Pursuant to Chapter 106 of the Resolves of 1959 entitled "Resolve Creating a Committee on the Uniform Commercial Code" the Chief Justice of the Supreme Judicial Court appointed a committee of three members of the bar, Thomas N. Weeks, Esq., of Waterville, Merrill R. Bradford, Esq., of Bangor and Jotham D. Pierce, Esq., of Portland. The committee had, among its duties, the preparation of annotations of the Uniform Commercial Code with relation to the existing Maine statutory and case law. The committee made arrangements through Professor Robert C. Braucher of Harvard Law School to have the following annotations prepared by students under his supervision.

The annotations are to the 1958 official text of the Uniform Commercial Code as promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The bill now before the 101st Maine Legislature, H.P. 79, L.D. 95, includes amendments to the 1958 official text, as suggested by the Permanent Editorial Board for the Uniform Commercial Code and, accordingly, the following annotations do not match the bill exactly.

Only five copies of the original annotations were available. Accordingly, the Maine Bar Association Committee for the Promotion of the Uniform Commercial Code undertook to have these annotations reproduced in quantity for the use of the Legislature and other interested persons. The present committee has not made any editorial revisions in the annotations and has made only a superficial review of the form and substance thereof. The expense of this reproduction has been borne by the Maine Bar Association with the assistance of the Maine Bankers Association, and First National Bank of Portland donated the use of its printing facilities.

MAINE BAR ASSOCIATION COMMITTEE FOR THE
PROMOTION OF THE UNIFORM COMMERCIAL CODE

Merrill R. Bradford, of Bangor, Chairman
Paul A. Wescott, of Portland, Vice Chairman

Article 1

GENERAL PROVISIONS

Part 1

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

Section 1-101. Short Title.

No comment.

Section 1-102. Purposes; Rules of Construction; Variation by Agreement.

Subsection (1).

R. S. 1954, c. 181, sec. 11 (Factors Lien Act) is in accord with this subsection's provisions for a liberal reading. That section (R. S. 1954, c. 181, sec. 11) calls for a liberal construction designed to secure the beneficial interest and purposes of the Act. Its policy is almost identical with the Code's. However, there do not appear to be any similar provisions in the other statutes governing commercial transactions. For example, R. S. 1954, c. 185 (Uniform Sales Act); R. S. 1954, c. 186 (Uniform Bills of Lading Act); and R. S. 1954, c. 187 (Uniform Warehouse Receipts Act) do not require a liberal construction. Furthermore, R. S. 1954, c. 10, sec. 22 (Rules of Construction), which lays down general rules of construction, states as its principle the requirement of an interpretation in accord with the "plain meaning" of words. The other rules of construction provided by that section are said to be applicable only if not inconsistent with the "plain meaning" of the statute. Finally, R. S. 1954, c. 10, sec. 22(I) provides that words and phrases be construed according to the "common meaning" of the language. Therefore, this subsection, in expressly requiring a liberal construction, will serve the function of making it clear that a freer

spirit of interpretation must be followed.

Case law on the subject of liberal construction is scarce. Rather, judicial liberality has been expressed under the cover of looking to the "purposes" of the Act. However, cases like Hamilton v. Littlefield, 149 Me. 48, 98 A.2d 545 (1933) and Gendron Lumber Co. v. Inhabitants of Town of Hiram, 15 Me. 450, 120 A.2d 560 (1956) do indicate judicial liberality in the interpretation of statutes.

In requiring that the underlying purposes of the statute be in accord with the meaning given a statute, this subsection is consistent in spirit with Maine's present commercial law. R. S. 1954, c. 185, sec. 74 (Uniform Sales Act); R. S. 1954, c. 186, sec. 52 (Uniform Bills of Lading Act); R. S. 1954, c. 187, sec. 57 (Uniform Warehouse Receipts Act). However, as will be indicated in subsection (2) of this section, the provisions of the Uniform Acts are less broad than the Code's provisions.

Maine's case law makes it clear that legislative intent, purpose, and the mischief the statute is intended to remedy must be taken into consideration when the meaning of the statute is being fixed. Greaves v. Houlton Water Co., 143 Me. 207, 59 A.2d 217 (1948); Duddy v. McDonald, 148 Me. 535, 97 A.2d 445 (1948); Hamilton v. Littlefield, 149 Me. 48, 98 A.2d 545 (1953); York v. Day's, Inc., 153 Me. 441 (1958). In the Greaves case, supra, the court said:

> ". . . we should seek to avoid an interpretation which leads to a result which is absurd, even though to do so we may have to disregard the strict letter of the enactment."

Finally, the trend of decisions has been toward increased liberality and an increased awareness of the purpose of legislation.

Where cases like Hagget v. Hurley, 91 Me. 542, 40 Atl. 561 (1898) (new statute will not be construed as intending a reversal of long established principles of law and equity unless such intent unmistakably appears); and Roberts v. Portland Water District, 124 Me. 63, 126 Atl. 162 (1924) ("true sense" of words determines the meaning of the statute) have taken a textual approach to the problems of statutory interpretation, a greater number of cases have looked to the purposes of the legislation. Greaves v. Houlton Water Co., 143 Me. 207, 59 A.2d 217 (1948); Gendron Lumber Co. v. Inhabitants of Town of Hiram, 151 Me. 450, 120 A.2d 560 (1956).

Subsection (2).

Although Maine law requires a harmony of purpose with meaning, the only underlying purpose expressly recognized under present law is the desirability of uniformity. See R. S. 1954, c. 185, sec. 74; R. S. 1954, c. 186, sec. 52; and R. S. 1954, c. 187, sec. 57. Hence subsections 2(a) and 2(b) expand the meaning of "underlying purposes" as that term is known today, and therefore work a change in the present law.

Subsection (3).

In expressly recognizing the principle of freedom of contract, this subsection is similar in spirit with the Uniform Acts of Maine. R. S. 1954, c. 185, sec. 71 would permit a variation of implied obligations arising from the contract of sale; R. S. 1954, c. 186, sec. 3 would permit a variation of the terms of a bill of lading so long as not contrary to law and public policy, and so long as the carrier does not contract away his duty of due care. R. S. 1954, c. 187, sec. 3 (UWRA)

is stricter: a warehouseman may insert terms in the receipt only if not contrary to the provisions of that chapter, and may not insert terms impairing his obligation of due care. Since the Code expressly provides for a variation of its own provisions, and since the power of variation is subject only to the specific exceptions of the Code, the effect of this subsection would appear to enlarge the degree of freedom of contract now possible.

On the other hand, the Code -- restricting the power to disclaim good faith, diligence, reasonableness, and due care -- has constricted the power to contract. The Code is consistent with the restrictions imposed on parties in the "public service" field. R. S. 1954, c. 186, sec. 3(II) (UBLA); R. S. 1954, c. 187, sec. 3(II). See also, Little v. Boston & Maine R. R., 66 Me. 239 (1876); Young v. Maine Central R. R. Co., 113 Me. 113, 93 Atl. 48 (1915). However, since R. S. 1954, c. 185, sec. 71 would seem to permit the parties to a contract of sale to limit their liabilities for negligence, and since the prohibitions of this Code subsection would reach the parties to an ordinary sales contract, the Code does limit the power to contract of those parties in a "non-public service" function.

But the difference, it must be noted, is more formal than substantive. While no Maine cases appear to have been decided squarely under R. S. 1954, c. 185, sec. 71, cases elsewhere have generally construed the seller's disclaimer clause so restrictively as to make the clause, in effect, subject to a "good faith" or "reasonableness" qualification. See Wade v. Chariot Trailer Co., 331 Mich. 576, 50 N.W. (2d) 162 (1951).

Subsection (4).

No explanation seems necessary.

Subsection (5).

This rule is substantially in accord with R. S. 1954, c. 10, sec. 22(II). See also, Rich v. Roberts, 48 Me. 548 (1860); Morrill v. Sanford, 49 Me. 566 (1861); Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949).

Section 1-103. Supplementary General Principles of Law Applicable.

This section substantially restates the following statutory provisions:

R. S. 1954, c. 53, sec. 68 (Corporations)

R. S. 1954, c. 181, sec. 11 (Dealing with factors and agents)

R. S. 1954, c. 185, sec. 73 (Uniform Sales Act)

R. S. 1954, c. 186, sec. 51 (Uniform Bills of Lading Act)

R. S. 1954, c. 187, sec. 56 (Uniform Warehouse Receipts Act)

R. S. 1954, c. 189, sec. 17 (Uniform Trust Receipts Act)

All in all, this section makes few substantive changes. The express reference to estoppel is new; but the availability of that invalidating (or validating) cause can be implied from R. S. 1954, c. 185, 186 or 187. Thus, it would seem that those Maine cases applying the principle of estoppel to commercial controversies -- Belfast v. Belfast Water Co., 115 Me. 234, 93 Atl. 543 (1916); Wilkins v. Waldo Lumber Co., 130 Me. 5, 153 Atl. 191 (1931); and Tewksbury v. Noyes, 138 Me. 127, 23 A.2d 204 (1941) -- state the Code rule.

Therefore, except for the fact that this section makes clear the inclusion of "estoppel" and other "validating causes" and states the policy that the list is intended to be illustrative and not exhaustive

(see Comment 3), the section makes no substantial change in the law.

Section 1-104. Construction Against Implicit Repeal.

No statutory matter on this point has been discovered.

The question whether a new act impliedly repeals an existing statute is answered by asking whether it was the legislative intent to do so. Case law indicates that repeal by implication is not favored: to effect a repeal by implication, a later statute must be so clear and explicit as to show that it was intended to cover the whole subject matter, and displace the prior statute, or the two must be plainly repugnant and inconsistent. Starbird v. Brown, 84 Me. 238, 24 Atl. 824 (1892); Eden v. Southwest Harbor, 108 Me. 489, 81 Atl. 1003 (1911); Opinion of Justices, 120 Me. 568 (1921).

The limits of whatever presumption there is against implied repeal are defined in cases like Smith v. Sullivan, 71 Me. 150 (1880); Maine Central Institute v. Palmyra, 139 Me. 304, 30 A.2d 541 (1943); Cram v. County of Cumberland, 148 Me. 515, 96 A.2d 839 (1953). In the Cram case, supra, the court said:

> "If repugnant provisions of prior statutes are complied . . . in a general Revision of the Statutes, it must be presumed that the repugnancy was overlooked and that it was the intention of the Legislature to bring forward the latest expression of the legislative will where irreconcilable inconsistency or repugnancy appears in different sections of the Revised Statutes."

Hence, the court in that case found a repeal by implication.

To sum up, this section and especially the comments to this section seem to be in accord with present Maine law.

Section 1-105. Teritorial Application of the Act; Parties' Power to Choose Applicable Law.

Subsection (1).

In expressly stating that parties may choose their own law under some circumstances, the Code is affirmative where present law was neutral if not negative. No Maine cases concerning the validity of stipulations regarding choice of law have been found. However there have been hints as to how the Maine courts would have ruled had they been faced with this problem.

Where they question is as to the choice of law applicable to a contractual transaction, present law is in a confused state. Three theories have been enunciated: 1) That the law of the place of making governs; 2) That the law of the place of performance governs; 3) That the law intended by the parties governs. If the first or second of the three rules is the present rule -- and there is authority to that effect; see, for example, Bell v. Packard, 69 Me. 105 (1879); Flynn v. Currie, 130 Me. 461, 157 Atl. 310 (1931); 2 Beale, Conflict of Laws 1140 (1935); Nonotuck Savings Bank v. Norton, 135 Me. 92, 189 Atl. 829 (1937), in which the court states that there is a strong indication that Maine has adopted the law of the place of performance as the test of the choice of law question -- then the Code would change the law. This is because under those rules, there would appear to be no room for choice of law agreements. Consistent with the Maine authority, cited supra, would be Professor Beale's contention that allowing the intent of the parties to govern the choice of law would make a legislative body of the parties who chose to get together and contract. He contended that this was undesirable.

On the other hand, there are hints in some cases that present law would pay due deference to the implied intent of the contracting parties. In Carey v. Mackey, 82 Me. 516, 20 Atl. 84 (1890), the court said:

> ". . . strong circumstances . . . strengthen the presumption that the parties intended to be governed by the laws of Maine in their contracts."

The same presumption as to the intent of the parties was made in Emerson Co. v. Proctor, 97 Me. 364, 54 Atl. 849 (1903). There the court said that since the contract was made in Maine, the parties are presumed to have contracted with reference to the laws of Maine. Since these cases give an implied intent effect, a fortiori an expressed intent to follow the rules of another state should be given effect. If so, this Code section works no change in present law.

to sum up, one must come to the conclusion that it is unclear as to how present law would treat a stipulation as to choice of law. As noted, supra, arguments pro and con can be made. The treatise by Professor Beale indicates not only his aversion to the "intent" theory, but also his opinion that Maine would follow the rule of the place of performance. But even his conclusion as to Maine's rule is open to question. See Goodrich, Conflict of Laws 332 (1949). Finally, it should be noted that even though the Code does not make the distinction of whether the parties' stipulation is effective or not, it may often depend on what was stipulated. As noted in Goodrich, Conflict of Laws 340 (1949), whereas stipulations regarding the validity of contracts are not looked on with favor, stipulations regarding the construction of the contracts are, more often than not, given effect. Also, the

"reasonable relation" test is new.

In the event the parties fail to choose their own law, or if their choice of law is one which does not bear a reasonable relation to the transaction, Professor Beale in his treatise (2 Beale, Conflict of Laws 1140 (1935) said that Maine would look to the rule of the place of the performance of the contract because the state where performance was to be made was the one with an appropriate relation to the transaction. See also Flynn v. Currie, 130 Me. 461, 157 Atl. 310 (1931); Giguere v. Webber, 142 Me. 12, 98 A.2d 548 (1953). But Professor Beale's conclusion as to the rule in Maine has been questioned. See the footnote in Goodrich, Conflict of Laws 332 (1949). Probably, the conclusion is questioned because some cases clearly say that the rule of the place of making is the applicable law because that state is the one bearing the appropriate relation with the transaction. Stickney v. Jordan, 58 Me. 106 (1870); Bell v. Packard, 69 Me. 105 (1879). And cf. Portland National Bank v. Brooks, 125 Me. 251, 137 Atl. 641 (1927). And again, others indicate that the intent of the parties is the true test. Carey v. Mackey, 82 Me. 516, 20 Atl. 84 (1890); Emerson Co. v. Proctor, 97 Me. 364, 54 Atl. 849 (1903). In addition, variables not considered by the Code -- for example, whether the controversy concerns a primary or remedial right or whether the question is one concerning specific or general commercial law -- have been factors to consider under present Maine law. Thus, in Roads v. Webb, 91 Me. 406, 40 Atl. 128 (1898), it is said that even if the sale was consummated in another state by delivery in that state, still the lex loci applies because the question (whether a note was negotiable or not) was one of general commercial law. Again in Katz v. Gordon Johnson

Co., 160 F. Supp. 126 (D. Me. 1958), the court said that matters relating to remedy and procedure are determined by law of forum; matters concerning substantive rights themselves are determined by a law other than the forum. See also Alropa Corp. v. Boutton, 135 Me. 41, 188 Atl. 722 (1936); Roads v. Webb, supra.

Another variable to consider is whether the controversy is concerned with the validity and construction of the transaction or whether it is concerned with the question of damages. If the question is one of validity, the court would most likely apply the law of the place of making. But if the question looks to damages, a federal court applying the Maine conflict of law rule said:

> "Since damages in contract flow from a breach of the duty to perform and consequently are a matter pertaining directly to the performance of the contract . . . the appropriate law . . . would appear to be the law of the place of performance . . . ."
>
> Katz v. Gordon Johnson Co., supra.

In summing up, the above discussion indicates that no categorical conclusion as to what would be an appropriate relationship can be made. Instead, and unlike the Code, the Maine Courts would consider different variables: Did the parties intend to abide by one state's rules? What is the controversy about -- primary or remedial rights, general or specific problems? Dependent on these variables, Maine would choose as between the rule of the place intended by the parties, the rule of the place of making and the rule of the place of performance.

Subsection (2).

In making explicit the extent to which parties can stipulate the

law governing their transaction, this subsection is new. For a comparison of the present state of Maine conflict of law principles governing the types of transactions listed in this subsection and the Code treatment of the same, see the UCC sections 2-402, 4-102, 6-102, 8-106, 9-103, and the annotations thereto.

Section 1-106. Remedies to be Liberally Administered.

Subsection (1).

The rule that the damages awarded should put the aggrieved party in as good a position as he would have been in if the contract was performed is a restatement of the common law position on contract damages. See Restatement, Contracts, Secs. 329-46. But in expressly providing for a "liberal" administration of remedies, this subsection cures the sometimes restrictive and narrow view Maine courts have taken. For example, under Maine law where the seller of personal property has been found guilty of fraud, the purchaser upon discovery of the fraud may elect one of two remedies. He may rescind the sale, return the property and sue the seller for recovery of the purchase price; or, he may keep the property and without recission sue the seller in tort for deceit. He is not, however, privileged to choose both remedies. Shine v. Dodge, 130 Me. 440, 157 Atl. 318 (1931); Katz v. Gordon Johnson Co., 160 F. Supp. 126 (D. Me. 1958). And again, R. S. 1954, c. 185, sec. 69 (Uniform Sales Act) provides the purchaser with four separate remedies, but these remedies have also been held inconsistent and the purchaser has been forced to elect his remedy. Powers v. Rosenbloom, 143 Me. 361, 62 A.2d 531 (1948).

Present law provides for the recovery of special damages when

specially declared for and when such damages may reasonably be supposed to have been contemplated by both parties when the contract was made. Thomas v. Dingley, 70 Me. 100 (1879); Henderson v. Berce, 142 Me. 242, 50 A.2d 45 (1946). And see R. S. 1954, c. 185, sec. 70.

In prohibiting penal damages, the Code takes the same position present law does. Burrill v. Daggett, 77 Me. 545 (1885); Maybury v. Spinney-Maybury Co., 122 Me. 422, 120 Atl. 611 (1923).

Finally present law is consistent with the Code rule that damage need not be calculable with mathematical accuracy: reasonably rather than absolute certainty is required. Hincks Coal Co. v. Milan and Toole, 135 Me. 203, 193 Atl. 243 (1937); Lawson v. McLeod, 152 Me. 67, 123 A.2d 199 (1956). Thus the Lawson courts said: the test for determining the sufficiency of proof was whether there were sufficient facts establishing proof of the damages with reasonable certainty. But this liberal attitude necessitates some boundary. That line is provided by cases like Megquier v. DeWeaver, 139 Me. 95, 27 Atl. 399 (1942) and McDougal v. Hunt, 146 Me. 10, 76 A.2d 857 (1950) (determination of the amount of damages cannot be left to mere speculation or conjecture).

Subsection (2).

This Subsection substantially restates R. S. 1954, c. 185, sec. 72.

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

Compare this section with R. S. 1954, c. 188, sec. 119(3), 120(2), and 122. Since R. S. 1954, c. 188, sec. 119(3) recognizes the validity of an intentional cancellation without a written memorandum, this section seems to state a stricter rule. Thus in Norton v. Smith, 130 Me. 58, 153 Atl. 886 (1931) the court said:

". . . if the holder of a promissory note intentionally destroys it, he thereby forgives and discharges the debt evidenced by it and cannot maintain an action based upon the instrument."

Under the Code, the obligor must prove more than an intentional cancellation in order to escape his obligations: he must show a written waiver.

Present law requires that a release of claims arising from an alleged breach be supported by an adequate consideration. Austin v. Smith, 39 Me. 203 (1855). Part payment, however small, is an adequate consideration. Weymouth v. Babcock, 42 Me. 42 (1856). In permitting a release without consideration, the Code is more liberal. True, present law respects releases -- even in the absence of proof of adequate consideration -- if the release is evidenced by a sealed instrument. Duffy v. Metropolitan Life Insurance Co., 94 Me. 414, 47 Atl. 905 (1900). But again, since this section recognizes the validity of the release even when the writing is unsealed, the section seems more liberal.

Section 1-108. Severability.

This section states the same policy expressed in R. S. 1954, c. 189, sec. 19 (Uniform Trust Receipts Act).

Section 1-109. Section Captions.

This is new.

Part 2

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

Section 1-201. General Definitions.

(1) "Action." See the similar definition in R. S. 1954, c. 185, sec. 76 (Uniform Sales Act); R. S. 1954, c. 186, sec. 56 (Uniform Bills of Lading Act); R. S. 1954, c. 187, sec. 53 (Uniform Warehouse Receipts Act); R. S. 1954, c. 188, sec. 191 (Uniform Negotiable Instruments Law). The definition has been rephrased and enlarged.

(2) "Aggrieved party." As far as statutory definitions go, this is new; however the term is not new to the law.

(3) "Agreement." Again, this is new; it can be found in case law. Thus in Portland Terminal Co. v. B. & M. R. R., 127 Me. 428, 144 Atl. 390 (1929) it was said that: "agreement" may mean an expression by two or more persons of assent in regard to some present or future performance by one or more of them; the term is somewhat wider than the term "contract."

(4) "Bank." See R. S. 1954, c. 188, sec. 191 (Uniform Negotiable Instruments Law). The definition has been rephrased and contracted.

(5) "Bearer." The prior statutory definition has been broadened. See R. S. 1954, c. 188, sec. 191.

(6) "Bill of lading." This definition also broadens prior statutory definition. R. S. 1954, c. 186, sec. 53. See Weed v. B. & M. R. R., 124 Me. 336, 128 Atl. 696 (1925) for case law treatment of this term.

(7) "Branch." This is new.

(8) "Burden of establishing." This is new.

(9) "Buyer in ordinary course of business." The definition broadens the present statutory definition. See R. S. 1954, c. 189, sec. 1 (Uniform Trust Receipts Act). Its major significance lies in UCC Section 2-403 and in the article on Secured Transactions (Article 9).

(10) "Conspicuous." This is new.

(11) "Contract." See R. S. 1954, c. 185, secs. 3 and 71 (Uniform Sales Act) for the use of this term. See also Portland Terminal Co. v. B. & M. R. R., 127 Me. 428, 144 Atl. 390 (1929).

(12) "Creditor." There is no statutory definition; however, the term has a commonly accepted meaning in accord with the Code's definition.

(13) "Defendant." Accord: R. S. 1954, c. 185, sec. 76 (Uniform Sales Act).

(14) "Delivery." Accord: R. S. 1954, c. 188, sec. 191 (Uniform Negotiable Instruments Law).

(15) "Document of title." Accord: R. S. 1954, c. 185, sec. 76 (Uniform Sales Act).

(16) "Fault." Accord: R. S. 1954, c. 185, sec. 76 (Uniform Sales Act).

(17) "Fungible." R. S. 1954, c. 185, secs. 5,6, and 76 are

substantially in accord. Fungibility of goods "by agreement" has been added for clarity and accuracy. See also R. S. 1954, c. 187, sec. 58 (Uniform Warehouse Receipts Act).

(18) "Genuine." This is new.

(19) "Good faith." Prior statutory definition can be found in R. S. 1954, c. 185, sec. 76 (Uniform Sales Act); R. S. 1954, c. 186, sec. 53 (Uniform Bills of Lading Act); R. S. 1954, c. 187, sec. 58 (Uniform Warehouse Receipts Act). This subsection states only the minimum requirements for a finding of "good faith."

(20) "Holder." Similar statutory definitions are contained in R. S. 1954, c. 186, sec. 53 (Uniform Bill of Lading Act); R. S. 1954, c. 187, sec. 58 (Uniform Warehouse Receipts Act); R. S. 1954, c. 188, sec. 191 (Uniform Negotiable Instruments Law).

(21) "Honor." No similar statutory definitions can be found.

(22) "Insolvency proceedings." No similar statutory definitions.

(23) "Insolvent." Similar statutory definition is found in R. S. 1954, c. 185, sec. 76 (Uniform Sales Act).

(24) "Money." See R. S. 1954, c. 188, sec. 6(V) (Uniform Negotiable Instruments Law). Aside from that chapter, there is no statutory definition. See State v. Thomas, 126 Me. 230, 137 Atl. 396 (1927).

(25) "Notice." This is new. Compare R. S. 1954, c. 188, sec. 56 (Uniform Negotiable Instruments Law). But there is case law. For a

complete discussion of what constitutes "actual notice," see Hopkins v. McCarthy, 121 Me. 27, 115 Atl. 511 (1921). Where there is no actual notice of the true state of affairs, then notice sufficient to put on inquiry imposes such a degree of diligence as will enable ascertainment of truth. American Realty Co. v. Amey, 121 Me. 545, 118 Atl. 475 (1922). But no rule can be established as to the sufficiency of facts to put on inquiry; each case depends upon its own facts. American Realty Co. v. Amey, supra; Boyle v. Clukey, 126 Me. 443, 139 Atl. 461 (1927).

(26) There is no similar statutory provision. But when the Code says that a person gives a notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, it expresses the same principles found in Bragg v. Bangor, 51 Me. 532 (1863); Knapp v. Bailey, 79 Me. 195, 9 Atl. 122 (1887); Hudson v. Smith & Rumery Co., 110 Me. 123, 85 Atl. 384 (1912).

As to the rule governing the time when a person "receives" a notice, present law has decided this on a case-to-case basis. One thing we know: where the law requires notice, mailing a letter is insufficient evidence of its receipt. Ware v. Hunnewell, 20 Me. 291 (1841); Chase v. Surrey, 88 Me. 468, 34 Atl. 270 (1896); Goodwin v. Hodgkins, 107 Me. 170, 77 Atl. 711 (1910). The implications of those decisions are in accord with the Code rule.

(27) This is new.

(28) "Organization." There is no statutory definition similar to this.

(29) "Party." There is no present statutory definition similar

to this.

(30) "Person." Definitions of "person" were included in R. S. 1954, c. 185, sec. 76; R. S. 1954, c. 186, sec. 53; R. S. 1954, c. 187, sec. 58; R. S. 1954, c. 188, sec. 191; R. S. 1954, c. 189, sec. 1. These were substantially in accord with the Code's definition.

(31) "Presumption." The term has not been defined by statute before. But Maine cases -- Lyons v. Jordan, 117 Mr. 117, 102 Atl. 976 (1918); Smith-Fitzmaurice Co. v. Harris, 126 Me. 308, 138 Atl. 389 (1927); Armour Fertilizer Co. v. Tuttle, 126 Me. 423, 139 Atl. 225 (1927) -- have given the word a meaning. This meaning is similar to the one the Code declares.

(32) "Purchase." The word is defined in R. S. 1954, c. 185, sec. 76; R. S. 1954, c. 186, sec. 53; R. S. 1954, c. 187, sec. 58; R. S. 1954, c. 189, sec. 1 (Uniform T ust Receipts Act) and see Uniform Stock Transfer Act. The Code's definition is the same in substance but is rephrased.

(33) "Purchaser." This word has been defined in the same chapters defining the word "purchase." Again, the Code's definition is substantially in accord with the present statutory definitions; it has only been rephrased.

(34) "Remedy." No similar statutory definition can be found.

(35) "Representative." This is also new.

(36) "Rights." Remedial rights have been generally understood

to be included within the meaning of the word "rights."

(37) "Security interest." This term is defined in R. S. 1954, c. 189, sec. 1 (Uniform Trust Receipts Act). However, the Code's definition is more elaborate.

In connection with that portion of the definition dealing with "reservation of property by the seller or consignor," compare R. S. 1954, c. 185, sec. 20 and R. S. 1954, c. 186, sec. 40. For a full discussion on the point, see also Williston, Sales, secs. 289, 303-06.

(38) "Send." This is new to the statutory scheme. This definition appears to be a new, more elaborate and precise definition of a rather broad term designed to attach to the term more specific legal implications than would be the case if the term was not defined.

The use of the phrase "by any other usual means of communication" in reference to the writing or notice appears to be an adoption of the liberal view regarding the mode of communication used. Williston, Contracts, Sec. 83 says:

> "Where the offeror has not himself made use of the medium of communication, adopted by the offeree, the question whether the means adopted was authorized is one of fact, depending upon what would reasonably be expected by one in the position of the contracting parties, in view of prevailing business usages, and other surrounding circumstances."

The last sentence of subsection (38) is an adaptation of Restatement, Contracts, Sec. 68 which states.

"An acceptance inoperative when dispatched only because the

offeree uses means of transmission which he was not authorized to use is operative when received, if received by the offeror within the time within which an acceptance sent in an authorized manner would probably have been received by him."

The total effect of this subsection is to make Maine law adhere more closely to the Restatement of Contracts.

(39) "Signed." This subsection is similar in principle and effect to that found in present Maine law. The court stated that a person is bound by any mark or designation he thinks proper to adopt if that mark is used as a substitute for his name and if he intends to bind himself. Rogers v. Reed, 18 Me. 257 (1841); Sawtelle v. Wardwell, 56 Me. 146 (1868); and Wade v. Bessey, 76 Me. 413, 7 Atl. 539 (1884).

(40) "Surety." This definition changes Maine law because present law draws some distinction between a guarantor and surety. Thus in Read v. Cutts, 7 Me. 186 (1831), the court said that "strictly speaking, guarantors . . . are all sureties for others who are the principals; but still, in common parlance, the word surety is used in a more limited sense. . . ." Surety could mean a co-obligor or co-promisor, entering into a contract with the principal jointly, or jointly and severally, and at the same time. A guarantor means one liable to the creditor on an independent contract. In effect this means that the surety need not be sured separately; the guarantor must be.

Another distinction between surety and guarantor is that a promise of a surety is supported by the consideration on which the promise of the principal is founded, but the engagement of a guarantor must be

founded on some new or independent consideration. Read v. Cutts, supra. The position taken by the Read court has been reaffirmed. Foster v. Kerr and Houston Inc., 133 Me. 389, 179 Atl. 297 (1935).

(41) "Telegram." This is new and appears to require no comment.

(42) "Term." This is new and appears to require no comment.

(43) "Unauthorized" signature. This definition is new.

(44) "Value." See R. S. 1954, c. 185, sec. 76; R. S. 1954, c. 186, sec. 53; R. S. 1954, c. 187, sec. 58; R. S. 1954, c. 188, secs. 25-27, 191; R. S. 1954, c. 189, sec. 1.

Subsection (c), making explicit that "value" is given when a buyer takes delivery under a pre-existing contract, has no counterpart in the presently applicable laws.

(45) "Warehouse receipt." See R. S. 1954, c. 185, sec. 76, R. S. 1954, c. 187, sec. 1 and 58.

(46) This is a broadening of the term contained in R. S. 1954, c. 188, sec. 191.

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

Generally this section states the rule expressed in Sellars v. Carpenter, 27 Me. 63 (1847): admission of the document is prima facie evidence of its authenticity.

Section 1-203. Obligation of Good Faith.

Present statutory law does not contain a "blanket" requirement

of good faith. However, good faith is specifically required in certain transactions. Hence, the definition of that term in R. S. 1954, c. 185, sec. 76; R. S. 1954, c. 186, sec. 53; R. S. 1954, c. 187, sec. 58.

On the other hand, case law is explicit on the point and is in accord with this section. "Good faith, bona fides," said the court in Campion v. Marston, 99 Me. 410, 59 Atl. 548 (1904), should be as much an essential part of a contract now as it was in the time of Justinian."

Section 1-204. Time; Reasonable Time; "Seasonably."

There is no similar statutory provision.

Subsection (1).

Since R. S. 1954, c. 185, sec. 71 would permit a variation of any right arising under a contract to sell by implication of law and since this subsection would not permit that variation where the time agreed upon is manifestly unreasonable, this subsection seems to change the law.

Subsection (2).

The test for determining "reasonable time" under Maine law is substantially in accord with the Code rule. Hollis. v. Libby, 101 Me. 302, 64 Atl. 617 (1906); R. P. Hazzard Co. v. Maine Central R.R. Co., 121 Me. 199, 116 Atl. 258 (1922). A reasonable time is "such time as is necessary conveniently to do what the contract requires should be done," said the Hollis case. "A reasonable time for delivery of goods . . . ," said the Hazzard case, " . . . is the time required conveniently to make such transportation and delivery in the ordinary course of business, taking into consideration all the circumstances, the distance, the season of the year, weather conditions, labor

conditions and other accompanying elements. It is a fact to be determined in each particular case." The Code rule is a general elaboration of the determinative factors expressed in the Hazzard case.

Subsection (3).

"Seasonably" has not been given a statutory definition.

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

Subsection (1).

See R. S. 1954, c. 185, sec. 9(1) for a use of the phrase "course of dealing." The Code's definition of the phrase is substantially in accord with the meaning given the word "usage" in Strafford Bank v. Crosby, 8 Me. 191 (1832). There the controversy was between the surety on a note and the creditor bank. Persons transacting business with a bank, the court said, are presumed to be acquainted with its usages. Further, they are deemed to have assented to those usages. As to what was the "usage" of the bank, the court said that it was the "course of the bank."

Subsection (2).

The Code's definition of "usage in trade" is substantially in accord with the present law's definition of the term "usage." See Gleason v. Walsh, 43 Me. 397 (1857); Cobb v. Lime Rock Ins. Co., 58 Me. 326 (1870); Robbins v. Bangor R. & E. Co., 100 Me. 496, 62 Atl. 136 (1905).

Like the Code, there must be proof of the "usage;" and proof must be met with facts and not speculative opinions. Folsom v. Merchangs M.M. Ins. Co., 38 Me. 414 (1854). Proof of the fact of "usage" is made in the general fashion; whether a usage exists is for the jury. Leach v. Perkins, 17 Me. 462 (1840); Bodfish v. Fox, 23 Me. 90 (1843).

In leaving the interpretation of the writing for the court once it is established that an established usage is embodied in a written trade or similar writing, the Code is consistent with present law -- construction of a writing is generally for the court. Nash v. Drisco, 51 Me. 417 (1864); Cocheco Bank v. Berry, 52 Me. 293 (1864).

Subsection (3).

The thrust of this subsection -- courses of dealing and usages of trade supplement and give meaning to the terms of an agreement -- is not new. The same rule is contained in Maine law. Leach v. Perkins, 17 Me. 462 (1840); Gleason v. Walsh, 43 Me. 397 (1857); Eaton v. McIntire, 88 Me. 578 (1896); Madunkeunk Co. v. Allen Clothing Co., 102 Me. 257 (1906).

Subsection (4).

Maine cases have indicated that custom is immaterial when the contract is clear and unambiguous. Ripley v. Crooker, 47 Me. 370 (1860); Marshall v. Perry, 67 Me. 78 (1877); Gooding v. Northwestern Mut. Ins. Co., 110 Me. 69 (1912). Basically, this is the policy expressed by this subsection when it says that the express words control usage and course of dealing. As to whether usage of trade or course of dealing controls, no Maine case deciding this point has been found.

Subsection (5).

This subsection expresses the same principle expressed in UCC Section 9-103.

Subsection (6).

Generally, this subsection expresses the same policy -- notice that

a usage of trade will be used to establish a meaning must be given the other party -- expressed in Grant v. Libby, 71 Me. 427 (1880).

Section 1-206. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.

This section changes Maine law. Today, the formal requirements for contracts for the sale of personal property are governed by R. S. 1954, c. 185, sec. 4 (Uniform Sales Act). That Act contains stricter formal requirements than does the Code: contracts for the sale of any goods or choses in action of the value of $500 are generally required to be in writing. It is apparent that the Code's treatment -- raising the limit to $5,000 for all contracts of sale but excluding contracts of the type mentioned in subsection (2) of this section -- is less stringent. The comment to this section makes clear the reasons for the new rule: there is a recognition of the informality normal to the transactions included within the scope of this section.

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

R. S. 1954, c. 185, sec. 49 is similar in spirit to this section. Under that act, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy, if, after acceptance of the goods, the buyer gives notice to the seller of the breach.

No case dealing with the question which this section answers -- whether a party may reserve his rights by explicit reservation -- has been found. It is clear that a party can waive his rights under certain circumstances: acceptance or voluntary use of subject matter of a contract or partial payment with knowledge of the breach. Hayden v.

Madison, 7 Me. 76 (1830); Hattin v. Chase, 88 Me. 237 (1895). It is equally clear that not every case of receipt of what is due is a waiver of a prior breach. Skowhegan Water Co. v. Village Corp., 102 Me. 323, 69 Atl. 266 (1906). Therefore, this section seems to serve the function of expressly providing for a sure method of preventing a waiver. See Comment 2 of this section.

Section 1-208. Option to Accelerate at Will.

This section is a specific application of UCC Section 1-203 which imposes a general obligation of good faith in performing and enforcing contracts. Since the issues raised by this section have not yet been authoritatively decided in Maine, further comment is unnecessary.

Article 2

SALES

Part 1

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

Section 2-101. Short Title.

Article 2 of the Code would supplant the Uniform Sales Act, adopted in Maine in 1923 (R. S. 1954, c. 185). For the most part the results under the Code will be the same as under the Sales Act, although the form of expression has been changed.

The principal change in approach has been the drafting of narrow and specific rules in contrast to the broad and general provisions of the Sales Act. The outstanding example of the change is the Code's de-emphasis of "property in the goods." Like the Sales Act, the Code lays down general rules governing "property" or "title." But under the Sales Act, many different consequences, such as risk of loss and the remedies available to a buyer or seller turn on "title." The Code makes separate and specific provisions for risk, remedies, etc., which apply "irrespective of title" (UCC Section 2-401).

The Code restates some aspects of contract law affecting sales, such as offer and acceptance (UCC Sections 2-206, 2-207), delegation and assignment (UCC Section 2-210) and definiteness (UCC Section 2-305). These matters are not covered in the Sales Act. Similarly, the Code defines a number of much used commercial terms, such as F.O.B., F.A.S., C.I.F., (UCC Sections 2-319 through 2-325), not defined in the Sales Act.

The most significant changes made by this Article are found in the re-shaping of the Statute of Fraud provision (UCC Section 2-201), in the

provision for "firm" offers binding without consideration (UCC Section 2-205), in the invalidation of "unconscionable" contract terms (UCC Sections 2-302, 2-719(3)), in placing the risk of loss in many cases on the possessor rather than the owner (UCC Section 2-509), in a broadening of the buyer's right to replevy (UCC Sections 2-502, 2-716), and in limiting the buyer's right of rejection (UCC Sections 2-508, 2-612, 2-614).

Sections 27 through 40 of the Uniform Sales Act, dealing with documents of title, are covered in Article 7 of this Code rather than in Article 2.

Section 2-102. Scope; Certain Security and Other Transactions Excluded From This Article.

Accord: R. S. 1954, c. 185, sec. 75 (mortgage, pledge, charge or other security). (Applied in Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1936)).

Section 2-103. Definitions and Index of Definitions.

Subsections (1)(a) and (d).

The phrase "any legal successor in interest of such person" is omitted from the definitions of "buyer" and "seller." Compare R. S. 1954, c. 185, sec. 76; see UCC Commissioner's comments, para. (1).

Subsection (1)(b).

The requirement of "good faith" in the case of a merchant and the inclusion of "honesty in fact" within the meaning of that term states present law. See R. S. 1954, c. 185, sec. 76. The Code states new law when it requires an "observance of reasonable commercial standards of fair dealing in the trade." For a definition of "merchant," see UCC Section 2-104.

Subsection (1)(c).

The definition of "receipt" is new. Compare it with the definition of "delivery," R. S. 1954, c. 185, sec. 76.

Section 2-104. Definitions: "Merchant;" "Between Merchants;" "Financing Agency."

In addition to the special rules for merchants listed by UCC Commissioners, see UCC Section 2-326, comment (1). On "financing agency," see UCC Sections 2-506, 2-512(1)(b).

The Code goes beyond present law in setting forth special rules for merchants. But R. S. 1954, c. 185, sec. 15(II) and sec. 16(III) do impose implied warranties on a seller who "deals in" and/or is a "dealer" in goods of similar description. Compare R. S. 1954, c. 185, sec. 15(V) (implied warranty annexed by usage of trade); R. S. 1954, c. 185, sec. 71 (course of dealing or custom may negate). See Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925) (dicta: implied warranty between food dealer and customer unless customer assumes risk by selecting food).

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

Subsection (1).

"Goods." This definition, which fixes the coverage of most of Article 2, follows the Sales Act in general. Excluded are choses in action, investment securities and the money with which a price is paid (not money as a commodity). Growing crops, unborn animal young, and unshorn wool are goods under this Article. See R. S. 1954, c. 178, sec. 7 (mortgages on growing crops). Compare UCC Section 2-501 on insurable interests in growing crops and unborn yound. See also UCC Section 2-207 (Statute of Frauds as to

goods "specially manufactured"); UCC Section 2-107 (things attached to realty).

Subsection (2).

"Future Goods." As under present law, there can be no present sale of future goods, but the Code defines future goods as those not both existing and identified. Cf. R. S. 1954, c. 185, secs. 5, 76 (goods to be manufactured or acquired).

Subsection (3).

"Part Interests; Fungible Goods." Accord: R. S. 1954, c. 185, sec. 6.

Section 2-106. Definitions: "Contract;" "Agreement;" "Contract for Sale;" "Sale;" "Present Sale;" "Conforming to Contract;" "Termination;" "Cancellation."

These definitions articulate specific sections of the Code and do not require separate treatment. The definitions of "contract for sale" and "sale" carry forward R. S. 1954, c. 185, sec. 1, but make it clear that "contract for sale" includes present sale.

Section 2-107. Goods to be Severed from Realty: Recording.

Subsections (1) and (2).

Section 2-105, defining "goods," includes "identified things attached to the realty" as described in this section. Under subsection (1) this includes contracts for the sale of timber, minerals, or structures, without regard to the question of material harm to the realty, if the seller is to sever. Under present law, a contract to sell timber may be interpreted as a contract to sell chattels even though the buyer is to sever. Erkstine v. Plummer, 7 Me. 447 (1831); Banton v. Shorey, 77 Me.

48 (1885). Other things which can be severed without material harm, such as growing crops, are covered by subsection (2) which continues the policy of the Uniform Sales Act, R. S. 1954, c. 185, sec. 76.

Subsection (3).

This subsection provides for recording a contract of severance even though no material harm to the realty is involved, as a conveyance under R. S. 1954, c. 168, sec. 14, covering conveyances by deed. That statute now applied to a "conveyance of an estate in fee simple, fee tail or for life, or lease for more than 2 years. . . ." As to what may pass as personalty, see R. S. 1954, c. 168, sec. 1.

Part 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

Section 2-201. Formal Requirements; Statute of Frauds.

This section in part follows the pattern of the Statute of Frauds in the present Sales Act, R. S. 1954, c. 185, sec. 4, which requires a writing for the enforcement of sales for $500 or upward, subject to exceptions for (a) a special manufacture, (b) receipt or (c) payment. But present rules are changed in a number of important respects.

(1) Subject Matter

(a) Choses in Action. The present Uniform Sales Act embraces "goods or choses in action." This section excludes choses in action by the definition of "goods" in UCC Section 2-105. Securities, as defined in UCC Section 8-102 (1)(a), are subject to a separate Statute of Frauds in UCC Section 8-109. Compare Ford v. Howgate, 106 Me. 517, 76 Atl. 939 (1910); Pray v. Mitchell, 60 Me. 430 (1872), (shares of stock within Statute of Frauds). Some sales of accounts receivable are subject to the formal requirements of UCC Section 9-203 and 9-302. See UCC Sections 9-102 (1)(b) and 9-302, Comment 5. Contracts to sell other choses in action are controlled by UCC Section 1-206, which contains significantly different requirements.

(b) Specially Manufactured Goods. The exception in Subsection (3)(a) of this provision is generally similar to the exceptions in R. S. 1954, c. 185, sec. 4, II. But the Code provision is not limited, as is the present exception, to special manufacture "by the seller." The Code also limits the exception to cases where the seller has made a "substantial beginning" of manufacture of "commitments for their procurement."

Thus the fact that labor and skill may be the essence of the contract may not be sufficient to bring the case within the Code exception. Compare Hight v. Ripley, 19 Me. 137 (1841) (if labor and skill are to be applied to existing materials, such a contract is not within the Statute of Frauds).

(2) The Memorandum

(a) Sufficiency. The Sales Act requirement of "some note or memorandum in writing of the contract or sale" has been held not satisfied if the memorandum states merely the quantity and omits theprice, time of delivery and terms of payment. L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 Atl. 384 (1923). The Code requires only that the note or memorandum "indicate that a contract for sale has been made between the parties." See Uniform Laws Comment (1) suggesting permissibility of omitting the price term and stating the three essential requirements. But the Code introduces the new limitation that the contract is not enforceable beyond the quantity shown.

(b) Special Rule for Merchants. Subsection (2) makes the provision that the Statute is satisfied "between Merchants" if written confirmation is received and not objected to within 10 days. But the confirmation must be sufficient to bind the sender.

(3) Admissions in Court. Subsection 3(b) gives effect to admissions in court. The present statute has no such provision, and the Code seems to change the law. Williams v. Robinson, 73 Me. 186 (1882); L. J. Upton & Co. v. Colbath, 122 Me. 188, 197, 119 Atl. 384 (1923). But the Code provision is consistent with holdings that the memorandum may be good even though made without the intention that it be a memorandum. Knobel

& Bloom v. Cortell-Markson Co., 122 Me. 511, 120 Atl. 721 (1923).

(4) Payments and Receipt. Under the present law, the entire contract may be enforced if the buyer accepts or receives the goods or makes part payment. Ford v. Howgate, 106 Me. 517, 76 Atl. 939 (1910); E. A. Clark & Co. v. D. & C. E. Scribner Co., 122 Me. 418, 120 Atl. 609 (1923). Subsection 3(c) of this section allows for such an exception only to the extent of the partial receipt or payment. This provision limits the enforcement of oral contracts more than the present law, but expresses the same policy as the limitation of the enforcement under subsection (1) to the quantity stated in the memorandum and the similar limitation on the effect of admission in court under subsection 3(b).

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

Parold evidence is now governed b general contract rules. See R. S. 1954, c. 185, sec. 73. This section is generally consistent with the contract rules.

(1) Writings Protected

The Code phrase "intended as a final expression" appears to follow the concept of "integration" expressed in the Restatement, Contracts, secs. 228 and 237. Compare Bar Harbor & Union River Power Co. v. Foundation Co., 129 Me. 81, 149 Atl. 801 (1930); Towne v. Larson, 142 Me. 301, 51 A.2d 51 (1947); Luce v. Park Street Motor Corporation, 123 Me. 169, 122 Atl. 338 (1923); Bassett v. Breen, 118 Me. 279, 107 Atl. 829 (1919), following general rule that once parties have committed bargain to writing, they cannot introduce prior or contemporaneous parole evidence that they meant something else.

(2) Course of Dealing, Usage of Trade, and Course of Performance. As to custom and usage, see accord: Restatement, Contracts, sec. 246; Randell v. Smith, 63 Me. 105 (1873) (Usage must be certain, known, reasonable and not repugnant to the contract); Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. 65 (1888) (may modify or explain intent of the parties in case of an ambiguity); Gooding v. Northwestern Mutual Life Insurance Co., 110 Me. 69, 85 Atl. 391 (1912). (But custom will not be taken into account when the contract is clear, express, and unambiguous). As to course of performance, see accord: Restatement, Contracts, sec. 235 (e). The Code appears to change the rule that such evidence is restricted to cases of ambiguity or omission. Borneman v. Milliken, 123 Me. 488, 124 Atl. 200 (1924).

(3) Consistent Additional Terms. This section follows present law in permitting evidence of consistent additional terms when the writing is not complete. Burdett v. Hunt, 25 Me. 419 (1845); Vumbraca v. West, 107 Me. 130, 77 Atl. 642 (1910); cf. Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352 (1882). Compare Restatement, Contracts, secs. 238-240. The Code's holding that evidence may be admitted unless there is a finding that the writing was intended as a "complete and exclusive statement" may result in an admission of evidence which would be excluded under present law.

Section 2-203. Seals Inoperative.

At present a written instrument which recites that it is under seal, disenables the obligor from pleading want of consideration. Sterns v. Richie, 128 Me. 368, 147 Atl. 703 (1929), and imports

consideration Goodwin v. Cabot Amusement Co., 129 Me. 36, 149 Atl. 574 (1930). See Restatement, Contracts, sec. 110. Under this Code provision, contracts or offers to buy or sell goods will require consideration, despite the presence of a seal, except as provided under other sections of the Code. See UCC Sec. 2-205, 202-9 (1).

Section 2-204. Formation in General.

(1) Manner of Formation. Accord: R. S. 1954, c. 185, sec. 3; L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 Atl. 384 (1923).

(2) Conduct Recognizing Existence. Accord: R. S. 1954, c. 185, sec. 3; Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849 (1923), Restatement, Contracts, sec. 21.

(3) Omitted Terms; Indefiniteness. See Annotations to UCC Sec. 2-305, Open Price Term; UCC Sec. 2-311, Options and Co-operation Respecting Performance. Compare Restatement, Contracts, secs. 32 and 33; Corthell v. Summit Thread Co., 132 Me. 94, 167 Atl. 79, 92 A.L.R. 1391 (1933); Ross v. Mancini, 146 Me. 26, 76 A.2d 540 (1950).

Section 2-205. Firm Offers.

This section is new and will modify present rules as to consideration by giving effect for a limited time to a Merchant's "irrevocable" offer. Cumberland Bone Co. v. Atwood Lead Co., 63 Me. 167 (1874); Ervin v. Colby, 119 Me. 118, 109 Atl. 388 (1920); Restatement, Contracts, secs. 35, 45-47. The same result might be obtained under present law by an offer made under seal. See Annotations to UCC Sec. 2-203.

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

(1)(a) Manner and Medium of Acceptance. No Maine cases were

found in point. Thise Code provision may alter the general rule determining the time the acceptance is deemed communicated. It is generally held that the offeree may use any means of communication which is either expressed or implicit (such as using same mode as offeror) in the offer, and acceptance will be deemed upon delivery thereto; otherwise, acceptance will be deemed as of the time it reaches the offeror. Restatement, Contracts, sec. 64; 46 Am. Jur., Sales 54, 53.

(1)(b) Acceptance by Shipment. No cases were found in point but this provision is apparently in accord elsewhere. 46 Am. Jur., Sales 49.

(2) Non-Conforming Shipments. On the distinction between a shipment which purports to be an acceptance and a shipment offered as an accommodation, see Restatement, Contracts, sec. 63 (tender of performance "operates as a promise to render complete performance").

(3) Beginning of Performance. Subsection (2) follows Restatement, Contracts, sec. 45, with the added requirement of notification to the offeror. But compare Restatement, Contracts, sec. 56 (notice required when offeror "has no adequate means of ascertaining. . . that the act or forbearance has been given").

Section 2-207. Additional Terms in Acceptance of Confirmation.

(1) Validity of Acceptance. Present law upholds an acceptance which requests additional terms, if the acceptance is not made to depend on assent to those terms. Simpson v. Emmons, 116 Me. 14, 99 Atl. 658 (1917); Phillip v. Moor, 71 Me. 78 (1880). But an acceptance which adds qualifications can operate only as a counter-offer. Jenness v. Mt. Hope

Iron Co., 53 Me. 20 (1864); Stock v. Towle, 97 Me. 408, 54 Atl. 918 (1903). See also Restatement, Contracts, secs. 38, 60 and 62. The Code, however, contemplates that additional terms should be interpreted as suggestions when, under present law, they might be regarded as qualifications.

(2) Incorporation of Additional Terms. On giving effect to additional terms where no objection is made, see, substantially in accord: Restatement, Contracts, sec. 72 (acceptance by silence in limited circumstances). But cf. Jenness v. Mt. Hope Iron Co., 53 Me. 20 (1864); Stock v. Towle, 97 Me. 408, 54 Atl. 918 (1903).

(3) Conduct Recognizing Existence. On the establishment of a contract by conduct, see annotation to UCC Sec. 2-204.

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

On rendering the failure to object to a course of performance "relevant," but not controlling, to determine the meaning of the agreement, see accord: R. S. 1954, c. 185, sec. 3 (contract "may be inferred from conduct of the parties"); R. S. 1954, c. 185, sec. 71 (implied terms may be negatived or varied "by the course of dealing"); Restatement, Contracts, secs. 72, 235(e). But cf. Cumberland Bone Co. v. Atwoood Lead Co., 63 Me. 167 (1874). (A general understanding to supply material without a binding contract, is terminable at will by either party).

The various rules of precedence established in subsection (3) are consistent with UCC Section 1-205; see annotations to that section.

As to "waiver" by failure to object, see accord: R. S. 1954, c. 185, sec. 49 (failure to give notice of breach of warranty): Restatement, Contracts, secs. 298, 411-413.

Section 2-209. Modification, Rescission and Waiver.

(1) Modification without Consideration. Subsection (1) abolishes the requirement of consideration in agreements modifying sales contracts under present law. Wescott v. Mitchell, 97 Me. 377, 50 Atl. 21 (1901) (although, in thise case, there is some dicta to the effect that if the subsequent modifying contract were only "explanatory" of the former contract, no consideration needed); Savage v. North Anderson Mfg. Co., 124 Me. 1, 124 Atl. 724 (1924); United Company v. Grinnell Canning Co., 134 Me. 118, 182 Atl. 415 (1936). Compare Restatement Contracts, secs. 76, 88-90. Modification without consideration might be accomplished under present law without a seal. See Annotation to UCC Sec. 2-203.

(2) Signed Agreement Excluding Modification or Rescission. Subsection (2) would overrule Maine cases, which permit modification or rescission of a written contract by an oral agreement in cases where a signed agreement excludes oral modification or rescission. Copeland v. Hewitt, 96 Me. 525, 53 Atl. 36 (1902); Restatement, Contracts, sec. 407. Under subsection (4) and (5), an ineffective attempt at modification or waiver can operate as a waiver, but the waiver can be withdrawn if a material change of position has not resulted from reliance on the waiver. Accord: Restatement, Contracts, secs. 88(2) and 297. Compare Colbath v. H. B. Stebbin Lumber Co., 127 Me. 206, 144 Atl. 1 (1929). (To constitute a waiver without consideration, there must be reliance thereon).

(3) Effect of Statute of Frauds. Insofar as a modification requires a signed writing of the contract as modified is within the Statute of Frauds, no Maine cases were found in point, but the Code rule is in

accord elsewhere. 37 C.J.S., Frauds, Statute of, p. 731. Maine law, however, would probably be in accord; compare William v. Robinson, 73 Me. 186, 40 Am. Rep. 352 (1882) (Once the memo is complete, parol evidence is not competent to vary its terms); L. J. Upton & Co. v. Colbath, 122 Me. 188, 119 Atl. 384 (1923). (Rights of party must be ascertained from memorandum without resort to parol testimony.) A general exception to the above rule, however, occurs when the subsequent oral modification affects only the time of performance and not the terms. Richardson v. Cooper, 25 Me. 450 (1845); Smith v. Loomis, 74 Me. 503 (1883); 27 C. J. Frauds, Statute of, p. 328. These exceptions appear to be consistent with Subsection (4) of this Code provision, i.e., a waiver.

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

(1) Delegation. Accord: Salmon Lake Seed Co. v. Frontier Trust Co., 130 Me. 69, 153 Atl. 671 (1931). ("An executory contract for personal services. . . cannot be assigned by the sole act of one of the parties thereto.")

(2) Assignment. Accord: Restatement, Contracts, secs. 151 and 161. But UCC Sec. 9-318(4) makes ineffective a term prohibiting assignments of an "account" or a "contract right" as defined in UCC Secs. 9-102, 9-104, 9-106.

(3) Interpretation. As to subsection (3), no Maine cases were found in point, but for strict construction of clauses prohibiting assignments, see Restatement, Contracts, sec. 151(c). As to subsection (4), see generally in accord: Restatement, Contracts, secs. 136, 141

and 164. This section would appear to modify Maine law since a party to a contract cannot alone assign his contract when the performance of a provision would require personality. Salmon Lake Seed Co. v. Frontier Trust Co., 130 Me. 69, 153 Atl. 671 (1931).

(4) Insecurity of Other Party. Subsection (5), providing for "assurance" from the assignee, is new.

Part 3

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

Section 2-301. General Obligations of Parties.

Accord: R. S. 1954, c. 185, secs. 11, 41.

Section 2-302. Unconscionable Contract or Clause.

This section states a theory new to sales law. It appears to be intended to carry equity practice into the sales field. See Restatement, Contracts, sec. 367. See also Bither v. Packard, 115 Me. 306, 98 Atl. 929 (1916) (where the court held that there may be such unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon the satisfactory ground of fraud).

Section 2-303. Allocation or Division of Risks.

Compare R. S. 1954, c. 185, secs. 71 (variation of implied obligations), 22 (rules on risk "unless otherwise agreed").

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

This section expands R. S. 1954, c. 185, sec. 9(II) to cover cases excluded by R. S. 1954, c. 185, sec. 9(III) where the consideration for a transfer of property in goods included real property. In such cases, the Code covers the transfer of the goods and the seller's obligation with reference to them, but not the transfer of the realty. Contracts of barter of goods are covered by the Sales Act and by these section.

Section 2-305. Open Price Term.

Generally in accord. R. S. 1954, c. 185, secs. 9(I)(IV), and 10.

See also Restatement, Contracts, secs. 32 and 33.

Section 2-306. Output, Requirement and Exclusive Dealings.

This section is new. See Restatement, Contracts, secs. 32, 77-80.

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

Accord: R. S. 1954, c. 185, sec. 45(I).

Section 2-308. Absence of Specified Place for Delivery.

Accord: R. S. 1954, c. 185, sec. 43(I). Subsection (c) is new.

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

Subsection (1). Performance within Reasonable Time.

Accord: R. S. 1954, c. 185, secs. 43(II), 45(II), 47(I), 48. For a definition of reasonable time under R. S. 1954, c. 185, sec. 43(II), see Franklin Paint Co. v. Flaherty, 139 Me. 330, 29 A.2d 651 (1943); R. S. 1954, c. 185, sec. 47 is cited in McNally v. Ray, 151 Me. 277, 117 A.2d 342 (1955).

Subsection (2). Indefinite Duration.

Accord: Cumberland Bone Co. v. Atwood Lead Co., 63 Me. 167 (1874) (where under a contract to furnish acid, no terms of payment or period of continuance specified, it was held that the contract was terminable at the pleasure of either party); Durgin v. Baker, 32 Me. 273 (1850) (in a contract of services for a specified time, "if the parties can agree," either party may terminate it at pleasure, and without showing that there was any reasonable cause of disagreement). Cf. Restatement, Contracts, secs. 32, 33, 44.

Subsection (3). Notice of Termination.

This subsection is new but in general accord with provisions requiring reasonable notification, as for example in revocations of offers. The provision invalidating "unconscionable" agreements dispensing with notification is in accord with the general policy of UCC Section 2-304. Compare UCC Sections 1-102, 1-204.

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

Subsection (a). Time of Payment.

This subsection follows R. S. 1954, c. 185, sec. 42 in setting up a presumption against extension of credit. See, accord, Restatement, Contracts, sec. 267. It also clears up an ambiguity in the present law by providing that payment under a shipment contract is due on arrival at destination. Compare R. S. 1954, c. 185, sec. 46(I).

Subsections (b) and (c). Shipment under Reservation; Inspection.

Compare R. S. 1954, c. 185, sec. 47(I). The Sales Act, however, contains no provision like subsection (b), authorizing the seller to ship under reservation and to demand payment against documents. Subsection (c) follows R. S. 1954, c. 185, sec. 47(III) in requiring payment before inspection under a C.O.D. contract. The preservation of the buyer's right to inspect before payment in cases where documentary shipment is not expressly agreed to is consistent with that section and R. S. 1954, c. 185, sec. 47(II).

Subsection (d).

This provision is new law, described in part in the Comment

as "common commercial understanding." The provision for extension of the credit period when the invoice is delayed seems to follow the principle of Restatement, Contracts, sec. 276, especially Illustrations 4 and 5.

Section 2-311. Options and Co-operation Respecting Performance.

Subsection (1). Definiteness.

Accord: Restatement, Contracts, sec. 32. The limit of "commercial reasonableness" is new.

Subsection (2). Specification.

This provision is new law, described in the Comment as a "standard commercial interpretation."

Subsection (3). Lack of Co-operation.

The Sales Act did not deal with this problem. See accord, Restatement, Contracts, sec. 295.

Section 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

Subsection (1)(a). Title.

The implied warranty of title of this subsection is comparable to that of Section 13(1) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 13(I). Accord: Huntington v. Hall, 36 Me. 501 (1853); McDonald v. Mack Truck Co., 127 Me. 133, 142 Atl. 68 (1928).

Subsection (1)(b). Freedom from Liens and Encumbrances.

The warranty of freedom from liens and encumbrances provided under this subsection is comparable to that of Section 13(2) and

(3) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 13(II) and (III).

Subsection (2). Exception Where Title Not Claimed by Seller.

This subsection, like Section 13(4) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 13(IV), frees the seller from the implied warranty of title if he does not purport to have title or to be able to convey it. The provision of specific language for a modification or an exclusion is more stringent than the Uniform Sales Act, Section 71, R. S. 1954, c. 185, sec. 71.

Subsection (3). Claims of Infringement.

These claims are explicitly added to the coverage of the warranty where the seller is a merchant dealing in goods of the kind sold.

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

Subsection (1). Express Warranties: Scope and Terminology.

The Code treats descriptions and the use of samples or models, as well as affirmations and promises, as "express" warranties, rather than as "implied" warranties as is done in the Uniform Sales Act, Secs. 14 and 16, R. S. 1954, c. 185, secs. 14 and 16.

Subsection (1)(a). Affirmations and Promise.

Affirmations of fact and promises are made express warranties by this subsection just as they are by Section 12 of the Uniform Sales Act, R. S. 1954, c. 185, sec. 12. See Ross v. Porteous, Mitchell and Braun Co., 136 Me. 118, 3 A.2d 650 (1939) (no expression of opinion, however strong, imports a warranty).

Subsection (1)(b). Description.

This subsection establishes an express warranty based on a description of the goods equivalent to the implied warranty of Section 14 of the Uniform Sales Act, R. S. 1954, c. 185, sec. 14. Accord: Henderson v. Berce, 142 Me. 242, 50 A.2d 45 (1946) (sale by description imports a warranty).

Subsection (1)(c). Sample or Model.

The express warranty that the whole of the goods shall conform to a sample or model made the basis of the bargain is comparable to that established by Section 16 of the Uniform Sales Act, R. S. 1954, c. 185, sec. 16.

Materiality of Affirmation, Promise, Description, Sample.

The requirement that affirmation, etc., become a "part of the basis of the bargain" in order to create a warranty is apparently the same as the "reliance" requirement of Section 12 of the Uniform Sales Act, R. S. 1954, c. 185, sec. 12.

Subsection (2). Formal Words Not Necessary.

This subsection, rendering formal words unnecessary, is in accord with Section 12 of the Uniform Sales Act, R. S. 1954, c. 185, sec. 12, making "any" affirmation or promise the basis of a warranty.

Statements of Value or Opinion.

Likewise, the provision of subsection (2) that a mere affirmation of value or a statement of opinion or commendation by the seller does not create a warranty is in accord with a similar provision of Section 12

Accord: Ross v. Porteous, Mitchell and Braun Co., 136 Me. 118, 3 A.2d 650 (1939).

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

Subsection (1). Scope.

(a) Sales by Merchant.

A special implied warranty or merchantability is imposed on merchants by subsection (1), the same as that imposed in the case of goods bought by description "from a seller who deals in goods of the description," under the Uniform Sales Act, Section 15(2), R. S. 1954, c. 185, sec. 15(II). Subsection (1)(a), however, broadens the scope of the warranty by omitting the requirement that the sale be "by description." R. S. 1954, c. 185, sec. 15 is cited in McNally v. Ray, 151 Me. 277, 117 A.2d 342 (1955).

For cases in which the implied warranty of merchantability has been implied, see Campion v. Marston, 99 Me. 410, 59 Atl. 548 (1904); Stevens Tank and Tower Co. v. Berlin Mills Co., 112 Me. 336, 92 Atl. 180 (1914).

(b) Serving of Food or Drink.

The Uniform Sales Act, unlike the Code, does not specifically include the serving of food or drink as a sale within its scope.

Subsection (2). Definition of Merchantable Quality.

The Code, unlike the Uniform Sales Act, establishes tests under subsection (2) to be used in determining "merchantable quality."

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

This section of the Code incorporates the provisions of Section 15(1)

of the Uniform Sales Act, R. S. 1954, c. 185, sec. 15(I). In addition, it elaborates and strengthens the provisions of the present law in several respects: (a) the skill or judgment on which the buyer must rely is defined as skill or judgment "to select" or "to furnish" suitable goods; (b) it is enough that the seller "has reason to know" a buyer's purpose in order for a warranty to arise, as compared with a buyer's having to "make known" his purpose under the Uniform Sales Act. Compare Ross v. Diamond Match Co., 149 Me. 360, 102 A.2d 858 (1953) (setting down the requirements of what plaintiff must prove to support recovery and including that he make known to the seller the particular purpose for which the goods were required).

For other cases under R. S. 1954, c. 185, sec. 15(I), see Ross v. Porteous, Mitchell and Braun Co., 136 Me. 118, 3 A.2d 650 (1939) (implied warranty measures buyer's right and seller's liability); Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925) (holding no implied warranty arises without privity of contract. Compare UCC Section 2-318).

Sales Under Patent or Trade Name.

The Code contains no provision comparable to Section 15(4) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 15(IV), under which the implied warranty of fitness for a particular purpose is made inapplicable to sales "of a specified article under its patent or other trade name."

The omission of the trade name qualification from the Code mades clear that a sale under a patent or a trade name is merely one factor to be considered on the question of whether the buyer actually relied on the seller. Compare the interpretation of R. S. 1954, c. 185, sec. 15(IV) in Ross v. Porteous, Mitchell and Braun Co., 136 Me. 118, 3 A.2d 650 (1939) (implied warranty not necessarily defeated because article has trade name).

Section 2-316. Exclusion or Modification of Warranties.

Subsection (1). Construction of Disclaimer in Light of Express Warranty.

Subsection (1) seems consistent with the general principle of law that a contract must be read as a whole to give effect, if possible, to each provision and that specific provisions govern more general language. See Restatement, Contracts, Sections 235, 236.

For the effect of a clause expressly stipulating that the written contract contains all agreements between the parties, see Lasher v. LaBerge, 125 Me. 475, 135 Atl. 31 (1926).

Subsection (2). Disclaimer of Implied Warranty of Merchantability or Fitness; Must be Specific.

Subsection (2) is consistent with Section 15(6) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 15(IV), under which an express warranty does not negative an implied warranty, unless inconsistent therewith.

However, the requirement of conspicuous, written, and somewhat specific language to disclaim the implied warranties of fitness and merchantability goes further than prior law under which a general disclaimer of all warranties not expressly excluded would be effective. Compare Lasher Co. v. LaBerge, 125 Me. 475, 135 Atl. 31 (1926).

Exceptions.

The exceptions of paragraphs (a), (b), and (c) of subsection (3) are situations where the Code deems the circumstances sufficient in themselves to call the buyer's attention to the exclusion of the implied warranties and thus equivalent to a specific exclusion in the contract.

Subsection (3)(a).

The effect given such words as"as is" is in line with the ordinary commercial usage of the term.

Subsection (3)(b).

This subsection incorporates Section 15(3) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 15(III). Although the present statute makes no reference to a buyer's refusal to examine the goods, it has been indicated in some jurisdictions that the buyer loses his remedy by failure to inspect the goods upon the terms permitted. Under the Code, the further requirement that the seller demand that the buyer examine the goods may be necessary.

Subsection (3)(c).

Course of dealing and usage of trade are dealt with under annotations to UCC Section 1-205, supra.

Subsection (4). Limitation on Remedies.

As indicated in this subsection, limitations on remedies are subject to the provisions of UCC Section 2-718 and 2-719, infra.

Section 2-317. Cumulation and Conflict of Warranties Express and Implied.

This section incorporates the narrower rule of Section 15(6) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 15(VI), to the effect that an express warranty does not negative an implied warranty unless inconsistent therewith. See annotation to UCC Section 2-316(2), supra.

In addition, the Code establishes a set of presumptions for determining the parties' intention with respect to which warranty is dominant in the

situation where to construe the warranties as consistent and cumulative would be unreasonable. These presumptions for reconciling different types of warranties have no counterpart in the present statute.

However, the emphasis of the section upon construing warranties as cumulative and of subsection (a) on exact specifications displacing general language of description is consistent with the general contract principles referred to in the annotation to UCC Section 2-316(1), supra.

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

The present law does not specify, as does this section of the Code, that the seller's warranty runs to certain persons other than the immediate buyer.

See prior Maine cases: Burns v. Baldwin-Doherty Co., 132 Me. 331, 170 Atl. 511 (1934) (warranty of quality of chattel does not run with chattel on resale, and hence is not available to subvendee); Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925) (warranty does not run from manufacturer to consumer in absence of privity of contract); Carter v. Hardon, 78 Me. 528, 7 Atl. 392 (1886) (false representations to husband do not give wife cause of action.

The Code goes further than the present law by extending coverage of a warranty to the buyer's family, household and guests. The prohibition against limiting by contract the responsibility to third persons is also new.

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

Subsection (1). F.O.B.

The Uniform Sales Act does not define shipping terms such as F.O.B. This section of the Code, however, states commercial understanding that

the term defines the point to which the seller has responsibility for the transportation of the goods free of transportation expenses to the buyer. See American Foreign Trade Definitions (Chamber of Commerce, 1941) II-A, II-B; 2 Williston, Sales (1948) Section 280.

Risk.

By placing the risk on the seller until the F.O.B. point, the Code is consistent with the provisions of R. S. 1954, c. 185, secs. 19 (Rules 4 and 5), 22 and 46. See J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 Atl. 890 (1937) (applying R. S. 1954, c. 185, sec. 19 (Rule 5) as to when title passes in F.O.B. carrier contract). One question not clearly covered by the Code is when risk passes to the buyer in a situation where the seller quotes a delivered price without the use of the term "F.O.B." Under UCC Section 2-319(1)(b) risk is on the seller until the destination is reached if the contract is "F.O.B. the place of destination." But it is not clear that this same result would follow in the former case. See UCC Section 2-509, infra.

Subsection (2). F.A.S.

The Code's definition in subsection (2) expresses commercial understanding of the term. 2 Williston, Sales (1948) Section 280h; American Foreign Trade Definitions (Chamber of Commerce, 1941) III.

Subsection (3). Buyers Instructions.

The rule of subsection (3) imposing on the buyer the duty to give needed instructions is also consistent with commercial understanding. See American Foreign Trade Definitions (Chamber of Commerce, 1941) II-E, III.

Subsection (4). Payment against Documents.

Subsection (4) is new. Compare Section 2-513(3) of the Code.

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

Subsection (1). Definitions.

The Uniform Sales Act does not specify the effect to be given these shipping terms. The Code's definition of C.I.F. states commercial understanding that the price quoted by the seller under this term includes the cost of the goods, the insurance and the freight. See 2 Williston, Sales (1948) Section 280c; American Foreign Trade Definitions (Chamber of Commerce, 1941) V.

The Code also states commercial understanding in defining C. & F. as meaning that the price quoted includes cost and freight to the named destination. See 2 Williston, Sales (1948) Section 280h; American Foreign Trade Definitions (Chamber of Commerce, 1941) IV.

Subsection (2). Seller's Obligations and Risks under C.I.F. Contract.

The detailed obligations listed in subsection (2) reflect commercial understanding. See 2 Williston, Sales (1948) Section 280c; American Foreign Trade Definitions (Chamber of Commerce, 1941) V. That commercial understanding is sufficient to override the presumption of R. S. 1954, c. 185, sec. 19 (Rule 5) arising from the seller's responsibility for freight. See 2 Williston, Sales (1948) Section 280d.

Subsection (3). Seller's Obligations and Risks under C. & F. Contract.

Here again the Code is in line with mercantile understanding, American Foreign Trade Definitions (Chamber of Commerce, 1941) IV, including the shifting of the risk of loss in transit to the buyer inspite of the fact

that the seller pays the freight. See 2 Williston, Sales (1948) Section 280h.

Subsection (4). Payments Against, and Tender of, Documents Rather than Goods.

In requiring the buyer to make payment against documents, without awaiting the arrival of the goods, and the seller to tender documents, and not the goods, the Code again adopts business usage. See 2 Williston, Sales (1948) Section 280c.

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

Subsection (1).

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

Subsection (2).

Under subsection (2), an agreement whereby the price is based on, or is to be adjusted according to, "net landed weights," etc., or a warranty of quality "on arrival," places the risks of "ordinary" deterioration, shrinkage, etc. on the seller, while other risks fall on the buyer. It is not perfectly clear how some borderline risks, such as sweating, wetting, and shifting of cargo would be allocated, or whether it would be practicable to determine on arrival whether a defect in quality resulted from an "ordinary" or "extraordinary" risk.

Subsection (3).

Subsection (3) provides that while payment may be postponed under

a C.I.F. contract where the contract documents are to be presented for payment on or after arrival of the goods, the arrival of the goods is not a condition precedent to payment which, in the case of lost goods, is due when the goods should have arrived.

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

The Uniform Sales Act does not deal with the effect to be given this shipping term. With respect to commercial understanding, compare American Foreign Trade Definitions (Chamber of Commerce, 1941) I (Ex Factory, etc.); VI (Ex Dock). The provisions of the Code appear to be in accord with British authority. See 2 Williston, Sales (1948) Section 280g.

Subsection (1), in permitting the seller to deliver by some other ship than the one named, is consistent with the Code's broader provision in Section 2-614 on Substituted Performance.

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

Subsection (1). Type of Bill of Lading.

The Uniform Sales Act does not deal with this question. Commercial practice is not uniform. See American Foregin Trade Definitions (Chamber of Commerce, 1941) II-A, II-B, II-C, and II-D (under quotation F.O.B. inland carrier, seller must obtain "clean bill of lading or other transportation receipt"); II-D (under quotation F.O.B. vessel, seller must provide "clean ship's receipt or on-board bill of lading"); IV and V (under quotations C. & F. and C.I.F., use of "received-for-shipment" or "on board" bill of lading depends on contract). See Also Customs and Practices for Commercial Documentary Credits (International Chamber of Commerce, (1938) Art. 19(a) (in the case of Sea or Ocean Bills of

Lading, "Received for Shipment" or "Alongside" Bills of Lading are acceptable).

Subsection (2). Bill of Lading Issued in Parts.

Subsection (2), in allowing tender of an incomplete set of documents with indemnity bond against loss where a bill of lading has been issued in a set of parts, codifies Dixon, Irmaos & Cia, Ltd. v. Chase National Bank, 144 F.2d 759 (2d Cir. 1944), cert. denied, 324 U.S. 850, 89 L. Ed. 1410, 65 S. Ct. 687 (1945). Contrast: Customs and Practices for Commercial Documentary Credits (International Chamber of Commerce, 1938) Art. 15(a) ("Full set" of Sea or Ocean Bills of Lading required).

Section 2-324. "No Arrival, No Sale" Term.

The Uniform Sales Act has no provision dealing with this term. When "no arrival, no sale" or a similar term is used, the Code obligates the seller to ship the goods and to tender them; it gives the buyer the choice of accepting or rejecting the goods that arrive if there is a casualty in transit, but relieves the seller of liability. These provisions seem in accord with general case law. See 1 Williston, Sales (1948) Sections 188, 188a, 188b. In giving the buyer the unlimited option to accept the goods that arrive, the Code may be changing the present law. See 1 Williston, Sales (1948) Section 188b (seller is not obligated to deliver the portion that arrives).

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

Subsection (3) seems to be in accord with commercial and banking understanding and the weight of authority in requiring an irrevocable letter of credit where a letter of credit has been agreed upon. See

2 Williston, Sales (1948), Section 469e. Compare Customs and Practices for Commercial Documentary Credit (International Chamber of Commerce, 1938) Art. 3, which seems to support the view, inconsistent with the Code, that a letter of credit is revocable unless specifically stated to be irrevocable, until the seller has accepted or acted upon it.

The definition of "confirmed credit" in subsection (3) is in line with banking practice. See 2 Williston, Sales (1948) Sec. 469d.

Section 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.

Subsection (1). Transactions Distinguished.

Subsection (1) provides a new test for distinguishing "sale on approval" from "sale or return", vix., "delivered primarily for use" versus "delivered primarily for resale." Previously, the distinction was drawn on whether or not the property in the goods had passed. Section 19 (Rules 3(1) and (2)) of the Uniform Sales Act, R. S. 1954, c. 185, sec. 19 (Rules 3(I) and (II).

Subsection (2). Claims of Buyer's Creditors.

Under prior law once the transaction was characterized as "sale on approval" or "sale or return", this result followed.

Subsection (3). Effect of Words of Consignment.

Subsection (3) provides that where a person has a place of business at which he deals in goods of the kind received for sale under a name other than that of the person making delivery, words such as "on consignment" purporting to reserve title until payment will not prevent a transaction from being a sale or rturn, thus subjecting the goods to

levy by the creditors of the person receiving delivery. Thus, doubts as to the nature of the transaction are resolved in favor of such general creditors, and the possibility of using the form of a bailment to conceal what is essentially a sale is reduced. Compare In re Wood, 283 F. 565 (1922). Under present law, difficult questions of fact as to the nature of the transaction have arisen. See 2 Williston, Sales (1948) Section 338.

The Code, therefore, gives such general creditors protection comparable to that given bona fide purchasers from agents, consignees and factors entrusted with merchandise and the authority to sell. See Annotation to UCC Section 2-403(2), infra.

Specific exceptions are made for the cases where the person receiving delivery is generally known by his creditors to be substantially engaged in selling the goods of others, or where there has been compliance with the filing provisions of Article 9. See UCC Section 9-102 and Section 1-201(37).

Subsection (4).

The rule of subsection (4) is new and seems to change the present law with respect to the Statute of Frauds. With respect to the parol evidence rule, for consistent cases, see 3 Williston, Contracts (1936) Section 641.

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

Subsection (1). Sale on Approval.

(a) Risks.

Subsection (1)(a), in providing that risk of loss and title do not pass to the buyer until acceptance, is consistent with R. S. 1954, c. 185, secs. 19 (Rule 3, II(a)) and 22.

(b). What Constitutes Acceptance.

Subsection (1)(b) is consistent with R. S. 1954, c. 185, sec. 19 (Rule 3, II(b)) in providing that failure seasonably to notify the seller of election to return constitutes acceptance.

(c). Return: Risk and Expense are Seller's.

There is no provision in the Uniform Sales Act with respect to who bears the risk and expense of return. Compare, by analogy, the rule of R. S. 1954, c. 185, sec. 50, that a buyer who rightfully refuses to accept goods delivered to him "is not bound to return them to the seller."

Subsection (2). Sale or Return.

(a) Option to Return and Seasonable Return.

The Code's provision for return of any "commercial unit", as well as the whole, of the goods has no counterpart in the Uniform Sales Act. The requirement that the return be exercised seasonably is consistent with R. S. 1954, c. 185, sec. 19 (Rule 3(I)).

(b) Return: Risk and Expense are Buyer's.

There is no provision in the Uniform Sales Act with respect to who bears the loss and expense or return. In the case of rescission, however, which may be analogized to this situation, R. S. 1954, c. 185, sec. 69(I)(d) requires the buyer to "return . . . or offer to return" the goods.

Section 2-328. Sale by Auction.

Subsection (1). Sale in Lots.

Subsection (1) is the same as R. S. 1954, c. 185, sec. 21(I).

Subsection (2). When Sale Complete.

The first sentence in subsection (2) follows R. S. 1954, c. 185, sec. 21(II). The provision in the second sentence with respect to bids made while the hammer is falling is new.

Subsection (3). When "With Reserve."

Subsection (3) also follows R. S. 1954, c. 185, sec. 21(II) in presuming that auction sales are "with reserve" unless explicitly announced to be "without reserve." The rule on the bidder's power to retract his bid even in an auction without reserve also follows R. S. 1954, c. 185, sec. 21(II).

Subsection (4). Bids by Seller.

Subsection (4) follows R. S. 1954, c. 185, sec. 21 (IV) in permitting the buyer to avoid an auction sale at which the seller or his agent bid, and at which no notice was given of the right to bid. The Code, however, goes further than the present law by giving the buyer, in addition, the option to take the last bona fide bid, and in permitting unannounced bidding on behalf of the seller at a forced sale.

Part 4

TITLE, CREDITORS AND GOOD FAITH PURCHASERS

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

Specific provision, without reference to "title," is made in the Code concerning most of the rights, obligations, and remedies of the seller, the buyer and third parties such as risk of loss, action for the price, and the effect of sale on rights of third persons. Any such specific provision dealing with a certain problem will override any implication to be drawn from the location of title. For this reason, "title" is material only in situations not covered by such provisions and is therefore much less important in determining the rights of parties than it is under the Uniform Sales Act.

(1) Time at which Title Passes - Explicit Agreement. The rule of subsection (1) that title cannot pass prior to "identification" of the goods to the contract is in accord with R. S. 1954, c. 185, sec. 17. Jewett v. Lincoln, 14 Me. 116, 31 Am. Dec. 36 (1836); Means v. Williamson, 37 Me. 556 (1854). The further provision that, subject to the foregoing limitation, title passes in the manner and on the conditions "explicitly agreed upon," is consistent with R. S. 1954, c. 185, sec. 18(I). Pettengill v. Merrill, 47 Me. 109 (1860). However, whereas the Code requires an "explicit agreement" to vary the rules of passage of title stated in the Code, under the Uniform Sales Act, R. S. 1954, c. 185, sec. 18(II), intent to transfer title may be implied from other extrinsic facts: contract, conduct of the parties, usage of the parties, usages of the trade and the circumstances. J. Wallworth's Sons, Inc. v. Daniel

E. Cummings Co., 135 Me. 267, 195 Atl. 890 (1937); Dean v. W. S. Given Co., 123 Me. 90, 121 Atl. 644 (1923); American Thread Co. v. Milo Water Company, 128 Me. 218, 146 Atl. 695 (1929).

(a) Effect of Reservation of Title. The rule in subsection (1) to the effect that a reservation of title after shipment or delivery is limited to a security interest, is consistent with the Uniform Sales Act, R. S. 1954, c. 185, sec. 20(II) where title passes on shipment unless the bill of lading is made out to the seller or his order. This subsection will also produce the same result as R. S. 1954, c. 185, sec. 22(I), which, when the seller has retained property in the goods merely to secure performance, shifts the risk of loss to the buyer at the time of delivery. Subsection (1) states a broader rule: unless the seller retains a security interest, title passes to the buyer. Under similar circumstances under present law only the risk of loss would pass to the buyer. See R. S. 1954, c. 185, sec. 22(I).

(b) Buyer's Special Property. Part 7 of Article 2 governs the incidents of the "special property" in the goods which the buyer acquires upon identification in the absence of an explicit agreement. See UCC Sections 2-703 and 2-711. This special property is not a security interest within Article 9. See UCC Section 1-201 (37) and UCC Section 9-113.

(2) No explicit Agreement - Delivery Requiring Moving of Goods. The rule of Subsection (2) is that, in the absence of explicit agreement by the parties, title passes when the seller "completes his performance with respect to the physical delivery of the goods." Although the rule is stated differently, it appears consistent with R. S. 1954, c. 185,

sec. 19, rules 4(2) and 5, for ascertaining the intention of the parties as to the passage of title where delivery is made pursuant to the contract or the contract requires the seller to make delivery.

This distinction drawn in subsection (2)(a) and (b), between a contract merely requiring or authorizing the sending of goods to the buyer by the seller and one requiring delivery at destination, is comparable to the distinction drawn in R. S. 1954, c. 185, secs. 19, 4(2) and 5. See Smith-Fitzmaurice Co. v. Harris, 126 Me. 308, 138 Atl. 389 (1927); J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 Atl. 890 (1937); Hoyt v. Tapley, 121 Me. 239, 116 Atl. 559 (1922).

(3) No Explicit Agreement - Delivery without Moving Goods.

(a) Seller is to Deliver Document -- The rule of subsection (3)(a) is new.

(b) Goods Identified when Contract Made and no Document to be Delivered. Subsection (3)(b) adopts the passage of title rule of the Uniform Sales Act, R. S. 1954, c. 185, sec. 19, Rule I -- namely, that in the case of an unconditional contract to sell specific goods in a deliverable state title passes when the contract is made. But the Code does not make passage of title turn on whether the goods are in a deliverable state as does the Uniform Sales Act, R. S. 1954, c. 185, sec. 19, Rule 2. Compare J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 267, 194 Atl. 890; Dean v. W. S. Given Company, 123 Me. 92, 121 Atl. 644 (1923); Jewett v. Lincoln, 14 Me. 116, 31 Am. Dec. 36 (1936).

(4) No Maine law was found in point, but Massachusetts, Jones v. Le May-Lieb, 301 Mass. 133, 16 N.E. (2d) 634 118 A.L.R. 562 (1938), is in accord with Subsection (4).

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

(1) Sold Goods in Seller's Possession.

Subsection (3) contains the general rule of the Uniform Sales Act, R. S. 1954, c. 185, sec. 26: the local rules of law re transactions in fraud of credtiros are preserved. The exception in subsection (2), however, under which the buyer's interest in goods left with a merchant-seller in the "current course of trade" and "for a commercially reasonable time after a sale or identification" is protected, is not included in the Uniform Sales Act.

The exception appears to alter Maine case law which requires that in order for a sale of personal property to be valid against third parties, "delivery, either actual, constructive, or symbolical, is very essential . . . ." Bridgham v. Hinds, 120 Me. 444, 115 Atl. 197, 21 A.L.R. 1024 (1921). Property may, however, be left in possession of seller for a specific purpose, and delivery is a question of fact. Bridgham v. Hinds, supra.

For an exhaustive review of the Maine law in this area, see 2 Williston, Sales (Rev. ed., 1948) 372.

(2) Preferences.

Subsection (3) is designed to give effect to any rights a seller's creditor may acquire under Article 9 or under any local law governing preferential identification not in the current course of trade.

(3) Buyer's Rights to Identified Goods.

Subsection (1) effectuates the changes in Maine law noted under the Annotation of Subsection (2) by affirmatively providing that subject

to Subsections (2) and (3) the buyer's right to recover identified goods prevails over the rights of unsecured creditors of the seller. Also see UCC Section 2-502.

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

(1) Power to Transfer. Subsection (1), in giving a purchaser all the title his transferor "had power to transfer" appears consistent with general agency principles, such as the doctrine of apparent authority. See Restatement, Agency, secs. 8, 12, and 170; Feingold v. Supovitz, 117 Me. 371, 104 Atl. 697 (1918); Frye v. E. I. DuPont De Nemours & Co., 129 Me. 289, 151 Atl. 537 (1930).

Bona Fide Purchaser. The provision of subsection (1) giving title to a good faith purchaser for value from one who has voidable title repeats the principle of the Uniform Sales Act, R. S. 1954, c. 185, sec. 24. Martin v. Green, 117 Me. 138, 102 Atl. 977 (1918); Tourtellott v. Pollard, 74 Me. 418 (1883). This protection is extended under the examples, however, since a bona fide purchaser from one who obtained delivery of goods by a bad check would receive good title, even though the purchaser's transferor acquired the goods under a "cash sale" agreement. See Wyman v. Carrahassett Hardwood Lumber Co., 121 Me. 271, 116 Atl. 279 (1922); Peabody v. Maguire, 79 Me. 572, 12 Atl. 630 (1887); Stone v. Perry, 60 Me. 48 (1872); and compare 2 Williston, Sales (Rev. Ed. 1948) 343, 346a.

(2) Insofar as Subsection (2) protects a purchaser who buys in the ordinary courst of business from a merchant who was given authority to deal with the goods, see accord: R. S. 1954, c. 181, sec. 1; Pinkham v. Crocker, 77 Me. 563, 1 Atl. 827 (1885). However, Maine law has not

gone so far as to protect the bona fide purchaser where the merchant was given no authority to deal with the goods by the entruster. Mark v. Barrett, 41 Me. 403 (1856); Cadwallader v. Clifton R. Shaw, Inc., 127 Me. 172, 142 Atl. 580 (1928). Compare Restatement, Agency, secs. 200 and 140(c); R. S. 1954, c. 185, sec. 23.

The protection of Subsection (2) is limited to a "buyer in the ordinary course of business." This term, as defined by UCC Section 1-201 (9), supra, is more restrictive than a "good faith purchaser for value" defined in UCC Section 1-201 (19). The Code's definition excludes transfers in bulk or as a security for, or in satisfaction of, a debt, and sales by pawnbrokers.

(3) Definition of "Entrusting." Subsection (3) defines the term "entrusting" as including any delivery or acquiescence in retention of possession. Thus the protection given to sellers who retain possession is comparable to R. S. 1954, c. 185, sec. 25. By limiting this protection to buyers in the ordinary course, however, this provision, unlike present law, gives no protection to the mortgagee. The mortgagee must seek protection from prior sales, if at all, as a creditor under UCC Section 2-402.

(4) Rights of Other Purchasers and Lien Creditors. Subsection (4) refers to the other Articles dealing with the rights of purchasers not particularly covered by UCC Section 2-403.

Part 5

PERFORMANCE

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

(1) Insurable Interest. This provision is generally consistent with existing law. Refer to: Cumberland Bone Co. v. Andes Insurance Co., 64 Me. 466 (1874); Gilman v. Dwelling-House Insurance Co., 81 Me. 488, 17 Atl. 544 (1889).

(2) Identification. This provision introduces a new concept for determining insurable interest (i.e., "identification") but it is comparable to "appropriation" as used in R. S. 1954, c. 185, sec. 19, Rule 4. Also UCC Section 2-401(1). Under existing law in Maine, "appropriation" signifies the passing of title to property.

(3) Crops, Unborn Young. This provision is new.

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

This provision provides a new remedy of replevin for the buyer. Compare R. S. 1954, c. 185, sec. 66 basing buyer's right to obtain goods on passage of title to him. Also see the case cited thereunder which states that, otherwise, trover (damages) is the appropriate remedy for the buyer. Giguere v. Morrisette, 142 Me. 95, 48 A.2d 257 (1946).

This provision also modifies the rule stated in Bridgham v. Hinds, 120 Me. 444, 115 Atl. 197, 21 A.L.R. 1024 (1921): ". . . in the absence of delivery, actual, constructive, or symbolical, an attaching creditor could not be precluded by an antecedent chattel sale. . . ."

Also compare UCC Section 2-402, and Jordan v. Parker, 56 Me. 557

(1869), which allows creditors of a vendor an action of replevin for goods delivered to the vendor, when the vendee commits some act of fraud.

As to insolvency after the ten day period, see Article 9 (Secured Transactions).

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

This section generally follows the results under R. S. 1954, c. 185. The express requirement of notice is new. Compare R. S. 1954, c. 185, sec. 43 (IV) which requires only that tender of delivery be at a reasonable hour.

Subsection (3) of this section changes the rule as to what is a destination contract. Compare this Subsection with R. S. 1954, c. 185, sec. 19, Rule 5. Contract terms calling for the seller to pay the cost of transportation no longer operate as an agreement to deliver to the buyer or at an agreed destination. Under UCC Section 2-503, the seller is not obligated to deliver to the buyer, and thus bear risk of loss, unless seller "specifically" so agrees. Compare R. S. 1954, c. 185, sec. 19, Rule 5 with Uniform Laws Comment 5.

Subsection (4) on the goods in possession of a bailee generally follows R. S. 1954, c. 185, sec. 43(III).

Subsection (5) is consistent with R. S. 1954, c. 185.

Section 2-504. Shipment by Seller.

This section is generally in accord with existing Maine law, following and continuing the policy of R. S. 1954, c. 185, sec. 46. Also see Smith-Fitzmaurice Co. v. Harris, 126 Me. 308, 138 Atl. 389 (1927) and compare Sanders v. Pratt, 121 Me. 333, 117 Atl. 95 (1922).

As to title implications arising under R. S. 1954, c. 185, sec. 46, see UCC Section 2-401.

The seller's express duty of notification of shipment is not contained in R. S. 1954, c. 185. Also see UCC Section 2-503(1). The buyers right to breach for failure of notification by the seller arises "only if material delay or loss ensues." In this respect, compare R. S. 1954, c. 185, sec. 46 (III).

As to the buyer's rights should the seller not make a proper contract with the carrier or fail to notify, compare R. S. 1954, c. 185, sec. 19, Rule 4 (II) which has the buyer bear the risk and be liable for the price only if the seller delivers ". . . in pursuance of a contract. . . ."

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

(1) The existing statutory policy found in the Uniform Bills of Lading Act, R. S. 1954, c. 186, sec. 40, and in the Uniform Sales Act, R. S. 1954, c. 185, sec. 20 is continued with the change in emphasis from the phraseology of property and title to that of interest and possession.

(2) This Subsection is new; but compare R. S. 1954, c. 185, sec. 19, Rule 4 (II) requiring shipment "in pursuance of a contract."

Section 2-506. Rights of Financing Agency.

This section is new, and was not covered by prior statutory law. For Code coverage of the relationship between seller and buyer, and financing banks, see Article 4. (Bank Deposits and Collections), and Article 5 (Letters of Credit).

The rights given to the financing agency appear to be consistent with the doctrine of equitable assignments. See R. S. 1954, c. 181, sec. 4, and Greely v. Bartlett, 1 Me. 172 (1821), placing loss on

principal of vendor becomes insolvent. Also compare Gragg v. Brown, 44 Me. 157 (1857).

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

This conforms to principles set out by existing statutory law. As to tender, see R. S. 1954, c. 185, secs. 40 and 41. As to the phrases "unless otherwise agreed" and "according to the contract" see R. S. 1954, c. 185, sec. 9 and R. S. 1954, c. 185, sec. 71.

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

No similar statutory provision is contained in the Maine Uniform Sales Act.

(1) No Maine cases were found on this particular point. But see Bonney v. Blaisdell, 105 Me. 121, 73 Atl. 811 (1909), where, although the breach was not an executory one, the court held that the seller had an implied right to remedy trivial faults.

Insofar as it is said that this Subsection emanates from the doctrine of anticipatory breach, this provision would seem to clarify Maine case law. See Maine Annotations to UCC Section 2-610.

(2) Accord: Bonney v. Blaisdell, 105 Me. 121, 73 Atl. 811 (1909). Here, the court said that the suggestions that the property (a boat) was ready for the buyer's "trial run" implies that seller is to have the right to cure easily remedied defects.

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

While the general provisions concerning risk of loss under existing law are geared to the passage of property (see R. S. 1954, c. 185, secs.

20 and 22), this provision is not so related. The law is not radically changed, however.

Subsection (1)(a), which transfers risk to buyer on delivery to carrier, corresponds to R. S. 1954, c. 185, sec. 19, Rule 4 (II), read together with R. S. 1954, c. 185, sec. 22. See Smith-Fitzmaurice Co. v. Harris, 126 Me. 308, 138 Atl. 389 (1927).

Subsection (1)(b) corresponds with R. S. 1954, c. 185, sec. 19, Rule 5, and its application in J. Wallworth's Sons, Inc. v. Daniel E. Cummings Co., 135 Me. 257, 194 Atl. 890 (1937).

Subsection (2) is in harmony with R. S. 1954, c. 185, sec. 43 (III). Also see UCC Section 2-503(4).

Subsection (3) modifies R. S. 1954, c. 185, sec. 19, Rules 1 and 4 (I) which makes no distinction as to whether the seller is a merchant or otherwise. See definition of a "merchant" in UCC Section 2-104, and compare the "receipt" test in UCC Section 2-103 with the "tender" test in UCC Section 2-503.

Subsection (4) conforms to R. S. 1954, c. 185, sec. 22.

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

Subsection (1) is new to Maine statutory law, however, it probably conforms to R. S. 1954, c. 185, sec. 19, Rule 4 (II), where the words ". . . in pursuance of a contract to sell . . ." would suggest that seller's actions conform to the contract. Support for this conclusion is found in Smith-Fitzmaurice Co. v. Harris, 126 Me. 308, 138 Atl. 389 (1927): "Compliance with the contract authorizes appropriation . . . . Non-compliance does not." This provision also appears as a logical extension of R. S. 1954, c. 185, sec. 19, Rule 2, which requires the

seller to put specific goods in a deliverable state," the property not to pass until such things be done."

Subsections (2) and (3) as to insurance are also new. Compare R. S. 1954, c. 185, sec. 22 (risk of loss for delay in delivery), R. S. 1954, c. 185, secs. 63, (I) and (II) (sellers action for price when buyer breaches), and R. S. 1954, c. 185, secs. 66 and 67 (damages for seller's breach).

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

Subsection (1) corresponds to the "cash sale" provisions of R. S. 1954, c. 185, sec. 42.

Subsection (2) is new. Compare R. S. 1954, c. 188, sec. 6 (V), and Restatement, Contracts, sec. 305.

Also see Kneeland v. Fuller, 51 Me. 518 (1863), where payment in goods is recognized as payment in money.

Subsection (3) has not been expressly covered in R. S. 1954, c. 185, but it is in accord with Maine case law. See Merrett v. Brackett, 60 Me. 524 (1824), where it was held the taking of a check for an existing debt is not, ipso facto, payment of the debt. But compare this with Spitz v. Morse, 104 Me. 447, 72 Atl. 178 (1908), and Mehan v. Thompson, 71 Me. 492 (1880), wherein it was stated that the acceptance of a negotiable instrument is prima facie deemed as an extinguishment of the original debt.

Section 2-512. Payment by Buyer Before Inspection.

(1) This provision has no express counterpart in R. S. 1954, c. 185, but it is logically consistent with R. S. 1954, c. 185, sec. 47 (III).

(2) Preservation of the buyer's rights in spite of payment before

inspection is in accordance with R. S. 1954, c. 185, sec. 49.

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

Subsections (1) and (3) follow the law set forth in R. S. 1954, c. 185, secs. 47 (II) and (III). Subsection (3) is also made subject to UCC Section 2-321. Compare Fiske v. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919). Attention is also called to the Uniform Law Comment #9 stating that this section is not to be confused with "examination" which may affect the warranties involved in a contract.

Subsection (2) is new and no Maine law was found on this point. But recovery from seller, in the event of breach, for additional damages is allowed when specially declared. This is consistent with Maine case law. Thomas v. Dingley, 70 Me. 100 (1879).

Subsection (4) is new and no Maine law was found on this point. Compare Williston, Sales, sec. 480.

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

This section is derived from the Uniform Bills of Lading Act, R. S. 1954, c. 188 sec. 41; but the word "documents" in the UCC section would make the UCC broader in scope than R. S. 1954, c. 188, sec. 41, and include any document, whatever its form. See also UCC Sections 4-503 and 5-112.

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

This section is new to the sales law and no corresponding provision appears in R. S. 1954, c. 185.

Subsection (2) follows the favorable attitude toward the settlement of disputes by arbitrators found in R. S. 1954, c. 121.

Part 6

BREACH, REPUDIATION AND EXCUSE

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

Subsection (a) is generally in accord with R. S. 1954, c. 185, sec. 69 (I)(c). ("Refuse to accept the goods, if property therein has not passed, . . .") and R. S. 1954, c. 185, sec. 69 (I)(D) (rescission). In this respect, the Code abandons the distinction between "rejection" and "rescission" under R. S. 1954, c. 185, sec. 69. For the legal effect of this distinction on the buyer's remedies under present case law, see Morse v. Moore, 83 Me. 473, 483, 22 Atl. 362 (1891); Fiske v. H. E. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919). "Rescission" under present law is also somewhat comparable to "Revocation of Acceptance" under UCC Section 2-608.

Subsection (b) is in accord with R. S. 1954, c. 185, secs. 49; 69 (I)(A) and (B).

The existing Sales Act provides for partial acceptance only in limited situations. R. S. 1954, c. 185, sec. 44 (II) and (III). Williston, Sales, sec. 493B (buyer may accept a portion without accepting remainder if defective). Except in the limited situations covered by the Sales Act, Maine case law appears only to allow the buyer damages for the defective part of the shipment, or complete rescission of the contract. Fiske v. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919); Powers v. Rosenbloom, 143 Me. 361, 62 A.2d 531 (1948). Where the contract of sale is a "severable" one, however, each part may be treated as a separate contract. Viles v. Kennebec Lumber Co., 118 Me. 148, 106 Atl. 431 (1919). But compare R. S. 1954, c. 185, sec. 45 (II) making it a question of materiality as to whether or not the injured party may treat the contract as

at an end. This section of the Code, by using the term "commercial unit," permits partial acceptance if the goods are commercially divisible, as defined in UCC Section 2-105(6). The Sales Act would make divisibility turn on whether the price can be divided. See R. S. 1954, c. 185, secs. 7 (II)(b) and 8 (II)(b); and the definition in R. S. 1954, c. 185, sec. 76.

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

Subsection (1).

This subsection is in accord with R. S. 1954, c. 185, sec. 58, (buyer is deemed to have accepted the goods if he fails to notify the seller within a reasonable time), and R. S. 1954, c. 185, sec. 69 (III) (right of rescission cut off under same circumstances).

Subsection (2)(a).

Accord: R. S. 1954, c. 185, sec. 48.

Subsection (2)(b),(c).

This provision is basically in accord with R. S. 1954, c. 185, sec. 69 (III). (To rescind, buyer must return, or offer to return, the goods.) It broadens the buyer's duties, however, when he rightfully rejects or refuses to accept the goods. In the latter case, it has been sufficient that he only notify the seller of his non-acceptance. R. S. 1954, c. 185, sec. 50; White v. Harney, 85 Me. 212, 27 Atl. 106 (1892); Greenleaf v. Hamilton, 94 Me. 118 (1900). Hence, the Code would now require the buyer to hold the goods with "reasonable care" once he exercised "physical possession."

Subsection (3).

See the Maine Annotations to the appropriate seller's remedies

in Part 7, "Remedies" of the Code.

Section 2-603. Merchant Buyer's Duties as to Rightfully Rejected Goods.

Subsection (1).

The Sales Act does not require the buyer who rightfully rejects goods to follow any instructions from the seller. Under R. S. 1954, c. 185, sec. 50, the buyer who refuses to accept need only notify the seller of his action; R. S. 1954, c. 185, sec. 69 (III) requires the rescinding buyer only to return or offer to return the goods to the seller; case law places this same requirement upon a "rejecting" buyer who has received non-conforming goods. Stephens Tank & Tower Co. v. Berlin Mills Co., 112 Me. 336, 92 Atl. 180 (1914).

The obligation on the buyer to sell perishable goods for the sellers account is in accord to the extent that R. S. 1954, c. 185, sec. 69 (V) requires the buyer, when seller refuses to accept the returned goods, "to hold the goods as bailee for the seller." Also see comparable obligations imposed by the Perishable Agricultural Commodities Act, 7 USCA sec. 499 (1)(b)(3), as to goods shipped in interstate commerce.

Subsection (2).

No comparable provision in the Sales Act but appears to be in accord with existing case law. See: Keeling-Easter Co. v. R. B. Dunning & Co., 113 Me. 34, 92 Atl. 929 (1915). (Seller is liable for "freight and cost of handling" within contemplation of the parties in a resulting breach). Also compare R. S. 1954, c. 185, sec. 69 (V), giving the rescinding buyer the rights of an unpaid seller under R. S. 1954, c. 185, sec. 53.

Subsection (3).

This provision immunizes the buyer in good faith as defined in

UCC Section 1-201 (19).

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

The Sales Act has no comparable provision, but many states are in accord; see 29 A.L.R. 61 (1924). Compare R. S. 1954, c. 185, sec. 69 (V), giving the rescinding buyer a lien on the goods for any portion of the price he has paid. To some extent, this provision may modify R. S. 1954, c. 185, sec. 48, where a buyer is deemed to have accepted the goods when he does an act which is inconsistent with the seller's ownership. Hence, the Code provision would eliminate the imputation of "acceptance" to a good faith buyer who attempts to salvage the goods.

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

Subsection (1)(a).

The Sales Act has no such provision, but R. S. 1954, c. 185, sec. 49 does preclude buyer from asserting breach if he fails to notify seller of easily discoverable defects within a reasonable time. Also see Fiske v. H. E. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919) - (Buyer must "seasonably" notify seller to preserve his rights). Also compare Restatement, Contracts, sec. 302, which recognizes a similar rule as a matter of contract law.

Subsection (1)(b).

The request for notice of defects "between merchants" is new, but may, under Sales Act, have been important in determining a "reasonable time."

Subsection (2).

No Maine law was found on this particular point. Compare R. S. 1954,

c. 185, sec. 69 (III) denying buyer relief if he accepted the "goods" with knowledge of the defect. Insofar as this provision appears to absolutely preclude recovery after payment on obviously defective documents, compare Restatement, Contracts, sec. 309, where, under certain conditions, buyers rights may be reinstated even after waiver.

Section 2-606. What Constitutes Acceptance of Goods.

Subsections (1), (a),(b) and (c).

Accord: R. S. 1954, c. 185, sec. 48, 47 (I) and Walcott v. Richmond, 94 Me. 364, 47 Atl. 901 (1900).

Subsection (2).

See definition of "commercial unit" in UCC Section 2-105(6); and the Maine Annotations to UCC Section 2-601(c) which conclude that this provision is synonymous with the rule now applied to the entire indivisible contract.

Section 2-607. Effect of Acceptance, Notice of Breach, Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

Subsection (1).

The comparable provision of the Sales Act would have liability for payment hinge on whether "property in the goods has passed to the buyer." R. S. 1954, c. 185, sec. 63 (I). The Code provision is new, then, in that it makes acceptance the criterion of liability for payment. This change probably narrows the time in which the seller can claim payment, since under the Sales Act, property in goods can pass prior to acceptance.

Subsection (2).

Insofar as this section precludes revocation of acceptance when the buyer accepts the goods with knowledge of the non-conformity, it is in

accord with R. S. 1954, c. 185, sec. 69 (III) which precludes rescission under such circumstances. Also see Fiske v. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919) (where buyer's right of rejection is also precluded after a reasonable time for inspection following delivery), and compare R. S. 1954, c. 185, sec. 69 (I)(C).

The provision as to "cure" is new. See UCC Sections 2-508, 2-506.

Subsection (3)(a).

Accord: R. S. 1954, c. 185, sec. 49; Fiske v. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919).

Subsection (3)(b).

This Subsection is new and no Maine law was found in point.

Subsection (4).

This section is new but follows general rules to the extent that the burden of proof to show breach is upon the the alleging party. Armour Fertilizer Works v. Logon, 116 Me. 33 99 Atl. 766 (1917); Keeling-Easter Co. v. R. B. Dunning & Co., 113 Me. 34, 92 Atl. 929 (1915).

Subsection (5).

This provision is new to codified law. Case law appears to conform to the extent that when the buyer gives notice to the seller of a suit for which the seller is answerable over, the subsequent judgment is conclusive to such seller. Burns v. Baldwin-Doherty Co., 132 Me. 331, 170 Atl. 511 (1934).

Insofar as it may be said that this provision emanates from the "consequential damages" concept, Williston, Sales (Rev. Ed. 1948), sec.

614A, says the weight of authority holds that buyer can recover from seller when buyer has to pay a third party for breach resulting from the seller's breach.

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

The buyer's power to revoke acceptance under this provision performs the same general function as the buyer's right to rescind under R. S. 1954, c. 185, sec. 69 (I)(D). The Code permits this power even after acceptance, and consequently brings some consistency to the previously inconsistent remedies of R. S. 1954, c. 185, secs. 69 (I)(C) and (D) (i.e., "refuse to accept the goods, if the property has not therein passed," or rescind). Powers v. Rosenbloom, 143 Me. 361, 62 A.2d 531 (1948). Compare also Fiske v. Dunbar, 118 Me. 342, 108 Atl. 324 (1919), where buyer has a right to reject goods received which are non-conforming.

The Code also modifies present law by allowing partial revocation of acceptance as well as partial rejection.

See Maine Annotations to UCC Section 2-601(c). The Code also extends revocation of acceptance to cases where the buyer accepted with knowledge of the breach but assumed it would be cured. See UCC Section 2-607(2). There is no such qualification under R. S. 1954, c. 185, sec. 69(III), and the buyer's right to fescind would depend on whether "he knew of the breach when he accepted, ..."

Subsection (1).

Under this provision, the buyer has a right to revoke his acceptance, only when the "non-conformity substantially impairs its value to him," whereas under UCC Section 2-601, the buyer's right to reject does not have such limitation.

Subsection (2).

Accord: R. S. 1954, c. 185, sec. 69(III); Fiske v. H. E. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919).

Subsection (3).

R. S. 1954, c. 185, sec. 69(III) imposes upon the buyer who rescinds a duty to return or offer to return the goods. R. S. 1954, c. 185, sec. 50 imposes upon the buyer who rightfully refuses to accept the goods only a notice to the seller of his non-acceptance. White v. Harvey, 85 Me. 212, 27 Atl. 106 (1892). The Code, however, imposes the same duties on the buyer in both types of cases. See UCC Sections 2-602 and 2-603. This means, moreover, that the buyer who revokes acceptance is not limited to recovery of payments made, but may also recover damages. See UCC Section 2-711.

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

The provision for demand of "adequate assurance" whenever "reasonable grounds for insecurity arise" is new. The effect of this section will broaden the rights of the aggrieved party to suspend performance whenever the other party manifests inability to perform or intention not to perform. Newhall v. Vargas, 104 Me. 62, 71 Atl. 69 (1908); Dickey v. Linscott, 20 Me. 453 (1841); Dodge v. Greeley, 31 Me. 343 (1850); R. S. 1954, c. 185, secs. 63(2), 53, 54(I), 55; Restatement, Contracts, secs. 280, 287.

Section 2-610. Anticipatory Repudiation.

No comparable provision in the Sales Act, and this section appears to modify Maine cases which hold that "anticipated injury is not grounds of legal recovery." South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165, 53 Atl. 1110 (1902) citing leading case of Daniels v. Newton, 114 Mass.

530 (1894) which refutes the right of anticipatory breach; Lynch v. Stephens, 127 Me. 203, 142 Atl. 735 (1928). But cf. Lewis v. Marsters, 139 Me. 17, 26 A.2d 649 (1942); Simpson v. Emmons, 116 Me. 14, 99 Atl. 658 (1917); (Parties to an executory contract may rescind by mutual consent, and refusal of one party to a contract to be bound will authorize the other party to rescind it.) Also compare Listman Mill Co. v. Dufresne, 111 Me. 104 (1913), ("If renunciation of an executory contract is accepted, . . . the party accepting. . . may sue at once for and recover the value of what had been done by him. . . .") A non-breaching party, however, need not wait until all damages accrue. Sutherland v. Wyer, 67 Me. 64 (1887), (a contract of employment). Action under such circumstances is allowed regardless of whether the doctrine is recognized. 3 Williston, Sales, sec. 585A. Also compare R. S. 1954, c. 185, sec. 65; Dwinel v. Howard, 30 Me. 258 (1849).

Section 2-611. Retraction of Anticipatory Repudiation.

Refer to the Maine Annotations to the anticipatory breach doctrine, UCC Section 2-610. Whereas Maine case law appears not to recognize the anticipatory breach except through mutual consent, this section should not materially affect present law. Compare Lynch v. Stebbins, 127 Me. 203, 142 Atl. 735 (1928), where non-fulfillment of a condition by one party "suspends" obligations of the other party. For the recognition of this provision elsewhere, see 3 Williston, Sales, (Rev. Ed.) sec. 585C. Insofar as the retraction of repudiation is denied after the other party has materially changed his position, see Restatement, Contracts, secs. 323, 398.

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

Subsection (1).

This provision is broader than R. S. 1954, c. 185, sec. 45; the Code will recognize the validity of installment delivery even when "tacitly authorized," as well as when it may be required. Compare Levine v. Reynolds, 143 Me. 15, 54 A.2d 514 (1947); 2 Williston, Sales (Rev. Ed.) secs. 465-467.

Subsection (2).

The Sales Act does not specifically provide for the rejection of non-conforming installments, but the buyer's rights with regard to non-conformity are generally covered in R. S. 1954, c. 185, sec. 69 which, however, does not limit rejection to cases where the non-conformity "materially impairs" the value and cannot be cured. See Annotations to UCC Section 2-601. With respect to seller's right to "cure," see Annotations to UCC Section 2-508.

Subsection (3).

This provision is generally in accord with R. S. 1954, c. 185, sec. 45; Viles v. Kennebec Lumber Co., 118 Me. 148, 106 Atl., 431 (1919).

Section 2-613. Casualty to Identified Goods.

This section deals with the problems treated separately in R. S. 1954, c. 185, secs. 7 and 8. The Sales Act refers to "specific goods" before risk passes to the buyer, while the Code refers to "goods identified when the contract is made. . . ." This change in phraseology does not appear to have any material effect. See R. S. 1954, c. 185, sec. 76 for definition of "specific goods."

Under R. S. 1954, c. 185, secs. 7 and 8 the buyer has a choice of receiving any remaining undamaged goods only upon full payment of the

contract price, if the contract is indivisible, or to pay the appropriately agreed price, if divisible. The Code, however, makes no distinction as to the divisibility of contracts and should enable the buyer to receive the goods and take an allowance for any deficiency. There has been little litigation involving this problem, but compare Restatement, Contracts, sec. 460; Williston, Sales (Rev. Ed.), sec. 656, 422.

Section 2-614. Substituted Performance.

Subsection (1).

Accord: White v. Mann. 26 Me. 361 (1846); Cohen v. Morneault, 120 Me. 358, 114 Atl. 307 (1921). (Destruction of a substitutible item does not relieve the seller of his burden to deliver when the contract calls for "any" item.) Also compare Restatement, Contracts, sec. 462; Williston, Sales, secs. 661E and G.

Subsection (2).

This section is new and no comparable law was found.

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

The Sales Act has no comparable provision but R. S. 1954, c. 185, sec. 73 incorporates the general contract principles governing impossibility of performance.

(a) Accord: American Mercantile Exchange Co. v. Blunt, 102 Me. 128, 66 Atl. 212 (1906); Dingley v. Bath, 112 Me. 93, 90 Atl. 972 (1914); Goodwin v. Clark, 65 Me. 280 (1876). Compare Kenny v. Pitt, 111 Me. 26, 87 Atl. 480 (1913). Also in Accord: Restatement, Contracts, secs. 454-461; 3 Williston, Sales (Rev. Ed.) sec. 661.

(b) Accord: Restatement, Contracts, sec. 464(1); 3 Williston, Sales (Rev. Ed.) sec. 661(B).

(c) This provision is new but appears consistent with the previous contract principles.

Section 2-616. Procedure on Notice Claiming Excuse.

This section establishes the procedure to implement the rules established under UCC Sections 2-614 and 2-615. As to the buyer's option to cancel when the seller's failure of performance is excused, see Accord: Restatement, Contracts, sec. 274-276. This also appears consistent with the principle that the buyer need not accept when the deficiency impairs the value of the whole contract. Gould v. Murch, 70 Me. 288 (1879).

Part 7

REMEDIES

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

This section appears to limit the scope of the Sales Article to only those parts of a contract which relate to the sale of goods and requires no annotation.

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

Subsection (1).

Accord: R. S. 1954, c. 185, sec. 54 (I)(C), as to sellers right to refuse delivery on buyer's insolvency. With regard to stoppage of delivery, see Annotations to UCC Section 2-705, infra. The right of the seller to assert a lien for payment of goods already delivered under the contract is new. Compare R. S. 1954, c. 185, secs. 55 and 56 in this respect.

Subsection (2).

The Sales Act has no comparable provision as to seller's right to reclaim goods. Case law, however, would allow the seller to reclaim where the buyer obtained the goods on a false representation of financial condition and third party rights have not intervened. Pyrene Mfg. Co. v. Burnell, 127 Me. 503, 144 Atl. 649 (1929). Or where fraud led to the inducement of the contract. Wheeldon v. Lowell, 50 Me. 499 (1862); Jordan v. Parker, 56 Me. 557 (1869). Compare Restatement, Contracts, sec. 473.

Automatic reclamation on demand because of insolvency, and its limitation to ten days is new, as well as the removal of this limitation

if the seller receives written notice of misrepresented solvency within three months before delivery. In regard to the limitation on reclamation, compare Restatement, Contracts, secs. 480 and 483, which would allow the seller a reasonable time to reclaim upon notice of fraud. It appears that under present law the only limitation prior to receipt of notice would come from the Statute of Limitations, 3 Williston, Sales (Rev. Ed.) sec. 648.

Subsection (3).

Reclamation is made the exclusive remedy because it prefers the seller to all parties other than a good faith purchaser or a lien creditor. (Compare definition of creditor in UCC Section 1-201 (12).) Such a preference in a case of actual fraud is not inconsistent with bankruptcy legislation, but there may be difficulty in cases of "presumed" fraud. See Collier, Bankruptcy Manual, sec. 70.26, notes 9 & 10.

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

This section sums up the remedies given the seller under other sections of this article (i.e., UCC Sections 2-701 to 2-710), and requires no separate annotation.

Section 2-704. Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods.

Subsection (1).

This section is introductory to later provisions giving the seller the right to fix the buyer's damages by resale (UCC Section 2-706) and in special circumstances, to sue for the price (See UCC Section 2-709).

Seller's "Right to Identify" also affects existence of an insurable interest (UCC Section 2-501) and is a necessary element in shifting risk

of loss to the breaching party (UCC Section 2-510).

Subsection (2).

Insofar as subsection (2) allows the aggrieved seller either to complete the manufacturing or to cease manufacturing the product, with only the condition of using a "reasonable commercial standard," compare the harshness of R. S. 1954, c. 185, sec. 64(IV), which would prevent buyers liability from exceeding damages which would have accrued had the seller stopped manufacture. On this respect, compare 3 Williston, Sales (Rev. Ed.) 589; Listman Mill Co. v. J. T. Dufresne, 111 Me. 104, 88 Atl. 354 (1913). (If renunciation made by a party is not accepted, the contract is still in force; if renunciation is accepted, performance may not be continued to enhance damages.)

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

Subsection (1).

This subsection is comparable to the rights conferred upon the seller on the buyer's insolvency under R. S. 1954, c. 185, sec. 57. Newhall v. Vargas, 13 Me. 93 (1836); Johnson v. Eveleth, 93 Me. 306, 45 Atl. 35 (1899). The Code, however, broadens this right to include a buyer's repudiation, or failure to make a due payment, or "any other" instance where the seller would have a right to withhold or reclaim. Compare State v. Intoxicating Liquors, 110 Me. 178, 85 Atl. 499 (1912).

As to less than carload shipments, the right is limited under present law to cases of insolvency.

Subsection (2).

(a) "Receipt" criterion is comparable to "delivery" test in

R. S. 1954, c. 185, secs. 58(I)(A) and (II)(A).

Subsections (2)(b) and (c).

The Code's "acknowledgement" by bailee or carrier is more specific than R. S. 1954, c. 185, sec. 58 (II)(b), and prolongs the right of stoppage beyond notification of arrival by the carrier.

Subsection (2)(d).

Accord: R. S. 1954, c. 185, secs. 59(II) and 62.

Subsections (3)(c).

Accord: R. S. 1954, c. 185, secs. 59(II) and 62.

Subsection (3)(d).

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

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

Subsection (1).

This Subsection allows the seller to act promptly to resell if the buyer defaults. Under R. S. 1954, c. 185, sec. 60(I), the right to resell arises only when the goods are perishable, when the right is expressly reserved, or when the buyer has been in default for an "unreasonable time." Also contrary to the Sales Act, this Subsection

requires the seller to account for any "expenses saved" in determining the damages as a result of the breach. (As to "profits" on resale, though, see Subsection 6 of this section).

Subsection (2).

Accord: R. S. 1954, c. 185, sec. 60(V). The Code's requirement of a "commercially reasonable" resale may give more latitude than the Sales Act requirement of "reasonable care and judgment." See Comment 4.

Subsection (3).

Subsections (3) and (4)(B) require notice to the buyer under the prescribed circumstances where the present law does not. R. S. 1954, c. 185, secs. 60(III) and (IV) merely make the failure to give notice relevant to the question of whether the sale was made on "unreasonable time" after buyer's default. Under the Code, however, a seller who fails to give a notice may apparently recover damages based on market price under UCC Section 2-708.

Subsection (4).

The requirements of Subsection (4) which regulate the conduct of public (auction) sale are new. Compare R. S. 1954, c. 185, sec. 60 (V).

Subsection (5).

Subsection (5) gives greater protection to good faith purchasers than does R. S. 1954, c. 185, sec. 60 (II), which gives protection only if resale is made "as authorized in this section."

Subsection (6).

As to the seller, Subsection (6) is in accord with R. S. 1954,

c. 185, sec. 60 (I). The provision making other parties accountable for profits probably changes the existing law. As to a person in the position of a seller, see R. S. 1954, c. 185, secs. 52 (**), 60 (I) and 76 (definition of "seller"). But compare the principle of R. S. 1954, c. 114, sec 53, R. S. 1954, c. 178, sec. 71 and R. S. 1954, c. 178, sec. 87 under which the excess over the judgment of proceeds of property sold at an execution goes to the debtor.

As to the rescinding buyer, see R. S. 1954, c. 185, sec. 69 (V).

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

Basically in accord with R. S. 1954, c. 184, sec. 52 (II), but the Code is broader in the sense that it now includes a financing agency with a security interest.

Section 2-708. Seller's Damages for Non-Acceptance or Repudiation.

The basic rule for measuring damages approximates that of R. S. 1954, c. 185, sec. 64(III). Tufts v. Gremer, 83 Me. 407, 22 Atl. 382 (1891). Bonney v. Blaisdell, 105 Me. 121, 73 Atl. 811 (1909). The Code also clarifies the seller's right to claim profits when "resale is impractical," which appears to remove some of the restrictions under present law. See Restatement, Contracts, secs. 330 and 331. The Code provision deos not appear to alter the seller's rights to profits upon an anticipatory repudiation. See Simpson v. Emmons, 116 Me. 14, 99 Atl. 658 (1917).

Section 2-709. Action for the Price.

Subsection (1)(a).

The Code narrows the seller's right to the full price and makes

an action for damages the basic remedy. Under the Code, liability for price turns mainly on acceptance rather than the passage of property as under the present law. Compare UCC Section 2-606 with R. S. 1954, c. 185, secs. 63 and 147(I).

There is a change in the law relative to the situation in which the seller places the goods on the carrier and the buyer is responsible for the freight. Under R. S. 1954, c. 185, sec. 19, Rule 4(II), title would pass on delivery to carrier in the absence of a contrary intent; and under R. S. 1954, c. 185, sec. 63(I), if the buyer thereafter refuses to pay, the seller may sue for the price. (Query, whether the application of R. S. 1954, c. 185, sec. 63(I) would require acceptance as defined in R. S. 1954, c. 185, sec. 48 as some cases suggest.) No Maine cases were found strictly to support this interpretation and many cases decided prior to the enactment of the Sales Act in Maine in 1923 illustrate the reluctance of the courts to allow the seller an action for the price. In this sense, their philosophy may be said to be in harmony with the Code. Compare Bixler v. Wright, 116 Me. 133, 100 Atl. 467 (1917); Greenleaf v. Gallagher, 93 Me. 549, 45 Atl. 829 (1900); Atwood v. Lucas, 53 Me. 508, 89 Am. Dec. 713 (1866), suggesting that seller must have first divested himself of all liens. R. S. 1954, c. 185, sec. 56(1)(a), however, would nullify this assertion and cause the seller to lose his lien upon delivery to the carrier.

Also compare Clark v. Young, 130 Me. 119, 153 Atl. 884 (1931); Smith-Fitzmaurice Co. v. Harris, 126 Me. 308, 138 Atl. 389 (1927) and Merrill v. Parker, 24 Me. 89 (1884). These cases, however, may be distinguishable on their facts. See 3 Williston, Sales (Rev. Ed.) 560.

The Code would allow an action for the price, though, for goods

lost or damaged. See also UCC Section 2-509. Accord: Dean v. W. S. Given Company, 123 Me. 90, 121 Atl. 644 (1923). But the Code would not allow an action for price for unaccepted goods which are readily resalable, even though conforming. This section also omits the provisions of R. S. 1954, c. 185, sec. 63(II) which allow the seller an action to enforce a requirement of advance payment. See Comment 1.

Subsection (1)(b).

This Subsection corresponds to R. S. 1954, c. 185, sec. 63(III).

Subsection (2).

Insofar as the seller must hold the goods for the buyer, see in accord: R. S. 1954, c. 185, sec. 63(III). With respect to the seller's option to resell if it subsequently becomes possible, the Code is new but not inconsistent with present law. See R. S. 1954, c. 185, sec. 60.

Subsection (3).

This Subsection contemplates an action for the price or damages in the alternative. Compare similar alternative relief discussed in Restatement, Contracts, sec. 363.

Section 2-710. Seller's Incidental Damages.

Accord: R. S. 1954, c. 185, secs. 51, 64, 70; Salmon Lake Seed Company v. Frontier Trust Company, 130 Me. 69, 153 Atl. 671 (1931); Tufts v. Gremer, 83 Me. 407, 22 Atl. 382 (1891).

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

This section sums up the buyer's remedies conferred in other sections. Subsection (1), permitting the buyer both to revoke acceptance and sue for

damages, is an important innovation. See UCC Sections 2-601, 2-608 and their annotations above. Subsection (3), permitting the buyer a lien, extends R. S. 1954, c. 185, sec. 69(V) to cases of rejection.

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

This section gives greater weight in fixing buyer's damages to the price paid for substituting goods. See the comparable seller's right, UCC Section 2-706. But the alternative of damages based on market price would remain available to the buyer. Compare UCC Section 2-713; R. S. 1954, c. 185, sec. 67; Cohen v. Morneault, 120 Me. 358, 114 Atl. 307 (1921); R. J. Caldwell Co. v. Cushnoc Paper Co., 114 Me. 411, 90 Atl. 730 (1916); Miller v. Trustees of Mariner's Church, 7 Me. 51, 20 Am. Dec. 341 (1830).

Section 2-713. Buyer's Damages for Non-Delivery or Repudiation.

Subsection (1).

This Subsection generally follows R. S. 1954, c. 185, sec. 67 (III). The provision which relates damages to the time the buyer "learned" of the breach rather than the stated time of delivery is new and appears to modify existing law. Cohen v. Morneault, 120 Me. 358, 114 Atl. 307 (1921); South Gardiner Lumber Co. v. Bradshaw, 97 Me. 165, 53 Atl. 1110 (1902). But cf.: Bush v. Holmes, 53 Me. 417 (1866) (at time of refusal).

Insofar as incidental and consequential damages are concerned, see Annotations to UCC Section 2-715.

Subsection (2).

As to damages measured at the place of tender, see in accord: Cohen v. Morneault, 120 Me. 358, 114 Atl. 307 (1921); South Gardiner Lumber Co. v. Bradshaw, 97 Me. 165, 53 Atl. 1110 (1902); Hoyt v. Easler,

126 Me. 389, 138 Atl. 689 (1927); Berry v. Dwinel, 44 Me. 255 (1857). As the preceding cases suggest, Maine law appears not to have made any distinction between place of tender and place of arrival.

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

Subsection (1).

Insofar as this section allows the buyer to accept and have an action for damages, the Code follows R. S. 1954, c. 185, secs. 49, 69(I)(a) and (b). The limitation to damages resulting "in the ordinary course of events," follows R. S. 1954, c. 185, sec. 79(IV), but the Code applies to "any nonconformity of tender" as well as to breach of warranty.

Subsection (2).

This Subsection follows the general rule for measuring damages for breach of warranty found in R. S. 1954, c. 185, sec. 69(VII). See accord: Thomas v. Dingley, 70 Me. 100, 35 Am. Rep. 310 (1879); Keeling-Easter Co. v. R. B. Dunning & Co., 113 Me. 34, 92 Atl. 929 (1915); Moulton v. Scruton, 39 Me. 387 (1855). Henderson v. Berce, 142 Me. 242, 50 A.2d 45, 168 A.L.R. 572 (1946).

Subsection (3).

As to incidental and consequential damages, see UCC Section 2-715.

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

Subsection (1).

The specification of expenses recoverable by the buyer is new, but it appears consistent with prior case law. Compare Miller v. Mariner's Church, 7 Me. 51 (1830); R. J. Caldwell, Co. v. Cushnoc Paper Co., 114 Me. 411, 90 Atl. 730 (1916) (expenses of "cover"); Keeling-Easter Co.

v. R. B. Dunning & Co., 113 Me. 34, 92 Atl. 929 (1915) (freight expenses); Starns v. Hudson, 113 Me. 154, 93 Atl. 58 (1915) (care of goods).

Subsection (2).

This subsection is also new to statutory law but appears consistent with R. S. 1954, c. 185, sec. 70 and case law as follows:

(a) This provision is consistent with Philbrick v. Kendall, 111 Me. 198, 88 Atl. 540 (1913); Spitz v. Lampart, 119 Me. 556, 112 Atl. 552 (1921). Thomas v. Dingley, 70 Me. 100, 35 Am. Rep. 310 (1879). Sanborn v. Elmore Milling Co., 152 Me. 355, 129 A.2d 556 (1957).

(b) This Subsection is consistent with Philbrick v. Kendall, 111 Me. 198, 88 Atl. 540 (1913); Sanborn v. Elmore Milling Co., 152 Me. 355, 129 A.2d 556 (1957) (here, however, a jury question).

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

(1) Specific Performance. Subsection (1) broadens the rule of R. S. 1954, c. 185, sec. 68 by excluding the requirement that the goods be "specific or ascertained," and opens the door to "output and requirements" contracts. See Comment 2. Compare Eastman v. Eastman, 117 Me. 276, 104 Atl. 1 (1918); Tewksbury v. Noyes, 138 Me. 126, 22 A.2d 861 (1941); Draper v. Stone, 71 Me. 175 (1880).

(2) Replevin. Subsection 3 abandons the present rule that an action of replevin depends on the passing of title. See R. S. 1954, c. 185, sec. 66; Pettengill v. Merrill, 47 Me. 109 (1860); Hammond v. Flood, 115 Me. 116, 97 Atl. 834 (1916). In some instances, the Code will narrow the tight of replevin, as where title passed to goods available on the market. In some instances, the right of replevin is expanded,

as where substitute goods are unavailable, but the title to the goods is deemed to be in the seller through a contract provision requiring seller to take the risk, or deliver, or complete the work on the goods.

Section 2-717. Deduction of Damages from the Price.

This section follows and enlarges upon the provision allowing recoupment in R. S. 1954, c. 185, sec. 69(I)(a). The requirement of notice is new but is comparable to R. S. 1954, c. 185, sec. 49 which requires notice of a breach of warranty. Compare Fiske v. H. E. Dunbar & Co., 118 Me. 342, 108 Atl. 324 (1919).

Section 2-718. Liquidation of Limitation of Damages; Deposits.

Subsection (1).

Liquidated Damages. The test imposed in this Subsection is similar to that set forth in the Restatement, Contracts, sec. 339. See Accord: 3 Williston, Contracts (Rev. Ed.) 779; Maxwell v. Allen, 78 Me. 32, 2 Atl. 386 (1886); Bell v. Jordan, 102 Me. 78, 65 Atl. 759 (1906). Maybury v. Spinney-Maybury Co., 122 Me. 422, 120 Atl. 611 (1923); Wade & Dunton, Inc. v. Gordon, 144 Me. 49, 64 A.2d 422 (1949).

Subsection (2).

Return of Down Payment. Subsection (2) may broaden the right of a defaulting buyer to restitution. See 2 Williston, Sales (Rev. Ed.) 467G; Restatement, Contracts, secs. 340, 357(2). The specific figures ($500 or 20%), below which forfeiture may be effective regardless of amount of damages, are new.

Section 2-719. Contractual Modification of Limitation of Remedy.

Subsection (1).

The rule of Subsection (1) that remedies may be modified by agreement is consistent with the general rule of R. S. 1954, c. 185, sec. 71. Compare Bergman v. Langley, 119 Me. 124, 109 Atl. 393 (1920).

Subsection (2).

This Subsection is new.

Subsection (3).

The refusal to honor contracts limiting consequential damages if "unconscionable" is an example of the new rule established by UCC Section 2-302. See the Annotations to that section.

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

The presumption against intent to renounce a claim for damages appears to be consistent with Listman Mill Co. v. Dufresne, 111 Me. 104, 88 Atl. 354 (1913); Simpson v. Emmons, 116 Me. 14, 99 Atl. 658 (1917); Compare Restatement, Contracts, secs. 406 and 410.

Section 2-721. Remedies for Fraud.

This section is designed to insure that an action based on fraud is not restricted to common law rules but is at least governed by rules as liberal as those applicable where fraud is not present. The Code, in holding no inconsistency of remedies, appears to be contrary to the rule set forth in the Restatement, Restitution, secs. 65 and 68; illustration 6; Ayers v. Hewitt, 19 Me. 281 (1841); Powers v. Rosenbloom, 143 Me. 361, 62 A.2d 531 (1948) (rescission inconsistent with damages). Also compare Shine v. Dodge, 130 Me. 440, 157 Atl. 318 (1931) (defrauded buyer may elect to rescind and recover purchase price or he may sue in tort for damages).

Insofar as this section does not limit damages merely to the loss suffered and would include as damages any benefit the defrauded party would have received had the representations been true, see Accord: Chellis v. Cole, 116 Me. 382, 101 Atl. 444 (1917); Davis v. Coshnear, 129 Me. 344 (1930).

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

(a) Right of Action. This provision has not been codified in the Maine Sales Act. Under prior law, delivery to and possession by the buyer gives the buyer the right of action. Vining v. Gilbreth, 39 Me. 496 (1855); Cummings v. Gilman, 90 Me. 524, 38 Atl. 538 (1897). Compare Webber v. McAvoy, 117 Me. 326, 104 Atl. 513 (1918) (mortgagee v. third party); Wyman v. Carrahassett Hardwood Lumber Co., 121 Me. 271, 116 Atl. 729 (1922) (seller's right against third party convertor).

(b) Suits as Fiduciary. This provision is in accord with the principle that allows an action against a party who has in his possession money which in equity and good conscience belongs to another. Restatement, Restitution, sec. 1; Bither v. Packard, 115 Me. 306, 98 Atl. 929 (1918); Dow v. Bradley, 110 Me. 249, 85 Atl. 896 (1913).

(c) This section appears consistent with Maine cases which allow suits by nominal parties. Metropolitan Insurance Co. v. Day, 119 Me. 380, 111 Atl. 429 (1920). However, it may go further in some circumstances which require assignments to be in writing. Weed v. Boston and Maine Railroad, 124 Me. 336, 128 Atl. 696 (1925).

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

Subsection (1).

Subsection (1) is made necessary by UCC Subsection 2-610(a) under

which a party faced with anticipatory repudiation may "await performance." This choice appears consistent with present cases which allow the non-breaching party the option to accept the "offer" of repudiation by the breaching party and sue. Simpson v. Emmons, 116 Me. 14, 99 Atl. 658 (1917). See also the Maine Annotations to UCC Section 2-610. The standard used for measuring damages on trial prior to the time of performance under UCC Section 2-723 appears new in theory. See Restatement, Contracts, sec. 338.

Subsection (2).

Subsection (2), allowing the use of a market other than the one related to the contract, is new as a statutory provision. Compare South Gardiner Lumber Company v. Bradstreet, 97 Me. 165, 53 Atl. 1110 (1902).

Section 2-724. Admissibility of Market Quotations.

The liberal rule of evidence in this section, providing that published market reports are admissible, goes beyond existing statutes. See R. S. 1954, c. 113. Compare Washington Ice Company v. Webster, 68 Me. 449 (1878); and see Wigmore on Evidence (3rd Ed.), sec. 1704.

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

(1) Statutory Period. The four year period under the Code would change present law. There is now a limitation of 6 years on personal actions. R. S. 1954, c. 112, sec. 90.

(2) Modification by Contract. This provision has no exact counterpart in existing statutes. But see Accord: Restatement, Contracts, secs. 86, 558. Also compare R. S. 1954, c. 112, sec. 105 and Johnson v. Hussey, 89 Me. 488, 36 Atl. 993 (1897).

(3) Lack of Knowledge. See Accord: Bishop v. Little, 3 Me. 405 (1825) and compare R. S. 1954, c. 112, sec. 104. The exception made under the Sales Act concerning implied warranty of quiet possession is not continued in the Code. Compare R. S. 1954, c. 185, sec. 13(II) and UCC Section 2-312.

Subsection (4).

As to a six month extension for a technical defect in a prior suit, compare R. S. 1954, c. 112, sec. 99 and Densmore v. Hall, 109 Me. 438, 84 Atl. 983 (1912).

Article 3

COMMERCIAL PAPER

Introductory Comment

Article 3 of the Uniform Commercial Code is a general revision of the Maine Negotiable Instruments Law, enacted as R. S. 1954, c. 188, secs. 1-195 inclusive.

Several subjects previously covered by the NIL are treated separately in the Code. Thus, bank deposits and collections have become the subject of Article 4. Letters of credit are treated in UCC Article 5. Bonds, debentures, and other corporate obligations, now covered at least in part by the NIL, have been transferred to Article 8, INVESTMENT SECURITIES, where they are treated in common with stock certificates on the theory that this follows the thinking and practice of businessmen. Negotiable instruments involved in secured transactions are controlled by Article 9. In cases of conflict between the provisions of Article 4 or Article 9 and the provisions of Article 3, the former are given precedence.

Certain provisions of Article 3 are new in the sense that there is no prior statutory coverage of the subject in the NIL. These provisions include:

3-119 Other Writings Affecting Instrument.

3-120 Instruments "Payable Through" Bank.

3-122 Accrual of Cause of Action.

3-406 Negligence Contributing to Alteration or Unauthorized Signature.

3-416 Contract of Guarantor.

3-510 Evidence of Dishonor and Notice of Dishonor.

3-701 Letter of Advice of International Sight Draft.

3-802 Effect of Instrument on Obligation for which it is Given.

3-803 Notice to Third Party.

3-804 Lost, Destroyed or Stolen Instruments.

3-805 Instruments Not Payable to Order or to Bearer.

Part 1

Section 3-101. Short Title.

See Introductory Comment.

Section 3-102. Definitions and Index of Definitions.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 191. (The phrase "or a remitter" is new.)

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 8. (The provision for drawees in the alternative was not included in the NIL.)

Subsection (1)(c).

No Maine cases were found on this point. Massachusetts is in accord: McDonald v. Hanahan, 328 Mass. 539, 105 N.E.2d 240 (1952).

Subsection (1)(d)

Refer to: R. S. 1954, c. 188, sec. 192.

Subsection (1)(e).

Accord: R. S. 1954, c. 337, sec. 191.

Subsections (2), (3) and (4).

See Annotations and comments to sections cited.

Section 3-103. Limitations on Scope of Article.

Subsection (1).

The exclusion of investment securities restricts the scope of Article 3, as compared with R. S. 1954, c. 188, under which the

negotiability of bills, notes, bonds, and other corporate obligations were determined.

Subsection (2).

See Introductory Comment to Article 3.

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

Subsection (1)(a)

Accord: R. S. 1954, c. 188, sec. 1(I).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 1(II). This subsection further provides that the writing must not contain any "other promise, order, obligation or power given by the maker or drawer except as authorized by this Article."

Subsection (1)(c).

Accord: R. S. 1954, c. 188, sec. 1(III).

Subsection (1)(d).

Accord: R. S. 1954, c. 188, sec. 1(IV). UCC Section 3-109 defines "definite time."

Subsection (2)(a).

Accord: R. S. 1954, c. 188, sec. 126.

Subsection (2)(b).

Accord: R. S. 1954, c. 188, sec. 185.

Subsection (2)(c).

Accord: Cooper v. Fidelity Trust, 134 Me. 40 (1935).

Subsection (2)(d).

Accord: R. S. 1954, c. 188, sec. 184.

Subsection (3).

No known statutory or case law found on this point. But see: Kendall v. Galvin, 15 Me. 131, 32 Am. Dec. 141 (1838) wherein it was said that it was not necessary to the validity of a Bill of Exchange that it be negotiable.

Section 3-105. When Promise or Order Unconditional.

Subsection (1)(a).

No Maine cases were found on this point.

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 3(II).

Subsection (1)(c).

Accord: Collins v. Bradbury, 64 Me. 37 (1875).

Subsection (1)(d).

No Maine cases were found on this point.

Subsection (1)(e).

Accord: Collins v. Bradbury, 64 Me. 37 (1875) and Murray v. Quint, 102 Me. 145, 66 Atl. 313 (1906).

Subsection (1)(f).

Accord: R. S. 1954, c. 188, sec. 3(I).

Subsection (1)(g)

Accord: Varner v. Nobleborough, 2 Me. 121, 11 Am. Dec. 48 (1822).

Subsection (1)(h).

No Maine cases were found on this point, but compare Maine cases which hold only the subscribers of such instruments personally liable. Sturdivant v. Hull, 59 Me. 172, 8 Am. Rep. 409 (1871); McKenney v. Bowie, 94 Me. 397, 47 Atl. 918 (1900). The Subsection adopts the New York rule under Hibbs v. Brown, 190 N.Y. 167, 83 N.E. 1008 (1907).

Subsection (2)(a).

Accord: For an endorsement with a "subject to" a collateral instrument clause which destroys the negotiability of the primary instrument see: Cushing v. Field, 70 Me. 50, 35 Am. Rep. 293 (1879).

Subsection (2)(b).

Accord: R. S. 1954, c. 188, sec. 3(II).

Section 3-106. Sum Certain.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, secs. 2(I) and (II).

Subsection (1)(b).

Accord: Hatch v. First National Bank, 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401 (1900), where a certificate of deposit with provision for charging of an interest rate after a certain time was held negotiable.

Subsection (1)(c).

Accord: Hatch v. First National Bank, 74 Me. 348, 47 Atl. 908

(1900), as to "addition" after a stated time. But contra: Waterhouse v. Chouinard, 128 Me. 505, 149 Atl. 21 (1930) (where privilege of discount for payment within 30 days held non-negotiable).

Subsection (1)(d).

Accord: R. S. 1954, c. 188, sec. 2(IV). (The phrase "or less exchange" is new.)

Subsection (1)(e).

Accord: R. S. 1954, c. 188, sec. 2(V). (The phrase "or both" is new.)

Subsection (2).

No Maine law found on this point, but see Uniform Law Comment to this section.

Section 3-107. Money.

Subsection (1).

No Maine cases were found on this point. The weight of authority is apparently in accord. See Beutel's Brannan, Negotiable Instrument Law (7th Ed.) p. 300.

Subsection (2).

No Maine cases found on this point. The first sentence appears to be in accord with the weight of authority concerning the situation when the exchange rate is ascertainable. See: Italian Trust Co. v. Hershman, 262 Mass. 362, 160 N.E. 184 (1928). Also see Uniform Law Comment on second sentence.

Section 3-108. Payable on Demand.

Accord: R. S. 1954, c. 188, sec. 7. But Code omits last sentence

in R. S. 1954, c. 188, sec. 7 (which states that an overdue instrument is demand paper as against a post-maturity endorser).

Section 3-109. Definite Time.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 4(II).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 4(I).

Subsection (1)(c).

Accord: R. S. 1954, c. 188, sec. 4(IV). (1959 Amendment adopted this rule.)

Subsection (1)(d).

Accord: R. S. 1954, c. 188, sec. 4(III). (". . . fixed period after occurrence of a specified event, ...")

Subsection (2).

Contra: R. S. 1954, c. 188, sec. 4(III). Also see Uniform Laws Comment to Subsection (2).

Section 3-110. Payable to Order.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 8(II).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 8(III).

Subsection (1)(c).

Accord: R. S. 1954, c. 188, sec. 8(I).

Subsection (1)(d).

Accord: R. S. 1954, c. 188, sec. 8(IV). (The words "or in the alternative" are omitted from R. S. 1954, c. 188, sec. 8(IV).)

Subsection (1)(e).

No Maine cases were found on this point. Massachusetts is in accord: Shaw v. Smith, 150 Mass. 166, 22 N.E. 887, 6 L.R.A. 348 (1889).

Subsection (1)(f).

Accord: R. S. 1954, c. 188, sec. 8(VI). ("Holder of an office for time being. . .")

Subsection (1)(g).

No Maine cases were found on this point.

Subsection (2).

No Maine cases were found on this point. There is an apparent split of authority elsewhere. See Bentel's Brannan, Negotiable Instrument Law (6th Ed.) p. 127, and 11 B.U.L. Rev. 549.

Subsection (3).

No Maine cases were found on this point.

Section 3-111. Payable to Bearer.

Alternative (a) Accord: R. S. 1954, c. 188, sec. 9(I). (The words "or order of bearer" are new.)

Alternative (b) Accord: R. S. 1954, c. 188, sec. 9(II).

Alternative (c) Accord: R. S. 1954, c. 188, sec. 9(IV). (The illustration of "'cash' or the order of 'cash'" is new.)

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

Subsection (1)(a).

Accord: R. S. 1954, c. 188, secs. 6(II) and (III).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec.5(I).

Subsection (1)(c).

No Maine cases were found on this point. However, a recital of collateral in the instrument did not impair its negotiability in Collins v. Bradbury, 64 Me. 37 (1875).

Subsection (1)(d).

Accord: R. S. 1954, c. 188, sec. 5(II).

Subsection (1)(e).

Accord: R. S. 1954, c. 188, sec. 5(III).

Subsection (1)(f).

No Maine cases were found on this point.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 5 (last sentence).

Section 3-113. Seal.

Accord: R. S. 1954, c. 188, sec. 6(IV).

Section 3-114. Date, Antedating, Postdating.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 6(I) (when not dated); R. S. 1954, c. 188, sec. 12 (antedated or postdated).

Subsection (2).

No Maine cases were found on this point, but see: Flynn v. Currie, 130 Me. 461, 157 Atl. 310 (1931), recognizing validity of postdated check.

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 11.

Section 3-115. Incomplete Instruments.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 14 with some changes in the phraseology.

Subsection (2).

Contra: R. S. 1954, c. 188, sec. 15 (as to undelivered paper).

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

(a) No Maine cases were found on this point. Other jurisdictions are in conflict. Some states treat the "OR" (the alternative) as "and" (joint payees); some states treat such an instrument as non-negotiable because of the uncertainty of payees. For an excellent treatment of this conflict, see: 171 A.L.R. 523.

(b) Accord: R. S. 1954, c. 188, sec. 41.

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

(a) Accord: R. S. 1954, c. 188, sec. 42. Under R. S. 1954, c. 188, sec. 42, however, this rule was limited to cashiers or other fiscal officers.

(b) No Maine cases were found on this point. Massachusetts is in accord: Plimpton v. Goodell, 126 Mass. 119 (1879).

(c) No Maine cases were found on this point.

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

(a) Accord: R. S. 1954, c. 188, sec. 17(V). The sentence: "A draft drawn on the drawer is effective as a note" is new.

(b) Accord: R. S. 1954, c. 188, sec. 17(IV). The priority given to typewritten words over printed words is new.

(c) Accord: R. S. 1954, c. 188, sec. 17(I).

(d) Accord: R. S. 1954, c. 188, sec. 17(II).

(e) Accord: R. S. 1954, c. 188, sec. 17(VII).

(f) No Maine cases were found on this point. However, it has been held that an accommodation maker is discharged when he does not assent to the extension. Westbrook Trust Co. v. Timberlake, 121 Me. 64, 115 Atl. 555 (1921).

Section 3-119. Other Writings Affecting Instrument.

Subsection (1).

Accord: American Gas & Ventilating Machine Co. v. Woods, 90 Me. 516, 38 Atl. 548, 43 L.R.A. 449 (1897). (Contemporaneous agreement between original parties.) No Maine cases were found on the point involving a holder in due course.

Subsection (2).

Accord: American Gas & Ventilating Machine Co. v. Woods, 90 Me. 516, 38 Atl. 548, 43 L.R.A. 449 (1897).

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

This section is new, and no Maine cases were found on this point.

Section 3-121. Instruments Payable at Bank.

Accord: R. S. 1954, c. 188, sec. 87. Alternative A was adopted in the Maine NIL.

Section 3-122. Accrual of Cause of Action.

Subsection (1)(a).

Accord: Lunt v. Adams, 17 Me. 230 (1840).

Subsection (1)(b).

Accord: Porter v. Porter, 51 Me. 376 (1862).

Subsection (2).

No Maine cases were found on this point. Massachusetts is in accord: National Surety Co. v. Commissioner of Banks, 243 Mass. 218, 137 N.E. 533 (1922).

Subsection (3).

No Maine law was found on this point. Massachusetts is in accord: Whitwell v. Bingham, 19 Pick. 117 (Mass. 1837).

Subsection (4)(a).

Accord: Byrne v. Byrne, 135 Me. 330, 196 Atl. 402 (1938).

Subsection (4)(b).

Accord: Eaton v. Bossonault, 67 Me. 540, (1877); Duran v. Ayer, 67 Me. 145 (1877).

Part 2

TRANSFER AND NEGOTIATION

Section 3-201. Transfer: Right to Indorsement.

Subsection (1).

This Subsection alters R. S. 1954, c. 188, sec. 58 under which a holder with notice could improve his status by selling to a good faith purchaser and then reacquiring the latter's rights. Under the new provision, "white-wash" sales are eliminated.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 27.

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 49.

Section 3-202. Negotiation.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 30.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 31, except "by and on behalf of holder."

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 32.

Subsection (4).

This section is new but guarantees and conditions did not affect indorsements in Irish v. Cutter, 31 Me. 356 (1850) and McDonald v. Bailey, 14 Me. 101 (1836).

Section 3-203. Wrong of Misspelled Name.

Accord: R. S. 1954, c. 188, sec. 43. The provision which allows a person paying or giving value to require signature in both names is new but consistent with prior practice.

Section 3-204. Special Indorsement; Blank Indorsement.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 34; contra: to R. S. 1954, c. 188, sec. 40. This new provision rejects the "once a bearer, always a bearer" rule.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 34.

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 35.

Section 3-205. Restrictive Indorsements.

Alternative (a). Accord: R. S. 1954, c. 188, sec. 39.

Alternatives (b), (c) and (d). Accord: R. S. 1954, c. 188, sec. 36. The new provisions have more definitive phraseology and are basically consistent with R. S. 1954, c. 188, sec. 36.

Section 3-206. Effect of Restrictive Indorsement.

Subsection (1).

Contra: R. S. 1954, c. 188, sec. 47. This provision will now allow further negotiability of a restrictively indorsed instrument.

Subsection (2).

Contra: R. S. 1954, c. 188, sec. 37 which provided that subsequent

indorsees only acquired the title of the restrictive indorsee. This new provision will now relieve banks (other than the depository bank) of this limitation.

Subsection (3).

Alters and clarifies R. S. 1954, c. 188, sec. 39. Under this provision, to attain the benefits of a holder for value, the transferee must apply any value given consistently with the conditions and restrictions of the indorsement. Also contra to R. S. 1954, c. 188, sec. 47, under which a restrictive indorsee could be precluded from a due course status.

Subsection (4).

Alters R. S. 1954, c. 188, sec. 47, under which the negotiability of the instrument would end with a restrictive indorsement. This provision further hurdles the "notice" obstacle of R. S. 1954, c. 188, sec. 52(IV) and extends the rights of subsequent indorsees under R. S. 1954, c. 188, sec. 27.

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

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 22.

Subsection (1)(b).

Accord: Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427 (1873) (Fraud). (However, a signature obtained by fraud was considered forgery and thereby rendered the instrument non-negotiable in Biddeford National Bank v. Hill, 102, Me. 346, 66 Atl. 721 (1907).) Also see Knowlton v. Ross, 114 Me. 18, 95 Atl. 281 (1915) for dictum that an instrument obtained under duress could be ratified by an act of the aggrieved party.

Subsection (1)(c).

Accord: Wright v. Wheeler, 72 Me. 278 (1881)(illegal object).

Subsection (1)(d).

No cases found in point, but see Furber v. Fogler, 97 Me. 585, 55 Atl. 512 (1903) where an omission to mention the indebtedness of the corporation did not invalidate the instrument.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 58 (First sentence).

Section 3-208. Reacquisition.

Accord: R. S. 1954, c. 188, sec. 50; R. S. 1954, c. 188, sec. 48; R. S. 1954, c. 188, sec. 121.

Part 3

RIGHTS OF A HOLDER

Section 3-301. Rights of a Holder.

Accord: R. S. 1954, c. 188, sec. 51; Merrill Trust Co. v. Brown, 122 Me. 101, 119 Atl. 109 (1922).

Section 3-302. Holder in Due Course.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 52(III).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 52(III).

Subsection (1)(c).

Contra: Hibbard v. Collins, 127 Me. 383, 143 Atl. 600 (1928), where a holder taking a note which was in fact overdue was not a holder in due course, under R. S. 1954, c. 188, sec. 52(II).

Subsection (2).

Accord: Nonotuck Savings Bank v. Norton, 135 Me. 93, 189 Atl. 829 (1937)(applying Massachusetts law).

Subsection (3).

No Maine cases.

Subsection (4).

Accord: R. S. 1954, c. 188, secs. 27 and 54.

Section 3-303. Taking for Value.

Alternative (a). Accord: R. S. 1954, c. 188, secs. 27 and 54.

Alternative (b). Accord: R. S. 1954, c. 188, sec. 25.

Alternative (c). Accord: R. S. 1954, c. 188, sec. 25.

Section 3-304. Notice to Purchaser.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 52(I) and Jordan v. Goodside, 123 Me. 330, 122 Atl. 859 (1923).

Subsection (1)(b).

No Maine cases.

Subsection (2).

Accord: Gilman v. F. O. Bailey Carriage Co., 125 Me. 108, 131 Atl. 138 (1925); and 127 Me. 91, 141 Atl. 321 (1928).

Subsection (3).

Contra: R. S. 1954, c. 188, sec. 56, applied in Mechanics' Savings Bank v. Berry, 119 Me. 404, 111 Atl. 533 (1920).

Subsection (4)(a).

Accord: R. S. 1954, c. 188, sec. 12, Flynn v. Currie, 130 Me. 461, 157 Atl. 310 (1931).

Subsection (4)(b).

Accord: R. S. 1954, c. 188, sec. 52(III) and (IV), Merrill Trust Co. v. Brown, 122 Me. 101, 119 Atl. 109 (1922).

Subsection (4)(c).

Accord: R. S. 1954, c. 188, sec. 29, Ticonic National Bank v. Fashion Waist Shop, 123 Me. 509, 124 Atl. 308 (1924).

Subsection (4)(d).

Accord: R. S. 1954, c. 188, sec. 14.

Subsection (4)(e).

No Maine cases.

Subsection (4)(f).

No Maine cases.

Subsection (5).

No Maine cases.

Subsection (6).

Contra: Foss v. Hume, 130 Me. 22, 153 Atl. 181 (1931).

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

Subsection (1).

The substitution of "all claims to it on the part of any person" for "any defect on title of prior parties" found in R. S. 1954, c. 188, sec. 57 does not seem to change the practical result under existing law.

Subsection (2)(a).

See "Tort and Contract Liability of Infants in New England," 36 B.U.L. Rev. 600 (1956).

Subsection (2)(b).

This appears to be in accord with the wieght of authority elsewhere; Maine cases are lacking on this point.

Subsection (2)(c).

Accord: R. S. 1954, c. 188, sec. 23, Branz v. Stanley, 142 Me.

318, 51 A.2d 192 (1947).

Subsection (2)(d).

Accord: 11 USCA sec. 35.

Subsection (2)(e).

Accord: R. S. 1954, c. 188, sec. 122 with respect to Renunciation.

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

(a) Accord: R. S. 1954, c. 188, sec. 58.

(b) Accord: R. S. 1954, c. 188, sec. 58.

(c) Accord: R. S. 1954, c. 188, secs. 16 and 28.

(d) Accord: R. S. 1954, c. 188, secs. 37 and 58. Maine cases appear to be lacking on the exception for the defense of theft, but no such exception appears in R. S. 1954, c. 188, sec. 59.

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

Subsection (1).

See Rule X of the Rules of Court and Eisenman v. Austen, 132 Me. 214, 162 (1933).

Subsection (2).

Accord: Milan v. Graham, 131 Me. 220, 160 Atl. 581 (1932).

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 59.

Part 4

LIABILITY OF PARTIES

Section 3-401. Signature.

Accord: R. S. 1954, c. 188, sec. 18. R. S. 1954, c. 188, secs. 134 and 135, relating to collateral and virtual acceptances, are not included in the Code.

Section 3-402. Signature in Ambiguous Capacity.

Accord: R. S. 1954, c. 188, secs. 17(6) and 63.

Section 3-403. Signature by Authorized Representative.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 19.

Subsection (2)(a).

Accord: R. S. 1954, c. 188, sec. 20.

Subsection (2)(b).

Accord: Pre-NIL cases: Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45 (1837); Ross v. Brown, 74 Me. 352 (1883); Chick v. Trevitt, 20 Me. 462, 37 Am. Dec. 68 (1841).

Subsection (3).

Substantially in accord: Gleason v. Sanitary Milk-Supply Co., 93 Me. 544, 45 Atl. 825 (1900); Simpson v. Garland, 72 Me. 40, 39 Am. Rep. 297 (1881). But cf. Mellen v. Moore, 68 Me. 390, 28 Am. Rep. 77 (1878) (a non-incorporated association).

R. S. 1954, c. 188, sec. 21 is omitted.

Section 3-404. Unauthorized Signatures.

Subsection (1).

First clause is in accord with R. S. 1954, c. 188, sec. 23 except the phrase "unless he ratifies" which refers to subsection (2). Provision applied in Branz v. Stanley, 142 Me. 318, 51 A.2d 192 (1947). The second clause is new.

Subsection (2).

Accord: Casco Bank v. Kane, 53 Me. 103 (1865).

Section 3-405. Imposters; Signature in Name of Payee.

Accord with R. S. 1954, c. 188, sec. 9(3), except that the instrument is not in terms made payable to bearer and indorsement is still necessary to negotiation, although it may be made by "any person." (1)(a) adds a provision for fraud that is not face to face and eliminates the "concept of" fictitious or non-existing person.

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

Accord: Biddeford National Bank v. Hill, 102 Me. 346, 66 Atl. 721 (1907); Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427 (1873); Breckenridge v. Lewis, 84 Me. 349, 24 Atl. 864 (1892).

Section 3-407. Alteration.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 125, applied in Scribner v. Cyn, 148 Me. 329, 93 A.2d 126 (1952).

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 124, except that the alteration

must be by the holder; the alteration must be for a fradulent purpose; the defense must be raised by the party whose contract is changed by the alteration; and if the above are not applicable the instrument may be enforced according to its original tenor.

Subsection (3).

Accord: R. S. 1954, c. 188, secs. 124 and 14. The separate rule in R. S. 1954, c. 188, sec. 15 for an instrument that has not been delivered is reversed.

Section 3-408. Consideration.

Accord: R. S. 1954, c. 188, secs. 24, 25 and 28; Douglas v. Bunham, 127 Me. 301, 143 Atl. 55 (1928); Merrill Trust Co. v. Brown, 122 Me. 101, 119 Atl. 109 (1922); Peterson Owen Co. v. Fickett, 121 Me. 413, 117 Atl. 575 (1922).

Section 3-409. Draft Not an Assignment.

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 127 and 189; Foss v. Hume, 130 Me. 22, 153 Atl. 181 (1931).

Subsection (2).

This provision is new and clarifies the rule that this section is not intended to affect any liability which may arise apart from the instrument itself.

Section 3-410. Definition and Operation of Acceptance.

Subsection (1).

First sentence is in accord with R. S. 1954, c. 188, sec. 132.

Second sentence is in accord with R. S. 1954, c. 188, secs. 132 and 133. But the requirement that the acceptance must be on the draft reverses the last part of R. S. 1954, c. 188, secs. 134 and 135. As to the time the acceptance becomes operative, this subsection is basically in accord with definitions in R. S. 1954, c. 188, sec. 191. R. S. 1954, c. 188, secs. 136 and 137 are eliminated.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 138.

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 14 on incomplete instrument. Changes last sentence of R. S. 1954, c. 188, sec. 138.

Section 3-411. Certification of a Check.

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 187 and 188.

Subsection (2).

No Maine cases were found on this point and the Code provision is in accord elsewhere: See Annotations in 62 A.L.R. 374, 377 (1928) to Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326 (1928).

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 138, and consistent with UCC Section 3-410(2).

Section 3-412. Acceptance Varying Draft.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 142. The distinctions between

various kinds of qualified acceptances, in R. S. 1954, c. 188, sec. 141, are eliminated and the rule is made to apply to any "acceptance that in any manner varies the draft." The provision that where the holder refuses the conditional acceptance the drawee is entitled to have his acceptance cancelled is new.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 141, except for the new limitation "in the continental United States."

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 142, insofar as the drawer and endorsers are discharged when the qualification is accepted. This provision changes R. S. 1954, c. 188, sec. 142 by requiring affirmative assent to the acceptance.

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

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 60 and 62.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 61.

Subsection (3).

Accord: R. S. 1954, c. 188, secs. 60, 61 and 62(2).

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

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 38, 44, 66 (applied in Weeks v. Hickey, 129 Me. 339, 151 Atl. 890 (1930); Home Insurance Co. v. Bishop,

140 Me. 72, 34 A.2d 22 (1943)), and 67.

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 68 (applied in Holsten v. Haley, 125 Me. 485, 135 Atl. 98 (1926)).

Section 3-415. Contract of Accommodation Party.

Subsection (1).

Definition of accommodation party is basically in accord with R. S. 1954, c. 188, sec. 29.

Subsection (2).

Accord: R. S. 1954, c. 188, secs. 29, 64.

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 29; Madigan v. Lumbert, 136 Me. 178, 5 A.2d 278 (1923); Ticonic National Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 Atl. 308 (1924). Cf. Westbrook Trust v. Timberlake, 121 Me. 64, 115 Atl. 555 (1921).

Subsection (4).

Contra: R. S. 1954, c. 188, sec. 63; Home Insurance Co. v. Bishop, 140 Me. 72, 34 A.2d 22 (1943).

Subsection (5).

First clause accords with R. S. 1954, c. 188, sec. 29 and dictum in Madigan v. Lumbert, 136 Me. 178, 5 A.2d 278 (1939). As to the second clause, no cases were found in point but this provision is contra to the Maine cases holding that "When commercial paper is paid by a party whose debt it appears to be, paper becomes commercially dead and . . . becomes but evidence of its commercial life." In re Paradis' Estate, 134 Me. 333, 186 Atl. 672 (1936);

Morris v. Bellfleur, 124 Me. 270, 132 Atl. 817 (1926)(citing the Massachusetts case of Quimby v. Varnum, mentioned in Uniform Law Comment 5). But cf. Bishop v. Rowe, 71 Me. 263 (1880).

Section 3-416. Contract of Guarantor.

This section is new and provides for an interpretation of words of guarantee added to a signature. No modern cases could be found on the effect of such a signature, and the pre-NIL cases appear to be basically in accord: Myrick v. Hasey, 27 Me. 9 (1847); Flynn v. American Banking and Trust Co., 104 Me. 141, 69 Atl. 771, 19 L.R.A. (NS) 428 (1908). Subsection (6) is in accord with R. S. 1954, c. 119, sec. 1(II), which does not require a statement of the consideration to call the Statute of Frauds into operation.

Section 3-417. Warranties on Presentment and Transfer.

Subsection (1).

New provision stating an undertaking to a party who accepts or pays by one who obtains payment or acceptance or of any prior transferor.

Subsection (1)(a).

No Maine cases were found in point but Massachusetts is in accord: Carpenter v. Northborough National Bank, 123 Mass. 66 (1877). Thus Subsection does not disturb the Price v. Neal doctrine (i.e., where the drawer's signature is forged, an innocent transferee is not liable for repayment to the drawee bank) followed in Coburn v. Neal, 92 Me. 139, 42 Atl. 348 (1901).

Subsection (1)(b).

No Maine cases were found in point but this provision would modify Belnap v. Davis, 19 Me. 457 (1841) which states that "the acceptance

admits the signature of the drawer and the authority to draw." Also compare Coburn v. Neal, supra.

Subsection (1)(c).

See basically in accord: Forsyth v. Day, 46 Me. 176 (1858) (maker may be deemed to adopt his forged signature if his acts constitute an estoppel). Compare National City Bank of Chicago v. National Bank of the Republic of Chicago, 300 Ill. 103, 132 N.E. 832, 22 A.L.R. 1153 (1921).

Subsection (2).

Accord: R. S. 1954, c. 188, secs. 65 and 66 except that 65(IV) is changed by Subsection (2)(e) to a knowledge only of any insolvency proceeding. The Code extends warranty beyond the immediate transferee only where the transfer is by indorsement.

Subsection (3).

Accord: R. S. 1954, c. 188, secs. 38 and 65.

Subsection (4).

Accord: R. S. 1954, c. 188, sec. 69 except that it applies only to a selling agent.

Section 3-418. Finality of Payment or Acceptance.

Accord: R. S. 1954, c. 188, sec. 62; Coburn v. Neal, 92 Me. 139, 42 Atl. 348 (1901).

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

New provision providing an action for conversion of an instrument in certain circumstances. Modifies R. S. 1954, c. 188, sec. 137.

Part 5

PRESENTMENT, NOTICE OF DISHONOR AND PROTEST

Section 3-501. When Presentment, Notice of Dishonor, and Protest Necessary or Permissible.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, secs. 143(1), (2), (3), and 167.

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 70. See UCC Section 3-102(d) for definition of "secondary party."

Subsection (1)(c).

This section, in conjunction with UCC Subsection 3-502(1)(b) extends the rule of R. S. 1954, c. 188, sec. 186, with certain modifications (see Annotations to UCC Subsection 3-502(1)(b)), to the effect that drawers of checks are discharged only to the extent of the loss caused by the delay in presentment, to include acceptors of drafts and makers of notes payable at a bank. It thus changes the rule of some cases which held, in relying on the "tender" language of NIL sec. 70, that makers and acceptors of paper payable at banks were not discharged to any extent by a failure to make presentment. See, for example, Federal Bank v. Epstein, 151 S.C. 67, 148 S.E. 713 (1928). Apart from these changes, the present section is in accord with R. S. 1954, c. 188, sec. 70.

Subsection (2)(a).

Accord: R. S. 1954, c. 188, sec. 89.

Subsection (2)(b).

This Subsection extends the limited discharge rule applicable

to failure to present bank paper, Subsection (1)(c), supra, to a failure to give notice of dishonor.

Subsection (3).

Under R. S. 1954, c. 188, sec. 129, "foreign bills" included those drawn or payable in another state. This Subsection changes this definition to include only those bills drawn or payable outside the United States. Other than this exception, the same rules apply as are found in R. S. 1954, c. 188, secs. 188 and 152.

Subsection (4).

Contra: Pre-NIL case - Hunt v. Wadleigh, 26 Me. 271, 45 Am. Dec. 108 (1846). The last sentence of R. S. 1954, c. 188, sec. 7 has been omitted from this chapter. This sentence, when coupled with R. S. 1954, c. 188, sec. 70, would have required presentment in order to charge the indorser who became such when the instrument was overdue. The present section reverses this rule.

Section 3-502. Unexcused Delay; Discharge.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, secs. 70, 89 and 144, and pre-NIL case: Groton v. Dallheim, 6 Me. 476 (1830).

Subsection (1)(b).

This section extends the rule of R. S. 1954, c. 188, sec. 186 to any drawer and to acceptors of drafts and makers of notes payable at a bank, and further limits the discharge of such persons only where the bank becomes insolvent and only where the drawer, acceptor or maker gives a

written assignment of this right against the bank to the holder. For application of the rule that holder must stand for drawer's loss because of failure of bank before delayed presentment, see Viles v. S. D. Warren Co., 132 Me. 277, 170 Atl. 501 (1934).

Subsection (2).

Accord: R. S. 1954. c. 188, sec. 152.

Section 3-503. Time of Presentment.

Subsections (1)(a) and (b).

Accord: R. S. 1954, c. 188, secs. 71 and 144, with certain clarifications.

Subsection (1)(c).

Accord: R. S. 1954, c. 188, sec. 71.

Subsections (1)(d) and (e).

No Maine cases were found on these points.

Subsections (2)(a) and (b).

Accord: R. S. 1954, c. 188, sec. 193, but R. S. 1954, c. 188 makes no distinction between drawers and indorsers in defining a reasonable time. The provision of Subsection (2)(a) greatly extends the period within which a check must be presented in order to charge the drawer and to that extent, the Code is contra to Viles v. S. D. Warren Co., 132 Me. 277, 170 Atl. 501 (1934).

Subsection (3).

This section simplifies and changes the rules of R. S. 1954, c. 188,

secs. 85 and 146. The net effect of the change is to insure that presentment will be due on a day which is a full business day for both parties.

Subsection (4).

Accord: R. S. 1954, c. 188, secs. 72(II) and 75, except that the provision of the latter section permitting presentment at a bank at any time prior to the closing of the bank in cases where the drawer has no funds at the bank is eliminated and confined to the "banking day," as defined in UCC Section 4-104.

Section 3-504. How Presentment Made.

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 72(I) and (IV) and sec. 145.

Subsection (2)(a).

R. S. 1954, c. 188, secs. 72 and 145 make no provision for presentment by mail unless such a provision is included by implication in the words "or some person authorized to receive payment on his behalf" in R. S. 1954, c. 188, sec. 145.

Subsection (2)(b).

No Maine cases were found in point but insofar as one bank may make presentment to drawer's bank, see accord: Burnham v. Webster, 19 Me. 232 (1841). This section adopts New York rule in Columbia-Knickerbocker Trust Co. v. Miller, 215 N.Y. 191, 109 N.E. 179, Ann. Cases 1917 Atl. 348 (1915).

Subsection (2)(c).

Accord: R. S. 1954, c. 188, secs. 72(IV) and 73(I), (II) and (III).

Subsection (3)(a).

Accord: If the persons are partners, R. S. 1954, c. 188, sec. 77. Contra: If the persons are not partners, R. S. 1954, c. 188, secs. 78 and 145(I).

Subsection (3)(b).

Accord: R. S. 1954, c. 188, secs. 145 and 72(IV).

Subsection (4).

Accord: R. S. 1954, c. 188, sec. 73(I), and this section makes it clear that the instrument must be presented at the place so designated.

Subsection (5).

This section permits presentment to be made in the manner and with the result stated in UCC Section 4-210. See the annotations to that section.

Section 3-505. Rights of Party to Whom Presentment is Made.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, sec. 74, with the exception that Maine's NIL provision requires that the instrument be exhibited in all cases.

Subsection (1)(b).

No Maine cases were found on this point. Earlier cases in other jurisdictions have held that mere possession of the instrument is sufficient evidence. See Morris v. Foreman, 1 Dall. 193 (1787) and 8 Am. Jur. 380.

Subsection (1)(c).

Accord: R. S. 1954, c. 188, sec. 73.

Subsection (1)(d).

Surrender of the instrument upon full payment is in accord with R. S. 1954, c. 188, sec. 74. But the right to demand a signed receipt is new.

Subsection (2).

This section is new and no Maine cases were found.

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

Subsection (1).

This section substitutes "the close of the next business day following presentment" for the 24-hour period in R. S. 1954, c. 188, sec. 136. Under R. S. 1954, c. 188, sec. 137, the holder could also extend the period for acceptance, without the Code's limitation, "for an additional business day."

Subsection (2).

This section allows the party required to pay until the close of business on the day of presentment for reasonable examination to determine whether the instrument is properly payable. As to drafts drawn under a letter of credit, see Annotations to UCC Sections 5-112.

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

Subsection (1)(a).

Accord: R. S. 1954, c. 188, secs. 83(I), 149(i).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, secs. 83(II), 149(II).

Subsection (2).

Accord: R. S. 1954, c. 188, secs. 84, 151.

Subsection (3).

No Maine cases were found on this point but see Continental National Bank & Trust Co. v. Olney National Bank, 33 F.2d 437 (7th Cir. 1929) and opinions in 2 Paton's Digest p. 2059.

Subsection (4).

No Maine cases were found on this point. This section leaves open the question of who are secondary parties "bound by the term." Also see Husted and Leary, "An Approach to Drafting an International Code," 49 Colum.L. Rev. 1072, 1090 ff (1949).

Section 3-508. Notice of Dishonor.

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 90, 91, 94, 97.

Subsection (2).

This provision extends the time within which notice of dishonor must be given in R. S. 1954, c. 188, secs. 102, 103, 194 to three days for all except banks, for which the time limit is midnight of the next banking day.

Subsection (3).

Accord: R. S. 1954, c. 188, sec. 95, 96.

Subsection (4).

Accord: R. S. 1954, c. 188, sec. 105. See UCC Section 1 201(38) for definition of "send."

Subsection (5).

Accord: R. S. 1954, c. 188, sec. 99.

Subsection (6).

Accord: R. S. 1954, c. 188, sec. 101.

Subsection (7).

Accord: R. S. 1954, c. 188, sec. 98, except that the Code provision makes notice, to the personal representative of a party who is dead, permissive rather than mandatory as in the NIL.

Subsection (8).

Accord: R. S. 1954, c. 188, secs. 92, 93.

Section 3-509. Protest; Noting for Protest.

Subsection (1).

The Code has changed the law by requiring that only a bill drawn or payable in a foreign country be protested. See UCC Section 3-501. Also, under the Code, protest may no longer be made by "any respectable resident of the place where the bill was dishonored" as under R. S. 1954, c. 188, sec. 154(II). It may now be made by a United States consul or vice-counsul, a notary, or "other person authorized to certify dishonor by the law of the place where dishonor occurs."

Subsection (2).

Accord: R. S. 1954, c. 188, sec. 153, except that the Code does not require that the protest be annexed to the bill or contain a copy thereof. The Code does require, however, that it identify the instrument.

Subsection (3).

No Maine cases were found on this point, but the Code recognizes this practice adopted elsewhere. 8 Am. Jur. 388 (1937).

Subsection (4).

Accord: R. S. 1954, c. 188, sec. 155, except that protest is now due when notice of dishonor is due rather than on the day of dishonor.

Subsection (5).

Accord: R. S. 1954, c. 188, sec. 155 (last sentence).

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

(a) Accord: Orono Bank v. Wood, 49 Me. 26 (1860); Pattee v. McGullis, 53 Me. 410 (1886).

(b) No Maine cases were found on this point.

(c) Accord: R. S. 1954, c. 53, sec. 34 (Entries made in the regular course of business).

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

Subsection (1).

Accord: R. S. 1954, c. 188, secs. 81 (presentment for payment); 113 (delay in giving notice of dishonor), 159 (protest), and 147 (insufficient time for presentment).

Subsection (2)(a).

Accord: R. S. 1954, c. 188, secs. 83(III)(presentment for payment), 109 (notice of dishonor); 111 and 159 (protest).

Subsection (2)(b).

Accord: R. S. 1954, sec. 114(IV).

Subsection (2)(c).

Accord: R. S. 1954, c. 188, secs. 82(I), 112, 159.

Subsection (3)(a).

Contra: R. S. 1954, c. 188, sec. 76 (where person primarily liable on the instrument is dead, presentment must be made to the personal representative); Gromer v. Moore, 21 Me. 455 (1845); Hunt v. Wadleigh, 26 Me. 271 (1846) (notice of insolvency of party primarily liable doesn't excuse presentment).

Subsection (3)(b).

Accord: R. S. 1954, c. 188, sec. 148(III).

Subsection (4).

Accord: R. S. 1954, c. 188, secs. 116, 151.

Subsection (5).

Accord: R. S. 1954, c. 188, sec. 111.

Subsection (6).

Accord: R. S. 1954, c. 188, sec. 110.

Part 6

DISCHARGE

Section 3-601. Discharge of Parties.

Accord: R. S. 1954, c. 188, secs. 119, 120, 121.

Where R. S. 1954, c. 188, sec. 119 provided for "discharge of the instrument," the UCC provides only for the discharge of some or all of the parties thereto; under UCC Section 3-602, the Code makes it clear that this discharge is ineffective against a subsequent holder in due course without notice, so that the instrument itself is not dead.

Section 3-602. Effect of Discharge Against Holder in Due Course.

This section is new and makes it clear that all discharges are only personal defenses and are effective against a subsequent holder in due course only if he has notice of the discharge.

Section 3-603. Payment or Satisfaction.

Subsection (1).

R. S. 1954, c. 188, secs. 51 and 119 hold that "payment in due course" discharges the instrument. R. S. 1954, c. 188, sec. 88 holds that to constitute "payment in due course," there should be no notice of defective title. The Code, however, discharges the party that makes payment even with notice of an adverse claimant unless the party claiming to be the "true owner" provides indemnity or secures an injunction.

Subsection (2).

Amends R. S. 1954, c. 188, sec. 121 and repeals R. S. 1954, c. 188, secs. 171-177. Under the Code, anyone who pays with consent of the holder can recover on the instrument. Contra: pre-NIL cases:

Willis v. Hobson, 37 Me. 403 (1854); Smith v. Sawyer, 55 Me. 139, 92 Am. Dec. 576 (1867). But cf. Bishop v. Rowe, 71 Me. 263 (1880).

Section 3-604. Tender of Payment.

Subsection (1).

This provision is new but states an accepted rule. See e.g., Dewees v. Middle States Coal & Iron Co., 248 Pa. 202, 93 Atl. 958 (1915).

Subsection (2).

Amends R. S. 1954, c. 188, sec. 120(4), in that when the holder refuses tender, the NIL discharges all subsequent parties secondarily liable, whereas under the Code, all parties having recourse against the tendering party are discharged.

Subsection (3).

Amends R. S. 1954, c. 188, sec. 70. The UCC makes it clear that readiness to pay at all places specified in the instrument is equivalent to tender and discharges the same parties.

Section 3-605. Cancellation and Renunciation.

Subsection (1)(a).

Accord: R. S. 1954, c. 188, secs. 48, 119(3) and 120(2).

Subsection (1)(b).

Accord: R. S. 1954, c. 188, sec. 122.

Subsection (2).

This is a new provision but the principle was recognized in Bishop v. Rowe, 71 Me. 263 (1880).

Section 3-606. Impairment of Recourse or of Collateral.

Accord: R. S. 1954, c. 188, sec. 120. This provision extends the principle to cover case of a principal bound otherwise than on the instrument, as for instance, accommodation maker. Accord: Pokroisky v. Potter, 129 Me. 70, 149 Atl. 806 (1930).

Part 7

ADVICE OF INTERNATIONAL SIGHT DRAFT

Section 3-701. Letter of Advice of International Sight Draft.

No Maine cases were found in this area. This section clarifies some practices of international banking.

Part 8

MISCELLANEOUS

Section 3-801. Drafts in a Set.

Subsection (1).

Accord: R. S. 1954, c. 188, sec. 178.

Subsection (2).

Accord: R. S. 1954, c. 188, secs. 179, 180 and 181.

Subsection (3).

Accord: First sentence, R. S. 1954, c. 188, sec. 182. The second sentence is new. For the effect of a payment of a check notwithstanding an effective stop-order, see UCC Section 4-407 and Annotations thereto.

Subsection (4).

Accord: R. S. 1954, c. 188, sec. 183.

Section 3-802. Effect of Instrument on Obligation for Which it is Given.

Subsection (1)(a).

No Maine cases were found on this point. Compare R. S. 1954, c. 188, secs. 187 and 188 relative to certified checks which, when certified by the holder, discharge the indorser and drawer.

Subsection (1)(b).

Accord: Merrett v. Brackett, 60 Me. 524 (1872); Gordon v. Keene, 118 Me. 269, 107 Atl. 849 (1919).

Subsection (2).

No Maine cases were found on this point.

Section 3-803. Notice to Third Party.

No Maine cases were found in point, but the principle of "vouching in" has been recognized in Maine which holds a judgment as conclusive to a party "answerable over" if notice was given. Thurston v. Spratt, 52 Me. 202 (1863); Burns v. Baldwin-Doherty Co., 132 Me. 513, 170 Atl. 513 (1934).

Section 3-804. Lost, Destroyed or Stolen Instruments.

Accord: Moore v. Fall, 42 Me. 450, 66 Am. Dec. 299 (1856); Matthews v. Matthews, 97 Me. 42, 53 Atl. 831 (1902).

Section 3-805. Instruments Not Payable to Order or to Bearer.

This section is intended to make this article applicable to non-negotiable instruments insofar as their form permits. Since, however, there cannot be a holder in due course of such an instrument, the sections of this chapter peculiar to such holders do not apply.

Article 4

BANK DEPOSITS AND COLLECTIONS

Part 1

GENERAL PROVISIONS AND DEFINITIONS

Section 4-101. Short Title.

Under the Negotiable Instruments Law, R. S. 1954, c. 188, rights and duties of parties to commercial paper have been determined without distinction between items that are and items that are not involved in the bank collection process. In recent years, however, the unique and complex character of bank collections has given rise to an expanding body of case law and banking practice that can no longer be fitted easily into ordinary NIL concepts. Answers to bank collection problems have been variously sought in rules drawn from common law, state and federal statutes, Federal Reserve regulations and operating letters, clearing house rules and banking usage. Drawing upon these sources, Article 4 now furnishes a separate and cohesive set of legal rules applicable to commercial paper in the bank collection process.

Section 4-102. Applicability.

Subsection (1).

This Subsection states the rule of supremacy in cases of conflict between Articles 3, 4 and 8. Inasmuch as the instruments within Articles 3 and 4 are generally the same, instances of conflict between these two Articles may be frequent. Instances of conflict between Articles 4 and 8, however, would be fewer, because Article 8 is addressed to investment securities rather than the far more extensive category of commercial paper "items" (UCC Section 4-104(g)) with which this Article is primarily concerned.

Subsection (2).

This Subsection states the rule that the bank's liability for acts done in the presentment, payment, or collection process is governed by the law of the bank's location -- this is a rule of convenience. The law of the jurisdiction in which an item has been executed or endorsed has no effect; Maine law would be changed by the enactment of this section. Nonotuck Savings Bank v. Irving T. Norton, 135 Me. 92, 189 Atl. 29 (1937); Roads v. Webb, 91 Me. 406, 40 Atl. 128 (1898). These cases say it is the law of the place where the contract is executed which controls. Cf. however Flynn v. Currie, 130 Me. 461, 157 Atl. 310 (1931), which, in holding that the validity of a check negotiated outside of Maine depended on the laws of Maine, gave as a reason not only that the check bore upon its face every mark of a transaction to be performed in Maine, but also that it was drawn on a Maine bank. Thus the location of the bank seems to have been, at least, a factor not to be ignored.

Section 4-103. Variation by Agreement; Measure of Damages; Certain Action Constituting Ordinary Care.

Subsection (1).

Although the provisions of this subsection have no counterpart in previous Maine statutory or case law, it is in accord with traditional common law rules and banking practices. This rule against disclaimers by banks is consistent with the rule against disclaimers applicable to all parties generally under UCC Section 1-102(3). Thus for purposes of the disclaimer rule, the Code seems to place banks in the "public service" area, together with public warehousemen and common carriers, who under prior Maine law were unable to make effective disclaimers of liability

for bad faith or negligence. R. S. 1954, c. 187, sec. 3 (warehousemen); R. S. 1954, c. 186, sec. 3 and Little v. Boston & Maine R. R., 66 Me. 239 (1876) (common carriers).

The rule against limitation of damages arising from failure to act in good faith or with ordinary care does not appear in UCC Section 1-102(3). In this respect, the disclaimer power of banks would appear to be somewhat more restricted than that of private persons.

Subsection (2).

In accord with traditional common law rules and banking practices.

Subsection (3).

In accord with traditional common law rules and banking practices.

Subsection (4).

No annotation seems necessary.

Subsection (5).

This Subsection limits damages more strictly than the common law rule, which permitted recovery of consequential and special damages against a bank which failed to exercise due care. No Maine case in point has been found, but therefore the implication is that the traditional common law rule has not been changed. This is the more so since Maine was once a part of Massachusetts, which has indicated in its decisions that it follows the common law rule of consequential damages. See: Hopkinson v. Forster, L. R. 19 Eq. 74 (1874); Fleming v. Bank of New Zealand, 1900 A. C. 577; Wiley v. Bunker Hill National Bank, 183 Mass. 495, 67 N.E. 655 (1903). For other authorities see 5a Michie, Banks and Banking, secs. 242, 244 (perm. ed. 1950).

Section 4-104. Definitions and Index of Definitions.

The Maine Banking statute, R. S. 1954, c. 59, contained no comparable definitions, but, with three possible exceptions, they do not depart from ordinary commercial understanding. The exceptions are Subsection (1)(e), which defines "customer" to include a bank; Subsection (1)(g), which defines an "item" to include money; and Subsection (1)(h), which defines the bank's midnight deadline in terms that alter the cut-off point employed by courts to ascertain when a drawee's failure to give notice of dishonor converts provisional settlement into absolute payment. See Hallenbeck v. Leimert, 295 U. S. 116, 55 S. Ct. 687 (Ill. 1935).

Section 4-105. "Depositary Bank;" "Intermediary Bank;" "Collecting Bank;" "Payor Bank;" "Presenting Bank;" "Remitting Bank."

See Annotation to UCC Section 104.

Section 4-106. Separate Office of a Bank.

In Maine no distinction was made between the main office and the branches; it was not at all clear to what extent, if any, a drawer diminished the effectiveness of his stop order when he sent it to a branch other than the one at which he had his account. Under this Subsection, time of receipt by the branch at which the account is maintained becomes crucial to the effectiveness of the order.

Section 4-107. Time of Receipt of Items.

No Maine cases dealing with this point have been found. The rule states a practice among many banks in important American cities, and a widely used form of deposit slip contains a printed legend that incorporates the practice of Subsection (2).

Section 4-108. Delays.

There are cases which require due care in banking transactions, but they do not deal with the substance of the specific provisions of this section. The extent to which the bank could successfully assert an excuse for delayed payment would, under prior law, probably have been determined according to normal contract principles, which, at least in the case of subspension of payments by another bank, would ordinarily not support the liberal relief afforded to banks by subsection (2).

Part 2

COLLECTION OF ITEMS: DEPOSITARY AND COLLECTING BANKS

Section 4-201. Presumption and Duration of Agency Status of Collecting Banks and Provisional Status of Credits; Applicability of Article; Item Indorsed "Pay Any Bank."

Subsection (1).

In making the collecting bank take as merely the agent for the owner of the item, the Code is in accord with prior Maine law. Lawrence v. Lincoln County Trust Co., 125 Me. 150, 131 Atl. 863 (1926); Cooper v. Fidelity Trust Co., 135 Me. 129, 190 Atl. 732 (1937). The latter case also stated that after the moment of collection, the relationship may change from one of principal and agent to one of debtor and creditor but only if the parties "by a reasonable construction of their acts must be held to have contemplated from that time on the relationship of debtor and creditor" (at 132). There is nothing in this Subsection contrary to this -- indeed, as is stated in (4) of the UCC Comment, "at some stage in the bank collection process the agency status of a collecting bank changes to that of debtor, a debtor of its customer," and the "state" in the process may understandably be immediately after the moment of collection, if this is what the parties desire and intend.

Subsection (2).

This is new, and represents an exception to the rule that would otherwise be applicable to commercial paper, bearer in form, and containing the "pay-any-bank" endorsement. Under this Subsection and subject to the two indicated exceptions, persons other than banks could no longer acquire the status of holders of such paper.

Section 4-202. Responsibility for Collection; When Action Seasonable.

Subsection (1).

This Subsection codifies the rule requiring a bank to exercise due care. No Maine case on the point can be found, but it is likely that Maine followed this rule, which is sustained by ample authority. See 6 Michie, Banks and Banking, sec. 60 (perm. ed. 1950), where the authorities are assembled.

Subsection (2).

This Subsection departs from the rule in Hallenbeck v. Leimert, 295 U. S. 116, 55 S. Ct. 687 (Ill. 1935), where a drawee bank was deemed to have "paid" checks of the drawer when, after presentment, the drawee failed to give notice of dishonor within the time fixed by clearing house rules. The time fixed by the clearing house in the Hallenbeck case was 2:30 p.m. of the day of presentment. Under the Code, the cut-off point is no longer determined by the clearing house rule but rather by the bank's midnight deadline; and UCC Section 4-104(h) defines that deadline as midnight of the next banking day following the banking day on which the item was received.

Subsection (3).

This Subsection adopts the Massachusetts rule exempting the initial collecting bank from liability for the negligence of prudently selected sub-collecting banks. It rejects the New York rule holding liable the initial collecting bank for any neglect of duty whereby the collection is defeated, even if such neglect is on the part of one of the sub-collecting banks. Authorities supporting both the Massachusetts and New

York views are collected in 6 Michie, Banks and Banking, sec. 64 (perm. ed. 1950); there is no case in Maine indicating which of the two rules it followed, prior to the Code.

Section 4-203. Effect of Instructions.

This section codifies the "chain of command" principle of bank collections whereby a collecting bank may safely disregard instructions of anyone other than its transferor. By thus insulating the collecting bank from the notice impact of a remote transferor's restrictive indorsement, this provision, like UCC Section 4-205(2) and Section 3-206(2), probably changes the prior rule. Although there is no Maine case in point, the common law rule, followed by Massachusetts, was that a restrictive indorsement was binding upon remote as well as immediate indorsees, and constituted notice of an outstanding paramount title in the beneficiary of the indorsement. See Beal v. City of Somerville, 50 Fed. 647, 17 L.R.A. 291 (1st Cir. 1892); Basse, "Restrictive Indorsements," 52 Yale L.J. 890, 905 (1943). This section would appear to favor the interests of the banks; it has been said of it that it abolishes the whole concept of payment in due course. Beutel, "The Proposed Uniform Commercial Code Should Note Be Adopted," 61 Yale L.J. 334, at 361 (1952). But see Gilmore, "The Uniform Commercial Code: A Reply to Professor Beutel," 61 Yale L.J. 364, at 374, n. 22 (1952).

Section 4-204. Methods of Sending and Presenting; Sending Direct to Payor Bank.

Even under the Massachusetts rule which UCC Section 4-202(3) codifies, the initial collecting bank exposes itself to liability for failure to exercise due care in presenting the item or in sending it for presentment.

Subsection (1) states general, and Subsection (2) more specific, rules for determining when a given method of presenting or sending is appropriate. The rules are consistent with current banking practice.

Section 4-205. Supplying Missing Indorsement; No Notice from Prior Indorsement.

Subsection (1).

This Subsection, authorizing the depositary bank to supply the customer's missing indorsement, is new. Under R. S. 1954, c. 188, sec. 49, the bank taking an unindorsed instrument could compel the indorsement, but could not, as Subsection (2) permits, supply the indorsement. A question is raised as to the status the depositary bank achieves when it supplies the missing indorsement: Does the "effective-as-the-customer's-indorsement" clause in this Subsection also exclude the rule in UCC Section 3-304(1)(a) relating to irregularities in the instrument that gives the holder notice sufficient to negate his due course status? Literally read, especially in conjunction with UCC Section 4-102(1), the clause would seem to have that effect, too.

Subsection (2).

This Subsection alters the rule in R. S. 1954, c. 188, sec. 37, under which a restrictive indorsement was notice to all subsequent indorsees of the paramount interest of the beneficiary. Where the intermediary or payor bank is the indorsee, the Subsection would now permit only the restrictive indorsement of the bank's immediate transferor to constitute notice to the bank. Restrictive indorsements by more remote transferors would no longer impart notice to such bank. See Comment to UCC Section 4-203.

Section 4-206. Transfer Between Banks.

This Subsection departs from R. S. 1954, c. 188, sec. 30, which requires an indorsement, but the rule is limited to inter-bank transfers. Thus, a number or an I.B.M. marking could suffice. Maine cases are lacking, but case law elsewhere seems to be contra. See Bowles v. Billik, 27 Wash.2d 629, 178 P.2d 954, at 957, where the court said, "The stamping of a number is not an indorsement in writing."

Section 4-207. Warranties of Customer and Collecting Bank on Transfer or Presentment of Items; Time for Claims.

Subsection (1).

This Subsection expands the remedy of the payor for breach of warranty. Under R. S. 1954, c. 188, sec. 66, the remedy ran only in favor of the holder in due course, and the drawee-payor was held not to be such a holder. See: Weeks v. Hickey, 129 Me. 339, 151 Atl. 890 (1930); Home Insurance Co. v. Bishop, 140 Me. 72, 34 A.2d 22 (1943); South Boston Trust Co. v. Levin, 249 Mass. 45, 143 N.E. 816 (1924). Thus Subsection expressly makes available to the payor a remedy for breach of warranty.

Subsection (2).

Substantially in accord with R. S. 1954, c. 188, sec. 66.

Subsection (3).

This Subsection makes it clear that the warranty remedy is available even in the absence of the "prior-indorsements-guaranteed" form of indorsement, and, indeed, in the absence of any indorsement. And, in excluding recovery of special damages and of most items of consequential damages, the subsection probably reflects a departure from prior principles. See

Annotation to UCC Section 4-103(5).

Subsection (4).

This Subsection gives the warrantor under the preceding Subsection a pro-tanto discharge, analogous to the discharge that a dilatory presentment afforded the drawer of a check under R. S. 1954, c. 188, sec. 186. See also Viles v. S. D. Warren Co., 132 Me. 277, 170 Atl. 501 (1934). This rule, which was first set forth by dictum in Canal Bank v. Bank of Albany, 1 Hill 287 (N.Y. 1841), has been followed in most jurisdictions. See for example Ladd & Tilton Bank v. United States, 30 F.2d 334 (9th Cir. 1929), where a delay of 19 months in giving notice was held to bar recovery.

Section 4-208. Security Interest of Collecting Bank in Items, Accompanying Documents and Proceeds.

Subsection (1).

The facts supporting a bank's security interest under part (a) of this Subsection do not depart from those which would have qualified the bank as a holder for value under R. S. 1954, c. 188, secs. 25 and 26.

Subsection (2).

This Subsection incorporates the "first in, first out" rule, generally referred to as the rule in Clayton's Case, 1 Mer. 572, 35 Eng. Rep. 781 (1815). This seems to be the majority rule. Britton, Bills and Notes, sec. 97 (1943), and cases collected therein. Under the rule the earliest credits will be deemed to have been absorbed by the earliest debts. There is some authority for the "intermediate balance" rule, under which the bank does not gain an interest in an item as long as the depositor's account does not at any time drop below the sum represented by the

particular item involved in the litigation or controversy. No Maine case can be found committing the state to either rule.

Subsection (3).

This Subsection insulates the bank's security interest from the filing requirements of Article 9.

Section 4-209. When Bank Gives Value for Purposes of Holder in Due Course.

Although the rule is consistent with R. S. 1954, c. 188, sec. 27, the practical result is significantly altered because of the more liberal Code definition of "value" to include the mere extension of immediately available credit. See UCC Section 1-201(44)(a).

Section 4-210. Presentment by Notice of Item Not Payable By, Through or At a Bank; Liability of Secondary Parties.

Subsection (1).

The provision for presentment by written notice in this Subsection departs somewhat from R. S. 1954, c. 188, sec. 74, under which proper presentment appeared to require an exhibition of the instrument.

Subsection (2).

This Subsection restates, with only minor changes, the dishonor and recourse provisions of R. S. 1954, c. 188, secs. 83 and 84.

Section 4-211. Media of Remittance; Provisional and Final Settlement in Remittance Cases.

Subsection (1).

Under Federal Reserve Bank of Richmond v. Malloy, 264 U. S. 160, 44 S. Ct. 296 (N.C. 1924), a collecting bank was held liable for any

loss if it accepted anything other than cash in remittance for collection items. Authorities are collected in Annotation, Liability of Collecting Bank which Accepts Something Other Than Cash, 61 A.L.R. 739 (1929), but Maine cases are lacking. As the check was deemed under this rule to have been paid, the customer's action was against the collecting bank. See Berg v. Federal Reserve Bank of Minneapolis, 55 N.D. 406, 213 N.W. 963 (1927). This Subsection offers several alternative forms of remittances. The rule in the Malloy case has also been avoided in other jurisdictions, either by statute or case law. See Idaho Sess. Laws 1931, c. 60, secs. 1, 2, 9; Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929); McGoldrick Lumber Co. v. Farmers' Lumber Co. of Streeter, 64 N.D. 544, 254 N.W. 281 (1934).

Subsection (2).

This Subsection expands the protective rule in Subsection (1) to include the collecting bank that forwards a remittance instrument which does not comply with Subsection (1). In such cases, the collecting bank's liability, if any, would probably require a showing of lack of due care.

Subsection (3).

This Subsection spells out the time intervals within which remittance instruments or credits, whether or not they fall within Subsection (1), qualify as "final settlement."

Section 4-212. Right of Charge-Back or Refund.

Subsection (1).

Although no Maine cases can be found, this provision reflects

current banking practice.

Subsection (2).

This is new, but seems sound; see the reasons stated in the Uniform Commercial Code Comment.

Subsection (3).

This also reflects current banking practice.

Subsection (4).

Note that under part (b) of this Subsection the negligent bank can charge back, but remains liable. This may not be the common law rule. See UCC Section 4-202(3). No Maine cases have been found.

Subsection (5).

This Subsection preserves alternative remedies of the bank in lieu of charge-back.

Subsection (6).

The customer, not the bank, gains or loses on the increase or decrease of dollar value. This is because the bank, anticipating payment, has protected itself in the foregin exchange market on the day credit was given.

Section 4-213. Final Payment of Item by Payor Bank; When Provisional Debits and Credits Become Final; When Certain Credits Become Available for Withdrawal.

Maine cases in this area appear to be lacking. Subsections (3), (4), and (5), relating to withdrawal of credits as of right and stating when final payment occurs, are, for the most part, consistent with banking practice. For an excellent presentation of the over-all problem

of determining the point of final payment, see Leary,"Deferred Posting and Delayed Returns -- The Current Check Collection Problem," 62 Harv. L. Rev. 905 (1949).

Section 4-214. Insolvency and Preference.

Subsection (1).

Under prior federal court decisions, the receiver of a collecting bank that failed was held not entitled to restrictively indorsed items forwarded to it but which had not been finally paid. Kirstein Leather Co. v. Deitrick, 86 F.2d 793 (1st Cir. 1936). R. S. 1954, c. 188, secs. 36 and 37, where applicable, would probably have required a similar result. This Subsection extends the rule to "any" item, thus including an item that is not restrictively indorsed. But the rule has no application to items on which there has been final payment. And the ease with which such payment may be made, say by a bookkeeping entry under UCC Section 4-213(1), suggests that the Subsection's practical value for many depositors may be small.

Subsection (2).

This Subsection, along with Subsection (4), gives the depositor a more significant form of protection, as against the failed collecting bank, than that possible under Subsection (1): the preferred claim, even where final payment has technically occurred. Under prior law, this protection was probably limited to restrictive indorsers only.

Subsection (3).

See Subsection (1).

Subsection (4).

See Subsection (2).

Note as to the constitutionality of this section: In Jennings v. U. S. Fidelity & Guaranty Co., 294 U.S. 216, 55 S. Ct. 394 (Ind. 1935), Section 13 of the Bank Collection Code, after which this section is patterned, was held unconstitutional as applied to national banks. See also Tompkins v. Bender, 42 F.Supp. 211 (D.C. Pa. 1941). UCC Section 1-108 would, however, preserve the applicability of it to state banks.

Part 3

COLLECTION OF ITEMS: PAYOR BANKS

Section 4-301. Deferred Posting; Recovery of Payment by Return of Items; Time of Dishonor.

This section replaces the Maine Deferred Posting Statute, R. S. 1954, c. 59, sec. 198. Subsection (1), following the lead of the prior Deferred Posting Statute, departs from the rule in Hallenbeck v. Leimert, 295 U.S. 116, 55 S. Ct. 687 (Ill. 1935). See Annotation to UCC Section 4-202(2).

Section 4-302. Payor Bank's Responsibility for Late Return of Items.

Unlike R. S. 1954, c. 59, sec. 198, which was declarative of the bank's duty but silent as to sanctions for noncompliance, this section states the penalty incurred by a bank that retains an item beyond the "midnight deadline." However, under the Negotiable Instruments Law, the dilatory drawee to whom a bill had been delivered for acceptance was clearly liable on the instrument as an acceptor. R. S. 1954, c. 188, sec. 137. Subsection (b) makes the dilatory drawee merely "accountable for the amount of the item," rather than liable upon the instrument qua acceptor. The rule is analogous to that in UCC Section 3-419, where the drawee's liability is declared to be that of a converter rather than an acceptor, and is limited, as here, by the face amount of the instrument.

Section 4-303. When Items Subject to Notice, Stop-Order, Legal Process or Setoff; Order in Which Items may be Charged or Certified.

Subsection (1).

Part (a) of this Subsection does away with the distinction made under the Negotiable Instruments Law between a check certified at the request

of the drawer and one certified at the request of the holder. Where the drawer procured certification, the bank that paid over a stop-payment order could be compelled to recredit the drawer's account. There are no Maine cases in point, but see Sutter v. Security Trust Co., 95 N.J. Eq. 44, 122 Atl. 381 (1923). But where the holder procured certification, R. S. 1954, c. 188, sec. 188 was available to protect the paying bank, despite the stop-payment order. See Sutter v. Security Trust Co., 94 N.J. Eq. 44, 122 Atl. 381, at 382 (1923). But two years after the Sutter decision, the New Jersey legislature extended the rule protecting bank payments of certified checks specifically to include payments on checks certified at the drawer's request. N.J. Laws 1925, c. 115, page 333. Part (a) of this Subsection, much like the New Jersey statute, eliminates the distinction made in the Sutter case, and affords protection to the paying bank regardless of whether the drawer or the holder procured certification.

Subsection (2).

This Subsection adopts the rule under which a depositor who draws a series of checks for more than his balance "cannot complain that some of the checks have been selected for payment and some refused." Castaline v. National City Bank of Chelsea, 244 Mass. 416, 138 N.E. 398 (1923). Maine cases are lacking. See 5a Michie, Banks and Banking, secs. 221, 229, 232, 233, (perm. ed. 1950).

Part 4

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER

Section 4-401. When Bank May Charge Customer's Account.

Subsection (1).

This Subsection carries over the prior Maine rule permitting a bank to recover the amount of an overdraft from the drawer. Franklin Bank v. Byram, 39 Me. 489, 63 Am. Dec. 643 (1855).

Subsection (2).

Part (a) of this Subsection carries forward the rule of R. S. 1954, c. 188, sec. 88. Part (b) modified R. S. 1954, c. 188, sec. 88, under which the bank's payment, to be protected against a drawer's demand for recredit, must satisfy all the elements of a "payment in due course."

Section 4-402. Bank's Liability to Customer for Wrongful Dishonor.

This section replaces R. S. 1954, c. 59, sec. 193. The prior statute spoke of any "check, draft, or order," and this section is more expansive in that it includes any "item." However, this section is also more restrictive in that it limits the measure of damages to "actual damages proved," including damages for an arrest or prosecution of the customer. The prior statute implied a higher measure of recovery where nonpayment was malicious. The section rejects the view of some jurisdictions under which a customer who qualifies as a trader or businessman may recover substantial damages upon a mere showing of the bank's nonpayment. Third Nat. Bank v. Ober, 178 Fed. 678 (8th Cir. 1910); Hooper v. Herring, 14 Ala. App. 455, 70 So. 308 (1915); First Nat. Bank v. McFall & Co.,

144 Ark. 149, 222 S.W. 40 (1920); Wildenberger v. Ridgewood Nat. Bank, 230 N.Y. 425, 130 N.E. 600 (1921).

Section 4-403. Customer's Right to Stop Payment; Burden of Proof of Loss.

Subsections (1) and (2).

These Subsections state the customer's right to stop payment and the period of time within which a stop-payment order is binding. Maine cases are lacking.

Subsection (3).

In placing the burden of proof upon the customer, this Subsection rejects the result of such cases as Carroll v. South Carolina Nat. Bank, 211 S.C. 406, 45 S.E.2d 729 (1947), where a mere showing of payment over a stop-payment order was sufficient to establish the bank's prima facie liability, and to impose upon the bank the burden of proving good faith and its use of all reasonable efforts to comply with the stop-payment order. A careful search has failed to disclose Maine cases on the point.

Section 4-404. Bank Not Obligated to Pay Check More Than Six Months Old.

This seems to be in accord with R. S. 1954, c. 188, sec. 88, under which the bank could charge the drawer's account where the bank paid in due course; and good faith was, as it is under this section required. See also R. S. 1954, c. 188, sec. 53, under which a holder who negotiated an instrument payable on demand "an unreasonable length of time after its issue" lost holder-in-due course status.

Section 4-405. Death or Incompetence of Customer.

According to the overwhelming weight of authority, the rule that

the agency relationship is terminated by the death of the principal does not apply to the payment of a check by a bank without knowledge of the drawer's death, since such an application would be thoroughly impracticable. Restatement, Agency, Sec. 120 (2)(1958); Britton, Bills and Notes, Sec. 181 (1943). And in the case of insanity or incompetence of the drawer, the bank may also safely pay at any time, in the absence of knowledge of his incapacity at the time of doing so. 5a Michie, Banks and Banking, sec. 173 (perm. ed. 1950). Guild v. Eastern Trust and Banking Co., 122 Me. 514, 121 Atl. 13 (1923) states the rule that the death of the drawer operates as a revocation and justifies the bank in withholding payment, but since there the bank knew of the death of the drawer, the case sheds no light on the question of whether the Code makes any change on the Maine attitude towards banks without knowledge. Cf. also Jones v. Jones, 101 Me. 447, 64 Atl. 815 (1906) (promissory notes: a promissory note generally does not become a liability until delivery -- if the maker, having delivered a note to an agent for delivery to the payee, dies before delivery by the agent, the agent's authority is thereby revoked, and a subsequent delivery by him is ineffectual to create a liability). There are no Maine cases exactly in point.

Section 4-406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration.

Subsection (1).

This Subsection is in line with prior Maine law. American Lumber Sales Company v. Fidelity Trust Company, 127 Me. 65, 141 Atl. 102 (1928).

Subsection (2).

Although no Maine case has been found, the estoppel provision

of this Subsection is in line with the overwhelming weight of authority. See: Annotation, 39 A.L.R. (2d) 641 (1955); 5a Michie, Banks and Banking, Sec. 192 (perm. ed. 1950); American Jurisprudence, Banks, Sec. 514; Corpus Juris Secundum, Banks and Banking, Sec. 356, p. 743.

Subsection (3).

This Subsection places the burden of proving the bank's lack of due care upon the customer seeking to escape the estoppel provision of Subsection (2). While again no Maine case has been found, the majority of other courts required the bank to demonstrate its own freedom from negligence as a prerequisite to asserting an estoppel to defeat the customer. See for example; Basch v. Bank of America Nat. Trust & Savings Assn., 22 Cal.2d 316, 139 P.2d 1 (1943); Wussow v. Badger State Bank of Milwaukee, 204 Wis. 467, 234 N.W. 720 (1931).

Subsection (4).

This Subsection is phrased so as to catch the customer who, notwithstanding the exercise of due care in examining the returned items, fails to detect unauthorized signatures or alterations. The one-year period applicable to him in the case of a forgery of his signature or of an alteration is the same period that was prescribed under R. S. 1954, c. 59, sec. 189. The three-year period as to unauthorized indorsements is new.

Subsection (5).

This Subsection is new.

Section 4-407. Payor Bank's Right to Subrogation on Improper Payment.

This section deals with the problem that arises when a drawer issues a check to his seller but, correctly or incorrectly believing that consideration has failed, directs the bank to stop payment. Can the drawee that nevertheless pays the check be subrogated either to the drawer's claim against the payee or to the payee's claim against the drawer? The question has not been answered in Maine, but New York has answered it in the negative. Chase Nat. Bank v. Battat, 297 N.Y. 185, 78 N.E.2d 465 (1948). This provision rejects the New York view, and permits subrogation.

Part 5

COLLECTION OF DOCUMENTARY DRAFTS

Section 4-501. Handling of Documentary Drafts; Duty to Send for Presentment and to Notify Customer of Dishonor.

This provision is new, but requires a presentment and notice procedure that has long been a part of standard banking practice. Note that R. S. 1954, c. 188, sec. 89 required that notice of dishonor be given to every drawer and every indorser.

Section 4-502. Presentment of "On Arrival" Drafts.

This provision is new. Normal banking practice has been to present the "on-arrival" draft upon receipt and again after elapse of a reasonable time. Under this provision, only instructions to present or the bank's knowledge of the arrival of the goods could impose a duty upon the bank to present a second time. The mere elapse of a reasonable time after the first presentment would not.

Section 4-503. Responsibility of Presenting Bank for Documents and Goods; Report of Reasons for Dishonor; Referee in Case of Need.

The "unless-otherwise-instructed" clause in the opening sentence reduces the practical scope of this provision, because the bank is normally supplied with instructions. Drafts drawn under a letter of credit are covered in Article 5, and are expressly excluded from the operation of this section.

Subsection (a), requiring the presenting bank to deliver to the drawee documentary drafts that are payable more than three days after presentment, follows closely the rule in UCC Section 2-514 and in prior R. S. 1954, c. 186, sec. 41.

Subsection (b)'s provision for a "referee in case of need" replaces the provision in R. S. 1954, c. 188, sec. 131. The reference to the referee's giving of instructions is new, although the bank's option to disregard these instructions would appear to leave the bank's relationship with the referee as loose as it was under the prior statute.

Section 4-504. Privilege of Presenting Bank to Deal with Goods; Security Interest for Expenses.

Subsection (1).

This Subsection is new; it leaves the bank's post-dishonor storage, sale or other dealing with the goods merely optional.

Subsection (2).

This provision for the bank's lien is new. Since the lien may be foreclosed in the same manner as an unpaid seller's lien, the purchaser in good faith at a foreclosure sale could take the goods free from the rights of the original buyer, even where the bank fails to comply with the requirements of UCC Section 2-706. See UCC Section 2-706(5).

Article 5

LETTERS OF CREDIT

Section 5-101. Short Title.

Neither statutory nor case law specifically addressed to the letter of credit exists in Maine. Article 5 would thus furnish Maine with its first set of systematized letter-of-credit rules.

Section 5-102. Scope.

Subsections (1) and (2) are new. Subsection (3), while also new, is consistent with traditional rules of statutory interpretation. See dictum of Rugg, C.J., in Moss v. Old Colony Trust Co., 246 Mass. 139, 151, 140 N.E. 803 (1923): ". . . letters of credit are extensively used in commerce. Their nature and use ought to be kept as free as possible from narrowing statements of limitations and from judicial dicta not necessary to a particular decision. They should not be bound by definitions so as to become incapable of growth and change in accordance with the development of legitimate business practices."

Section 5-103. Definitions.

Because there are no Maine cases on letters of credit, these specialized definitions are new, but they appear consistent with ordinary commercial understanding.

The Code seems to leave untouched the field of informal revocable credits issued by buyers.

Section 5-104. Formal Requirements; Signing.

Subsection (1) is consistent with the pre-NIL rule in Maine that a bill of exchange could only be accepted in writing, Hall v. Flanders,

83 Me. 242, 22 Atl. 158 (1891), and with Uniform Negotiable Instruments Act, R. S. 1954, c. 188, sec. 132 to the same effect, although the latter is probably inapplicable per se inasmuch as letters of credit are probably not negotiable instruments within R. S. 1954, c. 188, sec. 1.

Subsection (2) is new.

Section 5-105. Consideration.

This provision seems to change the common law rule. Since a letter of credit would seem to be a bilateral contract between the issuer and the buyer for the benefit of the seller-beneficiary, Carnegie v. Morrison, 2 Metc. 381 (Mass. 1841); contra: Moss v. Old Colony Trust Co., 246 Mass. 139, 140 N.E. 803 (1923) and Banco Nacional Ultramarino v. First National Bank of Boston, 389 Fed. 169 (D.Mass. 1923), it would probably require consideration, like the obligation of any ordinary promisor. "An instrument given without consideration does not create any obligation in favor of the payee named therein." Greeley v. Greeley, 119 Me. 264, 110 Atl. 637 (1920).

Section 5-106. Time and Effect of Establishment of Credit.

The provision is new. Under Subsection (1) the time of the establishment of the credit differs from the time that would be indicated were the credit deemed merely an offer (as in Moss v. Old Colony Trust Co., 246 Mass. 139, 140 N.E. 803 (1923)).

The provisions relating to revocation of credits set forth in Subsections (2), (3) and (4) seem consistent with general contract law except that it seems to give the beneficiary some additional protection that he might not otherwise have if, for example, there were a novation

between the promisor and promisee of a third-party-beneficiary contract for his benefit and established as to him.

Section 5-107. Advice of Credit; Confirmation; Error in Statement of Terms.

No prior Maine law in this area.

Section 5-108. "Notation Credit;" Exhaustion of Credit.

No prior Maine law in this area. Subsection (3)(b) seems consistent with the Maine law relating to priority among assignees of accounts, R. S. 1954, c. 113, sec. 171.

Section 5-109. Issuer's Obligation to Its Customer.

The broad inclusion of general banking custom seems contrary to the Maine law that custom cannot be taken into account where the contract is express, clear and unambiguous. Randall v. Smith, 63 Me. 105 (1873); Marshall v. Perry, 67 Me. 78 (1877); Norton v. University of Maine, 106 Me. 436, 76 Atl. 912 (1910); Gooding v. Northwestern Mutual Life Ins. Co., 110 Me. 69, 85 Atl. 391 (1912); Everett v. Rand, 152 Me. 405, 131 A.2d 205 (1957). Subsections (1)(c) and (3) are in accord with Marshall v. Perry, 67 Me. 78 (1877) to the effect that a party lacking knowledge of a usage peculiar to a particular trade is not bound thereby. To the extent that (1)(c) eliminates liability of an issuer for usages and customs of which he is or should be aware and concerning which the contract is not express, clear and unambiguous, it would seem to contravene Williams v. Gilman, 3 Me. 276 (1825); Leach v. Perkins, 17 Me. 462 (1840); Bodfish v. Fox, 23 Me. 90 (1843); Merrett v. Brackett, 60 Me. 524 (1872) and other cases following these.

Section 5-110. Availability of Credit in Portions; Presenter's Reservation of Lien or Claim.

No Maine statutory or case law in this area.

Section 5-111. Warranties on Transfer and Presentment.

The provision is new. Neither the warranty provisions in the Uniform Negotiable Instruments Act, R. S. 1954, c. 188, sec. 65, nor those in the Uniform Sales Act, R. S. 1954, c. 185, secs. 12-16, are applicable to the letter of credit.

Section 5-112. Time Allowed for Honor or Rejection; Withholding Honor or Rejection by Consent; "Presenter."

No relevant statutory or case law. The rule in R. S. 1954, c. 188, sec. 136, under which the drawee of a bill is allowed twenty-four hours after presentment to decide whether or not to accept, is rejected in favor of the longer period described in Subsection (1).

Section 5-113. Indemnities.

This provision is new.

Section 5-114. Issuer's Duty and Privilege to Honor; Right to Reimbursement.

No prior statutory or case law in Maine.

Section 5-115. Remedy for Improper Dishonor or Anticipatory Repudiation.

Subsection (1) is consistent with traditional common law contract principle in permitting the holder to recover the face amount of a draft, together with interest and incidental damages, less any amount realized from use or resale of the goods. No reference is made, however, to the holder's duty to mitigate damages. If that duty is eliminated, Maine law would be altered. See Miller v. Mariner's Church, 7 Me. 51 (1830) and

cases following it.

This section does not seem to cover the buyer's rights on account of the issuer's wrongful dishonor, covered by R. S. 1954, c. 59, sec. 193.

There seems to be no Maine case law on when a cause of action for anticipatory breach of contract accrues.

Section 5-116. Transfer and Assignment.

There is no prior case law in this area. Compare with the immediate perfection of the assignment of an account receivable, R. S. 1954, c. 113, sec. 171.

Section 5-117. Insolvency of Bank Holding Funds for Documentary Credit.

No prior statutory or case law in Maine. The preference provisions in Subsection (1) are inapplicable to national banks by reason of the overriding preference provisions in federal law. See Jennings v. U. S. Fidelity & Guaranty Co., 294 U.S. 216, 55 S. Ct. 394, 76 L. Ed. 869, 99 A.L.R. 1248 (1935). The subsection would be applicable to other banks, of course. See UCC Section 1-108 and Comment 3, following UCC Section 4-214.

Article 6

BULK TRANSFERS

Section 6-101. Short Title.

This Article replaces the Maine Bulk Sales Act, R. S. 1954, c. 119, sec. 6-8. Apart from the expanded definition of transfers includible as "bulk transfers" (UCC Section 6-102) and the specific inclusion of auction sales within the bulk transfer concept (UCC Section 6-107), the Article is substantially in accord with prior statutory and case law. As under the prior Bulk Sales Act, Article 6 omits provision for sanctions to be imposed for non-compliance, except in the case of auctioneers. See UCC Section 6-108(4) and the Annotation to UCC Section 6-104.

Because of the close resemblance between this Article and the statute it displaces, the reasons suggested in McGray v. Woodbury, 110 Me. 163, 85 Atl. 491 (1912) for upholding the constitutionality of the prior statute would seem applicable for this Article.

Although there are parts of the UCC which have evoked criticism, the Bulk Transfers Article is far more adequate and leaves far less to judicial conjecture than does most bulk sales legislation. Certainly it is far more complete than the Maine law, and since the bulk transfer is not limited to any one ecological area but may be found wherever business flourishes on whatever scale, this State might do very well to examine it closely as a definitive and precise compilation of statutes on the law of bulk sales.

For an exhaustive discussion of the bulk sales laws, see Miller, Bulk Sales Laws, 1954 Wash. U.L.Q. 1, 132, 283. For discussion of the Code provisions, see Miller, The Effect of the Bulk Sales Article on Existing Commercial Practices, 16 Law & Contemp. Prob. 267 (1951);

Weintraub and Levin, Bulk Sales Law and Adequate Protection of Creditors, 65 Harv. L. Rev. 418 (1952); Billig, Article 6 -- Order Out of Chaos: A Bulk Transfers Article Emerges, 1952 Wis. L. Rev. 312. For a discussion of the rules at common law prior to the adoption of bulk sales statutes, see Billig, Bulk Sales Laws: A Study in Economic Adjustment, 77 U. of Pa. L. Rev. 72 (1928).

Section 6-102. "Bulk Transfer;" Transfers of Equipment; Enterprises Subject to this Article; Bulk Transfers Subject to this Article.

Subsection (1).

This Article excludes from the classification of "bulk transfers" transfers in the ordinary course of the transferor's business, and seems to be in accord with R. S. 1954, c. 119, sec. 6 ("otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business").

The transaction covered by the Article is any "transfer in bulk," a broader term than Maine's "sale in bulk." The Code also uses the term "major part" (of the "materials, supplies, merchandise, or other inventory"), while R. S. 1954, c. 119, sec. 6 speaks of "any part" ("of the whole or a stock of merchandise"). "Obviously this (major part) means more than one-half of the transferor's total stock." 1954 Wash. U.L.Q. 283, 313. Quaere: does the term "in bulk" involve "a comparison of the value of the goods disposed of with that of the whole stock," as suggested in 1952 Wis. L. Rev. 312, 217? Compare 1954 Wash. U.L.Q. 283, 286.

Note that under the Code, since a "major part" must be transferred, and the balance retained must be insufficient to enable the transferor to meet his debts as they mature, insolvency in the equity sense is adopted.

See Note, 33 A.L.R. 62 (1924), sale of entire stock of one branch or department of business as within bulk sales law; Note, 36 A.L.R. (2d) 1141 (1954), sales of "off-season" or "obsolete" merchandise as within bulk sales law; 18 Albany L. Rev. 43 (1954); 23 Fordham L. Rev. 93 (1954).

Subsection (2).

This is new in Maine. The prior statute did not mention fixtures. Here a sale of fixtures is covered so long as it is made in connection with a bulk transfer of inventory. Quaere: when is a sale of equipment "made in connection with" a transfer of inventory? If the seller transfers the inventory to one buyer and the equipment to another simultaneously, but separately, is the transfer subject to this subsection? See 15 U. of Pitt. L. Rev. 541, 548 (1954). Note that it is the transfer of a "substantial" part of the equipment, but a "major" part of the inventory that is covered. See also 16 Law & Contemp. Prob. 267, 269-71 (1951).

Subsection (3).

It has been said that the general rule appears to be that bulk sales laws relating to sales of merchandise have no application to sales by manufacturers. 3 Williston, Sales, sec. 643c (Rev. Ed. 1948); Note, 41 A.L.R. 1214 (1926); 15 U. of Pitt. L. Rev. 541, 546 (1954); 1954 Wash. U.L.Q. 1, 16. Note that Subsection (3) defines the "enterprises" subject to the Article and that by Subsection (1) a transfer by a subject enterprise of a major part of its materials and supplies as well as its merchandise or inventory is covered. See UCC Section 9-109 for a definition of equipment as well as of inventory.

Subsection (4).

This is new in Maine. Quaere: in determining whether "a major part" of the covered goods has been transferred under Subsection (1), must there be taken into account similar goods of the transferor located outside the State? See UCC Section 1-105.

Section 6-103. Transfers Excepted from this Article.

Subsection (1).

Accord: R. S. 1954, c. 119, sec. 8.

Subsection (2).

Accord: R. S. 1954, c. 119, sec. 8. This Subsection carries forward the prior exemption of sales by "assignees under voluntary assignments for the benefit of creditors." In addition, the Subsection exempts the initial transfer by way of general assignment to the assignee. The reference to "all the creditors" would leave general assignments for the benefit of less than all creditors, and transfers by the assignee thereunder, within the Article. R. S. 1954, c. 119, sec. 8 included assignments for the benefit of less than all the creditors.

Subsection (3).

This is new in Maine. The Subsection relieves the holder of a lien or other security interest from compliance with Article 6 where, upon foreclosure, he takes a transfer "in settlement or realization." However, there might be cases where the mortgagee's interest would merit a special judicial scrutiny to protect creditors, for example, if a debtor were to release his equity of redemption on the day of the mortgage and give immediate possession to the mortgagee.

Subsection (4).

Accord: R. S. 1954, c. 119, sec. 8.

Subsection (5).

This Subsection furnishes a new exemption. The requirement of notice to creditors pursuant to judicial or administrative order would seem to be an adequate substitute for compliance with Article 6.

Subsection (6).

This Subsection is also new. The theory behind this exception is that if the transferee is willing to assume personal liability for all of the debts of the transferor, and is solvent after such assumption, there is no reason to subject the transaction to the delay and red tape which this Article otherwise imposes. In Maine there is no problem, for the creditors of the transferor have a direct cause of action against such a transferee. Harvey v. Maine Condensed Milk Co., 92 Me. 115, 42 Atl. 342 (1898) (remedy is in equity only). Indeed, it has been said that such creditors are now "in a much better position than they otherwise would be." 16 Law & Contemp. Prob., 267, 273-4 (1951).

Subsection (7).

This Subsection is also new. The courts have been in conflict as to whether bulk sales laws apply to the kind of transfer now excepted under it. Note, 96 A.L.R. 1213 (1935); 3 Williston, Sales, sec. 643b (Rev. Ed. 1948); 39 W. Va. L. Q. 333 (1933). The precise point does not seem to have been decided in Maine but the rationale of the exemption in Subsection (6) would seem, for the most part, applicable to the exemption here given. The Subsection is highly recommendable. Notice

that in all the transactions to which the Subsection applies (a) both the original debtor and the new enterprise are personally bound to pay the debts, (b) the property subject to the debts before the transfer is still subject to them, and (c) the original debtor has taken nothing out of the transaction except an interest (shares in a corporation or an interest in a firm, or a subordinated obligation) which is junior to the debts.

Subsection (8).

Another new exemption. see 59 Com. L. J. 92 (1954).

Section 6-104. Schedule of Property, List of Creditors.

Subsection (1).

Noncompliance with the requirements of these Subsections renders the transfer "ineffective." Under R. S. 1954, c. 119, sec. 6, "void" was used. The practical difference, however, would not seem to be substantial. R. S. 1954, c. 119, sec. 6 declared that a failure to comply with its provisions rendered the sale void as against creditors of the seller. The Statute did not declare the transaction to be void as between the seller and the purchaser. If the purchaser had not complied with the provisions of the Act as to inventory or notice but before action was commenced by any of the creditors, the purchaser made a resale to a bona fide purchaser, the first purchaser could not be made a received of the goods, for he no longer had them, but it would seem that he might have been made a receiver of the proceeds, if he had not spent them; otherwise the purpose of the Statute might have been defeated. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 Atl. 308 (1924). The Code here remains in line with this.

Subsection (1)(a).

Accord: R. S. 1954, c. 119, sec. 6.

Subsection (1)(b).

This Subsection serves to reduce the amount of informational detail necessary in the property schedule. Under R. S. 1954, c. 119, sec. 6, there was required "a full, detailed inventory, showing the quantity, and, so far as possible with exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale." A schedule that was merely sufficient to identify the property, which would now be adequate under this Subsection, would probably have been inadequate under the prior statute.

Subsection (1)(c).

R. S. 1954, c. 119, sec. 6 required the purchaser to preserve the inventory schedule for inspection by the creditors for 30 days after the completion of the sale. In contrast, this Subsection offers the creditors much more protection: not only have the creditors been warned of the impending transfer (UCC Sections 6-105 and 6-107), but for six months thereafter the transferee must keep available for inspection and copying the list of creditors as well as the schedule. If the transfer was in fact a fraudulent conveyance, the evidence necessary to set it aside is made more readily available. If the transfer was a preferential one within the meaning of the Bankruptcy Act, the Subsection provides plenty of time for meeting the four months

deadline provided for in the bankruptcy statute. Cf. I Glenn, Fraudulent Conveyances, Sec. 313, page 547, Baker, Voorhis & Co. (1940); 16 Law & Contemp. Prob. 267, 271 (1951).

Subsection (2).

The final clause in this Subsection, requiring inclusion of persons asserting disputed claims against the transferor, is new.

Subsection (3).

This Subsection is new. No Maine case can be found on the point, but what was probably the prevailing view elsewhere gave the innocent transferee a comparable protection. See, for example, Glantz v. Gardiner, 49 R.I. 297, 100 Atl. 913 (1917); Coach v. Gage, 70 Ore. 182, 138 P. 847 (1914); International Silver Co. v. F. G. Hull & Co., 140 Ga. 10, 78 S.E. 609 (1913); Note, 83 A.L.R. 1140 (1933). Clearly, the Subsection lodges responsibility in the proper place.

Section 6-105. Notice to Creditors.

This provision replaces the notice requirement in R. S. 1954, c. 119, sec. 6. The ten-day period contemplated by this provision increases by five days the notice period prescribed in the prior statute. Neither this Article, except in the section dealing with auctioneers, nor the prior statute, makes any attempt to define the nature and the scope of the liability of a transferee for non-compliance. The only sanction imposed in statutory language is that the transfer shall be "ineffective" or, under the prior statute, that it shall be "fraudulent and void" as against creditors. Under R. S. 1954, c. 119, sec. 6, a sale could be upheld only by showing compliance with the statute, and, if in violation,

or not complying with the provisions, was conclusively deemed fraudulent and void as against creditors of the seller or transferor, regardless of whether there was fraudulent intent or actual good faith. Conquest v. Atkins, 123 Me. 327, 122 Atl. 858 (1923). The Code does not require departure from this rule; nor does it require departure from other rules established in prior Maine decisions under the Bulk Sales Act for determining the creditor's rights in instances of non-compliance. The creditor seeking to upset the transfer could, as before, do it by a bill in equity or by trustee process. Lee Tire & Rubber Company v. Snow Hudson Company, Inc., 130 Me. 475, 175 Atl. 710 (1931). And the transferee, despite the good faith character of his payments to creditors, would receive credito only for payments made to secured creditors. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 Atl. 308 (1924).

The contents of the notice, the persons to whom it must be given, and the manner of giving it are stated in UCC Section 6-107.

Section 6-106. Application of the Proceeds.

Under this section, which is the most controversial one in the Article and which still remains in brackets, if the transfer is for new consideration (as most transfers of business are), the buyer must see to it that the consideration is used to pay the debts due the creditors whose names appear on the list of creditors and who file claims within thirty days after receiving notice of the impending sale. Many states, including Maine, R. S. 1954, c. 119, sec. 6, think that that responsibility is too much for the buyer to assume, and so their laws do not impose it. The section also provides that the duty of the buyer to see that creditors are paid is a duty running to all creditors, and

may be enforced by any one of them for the benefit of all.

Section 6-107. The Notice.

Subsections (1) and (2).

Subsections (1) and (2) provide for alternative notice forms, depending, essentially, upon whether or not the transferor's debts are to be paid. Under R. S. 1954, c. 119, sec. 6, only a single notice form was prescribed, and all that was required was to give notice of "the proposed sale." Here, the contents of the notice are entirely governed by (1) where the debts are to be paid in full; otherwise, or if such payment is doubtful, the notice must contain in addition to that which is required by (1), all of the information specified in (2). Quaere: under what circumstances, other than a full assumption of liability under UCC Section 6-103 (6) (7), may a transferee safely rely upon a Subsection (1) form of notice?

Subsection (3).

Notification, either personally or by registered mail, is required by Subsection (3), which thus adopts the method of communication prescribed in R. S. 1954, c. 119, sec. 6. The prior statute, however, had no provision comparable to the final clause in the Subsection (3), requiring notice to unlisted claimants of whose claims the transferee has knowledge.

Section 6-108. Auction Sales; "Auctioneer."

The inclusion of auction sales within the bulk sale concept is new. R. S. 1954, c. 119, sec. 6 omitted reference to auction sales. A careful search has failed to reveal a Maine case on the point;

however, the New York and New Jersey bulk sales statutes, which are of the same general "New York" type as the Maine statute, and which also make no reference to auction sales, have been held inapplicable to such sales. Lowe v. Fairberg, 280 N.Y.Supp. 615, 245 App. Div. 731, aff'd, 270 N.Y. 590, 1 N.E.2d 344 (2d Dept. 1935); Schwartz v. King Realty & Investment Co., 93 N.J.L. 111, 107 Atl. 154, aff'd, 94 N.J.L. 134, 109 Atl. 567. The Code here rejects this result.

Subsection (3).

The definition of an auctioneer in this Subsection is broad enough to include the transferor's agent of any kind, e.g., plant manager, lawyer, partner, etc.

Subsection (4).

This is the only provision in the Article which imposes a sanction for non-compliance specifically and in defined terms. The validity of the auction sale may not be affected by non-compliance. The auctioneer, and those who by definition are associated with him in joint and several liability, may be accountable to the "creditors . . . as a class," but such liability is limited in amount to the net proceeds of the auction.

Section 6-109. What Creditors Protected; (Credit for Payment to Particular Creditors).

Subsection (1).

This Subsection defines the creditors as those having claims based on transactions prior to the bulk transfer, who are protected under the Code, while R. S. 1954, c. 119, sec. 6 provided that failure to comply with the statute rendered the sale fraudulent and void against (any and

all) creditors of the seller -- but, this would mean existing creditors. Therefore, although no Maine case is to be found on the point, to the extent that this section defines the creditors who are protected as those existing at the time of the transfer, it is probably declaratory of the prior law. Authorities in other jurisdictions are collected in 84 A.L.R. 1406 (1933); 102 A.L.R. 565 (1936); 71 U.S. L. Rev. 607 (1937); 21 Notre Dame Law. 134 (1945); 10 Tulane L. Rev. 131 (1935). But to the extent that the word "claims" could be taken to include tort as well as contract claims, and also to include claims of a contingent or unliquidated character, this section may change the law. Under R. S. 1954, c. 119, sec. 6, the status of persons asserting such claims was undefined. The doctrine that a statute in derogation of the common law requires a strict construction would probably have operated to exclude these persons from the protection of the statute; on the other hand, the notion that the statute is "remedial" and thus merits a liberal construction, could have supported the contrary result. See 3 Williston, Sales, sec. 643a at 470 (Rev. Ed. 1948) for authorities in support of both views.

Subsection (2).

This Subsection, which is to be included only if UCC Section 6-106, relating to the application of proceeds is retained, provides for something like subrogation. Under its wording, the idea that the responsibility for the completeness of the list of creditors rests with the transferor is reinforced.

Section 6-110. Subsequent Transfers.

R. S. 1954, c. 119 was silent on this point, and there does not

seem to be any Maine decision on it either. However, the jurisdictions which have passed on the question are in line with the Code. For cases holding a purchaser with notice, see Woodruff v. Laugharn, 50 F.2d 532 (9th Cir., 1931), cert. denied, 284 U.S. 680, 52 Sup. Ct. 197 (1932); Kett v. Masker, 86 N.J.L. 97, 90 Atl. 243 (1914); Wyandotte Hardware Co. v. Loveland, 106 Okl. 95, 233 P. 205 (1925); New First Nat. Bank v. Light, 60 S.D. 237, 244 N.W. 369 (1932). For cases allowing a purchaser without notice to take free of defect, see Kelly-Buckley Co. v. Cohen, 195 Mass. 585, 81 N.E. 297 (1907); McPartin v. Clarkson, 240 Mich. 390, 215 N.W. 33 (1927); Kennedy v. Dillon, 97 N.H. 76, 80 A.2d 394 (1951); Prokopovitz v. Kurowski, 170 Wis. 190, 174 N.W. 448 (1919). This seems to be simply good, sound elementary personal property law.

Section 6-111. Limitation of Actions and Levies.

This section is new. The period of limitation is substantially co-extensive with the period during which the transferee has an obligation to preserve the list of creditors and schedule of property transferred under UCC Section 6-104(1)(c). Notice that if the transfer is concealed, the period will not start to run until discovery of the transfer.

Article 7

WAREHOUSE RECEIPTS, BILLS OF LADING AND OTHER DOCUMENTS OF TITLE

Part 1

GENERAL

Section 7-101. Short Title.

Scope: This article consolidates and revises provisions of three uniform acts which appear in the Maine statutes as follows:

1. Uniform Warehouse Receipts Act, R. S. 1954, c. 187.

2. Uniform Bills of Lading Act, R. S. 1954, c. 186.

3. Uniform Sales Act, R. S. 1954, c. 185.

All three acts are repealed by the Code, except for criminal provisions, which are not contained in the Code. The general scope of Article 7 is very similar to that of the repealed portions of the first two acts listed and of sections 27-40 of the Uniform Sales Act.

"Document of Title:" The Code definition of "document of title" is substantially the same as that in the Sales Act. It includes warehouse receipts, bills of lading, delivery orders, and other documents treated in the current course of business as evidencing the right to control the goods they cover (UCC Sections 1-201(15), 7-102(1)(e); R. S. 1954, c. 185, sec. 76). The Code includes general provisions for all documents of title, a number of special provisions for warehouse receipts and bills of lading, and some specific provisions not found in present law governing delivery orders (UCC Sections 7-102(1)(d)(g), 7-502(1)(d), 7-503(2)), through bills of lading (UCC Section 7-302), destination bills of lading (UCC Section 7-305), and bills of lading issued by freight forwarders (UCC Section 1-201(6), 7-503(3)).

Conflict of Laws: Article 7 is made applicable by UCC Section 1-105(1) when the parties so agree or when the transaction bears an "appropriate" relation to this state and there is no contrary agreement. But the provisions as to bills of lading are displaced by the Federal Bills of Lading Act, 49 USCA secs. 81-124, as to bills of lading issued by common carriers for interstate shipments and exports to foreign countries. Like the Uniform Bills of Lading Act, the Code would apparently govern bills of lading for shipments within Maine, and some aspects of the transfer of bills of lading issued abroad to cover imports.

Provisions Deleted: The repeal of the present uniform acts would delete some provisions which would not be replaced by Article 7. Some such provisions would be deleted entirely, others would be transferred to other articles of the Code. Since such changes do not fit into the Annotations to particular sections of Article 7, they are noted here:

(1) Form of Bill of Lading: The Bills of Lading Act requires all bills of lading to embody certain essential terms (R. S. 1954, c. 186, sec. 2). These requirements are substantially the same as those required by the Warehouse Receipts Act (R. S. 1954, c. 187, sec. 2), but are omitted from the Federal Bills of Lading Acts. The Code continues the requirements as to warehouse receipts (UCC Section 7-202), but omits them as to bills of lading. As to the effect of violation of such requirements, see Annotations to UCC Sections 7-202, 7-401.

(2) Other Aspects of Bills of Lading: Three sections of the Bills of Lading Act, for which the Warehouse Receipts Act and the Federal Bills of Lading Act contain no corresponding provisions, are omitted from Article 7.

The section on acceptance of the terms of a bill of lading by receipt without objection (R. S. 1954, c. 186, sec. 10), so far as it affects disputes between buyer and seller, is covered in Article 2 (UCC Section 2-605(2) and Comment 4); but there is no corresponding provision for waiver as against the carrier.

The section on the effect of the form of the bill of lading as indicating the state of the title to the goods (R. S. 1954, c. 186, sec. 40) closely resembles Section 20 of the Uniform Sales Act (R. S. 1954, c. 186, sec. 20). Its subject matter is omitted from Article 7 since it is covered in Article 2 (UCC Sections 7-509, 2-401, 2-403, 2-503, 2-505).

The section of the Bills of Lading Act dealing with the payment of acceptance of a draft accompanied by a bill of lading (R. S. 1954, c. 186, sec. 41) is not included in Article 7. Corresponding provisions are found in Article 2 (UCC Section 2-514) and the collection of documentary drafts is regulated under Article 4 (Part 5).

Section 7-102. Definition and Index of Definitions.

No Annotation.

Section 7-103. Relation of Article to Treaty, Statute, Tariff, Classification or Regulation.

Existing legislation dealing generally with warehouse receipts, bills of lading, or other documents has never been interpreted as overriding regulations concerning specific types of transactions, and this provision merely makes explicit the normal rule of statutory construction. The Code provisions are subject to the Federal Bills of Lading Act (see Introductory Comment above), the Carriage of Goods by Sea Act (46 USCA secs. 1300-1315, regulating ocean bills of lading), the United

States Warehouse Act (7 USCA secs. 241-273, regulating federal licensed warehouses) and other federal statutes. The Code would not affect such Maine statutes as R. S. 1954, c. 23 (regulating carriers of freight or merchandise for hire by motor vehicles).

Section 7-104. Negotiable and Non-Negotiable Warehouse Receipt, Bill of Lading or Other Document of Title.

Generally in accord: R. S. 1954, c. 186, secs. 4, 5; R. S. 1954, c. 187, secs. 4, 5; R. S. 1954, c. 185, sec. 27.

Changes: The Warehouse Receipts and Sales Acts provide for "bearer" documents of title (R. S. 1954, c. 187, sec. 5; R. S. 1954, c. 185, sec. 27). The Bills of Lading Act does not (R. S. 1954, c. 186, sec. 5). The Code provides also for "bearer" bills of lading.

Although the Code sets out "Non-Negotiable Bills of Lading" as an example in the definition of "conspicuous" (UCC Section 1-201(10)), the requirement of present law that warehousemen and carriers plainly mark non-negotiable documents as such is omitted (R. S. 1954, c. 186, sec. 8; R. S. 1954, c. 187, sec. 7; R. S. 1954, c. 185, sec. 30). Also omitted, without apparent change in the law, is the provision that such marking does not impair the negotiability of a document which runs to order or to bearer (R. S. 1954, c. 186, sec. 5; R. S. 1954, c. 187, sec. 5; R. S. 1954, c. 185, sec. 30).

The Code makes provision, "where recognized in overseas trade," for documents running to "X or assigns." Such documents are not now provided for; the Code would make them negotiable. The point may arise as to bills of lading issued abroad. See Introductory Comment, above.

Section 7-105. Construction Against Negative Implication.

New.

Part 2

WAREHOUSE RECEIPTS: SPECIAL PROVISIONS

Section 7-201. Who May Issue a Warehouse Receipt; Storage Under Government Bond.

Existing legislative provision: R. S. 1954, c. 187, sec. 1.

Changes: As to Subsection (2), which is new, compare UCC Section 7-401.

Section 7-202. Form of Warehouse Receipt; Essential Terms; Optional Terms.

Subsection (1).

Accord: R. S. 1954, c. 187, secs. 2, 3.

Subsection (2).

This section is by its terms applicable to all warehouse receipts. R. S. 1954, c. 187, sec. 2, refers only to negotiable warehouse receipts. Thus a greater liability is imposed upon the warehouseman by the Code.

Another change is introduced in Subsection (2)(e). In the case of field warehousing arrangements, it is not necessary to state upon the face of the receipt the rate of storage or the handling charges. It is sufficient merely to state that there is such a field warehousing arrangement.

Subsection(2)(i) requires that the amount for which a warehouseman claims a lien or security interest be stated on the receipt. The words "security interest" are new. Cf. R. S. 1954, c. 187, sec. 2(IX). "Security interest" as used in this context is defined in UCC Section 1-201(37).

Subsection (3).

Subsection (3) includes delivery and due care as duties which may

not be varied by terms inserted into the warehouse receipt. R. S. 1954, c. 187, sec. 3 specifies only the obligation to use due care which may not be varied by the terms of the instrument.

Section 7-203. Liability for Non-Receipt or Misdescription.

Generally in accord: R. S. 1954, c. 187, sec. 20.

Changes:

(1) In the case of non-receipt or misdescription only a "party to or purchaser for value in good faith" of a document may hold the warehouseman liable for damages resulting therefrom. Under present law, any holder may hold the warehouseman liable.

(2) To avoid liability the warehouseman must indicate conspicuously that he does not know whether the goods conform to the description on the document. Under present law there is no such requirement. A printed heading in capitals is conspicuous within the meaning of this section. See UCC Section 1-201(10).

Section 7-204. Duty of Care; Contractual Limitation of Warehouseman's Liability.

Subsection (1).

Accord: R. S. 1954, c. 187, sec. 21.

Changes:

The standard of care required of the warehouseman by the instant section is that of a "reasonably careful man . . . under like circumstances." Present law requires the care of a "reasonably careful owner." It is difficult to know whether the courts will construe the change as requiring a less stringent standard. The Maine courts have used both standards. Compare Briggs Hardware Co. v. Aroostook Valley Ry., 117

Me. 321, 324, 104 Atl. 8 (1918), with Brown v. Railway Express Agency, 134 Me. 477, 482, 188 Atl. 716 (1934).

Subsection (2).

Present Maine law does not deal specifically with contractual limitation of warehouseman's liability in the event of loss or damage. The statute is silent and there are no Maine cases in point. The Code would, by virtue of this section, permit limiting liability by a term to that effect on the face of the receipt. The majority among other jurisdictions follows this rule.

Note that this section is parallel to UCC Section 7-309, which relates to bills of lading.

Section 7-205. Title Under Warehouse Receipt Defeated in Certain Cases.

Present statutory provisions: none. But see R. S. 1954, c. 185, sec. 23; also R. S. 1954, c. 187, sec. 41.

The purpose of this provision is to provide greater protection for the bona fide purchaser who has taken delivery of fungible grain from a warehouseman-vendor. Under the old Acts, the bona fide purchaser was subject to the right of the original owner to trace the grain and assert his title thereto, although the courts were anxious to find estoppels against the owner who left his goods with a bailee.

However, mere surrender of possession is not sufficient to raise an estoppel -- possession in the bailee must be accompanied by some additional indicia of ownership. Cadwallader v. Shaw, 127 Me. 172, 142 Atl. 580 (1928). The court left open the question of what constitutes sufficient indicia to estope the original owner.

The new provision makes conclusive the bona fide purchaser's title when (1) the bailee-vendor is in both warehousing and selling as businesses; (2) the purchaser is in the ordinary course of business; (3) the purchaser has taken delivery.

Section 7-206. Termination of Storage at Warehouseman's Option.

Subsection (1).

Present statutory provision: none.

Changes:

In its present form the statute does not provide procedures for termination of the bailment by the vailee. The instant Subsection permits the warehouseman to terminate the arrangement upon (1) appropriate notice to the proper parties; (2) waiting thirty days when there is no specific termination date.

Subsections (2) and (3).

Present statutory provisions: R. S. 1954, c. 187, sec. 34.

Present law provides for disposition of perishables, but the instant section of the Code extends the warehouseman's right to use the procedures outlined for termination of the bailment to situations in which market fluctuations, as dintinguished from deterioration in instrinsic quality, are the cause of the decline in value.

Under present law the warehouseman may, after appropriate notice, sell the goods at public or private sale, and without advertising, if the owner fails to satisfy his lien and remove the goods. This applies equally to goods which are perishables, and those which are hazardous to life or property. The Code differentiates between these categories:

Perishables:

If the warehouseman seeks to dispose of goods because they are perishable or because they are for other reasons falling in value to less than the amount of his lien, the sale must be public and not less than one week after advertisement.

Hazardous Goods:

With reference to goods deemed a hazard to life or property, the Code treats these in much the same manner as does present law. Much less is required of the warehouseman: no advertisement is necessary, nor is public sale required.

Note that Subsection (3) is limited in its application to those cases in which the warehouseman has no notice of the hazardous nature of the goods at the time the bailment was created. Present law makes no reference to the knowledge of the warehouseman at the time the goods are deposited.

Subsection (4).

Accord: R. S. 1954, c. 187, secs. 33, 34.

Subsection (5).

Accord: R. S. 1954, c. 187, sec. 33.

Section 7-207. Goods Must be Kept Separate; Fungible Goods.

Present statutory provisions: R. S. 1954, c. 187, secs. 23, 24.

Changes:

Subsection (1).

Under existing law the warehouseman may commingle fungibles only if authorized by agreement or custom. The instant Subsection

permits commingling in any event, unless the parties otherwise provide.

Note that under the definition provided in UCC Section 1-201(17) goods which are not fungible may be deemed fungible to the extent that unlike units are by agreement treated as equivalents.

Subsection (2).

Under existing law the warehouseman is liable to the "depositor" for care and re-delivery of his share of the commingled mass. The instant Subsection of the Code uses the word "owner." This suggests that one who has a claim to a part of the mass, based upon legal title, may hold the warehouseman liable whether the claimant was a depositor of the goods or not.

Any holder of a receipt then, to whom the receipt has been duly negotiated, can lay claim to a proportional part of the goods -- even if the receipt did not at the outset represent a deposit.

"Due negotiation" is defined in UCC Section 7-501(4).

This section affords protection to the bona fide purchaser of a negotiable receipt for fungibles against overissue by the warehouseman. Note, however, that the holder of the receipt would still lack protection in the situation in which a warehouseman-vendor sold and delivered the fungibles to another buyer in the ordinary course of business. UCC Section 7-205.

Section 7-208. Altered Warehouse Receipts.

Present statutory provisions: R. S. 1954, c. 187, sec. 13.

Changes:

Present law is not wholly clear on whether filling a blank

constitutes a material alteration, with the consequences attendant upon such alteration. While there have been no Maine cases precisely in point, other jurisdictions have held that it is a question in each case of the authority of the person filling the blank to do so, and that it is not a material alteration per se. 3 C.J.S., Alteration of Instruments, sec. 62, p. 976; see also Mutual Health and Accident Co. v. Milder, 152 Neb. 519, 41 N.W.2d 780, at 785 (1950).

The instant section of the Code eliminates in some situations the question of actual authority to fill blanks on behalf of the issuer. A bona fide purchaser of a negotiable receipt may hold the issuer to the terms of a receipt issued in blank.

With respect to other alterations of a receipt, present law is somewhat ambiguous, but appears to differentiate between rights of a bona fide purchaser and those of one who has notice of or is a party to the fraud. The Code clearly states that any other (than filling blanks) material alteration leaves the receipt enforceable -- by any holder -- as originally issued.

Section 7-209. Lien of Warehouseman.

Present statutory provisions: R. S. 1954, c. 187, secs. 27-32.

Subsection (1).

Generally in accord: R. S. 1954, c. 187, secs. 27, 28 and 30.

Changes:

Under this Subsection, a negotiable receipt must state the rate or the amount of the charges, or if no charges are so specified, the amount of the lien will be limited to a reasonable charge for storage of the goods for time subsequent to the date of issue of the receipt.

Under present law (R. S. 1954, c. 187, sec. 30) neither rates nor amounts need be stated, although charges must be enumerated on negotiable receipts.

Under the Code, the limitations (set forth immediately above) on the enforceability of a warehouseman's lien apply in favor only of one to whom the receipt has been "duly negotiated." Present law does not distinguish among holders.

In the case of both negotiable and non-negotiable receipts, the warehouseman, when he claims a lien on the goods resulting from charges and expenses relating to other goods, must, under this Subsection of the Code, so state on the receipt in order to make the lien enforceable. Under present law, no such notation on the receipt is necessary. R. S. 1954, c. 187, sec. 28.

Compare UCC Section 7-202(2)(i) and R. S. 1954, c. 187, sec. 2(IX), both of which require a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. These provisions relate to liability for damages to persons injured by omission of specified terms, whereas the instant sections relate to enforceability of the warehouseman's lien.

Subsection (2).

Existing statutory provisions: R. S. 1954, c. 187, secs. 27, 28.

This Subsection permits the extension of the warehouseman's lien to situations beyond those enumberated in Subsection (1), which dealt with charges incident to storage and preservation of the goods. The instant provision allows the bailee to preserve a lien for money loaned and for interest thereon, provided that a maximum amount is specified, and regardless of whether the receipt is negotiable or non-negotiable.

Present law is more limited. In the case of non-negotiable receipts, it provides for a general lien -- that is, the warehouseman's lien extends to all the bailor's goods and not just that lot which gave rise to the charges for which the warehouseman seeks to assert a lien. See Harbor View Marine Corp. v. Braudy, 189 F.2d 481 (1st Cir., 1951), which deals with the Massachusetts equivalent of R. S. 1954, c. 187, secs. 27 and 28. But note that this applies to charges arising out of storage and care of the goods and is not intended to cover the situation in which the warehouseman is also a financier.

Moreover, the Code applies to both negotiable and non-negotiable receipts: as long as a maximum amount is specified in the receipt, the warehouseman may reserve a general lien against the bailor. Under present law, the provisions of R. S. 1954, c. 187, sec. 38 could only extend a general lien to goods covered by non-negotiable receipts, for section 30, dealing with negotiable receipts specifies that there shall be no lien except for storage subsequent to issuance of the receipt, unless the other charges are enumberated on the receipt. Harbor View Marine Corp. v. Braudy, supra, at p. 485.

Subsection (3).

Accord: R. S. 1954, c. 187, sec. 28(II).

Subsection (4).

Generally in accord, R. S. 1954, c. 187, sec. 29.

Section 7-210. Enforcement of Warehouseman's Lien.

Existing legislative provisions: R. S. 1954, c. 187, sec. 33.

Subsections (1) and (2).

Changes:

Basically, this provision operates to provide the warehouseman with a choice of methods for satisfaction of his lien on goods stored in the course of his business. Subsection (1) provides a method simpler than that in existing law, and eliminates the stringent and detailed requirements of R. S. 1954, c. 187, sec. 33 in favor of a standard of commercial reasonableness. Subsection (2) retains much of present section 33 making it mandatory only for cases involving goods not stored by the merchant in the course of his business. It is intended to apply to storage of household goods by private owners.

Thus the instant section of the Code modifies present law in that it draws a lien between commercial and non-commercial storage. In the former case, more flexible procedures are available than in present law for satisfaction of the warehouseman's lien; in the latter case, the rigid requirements designed to afford utmost protection to the bailor are preserved.

Among the present requirements which the Code modifies or relaxes (in cases of liens resulting from commercial storage) are: method of notifying parties in interest, details included in the notice, and advertising or posting requirements.

Subsection (3).

Generally in accord: R. S. 1954, c. 187, sec. 33.

Changes:

In the event of satisfaction of the lien prior to the sale, the Code requires that the warehouseman retain the goods subject to the

terms of the original receipt. Present law authorizes the warehouseman to deliver the goods to the person making the payment, provided that he is in fact entitled to possession on payment. Otherwise he must keep them in accordance with the terms of the original receipt.

Subsection (4).

Present legislative provision: none.

While there are no Maine cases in point, other jurisdictions have held it improper for the warehouseman to buy in at a lien enforcement sale. See, for example, Milford Packing v. Isaacs, 8 Terry 308, 90 A.2d 796 (Del. 1952). The Code allows the warehouseman to bid at a public sale, on the theory that this will raise the price.

Subsection (5).

Existing legislative provision: none.

Changes:

Section (5), in connection with section (9) spells out the rights of the parties in the event of a sale which fails to comply with the requirements of the Code. The bona fide purchaser takes free of rights of any person against whom the lien was valid; the warehouseman is liable only for actual damages except in case of wilful violation, in which instance he is liable for conversion.

Under present law, as interpreted in other jurisdictions (there being no Maine cases in point), sale without full compliance with statutory requirements is a conversion. See, e.g., Terry v. Ace Storage Co., 135 S.W.2d 263 (Mo. 1940).

Subsection (6).

Accord: R. S. 1954, c. 187, sec. 33.

Subsection (7).

Accord: R. S. 1954, c. 187, sec. 35.

Subsection (8).

See Comments under (1) and (2) above.

Subsection (9).

See (5) above.

Part 3

BILLS OF LADING: SPECIAL PROVISIONS

Section 7-301. Liability for Non-Receipt or Misdescription; "Said to Contain;" "Shipper's Loan and Count;" Improper Handling.

Present statutory provisions: R. S. 1954, c. 186, sec. 23.

Changes:

Subsection (1).

The class of persons to whom the carrier is liable under the Code is somewhat narrower than under present law. In the case of a negotiable bill the carrier under present law is liable to a holder who has given value in good faith relying upon the description contained in the bill; under the Code the holder must be one to whom the receipt was "duly negotiated." See UCC Section 7-501.

Subsections (2) and (3).

Changes:

These requirements are wholly new with the Code.

Subsection (4).

When the shipper loads the goods himself the carrier may, by noting this on the face of the bill, avoid liability for any damage resulting therefrom. But the Code leaves open the problem of whether the carrier may shift responsibility in the absence of such notation.

The issuer's bill acknowledging receipt in apparent good order is prima facie evidence that the goods were in proper order at least insofar as external appearances indicate. Goldberg v. N.Y., N.H. & H. RR., 130 Me. 96, 153 Atl. 812 (1931). But the presumption is not conclusive; it merely shifts to the carrier the burden of demonstrating that the goods

were not in face in good order. In other jurisdictions it has been held that the carrier may introduce evidence that the shipment was not in good order when loaded, where there is a bill acknowledging receipt in good order and even where the bill does not contain the notation "shipper's load and count." See, for example, Evergreen Broom Mfg. Co. v. Pennsylvania RR. Co., 378 Pa. 60, 105 A.2d 88 (1954).

Thus, the Code makes clear that the carrier may avoid liability by making the appropriate notation. In the absence of such notation -- the question left unanswered by the Code -- probably the carrier would still be permitted to prove that the damages were caused by the shipper's loading, if such were the case.

Subsection (5).

Under present law there is no provision imposing absolute liability upon the shipper to indemnify the carrier against damages resulting from inaccuracies in the description furnished by the former. Such indemnity is reputedly obtained only with difficulty.

Section 7-302. Through Bills of Lading and Similar Documents.

Existing legislative provision: none.

Although there is authority to the contrary, the majority view in this country is that in the absence of a contract, usage, or statute to the contrary, the liability of the initial carrier, notwithstanding the fact that the goods are marked to a point beyond its line, terminates when it transports goods to the end of its line and delivers them to a connecting carrier to be transported to their ultimate destination. See 13 C.J.S., Carriers, sec. 404.

Under the Carmack Amendment (49 USCA sec. 20(11)) a through bill of lading is deemed to be a contract for through shipment, and thus in certain interstate shipments the initial carrier will be liable for the losses caused by his own or by any connecting carrier. See discussion in Lewis Poultry Co. v. N.Y. Central RR. Co., 117 Me. 482, 105 Atl. 109 (1918).

The Code brings the policy of the Carmack Amendment to bear on intrastate shipments. Liability is placed on the issuer for losses in shipments sent on through bills. But the connecting carrier holds the goods on terms defined by the original bill of lading, and the issuer has a right over against the connecting carrier for whose negligence he may have to pay.

Section 7-303. Diversion; Reconsignment; Changes of Instructions.

Existing statutory provisions: none. Compare R. S. 1954, c. 186, sec. 12.

Changes:

Under present law, the carrier may follow a change of instructions without liability for misdelivery of the ultimate result in a "justified delivery" within the meaning of R. S. 1954, c. 186, sec. 12. It falls to the carrier, in the event of conflicting or changed instructions, to determine to whom delivery would be "justified."

With respect to negotiable bills of lading, the Code preserves intact present law. Delivery to the holder, or pursuant to directions from the holder, will insulate the carrier from any liability for misdelivery.

With respect to straight bills, on the other hand, the Code introduces changes designed to afford greater protection to the carrier

faced with a reconsignment order, or similar change in instructions. Under present law, as construed in most jurisdictions (there being no Maine cases touching the point) the consignee generally has the right to divert and reconsign. See C.J.S., Carriers, secs. 147, 148. But in following the instructions of the consignee the carrier assumes the risk of delivery to a person not lawfully entitled to prossession. See R. S. 1954, c. 186, secs. 12, 13. In the event of conflicting instructions from the consignor, the carrier is placed in the invidious position of having to determine which party has a right of property in the goods. R. S. 1954, c. 186, sec. 13. A miscalculation by the carrier results in liability for misdelivery.

The Code allows the carrier more flexibility. He may follow the instructions of the consignor and be wholly safe. Or he may comply with instructions of the consignee, taking the risk that the consignee may not be entitled to the goods. The risk is likely to be minimal. See 77 C.J.S., Sales, sec. 164.

Section 7-304. Bills of Lading in a Set.

Existing legislative provision: R. S. 1954, c. 186, sec. 6.

Changes:

Present law prohibits bills in sets of parts where transportation is to "any place in the United States on the continent of North America, except Alaska." The Code prohibits bills in sets of parts but makes an exception where such bills are "customary in overseas transportation." The term "overseas" is defined in UCC Section 2-323.

Present law is silent on regulation of bills of lading in sets of parts in the instances in which this is permitted. The Code does

provide regulations for situations in which such bills are permissible.

Note that the Federal Carriage of Goods by Sea Act, 46 USCA, sec. 1300, would govern most situations in which bills in sets of parts are properly used anyway, and that the Code is in accord with this Act.

Section 7-305. Destination Bills.

Existing legislative provisions: none.

Present law does not specifically provide for the kind of bill contemplated by this section, and there are no Maine court decisions dealing with such a bill. But it must be noted that there is nothing in present law to prohibit the issue and/or use of destination bills. The purpose of this section is to facilitate the use of order bills in connection with fast shipments. At present, shipments may be delayed at the carrier's terminal, pending arrival of documents.

Section 7-306. Altered Bills of Lading.

Present statutory provisions: R. S. 1954, c. 186, sec. 16.

Under present law the authority for alterations must be in writing or noted on the face of the document; the Code has no such requirement.

The Code deals explicitly with filling blanks, although this may be said to be included in the present statutory term "alteration, addition, or erasure."

Section 7-307. Lien of Carrier.

Existing legislative provisions: R. S. 1954, c. 186, sec. 26. See also R. S. 1954, c. 187, secs. 27-32.

Subsection (1).

Generally in accord: R. S. 1954, c. 186, sec. 26.

"Negotiable bills." Among negotiable bills, the Code distinguished between those held by purchasers for value and all others. In the former category the carrier's lien is limited to charges stated in the bill, or applicable tariffs, or, in the absence of either of these, to "a reasonable charge." With reference to bills in the hands of others than purchasers for value, the Code preserves present law intact, and allows a wider scope to the carrier's lien. Present law treats liens against goods covered by a negotiable bill as a single category, and the lien extends to charges for freight, storage, demurrage and terminal charges, etc. See R. S. 1954, c. 186, sec. 26.

The Code extends the lien to expenses incurred in "sale pursuant to law" whereas under sec. 26 such a charge would have to be enumerated to come within the purview of the carrier's lien.

"Non-negotiable bills." Subsection (1) extends the carrier's lien to charges on goods covered by non-negotiable as well as negotiable bills. The present statute simply does not mention a lien with reference to non-negotiable bills. However, Maine common law has long recognized a carrier's lien, although it is not clear that it would extend to as many varied charges as the Code. Ames v. Palmer, 42 Me. 197 (1856); Brown v. Railway Express Co., 134 Me. 477, 188 Atl. 716 (1936).

Subsection (2).

This Subsection protects the carrier's lien for charges incurred by a consignor who did not in fact have authority to subject the goods to such charges, provided always that the carrier is required to receive the goods, the Code protects his lien even if the consignor was a thief.

Existing statutory law does not deal with this situation, and there are no Maine cases in point. Generally, however, it may be said that no lien arises in favor of the carrier when the consignor or shipper has gained possession of the goods tortiously, or has no authority to ship them, unless the owner has clothed the consignor with apparent authority or is otherwise estopped.

Subsection (3).

Accord with common law rule.

(Note: This section is similar to UCC Section 7-209, relating to liens of warehousemen. But there are several significant points of departure:

a. The warehouseman is allowed a general lien; the carrier only a specific lien incident to a given shipment.

b. The warehouseman's lien may secure money lent; the instant section does not authorize a carrier's lien for the same purpose. But no negative implication is to be drawn from this. UCC Section 7-105. Such security may be permissible in the case of negotiable bills under present law too, if the proper notations appeared on the face of the bill. R. S. 1954, c. 186, sec. 26.)

Section 7-308. Enforcement of Carrier's Lien.

Existing legislative provisions: Compare R. S. 1954, c. 186, sec. 27; R. S. 1954, c. 187, sec. 33.

Changes:

Subsection (1).

Existing Maine law provides no comprehensive scheme for enforcement of the carrier's lien. R. S. 1954, c. 186, sec. 27 provides that "after goods have been lawfully sold to satisfy a carrier's lien" the carrier will not be liable for failure to deliver the goods to the consignee. But it fails to define the meaning of "lawfully sold." At common law a carrier could enforce its lien only be retention of the goods or by a proper court proceeding. See 13 C.J.S. Carriers, sec. 331.

Under the Code the standard of "commercial reasonableness" defines the time, place, and terms of the sale. Compare comment to UCC Section 7-210, Enforcement of Warehouseman's Liens.

Subsections (2) through (8).

These are new. See comments under UCC Section 7-210, Subsections (3) through (9), which are nearly identical.

Section 7-309. Duty of Care; Contractual Limitation of Carrier's Liability.

Existing legislative provisions: R. S. 1954, c. 186, sec. 3.

Changes:

Subsection (1).

Generally in accord: R. S. 1954, c. 186, sec. 3(II).

Present law prescribes a standard of care such as a reasonably careful man would exercise in regard to similar goods of his own; the Code requires merely the care of a reasonably careful man dealing with similar goods -- not necessarily his own. It appears doubtful that a Maine court would find any substantial difference between the two. See Annotation to UCC Section 7-204.

Subsection (2).

The Code allows quantitative limits on liability. That is, although the carrier may not disclaim liability for damages resulting from his own misconduct, he may, by agreement with the shipper, limit liability to a stated amount, with certain limitations. While Maine common law has long allowed carriers to avoid liability for damages not resulting from their own misfeasance, Morse v. Canadian Pacific Ry., 97 Me. 77, 53 Atl. 874 (1902); Hix v. Eastern S.S. Co., 107 Me. 357, 70 Atl. 379 (1910); Young v. Maine Central RR. Co., 113 Me. 113, 93 Atl. 48 (1915), there is doubt as to the endorceability of provisions limiting the extent of liability for damages admittedly resulting from the bailee's negligence.

The Code also allows terms in the bill relating to the time and manner of presenting claims. This is consistent with present Maine common law. R. P. Hazzard Co. v. Maine Central RR Co., 121 Me. 199, 116 Atl. 258 (1922) (relating to interstate shipments).

Part 4

WAREHOUSE RECEIPTS AND BILLS OF LADING: GENERAL OBLIGATIONS

Section 7-401. Irregularities in Issue of Receipt or Bill or Conduct of Issuer.

Existing legislative provisions: none.

Changes:

Subsections (a) and (b).

There is no authority in Maine on the application of the Warehouse Receipts Act (R. S. 1954, c. 187) and the Bills of Lading Act (R. S. 1954, c. 186) to documents violating other statutes. Violations of this Article render the issuer liable for damages caused thereby, whereas under present law, omission of an essential term causes liability for damages on a negotiable receipt only. See UCC Section 7-202, and compare R. S. 1954, c. 187, sec. 2.

Subsection (c).

Compare, as to warehouse receipts, R. S. 1954, c. 187, sec. 2(VIII); also sec. 53.

Subsection (d).

R. S. 1954, c. 187, sec. 1 states that warehouse receipts may be issued by any warehouseman. It is possible to infer from this that a receipt issued by one who is not a warehouseman is not within the purview of the statute and subject to its limitations. Although there are no Maine cases in point, such an inference has been made in other jurisdictions.

Moreover, the Uniform Act, by defining "warehouseman" as one who stores goods for profit might exclude co-operative warehouses, although again there are no Maine cases in point.

This section and Section 7-102(h) preclude such narrow construction of the duties imposed by the Code.

Section 7-402. Duplicate Receipt or Bill; Overissue.

Existing statutory provisions: R. S. 1954, c. 186, sec. 7; R. S. 1954, c. 187, sec. 6.

Changes:

Existing law applies only to negotiable documents, whereas the Code extends to the bona fide purchaser of non-negotiable documents the right to sue the issuer if the document were in fact an unmarked duplicate.

The purchaser of the unmarked duplicate acquires no interest in the goods, but only a right to recover damages from the issuer. Although this is not explicit in present law, it would seem to follow from the general rule that the first person who acquires one of a set, for value, has paramount title as against any "title" transferred in subsequent dealings involving others of the set. See 9 Am. Jur., Carriers, sec. 449. The purchaser's right to damages from the issuer is found in R. S. 1954, c. 187, sec. 6; R. S. 1954, c. 186, sec. 7.

The exception made for fungible goods applies only to warehouse receipts, UCC Section 7-207(2); prior law with reference to overissue of documents for fungibles by carriers or other bailees remains in force.

Section 7-403. Obligation of Warehouseman or Carrier to Deliver; Excuse.

Existing statutory provisions: R. S. 1954, c. 186, secs. 11-15, 19,

22; R. S. 1954, c. 187, secs. 8-12, 16, 19.

Changes:

Subsection (1).

(a) Accord: R. S. 1954, c. 186, secs. 11, 12(I); R. S. 1954, c. 187, secs. 8, 9(I).

(b) Accord: R. S. 1954, c. 186, sec. 11; R. S. 1954, c. 187, secs. 8, 21.

(c) Accord: R. S. 1954, c. 186, secs. 11, 27; R. S. 1954, c. 187, secs. 8, 36.

(d) Accord: R. S. 1954, c. 186, secs. 11, 12, 42; R. S. 1954, c. 187, secs. 8, 49; R. S. 1954 c. 185, secs. 57-59. See also Newhall v. Vargas, 13 Me. 93 (1836).

(e) See UCC Section 7-303 and Annotation thereto.

(f) Accord: R. S. 1954, c. 186, sec. 51; R. S. 1954, c. 187, sec. 56.

Subsection (2).

Generally in accord: R. S. 1954, c. 186, sec. 11(I); R. S. 1954, c. 187, sec. 8(I). Under present law the party seeking delivery must offer to satisfy the bailee's lien on the goods; the Code places the initiative in this respect upon the bailee, who may request satisfaction of his lien prior to delivery.

Subsection (3).

Generally in accord: R. S. 1954, c. 186, secs. 14, 15; R. S. 1954, c. 187, secs. 11, 12; R. S. 1954, c. 187, sec. 9(I); R. S. 1954, c. 186, sec. 12(I). Cf. Bryant v. Ware, 30 Me. 295 at 298 (1830).

The Code makes it clear that an outstanding negotiable document need not be surrendered where the claimant is the true owner and the bailor was a thief. This would seem to follow under present law, since the thief could convey no rights in the goods, and the bailee is justified in delivering to "a person lawfully entitled to the possession of the goods."

The instant Subsection also makes explicit the requirement implicit in present law that in case of partial deliveries the document must be surrendered for conspicuous notation thereon.

"Conspicuous" is defined in UCC Section 1-201(10).

Subsection (4).

Accord: R. S. 1954, c. 186, sec. 12; R. S. 1954, c. 187, sec. 9.

Under present law, the consignee is a "person entitled" under a non-negotiable bill of lading. The Code permits the consignor to change the consignee, under certain circumstances. See UCC Section 7-303.

Section 7-404. No Liability for Good Faith Delivery Pursuant to Receipt or Bill.

Present statutory provisions: R. S. 1954, c. 186, sec. 13; R. S. 1954, c. 187, sec. 10.

Changes:

Present law imposes liability for delivery to one not lawfully entitled to the goods, unless the delivery is to the holder of a negotiable instrument, or one named as consignee in a non-negotiable bill. But this seems to assume that the original delivery of goods to the bailee was proper, and that the imperfection in the claim of the recipient arose from some subsequent dealings. The Code, on the

other hand, protects the bailee even if the depositor was a thief, provided always that he acts in good faith and in accordance with reasonable commercial standards.

It should be noted that under present law the bailee is in any event liable for disdelivery if he is requested by the true owner not to make delivery to the holder or consignee; the Code provides a more flexible standard, granting the bailee immunity if he observes reasonable commercial standards and acts pursuant to this Article, or the terms of the document.

Part 5

WAREHOUSE RECEIPTS AND BILLS OF LADING: NEGOTIATION AND TRANSFER

Section 7-501. Form of Negotiation and Requirements of "Due Negotiation."

Subsection (1).

Accord: R. S. 1954, c. 184, secs. 28, 29; R. S. 1954, c. 186, sec. 28, 29; R. S. 1954, c. 187, secs. 37, 38.

"Any person:" Negotiation under this section may be made by any holder no matter how he acquired possession of the document. Accord: R. S. 1954, c. 186, sec. 31. Contra: R. S. 1954, c. 185, sec. 32; R. S. 1954, c. 187, sec. 40. The Code eliminates the requirement of "entrusting" by the owner.

Subsection (2).

(a) Accord: R. S. 1954, c. 186, sec. 28; R. S. 1954, c. 187, sec. 37.

(b) This section extends to documents of title the doctrine that the payee of a negotiable instrument can be a holder in due course, entitled to the rights created by negotiation. UCC Section 3-302(2). The result, not expressly stated in the Warehouse Receipts Act or the Bills of Lading Act, is to enable the person named in the document, whether he be depositor, buyer or financing bank, to claim the rights created by negotiation. For examples of such rights, see UCC Sections 7-207(2), 7-304(3) and (4), 7-502.

Subsection (3).

Accord: R. S. 1954, c. 184, sec. 29; R. S. 1954, c. 186, sec. 29; R. S. 1954, c. 187, sec. 38.

Subsection (4).

The present statutes use the phrase "duly negotiated" without

defining it, (R. S. 1954, c. 185, sec. 33; R. S. 1954, c. 186, sec. 32; R. S. 1954, c. 187, sec. 41). But they provide that listed defects do not impair the validity of the negotiation, if the person to whom the document is negotiated pays value without notice of the defect (R. S. 1954, c. 185, sec. 38; R. S. 1954, c. 186, sec. 38; R. S. 1954, c. 187, sec. 47). This section imposes the additional tests that the purchase be "in good faith" and "in the regular course of business or financing" and that it not involve "receiving the document in settlement or payment of a money obligation."

The Code also expands the definition of value necessary for due negotiation to include bank credit even though not drawn upon. See Annotation to UCC Section 1-201(44).

Subsection (5).

Accord: R. S. 1954, c. 185, sec. 31; R. S. 1954, c. 186, sec. 30; R. S. 1954, c. 187, sec. 39.

Subsection (6).

Accord: R. S. 1954, c. 186, sec. 9.

Section 7-502. Rights Acquired by Due Negotiation.

Generally in accord: R. S. 1954, c. 185, secs. 20, 25, 33, 38, 62; R. S. 1954, c. 186, secs. 32, 38-40, 42; R. S. 1954, c. 187, secs. 41, 47-49.

Subsection (1).

For changes, see Annotation to UCC Section 7-503.

Delivery orders: The present Sales Act recognized delivery orders

as documents of title (R. S. 1954, c. 185, sec. 76). But in defining the rights acquired on due negotiation, the present statutes give the holder the direct obligation of the "bailee," "carrier," or "warehouseman" (R. S. 1954, c. 185, sec. 33; R. S. 1954, c. 186, sec. 32; R. S. 1954, c. 187, sec. 41), assuming that the bailee and the issuer are the same person. The Code clarifies this situation by treating delivery orders separately. See also UCC Sections 2-503(4), 7-102(1)(d) and (g), 7-503(2).

Subsection (2).

"Adds nothing to the effect of the rules stated in Subsection (1), but it has been included since such explicit references were relied upon under the prior acts to preserve the rights of a purchaser by due negotiation unimpaired." Comment 4. The Code follows section 37 of the Federal Bills of Lading Act (USCA sec. 117) and an amendment to the Uniform Warehouse Receipts Act recommended by the Commissioners and adopted in sixteen states in adding explicit reference to "loss" and "theft." Compare R. S. 1954, c. 185, sec. 38; R. S. 1954, c. 186, sec. 38; R. S. 1954, c. 187, sec. 47.

Section 7-503. Document of Title to Goods Defeated in Certain Cases.

Subsection (1).

Generally in accord: R. S. 1954, c. 185, secs. 23-25, 33; R. S. 1954, c. 186, sec. 32; R. S. 1954 c. 187, sec. 41.

Changes: As to defects in the title of the person who deposits the goods and obtains a document of title, present law gives the purchaser of the document by due negotiation only the title which he

would obtain by direct purchase of the goods without the intervention of the issuance of a document. The Code expands the power of a person in possession of goods to give title to a bona fide purchaser (UCC Section 2-403). In addition, this section protects the purchaser by due negotiation against the claim of a true owner who "acquiesced" in the procurement of any document of title. This provision may narrow the occasions for defeating the document holders' title. But compare Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank and Trust Co., 239 U.S. 520, 60 L.Ed. 417, 36 S.Ct. 194, Ann. Cas. 1917E 25 (1916), giving similar protection under the Uniform Warehouse Receipts Act.

Subsection (2).

There is no statute or decisional law in Maine dealing with the situations here provided for. See Annotation to UCC Section 7-502(1) on delivery orders.

Subsection (3).

New. For direct liability of a carrier to a shipper as undisclosed principal of a freight forwarder, see Thompson v. American Abrasive Metals Co., 253, S.W.2d 83 (Tex. Civ. App. 1952), cert. denied 346 U.S. 816, 98 L.Ed. 343, 74 S.Ct. 28 (1953).

Section 7-504. Rights Acquired in the Absence of Due Negotiation; Effect of Diversion; Seller's Stoppage of Delivery.

Subsection (1).

Accord: R. S. 1954, c. 185, sec. 34; R. S. 1954, c. 187, sec. 33; R. S. 1954, c. 187, sec. 42.

Subsection (2).

Under R. S. 1954, c. 185, sec. 34; R. S. 1954, c. 186, sec. 33; R. S. 1954, c. 187, sec. 42, until the bailee is notified, the title of the transferee of a non-negotiable document may be defeated by any attaching creditors of the transferor. The Code makes provision for such defeat only if the creditor may treat the sale as void under UCC Section 2-402.

The present statutes also make it clear that the transferee's rights may be defeated by a bona fide purchaser from the transferor if the bona fide purchaser gives the first notice to the bailee. The Code provides such protection only for purchasers under UCC Section 2-403, which is limited to purchasers from a merchant-seller (cf. R. S. 1954, c. 185, sec. 25). This section and UCC Section 2-503(4), providing that receipt of notification by the bailee fixes the buyer's rights "as against the bailee and all third persons," continue the present rule that the transferee's rights can be defeated by a subsequent purchaser only if the purchaser gives the first notice to the bailee.

The Code makes it clear that the transferee's rights can be defeated before notification, by a good faith purchase by the bailee himself. Compare R. S. 1954, c. 186, sec. 19; R. S. 1954, c. 187, sec. 16.

Subsection (3).

This is a clear departure from present law. In the usual sales transaction calling for shipment of goods, title passes to the vendee when goods are delivered to the carrier (R. S. 1954, c. 185, secs. 18, 19 Rule 4 (II). Diversion to another purchaser cannot defeat the rights of the consignee named in the non-negotiable bill of lading unless he has lost those rights as against the seller or is precluded from denying

the seller's authority (R. S. 1954, c. 185, sec. 23). The Code changes this result. See Annotation to UCC Section 7-303.

Subsection (4).

Accord: R. S. 1954, c. 185, secs. 58, 59. The Code gives the carrier on express right to indemnity where he honors a seller's request to stop delivery. See Annotation to UCC Section 2-705.

Section 7-505. Indorser Not a Guarantor for Other Parties.

Accord: R. S. 1954, c. 185, sec. 37; R. S. 1954, c. 186, sec. 36; R. S. 1954, c. 187, sec. 45. See Comment to UCC Section 7-507.

Section 7-506. Delivery Without Indorsement: Right to Compel Indorsement.

Generally in accord: R. S. 1954, c. 185, sec. 35; R. S. 1954, c. 186, sec. 34; R. S. 1954, c. 187, sec. 43. The Code drops the requirement of present law that the transfer be "for value."

Section 7-507. Warranties on Negotiation or Transfer of Receipt or Bill.

Accord: R. S. 1954, c. 185, sec. 36; R. S. 1954, c. 186, sec. 35; R. S. 1954, c. 187, sec. 44. Provisions for warranties as to the goods are left to Article 2 (UCC Sections 2-312 through 2-318).

Section 7-508. Warranties of Collecting Bank as to Documents.

Generally in accord: R. S. 1954, c. 186, sec. 37; R. S. 1954, c. 187, sec. 46. The Code spells out affirmative warranties of goods faith and authority and negatives all others, while the present statutes merely negative warranties of genuineness, quantity or quality. The present provisions apply to a "mortgagee, pledgee, or holder for security;" the Code provision applies explicitly also to a mere holder for collection.

Section 7-509. Receipt or Bill: When Adequate Compliance With Commercial Contract.

Questions of compliance with sale contracts and letters of credit are not provided for in the present statutes on documents of title. This section makes explicit the reference of such questions to other bodies of law.

Part 6

WAREHOUSE RECEIPTS AND BILLS OF LADING: MISCELLANEOUS PROVISIONS

Section 7-601. Lost and Missing Documents.

Subsection (1).

R. S. 1954, c. 186, sec. 17 and R. S. 1954, c. 187, sec. 14 make similar provisions, limited to negotiable documents. The Code adds "stolen" documents to the "lost or destroyed" documents of the present statutes, makes provision for non-negotiable documents, and authorizes issuance of substitute documents as an alternative to delivery of the goods. Unlike the present statutes, the Code permits the bailee to comply with the court order "without liability to any person;" the holder's recourse is thus limited to the bond.

Subsection (2).

When a negotiable document is lost, the present statutes do not expressly authorize delivery without court order. Delivery without court order, under the Code as under the present statutes, may subject the bailee to liability to persons injured by the failure to cancel the document (R. S. 1954, c. 186, sec. 14; R. S. 1954, c. 187, sec. 11; UCC Section 7-403(3)). He will therefore usually insist on the protection of a bond. The Code removes any danger of criminal prosecution of the bailee in such cases (R. S. 1954, c. 187, sec. 54).

The Code seeks also to limit the bailee's liability for conversion in such cases (R. S. 1954, c. 186, sec. 13; R. S. 1954, c. 187, sec. 10). Liability is expressly imposed, as under present law, for delivery in bad faith. But good faith delivery in accordance with a filed

classification or tariff is not conversion under the Code; in the absence of a filed classification or tariff, the filing of a bond has a similar effect.

Section 7-602. Attachment of Goods Covered by a Negotiable Document.

Accord: R. S. 1954, c. 186, sec. 24; R. S. 1954, c. 187, sec. 25.

Section 7-603. Conflicting Claims; Interpleader.

Accord: R. S. 1954, c. 186, secs. 20, 21; R. S. 1954, c. 187, secs. 17, 18.

Article 8

INVESTMENT SECURITIES

Part 1

SHORT TITLE AND GENERAL MATTERS

Section 8-101. Short Title.

This article deals with investment securities as defined in the article and includes stocks, bonds, debentures and certain instruments now considered to be non-negotiable. It does not include commercial paper as such, usually consisting of notes, checks, and bills of exchange, including trade acceptances, but instruments coming within the definition of investment securities are governed by this article although otherwise they would be governed by Article 3.

The article on investment securities defines in brief a security as an instrument in bearer or registered form of a type commonly dealt in upon security exchanges or markets or recognized as a medium for investment, if it is one of a class or series of similar instruments and if it evidences a share or other interest in property or evidences an obligation of the issuer. The article on investment securities repeals secs. 51-72 of R. S. 1954, c. 53, which relate to the Uniform Stock Transfer Act, and removes the application of the Negotiable Instruments Law contained in R. S. 1954, c. 188.

Section 8-102. Definitions and Index of Definitions.

Under the "Blue Sky" laws (R. S. 1954, c. 59, secs. 228-42) of Maine, "security" is defined in sec. 231 as follows:

> "The term 'securities' shall include all stocks, bonds, debentures or certificates of participation, all ship shares,

all documents of title and certificates of interest in any profit-sharing agreement, or in any oil, gas or mining lease, royalty, right or interest, or in the title to or any profits or earnings from land or other property situated outside of Maine, and all other forms of securities, except that it shall not be held to include commercial paper or other evidence of debt running not more than 9 months, or notes secured by mortgage of real estate in this state, or the shares of loan and building associations organized under the laws of this state. The term 'securities' shall further include documents of title to and certificates of interest in real estate, including cemetary lots, and personal estate when the sale and purchase thereof is accompanied by or connected in any manner with any contract, agreement or conditions, other than a policy of title insurance issued by a Company authorized to do a title insurance business in this state, under the terms of which the purchaser is insured, guaranteed or agreed to be protected against financial loss or is promised financial gain."

The new law provides that a writing which is a security is governed by Article 8 even though it meets the requirements of commercial paper provided for in Article 3 (Commercial Paper).

An important difference between the Code and Maine's NIL lies in the concept of what constitutes notice of defect. Under the Code, UCC Section 1-201(25), a person has notice if "from all the facts and circumstances known to him at the time in question he has reason to know that it exists." A less stringent concept of notice was had

under R. S. 1954, c. 188, sec. 56 and Mechanics' Savings Bank v. Berry, 119, Me. 404, 111 Atl. 533 (1920), which would impute notice only under actual knowledge, or such facts which amount to a taking in bad faith, but existence of circumstances calculated to excite suspicion of a prudent man is not notice.

Section 8-103. Issuer's Lien.

This provision extends the rule found in Maine's Uniform Stock Transfer Act (applicable to liens on Corporation shares) to include all securities. R. S. 1954, c. 53, sec. 67 reads as follows:

> "There shall be no lien . . . and there shall be no restriction upon the transfer of shares. . . unless . . . stated upon the certificate."

Also see definition of "Conspicuous" in Code, UCC Section 1-201 (10).

Section 8-104. Effect of Overissue; "Overissue."

Insofar as this section recognizes the invalidity of overissued stock, compare R. S. 1954, c. 53, sec. 75, which would allow an increase in capital stock only through certain procedures (i.e., stockholder voting, filing, etc.).

As for the remedies of a purchaser of overissued stocks, the Code prescribes a scheme which appears new to Maine law: if an identical security which does not constitute an overissue is reasonably available for purchase, the person entitled to issue or validation may compel the issuer to purchase such a security for him against surrender of the security, if any, he holds. If a security is not so available for purchase, the person entitled to issue or validation may recover from

the issuer the price he or the last purchaser for value paid for it with interest from the date of his demand. No Maine law was found in this area, but compare Allen v. So. Boston RR. Co., 150 Mass. 200, 22 N.E. 917, 5 L.R.A. 716 (1889).

Section 8-105. Securities Negotiable; Presumptions.

This section clarifies any doubt as to the negotiability of securities governed by Article 8. Subsection (2) will apply the same rules as to the burden of proof in suits on securities as UCC Section 3-307 will apply in the case of commercial paper.

Section 8-106. Applicability.

As to validity of a negotiable instrument made in another state, see accord: Nonotuck Savings Bank v. Norton, 135 Me. 92, 189 Atl. 829 (1937).

Part 2

ISSUE -- ISSUER

Section 8-201. "Issuer."

This Subsection furnishes specific definitions and clarifies the meaning of the term "issuer" as used in Article 8. The definitions are new but probably consistent with interpretations of prior law.

Section 8-202. Issuer's Responsibility and Defenses; Notice of Defect or Defense.

Under the NIL, it has been held that mere references to collateral agreements do not render the instrument non-negotiable, Union Insurance Co. v. Greenleaf, 64 Me. 123 (1874), but the words "subject to (a contract)" would destroy the instruments negotiability, Cushing v. Field, 70 Me. 50, 35 Am. Rep. 293 (1879).

Subsection (1) probably broadens the extent to which a purchaser may be deemed to be without notice of matter referred to in the instrument by providing that conflicting terms in the outside agreement do not operate of themselves to charge a purchaser with notice.

As to Subsection (2), see accord: Megunticook National Bank v. Knowlton Bros., 125 Me. 480, 135 Atl. 95 (1926) (firm whose name was indorsed on a note without authority is liable to a BFP for value); Commercial Bank v. St. Croix Mfg. Co., 23 Me. 280 (1843) (if a corporation has power to make a note for any purpose, it cannot, as against a BFP, claim it had no power to make said note). This provision, however, does not make forged signatures or overissues invalid. As to Subsection (2)(b), see Uniform Law Comment and Waken v. Van Buren, 137 Me. 127, 15 A.2d 873 (1940) and Portland Tractor Co. v. Anson, 134 Me.

329, 186 Atl. 883 (1936) (all indebtedness incurred beyond constitutional limit is void).

As to Subsection (3), see definition of "genuine" in UCC Sec. 1-201(18) and accord in R. S. 1954, c. 188, sec. 23 (forged signatures).

As to Subsections (4) and (5), see Uniform Law Comment.

Section 8-203. Staleness as Notice of Defects or Defenses.

This section expands the NIL rule under R. S. 1954, c. 188, secs. 52(II) and 53 (to be a HIDC, one must take before overdue, or if a demand instrument, within a reasonable amount of time), to permit the acquisition of due-course rights in matured instruments in certain cases.

Section 8-204. Effect of Issuer's Restrictions on Transfer.

Under R. S. 1954, c. 53, sec. 65, there can be no restriction unless indicated on the certificate. This section tightens this rule by requiring that restrictions on transfers be "noted conspicuously" as defined in UCC Section 1-201(10).

Section 8-205. Effect of Unauthorized Signature on Issue.

No Maine cases were found in point, but see Uniform Law Comment as to accord elsewhere.

Section 8-206. Completion or Alteration of Instrument.

Subsection (1).

This provision broadens the NIL rule in R. S. 1954, c. 188, secs. 14 and 15 (which made non-delivery of an incomplete instrument a good defense against an HIDC) and now allows a purchaser for value and without notice to recover even though blanks are incorrectly filled

in and there has been no delivery by the issuer.

Subsection (2).

As to shares of stock, see accord: R. S. 1954, c. 53, sec. 66. As to securities, the rule under the NIL (R. S. 1954, c. 188, sec. 124), which determined the negotiability of altered instruments is broadened. Under the NIL, only the holder in due course would enforce the instrument according to its original tenor, and otherwise, it was avoided.

Section 8-207. Rights of Issuer with Respect to Registered Owners.

Accord: R. S. 1954, c. 188, sec. 53.

Section 8-208. Effect of Signature of Authenticating Trustee, Registrar or Transfer Agent.

This section states the warranties given to a purchaser for value by the issuer and valid agents and is consistent with the ordinary rules of agency.

Part 3

PURCHASE

Section 8-301. Rights Acquired by Purchaser; "Adverse Claim;" Title Acquired by Bona Fide Purchaser.

Subsection (1).

The present position of the law regarding the doctrine of "shelter" seems to be in accord with the Code provision. Since some instruments falling within the meaning of the word "securities" could formerly have been governed by R. S. 1954, c. 188 (Uniform Negotiable Instruments Law), it would do well to see how that act dealt with the question of "shelter." R. S. 1954, c. 188, sec. 58 indicates that that act contains the same principle the Code does: if a purchaser derives his title from a transferor who has actual authority to transfer title, the purchaser -- unless he himself is a party to any fraud or illegality affecting the instrument -- acquires all the rights of such transferor. Gilman v. F. O. Bailey Carriage Co., 127 Me. 91, 141 Atl. 321 (1928); Hibbard v. Collins, 127 Me. 383, 143 Atl. 600 (1928); Madigan v. Lumbert, 136 Me. 178, 5 a.2d 278 (1939).

R. S. 1954, c. 53, secs. 48-72 (Uniform Stock Transfer Act), dealing with the transfer of stocks, does not direct itself to the specific question dealt with by this Code Subsection.

Subsection (2).

This Subsection states the same principle stated by R. S. 1954, c. 188, sec. 57 (Uniform Negotiable Instruments Law). Also see Merrill Trust Co. v. Brown, 122 Me. 101, 119 Atl. 109 (1922); Gilman v. F. O. Bailey Carriage Co., 125 Me. 108, 131 Atl. 138 (1925); Lieberman v.

S. D. Warren Co., 124 Me. 392, 134 Atl. 449 (1926).

R. S. 1954, c. 53, secs. 57 and 58 (Uniform Stock Transfer Act), are also in accord with this Subsection.

Subsection (3).

See R. S. 1954, c. 188, sec. 54, for the same principle this Subsection expresses.

Section 8-302. "Bona Fide Purchaser."

R. S. 1954, c. 53, secs. 57 and 58 use the phrase "purchaser for value in good faith, without notice of any facts making the transfer wrongful." This Subsection's definition of "bona fide purchaser" is in substantially the same language used by R. S. 1954, c. 53 to describe that person who takes free from any defect of title of prior parties, and free from defenses available to prior parties among themselves.

R. S. 1954, c. 188, sec. 52 (Uniform Negotiable Instruments Law), gives the definition of a "holder in due course." This Subsection's definition of a "bona fide purchaser" is broader than the definition of a "holder in due course" because "value" is more broadly defined in UCC Section 1-201(44), and the requirement under R. S. 1954, c. 188, sec. 52(I) that the instrument be complete and regular upon its face is now omitted. For case law on the subject, see Merrill Trust Co. v. Brown, 122 Me. 101, 119 Atl. 109 (1922); Jordan v. Goodside, 123 Me. 330, 112 Atl. 859 (1923); Madigan v. Lumbert, 136 Me. 178, 5 A.2d 278 (1939).

Section 8-303. "Broker."

R. S. 1954, c. 59, sec. 231 (dealing with the registration of dealers in securities), indicates that it uses the term "dealers" to

mean those persons whom this Code section refers to as "brokers." And see State v. Cushing, 137 Me. 112, 15 A.2d 740 (1940).

R. S. 1954, c. 188, sec. 69 (Uniform Negotiable Instruments Law) uses the term "broker" in describing the liability of agents and brokers, but the chapter does not define the term "broker."

Section 8-304. Notice of Purchaser of Adverse Claims.

Subsection (1)(a).

This Subsection has the same effect as R. S. 1954, c. 188, sec. 37 -- subsequent indorsees acquire only the title of the first indorsee under a restrictive indorsement.

Subsection (1)(b).

No cases have been found, but the Subsection is in accord with accepted principles of notice.

Subsection (2).

This Subsection is a bit more explicit than the corresponding Maine statute, R. S. 1954, c. 188, sec. 57, when it comes to defining what does not constitute notice of a defect. See Mechanics Savings Bank v. Berry, 119 Me. 404, 111 Atl. 533 (1920).

Section 8-305. Staleness as Notice of Adverse Claims.

The Code changes present law: under given circumstances there may now be a bona fide purchaser of a matured instrument. Present law -- R. S. 1954, c. 188, sec. 52(II) -- requires that a holder be a holder of the instrument before it was overdue.

Cf. Jordan v. Goodside, 123 Me. 330, 122 Atl. 859 (1923);

Hibbard v. Collins, 127 Me. 383, 143 Atl. 600 (1928).

R. S. 1954, c. 188, sec. 53 deals with the situation in which an instrument payable on demand is negotiated an unreasonable length of time after its issue. This Code section states explicitly what is an unreasonable time.

Section 8-306. Warranties on Presentment and Transfer.

Subsection (1).

There is neither statutory nor case law dealing with warranties to the issuer.

Subsection (2).

The present statutory law on this subject is contained in R. S. 1954, c. 53, sec. 61, and R. S. 1954, c. 188, sec. 65. R. S. 1954, c. 53, sec. 61 (Uniform Stock Transfer Act) is substantially in accord with the three warranties provided for by this Code Subsection.

R. S. 1954, c. 188, sec. 65 (Uniform Negotiable Instruments Law) is similarly in substantial accord with this Code Subsection.

Subsection (3).

The principles expressed by this Subsection are substantially similar to those expressed in R. S. 1954, c. 188, sec. 69. However, unlike this Subsection, R. S. 1954, c. 188, sec. 69 would make brokers and agents subject to the same rule.

Subsection (4).

See the similar statutory provision in R. S. 1954, c. 53, sec. 52 (Uniform Stock Transfer Act).

Section 8-307. Effect of Delivery Without Indorsement; Right to Compel Indorsement.

This section changes the rule of R. S. 1954, c. 53, sec. 51 because the Code provides that as between the parties, transfer is complete upon delivery of the security. Under R. S. 1954, c. 53 (Uniform Stock Transfer Act) that is not true.

However, that position -- that as between the parties, transfer is complete upon delivery of the security -- is consistent with the position taken by R. S. 1954, c. 188, sec. 49 (Uniform Negotiable Instruments Law).

When the Code gives the purchaser the right to have any necessary indorsement supplied where that indorsement has not been made, it is consistent with the rule contained in R. S. 1954, c. 53, sec. 59 and R. S. 1954, c. 188, sec. 49.

Section 8-308. Indorsement, How Made; Special Indorsements; Indorser Not a Guarantor; Partial Assignment.

Subsection (1).

The definition of an "indorsement" is substantially the same as that contained in R. S. 1954, c. 53, sec. 69. The Code's definition leaves out the remark that a certificate is indorsed even if it has not been delivered, but this does not seem to be a significant change.

The Code's definition of an "indorsement" is clearly broader than the definition carried in R. S. 1954, c. 188, sec. 31 (Uniform Negotiable Instruments Law). That act merely says that "the indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

Subsection (2).

In providing that an indorsement may be in blank or special, this Subsection states the same rule contained in R. S. 1954, c. 188, sec. 33. The Code's definition of an indorsement in blank (indorsement in blank includes an indorsement to bearer) is similar to the definition of the same phrase in the last sentence of R. S. 1954, c. 188, sec. 34 (Uniform Negotiable Instruments Law).

The Code's definition of a special indorsement is again similar to the definition contained in R. S. 1954, c. 188, sec. 34. One dissimilarity is noticeable -- the present statute expressly states that the indorsement of the indorsee of the special indorsement is necessary for the further negotiation of the instrument; the Code does not expressly state that rule. However, in providing that a "special indorsement specifies the person . . . who has power to transfer it," the Code impliedly states the rule.

Finally the Code and R. S. 1954, c. 188, sec. 34 are consistent in principle in providing that a holder may convert a blank indorsement into a special indorsement. The present statutory provision goes a little further in defining how the conversion can be made.

Subsection (3).

(a) Accord: R. S. 1954, c. 53, secs. 69 and 70.

(b) No prior law.

(c) No prior law.

(d) Cf. R. S. 1954, c. 53, sec. 73.

(e) No prior law.

(f) Cf. R. S. 1954, c. 53, sec. 73.

(g) Cf. R. S. 1954, c. 53, sec. 73.

Subsection (4).

Subsection (4) of the Code does not change the law applying to stock for there was no warranty pertaining to the issuer's obligation, if any. The Negotiable Instruments Law provision does not apply under this section of the Code.

Subsection (5).

This Subsection provides for indorsement of a part of the security. This is a change with respect to R. S. 1954, c. 188, sec. 32 (Uniform Negotiable Instruments Law), which provided that the indorsement had to be of the entire instrument, but where the instrument had been paid in part, the indorsement could be of the residue.

Subsection (7).

This Subsection of the Code limits the definition of an unauthorized indorsement or signature when a fiduciary is involved. See UCC Section 8-304, re-purchaser and 8-403(3), 404.

Section 8-309. Effect of Indorsement without Delivery.

When it makes a transfer dependent upon delivery of the security, the Code states the rule appearing in R. S. 1954, c. 53, sec. 51(I). However, as the Comment to this section points out, the provisions of R. S. 1954, c. 53, sec. 60 -- as to the effect of an attempted transfer without delivery -- have been omitted.

Also, see R. S. 1954, c. 188, sec. 30.

Section 8-310. Indorsement of Security in Bearer Form.

Present statutory law on this subject is contained in R. S. 1954, c. 188, sec. 40 (Uniform Negotiable Instruments Law). The Code changes present law by omitting the qualification of the special indorser's liability that was contained in R. S. 1954, c. 188, sec. 40.

Section 8-311. Effect of Unauthorized Indorsement.

The Code changes the present law on this subject. R. S. 1954, c. 188, sec. 23 (Uniform Negotiable Instruments Law), the present law on this subject, says that when a signature is forged, it is wholly inoperative; the Code would protect a bona fide purchaser who has received a new, re-issued or re-registered security.

Case law on this subject is found in Branz v. Stanley, 142 Me. 318, 51 A.2d 192 (1947). The court said that if a person, by fraud and deceit, is tricked into signing that which afterwards proves to be a note, the instrument is a forgery and void as to all parties.

Section 8-312. Effect of Guaranteeing Signature or Indorsement.

Subsection (1).

There is no statutory law on this subject. Neither does there appear to be any case law describing the warranties made when any person guarantees a signature of an indorser of a security. However, in a case dealing with the same general problem, a Maine court laid down principles consistent with those of this Subsection. Wamesit National Bank v. Merriam, 114 Me. 437, 96 Atl. 740 (1916).

Subsection (2).

There is no statutory law describing the warranties made upon a guarantee of the indorsements on a security. However, the rule stated

in this Subsection seems to be in accord with the present laws treatment of problems similar to the one faced by this Subsection. Cf. Irish v. Cutter, 31 Me. 536 (1850); Bray v. Marsh, 75 Me. 452 (1883).

Subsection (3).

This is new.

Section 8-313. When Delivery to the Purchaser Occurs; Purchaser's Broker as Holder.

Subsection (1).

In making it clear that delivery to a purchaser may occur not only upon a transfer of possession to the purchaser but also upon other contingencies -- Subsections (1)(b), (c) and (d) -- the Code expands the meaning of the term "delivery." Statutory definitions of the term "delivery" are definitely narrower than the Code's definition because they do not expressly provide for the contingencies provided for by Subsection (1)(b), (c) and (d). See R. S. 1954, c. 53, sec. 71 and R. S. 1954, c. 188, sec. 191. For case law discussion of the requirements of "delivery," see Jones v. Jones, 101 Me. 447, 64 Atl. 815 (1906); International Harvester Co. v. Fleming, 109 Me. 104, 82 Atl. 842 (1906).

Subsection (2).

This is new. The purpose of this Subsection is made clear by Comments 3 and 4.

Section 8-314. Duty to Deliver, When Completed.

The emphasis of Subsection (1) is upon transfers on exchanges or through brokers. When a security is traded on an exchange or through brokers, the duty of delivery is satisfied by the customer

delivering to the selling broker, and the selling broker confirms when he delivers to the buying broker. Under Subsection (2) where the sale is not through an exchange or broker, the transferor must make physical delivery of the certificate. An exception is made under both Subsections where a person acknowledges that he holds the security for the selling broker or the purchaser. This exception constitutes a change in the law.

Section 8-315. Action Against Purchaser Based upon Wrongful Transfer.

Subsection (1).

This Subsection continues the policy of R. S. 1954, c. 53, sec. 57: an owner may reclaim possession of a security wrongfully transferred. An exception is made -- as in the prior law -- in favor of bona fide purchasers.

Subsection (2).

This Subsection states new law when it provides that where the transfer is based upon a forged or unauthorized indorsement the exception provided in Subsection (1) operates only in favor of a bona fide purchaser who has received a new security upon registration of transfer. See UCC Section 8-311 and the Comments thereto.

Section 8-316. Purchaser's Right to Requisites for Registration of Transfer on Books.

Existing legislative provisions: none.

This section is new.

Section 8-317. Attachment or Levy upon Security.

Accord: R. S. 1954, c. 53, secs. 63, 64.

Section 8-318. No Conversion by Good Faith Delivery.

Existing statutory provisions: none.

Changes:

This Subsection clearly changes the rule of the common law in Maine. Under Maine decisions, a person who sells property of another, without authority from the owner, is a converter. This is so notwithstanding the fact that the seller acts as bailee or agent of one purporting to be the owner, and is ignorant of the principal-depositor's lack of title and/or authority to dispose of the securities. Kimball v. Billings, 55 Me. 147 (1867); McPheters v. Page, 83 Me. 234, 22 Atl. 101 (1891); Wing v. Milliken, 91 Me. 387, 40 Atl. 138 (1898).

The Code provides that the agent or bailee is not liable for innocent conversion. Note that in the case of dealers observance of reasonable commercial standards is required in addition to good faith.

Section 8-319. Statute of Frauds.

Existing legislative provisions: R. S. 1954, c. 185, sec. 4.

Changes:

(a) Accord: R. S. 1954, c. 185, sec. 4; also R. S. 1954, c. 119, sec. 5 (relating to contracts entered into before July 6, 1923). See also Pray v. Mitchell, 60 Me. 434 (1872), holding that a sale of stock is within the Statute of Frauds.

One change is introduced in the Code in that it applies without regard to the amount in controversy. Present law is applicable to a sale or contract to sell choses in action of a value in excess of $500.

(b) Under prior law (R. S. 1954, c. 185, sec. 4(I)) partial

acceptance or payment would take the entire contract out of the Statute. See also Ford v. Howgate, 106 Me. 517 (1910) holding that delivery or acceptance is sufficient execution to take the contract outside the Statute of Frauds. Under the Code, the contract is taken out of the Statute only to the extent of such acceptance or payment.

(c) This provision is new.

(d) This follows closely the provisions of UCC Section 2-201(3)(b), which deals with the Statute of Frauds in sale of goods.

Part 4

REGISTRATION

Section 8-401. Duty of Issuer to Register Transfer.

Existing legislative provision: none.

Changes:

Subsection (1).

Although the Uniform Stock Transfer Act (R. S. 1954, c. 53) has no comparable provision, Maine courts have construed earlier statutes to impose upon corporate officers the duty to issue new certificates and to record the transfer on the books of the company. Dennett v. Acme Mfg. Co., 106 Me. 476, 76 Atl. 922 (1910). The provision presently corresponding to that in the Dennett case is R. S. 1954, c. 53, sec. 48, which applies only to shares issued prior to July 9, 1943.

Additional authority for the duty to register a transfer is found in Smith v. Poor, 40 Me. 415, at 422 (1855) which cites with approval Bank of Buffalo v. Kortright, 22 Wend. (N.Y.) 348 (1839).

The Code makes the duty to register the transfer clear and explicit, subject to the qualifications enumerated in (a) through (e).

Subsection (2).

In Dennett v. Acme Mfg. Co., supra, it was held that mandamus would lie against corporate officers who wrongfully refused to issue new certificates to the transferee. Dictum in the same case implies an alternative right to money damages.

The Code specifically provides for damages; it does not deal with other remedies, including mandamus. Presumably alternative remedies remain available.

Section 8-402. Assurance that Indorsements are Effective.

Subsection (1)(a).

Accords with present practice. Christy and McLean, "The Transfer of Stock", Second Edition (1940), sec. 44.

Subsection (1)(b).

Accord: Christy and McLean, supra, chapters 12 and 14.

Subsection (1)(c).

Accord: Christy and McLean, supra, secs. 85, 200, 210.

Subsection (1)(d).

Accord: Christy and McLean, supra, sec. 204.

Subsection (2).

This definition adopts practice followed in an organized securities exchange.

Subsection (3).

Follows R. S. 1954, c. 53, sec. 72(D) (enactment effective as of Jan. 1, 1960) relating to evidence of appointment or incumbency.

Subsection (4).

This provision authorizes the issuer to require additional assurance but deters needless investigation by putting searcher on notice of all data contained in the material requested. Compare last sentence of R. S. 1954, c. 53, sec. 72(D) "Neither the Corporation nor transfer agent is charged with notice . . . except to the extent that the contents relate directly to the appointment or incumbency." which

operates when the transfer agent or Corporation is bound to investigate.

Section 8-403. Limited Duty of Inquiry.

This section is basically in accord with the Uniform Act for Simplification of Fiduciary Security Transfers, R. S. 1954, c. 53, sec. 72, adopted in Maine in 1959, and effective as of Jan. 1, 1960.

Section 8-404. Liability and Non-Liability for Registration.

Subsection (1).

The non-liability of Corporations or transfer agents in making a transfer in a manner authorized is in accord with R. S. 1954, c. 53, sec. 72(F), adopted in 1959 and effective Jan. 1, 1960.

Subsection (2).

Subsection (2)(c) is new. See Annotations to Section 8-104.

Section 8-405. Lost, Destroyed and Stolen Securities.

Subsection (1).

The notification requirement imposed upon the owner of a lost, destroyed or stolen instrument is new, and no Maine cases were found in point. This provision is compatible, however, with R. S. 1954, c. 53, sec. 67 which allows a claimant to apply to a court of competent jurisdiction for an order compelling a new certificate and requires notice to all persons interested.

Subsection (2).

This provision alters R. S. 1954, c. 53, sec. 67 which requires that a court order be entered to compel issuance of a new certificate where original is not presented, and now allows the owner to do likewise upon satisfaction of the enumerated conditions.

Subsection (3).

No Maine cases were found in point. Under this Subsection, and where no overissue would result, the issuer is required to issue a new certificate to a BFP of the "lost" certificate, even though the original owner has been issued a new certificate. And unless the original owner has not transferred to a BFP, the issuer may not recover the new certificate issued. The indemnity bond, however, permits the issuer to shift his loss to the claimant who "lost" the original certificate. This follows the principle that "when one of two innocent parties must suffer . . ., he who occasioned the loss must sustain it." Phillips v. A. W. Joy Co., 114 Me. 403, 96 Atl. 727 (1916).

Section 8-406. Duty of Authenticating Trustee, Transfer Agent or Registrar.

Subsection (1).

This provision is new. See Uniform Law Comment 1.

Subsection (2).

Accord: Restatement of Agency, Section 268.

Article 9

SECURED TRANSACTIONS: SALES OF ACCOUNTS, CONTRACT RIGHTS AND CHATTEL PAPER

Part 1

SHORT TITLE, APPLICABILITY AND DEFINITIONS

Section 9-101. Short Title.

The basic policy of Article 9 is to eliminate technical distrinctions between form of security devices such as chattel mortgages, conditional sales, trust receipts, etc., and to substitute one uniform set of rules for all security transactions which would vary in minor respects, depending upon the subject matter of the transaction. The elimination of these distinctions will remove traps based upon formal technicalities resulting from the piece-meal development of the law relating to various types of security transactions in personal property and not from any apparent fundamental public policy.

To implement this basic policy, Article 9 either carries forward into all fields of security transactions principles which have been formulated in some fields of Maine law, expressly abrogates the application of principles which probably never represented Maine law but which because of the lack of sufficient case authority have never been clearly disposed of, plugs gaps in certain fields with respect to problems for which there is now no satisfactory answer in Maine law, or adopts rules which are probably contrary to Maine precedents.

Section 9-102. Policy and Scope of Article.

Subsection (1).

Some agreements, for example certain types of leases and consignments, which formerly were drafted so as not to constitute mortgages,

conditional sales or trust receipts might now be "security agreements" within the meaning of UCC Section 1-201(37). If so, they become subject to the provisions of this Article.

Subsection (2).

This Subsection makes it clear that unlike present Maine law, which places great weight on the form the transaction takes, the legal consequences flowing from this Article apply to agreements which are intended to be security interests, unless expressly excluded from coverage.

Subsection (3).

See the general repealing statute for the changes that must be made because of the adoption of this Code.

Section 9-103. Accounts, Contract Rights, General Intangibles and Equipment Relating to Another Jurisdiction; and Incoming Goods Already Subject to a Security Interest.

Subsection (1).

This rule is new. No Maine case deciding whether R. S. 1954, c. 113, sec. 171 (Assignment of Accounts) would be applied by a Maine court in determining the validity or perfection of an assignment made in a foregin state has been found. A hypothetical situation can be imagined where an assignment of a chose is made in another state. That state requires the assignee to record the assignment in order to be protected. He fails to record. A subsequent assignment of the same chose is made by the assignor in Maine. First assignee then brings an action against the second assignee in a state court of Maine claiming a superior right in the chose. If Maine applies the rule of the foreign state, second assignee wins because first assignee failed to record.

But if Maine applies the lex fori, then R. S. 1954, c. 113, sec. 171 gives the first assignee a superior position because that Maine section does not require recordation for protection. In the apparent absence of any Maine decision on this point, we can only speculate on how the courts would decide the foregoing question. The court could apply the law of the place of assignment, thereby following the principle of cases like Stickney v. Jordan, 58 Me. 106 (1870) and Bell v. Packard, 69 Me. 105 (1879). Or it could say that the law of the place of business of the account debtor is the governing law because that is where the final payment on the assigned accounts or contracts is made. Cf. Flynn v. Currie, 130 Me. 461, 157 Atl. 310 (1931); Gibuere v. Webber, 149 Me. 12, 98 A.2d 548 (1953). And again, it might take the position that R. S. 1954, c. 113, sec. 171, states a strong policy: therefore it should be strictly construed to mean that all assignments are valid when made. To sum up, the foregoing illustrates not only that the law in this area is in an unsettled state but also that by making the choice of law dependent on the office of the assignor, this Subsection states a rule not found in the different theories formerly espoused.

Also, note that an assignment of wages is not covered by this Subsection because UCC Section 9-104 excludes such assignments from Code coverage. R. S. 1954, c. 119, sec. 10 is the applicable law. And see Peabody v. City of Lewiston, 83 Me. 286, 22 Atl. 171 (1891).

Subsection (2).

Since present Maine law does not contain a classification analogous to the Code's "general intangibles," this rule as to such intangibles is new. "General intangibles" is defined by UCC Section 9-106, and,

more specifically, by the Comment to that section. The Comment states that this new classification includes goodwill, literary rights, rights to performance, copyrights, trademarks and patents. Thus, all security interests in those intangibles would be governed by this Subsection's "chief place of business" test. Compare this with present law which would test the validity and perfection of such security interest according to the specific intangible which is the subject of the security agreement or assignment. For example, R. S. 1954, c. 182, secs. 8 and 9 require that the assignment of a trademark be recorded in the office of the Secretary of State in order to be effective against all parties.

In addition to the new classification, the substance of the conflict of law test is changed. Presently, the court might look to a number of different tests in choosing the applicable law: the rule of the place of assignment, the rule of the place of performance or the rule of the place whose laws the parties intended to govern the transaction. See Subsection (1) of this section. In making the "chief place of business of the debtor" the test, this Subsection makes clear what otherwise was confusing.

Generally, Maine does not make a distinction between the rules governing the validity and perfection of security interests in "goods of a type normally used in more than one jurisdiction" and those governing interests in goods not normally used in more than one jurisdiction. An exception is R. S. 1954, c. 46, sec. 99, which requires that a conditional sale of railroad equipment be recorded in the office of the Secretary of State or with the Interstate Commerce Commission before it is afforded protection. Unlike the general rule governing

the protection afforded foreign conditional sales -- Drew v. Smith, 59 Me. 393 (1871) (even if the conditional sale was not recorded in Maine, the conditional vendor who made delivery in Vermont had a superior interest in the chattel because Vermont law ruled the transaction, and Vermont law did not require that conditional sales be recorded) -- the aforementioned statute appears to require filing with the proper authorities, i.e. the Secretary of State or the Interstate Commerce Commission, as a condition precedent to protection in this state. If so, this Code Subsection gives more protection to the secured party of this type of movable tangibles because under the Code, Maine will accede to the rules of the state where the debtor has his "chief place of business."

As to the rules governing interests in other types of moving tangibles not covered by the Maine statutes -- automobiles, road building equipment, etc. -- present law would treat them in the same manner normally stationary tangibles are treated: the legal consequences are dependent on the form the transaction takes. For example, the validity and perfection of security interests taking the form of conditional sales is governed by the law of the jurisdiction where the conditional sale was made. Drew v. Smith, 59 Me. 393 (1871) (conditional sale of horses, harnesses and wagon); Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 Atl. 1001 (1915) (conditional sale of automobile). Under this conflict of law rule, the conditional vendor of a sale made in a foreign state need not comply with the provisions of R. S. 1954, c. 119, sec. 9, for protection in Maine. Of course this assumes perfection in the state where made. Substantially the same rule was again enunciated in the recent case of Boscho, Inc. v. Knowles, 147 Me. 8, 83 A.2d 122

(1951). The Boscho court, like the Drew and Franklin Motor Car Co. courts, looked to the place of making. In addition, however, the Boscho court considered two other variables in choosing the appropriate law: the situs of the property at the time the contract was made and the place of delivery. Therefore, although it can definitely be said that present law would not require compliance with R. S. 1954, c. 119, sec. 9 when the contract is made in another state, the question still remains whether Maine will apply the law of the state where the contract is made, the law of the state where the collateral has its situs at the time of contract, or the law of the state where delivery of the collateral is made. For example, suppose the conditional sale contract is made in Maine, but at the time the transaction was made the chattel was in New Hampshire. Faced with a similar situation, other courts (Thomas G. Jewett, Jr., Inc. v. Keystone Driller Co., 282 Mass. 469, 185 N.E. 369 (1933)) have applied the rule of the place of making. The result of that case has been criticized. See Goodrich, Conflict of Laws, 486 (1949). Suffice it to say then that, as is the usual case in this area of the law, even where there is an apparently clear view as to the present state of the conflict laws in Maine, some questions are still unresolved. In expressly providing that the "chief place of the Code eliminates some such questions.

The present state of the law concerning security interests in movables taking the form of chattel mortgages is yet another question. On this one, there is little authority in point. On the one hand, Maine precedent says that R. S. 1954, c. 178, sec. 1 affording protection only to recorded mortgages, must be strictly construed. Peaks v. Smith,

104 Me. 315, 71 Atl. 884 (1908); Hayden v. Russell, 119 Me. 38, 109 Atl. 485 (1920); Production Credit Assn. v. Kent, 143 Me. 145, 56 A.2d 631 (1948). Therefore the court could go the way of the Texas Supreme Court in Consolidated Garage Co. v. Chambers, 111 Tex. 293, 231 S.W. 1072 (1921): it could protect the innocent third parties even if the security was perfected in the foreign state.

On the other hand, Maine could follow the general rule and apply the lex loci contractus. The Texas position of not recognizing and giving effect to the foreign security interest can raise due process questions; Maine might not want to take that risky position. See Stumberg, "Chattel Security Transactions in the Conflict of Laws," 27 Ia. L. Rev. 528 (1942). Moreover, the Maine statute on Chattel Mortgages was a re-enactment of the Massachusetts statute dealing with the same security interest. Drew v. Smith, 59 Me. 393 (1871). And that case said that Maine courts had followed the construction placed upon the same statute by the court in Massachusetts. Thus, although strictly speaking the question was not one of statutory interpretation, the fact that Massachusetts has not required foreign mortgages to comply with its recording statute is persuasive that Maine would rule the same way. See Langworthy v. Little, 12 Cush. 109 (Mass. 1853).

From this discussion of the present law, it is once again clear that the Code makes for explicitness in this area of the law because its "chief place of business" test eliminates the above problems.

Subsection (3).

In making the validity of the security agreement depend upon the law of the jurisdiction where the property is located when the

security interest attached, this section follows the rule enunciated by Drew v. Smith, 59 Me. 393 (1871). And see Katz v. Gordon Johnson Co., 160 F. Supp. 126 (S.D. Me. 1958).

However, in providing an exception to the general rule when the parties understand that the property would be brought into this state -- in such a case the Code says that the lex loci governs -- the Code changes the law. For today, even if the parties understand that the property is to be brought into Maine, the Maine court would still apply the Drew rule. Boscho, Inc. v. Knowles, 147 Me. 8, 83 A.2d 122 (1951).

The law regarding the protection of security interests perfected in foreign states is changed. The present state of the law was discussed in the Annotation to Subsection (1) of this section. Generally the rule for interests in goods normally used in more than one jurisdiction and in other personal property is the same because Maine does not make the separate classification the Code does. A conditional vendor, therefore, is better treated under present Maine law than under the Code because under the rule of Drew v. Smith, supra, once perfected in a foreign state the foreign security interest is safe. Under the Code he has protection for a 4-month period but must record once the 4 months elapses if he desires further protection.

With no authority elucidating the present state of the law, it is difficult to say whether the Code substantially changes the chattel mortgagee's position. If the Maine courts look to the lex loci -- as the Texas Supreme Court did in Consolidated Garage Co. v. Chambers, 111 Tex. 293, 231 S.W. 1072 (1921) -- the Code gives a greater degree of protection to the mortgagee because under the Code he has 4 months

to record, whereas R. S. 1954, c. 178, sec. 1 requires him to record immediately if he desires full protection. Production Credit Assn. v. Kent, 143 Me. 145, 56 A.2d 631 (1948). But if Maine respects the foreign chattel mortgage and looks to foreign law to settle the controversy, the question then becomes whether Maine would look to the law of the place where the property is located when the agreement is made or the place of the making of the contract. If the former, the Code makes no change because it states the same rule; if the latter, the Code changes the law. The question has not been decided in Maine.

To sum up, one thing is clear from the foregoing: Maine courts make their choice of law dependent on the form the security agreement takes. This Subsection makes it equally clear that the Code does not follow that position.

Section 9-104. Transactions Excluded from Article.

(a) Comment 1 of this section makes it clear that if the Federal statute contains no relevant provision, this Article could be looked to for an answer. Therefore, although the Federal Copyright Act contains provisions permitting the mortgage of a copyright (17 USCA Secs. 28, 30) such a statute would not seem to contain sufficient provisions governing the rights of parties to exclude security interests in copyrights from the provisions of Article 9. Compare Republic Pictures Corp. v. Security-First National Bank of Los Angeles, 197 F.2d 767 (9th Cir. 1952). This all seems to follow from the fact that clause (a) of this section excludes transactions from this Article only "to the extent" that the Federal statute governs

the rights of parties and third parties.

(b) Except for questions of priorities of liens on fixtures (UCC Section 9-313), this clause makes plain that this Article applies only to security interests in personal property; and that questions regarding the validity and perfection of landlord liens are still governed by present Maine law.

(c) Self-explanatory.

(d) Assignments of wages would continue to be governed by R. S. 1954, c. 119, sec. 10.

(g) through (k) These clauses are self-explanatory.

Section 9-105. Definitions and Index of Definitions.

Subsection (1)(a). "Account debtor."

The same phrase is used in R. S. 1954, c. 113, sec. 172. Although that statute fails to define the phrase, its meaning derived from its use in that context is the same given by this Subsection.

Subsection (1)(b). "Chattel paper."

There is no comparable statutory definition. However, in terms of existing security devices, the definition covers the conditional sale contract, the bailment lease and the chattel mortgage.

Subsection (1)(c). "Collateral."

Again the legislature has failed to define this term. But the word is used in R. S. 1954, c. 188, sec. 5 and it has

acquired a common business meaning consistent with the definition given by this Subsection.

Subsection (1)(d). "Debtor."

This word has been used to refer to either a person obligated on an account or to any person owing a debt.

Subsection (1)(e). "Document."

"Document of title" has a present statutory definition. See R. S. 1954, c. 185, sec. 76. The change worked by this Code section is to make it explicit that the document must purport to be addressed to a bailee. Also, the definition is left open so that new documents may be included. See R. S. 1954, c. 189, the Uniform Trust Receipts Act.

Subsection (1)(f). "Goods."

Like this section, the corresponding Maine definitions exclude "money" and "things in action" from the meaning of "goods."

Subsection (1)(g). "Instrument."

R. S. 1954, c. 189, sec. 1 (Uniform Trust Receipts Act), does not give as broad a meaning to "instruments" as this section because it specifies the type of writings which are "instruments" unlike the more inclusive "any other writing" approach this section takes.

Subsections (1)(h) and (i). "Security agreement."

There are no comparable statutory definitions in Maine

law because the present scheme of the law is in most cases to deal with security agreements and secured parties in accordance with the type of device employed.

Section 9-106. Definitions: "Account;" "Contract Right;" "General Intangibles."

"Account." The definition is similar in scope to that contained in the Maine statute dealing with "assignment of accounts," R. S. 1954, c. 113, sec. 171.

"Contract right." This intangible is given a separate classification under the Code. One degree less certain than an "account," a "contract right" represents a right to be earned by future performance under an existing contract. But since R. S. 1954, c. 113, sec. 171 would include within the meaning of "account" any amount to become due on a contract, present Maine law does not make the same distinction between the two types of intangibles.

"General Intangibles." Present law does not make use of this "catch-all" classification. Instead, intangibles such as copyrights and trademarks which are included within the Code meaning of "General Intangibles" (see Comment Section 9-106) are treated separately in the Maine statutes. For example, R. S. 1954, c. 182 governs the assignment of trademarks independent of R. S. 1954, c. 113, sec. 171 (Assignment of Accounts).

Section 9-107. Definitions: "Purchase Money Security Interest."

This section works a vital change in the law because it sweeps into one classification what formerly would have been conditional sales, certain mortgages and trust receipts. Its effect is to unify the

consequences resulting from security interests which have been created for the purpose of acquiring new assets. This is not the situation under today's law. Compare, for example, the filing requirements of R. S. 1954, c. 119, sec. 9 (Conditional Sales) and see Drew v. Smith, 59 Me. 393 (1871); R. S. 1954, c. 178, sec. 1 (Mortgages); and R. S. 1954, c. 189, secs. 7, 8, 9, 13 (Trust Receipts).

Section 9-108. When After-Acquired Collateral not Security for Antecedent Debt.

This section is of principal importance in insolvency proceedings under the Federal Bankruptcy Act. Since that Act would make certain transfers for antecedent debt voidable as preferences, and since the determination of when a transfer is for antecedent debt is left to state law, this section performs the function of taking some security interests in after-acquired property out of the preference prohibitions of Section 60 of the Federal Bankruptcy Act by deeming those interests to be taken for new value. In so doing, this section only makes clear what has most likely been the law in Maine -- an after-acquired property interest is not, by virtue of that fact alone, security given for an antecedent debt. But, since those cases which have concerned themselves with the problems arising from after-acquired property clauses, e.g., Sawyer v. Long, 86 Me. 541 (1894); Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678 (1905); Beal v. Universal C.I.T. Credit Corp., 146 Me. 437, 82 A.2d 412 (1951), have not directed themselves to the specific point made by this section, it is not clear whether the Maine courts would come out with the same result as Section 9-108 in all cases.

Section 9-109. Classification of Goods; "Consumer Goods;" "Equipment;" "Farm Products;" "Inventory."

Since Article 9 looks to the subject matter involved rather than the form of the legal device used, as is generally the case in Maine, the division of "goods" into various sub-classifications becomes necessary if certain protective provisions are to be made available only when economically necessary.

The division into the specific classification made by this section is new, but there is statutory precedent for such a division. For example, "inventory" may be compared to "merchandise" in R. S. 1954, c. 181, sec. 4.

Section 9-110. Sufficiency of Description.

Decisional law has been to the effect that property should be so specifically described as to enable all interested to identify it. Sawyer v. Pennell, 19 Me. 147 (1841). But specific enumeration of property is not essential to the validity of the mortgage. Wolfe v. Dorr, 24 Me. 104 (1844). Thus, in Capin v. Cram, 40 Me. 561 (1855), it was not essential to the validity of a mortgage that the schedule of the goods referred to in the mortgage, but not made a part of it, be recorded. The degree of specificity required by statutory law is expressed in Chapters 181 and 189.

Chapter 181, Section 4(III), Factors Lien Act, requires that the recorded notice of the lien state; "The general character of materials . . . and merchandise subject to the lien . . . ."

Chapter 189, Section 13(I)(c), Uniform Trust Receipts Act, would require "a description of the kind or kinds of goods covered . . . by such financing."

In view of the foregoing, the principles contained in both case

and statutory law seem to be in accord with the policy of this section.

Section 9-111. Applicability of Bulk Transfer Laws.

No case has been found which would include a security interest within the meaning of the word "sales" contained in Chapter 119, Section 6, Bulk Sales Act. Maine would therefore appear to follow the general rule expressed in the Comment to Section 9-111. See Article 6, Section 6-102.

Section 9-112. Where Collateral is not owned by Debtor.

There is no comparable provision in existing Maine law.

Section 9-113. Security Interests Arising Under Article on Sales.

See the Maine Annotation to the various sections of the Article on Sales (UCC Article 2) referred to in the Comments of this section. Note should be taken of the fact that the secured party may be the buyer and the debtor may be the seller, e.g., Sections 2-502, 2-711. It is also to be noted that Article 9 rules apply when the debtor lawfully obtains possession. Generally, see Hogan, "The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety," 38 B.U.L. Rev. 571 (1958).

Part 2

VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERETO

Section 9-201. General Validity of Security Agreement.

The emphasis here and throughout the Code is on the effectiveness of a security instrument, whereas older statutory provisions are often phrased in negative terms.

Section 9-202. Title to Collateral Immaterial.

Maine law has honored the location of "title" in security transactions. A chattel mortgage is a sale to the extent of carrying title, not an agreement to sell; a conditional sales agreement retains title in the vendor. Beal v. Universal C.I.T. Credit Corp., 146 Me. 437, 82 A.2d 412 (1951). See also, MAC Motor Sales, Inc. v. Pate, 148 Me. 72, 90 A.2d 460 (1952). This Article defines the rights, obligations and remedies of parties without reference to "title."

Section 9-203. Enforceability of Security Interest; Proceeds, Formal Requisites.

Subsection (1)(a).

Possession taken within twenty days of the date written in the chattel mortgage makes recording of the transaction unnecessary. R. S. 1954, c. 178, sec. 1. Production Credit Assn. v. Kent, 143 Me. 145, 56 A.2d 631 (1948). Possession by a factor or any third party for the account of a factor is equally effective. R. S. 1954, c. 181, sec. 9.

A delivery of personal property to one as collateral security, where there is no written conveyance of it, cannot

be regarded as a mortgage. Day v. Swift, 48 Me. 386 (1860). Consequently delivery of possession is generally essential to the validity of a pledge in Maine law. Beeman v. Lawton, 37 Me. 543 (1854). Under the recently enacted Uniform Trust Receipts Act, however, certain pledge transactions may be temporarily perfected without delivery of possession against all creditors for ten days, if new value is given at the time of the pledge. See R. S. 1954, c. 189, secs. 3, 15. The taking of possession by the entruster pursuant to a trust receipts arrangement is deemed to have the effect of filing, in the case of goods and documents, and the effect of notice, in the case of instruments. R. S. 1954, c. 189, sec. 7.

Subsection (1)(b).

The requirement of a written security agreement containing a description of the collateral where the collateral is not in the possession of the secured party is generally in accord with present Maine law. A chattel mortgage to be effective absent possession by the mortgagee or his bailee requires at the least the recording of a memorandum of the mortgage, signed by the party bound, and describing the parties bound, the mortgaged property, the date of the mortgage, the terms of payment and the amount unpaid. R. S. 1954, c. 178, sec. 1. Case law requires that the description be so specific as to enable all interested to identify the property, aided by the inquiries which itself would direct. Sawyer v. Pennell, 19 Me. 167 (1841). A similar filing requirement is imposed in a conditional

sales transaction. R. S. 1954, c. 119, sec. 9. A factor's lien must be recorded in substantially the same manner as the chattel mortgage. R. S. 1954, c. 181, secs. 4, 5.

There is no requirement in Maine law as to the recordation of assignments of accounts receivable. R. S. 1954, c. 113, sec. 171.

The Uniform Trust Receipts Act requires a description of the kind or kinds of goods covered or to be covered by the financing, and the signature of both entruster and trustee, in addition to the standard requirements. R. S. 1954, c. 189, sec. 13.

Subsection (2).

See Repealer. Regulatory legislation directly affecting the consumer interest appears to be diffused among these sections:

R. S. 1954, c. 59 (Loan and Building Associations), secs. 167, 172, 174 - 77;

R. S. 1954, c. 59 (Small Loan Agencies), secs. 209, 210, 217-27;

R. S. 1954, c. 59 (Motor Vehicle Sales Finance Act), sec. 254;

R. S. 1954, c. 100 (Pawnbrokers), sec. 134.

This does not purport to be an exclusive enumeration of those statutes bearing upon Article 9 transactions which will not be affected by the enactment of the Uniform Commercial Code.

Section 9-204. When Security Interest Attaches; After-Acquired Property; Future Advances.

In general this section and Section 9-303 make possible with respect to all classes of personal property the creation of a security

interest in after-acquired property in a manner permitted by present Maine law only under special circumstances -- that is, without the necessity of taking any further act at the time the property comes into existence or into the possession of the debtor. "The floating charge, as such, is not known in Maine, . . . but the equitable principles which are the foundation of the floating charge have always been recognized in Maine, where a chattel mortgage on after-acquired property constitutes an equitable lien." Pennsylvania Co. v. United Railways, 26 F. Supp. 379, 390 (D. Maine 1939). The taking of possession by the mortgagee of the after-acquired property effectuates the previous agreement. Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678 (1905). The Code validates the security interest without the additional act.

Subsection (1).

Present Maine law generally is in accord, except as noted below and except with respect to after-acquired property.

Subsection (2)(a).

Under present Maine law, crops may be mortgaged whether "grown, growing or are to be planted within the calendar year in which the mortgage is given, subject only to the rights of prior lienors and the rights of the state, county, and municipality." R. S. 1954, c. 178, sec. 7. The statute seems consistent with the common law rule that a chattel mortgage can be given of chattels actually in existence and actually belonging, or potentially belonging, to the mortgagor. Beal v. Universal C.I.T., 146 Me. 437, 82 A.2d 412 (1951). Since

the lien would attach to the crops no earlier than the planting, the effect of the Code provision and Maine law appears to be identical.

Maine case law specifies that a mortgage of a domestic animal, even in absence of particular reference in the agreement, covers unborn progeny. Dunton v. Kimball Brothers Co., 114 Me. 270, 95 Atl. 1038 (1915). This appears to suggest that the conceived young have sufficient potential existence to support a security agreement. See also, Farrar v. Smith, 64 Me. 74 (1873).

Subsection (2)(b).

In Sheldon v. Connor, 48 Me. 584 (1859), the court was divided in opinion as to whether one who had obtained a license to cut and haul timber could make a mortgage of the timber before it was cut that would be valid against a third party claiming a right to the timber acquired after it had been cut. It would seem that such a mortgage would not be upheld, because an assignment of a permit to cut standing timber has been sustained, Putnam v. White, 76 Me. 551 (1884).

Because standing timber is regarded as real estate, an interest in timber as such is not within the provision of the Code, Section 9-104(j).

With respect to fish, the rule that a grant cannot be made until they are caught would probably govern. See Low v. Pew, 108 Mass. 347, 80 Atl. 851 (1871); Morrill v. Noyes, 56 Me. 458 (1863). An oblique dictum to the contrary does appear

in Farrar v. Smith, 64 Me. 74, 77 (1873).

R. S. 1954, c. 178, sec. 32, provides for a laborer's lien on certain rock products of mining operations. Article 9 does not apply to such liens however. See UCC Section 9-104(c).

Subsection (2)(c).

Maine law is in accord with the Code provision, requiring an existing contract. A contingent debt founded on an existing contract is assignable. Knevals v. Blauvelt, 82 Me. 458, 19 Atl. 818 (1890).

Subsection (2)(d).

Under present Maine law, and consistent with the general rule as to after-acquired property, future accounts cannot be assigned. R. S. 1954, c. 113, sec. 171. In certain special circumstances, a contrary result will be allowed, i.e., under a trust receipts arrangement, R. S. 1954, c. 189, secs. 9, 10, 15, and under a factor's lien arrangement, R. S. 1954, c. 181, sec. 4.

Subsection (3).

See introductory comment to this section. The Code obviates the necessity of a subsequent act which is generally required in Maine to perfect a lien on after-acquired property. Delivery and possession taken by the mortgagee pursuant to the agreement and before third parties acquire rights effects the perfection. Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678 (1905). Recording is in most cases the alternative.

Subsection (4)(a).

Maine case law does consider that unplanted crops do have sufficient potential existence to support an equitable lien, although to shut out the claims of subsequent purchasers or mortgagees the lien must be recorded or possession taken. Kelley v. Goodwin, 95 Me. 538, 50 Atl. 711 (1901). It is a question of interpretation whether R. S. 1954, c. 178, sec. 7 embraces the circumstances described in this provision -- a chattel mortgage of crops given in conjunction with a lease or land purchase or improvement transaction. It is clear that dated case law has sustained such transactions, on the potential existence rationale. See the discussion in Garland v. Hilborn, 23 Me. 442 (1844).

To offset the attenuation of the "potential existence" rationale which supports the grant, the mortgage must be definite in its description of the area of the land on which the crop is to be grown, and as to the season when the crop is to be grown, Shaw v. Gilmore, 81 Me. 396, 17 Atl. 314 (1889); Corinna Seed Potato Farms, Inc. v. Corinna Trust Co., 125 Me. 1el, 131 Atl. 307 (1925).

Subsection (4)(b).

The general Maine rule requiring a further act under an after-acquired property clause applies of course to consumer goods. Dexter v. Curtis, 91 Me. 505, 40 Atl. 549 (1898). This Subsection does not preclude so-called replenishment of the secured property, as is also recognized in Maine, Sawyer v.

Long, 86 Me. 541, 30 Atl. 111 (1894).

Subsection (5).

The Maine chattel mortgage statute requires that the filed statement include whether the mortgage is to secure future advances. R. S. 1954, c. 178, sec. 1. There is no such requirement in a factor's lien transaction, R. S. 1954, c. 181, sec. 4, and a trust receipts transaction, R. S. 1954, c. 189, secs. 13, 14.

Section 9-205. Use of Disposition of Collateral Without Accounting Permissible.

This section makes it clear that the rule of Benedict v. Ratner, 268 U.S. 353, 69 L. Ed. 991, 45 S. Ct. 566 (1925), and its related cases are overruled by the Code. Many Maine statutes have embraced the thrust of the Code provision: e.g., with respect to returned property and proceeds of assigned accounts, R. S. 1954, c. 113, secs. 171, 172; to proceeds or the value thereof in trust receipts transactions, R. S. 1954, c. 189, sec. 10; to proceeds and returned merchandise in factor's lien transactions, R. S. 1954, c. 181, secs. 4, 8; and to proceeds, replacements and substitutions of property described in a chattel mortgage, R. S. 1954, c. 178, sec. 9.

Section 9-206. Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Agreement Exists.

There appears to be no comparable statute in Maine. Compare Annotation, 44 A.L.R. (2d) 7 (1955). Generally, in absence of any contractual undertaking in the original contract, the assignee takes subject to all the equities which existed against the assignor at the

time of the assignment. Hooper v. Brundage, 22 Me. 460 (1843); Collins v. Campbell, 97 Me. 23, 53 Atl. 837 (1902). Maine case law does affirm that a note containing a chattel mortgage agreement securing it is not thereby deprived of its status as a negotiable instrument. In such a case the burden is on the assignee to prove that he is a holder in due course. Hubbard v. Collins, 127 Me. 383, 143 Atl. 600 (1928).

Section 9-207. Rights and Duties When Collateral is in Secured Party's Possession.

Subsection (1).

Maine law is generally in accord. The mortgagee of personal property is responsible for ordinary diligence in the management and preservation of the property, and is liable for ordinary neglect. If the property is destroyed without fault on his part, he cannot be held to account for it. Covell v. Dolloff, 31 Me. 104 (1850); Jenkins v. National Village Bank of Bowdoinham, 58 Me. 275 (1870) (pledgee). However the factor apparently is held to a severer standard, requiring great care, attention and fidelity. Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 Atl. 554 (1938).

But one must also see Livermore Falls Trust and Banking Co. v. Richmond Mfg. Co., 108 Me. 206, 79 Atl. 844 (1911), in which the Court held that as a pledgee the bank was not required by law to collect accounts and was accountable only for what is actually received on them; and that as a mortgagee it was not required by law to pay off prior mortgages, or existing liens, nor to perform conditions necessary to secure or perfect the title to any of the mortgaged property, even though the property is lost through omission to do so.

The Code provisions do not seem inconsistent.

Subsection (2)(a).

See Starrett v. Barber, 20 Me. 457 (1841); Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 Atl. 554 (1938). Both cases suggest agreement with this provision.

Subsection (2)(b).

Accord: Covell v. Dolloff, 31 Me. 104 (1850). Insurance policies must be examined in light of this section.

Subsection (2)(c).

Accord: The secured creditor is accountable for the net proceeds. Covell v. Dolloff, 31 Me. 104 (1850).

Subsection (2)(d).

There apparently is no prior authority in Maine law.

Subsection (2)(e).

If the secured party has legal possession, recent authority suggests that a repledge would be valid. Dubie v. Branz, 146 Me. 455, 73 A.2d 217 (1950). Of course a sale by the mortgagee of personal property mortgaged before foreclosure is a conversion of the property for which the mortgagor can maintain an action. Mathews v. Fisk, 64 Me. 101 (1874); Drummond v. Rickey, 118 Me. 296, 108 Atl. 72 (1919).

Subsection (3).

This would seem to be consistent with the Maine cases cited imposing a duty of ordinary diligence to preserve the secured

property.

Section 9-208. Request for Statement of Account or List of Collateral.

There appears to be no counterpart in Maine law to either of these provisions.

Part 3

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

Section 9-301. Persons Who Take Priority Over Unperfected Security Interests; "Lien Creditor."

Subsection (1)

This section states generally the effect of a failure to perfect a security interest in personal property under Maine law where delivery, filing or some other action is necessary to perfect a security interest. See R. S. 1954, c. 181, sec. 6 (factor's liens); R. S. 1954, c. 119, sec. 9 (conditional sales); R. S. 1954, c. 46, sec. 99 (conditional sales of railroad equipment). Note that under Maine law assignments of accounts receivable are perfected on making, R. S. 1954, c. 113, sec. 171, and need not be recorded. Putnam v. White, 76 Me. 551 (1884).

Although Maine chattel mortgage law makes a chattel mortgage void except as between the parties if not perfected by filing or delivery within twenty days, R. S. 1954, c. 178, sec. 1, perfection within the twenty-day period does not relate back to the date of execution so as to give the mortgage priority over intervening titles or liens. Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948) citing Drew v. Streetier, 137 Mass. 460 (1884). Perfection after the twenty days does validate the mortgage as against mortgages, assignments and bills of sale executed and delivered subsequent thereto, attachments subsequent thereto arising from a cause of action also subsequent thereto, and also trustees in bankruptcy and common law assignees, so far as relates to claims accruing subsequent to the recording. R. S. 1954, c. 178, sec. 1; Production Credit Ass'n. v. Kent, 143 Me. 145,

56 A.2d 631 (1948). Under Maine law, however, such late recording does not validate the mortgage as against attachments subsequent thereto arising from prior causes of action, Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948), or trustees in bankruptcy and common law assignees, so far as they relate to claims accruing prior to the recording. This Subsection would seem to change this particular aspect of Maine law, making the date of attainment of the status of lien creditor significant rather than the date when the cause of action arises. Cf. In re Dipierro, 159 F. Supp. 497 (S.D. Me. 1958).

The Maine Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 8, allows a thirty day grace period during which the entruster's security interest is valid without filing (see annotation to Subsection (2)). Filing after the thirty days validates the security interest as of the date of filing against subsequent lien creditors. R. S. 1954, c. 189, sec. 8(II)(A), however, gives an attaching creditor the status of lien creditor as of the date of issuance of process, if it results in attachment within a reasonable time, even though the attachment is after filing of entruster's security interest.

This Subsection makes an important change in Maine law which subordinate certain unperfected security interests even to the rights of subsequent lien creditors and purchasers who had knowledge of the prior unperfected security interests. Rich v. Roberts, 48 Me. 548 (1860); Hayden v. Russell, 119 Me. 38, 109 Atl. 485 (1920); Lewiston Trust Co. v. Deveno, 145 Me. 224, 74 A.2d 457 (1950) (unrecorded chattel mortgages). Globe Slicing Machine Co. v. Casco Bank & Trust Co., 154 Me. 59, 142 A.2d 30 (1958) (unrecorded conditional sale).

Contra: R. S. 1954, c. 189, sec. 8 (trust receipts), with which this Subsection is in accord in this respect.

Subsection (2).

Maine law contains no special rules relating to perfection of purchase money security interests as such. Most such transactions would be covered by the provisions concerning trust receipts, allowing a thirty-day grace period, R. S. 1954, c. 189, secs. 7 and 8, conditional sales, R. S. 1954, c. 119, sec. 9, and factor's liens, R. S. 1954, c. 181, sec. 6, the latter two of which do not include a grace period. The ten-day grace period in this Subsection differs from the thirty-day grace period allowed for filing entruster's security interests by the Maine Uniform Trust Receipts Act, R. S. 1954, c. 189, secs. 7 and 8. See Official Comment No. 5 to this section. The provision concerning chattel mortgages, R. S. 1954, c. 178, sec. 1, requiring recording within twenty days, which recording does not relate back so as to cut off intervening interests, Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948) has been held not to apply to a vendor's lien reserved in a contract of sale. Sawyer v. Fisher, 32 Me. 28 (1850). DeLaval Separator Co. v. Jones, 117 Me. 95, 102 Atl. 968 (1918). Cf., however, R. S. 1954, c. 178, sec. 9.

The ten-day grace period in this Subsection dates from the debtor's acquisition of possession. This differs from the chattel mortgage filing period which runs from the date on the instrument or, if none, the date of execution and delivery of the instrument. R. S. 1954, c. 178, sec. 1. It is in accord with the grace period for filing security interests in a trust receipts transaction. R. S. 1954,

c. 189, sec. 8(I).

Subsection (3).

The definition of "lien creditor" is substantially that in the Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 1. See Official Comment No. 6 to this section. Query whether the status of lien creditor by attachment relates back to the date of issuance of process as in R. S. 1954, c. 189, sec. 8(II)(A).

The status of a representative of creditors as a lien creditor without knowledge, unless all of the actual creditors had knowledge, is in accord with R. S. 1954, c. 189, sec. 8(II)(B).

Section 9-302. When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of this Article do not Apply.

Requirements of this section differ from those under present Maine law in two respects. First, requirements of filing depend upon the nature of the transaction and the collateral (e.g. "consumer goods," "inventory") rather than the type of legal device used (e.g. "chattel mortgage," "conditional sale). Further, instead of the security agreement itself or a detailed memorandum thereof, as presently required to perfect a chattel mortgage, R. S. 1954, c. 178, sec. 1 or a conditional sale, R. S. 1954, c. 119, sec. 9, a simple "financing statement," which is a notice of the property encumbered, is filed. See UCC Section 9-402 for the requisites of a "financing statement." See UCC Section 9-401 as to place of filing.

Subsection (1).

The following transactions require filing to perfect a security

interest under present Maine law: chattel mortgages, in the absence of possession by the secured party, R. S. 1954, c. 178, sec. 1; conditional sales, R. S. 1954, c. 119, sec. 9; conditional sales of railroad equipment, R. S. 1954, c. 46, sec. 99; factor's liens, R. S. 1954, c. 181, sec. 6; trusts receipts, R. S. 1954, c. 189, sec. 8.

The following transactions (provided that they do not fall into one of the categories referred to above, cf. R. S. 1954, c. 119, sec. 9; Bryant v. Crosby, 36 Me. 562 (1853); Arthur E. Guth Piano Co. v. Adams, 114 Me. 390, 96 Atl. 722 (1916)) do not require filing to protect a security interest under present Maine law even where the collateral is not in the possession of the secured party: the lien reserved for stumpage, and any paper given therefor, in an unsealed permit to cut timber, Crosby v. Redman, 70 Me. 56 (1879), Webber v. Granville Chase Co., 117 Me. 150, 103 Atl. 13 (1918) (cf. UCC Section 2-107); assignments of accounts receivable, R. S. 1954, c. 113, sec. 171, or other contract rights, Putnam v. White, 76 Me. 551 (1884); consignments (cf. UCC Section 2-326 concerning rights of consignee's creditors under, and perfection of, consignments which are not security transactions); leases; bailments and other transactions intended as security devices. Subsection (1) would now require filing in connection with any such transaction unless the collateral is of a type which is specifically exempted from filing by this Subsection.

Subsection (1)(a).

Maine law is in accord. R. S. 1954, c. 179, sec. 1; Wheeler v. Nichols, 32 Me. 233 (1850); Peaks v. Smith, 104 Me. 315, 71 Atl. 884 (1908). See Annotations to UCC Sections 9-203(1)(a), and 9-305.

Subsection (1)(b).

See Annotations to UCC Sections 9-304 and 9-306.

Subsections (1)(c) and (d).

These exceptions represent a change from present Maine statutory requirements concerning chattel mortgages, R. S. 1954, c. 178, secs. 1 and 9, and conditional sales, R. S. 1954, c. 119, sec. 9. The exceptions, concerning fixtures and motor vehicles required to be licensed, to these exceptions are, therefore, in accord with Maine law. For Maine law concerning priority of perfected security interests in chattels subsequently affixed to real estate, see Annotation to UCC Section 9-313.

Subsection (1)(e).

Accord with Maine law which requires no filing of an assignment of accounts or contract rights at all. R. S. 1954, c. 113, sec. 171; Putnam v. White, 76 Me. 551 (1884). The requirement that assignments of accounts or contract rights to an assignee who will thereafter hold a significant part of the assignor's outstanding accounts or contract rights must be filed is the change in Maine law.

Subsection (1)(f).

See annotations to UCC Sections 4-208, 9-113, and 9-302(3).

Subsection (2).

There are at present no requirements for the recording of an assignment of the security interest under a chattel mortgage or a

conditional sale. Note that even though a real estate mortgage may under appropriate circumstances constitute chattel paper (see Annotation to UCC Section 9-105(1)(b)), the recording requirements of R. S. 1954, c. 168, sec. 14, would always have to be complied with in order to effectively assign the interest in real estate which is the subject matter of the mortgage.

Subsection (3)(a).

This section is in accord with Maine law regarding security interests in property in vessels which are duly registered or enrolled according to the laws of the United States. Wood v. Stockwell, 55 Me. 76 (1867). See 46 USCA Section 921 requiring recording of security interests in vessels of the United States.

Subsections (3)(b) and (4).

Enactment of the Code in Maine would result in the repeal of present central filing systems (cf. Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 13; R. S. 1954, c. 46, sec. 100 concerning recording of conditional sales of railway rolling stock). Maine has enacted no certificate of title law covering motor vehicles. (Since Alternative B, in the official text of UCC Section 9-302(3)(b), applies only to states with certificate of title laws in which notation of security interests upon the certificate is permissive, Alternative A would seem more appropriate for enactment in Maine.)

Section 9-303. When Security Interest is Perfected, Continuity of Perfection.

Subsection (1).

Except as noted below concerning after-acquired property clauses, Subsection (1) is generally in accord with the theory of present Maine filing statutes. See R. S. 1954, c. 56, sec. 99 (conditional sales of railway rolling stock); R. S. 1954, c. 119, sec. 9 (conditional sales); R. S. 1954, c. 178, secs. 1 and 9 (chattel mortgages); R. S. 1954, c. 181, sec. 4 (factor's liens); R. S. 1954, c. 189, sec. 13 (trust receipts).

As to after-acquired property, Maine law seems to be in accord with the principles of this Subsection in that a chattel mortgage is effective to constitute a valid lien on substitutions for or replacements of property described in the mortgage, when acquired by the mortgagor, R. S. 1954, c. 178, sec. 9; on crops growing or to be planted (within the calendar year of the mortgage), R. S. 1954, c. 178, sec. 7; and other chattels actually in existence and potentially belonging to the mortgagor, Beal v. Universal C.I.T. Credit Corp., 146 Me. 437, 82 A.2d 412 (1951).

But otherwise the common-law rule prevails that a chattel mortgage can be given only of chattels actually in existence and belonging to the mortgagor, Griffith v. Douglass, 73 Me. 532 (1882), and that in order to establish a valid lien against after-acquired property there must be a provision in the mortgage and a subsequent act such as retention of possession by the mortgagee, Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678 (1905) or proper recording of a confirmatory writing, Brown v. Thompson, 59 Me. 373 (1871). See Annotation to UCC Section 9-204.

The above proposition should not be confused with the situation where a filing is made as to property, described in the mortgage or other instrument, to be purchased with the proceeds of the loan secured

thereby. In such a situation Maine law seems to permit advance filing, as does this Subsection. See R. S. 1954, c. 178, sec. 9 (chattel mortgages); R. S. 1954, c. 181, sec. 4 (factor's liens); and R. S. 1954, c. 189, sec. 13 (trust receipts).

Subsection (2).

Although there is no direct counterpart in Maine statutes, this Subsection seems to be analagous to and consistent with the thirty day temporary perfection and permanent perfection thereafter by recording or possession by entruster of property covered by a trust receipt, R. S. 1954, c. 189, sec. 8. It would also seem to be consistent with the Maine rule that filing of a chattel mortgage after the twenty-day period therefor is valid against security interests arising subsequent thereto, R. S. 1954, c. 178, sec. 1, except certain ones arising from prior causes of action, Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948), which in the situation described in this Subsection would seem to be defeated by perfection through possession. This section probably represents present law as to any security interests originally perfected by possession but which are subsequently recorded.

Section 9-304. Perfection of Security Interest in Instruments, Documents, and Goods Covered by Documents; Perfection by Permissive Filing; Temporary Perfection without Filing or Transfer of Possession.

This section is based largely on the Uniform Trust Receipts Act, R. S. 1954, c. 189, secs. 1-20 enacted in 1955. See discussion of this section and that Act given in the Official Comments to this section.

Section 9-305. When Possession by Secured Party Perfects Security Interest without Filing.

This section states the usual Maine rule as to the effect of possession taken by a secured party. Wheeler v. Nichols, 32 Me. 233 (1850); Peaks v. Smith, 104 Me. 315, 71 Atl. 884 (1908). The rule here with regard to the possession the secured party is deemed to have of goods in the possession of a bailee who has been notified of the secured party's interest is in accord with Maine law as is the rule regarding the time thereof. Wheeler v. Nichols, 32 Me. 233 (1850). The time of perfection is the same as that provided by the Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 3(I)(B). It is in accord with Maine chattel mortgage law. Wheeler v. Nichols, 32 Me. 233 (1850) (generally); Hamlin v. Jerrard, 72 Me. 62, 79 (1881) (perfection from time possession taken); Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948) (without relation back); Saliem v. Glowsky and Fogg, 132 Me. 402, 172 Atl. 4 (1934) (and only so long as possession retained). Compare Section 60(a) of the Bankruptcy Act.

Under Maine chattel mortgage law perfection by a means other than possession, subsequent thereto, would not be good against attachments and certain other security interests taken after the perfection but arising from causes of action arising between the end of the initial possession and the subsequent perfection, if the latter occurs more than twenty days from the date of the mortgage. Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948). See Annotation to UCC Section 9-301(1). See also UCC Section 9-303(2) and the Annotation thereto relative to a perfection by a means other than possession, subsequent but contiguous thereto.

Furthermore, this section validates without filing security

interests in goods arising from field warehousing arrangements provided sufficient control is passed to the agents. See Friedman, D.M., "Field Warehousing," 42 Col. L. Rev. 991 (1942).

Section 9-306. "Proceeds;" Secured Party's Rights on Disposition of Collateral.

Subsection (1).

For discussion and application of the concept of proceeds in Maine law, see McLarren v. Brewer, 51 Me. 402 (1863).

Subsections (2) and (3).

These Subsections adopt as to security agreements generally a scheme, with respect to proceeds realized by a debtor on a sale or other disposition of collateral, which is generally similar to that adopted in the Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 10. The present Maine rules as to proceeds in other types of security interests, which have not been developed as fully as herein, are as follows:

. Chattel Mortgages: Present Maine law is similar to Subsection (2) in that the security interest continues in the original collateral, as well as in any identifiable proceeds, unless the sale by the mortgagor was expressly or impliedly permitted by the mortgagee. The mortgagee, however, must elect which remedy he will pursue. McLarren v. Brewer, 51 Me. 402 (1863). If the sale is permitted by the mortgagee and there is an agreement, express or implied, that the proceeds are to belong to the mortgagee, he will have a security interest in them. First National Bank of Auburn v. Eastern Trust and Banking Co., 108 Me. 79, 69 Atl. 4 (1911). Without at least an implicit agreement that the proceeds are to belong to, or be assigned to, the mortgagee,

he will lose his security interest in both the collateral and the proceeds by permitting the mortgagor to sell the collateral. White Mountain Bank v. West, 46 Me. 15 (1858).

The security interest of the mortgagee continues in identifiable cash proceeds. First National Bank of Auburn v. Eastern Trust and Banking Co., 108 Me. 79, 79 Atl. 4 (1911); McLarren v. Brewer, 51 Me. 402 (1863). As to proceeds other than cash, the rules with respect to after-acquired property govern. See Dexter v. Curtis, 91 Me. 505, 40 Atl. 549 (1898); Annotation to UCC Section 9-204.

Pledges: Maine law is similar to Subsection (1) in that after an unauthorized disposition of the collateral by a pledgor who has been given custody of the collateral for sufficiently temporary and limited purposes, the pledgee's security interest continues in the original collateral as between the pledgee and the pledgor but would not remain perfected against bona fide purchasers. R. S. 1954, c. 189, sec. 3. Compare Mosher v. Smith, 67 Me. 172 (1877). There is no Maine authority as to pledgee's interest in the identifiable proceeds of the pledgor's sale.

Conditional Sales: A conditional vendor retains security title in the goods sold, and a transfer of possession by the conditional vendee to an intended purchaser, without the consent of the vendor, is a conversion by both the vendee and the intended purchaser. Blaisdell Automobile Co. v. Nelson, 130 Me. 167, 154 Atl. 184 (1931). Without demand the vendor can maintain against the intended purchaser either replevin, Eaton v. Munroe, 52 Me. 63 (1862) or trover, Whipple v. Gilpatrick, 19 Me. 427 (1841). This seems to be consistent in result

with Subsection (2). Note, however, the limitations imposed by UCC Sections 9-307(1) and (2). There seems to be no Maine authority on cash proceeds arising under a conditional sale. Note, however, that the conditional vendor's rights against the conditional vendee are practically the same as those of a chattel mortgagee. Westinghouse Elec. & Mfg. Co. v. Auburn & Turner RR., 106 Me. 349, 76 Atl. 897 (1910; Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1936).

Inventory liens: Under R. S. 1954, c. 181, secs. 4 and 6 concerning factor's liens, it is provided as in Subsection (2) that a security interest attaches to proceeds resulting from sale or other disposition of inventory. The Maine statute does not, however, require that the proceeds be identifiable. The requirements of Subsection (3) seem stricter than the requirements of R. S. 1954, c. 181, sec. 4, that the notice states the general character of materials, etc., subject to the lien or which may become subject thereto. The effect of the reference in Subsection (2) to other provisions of Article 9 is that the secured party's interests in the inventory would not continue when the inventory is sold to a buyer in ordinary course of business. See Official Comment No. 3 to this section. This is in accord with R. S. 1954, c. 181, sec. 6, which specifies that the lien terminates as to the materials and attaches to the proceeds in the hands of the borrower.

The Uniform Trust Treceipts Act, R. S. 1954, c. 189, sec. 10, provides that a security interest attaches to proceeds which are identifiable (except in certain limited circumstances in which they need not be identifiable). The requirements of Subsection (3) are stricter than the requirements of R. S. 1954, c. 181, sec. 13(I)(C)

that the filing contain a description of the kind of goods covered or to be covered by the trust receipt financing. The buyer in the ordinary course is also protected from the entruster's security interest in the goods. R. S. 1954, c. 189, sec. 9(II)(A)(1).

Consignment: Since a consignee is a mere agent to sell property, the title to which remains in the consignor, his principal, he holds proceeds as an agent. Thomas v. Parsons, 87 Me. 203, 32 Atl. 876 (1895); Richardson Mfg. Co. v. Brooks, 94 Me. 146, 49 Atl. 672 (1901). No filing was necessary to perfect this interest. Thomas v. Parsons, supra.

Accounts Receivable: R. S. 1954, c. 113, sec. 171, perfects a written assignment on making and provides that the assignor of the account receivable who receives payment from the debtor is the trustee of, and accountable for, all such sums to the original assignee. In addition the Maine statute prevents any other party from acquiring any rights in the account receivable assigned, proceeds thereof or any obligation substituted therefor, which would be perfection. Cf. Official Comment No. 1 to UCC Section 9-301. Since there is no filing required at all by the Maine statute, the requirements of Subsection (3) are a clear change. Although no subsequent bona fide purchaser of the account can acquire any rights therein under the Maine statute, to which extent Maine law may be changed by this Article, the statute does provide that the debtor of the account receivable may acquit himself by payment to the assignor.

Subsection (4).

Substantially similar provisions are made in the Uniform Trusts Receipts Act. R. S. 1954, c. 189, sec. 10. See 66 Yale L.J. 922. Although there is no similar scheme in other Maine statutes, the

ten-day limitations in Subsection (4)(d) do seem to change the somewhat broader result in First National Bank of Auburn v. Eastern Trust & Banking Co., 108 Me. 79, 79 Atl. 4 (1911), requiring merely identification of the fund, rather than the particular money. See also Fogg v. Tyler, 109 Me. 109, 82 Atl. 1008 (1912), concerning identification of the fund.

Subsection (5).

Under Maine law the assignor of accounts receivable holds returned property in trust for the assignee. R. S. 1954, c. 113, sec. 172. There is no requirement of filing or possession of the returned goods for perfection of the assignee's beneficial interest. R. S. 1954, c. 113, sec. 172, might not apply, however, to an account receivable covered as proceeds by a factor's lien under R. S. 1954, c. 181, sec. 4. See R. S. 1954, c. 113, sec. 173. There seems to be no Maine authority giving special priority to the assignee of an account receivable arising as proceeds of sale of prior collateral as against an assignee of the account receivable after the sale, except that the former if perfected, being prior in time, would normally prevail.

Section 9-307. Protection of Buyers of Goods.

Subsection (1).

Subsection (1) adopts the same rule as to inventory as that contained in Maine factor's lien law, R. S. 1954, c. 181, sec. 6. Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 9 is generally similar.

The theory of Subsection (1) is consistent with the general

Maine rule that where the debtor has express, implied or apparent authority to sell collateral, a buyer in the ordinary course of business taken the collateral free of a security interest, even though knowing of it. If the sale is unauthorized, Subsection (1) apparently allows the buyer in the ordinary course of business to take the collateral free of a security interest if his knowledge is limited to the existence of the security interest, but not if he knows that the same violates terms of the security agreement which are in force. See Official Comment No. 2. By definition (UCC Section 1-201(9)) the seller must be one "engaged in the business of selling goods of that kind." Other secured creditors are not "buyers." Thus the Subsection is essentially limited to sales of inventory and does not create rules of priority.

Chattel Mortgages: As against a purchaser (in this case a factor who made advances) a mortgagee, although holding a perfected security interest, is estopped by his written consent that the mortgagor sell the collateral. White Mountain Bank v. West, 46 Me. 15 (1858). The mortgagee is not estopped by written consent as against a creditor taking on consideration of release of the antecedent debt. Melody v. Chandler, 12 Me. 283 (1835); Abbott v. Goodwin, 20 Me. 408 (1841); Dexter v. Curtis, 91 Me. 505, 40 Atl. 549 (1898). Even the buyer in the ordinary course of business, however, is not protected if the consent is merely oral. Rowe v. Green, 116 Me. 94, 100 Atl. 145 (1917); R. S. 1954, c. 178, sec. 2. And the mortgagee who has given no consent at all will prevail against the bona fide purchaser for value without notice. Lunt v. Whitaker, 10 Me. 310 (1833). There seems to be no Maine authority on consent implied from mortgagee's leaving chattels

in possession of a dealer in goods of that kind.

Pledges: Maine law requires possession on the part of the pledgee in order to perfect a security interest in the pledged collateral, Beeman v. Lawton, 37 Me. 543 (1853), except for the pledgee's right to leave a pledgor in possession for a temporary and limited purpose for ten days under R. S. 1954, c. 189, sec. 3. Under that statute, however, even in a case where pledged goods are properly redelivered to a pledgor a purchaser for value and without notice of the pledge would take free of the security interest. R. S. 1954, c. 189, sec. 3. This is in accord with the common law view. Mosher v. Smith, 67 Me. 172 (1877).

Conditional Sales: A buyer of goods from a conditional vendee would acquire a superior title to that of the vendor if the conditional vendor has authorized sale of the goods by the vendee or has so acted that he is estopped from asserting his title against the buyer in the ordinary course of business. Rogers v. Whitehouse, 71 Me. 222 (1880). Compare Blaisdell Automobile Co. v. Nelson, 130 Me. 167, 154 Atl. 184 (1931). Otherwise the buyer stands in no more favorable position than his own vendor, the conditional vendee. Milliken v. Warren, 57 Me. 46 (1869). He takes subject to the rights of the conditional vendor even though he is a bona fide purchaser for value without prior notice of the conditional vendor's interest. Tibbetts v. Towle, 12 Me. 341 (1835).

Inventory Liens: As noted above Maine law is substantially in accord. R. S. 1954, c. 181, sec. 6 (factor's lien); R. S. 1954, c. 189, sec. 9 (trust receipts).

Consignments: Where a consignee is given only a limited authority to sell, a purchaser takes free of the consignor's interest, even

though the consignee exceeds the scope of his authority in making the sale, if within his apparent authority. See Heath v. Stoddard, 91 Me. 499, 40 Atl. 547 (1898). Compare Parsons v. Webb, 8 Me. 38 (1831). See also Billings, Taylor & Co. v. Mason, 80 Me. 496, 15 Atl. 59 (1888).

Subsection (2).

There are no special Maine rules relative to consumer goods and farm equipment. For explanation of interaction of this section and section 9-302, see Official Comment No. 3. To protect himself hereunder a secured party need only file.

Section 9-308. Purchase of Chattel Paper and Non-negotiable Instruments.

New, but cf. Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 7.

Section 9-309. Protection of Purchasers of Instruments and Documents.

Compare Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 9(I)(A).

Section 9-310. Priority of Certain Liens Arising by Operation of Law.

The provisions of this section are similar to those of Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 11, and those of R. S. 1954, c. 181, sec. 6, relating to factor's liens.

As to creation and existence of liens resulting from the furnishing of services or materials with respect to goods subject to a security interest. This section looks to existing law. Such liens are given priority over perfected security interest in the goods unless the lien is statutory and the statute expressly provides otherwise.

Maine statutes give a variety of such liens. Some of these seem to require possession by the creditor for enforcement. R. S. 1954,

c. 178, sec. 67 (on animals for pasturage, food and shelter); R. S. 1954, c. 178, sec. 69 (on watches, jewelry, appliances, etc. for repairs). These are clearly within the scope of this section. Other statutes, however, do not require possession. R. S. 1954, c. 178, secs. 13 (ship builder's lien), 52 (on logs for shoring and running), 54 (on logs for driving), 55 (on logs for towing), 56 (on logs for advances), 62 (on vehicles, aircraft or parachutes for repairs) (see Universal C.I.T. Credit Corp. v. Lewis, 150 Me. 337, 110 A.2d 595 (1954)). Although these statutes provide for enforcement by attachment, within various limits, they are also enforceable as a possessory lien if the creditor has possession. R. S. 1954, c. 178, sec. 76. To the extent that such liens are thus possessory liens, they are within the scope of this section. To the extent that they and other statutory liens. e.g., liens for labor, R. S. 1954, c. 178, secs. 13, 32, 33, 34, 52, 57, 58, 59, 60, 61, 65; liens for food sold to cannery, R. S. 1954, c. 178, sec. 64; for stud service, R. S. 1954, c. 178, sec. 66; for monuments, R. S. 1954, c. 178, sec. 68 are non-possessory this section does not enforce their priority, and they would seem to be of doubtful validity under Bankruptcy Act, 11 USCA Section 107(c)(2). For the consequences of this section of the Bankruptcy Act, see In the Matter of Quaker City Uniform Co., 238 F.2d 155 (3rd Cir. 1956).

Under Maine common law and under certain statutes whether a lienor of the type referred to prevails over a secured party depends upon whether the secured party, or someone authorized by him, has given express or implied consent to the creation of the lien, and the authorization to give such consent is not to be implied from the secured party's grant

of possession to the mortgagor or the conditional vendee, even with expectation of use. Small v. Robinson, 69 Me. 425 (1879) and Bath Motor Mart v. Miller, 122 Me. 29, 118 Atl. 715 (1922)(common law): Fuller v. Nickerson, 69 Me. 228, 236 (1879) and Mehan v. Thompson, 71 Me. 492 (1880) (R. S. 1954, c. 178, sec. 13); express in R. S. 1954, c. 178, secs. 62 (see Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 Atl. 769 (1927)) and 67. Although this requirement may be stated in terms of the consent of the owner, it has been held that the "owner" is the mortgagee. Eastern Trust & Banking Co. v. Bean & Conquest, Inc., 148 Me. 85, 90 A.2d 449 (1952); compare, however, Universal C.I.T. Credit Corp. v. Lewis, 150 Me. 337, 110 A.2d 595 (1954). (The concept of ownership embodies in R. S. 1954, c. 178, sec. 74 concerning notice to the "owner" on the enforcement of a lien is not a technical term, but includes all parties claiming an interest in the property. Martin v. Darling, 78 Me. 78, 3 Atl. 118 (1886)). From the language of the cases and the statutes expressly requiring consent of the owner, it seems clear that a lien cannot arise without such consent. If so, this section would make no change in Maine law; for, if no such consent is given, there is no lien, and, if such consent is given, the lien has priority (unless the parties agree to some specific order of priority and subordination). The priority is express in R. S. 1954, c. 178, sec. 62 (on vehicles, etc., for repairs). Although not express in certain of the other lien statutes, priority has been granted to such a lien in Deering v. Lord, 45 Me. 293 (1858) (R. S. 1954, c. 178, sec. 13 (shipbuilder's lien)); Bowden v. Dugan, 91 Me. 141, 39 Atl. 467 (1898) (R. S. 1954, c. 178, sec. 67 (lien on animals for pasturage, etc.)).

Other lien statutes do not expressly require the owner's consent. See R. S. 1954, c. 178, secs. 52, 54, 55, 56 (logging liens) (see Doe V. Monson, 33 Me. 430 (1851)); R. S. 1954, c. 178, sec. 69 (on watches, etc. for repairs). In all of these, however, the priority over other claims is express. Concerning this point with respect to logging liens, see Oliver v. Woodman, 66 Me. 54 (1876).

The above does not purport to be an exhaustive analysis of all Maine statutes establishing liens. Compare R. S. 1954, c. 140, secs. 14, 15, 17 and 20 (animals), R. S. 1954, c. 100, sec. 42 (innkeeper's lien).

Section 9-311. Alienability of Debtor's Rights: Judicial Process.

The provisions of this section concerning voluntary transfers are in accord with Maine law which seems generally to recognize the alienability of the debtor's rights in collateral. Dean v. Cushman, 95 Me. 454, 50 Atl. 85 (1901) (chattel mortgage); State v. Automobile, 122 Me. 280, 119 Atl. 666 (1923) (conditional sale); Fisher v. Bradford, 7 Me. 28 (1830), Simansky v. Clark, 128 Me. 280, 147 Atl. 207 (1929) (pledge). The general rule seems to be that this can be done without the creditor's consent, even in spite of a condition in the contract creating the security interest that the secured party would have the right to immediate possession if the debtor transferred the property. See Dame v. C. H. Hanson & Co., 212 Mass. 124, 98 N.E. 589 (1912).

The provisions with respect to involuntary transfers are similar to R. S. 1954, c. 112, sec. 44, providing that personal property subject to mortgage, pledge or lien created by law and of which the debtor has the right of redemption, may be attached, held and sold as if unencumbered.

This would also seem to apply to property subject to security interest of a conditional vendor, which interest is itself subject to vendee's right of redemption and therein considered as a mortgage. See Westinghouse Elec. & Mfg. Co. v. Auburn & Turner RR., 106 Me. 349, 76 Atl. 897 (1910); Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 Atl. 1001 (1915). See Burrill v. Whitcomb, 100 Me. 286, 61 Atl. 678 (1905) re attachment of after-acquired property subject to a mortgage. Although Maine law once held that attachment of mortgaged property could not be made without prior payment or tender by the attaching creditor of the mortgage debt, Foster v. Perkins, 42 Me. 168 (1856), this was superseded by the statute of 1859, c. 114, see Barrows v. Turner, 50 Me. 127 (1863), commencing establishment of the present statutory pattern, R. S. 1954, c. 112, secs. 45-50. The attaching creditor must pay or tender the amount of the mortgage debt after attachment upon direction of the court or a justice thereof having validated the mortgage debt, R. S. 1954, c. 112, sec. 47.

In respect of trustee processes upon goods of the debtor subject to a security interest, R. S. 1954, c. 114, sec. 50, requires the trustee, in possession thereof, to deliver such property to the officer serving process upon payments or tender by the plaintiff to the trustee of the amount due him. The trustee-mortgagee or pledgee does not have to deliver the property until the amount of his debt is tendered. Stedman v. Vickery, 42 Me. 132 (1856); see also Woods v. Cooke, 58 Me. 282 (1870).

Section 9-312. Priorities Among Conflicting Security Interests in the Same Collateral.

Subsection (1).

All questions of priority not treated directly in this Section

9-312 are collected by cross-references in this Subsection.

Subsection (2).

This section, of very limited application, seems to change present Maine law which subordinates the security interest in crops to all prior liens. R. S. 1954, c. 178, sec. 7. See Kelley v. Goodwin, 95 Me. 538, 50 Atl. 711 (1901).

Subsections (3) and (4).

New as to mechanics. At present purchase money security interests are likely to be represented by conditional sales or trust receipts. Maine law permits relation back of filing within thirty days after delivery of the goods to the possession of the trustee under a trust receipts transaction, R. S. 1954, c. 189, sec. 7, but for immediate perfection of a conditional sale, filing before the vendee takes possession seems to be required. See Universal C.I.T. Credit Corp. v. Lewis, 150 Me. 337, 110 A.2d 595 (1954). There seem to be no Maine cases involving the contest between the party secured by a properly drawn and recorded mortgage of after-acquired property and the vendor of that property by a properly recorded conditional sale. The security interests of both parties would seem to attach as of the moment the vendee-mortgagor takes possession. If that is so, the prior recording would probably prevail. This appears to be the implication of the discussion in Beal v. Universal C.I.T. Credit Corp., 146 Me. 437, 82 A.2d 412 (1951). This discussion would also be applicable to a chattel mortgage for purchase money because although there is a twenty day filing period, no relation back is allowed. Production Credit Ass'n. v. Kent, 143 Me. 145, 56 A.2d 631 (1948). See Annotations to UCC Sections 9-204, 9-301(2).

Subsection (5).

The general rule of this Subsection that conflicting perfected security interests rank in order of time of filing is generally in accord with Maine law. Kelley v. Goodwin, 95 Me. 538, 50 Atl. 711 (1901). Knowledge by the first secured party to record of the existence of an unrecorded security interest would not weaken his priority. Hayden v. Russell, 119 Me. 38, 109 Atl. 485 (1920).

Subsection (5)(a).

The provision of clause (a) that an interest which attaches after filing taxes priority from time of filing has some Maine statutory counterparts. See R. S. 1954, c. 181, sec. 4 (factor's liens); R. S. 1954, c. 189, secs. 7, 13(IV) and 14 (Uniform Trust Receipts Act). See Annotation to UCC Section 9-204.

Subsection (5)(b).

Probably in accord with present Maine law. See R. S. 1954, c. 113, sec. 171 (accounts receivable).

Subsection (5)(c).

Present Maine law has no rules governing this factual situation.

Subsection (6).

No comparable provisions under present Maine law.

Section 9-313. Priority of Security Interests in Fixtures.

Subsection (1).

Probably no change in present law. This section makes the common

law definition as to fixtures controlling. Under Maine law a personal chattel becomes a fixture when it is physically annexed or affixed, at least by juxtaposition, to the realty or some appurtenance thereof, to which it is adapted and with which it is usable, with the manifest intention on the part of the annexer that it should be a permanent accession to the realty, which intention is the primary criterion. Cumberland County Power and Light Co. v. Hotel Ambassador, 134 Me. 153, 183 Atl. 132 (1936); Wedge v. Butler, 136 Me. 189, 6 A.2d 46 (1939) and cases cited therein. Note that R. S. 1954, c. 168, sec. 1 would seem to place some limitations upon this.

Subsection (2) and (3).

Present Maine law. Security interests in fixture-type items are presently handled through the use of either a chattel mortgage or a conditional sale. Neither the factor's lien, trust receipt nor pledge is adapted to this kind of collateral.

The general rule in Maine, which has adopted the Massachusetts rule on this subject is that all personal property added to real estate so as to become a fixture subsequent to a real estate mortgage becomes (presumably within the limits specified in R. S. 1954, c. 168, sec. 1) part of the mortgaged property, regardless of encumberances upon the personal property made subsequent to the mortgage and of any agreements between the holders of those chattel security interests and their debtor, the mortgagor of the real estate. Gaunt v. Allen Lane Co., 128 Me. 41, 145 Atl. 255 (1929) and Vorsec Co. v. Gilkey, 132 Me. 311, 170 Atl. 722 (1934) (mortgagor of real estate a conditional vendee of the chattel affixed); Wedge v. Butler, 136 Me. 189, 6 A.2d 46 (1939) (mortgagor of

real estate also mortgagor of chattel). The holder of the security interest in the chattels affixed would prevail only if the mortgagee of the real estate was a party to the transaction in which the security interest in the chattel was created or gave his permission to the arrangement whereby the fixture was to retain its chattel character. Hawkins v. Hersey, 86 Me. 394, 30 Atl. 14 (1894), and discussion in cases cited above. If the real estate is mortgaged after the chattel has been affixed thereto, though between the holder of a secured interest in the chattel and the owner of the land it may by agreement remain personalty, the fixture will pass by deed or mortgage of the realty to a mortgagee or purchaser without notice. Inhabitants of Andover v. McAllister, 119 Me. 153, 109 Atl. 750 (1920), citing a dictum in Hersey v. Hawkins, supra. Recording of the security interest in the chattel, if required by law, would seem to be sufficient notice, but not if not required by law. Inhabitants of Andover v. McAllister, supra. On the other hand, if recording is required, it would seem to be the only effective notice. See last paragraph of Annotation of UCC Section 9-301(1). With regard to this general topic and its treatment by the UCC, see 5 American Law of Property, sec. 19.12 (Casner ed. 1952). Note that these two Subsections refer to security interests which may not have been perfected.

Subsection (4).

These seem to differ from Maine law under which unperfected chattel mortgages and conditional sales are invalid even as against third parties with knowledge. Hayden v. Russell, 119 Me. 38, 109 Atl. 485 (1920); Lewiston Trust Co. v. Deveno, 145 Me. 224, 74 A.2d 457 (1950);

Globe Slicing Machine Co. v. Casco Bank & Trust Co., 154 Me. 59, 142 A.2d 30 (1958). See discussion in Annotation to UCC Section 9-301(1). Under clause (c) compare the words "contracted for" with present case law which requires that the prior encumberancer must have made the advance. W. A. Allen Co. v. Emerton, 108 Me. 221, 79 Atl. 905 (1911). But compare Allis-Chalmers Co. v. Central Trust Co. of N.Y., 190 Fed. 700 at 706 (1st Cir. 1911).

Subsection (5).

No Maine authority has been found establishing rules such as those of Subsection (5). They seem somewhat broader than the Maine rule "that the right of removal can only be exercised when it causes no material injury to the estate." John P. Squire & Co. v. Portland, 106 Me. 234, 240, 76 Atl. 679 (1909). Foreseeable injury in removal also raises the inference of an intention that the annexation should be permanent and a fixture. Hayford v. Wentworth, 97 Me. 347, 54 Atl. 940 (1903).

Section 9-314. Accessions.

Subsections (1) and (2).

These Subsections in preserving and giving priority to a security interest in accessions in certain circumstances seem to represent a change in Maine law. Under Maine law the security interest would in most cases be lost, since it is the general rule that the owner of the principal property will acquire the right to that which is united with it by accession. Pulcifer v. Page, 32 Me. 404 (1851). Where there is an accession to principal property subject to a security interest, the additions become subject to the security interest. Eaton v. Munroe, 52 Me. 63 (1862); Hamlin v. Jerrard, 72 Me. 63, 80 (1881).

Subsection (3).

These seem to differ from Maine law under which unperfected chattel mortgages and conditional sales are invalid even as against third parties with knowledge. Hayden v. Russell, 119 Me. 38, 109 Atl. 485 (1920); Lewiston Trust Co. v. Deveno, 145 Me. 224, 72 A.2d 457 (1950); Globe Slicing Machine Co. v. Casco Bank & Trust Co., 154 Me. 59, 142 A.2d 30 (1958). See discussion in Annotation to UCC Section 9-301(1). Under clause (c) compare the words "contracted for" with present case law which requires that the prior encumberancer must have made the advance. W. A. Allen Co. v. Emerton, 108 Me. 221, 79 Atl. 905 (1911). But compare Allis-Chalmers Co. v. Central Trust Co. of N.Y., 190 Fed. 700, 706 (1st Cir. 1911).

Subsection (4).

No Maine authority.

Section 9-315. Priority When Goods Are Commingled or Processed.

Subsection (1).

Although there is no Maine authority on the point, the protection afforded to the security interest holder by Subsection (1) does not vary greatly in principle from general Maine law regarding the confusion of goods. Confusion occurs when there has been such an intermixture of goods owned by different persons, that the property of each is no longer distinguishable. Hesseltine v. Stockwell, 30 Me. 237 (1849). If the confusion is made by the consent of the owners or by accident and without fault, the owners have an interest in common, in proportion to their respective shares. Martin v. Mason, 78 Me. 452, 7 Atl. 11 (1886). But if the

confusion is caused fraudulently, wilfully or negligently without the consent of the owners, the latter would be entitled to the whole mass. Tufts v. McClintock, 28 Me. 424 (1848); Hesseltine v. Stockwell, 30 Me. 237 (1849); Bryant v. Ware, 30 Me. 295 (1849). This is so even if the confused goods have been altered in form by processing. Wingate v. Smith, 20 Me. 287 (1841). There seems to be an exception if the proportions of the owners are of equal value. Hesseltine v. Stockwell, 30 Me. 237 (1849).

If an entruster has a security interest in raw materials and if the resulting processed goods are "proceeds" of these raw materials, it would seem that the entruster under certain conditions is entitled to such proceeds or their value under Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 10.

Subsection (2).

Subsection (2) is similar in principle to the case where the confusion of goods is by consent, accidental or innocent, and the owners are entitled to proportionate shares or are tenants in common of the whole. See Martin v. Mason, 78 Me. 452, 7 Atl. 11 (1886) and the other cases cited in Annotation to Subsection (1) above.

Section 9-316. Priority Subject to Subordination.

The provisions of this section are in accord with the general rule that a person entitled to a priority may effectively agree to subordinate his claim. Although no Maine cases could be found on this point there is implicit statutory support in R. S. 1954, c. 178, sec. 10, which specifies that such agreements shall be recorded, in which case they constitute constructive notice.

Section 9-317. Secured Party Not Obligated on Contract of Debtor.

Generally in accord with the provisions of the Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 12. There may, however, be some aspects of the relationship between the secured party and the borrower, particularly one in possession, which are analagous to an agency and which might lead to the liability of the secured party on agency principles. Such a result would be contrary to this section. No Maine authority found on this point. Also, note that because the definition of "seller" in the Uniform Sales Act, R. S. 1954, c. 185, sec. 76, includes legal successors in interest, assignees of purchase money security interests might be held liable to the various remedies of the buyer against the seller for breaches of contract or warranty, e.g. R. S. 1954, c. 185, secs. 67, 69.

Section 9-318. Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective; Identification and Proof of Assignment.

Subsection (1).

Maine cases indicate that the assignee takes subject to defenses, particularly set-offs, assertable against the assignor at the time of the assignment. Burham v. Tucker, 18 Me. 179 (1841); Hooper v. Brundage, 22 Me. 460 (1843); Leathers v. Carr, 24 Me. 351 (1844); New Haven Copper Co. v. Brown, 46 Me. 418 (1859); Pierce v. Bent, 69 Me. 381 (1879); Collins v. Campbell, 97 Me. 23, 28 (1902); Hamilton v. Wilcox, 126 Me. 529, 531, 140 Atl. 201 (1928). Compare, however, Brown v. Leavitt, 26 Me. 251, 256 (1846); Bartlett v. Pearson, 29 Me. 9 (1848), which indicate in closer accord with this Subsection that a debtor can assert against an assignee all of the defenses that might have arisen as against the creditor-assignor up to the time of notification of the assignment.

Cf. Restatement, Contracts, sec. 167(1). Concerning vulnerability of equitable assignees to defenses against the assignor, see Rogers v. Haines, 3 Me. 362 (1825).

Subsection (2).

The freedom of modification and substitution allowed by Subsection (2) would seem to change Maine law which severely restricts the assignor's control of the contract after the debtor has notice of the assignment, Hackett v. Martin, 8 Me. 77 (1831), unless there have been fraudulent efforts to conceal the true nature of the relationship, Atkinson v. Runnells, 60 Me. 440 (1872). See Homer v. Shaw, 212 Mass. 113, 117, 98 N.E. 697 (1912).

Subsection (3).

This considerably narrows the Maine law that bona fide payment by the debtor to the assignor of an account receivable acquits the debtor, R. S. 1954, c. 113, sec. 171, which would seem to allow bona fide payment even after notification.

Subsection (4).

Although there seem to be no Maine cases on this point, the Subsection changes the general law that a term prohibiting an assignment of an account or contract right is valid. Restatement, Contracts, sec. 151(c).

Part 4

FILING

Section 9-401. Place of Filing; Erroneous Filing; Removal of Collateral.

Subsection (1).

Present Maine law, except in the case of contracts for the conditional sale of railroad equipment (R. S. 1954, c. 46, sec. 99), provides in the ordinary case for recording in the office of the clerk of the town, city, or plantation in which the debtor resides. If, however, one or more of the debtors resides outside the state or in an unorganized place within the state, the place of recording will be determined by the nature of the transaction.

In the case of a chattel mortgage (R. S. 1954, c. 178, sec. 1) or a factor's lien (R. S. 1954, c. 181, sec. 5) if some of the debtors reside outside the state and some within the state, the document must be recorded in the office of the clerk of the town, city, or plantation where each in-state debtor resides. But if all debtors under a chattel mortgage or factor's lien reside outside the state, then the agreement must be recorded in the registry of deeds where the property is. In the case of a conditional sales contract if any of the purchasers resides outside of the state or in an unorganized place within the state, then the agreement must be recorded in the registry of deeds in the county where the seller resides (R. S. 1954, c. 119, sec. 9). In addition R. S. 1954, c. 181, sec. 5 requires in all cases that a factor's lien be recorded in the office of city or town clerk where the factor has his principal office or place of business, if within the state.

Under present law mortgages of crops are recorded in the same manner as mortgages of personal property (R. S. 1954, c. 178, sec. 7), and no special provision is made for recording of security interests in fixtures. Under R. S. 1954, c. 46, sec. 99 the conditional sale of railroad equipment is recorded in the office of the secretary of state or with the interstate commerce commission.

(Note: The choice of options presented under this section is left open. It will be noted that use of optional paragraph (a) plus the optional language in paragraph (c) would create a procedure closer to that of present law than would use of the other options presented.)

Subsection (2).

No cases were found relating directly to documents filed in the improper place. But see Globe Slicing Machine Co. v. Casco Bank & Trust Co., 154 Me. 62, 142 A.2d 30 (1958) in which the question of actual knowledge was not considered relevant where the mortgage had been recorded under an improper name.

Subsection (3).

Accord: Barrows v. Turner, 50 Me. 127 (1863)(chattel mortgage).

Subsection (4).

There are no statutory provisions covering this area.

Section 9-402. Formal Requisites of Financing Statement; Amendments.

Subsections (1), (3) and (4).

The financing statement is similar to the memorandum allowed

under R. S. 1954, c. 119, sec. 9 (conditional sales), R. S. 1954, c. 178, sec. 1 (chattel mortgages), and R. S. 1954, c. 181, sec. 4 (factor's liens). The most important difference between the financing statement and the present memorandum is that the financing statement (except in those cases covered by Subsection (2)) must be signed by both parties, whereas the present memorandum need be signed only by the debtor. Acknowledgment is currently required only in the case of contracts for the conditional sale of railroad equipment.

Subsection (2).

Present law makes no provision for filing without the signature of the debtor.

Subsection (5).

There is no similar provision in present Maine law. The Code would seem to reject the stringent attitude of such cases as Tardiff v. M-A-C Plan, 144 Me. 208, 67 A.2d 337 (1949).

Section 9-403. What Constitutes Filing; Duration of Filing; Effect of Lapsed Filing; Duties of Filing Officer.

Subsection (1).

Present law provides that papers entitled to be recorded shall be considered as recorded when received (R. S. 1954, c. 178, sec. 2). The Code continues this provision and provides alternatively that presentation of the statement and tender of the filing fee shall constitute filing.

Subsections (2) and (3).

There are presently no provisions for limiting the period of

effectiveness of a filed document.

Subsection (4).

The present practice is similar to that set forth here (R. S. 1954, c. 178, sec. 2).

Subsection (5).

The present schedule of fees is set forth in R. S. 1954, c. 89, sec. 216 (for Registers of Deeds) and R. S. 1954, c. 91, sec. 28 (for town clerks). The fees vary, depending on where the document is filed and how long it is.

Section 9-404. Termination Statement.

With minor changes this continues the provisions of R. S. 1954, c. 178, sec. 11. The Code requires a written demand, allows ten rather than seven days for compliance, and imposes a more severe penalty for non-compliance by the secured party.

Section 9-405. Filing of Statement of Assignment of a Secured Party's Interest; Duties of Filing Officer; Fees.

There is no corresponding provision in present Maine law.

Section 9-406. Release of Collateral; Duties of Filing Officer; Fees.

Under present law there is a similar provision (R. S. 1954, c. 178, sec. 10) allowing recording of waivers executed by parties having rights or interest in mortgaged property.

Section 9-407. Information from Filing Officer.

Subsection (1).

R. S. 1954, c. 181, sec. 5 provides that in the case of a factor's lien, the recording clerk shall on request issue a receipt in writing setting forth the recorded data, but no such provision is made for other documents.

Subsection (2).

There is no similar provision in present law.

Part 5

DEFAULT

Section 9-501. Default; Procedure When Security Agreement Covers Both Real and Personal Property.

See Annotations to UCC Sections 9-207 and 9-502 through 9-507 for present Maine law as to rights indexed in this section.

Subsection (1).

The provision upholding the rights of the secured party created by the agreement, as well as those created by statute, is in accord with R. S. 1954, c. 178, sec. 3 and Consolidating Rendering Co. v. Stewart, 132 Me. 139, 168 Atl. 100 (1933). Under Maine law a secured party can attempt collection of his debt by suit and also by enforcing his mortgage security concurrently or successively. Westinghouse Elec. & Mfg. Co. v. Auburn & Turner RR. Co., 106 Me. 349, 76 Atl. 897 (1910); Arthur E. Guth Piano Co. v. Adams, 114 Me. 390, 96 Atl. 722 (1916); M. Steinert & Sons Co. v. Reed, 118 Me. 403, 108 Atl. 334 (1919); see Lord v. Crowell, 75 Me. 399 (1883). This Subsection would seem to remove the limitation that attachment of the mortgaged property in a suit on the debt is a waiver of the security interest. Libby v. Cushman, 29 Me. 429 (1849); Whitney v. Farrar, 51 Me. 418 (1864); M. Steinert & Sons Co. v. Reed, supra. Provision for secured party's rights against either documents or goods covered thereby seems consistent with R. S. 1954, c. 189, sec. 6.

Subsection (2).

Although there is no exact counterpart in Maine law, this Subsection seems consistent with Loggie v. Chandler, 95 Me. 220,

49 Atl. 1059 (1901); Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1936); Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 Atl. 554 (1938) limiting equitable jurisdiction over foreclosures and redemptions, as created by R. S. 1954, c. 197, sec. 4(I), to exceptional situations where the statutory methods are insufficient to give complete remedy.

Subsection (3).

Although R. S. 1954, c. 178, secs. 3-6 provide for rights of redemption and for notice of foreclosure, these requirements may easily be avoided by insertion of a power of sale in the mortgage, foreclosure thereunder not bringing into play these restrictions. Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 Atl. 100 (1933). Although it has been held that long possession by a mortgagee without foreclosure will not amount to an implied waiver of the right of redemption, Penobscot Produce Co. v. Martin, 128 Me. 386, 147 Atl. 867 (1929), there seems to be no other case or statutory authority relative to waiver of the debtor's rights except R. S. 1954, c. 178, sec. 10, which requires that it be recorded.

Subsection (4).

Although there seems to be no Maine law directly in point, compare Simpson v. Emery, 134 Me. 213, 183 Atl. 842 (1936).

Subsection (5).

The provision for relation back of the levy to the date of the perfection of the security interest seems inconsistent with Maine law that attachment is a waiver of the security interest. Libby v. Cushman, 29 Me. 429 (1849); Whitney v. Farrar, 51 Me. 418 (1864); M. Steinert

& Sons Co. v. Reed, 118 Me. 403, 108 Atl. 334 (1919). Under Maine law a judicial sale pursuant to an execution could not be said to be a foreclosure, because, since the security interest in the property has been waived, there is no subsisting equity of redemption. The rights of the mortgages are no different from those of any other attaching creditor. Libby v. Cushman, supra.

Section 9-502. Collection Rights of Secured Party.

Subsection (1).

This provision of the Code is comparable to R. S. 1954, c. 113, sec. 171, which provides that a written assignment in good faith shall be deemed complete at the making and that the assignor shall hold in trust for the assignee any sums received from the debtor acting without notice of the assignment. That is, the assignment is binding on the debtor after notice. Palmer v. Palmer, 112 Me. 149, 91 Atl. 281 (1914).

Subsection (2).

There are no comparable Maine statutes.

Section 9-503. Secured Party's Right to Take Possession After Default.

With respect to a conditional sale, the conditional vendor has the right to possession in Maine law. If an agreement provides that possession shall be in the vendee, the vendor may nevertheless repossess on default. Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1936). Because Maine is a title theory state, a chattel mortgagee has sufficient right to possession to sanction his taking upon default of the mortgagor. See Libby v. Cushman, 29 Me. 429 (1849); Harvey v. Anacone, 134 Me. 245, 255-6, 184 Atl. 889 (1936). There is nothing in present Maine

law comparable to the last two sentences of this section.

Section 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

Subsection (1).

Foreclosure by a chattel mortgagee is strictly regulated by R. S. 1954, c. 178, secs. 3-6. The statutory method of foreclosure is not, however, the exclusive remedy, as Maine law recognizes a mortgage provision allowing the mortgagee a power of sale on default. The exercise of this right has been expressly accepted in R. S. 1954, c. 178, sec. 3. See discussion, Consolidated Rendering Co. v. Stewart and Farwell, 132 Me. 139, 168 Atl. 100 (1933). With respect to foreclosure, the conditional vendor has the same rights as the chattel mortgagee. R. S. 1954, c. 119, sec. 9. As the Code comment indicates, the section follows the more liberal provisions of the Trust Receipts Act, recently enacted in Maine. See R. S. 1954, c. 189, sec. 6.

There is no Maine statute comparable to the Code provisions with respect to the application of proceeds. Nor is there any case law which suggests that Subsection (a) or (b) would not conform to Maine law. In the analogous circumstances of a mortgage on real property, the costs of reasonable repairs and improvements, and suitable compensation for the care and management of the estate and taxes thereon are taken into account. See Pierce v. Faunce, 53 Me. 351. In Low v. Allen, 41 Me. 248 (1856), the Court does determine that proceeds from the disposition of mortgaged property must be applied to indemnify the mortgagee for partnership debts, running to the property itself, before being applied to the satisfaction of the mortgagor's indebtedness.

Considering the partnership debts as the expense of holding the property, the order of application enforced seems to conform with the order presented by the Code section. The application of the proceeds from the sale of pledged property is governed by R. S. 1954, c. 178, sec. 87.

Subsection (c) is consistent with Maine law to the extent that second mortgagees do have a legal right to appropriate the surplus of the proceeds to the payment of their debt. Treat v. Gilmore, 49 Me. 34, 39 (1860).

Subsection (2).

The section dealing with the proceeds of pledged property is comparable, R. S. 1954, c. 178, sec. 87. Likewise the section dealing with property sold by an entruster in possession on or after default by the trustee in a trust receipts transaction. R. S. 1954, c. 189, sec. 6. Concerning disposition of proceeds of foreclosure sale of property subject to a chattel mortgage, see Livermore Falls Trust & Banking Co. v. Richmond Mfg. Co., 108 Me. 206, 79 Atl. 844 (1911).

Subsection (3).

Subsection (3) makes changes in some of the present Maine law. The five-day notice required by the Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 6 will be eliminated, as will the notice requirements for a sale under a lien or pledge. R. S. 1954, c. 178, secs. 76-82 and 86. The notice requirements for foreclosure of chattel mortgages and conditional sales, R. S. 1954, c. 178, secs. 4-6 (see R. S. 1954, c. 119, sec. 9) and of railroad mortgages, R. S. 1954, c. 46, sec. 36 may be affected.

The standard that a disposition be commercially reasonable has no counterpart in Maine statutory or case law. See Restatement, Security, sec. 49. A pledgee cannot buy in at a foreclosure sale without the authorization of the pledgor. Appleton v. Turnbull, 84 Me. 72, 24 Atl. 592 (1891); see also Freeman v. Harwood, 49 Me. 195 (1859) and Restatement, Security, sec. 51. But there is no authority as to whether a chattel mortgagee can do so. See Parker v. Vose, 45 Me. 54 (1858).

Subsection (4).

The only statutory provision relative to the effect of disposition is in the Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 6(III)(c), protecting the purchaser for value in good faith.

Subsection (5).

No statutory counterpart, but probably no change in the law.

Section 9-505. Compulsory Disposition of Collateral; Acceptance of the Collateral as Discharge of Obligation.

Subsection (1).

Under present Maine law there are no statutory provisions comparable to Subsection (1).

Subsection (2).

The provision for retention of collateral in discharge of the obligation has no counterpart in present Maine statute law except R. S. 1954, c. 189, sec. 6(V) relative to trust receipts. It is apparently analogous to acquisition by the secured party of absolute title to the property by foreclosure, in which case presumably he

would not be accountable for excess of value above the amount of the debt. There seem to be no Maine cases on this point.

Section 9-506. Debtor's Right to Redeem Collateral.

This section is in accord with R. S. 1954, c. 178, sec. 3. Both allow redemption up to the time of sale or debtor's loss of his equity of redemption, which under Maine law would be accomplished by foreclosure and under the Code by an agreement in writing after default. Note that under Maine law, R. S. 1954, c. 178, sec. 3 would also apply to conditional sales. R. S. 1954, c. 119, sec. 9, Monaghan v. Longfellow, 82 Me. 419, 19 Atl. 857 (1890); Westinghouse Elec. & Mfg. Co. v. Auburn & Turner RR. Co., 106 Me. 349, 76 Atl. 897 (1910); Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1936).

Compare Uniform Trust Receipts Act, R. S. 1954, c. 189, sec. 6(V).

Section 9-507. Secured Party's Liability for Failure to Comply with this Part.

There are no comparable statutory provisions under present Maine law.

Subsection (1).

The provision in the first sentence of Subsection (1) that a secured party not proceeding in accordance with Part 5 may be ordered or restrained seems to considerably broaden the existing equity powers of a Maine court. Although R. S. 1954, c. 107, sec. 4(I) extends the powers of equity to foreclosures of mortgages of personal property and redemption of estates mortgaged, this has been limited to particular cases where the statutory methods were insufficient to

give complete remedy. Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 Atl. 554 (1938) and cases cited therein. See also York & Cumberland RR Co. v. Myers, 41 Me. 109 (1856) wherein injunctive relief was denied the mortgagor.

Concerning remedies of the debtor and others, see R. S. 1954, c. 178, sec. 3, which seems to be in general accord. See also the discussion in Harvey v. Anacone, 134 Me. 245, 184 Atl. 889 (1936).

Subsection (2).

See generally the Annotation to UCC Section 9-504(3).