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THE UNIFORM COMMERCIAL CODE— DOCUMENTS OF TITLE

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Both before and since its promulgation in 1952, the Uniform Commercial Code has been the subject of voluminous comment in the legal periodicals.¹ Article 7 of the Code deals comprehensively with documents of title; it is designed to replace the Uniform Warehouse Receipts Act,² the Uniform Bills of Lading Act,³ and Sections 27-40 of the Uniform Sales Act.⁴ The subject is one of great importance, and the changes made by the Code are significant; yet there has been surprisingly little comment on Article 7.⁵ Perhaps the most useful comments are to be found in annotations to the Code prepared for use in various individual states.⁶

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1. See, e.g., the following symposia: 16 *LAW & CONTEMP. PROB.* 1 (1951); [1952] *WIS. L. REV.* 197; 22 *TENN. L. REV.* 776 (1953); 14 *OHIO ST. L.J.* 1 (1953).

2. Hereinafter UWRA. The Act was promulgated in 1906 and has been enacted in every state. See 3 *UNIFORM LAWS ANN.*; Pa. Laws 1909, No. 13, p. 19, PA. STAT. ANN. tit. 6, §§ 23-32, 131-180 (Purdon 1930). See also 4 *WILLISTON, CONTRACTS* c. 35 (Rev. ed. 1936); *MOHUN, WAREHOUSE LAWS AND DECISIONS* (2d ed. 1914).

3. Hereinafter UBLA. The Act was promulgated in 1909 and has been enacted in 31 states. See 4 *UNIFORM LAWS ANN.*; Pa. Laws 1911, p. 838, PA. STAT. ANN. tit. 6, §§ 51-105 (Purdon 1930). See also 4 *WILLISTON, CONTRACTS* c. 36 (Rev. ed. 1936).

4. Hereinafter USA. The Act was promulgated in 1906 and has been enacted in 34 states. See 1 *UNIFORM LAWS ANN.*; Pa. Laws 1915, No. 241, p. 543, PA. STAT. ANN. tit. 69, §§ 1-339 (Purdon 1931). See *WILLISTON, SALES* (Rev. ed. 1948).

5. See Pryor, *Article 7—Documents of Title; An Attempt at Commercial Uniformity*, [1952] *WIS. L. REV.* 332; Note, 44 *ILL. L. REV.* 100 (1949); Comment, 17 *ALBANY L. REV.* 111 (1953); Comment, 31 *TEXAS L. REV.* 167 (1952); Comment, 32 *TEXAS L. REV.* 321 (1954).

6. See *PENNSYLVANIA ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE* (1952); *MASSACHUSETTS ANNOTATIONS TO THE PROPOSED UNIFORM COMMERCIAL CODE* (1953).

The enactment of the Code in Pennsylvania,⁷ effective July 1, 1954, brought the subject out of the realm of academic discussion and into that of the practice of law. Early in 1954 a series of forums on the Code was presented in Philadelphia under the joint auspices of the Philadelphia and American Bar Associations and the Committee on Continuing Legal Education of the American Law Institute. This article is based on one of the lectures given in that series, but is less heavily focussed on the specific changes made in preexisting Pennsylvania law.

I. BACKGROUND AND SCOPE

Statutes Repealed: In enacting the Uniform Commercial Code, the Pennsylvania legislature not only repealed the three uniform acts referred to above, but also repealed statutes relating to liens and their enforcement to the extent of any inconsistency,⁸ or to the extent they related to warehousemen and carriers.⁹ The general scope of Article 7 is very similar to that of the statutes repealed, except that the Code makes no provision for criminal penalties. In Pennsylvania criminal provisions substantially similar to those found in the Uniform Warehouse Receipts Act and Uniform Bills of Lading Act were separately enacted as additions to the Penal Code of 1939.¹⁰

Major Changes: The Code makes a large number of changes in terminology and in detail; this article treats those changes which seem to have the greatest significance. Here it is enough to list the outstanding novelties. First is a requirement of filing to validate field-warehousing arrangements. Second is a major change in the control of goods shipped under a straight bill of lading, relating to diversion and reconsignment. Third are novel provisions governing delivery orders. And fourth are provisions for bills of lading issued by freight forwarders, air bills of lading, destination bills of lading, and through bills of lading.

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7. Pa. Laws 1953, No. 1, p. 3, as amended by Pa. Laws 1953, No. 180, p. 624. See also Pa. Laws 1953, No. 304, p. 1110, amending the penal laws.

8. PA. STAT. ANN. tit. 12A, § 10-102 (Purdon 1953), repealing Pa. Laws 1925, No. 300, p. 557, PA. STAT. ANN. tit. 6, §§ 11-4 (Purdon 1930); PA. LAWS 1927, No. 52, p. 73, PA. STAT. ANN. tit. 56, §§ 511-3 (Purdon 1930). Unless otherwise indicated, citations to the UCC herein refer to the Official Draft of the Uniform Commercial Code as proposed by the American Law Institute and the National Conference of Commissioners on Uniform Laws, Text and Comments Edition (1952), with changes recommended by the Editorial Board in a pamphlet dated April 30, 1953, as reprinted in BRAUCHER, SUTHERLAND & WILLCOX, COMMERCIAL TRANSACTIONS: TEXT—FORMS—STATUTES (1953). The Pennsylvania text is identical except with respect to certain sections proposed in the alternative in the Official Draft, and with respect to the list of statutes repealed.

9. PA. STAT. ANN. tit. 12A, § 10-102 (Purdon 1953), repealing Pa. Laws 1864, No. 965, p. 1127, PA. STAT. ANN. tit. 6, §§ 15-7 (Purdon 1930).

10. Compare UWRA §§ 50-5, UBLA §§ 44-50, with PA. LAWS 1953, No. 304, p. 1110, PA. STAT. ANN. tit. 18, § 4851.1 (Purdon Supp. 1953).

Statutes Not Affected: Important statutes closely related to the subject matter of Article 7 are unaffected. First, state enactment of the Code cannot change overriding federal statutes. The United States Warehouse Act,¹¹ the Interstate Commerce Act,¹² and the Carriage of Goods by Sea Act¹³ regulate important aspects of warehousing and transportation. More directly in point is the Federal Bills of Lading Act,¹⁴ for the most part identical with the Uniform Bills of Lading Act, but covering interstate shipments and foreign exports. Unless that Act is amended by Congress, the law for interstate shipments will not be uniform with the law embodied in Article 7.¹⁵ State "regulatory statutes" and tariffs, classifications or regulations thereunder are similarly unaffected.¹⁶

"Document of Title": The term "document of title," basic to the coverage of Article 7, is defined in Article 1.¹⁷ It includes specifically bills of lading and warehouse receipts, which are separately defined. In the traditional concept, a bill of lading or warehouse receipt has three aspects: it is (1) a receipt for goods delivered to the issuer, (2) a contract between the issuer and the owner, and (3) a document of title. As a receipt, the document identifies the goods and is evidence against the issuer, although recitals of fact are ordinarily not subject to the parol evidence rule and may be contradicted by other evidence. The Code makes such a document, if a contract authorizes or requires its issuance by a third party, "prima facie evidence" between the contracting parties "of its own authenticity and genuineness and of the facts stated in the document by the third party."¹⁸ As a contract, the document may contain terms defining the issuer's obligation; in this aspect, the parol evidence rule may deny effect to agreements varying its legal effect.¹⁹

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11. 39 STAT. 486 (1916), as amended, 7 U.S.C. §§ 241-73 (1946); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). See Blomquist, *Warehouse Regulation Since Munn v. Illinois*, 29 CHI-KENT REV. 120 (1951).

12. 24 STAT. 379 (1887), as amended, 49 U.S.C. §§ 1-27 (1946) (Note especially the Carmack Amendment, 34 STAT. 593 (1906)); *Atchison T. & S.F. Ry. v. Harold*, 241 U.S. 371 (1916).

13. 49 STAT. 1207 (1936), as amended, 46 U.S.C. §§ 1300-15 (1946).

14. Hereinafter FBLA. 39 STAT. 538 (1916), as amended, 49 U.S.C. §§ 81-124 (1946). See *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209 (1931).

15. See, generally, Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 100 (1951).

16. UCC § 7-103. See, e.g., Pa. Laws 1949, No. 455, p. 1511, PA. STAT. ANN. tit. 31, §§ 962-76 (Purdon Supp. 1953) (Cold Storage Act); Pa. Laws 1937, No. 286, p. 1053, as amended, PA. STAT. ANN. tit. 66, §§ 1101-562 (Purdon Supp. 1953) (Public Utility Law).

17. UCC § 1-201(15), following USA § 76; UCC § 7-102(1)(e).

18. UCC § 1-202.

19. Compare UCC §§ 1-205, 2-202.

These first two aspects are not peculiar to documents of title. Under the Code a document of title must be treated "in the current course of business or financing . . . as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers."²⁰ It "must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass."²¹ Delivery orders are expressly included,²² as are dock warrants and dock receipts; other documents are covered if they meet the standards quoted. The official comment indicates that the specified types of documents must also meet those standards, and that dock warrants or dock receipts often will not do so.²³ The comment also excludes conditional sale contracts and "tokens" of storage such as baggage and parcel checks.

Conflict of Laws: Except where federal law interferes, the geographical scope of Article 7 is laid down in Article 1.²⁴ The controversial provisions of Section 1-105 make Article 7 applicable whenever any transaction within its terms or the terms of Article 2 (Sales) or Article 5 (Documentary Letters of Credit) has any one of several listed types of contact with the enacting state. But the parties may agree to be governed by the law of some other state or nation to which the transaction "bears a reasonable relationship."

Those provisions now constitute a directive to the courts of Pennsylvania to apply the Code in many situations where common-law principles of the conflict of laws would point to the law of some other state. While judicial dicta can be found that in some situations such a change in conflict-of-laws principles is beyond the legislative power,²⁵ there are analogous precedents for the Code provisions.²⁶ Parties to transactions which may give rise to litigation in Pennsylvania, therefore, must take

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20. UCC § 1-201(15).

21. *Ibid.*

22. See also UCC §§ 7-102(1) (d), (f), 7-502(1), (2).

23. UCC § 1-201, comment 15.

24. UCC § 1-105(2), (6); see Dean, *Conflict of Laws under the Uniform Commercial Code: The Case for Federal Enactment*, 6 VAND. L. REV. 479 (1953); Stumberg, *Commercial Paper and the Conflict of Laws*, 6 VAND. L. REV. 489, 498-504 (1953).

25. See *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 202, 100 N.E. 1025, 1027 (1913) (obligations of carrier under import bill of lading). *But cf. Voghel v. New York, N.H. & H.R.R.*, 216 Mass. 165, 103 N.E. 286 (1913) (rights against local connecting carrier); *Hallgarten v. Oldham*, 135 Mass. 1 (1883) (indorsement elsewhere of Massachusetts warehouse receipt).

26. *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408 (1927) (usury: validating law applied unless place "has no normal relation to the transaction"); see Note, 62 HARV. L. REV. 647 (1949) (contract stipulations).

account of the provisions of the Code, even though traditional principles would make Pennsylvania law inapplicable.

The principal cases under Article 7 where the Code may make Pennsylvania law newly applicable will involve warehouse receipts and bills of lading, either intrastate or foreign, issued elsewhere. But the Code is a direct command only to the courts, including the federal courts,²⁷ in Pennsylvania. If litigation arises in another state, the application of the Code depends in the first instance on the choice-of-law rule of the forum state.²⁸ The result is to make the applicable law depend, more clearly than before, on the choice of forum, and thus to encourage selection of the place of suit on that basis.

The Commercial Setting: Most shipments of goods today are made under bills of lading. The greatest volume, nearly one-and-one-half billion tons per year, is carried by railroads; the bulk of railroad transportation is in interstate commerce governed by the Federal Bills of Lading Act, and under straight, non-negotiable bills.²⁹ Water-borne tonnage amounts to some three-quarters of a billion; inter-city motor carriers account for between one and two hundred million tons; air carriers carry a much smaller tonnage. It seems likely that the most important impact of the Code on transportation will relate to rail and water imports from abroad and to intrastate shipments by rail and truck.

Public warehouses handle a smaller tonnage of merchandise than carriers; and the goods are likely to remain in their hands for a longer time.³⁰ The greatest need for warehousing arises where production is seasonal and consumption is not, as in the case of agricultural commodities. Of some 3400 public warehouses shown by the 1940 Census of Business, about half handled general merchandise and household goods; the remainder consisted primarily of cold-storage and farm-product warehouses. In 1952 there were 1434 warehouses holding federal licenses under the United States Warehouse Act for the storage of agricultural products; over half were grain warehouses and almost one-third were cotton warehouses. Cotton warehouses operating under federal licenses handle perhaps one-and-one-half billion dollars worth of cotton in a year.

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27. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

28. See UCC § 1-105, comment 1.

29. See Statement of Mr. Albert Ward, *Hearing before Enlarged Editorial Board*, 6 BUSINESS LAWYER 168, 170, 172 (1951). For transportation statistics, see STATISTICAL ABSTRACT OF THE UNITED STATES, 1952.

30. For warehouse statistics, see 3 U.S. CENSUS OF BUSINESS 16 (1940); REPORT OF THE PRODUCTION AND MARKETING ADMINISTRATION, U.S. DEPT OF AGRICULTURE, FISCAL YEAR ENDED JUNE 30, 1952, p. 116 (1953).

Enough has been said to indicate that the storage and shipment of merchandise are important in volume and dollar amount. Title documents not only play an important part in the mechanics of storage and shipment; they are also used as a basis of credit to finance those processes. Large sums of money are lent on the faith of such documents, both by such Government agencies as the Commodity Credit Corporation³¹ and by banks and other private lenders.³² Two patterns are followed in the usual financing transaction: a negotiable document is issued, calling for delivery to bearer or to the order of the depositor, and negotiated to the bank; or a nonnegotiable document is issued, calling for delivery to the bank.

II. FORMS OF DOCUMENTS

Warehouse Receipts: Under the Code, as under the UWRA, warehouse receipts may be issued by any "warehouseman."³³ The definition of warehouseman has been slightly changed to make it clear that state and cooperative warehouses are covered and that violations of law by a warehouseman do not remove his receipts from the scope of the Code. The issuer is bound by the obligations imposed by Article 7 even though the receipt covers his own goods, or even though he is not a warehouseman;³⁴ but, unless he is engaged in the business of storing goods "for others," his document does not come within the definition of "warehouse receipt." Thus the Code may not apply to a receipt issued by one who stores only his own goods.³⁵ A court might, however, protect a holder of such a receipt on estoppel grounds.³⁶

Many warehouse receipts are issued subject to Standard Contract Terms and Conditions for General Merchandising and Cold Storage Warehouses, adopted at a conference of industry representatives and approved October 30, 1926 by the United States Department of Commerce.³⁷ Such terms, usually printed on the back of the receipt and incorporated by reference on its face, are optional under both the

31. See *Scroggin Farms Corp. v. McFadden*, 165 F.2d 10 (8th Cir. 1948); *Hearings before Subcommittee of House Committee on Appropriations on Dep't of Agriculture Appropriations for 1953*, 82d Cong., 2d Sess. 1410, 1430-50 (1952); *Hearings before Committee on Agriculture and Forestry on Sen. Res. 256*, 82d Cong., 2d Sess. 58 (1952).

32. See RICHARDS, *THE MARKETING OF COTTON AND THE FINANCING OF COTTON MERCHANTS* (Chase Nat. Bank 1949).

33. UCC §§ 1-201(44), 7-102(1)(h), 7-201; UWRA §§ 1, 58(1).

34. UCC § 7-401(c), (d).

35. Cf. *Moore v. Thomas Moore Distilling Co.*, 247 Pa. 312, 93 Atl. 347 (1915).

36. UCC § 1-103; cf. *State Street Trust Co. v. Lawrence Mfg. Co.*, 284 Mass. 355, 187 N.E. 755 (1933). The same result might be reached by construing UCC § 7-401(d) as if it contained the following bracketed words: "if it is [in form] a warehouse receipt."

37. See BRAUCHER, SUTHERLAND & WILLCOX, *COMMERCIAL TRANSACTIONS: TEXT—FORMS—STATUTES*, Forms 27, 29, pp. 172-81 (1953).

UWRA³⁸ and the Code,³⁹ unless they conflict with specific provisions. Both statutes require as essential terms (a) warehouse location (b) date of issue (c) consecutive number (d) designation of obligee (e) rate of charges⁴⁰ (f) description of goods or packages (g) signature of the warehouseman or his agent (h) disclosure when warehouseman is owner or part owner of goods (i) statement of advances and liabilities for which a lien is claimed.⁴¹

Under the UWRA a failure to include essential terms may mean that the document is not a warehouse receipt at all, and hence is not subject to the Act.⁴² The UCC guards against this result expressly as to obligations of the issuer,⁴³ and the provision for essential terms states only that the warehouseman is liable for any loss caused by omission.⁴⁴ It would seem, therefore, that the question whether a document is a warehouse receipt for any purpose should depend solely on whether it comes within the definitions of "document of title" and "warehouse receipt."⁴⁵

Bills of Lading: The Code,⁴⁶ like the UBLA,⁴⁷ applies to bills of lading issued by common carriers. The Code expressly covers airbills, air consignment notes and air waybills, and is broadened to include bills issued by contract carriers and freight forwarders as well. The provisions of the UBLA for essential terms,⁴⁸ very similar to those of the UWRA, are omitted from the Code. The Interstate Commerce Commission has prescribed forms of railroad bills⁴⁹ which seem to be

38. UWRA §§ 2, 3.

39. UCC §§ 7-202, 1-102(3).

40. UWRA § 2(e) says "rate of storage charges"; UCC § 7-202(2) (e) says "rate of storage and handling charges." Omission of this term does not make the receipt invalid. *Manufacturers' Mercantile Co. v. Monarch Refrigerating Co.*, 266 Ill. 584, 107 N.E. 885 (1915); cf. *First Nat. Bank of Fort Worth v. Donald*, 84 S.W.2d 325 (Tex. Civ. App. 1935).

41. UWRA § 2(i); UCC § 7-202(2) (i) says "lien or security interest." See text at notes 163-204 *infra*.

42. *Rapp v. Germantown Fireproof Storage Co.*, 44 Pa. D. & C. 164 (C.P. Philadelphia County 1942); see *Rodgers v. Murray*, 247 S.W. 888, 889 (Tex. Civ. App. 1923). But cf. *Smith Bros. Co. v. Richheimer & Co.*, 145 La. 1066, 83 So. 255 (1919); note 40 *supra*.

43. UCC § 7-401(a).

44. UCC § 7-202(2). This provision is not limited, as is the corresponding provision of UWRA § 2, to negotiable receipts.

45. UCC § 1-201(15), (44); see text at notes 8-32 *supra*. Cf. *State Bank of Wilbur v. Almira Farmers Warehouse Co.*, 123 Wash. 354, 212 Pac. 543 (1923) (weight tickets not warehouse receipts).

46. UCC § 1-201(6).

47. UBLA § 1.

48. UBLA §§ 2, 3.

49. In the Matter of Bills of Lading, 14 I.C.C. 346 (1908), 52 I.C.C. 671 (1919); Domestic Bill of Lading and Live Stock Contract—In the Matter of Bills of Lading, 64 I.C.C. 357 (1921), 66 I.C.C. 63 (1922), 167 I.C.C. 214 (1930); In the Matter of Bills of Lading, Domestic Bill of Lading, and Live Stock Contract, 172 I.C.C. 362 (1931), 245 I.C.C. 527 (1941). See BRAUCHER, SUTHERLAND & WILLCOX, COMMERCIAL TRANSACTIONS: TEXT—FORMS—STATUTES, Forms 30, 31, pp. 184-91 (1953); 4 WILLISTON, CONTRACTS §§ 1073, 1110A (Rev. ed. 1936).

used without discrimination between interstate and intrastate commerce, and it was apparently thought that the regulation of the forms should be left to the regulatory agencies.⁵⁰

Freight forwarders have long engaged in the business of consolidating less-than-carload shipments into carloads to obtain the benefit of carload rail rates.⁵¹ After World War I they entered the field of motor carrier transportation and the coordination of truck and rail transportation, and became embroiled in rate controversies⁵² which finally resulted in 1942 in the addition of Part IV to the Interstate Commerce Act to regulate their interstate activities.⁵³ By the 1942 statute freight forwarders were required to issue bills of lading to their shippers,⁵⁴ and the Interstate Commerce Commission has made rules governing the issue of freight-forwarder bills of lading.⁵⁵ In 1949 the Supreme Court said that "Congress studiously avoided characterizing forwarders as carriers,"⁵⁶ but in 1950 the statute was amended to define a freight forwarder as a "common carrier."⁵⁷ The result would seem to be to confirm the application of the Federal Bills of Lading Act to interstate bills of lading issued by freight forwarders.⁵⁸

Thus the Code provisions for freight-forwarder bills of lading, as state law, will apparently apply only to intrastate shipments and foreign imports. Under the federal law the freight forwarder seems still to be classified as a shipper in relation to a railroad or trucker; and customers of a freight forwarder have been permitted to recover as undisclosed principals to the bill of lading issued by the railroad or trucker to the forwarder.⁵⁹ The Code provides for the discharge of the carrier by delivery in accordance with the bill of lading issued by it, but otherwise subjects title based on that bill of lading to the rights of holders

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50. See Statement of Mr. Albert Ward, *supra* note 29, at 169.

51. ICC v. Delaware, L. & W.R.R., 220 U.S. 235 (1911); see Freight Forwarders, *Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 5967*, 81st Cong., 2d Sess. 21-8, 71-91 (1950).

52. *Ibid.*; Freight Forwarding Investigation, 229 I.C.C. 201 (1938); Acme Fast Freight, Inc. v. United States, 30 F. Supp. 968 (S.D.N.Y.), *aff'd per curiam*, 309 U.S. 638 (1940); United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1940).

53. 56 STAT. 284 (1942), as amended, 49 U.S.C. §§ 1001-22 (Supp. 1952).

54. 56 STAT. 295 (1942), 49 U.S.C. § 1013 (1946).

55. Bills of Lading of Freight Forwarders, 259 I.C.C. 277 (1944).

56. Chicago, M., St. P. & P.R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 477 (1949).

57. 64 STAT. 1113 (1950), 49 U.S.C. § 1002(a)(5) (Supp. 1952). See, *accord*, Railway Express Agency, Inc., 2 C.A.B. 531, 538 (1941); American Airlines, Inc. v. C.A.B., 178 F.2d 903 (7th Cir. 1949).

58. 39 STAT. 538 (1916), 49 U.S.C. § 81 (1946). *Accord*, Slutzkin v. Gerhard & Hey, Inc., 199 App. Div. 5, 191 N.Y. Supp. 104 (1st Dep't 1921).

59. Thompson v. Am. Abrasive Metals Co., 253 S.W.2d 83 (Tex. Civ. App. 1952), *cert. denied*, 346 U.S. 816 (1953); see Chicago, M., St. P. & P.R.R. v. Acme Fast Freight, Inc., 336 U.S. 465, 487 n.27 (1949).

of bills issued by the forwarder.⁶⁰ Railroad representatives have suggested that the Code thereby imposes on the railroad direct liability to the forwarder's principal in the event of loss or damage.⁶¹ But their objection to "the possibility of a multitude of suits" seems to be an objection to existing law as well.

"Through bills of lading," not mentioned in the Federal Bills of Lading Act or the UBLA, are covered by the Code.⁶² The Carmack Amendment to the Interstate Commerce Act requires common carriers receiving property for interstate shipment or for export to an adjacent foreign country to "issue a receipt or bill of lading therefor"; the initial carrier is made responsible to the lawful holder for any damage to the property caused by it or by a connecting carrier "when transported on a through bill of lading."⁶³ The delivering carrier is also made responsible, and the initial or delivering carrier is given a right over against the carrier on whose line the damage is sustained. The Code provisions are patterned generally on the federal provisions, but impose no obligation to issue through bills.⁶⁴ Under the Code, also, the delivering carrier seems not to be liable for defaults of prior carriers.

The Code provision for through bills will apply primarily to intrastate shipments, but may also apply to some aspects of import shipments.⁶⁵ It makes one important departure from the federal law by extending the initial carrier's liability to acts of other "persons acting as its agents"⁶⁶ as well as connecting carriers; such other persons might, for example, include warehousemen. The Code provision might also, contrary to federal law,⁶⁷ subject a railroad to liability to a freight forwarder independent of the railroad bill of lading.

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60. UCC § 7-503(2).

61. See Statement of Mr. Albert Ward, *supra* note 29, at 171.

62. UCC § 7-302.

63. 34 STAT. 593 (1906), as amended, 49 U.S.C. § 20(11), (12) (1946), as amended, 49 U.S.C. § 20(11), (12) (Supp. 1952); made applicable to motor carriers by 49 STAT. 563 (1935), as amended, 49 U.S.C. § 319 (1946); made applicable to freight forwarders by 56 STAT. 295 (1942), 49 U.S.C. § 1013 (1946).

64. See UCC § 7-302, comment 1. In *Mexican Light & Power Co. v. Pennsylvania R.R.*, 33 F. Supp. 483 (E.D. Pa. 1940), the railroad avoided liability for damage on the Mexican Railway by issuing a bill of lading to Laredo, Texas, "for export to El Oro." *But cf.* *Mexican Light & Power Co. v. Texas Mexican Ry.*, 331 U.S. 731 (1947).

65. *Cf.* *Alwine v. Pennsylvania R.R.*, 141 Pa. Super. 558, 15 A.2d 507 (1940); *Reider v. Thompson*, 339 U.S. 113, 118 (1950).

66. UCC § 7-302(1).

67. *Chicago, M., St. P. & P.R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). The 1950 amendment, *supra* note 57, was not intended to change this federal rule. Chapter 1140, § 3, 64 STAT. 1114 (1950), 49 U.S.C. p. 2435 (Supp. 1952); see H.R. REP. NO. 2489, 81st Cong., 2d Sess. (1950).

The Code also makes provision for bills of lading in a set.⁶⁸ The UBLA prohibits the use of negotiable bills in a set for transportation to any place on the continent of North America, except Alaska;⁶⁹ the Code prohibits their use "except where customary in overseas transportation."⁷⁰ Except perhaps for some aspects of foreign imports, such bills will normally be governed by the Federal Bills of Lading Act, which excepts Panama and other possessions of the United States, and foreign countries.⁷¹

The "destination bill" is a legal invention included in the Code to resolve the problem arising from the fact that high-speed air or truck transportation may deliver the goods at destination before the bill of lading can arrive by mail.⁷² The Code authorizes the carrier to procure the issuance of the bill at destination or elsewhere, either originally at the request of the consignor or subsequently, on surrender of the original bill, at the request of the person entitled to control the goods. The carrier may then use wire or cable to give directions for the issue of the destination or substitute bill.

Negotiability: There are important differences between negotiable and nonnegotiable documents of title, particularly with respect to their use as security. The negotiable document more effectively represents the goods, for the bailee is under a duty not to deliver the goods without surrender of the document.⁷³ Nonnegotiable documents often provide that the goods will be delivered on detached written authority without return of the document.

It is therefore important to distinguish negotiable documents from nonnegotiable documents. Under ICC rules, order bills of lading, negotiable, are printed on yellow paper; straight or nonnegotiable bills are printed on white paper. The uniform acts require also that non-negotiable bills of lading and warehouse receipts be "plainly" so marked on their face.⁷⁴ The Code omits that requirement, though a trace of it remains in the use of "*Non-Negotiable Bill of Lading*" as an example in the definition of "conspicuous."⁷⁵

The Code, like the uniform acts, tests negotiability by the terms in which the document designates the person to whom the goods are to

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68. UCC § 7-304.

69. UBLA § 6.

70. UCC § 7-304(1); see UCC § 2-323(3).

71. 39 STAT. 539 (1916), 49 U.S.C. § 84 (1946).

72. UCC § 7-305; see Sneed, *A Proposed Solution to the Documentary Problem of Airborne International Trade*, 65 HARV. L. REV. 1392 (1952); Note, 44 ILL. L. REV. 100 (1942).

73. UWRA §§ 11, 12, 54; UBLA §§ 14, 15; UCC § 7-403(2).

74. UWRA § 7; UBLA §§ 8, 50.

75. UCC § 1-201(10).

be delivered.⁷⁶ The Code provides that warehouse receipts, bills of lading, and other documents of title are negotiable if the goods are to be delivered to bearer or to the order of a named person, or, where recognized in overseas trade, to a named person or assigns.⁷⁷ The provisions for bills of lading running to bearer and for documents of title other than warehouse receipts and bills of lading are found in the Uniform Sales Act but not the UWRA or UBLA; the provision for documents running to a named person or assigns is new. Such provisions may or may not control cases where the distinction between negotiable and nonnegotiable form is confused, as by printing on paper of the wrong color.⁷⁸

Duplicates: The Code continues and makes more precise the requirement that duplicate negotiable documents be plainly marked as duplicates, and extends it to nonnegotiable documents.⁷⁹ It also provides expressly that an unmarked duplicate confers no rights in the goods except in cases of bills in a set, overissue of documents for fungible goods, and substitutes for lost documents.⁸⁰ The requirement does not apply to documents covering the same goods but not issued by the same issuer, such as a warehouse receipt and a delivery order issued by the holder of the receipt, or a freight forwarder's bill of lading and a railroad bill issued to the forwarder.⁸¹

Alteration: The Code provides that alteration of either a warehouse receipt or a bill of lading leaves it enforceable according to its original tenor. The same rule applies to the filling of blanks in a bill of lading, but a bona fide purchaser may treat as authorized the filling of a blank in a negotiable warehouse receipt.⁸² Under the UWRA, filling of blanks would seem to have the same effect as alteration;⁸³ the UBLA provision applies to any addition or erasure after issue unless authority from the carrier was in writing or noted on the bill.⁸⁴

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76. UCC § 7-104; see USA § 27; UWRA §§ 4, 5; UBLA §§ 4, 5.

77. As to "or assigns," see, *contra*: Gubelman v. Panama R.R., 192 App. Div. 165, 182 N.Y. Supp. 403 (1st Dep't 1920); Goldstein v. Societa Veneziana per L'Industria delle Conterie, 193 App. Div. 168, 183 N.Y. Supp. 460 (1st Dep't 1920).

78. Cf. Rountree v. Lydick-Barmann Co., 150 S.W.2d 173 (Tex. Civ. App. 1941).

79. UCC §§ 7-402, 1-201(10); compare UWRA §§ 6, 15, 52; UBLA §§ 7, 18, 46. As to nonnegotiable documents, see Brock v. Atteberry, 153 La. 650, 96 So. 505 (1923).

80. Cf. Small v. Slater, 144 Wash. 268, 257 Pac. 625 (1927). *But cf.* Missouri Pac. Ry. v. Heidenheimer, 82 Tex. 195, 199-201, 17 S.W. 608, 610-611 (1891).

81. See notes 217-23 *infra*.

82. UCC §§ 7-208, 7-306. Cf. Chicago, R.I. & G. Ry. v. Floyd, 161 S.W. 954 (Tex. Civ. App. 1913) (consignor not bound by term inserted in bill).

83. UWRA § 13.

84. UBLA § 16.

The UWRA preserved the bailee's obligation to deliver, but imposed a theoretical forfeiture of "any other liability" of the warehouseman to an alterer or a person who took with notice.

III. LIABILITIES OF THE BAILEE

Nonreceipt and Misdescription: At common law it was held by many courts that a warehouseman or carrier was not bound by a document of title issued by an agent who had received no goods.⁸⁵ The UWRA was held not to have changed this rule in Massachusetts,⁸⁶ but the UBLA provided expressly for liability on bills issued by an agent "the scope of whose actual or apparent authority includes the issuing of bills of lading."⁸⁷ In 1922 the Commissioners on Uniform State Laws recommended an amendment to make the UWRA conform, and some 17 states have adopted it.⁸⁸ The Code carries a similar provision in its definition of "issuer."⁸⁹ Apparently the Code has not changed Pennsylvania law on the point, since the issuer seems to have been liable there without statutory provision.⁹⁰

The Code provision for bills of lading, like that of the UBLA, imposes liability for nonreceipt to the "holder" of a duly negotiated bill or the "consignee" of a nonnegotiable bill.⁹¹ It thus avoids a defect found in the FBLA, which, as to goods subject to a straight bill, protects only the "owner" and is therefore illusory when no goods are shipped.⁹² Under the Code, as under the previous statutes, the statutory protection is limited to persons who rely on the bill of lading.⁹³

As to warehouse receipts and other documents of title, the Code may give broader protection; it runs to any "party to or purchaser for value in good faith of" the document.⁹⁴ That language may cover an innocent depositor as a "party" without proof of reliance. It may also

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85. See WILLISTON, SALES § 419 (Rev. ed. 1948) and cases cited therein.

86. *Rosenberg v. National Dock & Storage Warehouse Co.*, 218 Mass. 518, 106 N.E. 171 (1914).

87. UBLA § 23; compare FBLA § 22, 49 U.S.C. § 102 (1946) which seems to require that the same agent also have authority to receive goods.

88. UWRA § 20, 3 U.L.A. § 20 (Supp. 1953). Compare Mass. Acts 1948, c. 145, p. 99, amending MASS. GEN. LAWS, c. 105, § 26 (1932).

89. UCC § 7-102(1) (f), as incorporated in §§ 7-203, 7-301.

90. Cf. *Brooke v. New York, L. E. & W. R.R.*, 108 Pa. 529, 1 Atl. 206 (1885); *Dulaney v. Philadelphia & R. Ry.*, 228 Pa. 180, 77 Atl. 507 (1910).

91. UCC § 7-301(1); UBLA § 23.

92. *Martin Jesse Motors, Inc. v. Reading Co.*, 87 F. Supp. 318 (E.D. Pa. 1949), *aff'd*, 181 F.2d 766 (3d Cir. 1950), 63 HARV. L. REV. 1439. But cf. *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349 (1929) (carrier liable though statute not applicable).

93. *R. J. Reynolds Tobacco Co. v. Boston & M.R.R.*, 298 Mass. 152, 10 N.E.2d 59 (1937); *Strohmeyer & Arpe Co. v. American Line S.S. Corp.*, 97 F.2d 360 (2d Cir. 1938).

94. UCC § 7-203.

protect a bank which purchases a nonnegotiable document from a party who fraudulently procured it without depositing goods.⁹⁵

Liability for misdescription is dealt with on the same footing as liability for nonreceipt.⁹⁶ An early decision under the FBLA held that misdating was not within the statutory provision covering "the description therein of the goods,"⁹⁷ and the Act was amended to cover misdating expressly.⁹⁸ The Code contains no such express provision, and is open to the same interpretation as the FBLA before the amendment. Aside from statute, a recital in a document may be evidence, though rebuttable, against the issuer;⁹⁹ and the issuer is estopped to deny the recital when it has been relied on by a purchaser.¹⁰⁰

The Code, like predecessor statutes, does not impose liability for failure to describe the goods, or make a failure to note exceptions equivalent to an affirmative recital of good condition.¹⁰¹ The standard forms of bills of lading recite receipt "in apparent good order, except as noted (contents and condition of contents of packages unknown)"; warehouse receipts have similar provisions and commonly carry the words "said to be or contain" before the description of the goods. Such statements, if true, protect the bailee both under the Code and under predecessor statutes, but the Code newly requires that such statements be conspicuous, except in bills of lading, and defines "conspicuous."¹⁰²

"Shipper's load and count," or words of like purport, may be inserted in bills of lading to indicate that the goods were loaded by the shipper.¹⁰³ If true, such statements, like "said to contain," free the carrier from responsibility for misdescription resulting from improper loading by the shipper. It has been held that "weight subject to correction" is not of like purport to "shipper's load and count," and does

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95. For denial of such protection to a purchaser of a straight bill of lading, see *Chesapeake & Ohio R.R. v. State Nat. Bank*, 280 Ky. 444, 133 S.W.2d 511 (1939), 283 Ky. 443, 141 S.W.2d 869 (1940), *cert. denied*, 311 U.S. 689 (1940).

96. UCC §§ 7-203, 7-301.

97. *Browne v. Union Pac. R.R.*, 113 Kan. 726, 216 Pac. 299 (1923), *aff'd on other grounds*, 267 U.S. 255 (1925).

98. FBLA § 22, amended by 44 STAT. 1450 (1927), 49 U.S.C. § 102 (1946).

99. *Beresin v. Pennsylvania R.R.*, 116 Pa. Super. 291, 176 Atl. 774 (1935). *Cf. Banner Mfg. Co. v. Long Island R.R.*, 277 App. Div. 142, 97 N.Y.S.2d 730 (1st Dep't 1950).

100. *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, 27 F.2d 129 (2d Cir. 1928); *The Carso*, 53 F.2d 374 (2d Cir. 1931), *cert. denied*, 284 U.S. 679 (1931).

101. *Austin Nichols & Co. v. Steamship "Isla de Panay"*; 267 U.S. 260 (1925); *Joseph v. Panhandle & S.F. Ry.*, 235 N.Y. 306, 139 N.E. 277 (1923).

102. UCC §§ 1-201(10), 7-203. Section 7-301 comment 1, referring to "conspicuous disclosure" in bills of lading, is a holdover from a previous draft, no longer justified by the text. See UCC § 7-301 (Proposed Final Draft, text and comments ed., Spring 1950).

103. UBLA § 23; FBLA §§ 20, 21, 49 U.S.C. §§ 100, 101 (1946); UCC § 7-301.

not relieve the carrier of liability.¹⁰⁴ And the carrier remains liable when the statement is false, as where the bill is issued before loading.¹⁰⁵ The Code seems merely to restate preexisting law on such points, but adds an express right of the carrier to indemnity from the shipper for any misdescription furnished by the shipper.

Damage to Goods: The Code restates the law on the liability of warehousemen and carriers for loss or injury to goods.¹⁰⁶ In both cases, the liability is stated in terms of a duty to exercise such care as a "reasonably careful man would exercise under like circumstances." But those provisions do not change "any existing law or rule of law which imposes a higher responsibility." The result is to retain the existing rule which obtains in many states that a common carrier is an insurer of the safety of the goods except as to acts of God or the public enemy, fault of the owner, inherent defect, or causes excepted by express contract.¹⁰⁷ In many situations, however, the liability of a warehouseman for negligence seems in practice to produce results at least equally strict.¹⁰⁸

The Code provisions are subject to the general rule of the Code that obligations of reasonable care may not be disclaimed by agreement, but that the parties may by agreement determine the standards by which performance of such obligations is measured, if such standards are not manifestly unreasonable.¹⁰⁹ Course of dealing and usage of trade may have the effect of agreement.¹¹⁰ In addition the sections on duty of care expressly preserve any existing law or rule of law which invalidates contractual limitations. Subject to those restrictions, and to regulatory statutes and tariffs, classifications, and regulations thereunder, the Code expressly permits certain types of limitation of liability.¹¹¹

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104. *Chicago & N.W. Ry. v. Bewsher*, 6 F.2d 947 (8th Cir. 1925), *cert. denied*, 270 U.S. 641 (1926). *But cf. Leigh Ellis & Co. v. Payne*, 274 Fed. 443 (N.D. Ga.), *aff'd, sub nom. Leigh Ellis & Co.*, 276 Fed. 400 (5th Cir. 1921), 260 U.S. 682 (1923).

105. *Chicago & N.W. Ry. v. Stephens Nat. Bank*, 75 F.2d 398 (8th Cir.), *cert. denied*, 295 U.S. 738 (1935); *cf. Alton Iron Co. v. Wabash Ry.*, 235 Ill. App. 151 (1924), *rev'd on other grounds*, 328 Ill. 353, 159 N.E. 802 (1927).

106. UCC §§ 7-204, 7-309. Compare UWRA §§ 3, 21; UBLA § 3.

107. See *Villari v. James*, 155 Pa. Super. 155, 158, 38 A.2d 379, 380 (1944); 4 WILLISTON, CONTRACTS § 1089 (Rev. ed. 1936).

108. Compare *Roberts v. General Cold Storage Co.*, 120 Pa. Super. 508, 183 Atl. 71 (1936) (warehouseman liable for sprouting of plants in cold storage), *with Jackson & Perkins Co. v. Mushroom Transp. Co.*, 351 Pa. 583, 41 A.2d 635 (1945), *cert. denied*, 326 U.S. 733 (1945) (carrier not liable for freezing of plants in unheated truck); compare UWRA § 8; 4 WILLISTON, CONTRACTS § 1048 n.5 (Rev. ed. 1936).

109. UCC § 1-102(3)(c); compare UWRA § 3; UBLA § 3; 4 WILLISTON, CONTRACTS §§ 1046, 1089A, 1109 (Rev. ed. 1936); see *Villari v. James*, 155 Pa. Super. 155, 159, 38 A.2d 379, 381 (1944).

110. UCC § 1-205.

111. UCC § 7-103; *cf. Kirwan v. Railway Express Agency*, 118 Pa. Super. 431, 179 Atl. 924 (1935).

Limitation of the amount of liability by reference to a declared value of the goods deposited has been the subject of controversy.¹¹² The Carmack Amendment established the validity of such "released value" provisions in interstate rail transportation, and the Code adopts a "generalized version" of the Carmack Amendment, applicable to private as well as common carriers.¹¹³ Although the language is not identical with that of the Carmack Amendment, the Code provision may well be construed similarly, so as to permit, for example, a disclaimer of liability for undeclared articles of extraordinary value, hidden from view.¹¹⁴ The Code expressly makes such limitations ineffective where the goods are converted by the carrier to its own use.¹¹⁵ The Code provisions for limitation of liability to declared value are differently worded for warehousemen than for carriers, though generally similar; the main added restriction on warehousemen's agreements seems to be the requirement that the agreement set out a "specific liability per article or item, or value per unit of weight."¹¹⁶

As to limitations in terms of time and manner of presenting claims and instituting actions, the Code permits "reasonable provisions" in warehouse receipts, bills of lading, or tariffs.¹¹⁷ The test of reasonableness has been applied in numerous cases both before and under the uniform acts.¹¹⁸ Under the Carmack Amendment, the shortest contractual limitations permitted as to interstate shipments are nine months for filing claims and two years for instituting suit, the latter period to be computed from the day when the carrier disallows the claim in writing; and the uniform bill-of-lading forms require claim in writing within nine months after delivery or after a reasonable time for delivery, and suit within two years and one day from written notice of disallowance. Those clauses, as to interstate shipments, cannot be waived by the carrier,¹¹⁹ and have been held to override state statutes of limitations.¹²⁰ Where the Carmack Amendment is not applicable, the deci-

112. See 4 WILLISTON, CONTRACTS §§ 1046, 1110 (Rev. ed. 1936).

113. UCC § 7-309 comment; Interstate Commerce Act § 20(11) 34 STAT. 593 (1906), as amended, 49 U.S.C. § 20(11) (1946); see 4 WILLISTON, CONTRACTS § 1110A (Rev. ed. 1936).

114. Cf. *Kirwan v. Railway Express Agency*, 118 Pa. Super. 431, 179 Atl. 924 (1935).

115. UCC § 7-309(1). Cf. *Van Dyke v. Pennsylvania R.R.*, 86 A.2d 346 (Del. Super. 1952).

116. UCC § 7-204(1)(a).

117. UCC §§ 7-204(1)(b), 7-309(1)(b).

118. See 4 WILLISTON, CONTRACTS § 1112 (Rev. ed. 1936) and cases cited therein.

119. *Insurance Co. of North America v. Newtowne Mfg. Co.*, 187 F.2d 675 (1st Cir. 1951).

120. *Neuss, Hesslein & Co. v. Louisville & Nashville R.R.*, 221 La. 296, 59 So.2d 195 (1952), 66 HARV. L. REV. 923 (1953). But cf. *Louisiana & W.R.R. v. Gardiner*, 273 U.S. 280 (1927) (state statute of limitations applied when contract provision invalid).

sions have found shorter periods of time to be reasonable, but have upheld waivers by carriers.¹²¹ Such provisions seem to have been far less common in warehouse receipts than in bills of lading, but it seems that the rules would be the same both at common law and under the Code.¹²²

Misdelivery: A primary purpose of the Code provisions on delivery is to simplify the statement of the bailee's obligation on the document.¹²³ Under Section 7-403(1) the bailee has the duty to deliver to a "person entitled under the document," unless he can establish one of six listed defenses which purport to be exhaustive.¹²⁴

Subsection 1(a) permits the bailee to deliver to a person whose receipt is rightful as against the claimant. The principal case covered is that of a title paramount to the rights under the document, such as the title of an owner whose goods were stolen and deposited with the bailee by the thief.¹²⁵ In such a case the bailee is safe in making delivery pursuant to the document only if he acts in good faith; the true owner is the person entitled to delivery,¹²⁶ and the bailee who makes the proper delivery has a defense against persons claiming under the document.

The catch-all language of Subsection (1)(f) may well protect a bailee who delivers pursuant to oral instructions of the person entitled,¹²⁷ despite the requirement of "written instructions" in the definition of "person entitled under the document." The succeeding sub-

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121. See note 118 *supra*. *Contra*: Chicago, St. P., M. & O. Ry. v. Kileen, 243 Wis. 161, 9 N.W.2d 616 (1943).

122. Cf. Home Ins. Co. of New York v. Los Angeles Warehouse Co., 16 Cal. App. 2d 737, 61 P.2d 510 (1936) (requirement of claim within thirty days after delivery from warehouse, enforced).

123. See UCC § 7-403, comment 1; compare UCC §§ 7-403, 7-404, with UWRA §§ 8-12, 16, 19, and UBLA §§ 11-15, 19, 22.

124. UCC § 7-403(1):

"The bailee must deliver the goods to a person entitled under the document who complies with subsection (2), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or loss or destruction of the goods for which the bailee is not liable;

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the Article on Sales (Section 2-705);

(e) a diversion, reconsignment or other disposition pursuant to the provisions of this Article (Section 7-303) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant."

125. UCC § 7-403 comment 2.

126. UCC § 7-503(1).

127. Cf. Citizens' Nat. Bank v. Texas Compress Co., 294 S.W. 331 (Tex. Civ. App. 1927).

sections state the conditions a claimant must perform, require cancellation of or notation on a negotiable document, and define "a person entitled under the document." The succeeding section grants the bailee immunity from liability for innocent conversion if he delivers in good faith pursuant to the document.¹²⁸

The conditions which the claimant must meet include satisfaction of the bailee's lien and surrender of any negotiable document for cancellation or for notation of partial deliveries. The owner of a paramount title, of course, need not surrender the document; but the Code seems to require him to satisfy the bailee's lien in some circumstances.¹²⁹ The Code requires the bailee to take the initiative by requesting satisfaction of the lien; prior law had been construed to require an offer by the claimant without any request.¹³⁰ Under a more general provision of the Code, the bailee would also be entitled to a signed receipt as a condition of completing a tendered delivery.¹³¹ Failure of the claimant to perform any of these conditions would seem to excuse refusal to deliver.

Delivery to the wrong person, under the Code as under prior law,¹³² would seem to subject the bailee to an absolute liability to the person entitled under the document, even though, for example, the bailee relied on a skillfully forged delivery order. When a negotiable warehouse receipt is outstanding, the bailee has been held liable to the holder even for surrender of the goods under the compulsion of legal process.¹³³ The Code states the duty to take up a negotiable document or to note partial deliveries thereon in terms which suggest that that result may be continued for warehouse receipts and extended to bills of lading.¹³⁴

The bailee is protected in making delivery in good faith to the holder of a negotiable document, even though the holder is a wrong-

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128. UCC § 7-404. Accord, RESTATEMENT, TORTS §§ 230, 235 (1934). "Good faith" here includes "observance of reasonable commercial standards." *Contrast* UCC § 1-201(19); see Due Negotiation, text at notes 253-78 *infra*.

129. UCC § 7-209(3), 7-307(2). See Charges Covered, text at notes 163-77 *infra*.

130. UCC § 7-403(2) and comment 4. *National Warehouse Co. v. United States*, 27 F.2d 4 (1st Cir. 1928).

131. UCC § 1-206.

132. UCC § 7-403(3). *Freedman v. Geo. W. Bush & Sons Co.*, 284 Pa. 16, 130 Atl. 263 (1925); *Adel Precision Products Corp. v. Grand Trunk W.R.R.*, 332 Mich. 519, 51 N.W.2d 922, *cert. denied*, 344 U.S. 831 (1952).

133. *Manufacturers' Mercantile Co. v. Monarch Refrigerating Co.*, 266 Ill. 584, 107 N.E. 885 (1915); UWRA §§ 10, 11, 25. But not as to bills of lading: UBLA §§ 14, 15.

134. See UCC § 7-403(2), (3), and comment 5. It has been proposed in Massachusetts, apparently with the informal approval of the enlarged Editorial Board of the sponsoring organizations, to revise those paragraphs and delete the comment. See REP. MASS. SPECIAL COMM'N TO INVESTIGATE AND STUDY THE UCC 27, 148 (January 1954). The effect of the revision is not clear. See note 194 *infra*.

doer.¹³⁵ But if the bailee fails to take up the document, he becomes liable to any person to whom the document is duly negotiated.¹³⁶ In cases of partial delivery, notation on the document is a substitute for taking it up; the Code newly requires that the notation be conspicuous. That liability has been held not to run to a true owner who, with full knowledge of the delivery, took back the document from the wrongdoing holder.¹³⁷ The bailee who delivers by mistake should be entitled to recover the goods or their value from a recipient who is not entitled to them.¹³⁸ But the bailee's rights may well not run against a bona fide purchaser of the goods from the recipient, and it has been held that a carrier cannot better its position against such a bona fide purchaser by taking up the bill of lading.¹³⁹ These points are not expressly dealt with in the Code;¹⁴⁰ nor is the holding, made on facts arising prior to the UBLA, that a carrier's liability did not run to a bona fide purchaser of a negotiable bill of lading who took it several months after the delivery, its "spent" quality having been concealed by alteration of the date.¹⁴¹

There is no statutory duty to take up a nonnegotiable document, although the terms of the document may impose a contractual duty.¹⁴² In the absence of such terms or of a lawful excuse, delivery on written instructions from the named person is required.¹⁴³ The Code provides that indorsement of nonnegotiable documents does not add to the transferee's rights,¹⁴⁴ but it would seem that an indorsement might constitute adequate "written instructions." The Code takes no express position on the effect of consignment to X "in care of Y," which has been held to authorize delivery to Y, or to X "notify Y," which has been held not

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135. UCC §§ 7-403(4), 7-404; UWRA § 9(c); UBLA § 12(c); *Pere Marquette Ry. v. J. F. French & Co.*, 254 U.S. 538 (1921).

136. ". . . unless the person to whom the goods were delivered is one against whom the document confers no right under Section 7-503(1)." UCC § 7-403(3). See also UWRA §§ 11, 12; UBLA §§ 14, 15; *Morse-Hubbard Co. v. Michigan C. R.R.*, 286 Ill. App. 163, 3 N.E.2d 93 (1936).

137. *Pere Marquette Ry. v. J. F. French & Co.*, 254 U.S. 538 (1921).

138. *Pa. Laws* 1881, No. 95, p. 86, *PA. STAT. ANN.* tit. 6, § 3 (Purdon 1930), not repealed by UCC § 10-102; *Hubbard Bros. & Co. v. Southern Pac. Co.*, 256 Fed. 761 (5th Cir. 1919).

139. *Southern Pac. Co. v. Bank of America*, 29 F.2d 465 (7th Cir. 1928), *cert. denied*, 279 U.S. 847 (1929); *Chicago G.W.R.R. v. Lowry*, 119 Kan. 336, 239 Pac. 758 (1925).

140. Compare UCC § 2-403 (bona fide purchase of voidable title; entrusting of possession to a merchant).

141. *Saugerties Bank v. Delaware & Hudson Co.*, 236 N.Y. 425, 141 N.E. 904 (1923). Compare UBLA §§ 14, 16; UCC §§ 7-306, 7-501(4), 7-502 comment 3.

142. *Cf. Cundill v. Lewis*, 245 N.Y. 383, 157 N.E. 502 (1927).

143. UCC § 7-403(1), (4).

144. UCC § 7-501(5).

to authorize delivery to Y.¹⁴⁵ Nor does it provide for fictitious consignees or impostors.¹⁴⁶

Diversion and Reconsignment: The uniform acts placed the bailee's right or duty to obey changed instructions upon the same footing as the right or duty to deliver. The Code seems to continue that policy except under straight bills of lading. Thus a warehouseman may obey instructions from the holder of a negotiable warehouse receipt or from the person to whom delivery is to be made by the terms of a non-negotiable receipt, if under the circumstances delivery would be proper.¹⁴⁷ Apparently, however, written instructions may be revoked to the extent that they have not been acted on, and the warehouseman will be protected in good faith obedience to superseding instructions.¹⁴⁸

When goods are in transit under a bill of lading, it is often important that the carrier be clearly authorized to obey the instructions of some person, so that the goods may be diverted to a new destination. The UBLA, in the absence of contrary notification, authorizes delivery to the person entitled under the document; but if conflicting instructions are received the carrier is protected only if it delivers to "a person lawfully entitled to the possession of the goods."¹⁴⁹ This means that the carrier must either delay action until the conflicting claims are resolved or determine at its peril who is "lawfully entitled."¹⁵⁰

To enable the carrier to act, the Code authorizes delivery, diversion, or reconsignment by the carrier on instructions from a proper party.¹⁵¹ If the bill of lading is negotiable, the proper party is the holder, but the carrier must protect possible purchasers by noting on the bill any change of instructions.¹⁵² As to nonnegotiable bills, the Code orients the carrier more toward the consignor and less toward the consignee than prior law, permitting obedience to the consignor's instructions even in cases of conflicting instructions from the consignee.

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145. *Rountree v. Lydick-Barmann Co.*, 150 S.W.2d 173 (Tex. Civ. App. 1941); *Southern Express, Inc. v. T.S.C. Motor Freight Lines, Inc.*, 200 F.2d 797 (5th Cir. 1952); UCC § 7-501(6).

146. Compare *Hartford Distillery Co. v. New York, N.H. & H.R.R.*, 97 Conn. 1, 115 Atl. 488 (1921), 20 MICH. L. REV. 667 (1922), with *Myers v. American Ry. Express Co.*, 243 Mass. 390, 137 N.E. 654, 23 Col. L. REV. 489 (1923). See UCC § 3-405 (negotiable instruments).

147. Compare UWRA §§ 9, 10, with UCC §§ 7-303, 7-403(1) (e), 7-404.

148. Cf. *Levy v. Terminal Warehouse Co.*, 121 Pa. Super. 95, 183 Atl. 102 (1936) (negotiable receipt).

149. UBLA § 12, 13.

150. See, e.g., *Miller v. New York Central R.R.*, 205 App. Div. 663, 200 N.Y. Supp. 287 (1st Dep't 1923); *Turner Lumber & Investment Co. v. Chicago, R.I. & P. Ry.*, 225 Mo. App. 1002, 34 S.W.2d 1009 (1931); *Southern Pac. Co. v. Agencia Joffroy, S.A.*, 65 Ariz. 65, 174 P.2d 278 (1946).

151. UCC § 7-303.

152. Cf. *Boatman's Nat. Bank v. St. Louis S.W. Ry.*, 75 F.2d 494 (8th Cir., cert. denied, 295 U.S. 751 (1935)).

The carrier may still, as under prior law,¹⁵³ obey the consignee and take the risk that he may not be entitled to the goods. But even in the absence of conflicting instructions, the Code fully protects the carrier who obeys the consignee only "if the goods have arrived at billed destination or if the consignee is in possession of the bill."¹⁵⁴

Lost Documents: The requirement that a negotiable document be surrendered when the goods are delivered causes trouble when the document is lost or destroyed. The uniform acts authorize court orders for delivery in such cases, to be made upon satisfactory proof of loss or destruction and the claimant's giving of a bond approved by the court.¹⁵⁵ Delivery without such a court order is unauthorized¹⁵⁶ and in the case of a warehouse receipt may even be criminal.¹⁵⁷ But the Federal Bills of Lading Act provides that a voluntary indemnifying bond without order of court shall be binding on the parties thereto,¹⁵⁸ and such bonds have been authorized by the Interstate Commerce Commission and enforced by the courts.¹⁵⁹ In any event, the bailee who delivers even under court order remains liable to a bona fide holder.

The Code generally revises the prior statutes.¹⁶⁰ The Code provision authorizes a court order for issuance of a substitute document as well as for delivery, covers "lost, stolen or destroyed" documents, and applies to both nonnegotiable and negotiable documents.¹⁶¹ The posting of security "to indemnify any person who may suffer loss as a result of non-surrender of the document" is mandatory where the court orders delivery under a lost document which is negotiable, discretionary where the document is nonnegotiable. As under prior law, the court may order payment of the bailee's reasonable costs and counsel fees. The bailee may comply with the court order "without liability to any person;" thus for the first time the recourse of the holder is limited to the posted security.

The Code also provides for delivery without court order. Such delivery leaves the bailee liable to persons injured. But the Code makes

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153. UBLA §§ 12, 13.

154. UCC § 7-303(1) (c).

155. UWRA § 14; UBLA § 17.

156. *Orange Nat. Bank v. Southern Pac. Co.*, 162 La. 223, 110 So. 329 (1926); *cf. Moise v. Southern Ry.*, 129 S.C. 162, 123 S.E. 790 (1924).

157. UWRA § 54; *see Dahl v. Winter-Truesdell-Diercks Co.*, 61 N.D. 84, 95, 237 N.W. 202, 206 (1931).

158. 39 STAT. 540 (1916), 49 U.S.C. § 94 (1946).

159. *Northwestern Casualty & Surety Co. v. Illinois Central R.R.*, 19 F.2d 868 (7th Cir. 1927); *see Morse-Hubbard Co. v. Michigan Cent. R.R.*, 286 Ill. App. 163, 3 N.E.2d 93 (1936).

160. UCC § 7-601.

161. Compare United States Warehouse Act § 20, 39 STAT. 489 (1916), 7 U.S.C. § 261 (1946).

separate and somewhat confusing provisions for liability for conversion, which may arise when the claim of loss is false and at the time of delivery the document is outstanding in the hands of someone other than the claimant. The Code expressly imposes liability for conversion on the bailee who delivers in bad faith and without court order; it expressly negates such liability for a carrier which acts in good faith pursuant to the official classification and tariff. Other cases are left unclear. A claimant on a negotiable warehouse receipt "must post security . . . to indemnify the warehouseman . . .," but the consequences of compliance or non-compliance with that requirement are not stated. The intent seems to be to give a warehouseman protection from liability for conversion at least where he acts in good faith and the required security is posted.

Conflicting Claims: Since the bailee is protected in delivering pursuant to the document only if he acts in good faith, notice of an adverse claim subjects him to a risk of double liability. In such cases the Code, like prior law, does not require him to decide between conflicting claimants at his peril. He is given an excuse from delivering until he has had a reasonable time to ascertain the validity of the adverse claims or to interplead.¹⁶²

IV. THE BAILEE'S LIEN

Charges Covered: Section 7-209 of the Code rewrites the UWRA provisions on warehousemen's liens;¹⁶³ it provides for both a specific and a general lien. The specific lien of the warehouseman covers charges "in relation to goods covered by the document;" it is limited to charges subsequent to the date of issue of the warehouse receipt. Section 7-307 extends to carriers a specific lien similar to that given warehousemen. The carrier's lien is limited to charges subsequent to receipt of the goods; it covers charges for storage and transportation, including demurrage¹⁶⁴ and terminal charges, and expenses of preservation and of sale to satisfy the lien. The warehouse provision refers expressly to such charges and also to insurance, labor, and "charges present or future."

The provision for a warehouseman's general lien, covering charges not relating to the bailment of particular goods, finds no counterpart

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162. UCC § 7-603; UWRA §§ 16, 17; UBLA §§ 20, 21.

163. UWRA §§ 27-32; compare UBLA § 26 (applicable only to negotiable bills of lading).

164. Cf. *Climber Motor Corp. v. Fore*, 273 S.W. 284, 288 (Tex. Civ. App. 1925). *Contra*, at common law: *Nicolette Lumber Co. v. Peoples Coal Co.*, 213 Pa. 379, 62 Atl. 1060 (1906).

for carriers, probably because carriers are commonly bound by published charges and are not free to make special arrangements with particular shippers.¹⁶⁵ It covers charges "other than those specified" by the specific lien, "such as for money advanced and interest;" as under the UWRA, it presumably covers storage charges on other goods, even though surrendered before the deposit of the goods on which a lien is later claimed.¹⁶⁶ The Code, however, introduces the requirement, new for nonnegotiable receipts, that the maximum amount of the charges for which a general lien is claimed be specified on the receipt.¹⁶⁷ Apparently a statement that advances have been made for stated purposes in an amount not known to the issuing agent would protect the warehouseman from liability for damages under Section 7-202, but would not preserve his general lien unless a "maximum amount" was specified. Any security interest reserved by the warehouseman is also subjected to Article 9, Secured Transactions, under which possession without filing perfects a security interest except in field warehousing arrangements.¹⁶⁸ Under Article 9 subsequent advances by the warehouseman would have priority from the time his security interest was perfected.¹⁶⁹

In the course of the consideration of the Code in Massachusetts, some concern was reported on the part of warehousemen that a warehouseman might lose his specific lien by issuing a new nonnegotiable receipt when goods in storage were sold.¹⁷⁰ To clarify this problem it was proposed, apparently with the informal approval of the Enlarged Editorial Board of the sponsoring organizations, to add a new comment 5 to Section 7-209. The new comment would make it clear that, when goods stored under a nonnegotiable receipt were sold, the warehouseman could withhold any acknowledgment to the new owner until storage charges were paid. Alternatively, he could preserve his lien for past

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165. Cf. *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242, 245 (1906); *Houston & T.C.R.R. v. Johnson*, 41 S.W.2d 14, 16 (Tex. Comm'n App. 1931).

166. Compare *Harbor View Marine Corp. v. Braudy*, 189 F.2d 481 (1st Cir. 1951); *Milford Packing Co. v. Isaacs*, 90 A.2d 796 (Del. Super. 1952). But cf. *Chemical Nat. Bank v. New York Dock Co.*, 203 App. Div. 108, 196 N.Y. Supp. 414 (1st Dep't 1922), *aff'd*, 236 N.Y. 560 (1923); *In re Taub*, 7 F.2d 447 (2d Cir. 1925).

167. *Accord*, at common law: *State Bank of Wilbur v. Almira Farmers' Warehouse Co.*, 123 Wash. 354, 212 Pac. 543 (1923); *State v. Broadwater Elevator Co.*, 61 Mont. 215, 201 Pac. 687 (1921). Compare *Negotiable Documents*, text at notes 178-201 *infra*. See also UCC § 7-202(2)(e), (i), notes 40-4 *supra*, extending to nonnegotiable receipts the liability stated in UWRA § 2.

168. UCC § 9-305; see *Field Warehousing*, text at notes 231-42, *infra*.

169. UCC §§ 9-204(5), 9-312(2); cf. *In re Quaker City Cold Storage Co.*, 138 F.2d 566 (3d Cir. 1943).

170. Cf. *Collins v. Kent Storage Co.*, 228 Mich. 137, 141-2, 199 N.W. 634, 636 (1924). *Contra* under the UWRA, *Boas v. De Pue Warehouse Co.*, 69 Cal. App. 246, 230 Pac. 980 (1924).

charges by noting on the new receipt that he reserved a security interest for charges "since a stated date." According to the new comment, such a notation would satisfy the requirement in the Code text of a "maximum amount specified on the receipt." The warehouseman would thus be relieved of any necessity of computing the dollar amount of the charges prior to issuance of the new receipt.

The warehouseman's lien under the UWRA and the carrier's common law lien are invalid as against the owner of a paramount title; only the owner or a person with power to pledge can subject the goods to the lien.¹⁷¹ The official comment states that under the Code "the owner must have put the depositor in control of the goods . . .,"¹⁷² but that statement seems contrary to the statutory text and hence invalid.¹⁷³ According to the text, the specific lien of a warehouseman or carrier is effective against "any person entitled to the goods unless the [bailee] had notice that the [bailor] lacked authority to subject the goods to such charges and expenses." Thus the Code protects the bailee's lien, unless he has "reason to know,"¹⁷⁴ by permitting a wrongdoer to encumber and even divest the title of an innocent owner. This policy goes beyond the Code's policy of protecting a buyer in ordinary course of business from a merchant to whom goods are "entrusted," for the latter policy is limited to cases where the innocent owner acquiesces in the merchant's possession.¹⁷⁵ The exceptional protection of the bailee's lien can be partially defended on the ground that the true owner is benefited by the preservation of his goods.¹⁷⁶ As to a security interest for money advanced, or for other charges going beyond the specific lien, however, a warehouseman of goods deposited without authority is treated like other lenders.¹⁷⁷ Thus a prior lender on the security of the same goods, having filed his security agreement in the proper public office, may rely on constructive notice to subordinate the warehouseman's general lien for money advanced; but the warehouseman's statutory specific lien for storage charges will prevail in the absence of actual knowledge or "reason to know."

Negotiable Documents: The uniform acts deny the warehouseman or carrier a lien on goods for which a negotiable document is issued,

171. UWRA §28(b); *S. Jacobs & Son v. North Kensington Storage Co.*, 81 Pa. Super. 140 (1923); *Swinson v. Atchison, T. & S.F. Ry.*, 117 Kan. 258, 230 Pac. 1046 (1924).

172. UCC §7-209 comment 2.

173. Compare UCC §§7-209(3), 7-307(2) with UCC §7-209 comment 2; see UCC §1-102(3) (f).

174. UCC §1-201(25), defining "notice."

175. UCC §2-403(2).

176. Cf. UCC §9-310 comment 1; Uniform Trust Receipts Act, §11 (specific liens for processing, warehousing, shipping, etc.).

177. UCC §§7-209(3), 7-503; see Invalid Documents, text at notes 204-8 *infra*.

except for types of charges listed in the statutes, unless the document "expressly enumerates other charges" for which a lien is claimed,¹⁷⁸ though the amount of the charges need not be stated. But a lien for charges on other goods was denied when the receipt failed to disclose that the other goods had been removed without payment before the receipt was issued; the court said that the receipt must separately list "each item in unmistakable terms."¹⁷⁹

As pointed out above, the Code requires a statement of maximum amount of the general lien in both negotiable and nonnegotiable warehouse receipts;¹⁸⁰ as to carriers it makes no grant of lien for charges not specified in the statute.¹⁸¹ The Code also makes a new restriction applicable only to negotiable documents.¹⁸² Unlike the prior provisions,¹⁸³ which seem to invalidate the specific lien regardless of who holds the document,¹⁸⁴ the new restriction applies only "against a purchaser for value" of the negotiable document. Against such a purchaser, the specific lien is limited to a "reasonable charge,"¹⁸⁵ unless the "charges" are stated in the document, or, in the case of a carrier, in applicable tariffs. "Charges" here seems to mean the amount rather than the type of charge.

Enforcement: The basic right of the bailee to withhold possession until his lien is satisfied is left by the Code to negative implication.¹⁸⁶ That right is lost by unjustifiable refusal to deliver or by surrender of the goods.¹⁸⁷ As under prior law, the lien might also be lost by misdelivery or other conversion, even though the warehouseman regained possession in an attempt to remedy the defect;¹⁸⁸ but perhaps an exception might be made for involuntary surrender under court order.¹⁸⁹ Forfeiture of the lien, like its enforcement by sale, would seem to leave unimpaired any contract right to recover the amount of the unpaid

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178. UWRA § 30; UBLA § 26.

179. *Metropolitan Commercial Corp. v. Larkin Co.*, 257 App. Div. 612, 614, 15 N.Y.S.2d 18, 20 (4th Dep't 1939), *leave to appeal denied*, 283 N.Y. 779 (1940).

180. See text at note 167 *supra*.

181. See text at note 164 *supra*; *cf.*, at common law, *Bácharach v. Chester Freight Line*, 133 Pa. 414, 19 Atl. 409 (1890).

182. UCC §§ 7-209(1), 7-307(1).

183. UWRA §§ 27, 28, 30.

184. *Klock Produce Co. v. Diamond Ice & Storage Co.*, 90 Wash. 67, 155 Pac. 414 (1916); *Wilson Distilling Co. v. Foust Distilling Co.*, 51 F. Supp. 744 (M.D. Pa. 1943).

185. *Cf. Schenley Distillers Corp. v. Kinsey Distilling Corp.*, 136 F.2d 350 (3d Cir. 1943) (lien of purchaser of bankrupt warehouse).

186. UCC § 7-403(2); see UCC § 7-209 comment 4; compare UWRA § 31.

187. UCC §§ 7-209(4), 7-307(3); compare UWRA § 29.

188. *Bernstein v. Hineman*, 86 Pa. Super. 198 (1925).

189. *McGann Co. v. New Jersey Novelty Footwear Co.*, 96 N.J.L. 481, 115 Atl. 445 (Ct. Err. & App. 1921).

charges from the depositor; and surrender of the goods to the owner may be consideration for his promise to pay the charges.¹⁹⁰ Conversely, however, if there is no indebtedness for storage charges, there is no lien.¹⁹¹

Like prior law, the Code contemplates enforcement of the bailee's lien by sale,¹⁹² and excuses the bailee from delivery to the person entitled under the document when such a sale has been lawfully made.¹⁹³ The section requiring that a negotiable document be surrendered on delivery makes no exception for such cases; on its face, though probably not so intended, it would seem to render the bailee liable to a bona fide holder, and an amendment has been proposed in Massachusetts to make clear the nonliability of the bailee.¹⁹⁴ Under prior law a sale not in strict compliance with the statute was a conversion¹⁹⁵ and probably conferred no right even on a bona fide purchaser; the Code protects bona fide purchasers and limits the bailee's liability for conversion to cases of willful violation.¹⁹⁶ In other cases the bailee is liable only for loss resulting from the noncompliance.

The Code makes provisions for the procedure for sale by a warehouseman substantially similar to those made by the UWRA.¹⁹⁷ Among the changes is a requirement of notification, not necessarily written,¹⁹⁸ to known claimants, instead of "written notice." The notification must contain a demand for payment within not less than ten days after "receipt" of the notification, and a "conspicuous"¹⁹⁹ statement as to the intended sale; under the UWRA the ten days ran from delivery or from the time when the notice "should reach" its destination by mail, and the defined term "conspicuous" is new. As under the UWRA, the sale must be held in the "nearest suitable place" to the warehouse and must be advertised for 15 days after the ten-day demand has expired; until sale the goods may be redeemed. A new provision expressly permits the warehouseman to bid at public sales.

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190. Compare UCC §§ 7-210(7), 7-308(6); UWRA § 32; *Mercer v. Shiver*, 81 Ga. App. 815, 60 S.E.2d 263 (1950).

191. *In re Hamburger Distillery, Inc.*, 115 F.2d 84 (3d Cir. 1940) (no lien against pledgee of receipts beneficially owned by warehouseman).

192. UCC §§ 7-210, 7-308; compare UWRA § 33.

193. UCC § 7-403(1) (c); compare UWRA § 36; UBLA § 27.

194. UCC § 7-403(3); see note 134 *supra*.

195. *Hirsch v. Hubert Transfer & Storage Co.*, 136 Pa. Super. 605, 8 A.2d 426 (1939); *Bernstein v. Hineman*, 86 Pa. Super. 198 (1925); *State ex rel. Kendrick v. Amarillo Transfer & Storage Co.*, 94 S.W.2d 590 (Tex. Civ. App. 1936); *Gulf, C. & S.F. Ry. v. North Texas Grain Co.*, 32 Tex. Civ. App. 93, 74 S.W. 567 (1903).

196. UCC §§ 7-210(4), (5), 7-308(3), (4).

197. UCC § 7-210(2); compare UWRA § 33.

198. UCC § 1-201(26). But see note 199 *infra*.

199. UCC § 1-201(10), apparently requiring a writing.

Proceeds in excess of the amount of the lien are held for the person for whom the goods were held.

These restrictive provisions are intended to apply primarily to storage of household goods by private owners. For "goods stored by a merchant in the course of his business" an alternative, more flexible procedure is newly provided; and carriers are subject only to the new provisions.²⁰⁰ A warehouseman who is in doubt whether the depositor is a "merchant" can safely sell only under the more restrictive procedure.

The new procedure for commercial storage and for carriers permits "public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable." Known claimants must be notified of the amount due, the nature of the sale, and the time and place of public sale. By negative implication the bailee may bid only at a public sale. The fact that a better price could have been obtained in another way does not "of itself" show that the sale was not "commercially reasonable."²⁰¹ Sale in the usual manner on a recognized market, or at the price current in such a market, or conforming to commercially reasonable practices among dealers in the type of goods sold, is "commercially reasonable." In other cases sale of more goods than apparently necessary to insure satisfaction of the lien is not commercially reasonable.

Termination of Storage: The Code provisions for enforcement of the bailee's lien by sale must probably be read as limited to cases where the bailee's claim is due and unpaid, although such a limitation is not expressly stated. Such a reading gives meaning to the provisions of Section 7-206 designed "to define the warehouseman's power to terminate the bailment" in the standard case of warehousing for an indefinite term.²⁰² Section 7-206 permits the warehouseman, without cause, to require payment of any charges and removal of the goods, by notifying known claimants. Where the storage is for a period fixed in the document, no minimum period of notice is prescribed, and the termination may take effect at the end of the period fixed. In the more common case where no period of storage is fixed, the termination may take effect within a stated period not less than thirty days after notification. In either case, if the goods are not removed at the end of the period, the warehouseman may sell under the provisions for enforcement of liens. The UWRA makes no provision for such termination at will.

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200. UCC §§ 7-210(1), (8), 7-308(1). For a definition of "merchant," see UCC § 2-104(1), not expressly made applicable to Article 7.

201. Cf. *Newton v. L. W. Culver Storage & Transfer Co.*, 157 S.W2d 656 (Tex. Civ. App. 1941).

202. See UCC § 7-206 comment 1.

Section 7-206 also carries forward, revises and extends the UWRA provision for termination of storage of perishable and hazardous goods.²⁰³ The Code provides generally for cases of impending decline in value to less than the amount of the lien; in such cases the warehouseman may give notification of a reasonable time shorter than that provided for termination at will, and may then sell at public sale not less than one week after a single advertisement or posting. Apparently the advertisement must be made after the notification time has expired. The provision for hazardous goods is limited, as the UWRA provision is not, to conditions of which the warehouseman had no notice at the time of deposit; it is not limited to the hazards of odor, leakage, inflammability, or explosive nature listed in the UWRA, but seems to apply to such other hazards as bacteria or insects. In hazard cases the warehouseman may sell at public or private sale on reasonable notification, and, if unable to sell, may dispose of the goods in any lawful manner without liability.

V. DOCUMENTS AS SECURITY

Invalid Documents: Perhaps the primary reason for codifying the law of title documents and certainly the main reason for the United States Warehouse Act ²⁰⁴ was to enhance the value of such documents for use as collateral security for loans. A bank which advances money against a document of title seeks a security interest in the goods covered by the document. If a nonnegotiable document is issued directly to the bank, or if a negotiable document is duly negotiated to it, the bank has the purported obligation of the bailee to hold the goods. The Code, like the uniform acts, leaves the bank subject to the risk that the bailee and the goods are fictitious, or that the bailee is not bound because its signature was forged or made without authority, or that the document has been altered.

The risks of forgery and alteration are narrowed somewhat by provisions with respect to documents issued by the bailee's agent and with respect to the filling of blanks.²⁰⁵ Criminal penalties have some deterrent effect. But bailees and their customers have not been ready to bear the cost of elaborate protective devices like those used for corporate stocks and bonds; bills of lading especially are often issued rather loosely. One reason may be that the credit involved is commonly for a short term; another may be that the borrower is often a regular com-

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203. UWRA § 34.

204. See note 11, *supra*.

205. See Non-Receipt and Misdescription, text at notes 85-105 *supra*; Alteration, text at notes 82-4 *supra*.

mercial customer of the bank. In any event, banks often rely in part on the honesty of the borrower when they lend against documents of title.

Banks also rely on the credit of the bailee. The bailee's obligations on documents issued by him are discussed above: they include an undertaking that the goods were received before the document was issued, a duty at least to use due care to preserve the goods, and a promise not to deliver them to unauthorized persons. If those obligations are properly carried out, the bank has a good deal of assurance that it has the desired security interest. Risks remain that the goods will decline in value or will suffer damage from a cause for which the bailee is not responsible, but the value can sometimes be protected by hedging on a futures market and the goods can be insured against damage.²⁰⁶ If the bailee does its job, the bank's security interest will be valid against the bailee's receiver or trustee in bankruptcy.

When the bailee fails to perform its obligations, the bank has the liability of the bailee as a substitute for the goods it fails to get. The bank's security then depends on the financial responsibility of the bailee. Railroads, and other carriers to a lesser extent, commonly have resources very large in proportion to claims likely to be asserted against them for breach of their duties as bailees. This is less true of warehousemen, and there have been many cases where depositors and banks have suffered loss because a warehouseman has become bankrupt and a shortage has been found in the goods supposed to be stored with him. Property insurance may be written broadly to cover "physical loss or damage from any external cause, including non-delivery," but even such insurance has been held not to cover a loss caused by the issue of spurious warehouse receipts.²⁰⁷ The financial responsibility of a licensed warehouse is often buttressed by a requirement that a bond be filed; the scope of the bond depends, of course, on its terms.²⁰⁸

Unauthorized Bailment: In one situation the bank may have no rights against either the goods or the bailee even though it holds a

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206. See, e.g., *Curacao Trading Co. v. Federal Ins. Co.*, 137 F.2d 911 (2d Cir. 1943), *cert. denied*, 321 U.S. 765 (1944); *Richards, op. cit. supra* note 32. As to regulations permitting or requiring insurance to be taken out by the bailee, see, e.g., *Dixey v. Fed. Compress & Warehouse Co.*, 132 F.2d 275 (8th Cir. 1942), 140 F.2d 820 (8th Cir. 1944) (federal licensed warehouse); *Lucas v. Garrett*, 209 S.C. 521, 41 S.E.2d 212 (1947) (intrastate common carrier by truck).

207. *Curacao Trading Co. v. Federal Ins. Co.*, *supra* note 206.

208. See, e.g., *United States Warehouse Act* §6, 39 STAT. 486 (1919), as amended, 7 U.S.C. §247 (1946) (performance "of such additional obligations as a warehouseman as may be assumed by him under contracts with the respective depositors"); *Maryland Casualty Co. v. Washington Loan & Banking Co.*, 167 Ga. 354, 145 S.E. 761 (1928) (pledgee recovers where pledgor-warehouseman issued spurious receipts). But see *First Nat. Bank of Lincoln v. Lincoln Grain Co.*, 116 Neb. 809, 219 N.W. 192 (1928) (*semble*; possession by warehouseman necessary to validity of receipts against surety).

document issued by him in regular course: where the goods were deposited by one who did not own them.²⁰⁹ This risk is narrowed somewhat by doctrines of agency and estoppel, and by the rule that a right to rescind a transfer for fraud cannot be exercised against a bona fide purchaser.²¹⁰ Thus where a carrier issued negotiable bills of lading before goods were received, subsequent delivery of the goods to the carrier "fed" the bills of lading so as to protect banks to whom the bills had been pledged, despite the fact that the shipper had bought the goods fraudulently.²¹¹

The Code further narrows the occasions for defeating the title of the document holder. Article 2 (Sales) expands the power of a merchant to convey to a buyer in ordinary course; if the merchant is entrusted with the possession of goods of a kind in which he deals, he is given power to dispose of the rights of the entruster.²¹² And as against a person to whom a negotiable document is duly negotiated, the true owner loses his rights by entrusting goods to the bailor "with power of disposition."²¹³ Taken together, these provisions seem to go beyond the existing Factor's Acts in protecting the bona fide pledgee.²¹⁴ The Code protection is also extended to cases where the true owner has "acquiesced" in the bailor's "procurement of any document of title."²¹⁵ The intended result seems to be to permit the bona fide pledgee to prevail over the holder of a prior security interest, even though properly perfected by filing, whenever the prior secured party has thus "acquiesced."²¹⁶

Delivery Orders; Freight-Forwarder Bills: Delivery orders and freight-forwarder bills of lading rest in part on the credit of the issuer as well as on the credit of the bailee-warehouseman or carrier. For, at least until the bailee is notified, the issuer can defeat the rights of the holder by obtaining delivery of the goods or obtaining a substitute

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209. UCC §§ 7-403(1)(a), 7-503(1); UWRA § 41; UBLA § 32; *Dunagan v. Griffin*, 151 S.W.2d 250 (Tex. Civ. App. 1941); *Kendall Produce Co. v. Terminal Warehouse & Transfer Co.*, 295 Pa. 450, 145 Atl. 511 (1929).

210. UCC §§ 7-502(1)(c), 2-403(1); USA § 23.

211. *Baldwin v. Childs*, 249 N.Y. 212, 163 N.E. 737 (1928).

212. UCC §§ 1-201(9), 2-403(2), (3).

213. UCC § 7-503(1).

214. Compare *James v. Meriwether Graham Oliver Co.*, 152 Tenn. 528, 279 S.W. 390 (1925) (entrusting for sale), with *Gazzola v. Lacy Bros. & Kimball*, 156 Tenn. 229, 299 S.W. 1039 (1927) (entrusting for storage). Compare Pa. Laws 1834, p. 375, PA. STAT. ANN. tit. 6, §§ 201, 202 (Purdon Supp. 1953).

215. UCC § 7-503(1); cf. *Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520 (1916). *Contra*: *Gazzola v. Lacy Bros. & Kimball*, 156 Tenn. 229, 299 S.W. 1039 (1927); *Decker & Sons v. Milwaukee Cold Storage Co.*, 173 Wis. 87, 180 N.W. 256 (1920).

216. UCC § 7-503 comment (fifth paragraph); UCC § 9-309.

negotiable document from the bailee.²¹⁷ The official comment erroneously states that the Code "does not attempt to settle the title problems which would arise as between bona fide purchasers of negotiable documents of different issuers."²¹⁸

The Code seems to make inconsistent provisions as to the time when the rights of a holder of a delivery order become fixed as against others than the issuer. Article 2 (Sales), like the USA, seems to make decisive the receipt of "notification" by the bailee.²¹⁹ But Section 7-502(1) seems clearly to deny the holder any rights against others than the issuer until the delivery order has been "accepted" by the bailee.²²⁰ The apparent conflict should probably be resolved by limiting the acceptance provision to delivery orders in negotiable form; but it can be read as applying to any delivery order, or to any delivery order issued by the holder of a negotiable document of title. Even after acceptance, the title of the holder of the delivery order is subject to the rights of the bona fide holder of a negotiable document issued by the bailee.²²¹ Of course a delivery order issued by the holder of a negotiable document could not properly be honored without surrender of, or conspicuously noting partial deliveries on, the negotiable document.²²²

In freight-forwarder cases, the Code reverses the priority.²²³ The holder of a bill of lading issued by a freight forwarder prevails over any rights based on the bill issued to the freight forwarder by the carrier. But the carrier is protected in compliance with the bill issued by it. The theory is that a bill issued to a freight forwarder gives notice on its face that the forwarder has probably issued a bill, but that that theory should not be applied, for example, to impose less-than-carload-lot responsibility on a carrier which receives only carload rates.

Fungible Goods: A warehouseman must ordinarily keep separate the goods covered by each receipt, but an exception is made for goods

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217. Cf. *Brock v. Atteberry*, 153 La. 649, 96 So. 505 (1923); *Comptoir d'Achat v. de Ridder* [1949] A.C. 293 (H.L.).

218. See UCC § 7-402 comment 3. This comment is based on the 1949 draft of the Code, and became obsolete when Section 7-503(2) was added in 1950 to settle such problems. Compare UCC §§ 6-105 comment 3, 6-303 (May 1949 Draft), with UCC §§ 7-402 comment 3, 7-503(2) (Proposed Final Draft, Spring 1950).

219. UCC §§ 2-503(4), 7-504(2); USA § 43(3); *Brown v. National Dock & Storage Warehouse Co.*, 239 Mass. 10, 131 N.E. 458 (1921); *Peelle Co. v. Industrial Plant Corp.*, 120 N.J.L. 480, 200 Atl. 1007 (1938).

220. UCC § 7-502(1).

221. UCC § 7-503(2).

222. UCC § 7-403(3); cf. *Cundhill v. Lewis*, 245 N.Y. 383, 157 N.E. 502 (1927).

223. UCC § 7-503(2) and comment; see Statement of Mr. Albert Ward, *supra* note 29, at 171.

which are treated as fungible by usage or agreement.²²⁴ Fungible goods may be commingled; although the UWRA then makes the warehouseman liable to each depositor "as if the goods had been kept separate,"²²⁵ it seems that the depositor must take the risk of any impairment of quality which inevitably follows the authorized commingling.²²⁶ The owners become tenants in common of the whole, and loss by accident or misdelivery is borne pro rata, except that any claim of a wrongdoing bailee must be subordinated.²²⁷ Apparently the same result would follow where the commingling was unauthorized, at least if the goods were indistinguishable.

Where a shortage in commingled fungible goods arises from the issue of spurious receipts for goods not received, the problem is more difficult. If it cannot be ascertained which receipts were issued for goods and which were not, it may be fair to make all bona fide holders share the loss pro rata. But if it can be shown that a particular receipt never represented any goods, it may be argued that the general rule should apply that a second document of the same issuer, like an unmarked duplicate, confers no right to the goods. The Code expressly overrules that argument in cases of fungibles covered by negotiable receipts, providing that all holders to whom overissued receipts have been duly negotiated are entitled to share in the mass.²²⁸ But the same question is left open as it affects nonnegotiable receipts.

Where a warehouseman, after a shortage has arisen, adds to the mass new goods of his own or buys from a depositor some of the goods supposed to be included in the mass, the shortage may be held reduced.²²⁹ In some cases the warehouseman may intend to make good the shortage, but it seems fair to hold him to the result regardless of his intent. The fairness is less clear if the effect is to prefer depositors over other creditors of the warehouseman, or to defeat the title of a subsequent bona fide purchaser of the goods from the warehouseman. Where the warehouseman is in the business of buying and selling fungible goods of the kind involved, the Code protects buyers in the ordinary course of business against such claims of receipt holders.²³⁰

224. UCC §§ 7-207, 1-201(17); UWRA §§ 22, 23, 24, 58. Usage may bind a depositor ignorant of it. UCC § 1-205(3); cf. *In re Heyward-Williams Co.*, 284 Fed. 983 (S.D. Ga. 1922).

225. UWRA § 24.

226. *Allen V. Smith, Inc. v. Rosalia Producers, Inc.*, 36 Wash.2d 680, 219 P.2d 986 (1950).

227. *McDonnell v. Bank of China*, 33 F.2d 816 (9th Cir. 1929), cert. denied, 280 U.S. 612 (1930); see BROWN, PERSONAL PROPERTY § 78 (1936).

228. UCC § 7-207(2); cf. *McDonnell v. Bank of China*, supra note 227.

229. *Torgerson v. Quinn-Shepherdson Co.*, 161 Minn. 380, 201 N.W. 615 (1925); *State ex rel. Hermann v. Farmers' Elevator Co.*, 59 N.D. 679, 231 N.W. 725 (1930); *Kendall Produce Co. v. Terminal Warehouse & Transfer Co.*, 295 Pa. 450, 145 Atl. 511 (1929).

230. UCC § 7-205(1); compare UCC § 2-403(2). *Contra: Kimball Milling Co. v. Greene*, 141 Tex. 84, 170 S.W.2d 191 (1943).

In one situation the rule of pro rata sharing seems unsound. Where a shortage has already arisen, a depositor who delivers the full amount of goods for which a receipt is issued to him should not be held as a matter of law to have made an involuntary contribution to make up the loss already suffered by previous depositors. Considerations of convenience may justify the placing of the burden of proof on one who makes such a claim, and the claim will often fail because of the difficulty of proof. But the Code does not clearly foreclose it.

Field Warehousing: In many states the law has made it difficult or impossible to create a valid security interest in a shifting stock of goods.²³¹ If the borrower is a licensed public warehouseman, he may be able to create a valid pledge of his own goods by issuing receipts for them, and if the goods are properly kept separate the pledge may withstand attack by creditors of the warehouseman and purchasers from him.²³² But if the pledgor is not a licensed warehouseman, or if the goods are not properly identified, the transfer to the pledgee may be a fraud on creditors or may leave the pledgor with power to transfer a valid title to a bona fide purchaser.²³³

To avoid such risks, the device of "field warehousing" was devised.²³⁴ A "warehouse" is created on the borrower-owner's premises, leased to an independent licensed warehouseman. One of the borrower's employees is put on the warehousemen's payroll and covered by a fidelity bond, and put in charge of the "warehouse," which may be anything from a separate warehouse building to a chicken-wire enclosure. Signs are posted to disclose the situation, and warehouse receipts are issued against goods deposited in the warehouse. If the formalities are duly observed so that the warehouseman maintains "actual, open and exclusive possession,"²³⁵ the pledgee of such receipts is protected against those claiming under the pledgor, but mingling

231. See Cohen and Gerber, *Mortgages of Merchandise*, 39 COL. L. REV. 1338 (1939); Cohen and Gerber, *The After-Acquired Property Clause*, 87 U. OF PA. L. REV. 635 (1939).

232. *Michigan City Bank v. First State Bank of Manvel*, 51 N.D. 757, 201 N.W. 176 (1924); compare notes 33-6 *supra*; *McDonnell v. Bank of China*, *supra* note 227. Such receipts are not acceptable collateral for rediscount with Federal Reserve Banks. 4 FED. RES. BULL. 31 (1918).

233. USA §§ 25, 26; UCC §§ 2-402, 2-403(2); compare *In re Enterprise Foundry Co.*, 37 F. Supp. 745 (E.D. Ill. 1941); *Continental Can Co. v. Jessamine Canning Co.*, 286 Ky. 365, 150 S.W.2d 922 (1941). But cf. *Taney v. Penn National Bank of Reading*, 232 U.S. 174 (1914) (government-bonded distiller's warehouse).

234. See Friedman, *Field Warehousing*, 42 COL. L. REV. 991 (1942); Birnbaum, *Form and Substance in Field Warehousing*, 13 LAW & CONTEMP. PROB. 579 (1948); Note, 133 A.L.R. 203 (1941). As to the duty of the borrower to the warehouseman, see *Owens v. William H. Banks Warehouses, Inc.*, 202 F.2d 689 (5th Cir. 1953).

235. *Pittman v. Union Planters Nat. Bank & Trust Co.*, 118 F.2d 211, 214 (6th Cir.), *cert. denied*, 314 U.S. 632 (1941).

with other goods of the pledgor or failure to maintain control will defeat the pledgee's property in the goods.²³⁶

The Code provides for security interests in inventory without the intervention of a warehouseman; such interests must be perfected by filing to be valid against the borrower's creditors.²³⁷ The Code also provides for perfection without filing where the goods are in the possession of the lender or of a bailee,²³⁸ but filing is required for "a field warehousing or similar arrangement."²³⁹ The filing requirement is a simple one,²⁴⁰ and filing protects the lender against claims that the warehouse was invalid, for example, because the signs were inadequate.

The Code requirement of filing applies only to "any security interest" resting on the transfer of a warehouse receipt, where the goods are on premises which are either part of the place of business of the depositor, or within his premises, or substantially contiguous thereto. Thus failure to file does not impair the rights of an outright buyer of the goods who takes delivery by way of receipt. But failure to file will subordinate a pledgee to bona fide purchasers, to lien creditors without notice, and, perhaps most important, to the pledgor's trustee in bankruptcy.²⁴¹

The effect of the new filing requirement is that a bank lending money on the faith of warehouse receipts must ascertain at its peril whether a field warehouse is involved. There is no requirement that that question be answered on the receipt, but the bank can normally determine the answer readily. Even if it cannot, it may be safe in relying on the representations of the pledgor or the warehouseman, on whose credit warehouse receipts must rest in other respects. Bankers seem not to have objected to this filing requirement; but there has been opposition to the Code from the Merchandise Division of the American Warehousemen's Association which may rest in part on fear of field-warehouse companies that they will lose a competitive advantage over other forms of inventory security. As the official comment points out, however, field warehousing will retain its value as a stock-control

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236. *Ibid*; cf. *Heffron v. Bank of America Nat. Trust & Savings Ass'n*, 113 F.2d 239 (9th Cir. 1940); *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818 (8th Cir. 1951); *Barry v. Lawrence Warehouse Co.*, 190 F.2d 433 (9th Cir. 1951); *In re Wyoming Valley Collieries Co.*, 29 F. Supp. 106 (M.D. Pa. 1939). As to the liability of the warehouseman and his surety, see *William H. Banks Warehouses, Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *affirmed per curiam sub nom. William H. Banks Warehouses, Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *vacated*, 345 U.S. 932, *rehearing denied*, 205 F.2d 44, *cert. denied*, 346 U.S. 825 (1953).

237. UCC §§ 9-204, 9-205, 9-301, 9-302.

238. UCC § 9-305(1).

239. UCC §§ 7-205(2), 9-305(2) and comment 4.

240. UCC §§ 9-401(1), 9-402.

241. UCC § 9-301.

device, giving protection against carelessness or fraud of the borrower, so far as that value rests on practical business needs rather than on technical legal rules.²⁴²

Nonnegotiable Documents: The pledge of a nonnegotiable document to a bank named in the document as the person to whom the goods are to be delivered may give the bank a valid claim against the issuer, and may be adequate to transfer to the bank a security interest to the extent of the pledgor's property in the goods, but the document does not effectively represent the goods.²⁴³ A transfer of such a document confers on the transferee only such rights as the transferor has or has actual authority to convey; and, until the bailee receives notice of the transfer, it may be defeated by dealings between the transferor and the bailee or between the transferor and bona fide purchasers, or, in some cases, by creditors of the transferor.²⁴⁴ Notification of the bailee, however, may give the transferee much the same rights as if the document had originally been issued to him.

It has long been recognized that it is a dangerous practice to advance money on straight bills of lading.²⁴⁵ Not only is the carrier authorized to deliver the goods to the consignee without surrender of the bill, but the bank may be denied recovery against the carrier for issuing the bill without receiving any goods.²⁴⁶ A pledge of a straight bill may, however, give the pledgee some rights beyond those against the pledgor. The title of a consignee from whom payment is due or demanded on delivery of documents of title, under the Code, is conditional on his making the payment,²⁴⁷ and the pledgee may be able to assert the pledgor's title when that condition is broken. Under the Code the pledgor's title might be defeated by a resale by the consignee to a bona fide purchaser,²⁴⁸ but the pledgee, like the pledgor, might then have a claim to the proceeds. Moreover, it would seem that the pledgee, on notifying the carrier, would have the power given to the consignor by

242. See UCC § 9-305 comment 4; compare Birnbaum, *Article 9—A Restatement and Revision on Chattel Security*, [1952] WIS. L. REV. 348, 365-6.

243. UCC § 2-505(1)(b); see *Edward L. Eyre & Co. v. Hirsch*, 36 Wash.2d 439, 453, 218 P.2d 888, 896 (1950); *Twohig v. Lawrence Warehouse Co.*, 118 F. Supp. 322, 327 (N.D. Iowa 1954); compare notes 227-9, 232-3 *supra*.

244. UCC § 7-504(1), (2); UWRA §§ 39, 42; UBLA §§ 30, 33; compare notes 217-9 *supra*.

245. See 1 PATON, DIGEST OF LEGAL OPINIONS 710 (1940).

246. See notes 92-5 *supra*.

247. UCC §§ 2-507(2), 2-505(1)(b); *Rubber Corp. of America v. Brooks Tire & Battery Co.*, 45 S.D. 254, 186 N.W. 953 (1922); *Weyerhaeuser Timber Co. v. First Nat. Bank*, 150 Ore. 172, 38 P.2d 48, 43 P.2d 1078 (1935); cf. *Moore & Sinnott v. Louisiana Nat. Bank*, 44 La. Ann. 99, 10 So. 407 (1892).

248. UCC §§ 2-401(1)(b), 2-403, 2-702(1)(b). But see *Weyerhaeuser Timber Co. v. First Nat. Bank*, *supra* note 247.

the Code to divert the goods or change the shipping instructions.²⁴⁹ Wrongful exercise of that power might make the pledgee liable to the consignee; but the carrier would be protected, and a buyer in ordinary course would get a good title.²⁵⁰

The pledgee of a straight bill of lading attached to a draft might have additional rights. The Code provides that a financing agency which makes advances against a draft "which relates to a shipment of goods" acquires the shipper's right to have the draft honored by the buyer.²⁵¹ That provision in effect makes an exception to the rule that a draft of itself is not an assignment, and makes the financing agency an assignee of the shipper's right to the price. As an assignee, it should prevail without filing over the shipper's creditors or subsequent assignees.²⁵²

Due Negotiation: The rights of the transferee of a negotiable document, in the absence of "due negotiation," are much like those of a transferee of a nonnegotiable document: the transferee gets the rights which the transferor had or had actual authority to convey.²⁵³ The negotiable document does stand in the place of the goods, since the bailee may not safely deliver them to other claimants under the document so long as the transferee retains possession of the document.²⁵⁴ Thus where a seller pledges to a bank a bill of lading consigning the goods to the order of the buyer, no one but the bank can get the goods. But the bank is not a "holder"²⁵⁵ and may not receive the protection of doctrines of apparent authority, estoppel, and the like, which are available to bona fide purchasers of the goods and to persons to whom a negotiable document is duly negotiated. Nor is such a bank a "person entitled under the document," to whom the carrier is bound to deliver.²⁵⁶ The bank may therefore have difficulty in realizing upon its security interest.²⁵⁷

"Negotiation" of a document running to bearer or indorsed in blank is accomplished by delivery, meaning voluntary transfer of pos-

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249. See note 151 *supra*; UCC § 7-504(1).

250. UCC §§ 7-303 comment 2, 7-504(3).

251. UCC § 2-506(1). See *George F. Hinrichs, Inc. v. Standard Trust & Savings Bank*, 279 Fed. 382 (2d Cir. 1922); *cf. First Nat. Bank of McClusky, N.D. v. Rogers-Amundson-Flynn Co.*, 151 Minn. 243, 186 N.W. 575 (1922); *Pennsylvania R.R. v. Edson Bros.*, 92 Pa. Super. 496 (1927). *Contra: City Nat. Bank of Clinton, Iowa v. West Virginia Farm Bureau Service Co.*, 109 W. Va. 158, 153 S.E. 300 (1930).

252. UCC § 9-302(1) (e).

253. See note 244 *supra*.

254. UCC § 2-505(1) (a); *Babbitt v. Grand Trunk Western Ry.*, 285 Ill. 267, 120 N.E. 803 (1918); see notes 129-41 *supra*.

255. UCC § 1-201(20).

256. UCC § 7-403(4).

257. See 1 PATON, *DIGEST OF LEGAL OPINIONS* 711 (1940).

session; an order document not so indorsed is negotiated by indorsement and delivery.²⁵⁸ When a bailor delivers to a bank a document running to the bank's order, the effect is the same as that of negotiation. Apparently special indorsement of a document in bearer form will make necessary the further indorsement of the special indorsee, but this point is not made crystal clear.²⁵⁹

After "negotiation" the transferee is a "holder," a "person entitled under the document;" he may require delivery from the bailee. The bailee is protected in such delivery if made in good faith.²⁶⁰ Thus a thief or a finder may defeat the rights of the owner against the bailee if the document is in bearer form or is indorsed in blank; to protect himself against such defeat the owner must withhold a necessary indorsement. A forged indorsement is of course ineffective. A transferee is given a specifically enforceable right to have his transferor supply any necessary indorsement, but negotiation takes place only when it is supplied.²⁶¹ That right was limited by the prior statutes to cases of transfer "for value," "unless a contrary intention appears;" the official comment indicates that the Code provision is not intended to be so limited.²⁶² That provision seems not to help the transferee whose transferor has no power to indorse, such as the bank which receives from a seller a bill of lading running to the buyer's order.

The bona fide purchaser of a negotiable document, other than the bailee, gets the full protection given by the Code only if he takes by "due negotiation," although a bailee is protected if he delivers in good faith to one to whom the document was not "duly negotiated."²⁶³ Once due negotiation is found, the bona fide purchaser takes free not only of prior equities but also of prior legal interests based on the document: a thief can confer a good title on one to whom the document is duly negotiated.²⁶⁴ The phrase "duly negotiated" appeared in the prior statutes,²⁶⁵ but the Code for the first time defines it expressly.²⁶⁶ The Code definition includes the requirements of "value" and "good

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258. UCC §§ 7-501(1), (2), 1-201(14); UWRA §§ 37-40; UBLA §§ 28-31. *But cf.* John S. Hale & Co. v. Beley Cotton Co., 154 Tenn. 689, 290 S.W. 994 (1927) ("upon return of this receipt properly indorsed" controlled "bearer" document).

259. UCC § 7-501(3); compare UCC § 3-204(1) and comment 2. *But see* UCC § 7-501(1), (2)(a).

260. UCC §§ 7-501(4), 7-404; see notes 128, 135 *supra*.

261. UCC § 7-506; UWRA § 43; UBLA § 34.

262. UCC § 7-506, comment *Changes*; but see UCC § 1-102(3)(e), permitting contrary agreement.

263. UCC §§ 7-501(4), 7-404.

264. UCC § 7-502; compare UWRA §§ 40, 47, and amendments recommended in 1922; UBLA §§ 31, 38.

265. UWRA § 41; UBLA § 32.

266. UCC § 7-501(4).

faith" which were fairly implied in the prior provisions; but value is redefined, good faith is made to include "observance of reasonable commercial standards," and negotiation is not "duly" made if it is established that it is not "in the current course of business or financing."

The redefinition of "value" seems to make clear what was fairly intended by the prior statutes, that a bank or other purchaser gives value for a document when it extends "immediately available credit" or makes some other executory promise sufficient to support a simple contract,²⁶⁷ when it takes the document in payment of or as security for an antecedent debt, or when it takes it pursuant to a preexisting contract for purchase.²⁶⁸ Section 7-501(4) of the Code incorporates "reasonable commercial standards" into the concept of "good faith" and is thus in form contrary to prior law²⁶⁹ and stricter than the minimum standard required by the Code, which make honesty the test irrespective of negligence;²⁷⁰ but it may be in accord with decisions denying protection to a purchaser who had "notice" from facts putting him on inquiry.²⁷¹

The concept of "current course," new in the Code, is expounded at length in the official comment.²⁷² The comment refers to cases of negotiation by a tramp or professor or at a price suspiciously below the market as "obviously" out of current course; a factor's wrongful pledge of his principal's goods to secure his own preexisting bank debt is stated flatly not to be a due negotiation. Such statements suggest that the stated result is required as a matter of law, but litigation will be required to settle the question how far such a requirement is consistent with the statutory text. The text is open to the interpretation that what is in "current course" is a question for the trier of fact, with the burden of persuasion on the party attacking the negotiation. In that view, the comment might be taken merely as indicating the kind of proof needed to raise a question for the trier of fact.

Attachment: The fact that a nonnegotiable document is outstanding does not prevent creditors of the bailor from seizing the goods under legal process.²⁷³ Goods subject to a nonnegotiable document are also

267. UCC § 7-102(1)(g); UWRA § 58(1); UBLA § 53(1); Commercial Savings Bank of Grand Rapids, Mich. v. Mann, 206 App. Div. 297, 200 N.Y. Supp. 587 (4th Dep't 1923); see 3 WILLISTON, SALES § 620 (Rev. ed. 1948). Contrast UCC § 3-303(a); NEGOTIABLE INSTRUMENTS LAW § 54.

268. Cf. Baldwin v. Childs, 249 N.Y. 212, 163 N.E. 737 (1928).

269. UWRA § 58(2); UBLA § 53(2).

270. UCC § 1-201(19) and comment 19.

271. See 3 WILLISTON, SALES § 621 (Rev. ed. 1948); cf. Shaw v. R.R., 101 U.S. 557 (1879) ("reason to believe").

272. UCC § 501 comment 1.

273. Edward L. Eyre & Co. v. Hirsch, 36 Wash.2d 439, 218 P.2d 888 (1950). See notes 244, 252 *supra*.

subject to a seller's right to stop delivery, which is expanded beyond cases of the buyer's insolvency by the Code.²⁷⁴ Such attachment or stoppage cannot, however, impair the rights of a person to whom a negotiable document is duly negotiated.²⁷⁵ To protect both the holder and the bailee, the Code follows prior law in providing that goods subject to a negotiable document cannot be attached unless the document is surrendered or its negotiation enjoined, and that the bailee is not obliged to deliver the goods until the document is surrendered.²⁷⁶ Indeed, the Code goes beyond the prior law by freeing the bailee under a negotiable document of all obligation to obey a notice to stop until surrender of the document.²⁷⁷ The Code omits the affirmative authorization for equitable jurisdiction by injunction in aid of attachment found in the prior statutes, but without apparent change in result.²⁷⁸

Liability of Indorser: Banks often advance money against negotiable instruments to which documents of title are attached as security. One very common type of transaction involves a draft with bill of lading attached, drawn by the seller-pledgor and naming the buyer-consignee as drawee. Banks often undertake to collect such documentary drafts, and the UBLA contained provisions governing the duties of the collecting banks.²⁷⁹ Such provisions are omitted from Article 7 of the Code, but are included in other articles.²⁸⁰ The UBLA section on the form of the bill as indicating rights of buyer and seller is similarly transferred to Article 2.²⁸¹ But the obligation incurred by a collecting bank as an indorser or transferor of a document of title is covered in Article 7.

The indorser of a bill of lading or a warehouse receipt does not become liable for any default by the bailee or by previous indorsers.²⁸² But an indorser of a delivery order may undertake that it will be honored by the bailee;²⁸³ and one who transfers a document for value ordinarily warrants its genuineness, his own good faith, and title to the document and the goods.²⁸⁴ An exception is made for "a collecting

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274. UCC §§ 7-303(1)(d), 7-403(1)(d), 2-705; USA §§ 57-9; UWRA § 9; UBLA § 12. Compare notes 148-52 *supra*.

275. UCC § 7-502(2); USA § 62; UWRA §§ 11, 12; but compare UBLA §§ 14, 15; see note 133 *supra*.

276. UCC § 7-602; USA §§ 39, 59(2); UWRA § 25; UBLA §§ 24, 42; *Pottash v. Albany Oil Co.*, 274 Pa. 384, 118 Atl. 317 (1922).

277. UCC § 2-705(3)(c); compare USA § 59(2).

278. USA § 40; UWRA § 26; UBLA § 25.

279. UBLA § 41.

280. UCC §§ 2-514, 3-701 through 3-704.

281. UBLA § 40; see USA § 20; UCC § 2-505.

282. UCC § 7-505; USA § 37; UWRA § 45; UBLA § 36.

283. UCC § 7-505 comment.

284. UCC § 7-507; USA § 36; UWRA § 44; UBLA § 35.

bank or other intermediary" known to be acting for another or to be collecting a claim against delivery of documents; such an intermediary warrants "only its own good faith and authority."²⁸⁵

That exception is designed to render unnecessary the elaborate indorsement clauses used by some banks to disclaim responsibility for the genuineness of the document or the condition of the goods.²⁸⁶ In the absence of such clauses, there has been conflict of decision under the prior statutes.²⁸⁷ The Code states that the exception applies even though the intermediary has purchased a claim secured by the document, but presumably outright purchase of the document itself would deprive the bank of the status of "intermediary."²⁸⁸ A bank might also lose the benefit of the exception by making express representations as to the document.²⁸⁹

VI. CONCLUSION

This summary indicates that Article 7 of the Code will make significant changes in the law of Pennsylvania and of any other state which adopts it. Its impact will be felt primarily in the warehousing and transportation industries, secondarily in the field of banking. Buyers and sellers of merchandise will be directly affected more sporadically, but may reap the principal long-run benefits to the extent that the Code improves the bankable quality of documents of title.

Other articles of the Code will also have important effects on the law of documents of title. Questions as to the compliance or non-compliance of particular documents with the terms of a contract for sale or the conditions of a letter of credit are left to Article 2 (Sales) and Article 5 (Documentary Letters of Credit), respectively. The duties of banks collecting documentary drafts are governed by Article 3 (Commercial Paper) and Article 4 (Bank Deposits and Collections). The use of documents of title as security for loans is covered in Article 9 (Secured Transactions). Although occasional cross-references to other articles have been made, their provisions are beyond the general scope of this paper.

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285. UCC § 7-508; compare UWRA § 46; UBLA § 37.

286. See, e.g., *Am. State Bank v. Mueller Grain Co.*, 15 F.2d 899 (7th Cir. 1926), *reversed on other grounds*, 275 U.S. 493 (1927); *Johnston v. Western Maryland Ry.*, 151 Md. 422, 135 Atl. 185 (1926).

287. Compare *Bank of Italy v. Colla*, 118 Ohio St. 459, 161 N.E. 330 (1928), with *Am. Nat. Bank of Lawton v. J. Rosenbaum Grain Co.*, 148 Okla. 232, 299 Pac. 447 (1931).

288. Cf. *Bishop & Co. v. Midland Bank, Inc.*, 84 F.2d 585 (9th Cir. 1936), *cert. denied*, 299 U.S. 587 (1936).

289. Cf. *Archibald & Lewis Co. v. Banque Internat. de Commerce*, 216 App. Div. 322, 214 N.Y. Supp. 366 (1st Dep't 1926).

When Article 7 is compared with the prior law, as has been done here, it is apparent that the continuity with prior law is more significant than the changes are. Terminology is recast; disputed questions are resolved; and some innovations are introduced. But the overall picture is one of tidying up traditional concepts rather than of radical reform. Some initial confusion may be anticipated, and some sorrow on the part of experts who are forced to reeducate themselves under the new regime; but it seems likely that progress has been made without excessive cost.