss of conforming goods has passed to the buyer, (c) where the seller is unable to sell goods identified to the contract at a reasonable price, or (d) where circumstances indicate that an effort to sell goods identified to the contract will be unavailing.²⁵⁰ The right to recover the price of unaccepted goods is thus divorced from the concept of title and is made to depend upon the seller's ability to resell.

The seller's remedies on discovery of the buyer's insolvency are also broadened. As under the Sales Act,²⁵¹ the seller may refuse delivery except for cash, including payment for all goods theretofore delivered, and may stop goods in transit. However, where the Sales Act did not provide a remedy for the seller in the case of a buyer receiving goods on credit while insolvent, the Code does—an exclusive one.²⁵² If the buyer has received goods on credit while insolvent, the seller may reclaim them on demand made within ten days of the buyer's receipt of them. However, if a misrepresentation of solvency was made to the particular seller in writing within three months before delivery, the ten-day limitation has no application.²⁵³ The seller's right to reclaim is subject to the rights

²⁴⁸ See Official Comment 2 to § 2-706.

²⁴⁹ USA § 63. The remedy assumes, of course, a wrongful refusal to pay.

²⁵⁰ U.C.C. § 2-709(1).

²⁵¹ USA § 53, 54, 55 and 57.

²⁵² U.C.C. § 2-702(2). In *Pekin Plow Co. v. Wilson*, 66 Neb. 115, 92 N.W. 176 (1902), the court followed the rule that where goods are sold on credit on fraudulent representations of the buyer, the seller can rescind the sale and replevy the goods within a reasonable time after discovery of the fraud. The seller had assertedly relied on a false written statement to a credit agency, followed up by personal inquiry on the seller's part.

²⁵³ In this situation the right to reclaim will generally be exercised against the buyer's trustee in bankruptcy. For a discussion of the problems involved, see Kennedy, *The Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9*, 14 RUTGERS L. REV. 518, 549-56 (1960).

of a buyer in ordinary course or other good faith purchaser or lien creditor.²⁵⁴

Buyer's remedies

The remedies of the buyer upon breach by the seller are catalogued in section 2-711. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance with respect to the goods involved (and with respect to the whole if the breach goes to the whole contract), the buyer may cancel and, whether or not he has done so, may, in addition to recovering any part of the price paid, (a) cover and have damages under section 2-712 as to all goods affected whether or not they have been identified to the contract, or (b) recover damages for non-delivery under section 2-713. Where the seller fails to deliver or repudiates, the buyer may also, (a) if the goods have been identified, recover them as provided in section 2-502, or (b), in a proper case, obtain specific performance or replevy the goods under section 2-716. As under the Sales Act,²⁵⁵ the buyer has, on rightful rejection or justifiable revocation of acceptance, a security interest in goods in his possession or control for any payments on the price and any expenses incurred in connection with them.²⁵⁶

The buyer's right to cover refers to his "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."²⁵⁷ While this remedy is new to statutory law, it is one well established in decisional law.²⁵⁸

The rule for measuring the buyer's damages in cases of non-delivery and repudiation is changed from the "difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered"²⁵⁹ to "the market price at the time when the buyer learned of the breach and the contract price."²⁶⁰

²⁵⁴ U.C.C. § 2-702(3).

²⁵⁵ USA § 69(5).

²⁵⁶ U.C.C. § 2-711(3).

²⁵⁷ U.C.C. § 2-712(1).

²⁵⁸ *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 166 N.W. 622 (1918).

²⁵⁹ USA § 67(3).

²⁶⁰ U.C.C. § 2-713(1). In the case of non-delivery the time will be the same as under USA § 67(3), since non-delivery will occur at the time set for delivery. However, in the case of a repudiation taking the form of an announced intention not to perform, the buyer "learns of the breach" when he within a commercially reasonable period of time, not exceeding the date of performance, elects to treat the statement as a breach. See U.C.C. § 2-610.

No change is made in the rule respecting damages for breach in regard to accepted goods.²⁶¹ Where the buyer has accepted and given notification to the seller as required in section 2-607(3), he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach. The measure of damages for breach of warranty is, as before, the difference at the time and place of acceptance between the value of the accepted goods and the value they would have had had they been as warranted, absent special circumstances showing damages in a different amount.²⁶²

The buyer may also recover incidental and consequential damages in most cases.²⁶³

The remedy of specific performance is broadened since it may be decreed where the goods are unique or "in other proper circumstances."²⁶⁴ Under the Sales Act²⁶⁵ the remedy was available where the contract was to deliver specific or ascertained goods.

The right of replevin exists in the case of goods identified to the contract if the buyer is unable, after reasonable effort, to effect cover for the goods or if circumstances reasonably indicate that the effort will be unavailing.²⁶⁶

Finally, the buyer enjoys an expanded right to deduct from any part of the price still owing damages resulting from any breach of the sales contract.²⁶⁷ The right is conditioned upon the buyer's giving the seller notice of his intention to do so. The Sales Act expressly provided for recoupment of damages by the buyer only in the case of breach of warranty.²⁶⁸

²⁶¹ U.C.C. § 2-714(1); USA §§ 69(1) (a) and (6).

²⁶² U.C.C. § 2-714(2); USA § 69(7).

²⁶³ U.C.C. § 2-715. Incidental damages include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected. Consequential damages include any loss resulting from the general or particular requirements and needs of which the seller at the time of contract had reason to know and which could not have reasonably been prevented by cover or otherwise and injury to person or property proximately resulting from any breach of warranty.

²⁶⁴ U.C.C. § 2-716(1). It is not limited to identified goods.

²⁶⁵ USA § 68.

²⁶⁶ U.C.C. § 2-716(3). The right is also available if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

²⁶⁷ U.C.C. § 2-717.

²⁶⁸ USA § 49.

Contractual provisions as to remedies and damages

The Code sanctions, within limits established by the common law, contractual provisions concerning (1) liquidation or limitation of damages and (2) modifications or limitations of remedies.²⁶⁹

Remedies for fraud; use of term "rescission"

Remedies for material misrepresentation or fraud include all remedies available under Article 2 for a non-fraudulent breach.²⁷⁰

A substantial change from prior Nebraska law is effected by sections 2-720 and 2-721. Unless a contrary intention clearly appears, expressions of "cancellation" or "rescission" or the like are not to be construed as a renunciation or discharge of a claim for damages for antecedent breach.²⁷¹ Neither rescission nor claim for rescission nor rejection or return of the goods bars a claim for damages or other remedy.

Procedure, evidence, and limitations

Liberal rules of suability are established with respect to third parties dealing with goods which have been identified to a contract for sale so as to cause an actionable injury to a party to that contract.²⁷²

The Code also establishes rules for proof of the market price where evidence of a price prevailing at times and places described is not readily available. The substitute price is the one prevailing within any reasonable time before or after the relevant time or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described, with proper allowances for the cost of transporting goods to or from the other place.²⁷³

In accordance with prior Nebraska decisional law,²⁷⁴ the Code makes quotations of an established commodity market in official publications or trade journals or newspapers or periodicals of gen-

²⁶⁹ U.C.C. §§ 2-718, 2-719.

²⁷⁰ U.C.C. § 2-721.

²⁷¹ These provisions are counter to statements found in cases like *Henry v. Rudge & Guenzel Co.*, 118 Neb. 260, 224 N.W. 294 (1929), *supra* note 225 and accompanying text.

²⁷² U.C.C. § 2-722.

²⁷³ U.C.C. § 2-723 (2).

²⁷⁴ *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 166 N.W. 622 (1918) (dictum).

eral circulation which are published as reports of that market admissible in evidence whenever the price or value of goods regularly bought and sold in that market is in issue.²⁷⁵

The final section of part 7, section 2-725, establishes a statute of limitations for contracts involving the sale of goods. An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.²⁷⁶ A cause of action accrues when the breach occurs regardless of the aggrieved party's lack of knowledge of the breach.²⁷⁷ This statute of limitations does not apply to causes of action which have accrued before the Code becomes effective in Nebraska.²⁷⁸ It will apply to a breach after the effective date of the Code of a contract entered into before the effective date of the Code, since the breach results in the accrual of the cause of action.²⁷⁹

CONCLUSION

The Code is unquestionably a desirable advancement in Nebraska law. Article 2, in particular, effects a needed improvement in the law of sales. It benefits the businessman engaged in buying and selling personal property by modernizing the law to bring it into alignment with current business practices. It establishes confidence on his part that the practices he knows and understands will be recognized by the law and enforced in court if necessary. Article 2 is likewise of great advantage to the practicing lawyer, particularly the practicing Nebraska lawyer. It establishes law in numerous areas where there previously was none either in statute or court decision. Article 2 thereby provides certainty in many cases where previously uncertainty existed. Members of the Nebraska Bar can look forward with confidence to operation under the Code. The author believes that they will like it.

²⁷⁵ U.C.C. § 2-724.

²⁷⁶ U.C.C. § 2-725(1).

²⁷⁷ U.C.C. § 2-725(2).

²⁷⁸ U.C.C. § 2-725(4). Note may be taken that the general limitation provisions applicable to written and oral contract were not expressly amended to dovetail with the Code. NEB. REV. STAT. §§ 25-205 to 206 (Reissue 1958). Implied repeal of the latter by the Code pro tanto may be found under § 10-103. *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964).

²⁷⁹ U.C.C. § 2-725(2). Also it seems clear that the breach is a separate event under § 10-101.