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# WHEN DOES A DEBTOR HAVE RIGHTS IN THE COLLATERAL UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE?

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## INTRODUCTION

Article 9 of the Uniform Commercial Code[1] applies to any transaction (regardless of its form) that is intended to create a security interest[2] in personal property or fixtures.[3] The creation of a security interest is specifically governed by section 9-203.[4] The Code lists three requirements for an enforceable security interest: (a) an agreement[5] creating the security interest as evidenced either by the secured party[6] possessing the collateral, or by the debtor signing a security agreement[7] describing the

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1. All references in this article are to the 1972 version of the Uniform Commercial Code. The article, however, has equal application to the earlier versions since the phrase "the debtor has rights in the collateral" is a statutory requirement of equal mystery in all the versions of the Code.

2. U.C.C. § 1-201(37).

3. U.C.C. § 9-102.

4. U.C.C. § 9-203. That section provides as follows:

> (1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless
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> (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and
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> (b) value has been given; and
>
> (c) *the debtor has rights in the collateral* (emphasis added).

The corresponding sections under the 1962 version of the Code are U.C.C. §§ 9-203 and 9-204.

5. U.C.C. § 1-201(3).

6. U.C.C. § 9-105(1)(m). That section defines the term "secured party" as follows: "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

7. U.C.C. § 9-105(1). The Code defines a "security agreement" as any agreement which creates or provides for a security interest.

collateral; (b) value[8] must be given; and (c) the debtor must have "rights[9] in the collateral."[10] There is no specific order in which these requirements must be met,[11] but it is essential that they all be fulfilled.[12] Once the requirements have been satisfied, the security interest is deemed to attach[13] to the collateral, thereby becoming enforceable[14] against the debtor. After attachment, the security interest may be made enforceable against third parties by perfection.[15]

The creation of an enforceable security interest is clearly the foundation upon which a secured party must build his Article 9 protection. This article is focused on one of the building blocks for the creation of an enforceable security interest — the requirement that the debtor have rights in the collateral.[16] The

8. U.C.C. § 1-201(44).

9. The term "rights" is defined as including remedies in U.C.C. § 1-201(36). The definition has no application to the phrase in Article 9.

10. The phrase "rights in the collateral" appears six times in Article 9: U.C.C. §§ 9-105(1)(d); 9-107(b); 9-108; 9-203(1)(c); 9-204(2); 9-311.

For two cases indicating the need to have rights in the collateral, *see* Tinsman v. Moline Beneficial Fin. Co., 531 F.2d 815 (7th Cir. 1976); McCrackin v. Hayes, 118 Ga. App. 267, 163 S.E.2d 246 (1968).

11. *See, e.g., In re* United Thrift Stores, Inc., 363 F.2d 11 (3rd Cir. 1966); *In re* Allen, 395 F. Supp. 150 (E.D. Ill. 1975); *In re* Laue, 8 UCC Rep. Serv. 420 (D. R.I. 1970); Enterprises NOW, Inc. v. Citizens & S. Dev. Corp., 135 Ga. App. 602, 218 S.E.2d 309 (1975).

12. *See, e.g.,* Branch v. Steph, 389 F.2d 233 (10th Cir. 1968); *In re* Pelletier, 5 UCC Rep. Serv. 327 (D. Me. 1968); Peninsula State Bank v. Beneficial Fin. Co., 15 UCC Rep. Serv. 503 (N.Y. Sup. Ct. 1974); Karp Bros., Inc. v. West Ward Sav. & Loan, 440 Pa. 583, 271 A.2d 493 (1970).

13. Barry v. Bank of N.H., 113 N.H. 158, 293 A.2d 755 (1972); National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975); Sussen Rubber Co. v. Hertz, 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969).

14. A security interest which is enforceable means the secured party can satisfy the debt against a debtor's particular collateral. If a security interest were not enforceable, the secured party would have no specific source from which he could satisfy his debt. The absence of an enforceable security interest has no effect on the debt owed to the secured party.

15. U.C.C. § 9-303. Attachment is the process by which a secured party obtains a security interest in a particular piece or class of collateral. Attachment is necessary to establish the right to satisfy the debt from the collateral. Perfection is the process by which a secured party establishes his priority to the collateral with regard to other claimants to the collateral. Perfection presupposes attachment. U.C.C. § 9-303, comment 1, further explains the perfection-attachment relationship.

16. There are six different types of collateral. Four types are defined in U.C.C. § 9-105(1):

. . . .

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper.

purpose of this article is to give meaning to the phrase "rights in the collateral." The approach is an analysis of the phrase in terms of two elements: the quantum of rights needed for a

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When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

. . . .

(f) "Document" means document of title as defined in the general definitions of Article 1 (Section 1-201), and a receipt of the kind described in subsection (2) of Section 7-201;

. . . .

(h) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (Section 9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like (including oil and gas) before extraction. "Goods" also includes standing timber which is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and growing crops;

(i) "Instrument" means a negotiable instrument (defined in Section 3-104), or a security (defined in Section 8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.

Two types of collateral are defined in U.C.C. § 9-106:

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance. "General intangibles" means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

For purposes of this article, the focus will be on goods as the collateral because of the particular significance Article 2 plays in the analysis of the questions posed. Citations, however, will be provided for cases dealing with the other five types of collateral as they are available. Goods are further subdivided into additional categories of collateral as follows:

(1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

U.C.C. § 9-109.

debtor to qualify as having rights in the collateral[17] and the necessity that the debtor possess the collateral.[18]

## I. THE QUANTUM ELEMENT

Before giving value in reliance that certain collateral[19] will secure the debt, the secured party should first determine whether the debtor[20] has rights in the collateral. The Code, however, does not define the meaning of the phrase "rights in the collateral."[21] The only reference to its meaning appears in the explanatory reasons for the 1972 amendments to section 9-204:[22] "Former subsection (2) has been eliminated as unnecessary and in some cases confusing. Its operation appeared to be arbitrary, and it is believed that the questions considered [the meaning of rights in the collateral as related to different types of collateral] are best left to the courts."[23] It has, therefore,

17. One author states that a debtor has rights in the collateral when he has acquired some legal or equitable right in it. C. BUNN, H. SNEAD & R. SPEIDEL, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE, § 4.5 (1964).

18. This assumes that value and agreement have already occurred and that the debtor needs only rights in the collateral as the last of the three requisites to be completed under U.C.C. § 9-203. For "rights in the collateral" cases where the collateral was not goods, *see* American East India Corp. v. Ideal Shoe Co., 400 F. Supp. 141 (E.D. Pa. 1975) (general intangibles); First Nat'l Bank v. Jefferson Sales & Distribs., Inc., 341 F. Supp. 659 (S.D. Miss. 1971) (account); United States Fidelity & Guar. Co. v. First State Bank, 208 Kan. 738, 494 P.2d 1149 (1972) (general intangibles); Crete State Bank v. Lauhoff Grain Co., 195 Neb. 605, 239 N.W.2d 789 (1976) (general intangibles); *In re* Chase Manhattan Bank, N.A. v. New York, 48 App. Div. 2d 11, 367 N.Y.S.2d 580 (1975) (general intangibles); Corpus Christi Bank & Trust v. Smith, 525 S.W.2d 501 (Tex. 1975) (general intangibles).

19. The assumption that the secured party will give value in reliance on the fact that proposed collateral will secure the debt is not always true. Value is given under the Code when there is a preexisting claim or debt. *See* U.C.C. § 1-201(44)(b).

20. The term "debtor" is defined in U.C.C. § 9-105(1)(d):

> "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

21. *See* Avco Delta Corp. v. United States, 459 F.2d 436 (7th Cir. 1972). *See also* K.N.C. Wholesale, Inc. v. AWMCO, Inc., 55 Cal. App. 3d 43, 127 Cal. Rptr. 208 (1976).

22. The reason that the 1972 amendments merged the concepts of attachment and enforceability into U.C.C. § 9-203 was to correct the anomalous situation under the 1962 Code whereby the security interest could attach under U.C.C. § 9-204 but not be enforceable under U.C.C. § 9-203 because the debtor had not signed a security agreement. U.C.C. app. at 761 (West 1972).

23. U.C.C. app. at 761 (West 1972).

fallen upon the courts to assign a meaning to the tautology "rights in the collateral."[24]

The initial step in ascertaining whether the debtor has rights in the collateral is an examination of the relationship of the debtor to the collateral.[25] The quantum of rights imbued in the debtor as a result of this relationship determines whether the debtor has sufficient rights in the collateral to satisfy the quantum element. Since a debtor can acquire property that may be used as collateral by means of a sale, lease, bailment or consignment, these relationships will be analyzed. Also examined will be the effects of agency, voidable title and consent of the owner of the collateral.

### *A. Sale*

A sale consists of the passing of title from the seller to the buyer for a price.[26] A buyer is defined as a person who buys or contracts to buy goods,[27] but the quantum of rights that a buyer-debtor of goods receives is not clear. A seller's rights,

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24. Collateral is defined as property subject to a security interest. U.C.C. § 9-105(1)(c). If a person possesses collateral, he therefore must necessarily have had rights in it to have created a security interest therein. Therefore, it is circular reasoning to use the phrase "rights in the collateral."

25. *In re* Pelletier, 5 UCC Rep. Serv. 327 (D. Me. 1968) is the first case to suggest that the relationship of the debtor to the collateral is important under Article 9. In *Pelletier*, the relationship was important for determining the proper place to file a financing statement. The debtor in *Pelletier* purchased a camper while in transit between residences. Because of this, the secured party was faced with the problem of deciding where to file its financing statement. The court held that the proper place of filing is the place where the security interest attaches. The court used the following reasoning in reaching its conclusion:

> By the same token it is not easy to understand why the moment of filing a financing statement four years prior to the debtor's acquisition of any rights in the after-acquired collateral ought to be the time for making those determinations upon which the place of filing depends. It does indeed seem sensible that no security interest may be said to have attached until the debtor has acquired rights in the collateral. And to elect as the place for filing the financing statement the debtor's residence at a time when there is no contemplated or actual relationship between the debtor and the after-acquired collateral seems anything but helpful to those who must rely upon the public record. Selection of the place of filing on the basis of the debtor's residence at the time the security interest attaches can provide the searcher with helpful extrinsic clues as to where the filing should have been made.

*Id.* at 334 (footnotes omitted).

*See also* Air Traffic Conf. v. Downtown Travel Center, Inc., 18 UCC Rep. Serv. 1202 (N.Y. Sup. Ct. 1976); Poteet v. Winter Garden Prod. Credit Ass'n, 546 S.W.2d 650 (Tex. 1977).

26. U.C.C. § 2-106(1).

27. U.C.C. § 2-103(1)(a).

however, are more explicit. A seller[28] of goods who retains or reserves title, notwithstanding shipment or delivery to the buyer, is deemed to have reserved a security interest.[29] The Code, therefore, implies that if a seller has a security interest in a buyer-debtor's goods (collateral), then the buyer-debtor has a sufficient quantum of rights in the collateral.[30] The question is, however, precisely what is that quantum of rights?

A security interest continues in collateral notwithstanding its sale, exchange or other disposition.[31] The buyer-debtor has the power to sell, transfer, exchange or otherwise dispose of the collateral.[32] This power to sell logically would include lesser powers, such as the ability to lease, license, or create a security interest in the goods. In *In re Ten Brock*,[33] a trustee in bankruptcy argued that a buyer of a camper had no rights in the collateral sufficient to create a security interest in favor of a secured party. The court disagreed, holding the buyer-debtor acquired rights in the camper through the purchase agreement

28. U.C.C. § 2-103(1)(d).

29. U.C.C. § 1-201(37).

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

30. A seller has a security interest in the collateral when the requirements of U.C.C. § 9-203 have been complied with. The parties have made an agreement (a contract of sale), value has been given (the sale price) and the buyer-debtor must have had rights in the collateral sufficient to grant the security interest. The security interest, however, may not have attached unless the seller possesses the collateral or there is a security agreement (written contract of sale) in existence.

31. U.C.C. § 9-306(2).

32. The security agreement between the debtor and the secured party can restrict the debtor's rights regarding the collateral, but under U.C.C. § 9-307 such restrictions will have no effect on a buyer in the ordinary course of business.

33. 4 UCC Rep. Serv. 712 (W.D. Mich. 1976).

and delivery of possession pursuant to the security agreement with the seller.[34] A buyer-debtor of the collateral, therefore, by virtue of possessing the power to sell[35] (to transfer good title) has the requisite quantum of rights.

### *B. Lease*

A lease is a contractual arrangement whereby the lessor grants to the lessee-debtor the right to use and possess the leased property[36] as collateral. In a lease, the lessor retains title to the goods.[37] The retention or reservation of title by a lessor is not a security interest unless the lease is intended as security.[38] If the lease is intended as security, the transaction constitutes a conditional sale.[39]

Whether a lease is intended as security is determined on an ad hoc basis. An agreement that upon compliance with the terms of the lease the lessor shall become or has the option to become the owner of the property for no additional consideration or for nominal consideration amounts to a conditional sale and the lease, therefore, is intended as security.[40] In *Karp Brothers, Inc. v. Westward Savings & Loan Association,*[41] the Pennsylvania Supreme Court held that the execution of a bailment lease of restaurant equipment containing an agreement giving the lessee the right to become the owner of the property for no additional consideration or for a nominal consideration

34. *Id.* at 715.

35. For two cases holding that the debtor had rights in the collateral because he had the power to sell, *see* Douglas-Guardian Warehouse Corp. v. Esslair, 10 UCC Rep. Serv. 176 (W.D. Mich. 1971); Swets Motor Sales, Inc. v. Pruisner, 236 N.W.2d 299 (Iowa 1975).

36. Sanders v. Commercial Credit Corp., 398 F.2d 988 (5th Cir. 1968); *In re* Universal Medical Servs., Inc., 8 UCC Rep. Serv. 614 (E.D. Pa. 1970); *In re* Falco Prods. Co., 5 UCC Rep. Serv. 264 (E.D. Pa. 1968); Gibreal Auto Sales, Inc. v. Missouri Valley Mach. Co., 186 Neb. 763, 186 N.W.2d 719 (1971).

37. Sanders v. National Acceptance Co., 383 F.2d 606 (5th Cir. 1967); *In re* Overbrook & Barson's, Inc., 5 UCC Rep. Serv. 546 (E.D. Pa. 1968); *In re* Alpha Creamery Co., 4 UCC Rep. Serv. 794 (W.D. Mich. 1967).

38. U.C.C. § 1-201(37). For a discussion of loans intended as security, *see* Stanley v. Fabricators, Inc., 459 P.2d 467 (Alas. 1969); Uniroyal, Inc. v. Michigan Bank, N.A., 12 UCC Rep. Serv. 745 (Mich. Cir. Ct. 1972); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 762-64 (1972) [hereinafter cited as WHITE & SUMMERS].

39. A conditional sale is a simple transaction whereby the seller retains title to the goods sold until the buyer has made payment in full. WHITE & SUMMERS, *supra* note 38, at 755.

40. 459 P.2d at 469. *See* the definition of a security interest, *supra* note 2.

41. 440 Pa. 583, 271 A.2d 493 (1970).

created a security interest in the property for the lessor. The court further found the lessee-debtor had thereby acquired the requisite quantum of rights.[42]

There are numerous factors which must be considered in resolving the issue of whether a lease is a true lease or one intended as security.[43] The simple inclusion of an option to purchase does not of itself make the lease one intended as security.[44] The two most important factors indicating that the transaction is a true lease are that the lessee is acquiring no equity in the leased article during the term of the lease and that the option price, if any, approximates the market value at the time of exercise.[45] In *First National Bank & Trust Co. v. Smithhoff*,[46] the court held that the lease did not create a secu-

42. *Id.* at 588, 271 A.2d at 496.

43. *See* WHITE & SUMMERS, *supra* note 38, at 762.

44. *See* U.C.C. § 1-201(37).

45. In *In re* Alpha Creamery Co., 4 UCC Rep. Serv. 794 (W. D. Mich. 1967), where the court found a lease of a typewriter accounting machine to be a true lease, the court made the following statement:

> From such cases and other authorities on this subject the following factors should be considered in determining whether or not a lease is a security agreement:
>
> 1. The facts in each case control to show intention of the parties to create a security interest.
>
> 2. Reservation of title in a lease or option to purchase appurtenant to or included in the lease does not in and of itself make the lease a security agreement.
>
> 3. Lease agreement which permits the lessee to become the owner at the end of the term of the lease for a nominal or for no additional consideration is deemed intended as a security agreement as a matter of law.
>
> 4. The percentage that option purchase price bears to the list price, especially if it is less than 25%, is to be considered as showing the intent of the parties to make a lease as security.
>
> 5. Where the terms of the lease and option to purchase are such that the only sensible course for the lessee at the end of the lease term is to exercise the option and become the owner of the goods, the lease was intended to create a security interest.
>
> 6. The character of a transaction as a true lease is indicated by:
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> (a) Provision specifying purchase option price which is approximately the market value at the time of the exercise of the option.
>
> (b) Rental charges indicating an intention to compensate lessor for loss of value over the term of the lease due to aging, wear and obsolescence.
>
> (c) Rentals which are not excessive and option purchase price which is not too low.
>
> (d) Facts showing that the lessee is acquiring no equity in leased article during the term of lease.

*Id.* at 797-98.

46. 119 Ga. App. 284, 167 S.E.2d 190 (1969).

rity interest because the lease agreement did not give the lessee the right to proceed directly against the lessor's interest in the collateral which would have been similar to granting a security interest in the collateral.[47] In *Disch v. Raven Transfer & Storage Co.*,[48] the court held in a true lease case that the lessee of goods could not create a security interest in the goods in favor of a good faith purchaser[49] because the lessee did not have rights in the collateral. Mere lawful possession was not a quantum of rights sufficient to vest the lessee-debtor with rights in the collateral.[50]

A lessee-debtor in a disguised sale transaction does acquire a sufficient quantum of rights to have rights in the collateral as that term is used in section 9-203(1)(c). A lessee-debtor in a true lease transaction, however, does not acquire a sufficient quantum of rights. It has been said the essential distinction between a lease and a conditional sale is that in a lease the lessee never owns the property.[51] This statement is correct although the language needs refinement. The lessee-debtor is a disguised buyer in a transaction where the lease is intended as security. This disguised buyer has the same right that a disclosed buyer has regarding the goods — the power to transfer good title.[52] The power to transfer good title vests the lessee-debtor in a conditional sale transaction, as contrasted with the true lease transaction, with the requisite quantum of rights.

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47. *See* First Nat'l Bank & Trust Co. v. McElmurray, 120 Ga. 134, 169 S.E.2d 720 (1969).

48. 17 Wash. App. 73, 561 P.2d 1097 (1977).

49. U.C.C. §§ 1-201(19), (32) and (33).

50. 17 Wash. App. at ____, 561 P.2d at 1099. *See also* C.I.T. Financial Servs. Corp. v. First Nat'l Bank, 344 So. 2d 125 (Miss. 1977); Cordle v. Lincoln Moving & Storage, Inc., 19 UCC Rep. Serv. 1204 (Neb. Dist. Ct. 1976); Texas State Bank v. Foremost Ins. Co., 477 S.W.2d 652 (Tex. Ct. App. 1972).

51. In UniRoyal, Inc. v. Michigan Bank, N.A., 12 UCC Rep. Serv. 745 (Mich. Cir. Ct. 1972), the court found a tire mileage agreement whereby tires were leased to a debtor to be a lease intended as security. The court stated,

> All cases cited to the court have been read and both sides have presented excellent arguments to support their positions. It appears that the cases cited by defendant present the better reasoned approach. The prime essential distinction between a lease and a conditional sale is that in a lease the lessee never owns the property. In the absence of a right or option in the lessee to acquire ownership of the leased property, the transaction is one of pure lease.

*Id.* at 750.

52. *See* text accompanying footnotes 26 through 35, *supra*.

### C. *Voidable Title*

A buyer has voidable title to goods when they have been delivered under a transaction of purchase whereby (a) the transferor was deceived as to the identity of the purchaser, or (b) the delivery was in exchange for a check which is later dishonored, or (c) it was agreed that the transaction was to be a "cash sale," or (d) the delivery was procured through fraud punishable as larcenous under criminal law.[53] The buyer-debtor with voidable title to the delivered goods possesses them for use as potential collateral.

The analysis of the voidable title-debtor's rights in the collateral is best introduced by reference to three recent decisions which reach different conclusions on virtually the same facts. In *Zion's First National Bank v. First Security Bank*,[54] the voidable title-debtor received the goods under an agreement that title would pass only upon payment.[55] Payment, however, was not made upon receipt of the goods. The unpaid seller's priority was disputed by a secured party of the voidable title-debtor who claimed priority to the goods through an after-acquired property clause. The Supreme Court of Utah ruled that the voidable title-debtor never acquired any "rights in the collateral" and therefore could not create a security interest in favor of the secured party.[56] In *In re Samuels & Co.*,[57] the voidable title-debtor received the goods in consideration for checks which were subsequently dishonored.[58] The unpaid seller claimed first priority to the goods by virtue of a cash seller's reclamation right.[59] A secured party of the voidable title-debtor claimed priority to the goods by virtue of an after-acquired

53. U.C.C. § 2-403(1).

54. 534 P.2d 900 (Utah 1975).

55. Such an agreement falls within the purview of U.C.C. § 2-403(1)(c) and would be deemed a cash sale. The buyer would possess a voidable title.

56. 534 P.2d at 902.

57. 483 F.2d 557 (5th Cir. 1973), *rev'd & rem'd sub nom.* Mahon v. Stowers, 416 U.S. 100 (1974); *on remand*, 510 F.2d 139 (5th Cir. 1975), *reheard & rev'd* 526 F.2d 1238 (5th Cir. 1976).

58. The facts would fall within the purview of U.C.C. § 2-403(1)(b). The buyer would possess a voidable title.

59. The cash seller's reclamation right is based on U.C.C. §§ 2-507 (2) and 2-511(3). Section 2-507(2) provides that when payment is due upon delivery, the buyer's right to retain or dispose of the goods is conditional upon his making payment. Section 2-511(3) provides that when payment is made by check, it is conditional and is defeated between the parties upon dishonor. The seller, upon dishonor, has ten days to exercise his right of reclamation.

property clause. The Fifth Circuit held that the voidable title-debtor did acquire rights in the collateral sufficient to create a "security interest in favor of the secured party."[60] And finally, in *In re American Food Purveyors, Inc.*,[61] a voidable title-debtor received the goods after making misrepresentations to the seller.[62] The unpaid seller again claimed first priority to the goods by virtue of a credit seller's reclamation right.[63] A secured party of the voidable title-debtor claimed priority to the goods by virtue of an after-acquired property clause. The district court held that the voidable title-debtor did not acquire any rights in the collateral during the ten day period of the credit seller's reclamation right.[64] Since the seller sought to reclaim within the ten day period, the voidable title-debtor never acquired any rights in the collateral, and therefore could not create a security interest in favor of the secured party.[65]

The court in *Samuels* is correct. A person with voidable title has power to transfer good title to a good faith purchaser for value.[66] A purchaser is a person who takes by purchase,[67] including a lienholder.[68] A person can acquire a lien on the goods in the possession of the voidable title-debtor. Therefore, a voidable title-debtor has sufficient rights in the collateral to permit a lien to attach.

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60. 526 F.2d at 1246-48.

61. 17 UCC Rep. Serv. 436 (N.D. Ga. 1974).

62. This case does not fall clearly within the coverage of U.C.C. § 2-403(1). Subsections (a) and (c) have no application. The misrepresentations made by the buyer concerned the buyer's solvency, which would not amount to fraud punishable as larcenous under U.C.C. § 2-403(1)(d). Although the buyer stated that he sent a check in payment, in fact, no check was ever sent to put the case within U.C.C. § 2-403(1)(b). The classification, however, should not turn upon whether the fraudulent party actually tendered a check or not.

63. *See* U.C.C. § 2-702(2).

64. The cash seller has the same ten day limitation to its reclamation right. U.C.C. § 2-507, comment 3, states,

> Subsection (2) deals with the effect of a conditional delivery by the seller and in such a situation makes the buyer's "right as against the seller" conditional upon payment. These words are used as words of limitation to conform with the policy set forth in the bona fide purchase sections of this Article. Should the seller after making such a conditional delivery fail to follow up his rights, the condition is waived. The provision of this Article for a ten day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here.

65. 17 UCC Rep. Serv. at 443.

66. U.C.C. § 2-403. *See also* Jordan v. Butler, 182 Neb. 626, 156 N.W. 2d 778 (1968).

67. U.C.C. § 1-201(33).

68. U.C.C. § 1-201(32).

An Article 9 security interest is functionally identical to a lien. The only difference between a lien and a security interest is that a security interest is acquired by consent while a lien is acquired by attachment, levy or the like.[69] Therefore, if a voidable title-debtor has sufficient rights in the collateral to permit a lien to attach, *a fortiori* a voidable title-debtor has sufficient rights in the collateral to permit a security interest to attach.

A good faith purchaser includes a person who takes by a voluntary transaction creating an interest in property.[70] The grant of a security interest is a voluntary creation of an interest in property.[71] A secured party is a lender, seller or other person in whose favor there is a security interest.[72] A secured party can also be a good faith purchaser for value.[73] Since a voidable title-debtor has the power to transfer good title to a good faith purchaser for value,[74] a voidable title-debtor has the power to transfer good title to a secured party. Therefore, a voidable title-debtor has the requisite quantum of rights under section 9-203(1)(c).

Since the voidable title-debtor does have rights in the collateral,[75] the secured party's security interest can attach to the collateral by virtue of an after-acquired property clause. When this occurs the secured party's security interest in the collateral has priority over the reclamation right of either the cash or credit seller.[76] The credit seller may reclaim goods from the buyer-debtor upon demand made within ten days after receipt if the buyer-debtor has received the goods while insolvent.[77]

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69. U.C.C. § 9-301(3).

70. U.C.C. § 1-201(32).

71. U.C.C. § 9-102. The official comment to 9-102 states that the main purpose of the section is to bring all consensual security interests in personal property and fixtures under Article 9, except for transactions excluded by section 9-104.

72. U.C.C. § 9-105(1)(m).

73. United States v. Wyoming Nat'l Bank, 505 F.2d 1064 (10th Cir. 1974); *In re* Hayward Woolen Co., 3 UCC Rep. Serv. 1107 (D. Mass. 1967); Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974); Swets Motor Sales, Inc. v. Pruisner, 236 N.W.2d 299 (Iowa 1975); Jordan v. Butler, 182 Neb. 626, 156 N.W.2d 778 (1968); First-Citizens Bank & Trust Co. v. Academic Archives, Inc., 10 N.C. App. 619, 179 S.E.2d 850 (1971). *Contra, In re* American Food Purveyors, Inc., 17 UCC Rep. Serv. 436 (N.D. Ga. 1974); Mother Lode Bank v. General Motors Acceptance Corp., 46 Cal. App. 3d 807, 120 Cal. Rptr. 429 (1975).

74. U.C.C. § 2-403.

75. *See* text accompanying footnotes 53 through 84, *supra*.

76. For the seller's reclamation right defeating a trustee in bankruptcy, *see In re* Mort, 208 F. Supp. 309 (E.D. Pa. 1962).

77. U.C.C. § 2-702(2).

The credit seller's right to reclaim, however, is subject to the rights of a good faith purchaser,[78] and since a secured party is a good faith purchaser, the credit seller's reclamation right is subordinate to the rights of a secured party. In a cash sale, where payment is due and demanded upon delivery of the goods, a buyer-debtor's right to retain or dispose of the goods is conditional upon his making payment.[79] Payment by check is conditional, and is defeated if the check is dishonored.[80] The cash seller has the right to reclaim the goods from the buyer-debtor on demand within ten days after defeat of payment.[81] However, as in the case of the credit seller, the cash seller's right to reclaim is also subject to the rights of a good faith purchaser.[82] Therefore, since a secured party is a good faith purchaser, the cash seller's reclamation right is subordinate to the rights of a secured party.

In sum, because the ordinary buyer-debtor has the power to transfer good title to the collateral, he is vested with the requisite quantum of rights to create a security interest.[83] Likewise, the voidable title-debtor has the power to transfer good title by statute.[84] Hence, the "power to transfer good title" thus vests the voidable title-debtor with the requisite quantum of rights under section 9-203(1)(c).

### *D. Bailment*

A bailment occurs when a person possesses another person's property.[85] A bailment can be either voluntary or involuntary.[86] The bailor retains title to the goods similar to a lessor in a lease situation.[87] Unlike the lease transaction, there is no conditional

78. U.C.C. § 2-702(3). *See In re* Hayward Woolen Co., 3 UCC Rep. Serv. 1107 (D. Mass. 1967). For the same result when a cash sale is converted into a credit sale, *see* Galleon Indus., Inc. v. Lewyn Mach. Co., 50 Ala. App. 334, 279 So. 2d 137 (1973).

79. U.C.C. § 2-507(2).

80. U.C.C. § 2-511(3).

81. U.C.C. § 2-507, comment 3.

82. *Id. But see In re* Lindenbaum's, Inc., 2 UCC Rep. Serv. 495 (E.D. Pa. 1964), where the court erroneously held the cash seller's reclamation right to be equal to a secured creditor's. *See also* United States v. Wyoming Nat'l Bank, 505 F.2d 1064 (10th Cir. 1974); *In re* Samuels, 483 F.2d 557 (5th Cir. 1973); Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974).

83. *See* text accompanying footnotes 26 through 35, *supra.*

84. U.C.C. § 2-403.

85. R. BROWN, THE LAW OF PERSONAL PROPERTY 209 (3d ed. 1975).

86. *Id.* at 319-20.

87. *Id.* at 228.

sale problem in a bailment for several reasons. First, the bailee usually possesses the goods to benefit the bailor rather than for the use and enjoyment of the bailee. Second, the bailment is normaly for a duration much shorter than the life of the bailee's property. Third, payments customarily pass from the bailor to the bailee, as contrasted with a lease where rent passes from the lessee to the lessor.

The voidable title-debtor has a broad power to transfer good title.[88] The bailee-debtor, on the other hand, has a limited power to transfer good title.[89] Any entrustment[90] of goods to a merchant[91] who deals in goods of that kind gives the merchant the power to transfer all rights of the entruster to a buyer in the ordinary course of business.[92] A bailee-debtor who deals in goods of the kind entrusted could, therefore, transfer good title to a buyer in the ordinary course of business. A buyer in the ordinary course of business is someone who in good faith[93] and without knowledge[94] that the sale[95] to him is in violation of the ownership rights or security interest of a third party in the goods, buys in the ordinary course from someone in the business of selling goods of that kind.[96] A buyer is defined as a person who buys or contracts to buy goods.[97] A secured party is not a buyer because a secured party is neither buying nor contracting to buy goods when he claims his security interest attaches to the goods in the possession of the bailee-debtor.[98]

88. *See* text accompanying footnotes 53 through 84, *supra*. *See also* U.C.C. § 2-403(1).

89. U.C.C. § 2-403(2).

90. U.C.C. § 2-403(3). The Code defines "entrusting" as follows:

"Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

91. U.C.C. § 2-104(1). That section defines "merchant" as follows:

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

92. U.C.C. § 1-201(9).

93. U.C.C. § 1-201(19).

94. U.C.C. § 1-201(25).

95. U.C.C. § 2-106.

96. U.C.C. § 1-201(9).

97. U.C.C. § 2-103.

98. U.C.C. § 2-403, comment 2.

A secured party is a good faith purchaser for value,[99] but is not a buyer in the ordinary course of business. Since a secured party is not a buyer in the ordinary course of business, a bailee-debtor does not have the power to transfer good title to a secured party. The bailee-debtor, therefore, does not have the requisite quantum of rights.

In *Chrysler Corp. v. Adamatic, Inc.*,[100] a buyer returned for modification and adjustment some of equipment it had purchased from the seller. A secured party of the seller claimed priority to the equipment by virtue of its security interest in the seller's inventory. The Supreme Court of Wisconsin held that the rights acquired by the seller on return of the equipment were those of a bailee who had a possessory interest for a limited purpose, but did not amount to rights in the collateral under section 9-203(1)(c).[101] In *Cain v. Country Club Delicatessen, Inc.*,[102] the bailee-debtor was in possession of goods for a period of time prior to purchasing them. A secured party of the bailee-debtor claimed a security interest in the goods prior to the time that they were purchased. The court ruled that the secured party did not have a security interest in the goods prior to their purchase because the bailee-debtor did not have rights in the collateral.[103] And finally, in *Cordle v. Lincoln Moving & Storage, Inc.*,[104] the court found that an involuntary bailee in possession of property could not create a security interest therein for lack of sufficient rights in the collateral.[105]

The essential element clothing the bailee-debtor with the requisite quantum of rights under section 9-203(1)(c) is absent. The *Cain* court identified this element in holding the bailee-debtor would not acquire rights in the collateral under section 9-203(1)(c) until he purchased the goods.[106] The essential missing element, then, is the power to transfer good title to the collateral.

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99. U.C.C. § 1-201.

100. 59 Wis. 2d 219, 208 N.W.2d 97 (1973).

101. *Id.* at 235, 208 N.W.2d at 104. The decision in *Adamatic* was actually based on the rights in the collateral language in U.C.C. § 9-204 before the 1972 amendments were adopted in Wisconsin.

102. 25 Conn. Supp. 327, 203 A.2d 441 (1964).

103. *Id.* at ____, 203 A.2d at 444.

104. 19 UCC Rep. Serv. 1204 (Neb. Dist. Ct. 1970).

105. *Id.* at 1205.

106. 25 Conn. Supp. 327, 203 A.2d 441 (1964).

### E. Consent

The debtor in Article 9 is the person who owes payment or other performance of the obligation secured; he is not necessarily the owner of the collateral.[107] He may own or have rights in the collateral.[108] As previously noted, a debtor cannot create a security interest in collateral unless he has sufficient rights in the collateral. The debtor can personally possess these rights or derive the requisite quantum of rights through the consent of the owner of the collateral.[109]

In *Landy Co. v. Asch*,[110] a corporation attempted to create a security interest in certain collateral in favor of a secured party after it had transferred such collateral by a deed of trust to a trustee. The court found the corporation had no rights in the collateral enabling it to convey or encumber the property.[111] Similarly, in *In re Central Pipeline & Cable Co.*,[112] officers of a corporation obtained loans in their personal names to repay a debt of the corporation. The individual officers granted the lender a security interest in a truck titled to the corporation. Upon bankruptcy, the court held that the alleged secured lender did not have a security interest in the truck because the officers never acquired ownership of the truck. The officers, therefore, never had any rights in the collateral.

In those cases where the debtor does not have the requisite quantum of rights in the collateral to satisfy section 9-203(1)(c), the owner's consent must be proved. It must also be shown that the owner had the authority to consent. In *Branch v. Steph*,[113] corporate shareholders of one corporation who purchased stock in another corporation had the first corporation grant a security interest in its assets in favor of the seller of the stock. The court held that the seller had no security interest in

107. *See* U.C.C. § 9-105(1)(d); U.C.C. § 9-112. The caption of that section reads, "Where Collateral Is Not Owned by Debtor."

108. *Id.*

109. McCrackin v. Hayes, 118 Ga. App. 267, 163 S.E.2d 246 (1968); C.I.T. Financial Servs. Corp. v. First Nat'l Bank, 344 So. 2d 125 (Miss. 1977); Texas State Bank v. Foremost Ins. Co., 477 S.W.2d 652 (Tex. Ct. App. 1972); Clearfield State Bank v. Contos, 562 P.2d 622 (Utah 1977).

110. 267 Md. 251, 297 A.2d 285 (1972).

111. *Id.* at ____, 297 A.2d at 286.

112. 8 UCC Rep. Serv. 426 (W.D. Okla. 1970).

113. 389 F.2d 233 (10th Cir. 1968).

the corporate assets because the corporation had no authority to encumber its assets to secure the personal debt of its shareholders.[114]

Consent can be actual, implied or apparent. In *K.N.C. Wholesale, Inc. v. AWMCO, Inc.*,[115] a subsidiary granted a security interest in equipment to a secured creditor. The secured creditor subsequently released its claim against the subsidiary and asserted it against the parent. The parent then granted a security interest to the creditor in the same equipment of the subsidiary. The court held that the parent had the requisite quantum of rights under section 9-203(1)(c) because it could be reasonably inferred that the subsidiary consented to vest the parent with such rights in the collateral.[116] In *Disch v. Raven Transfer & Storage Co.*,[117] a lessee of goods attempted to create a security interest in goods in favor of a creditor. The secured creditor claimed that the lessee had the requisite quantum of rights because of the apparent authority created by entrusting the lessee with possession of the goods. The court disagreed and found that simply entrusting the lessee with possession of the goods is not enough to constitute apparent authority.[118]

In *Avco Delta Corporation v. United States*,[119] a parent corporation owned two subsidiaries — S1 and S2. S1 created a security interest in favor of a secured party in equipment owned by S2. Both the parent and S2 guaranteed payment of the loan to S1. The government asserted a tax lien against S2's equipment and argued that there was no security interest in the equipment of S2 because S1 never had any rights in the collateral. The Seventh Circuit, however, held that S1 did have rights in the collateral which arose through the acquiescence in and guarantee of the loan by S2 and the parent with the secured party.[120] The court found that an estoppel[121] was created

114. *Id.* at 236. For an authority case dealing with joint property, *see* Clearfield State Bank v. Contos, 562 P.2d 622 (Utah 1977). For a case indicating that even if the collateral is in another's name, the court will hear evidence to determine if the nontitle holder has rights in the collateral, *see* Peninsula State Bank v. Beneficial Fin. Co., 15 UCC Rep. Serv. 503 (N.Y. Sup. Ct. 1974).

115. 55 Cal. App. 3d 43, 127 Cal. Rptr. 208 (1976).

116. *Id.* at ___, 127 Cal. Rptr. at 210.

117. 17 Wash. App. 73, 561 P.2d 1097 (1977).

118. *Id.* at ___, 561 P.2d at 1110. *See also* Peninsula State Bank v. Beneficial Fin. Co., 15 UCC Rep. Serv. 503 (N.Y. Sup. Ct. 1974).

119. 459 F.2d 436 (7th Cir. 1972).

120. *Id.* at 441.

121. The doctrine of estoppel provides that a party who makes a promise or an

in favor of the secured party.[122] Furthermore, the court provided some insight into those situations where a debtor will have the requisite quantum of rights in the collateral under section 9-203(1)(c) by virtue of apparent consent:

> The Illinois Supreme Court early stated the principle in *Anderson v. Armstead,* 69 Ill. 452, 454-55 (1873):
>
> "The law is familiar, that where the owner of property holds out another, or allows him to appear as the owner of, or as having full power of disposition over the property, and innocent parties are thus led into dealing with such apparent owner, or person having the apparent power of disposition, they will be protected. Their rights, in such cases, do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power he caused or allowed to appear to be vested in the party, upon the faith of whose title, or power, they dealt."[123]

Thus, the requisite quantum of rights under section 9-203(1)(c) can be obtained by consent, and the determination of whether the debtor has the requisite quantum of rights to satisfy section 9-203(1)(c) turns on the traditional analysis of actual, implied or apparent consent.

### *F. Consignment*

A true consignment relationship is created when goods delivered to the buyer may be returned even though they conform to the contract.[124] A reservation of title under a true consignment is not a security interest.[125] A true consignment must be distinguished from a consignment intended as security.[126] A

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innocent representation of fact upon which the other party justifiably relies to his detriment is estopped from denying his utterances to the detriment of the other party. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS, 268-69 (1970). *See also* Arrow Lathing & Plastering, Inc. v. Schaulat Plumbing Supply Co., 83 Ill. App. 2d 394, 228 N.E.2d 209 (1967); American Bank & Trust Co. v. Trinity Universal Ins. Co., 251 La. 445, 205 So. 2d 35 (1967); Carruthers v. Whitney, 56 Wash. 327, 105 P. 831 (1909).

122. 459 F.2d at 441. The court further added that an estoppel could be express, implied or even created by silence. *Id.*

123. *Id.* For a case preventing a party from claiming apparent authority because he knew the extent of the agent's authority, *see* Branch v. Steph, 389 F.2d 233 (10th Cir. 1968).

124. U.C.C. § 2-326(1).

125. U.C.C. § 1-201(37). *See* note 29, *supra.*

126. *Id.*

reservation of title under a consignment intended as security is a security interest. A consignment intended as security is, therefore, a disguised sale, and the consignee-debtor has the rights of a buyer. As a buyer, the consignee-debtor possesses the power to transfer good title. This power vests the consignee-debtor with the requisite quantum of rights to create a security interest.

There are basically two kinds of true consignments under the Code — a "sale on approval" and a "sale or return."[127] A consigned sale on approval occurs when the goods are delivered to the consignee-debtor primarily for use.[128] The goods are delivered to the proposed buyer but they remain the property of the seller until the buyer accepts them.[129] The buyer is generally thought to be testing the goods on a trial basis. Goods held by a consignee-debtor "on approval" are not subject to the claims of the consignee-debtor's creditors until acceptance.[130]

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127. U.C.C. § 2-326.

128. *Id.*

129. U.C.C. § 2-326, comment 1. The comment provides:

> A "sale on approval" or "sale or return" is distinct from other types of transactions with which they have frequently been confused. The type of "sale on approval," "on trial"or "on satisfaction" dealt with involves a contract under which the seller undertakes a particular business risk to satisfy his prospective buyer with the appearance or performance of the goods in question. The goods are delivered to the proposed purchaser but they remain the property of the seller until the buyer accepts them. The price has already been agreed. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell.

130. U.C.C. § 2-326(2) states that goods held on approval are not subject to the claims of the buyer's creditors until acceptance. However, if the consignment falls within the purview of U.C.C. § 2-326(3), the goods are subject to creditors' claims notwithstanding the sale is allegedly on approval. U.C.C. § 2-326(3) states,

> Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery
>
> (a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or
>
> (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or
>
> (c) complies with the filing provisions of the Article on Secured Transactions (Article 9).

Therefore, until acceptance, the consignee-debtor possessing goods on approval does not have the requisite quantum of rights in the collateral to permit a security interest to attach.

A consigned sale or return occurs when the goods are delivered to the consignee-debtor primarily for resale.[131] The goods are delivered to the consignee-debtor with the understanding that the consignor[132] will take them back if they are not resold.[133] Goods held by a consignee-debtor for sale or return are subject to the claims of the consignee-debtor's creditors while in his possession.[134] In *Sussen Rubber Co. v. Hertz*,[135] a priority dispute arose between a consignor of goods and a secured party of the consignee-debtor in possession of goods for "sale or return." The consignor argued that the secured creditor's security interest did not attach to the collateral because the consignee-debtor did not have rights in the collateral. The court held that the security interest did attach because "as far as creditors are concerned such property may be treated as if owned by the debtor."[136] Therefore, a consignee-debtor possessing goods for "sale or return" has the requisite quantum of rights in the collateral to permit a security interest to attach.

A comparison of the consignee-debtor's relationship to the goods under a sale on approval with a sale or return is instruc-

131. U.C.C. § 2-326(1).

132. The consignor should always protect his interest in the goods by following the procedure provided in U.C.C. § 2-326(3)(a)-(c), which gives the consignor three different ways to protect and preserve his interest in the goods as against consignee's creditors. The simplest and safest method is to file a financing statement with regard to the goods under U.C.C. § 2-326(3)(c). The consignor, then, has first priority to the consigned goods notwithstanding there may have been a prior secured party filed against the consignee's after-acquired property. This, of course, presupposes that the consignor complies with U.C.C. § 9-114 to acquire his preferred status. *See* Sussen Rubber Co. v. Hertz, 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969).

133. U.C.C. § 2-326, comment 1.

134. U.C.C. § 2-326(2). The priority dispute between the unprotected consignor and the consignee's creditors is resolved in favor of the consignee's creditors. U.C.C. § 9-114(2). Comment 1 provides that

> where goods are furnished to a merchant under the arrangement known as consignment rather than in a security transaction, the consignor must, in order to protect his position as against an inventory secured party of the consignee, give to that party the same notice and at the same time that he would give to that party if that party had filed first with respect to inventory and if the consignor were furnishing the goods under an inventory security agreement instead of under a consignment.

The consignor's protection is provided by U.C.C. § 2-326(3).

135. 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969).

136. *Id.* at 6, 249 N.E.2d at 68.

tive. The difference between the two types of consignments lies in the quantum of rights inhering in the consignee-debtor under each type of consignment. In a sale on approval consignment, the consignee-debtor has the goods primarily for use, while in a sale or return consignment, the consignee-debtor has the goods primarily for resale. In a sale or return consignment, the consignee-debtor possesses the essential power to transfer good title. In a sale on approval consignment, however, the consignee-debtor possesses only the power to use. Hence, the consignee-debtor does not have the requisite quantum of rights in a sale on approval consignment, but does in a sale or return consignment.

### *G. Agency*

An agency relationship is created when one party agrees to act for another.[137] The agent is generally the actor,[138] and the principal is the one for whom the agent acts.[139] Since the agent would be in possession of the principal's goods, the agent-debtor's relationship to the goods is the focal point in ascertaining whether the agent-debtor has the requisite quantum of rights.

In *Poteet v. Winter Garden Production Credit Association*,[140] an agent bought goods in which a secured party of the agent-debtor claimed a security interest. The principal, who had paid the agent for the goods, argued that the alleged secured party had no security interest in the goods because the agent-debtor never had any rights in the collateral. The court found no proof that the goods were bought for the principal since they were bought in the name of the agent. The court, therefore, held that the agent-debtor did have the requisite quantum of rights to permit the security interest to attach.[141] In *National Livestock Credit Corp. v. First State Bank*,[142] an agent bought goods in which a secured party of the agent-debtor again claimed a security interest. The principal, who

137. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957).
138. *Id.* at § 1(3).
139. *Id.* at § 1(2).
140. 546 S.W.2d 650 (Tex. Ct. App. 1977).
141. *Id.* at 652.
142. 11 UCC Rep. Serv. 661 (Okla. Ct. App. 1972). The editor's note in the reporting service states that by direction of the Oklahoma Supreme Court this opinion should not be considered as precedent or authority and is not published in the Pacific Reporter.

had paid the agent for the goods, also argued that the alleged secured party had no security interest in the goods because the agent-debtor never had any rights in the collateral. The court found that the goods were sold to the agent for the account of the principal, which was indicated by the document of title.[143] The court, therefore, held that the agent-debtor never had any rights in the collateral under section 9-203(1)(c), and the security interest could not attach.[144]

An agent-debtor's relationship to the goods determines whether the agent-debtor has the requisite quantum of rights under section 9-203(1)(c). The agent-debtor who buys for the account of his principal does not obtain the requisite quantum because his principal is considered the buyer. The agent-debtor who buys for himself with the intent to transfer to his principal, does have the requisite quantum because when he himself is the buyer,[145] he obtains the essential right — the power to transfer good title.

To conclude, the key to resolving whether the debtor has satisfied the quantum element of section 9-203(1)(c) is to examine the debtor's relationship to the collateral. The necessary amount of rights is apparent after analyzing the case law and various relevant sections of the Code. All the relationships studied, with the sole exception of consent, indicate that the common thread necessary to satisfy the quantum requirement is possession of the power to transfer good title to the collateral. A debtor, therefore, has satisfied the quantum element of section 9-203(1)(c) if he has the power to transfer good title to the collateral.

## II. THE POSSESSION ELEMENT

Once the debtor has satisfied the quantum element of section 9-203(1)(c), the possession element must be considered. The possession element is most often confronted where the debtor is a buyer of goods that will be used as collateral. At issue is whether a debtor must possess the collateral as well as satisfy the quantum element in order to have "rights in the collateral." It is this writer's opinion that possession[146] is the

143. *Id.* at 664.

144. *Id.*

145. *See* text accompanying footnotes 26 through 36, *supra.*

146. Possession is not defined in the Code. The meaning of possession under the

second required element entitling the debtor to rights in the collateral.

The theory supporting the counter-proposition that a debtor does not need to possess the collateral to have rights in the collateral under section 9-203(1)(c) stems from Article 2.[147] The theory is that Article 2 provides various rights to the buyer-debtor prior to obtaining possession, and such rights

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Code is a study unto itself, but is naturally critical to determine when the debtor gets rights in the collateral. For cases supporting the possession theory, *see In re* King-Porter Co. v. Scanlon, 446 F.2d 722 (5th Cir. 1971); *In re* Dennis Mitchell Indus., Inc., 419 F.2d 349 (3rd Cir. 1969); *In re* Page, 6 UCC Rep. Serv. 250 (W.D. Ky. 1968); *In re* Ten Brock, 4 UCC Rep. Serv. 712 (W.D. Mich. 1966); Young v. Golden State Bank, 560 P.2d 855 (Colo. Ct. App. 1977); National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975); Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974); Galleon Indus., Inc. v. Lewyn Mach. Co., 50 Ala. App. 334, 279 So. 2d 137 (1973); First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203 (1972); First Nat'l Bank & Trust Co. v. McElmurray, 120 Ga. 134, 169 S.E.2d 720 (1969); First Nat'l Bank & Trust Co. v. Smithloff, 119 Ga. App. 284, 167 S.E.2d 190 (1969); Evans Prods. Co. v. Jorgenson, 245 Or. 362, 421 P.2d 978 (1966).

147. Professor Gilmore has the following comment:

> The Article does not specify the quantum of "rights" which a debtor must have in collateral to support a security interest: evidently less than full "legal title" will do and the secured party will get whatever rights the debtor had (or possibly, if the collateral is negotiable or the debtor has power to convey title to a good faith purchaser, more rights). Under the Sales Article of the Code, for example (§ 2-501), buyer gets what is described as a "special property interest" in goods as soon as they have been "identified" to a contract of sale. This "special property interest" would seem to qualify as "rights in the collateral" under § 9-204, so that a secured party who was financing the buyer's inventory could date the attachment of his security interest from the time of identification rather than from the time of shipment or delivery.

G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 353 (1965) (footnotes omitted).

In *In re* Pelletier, 5 UCC Rep. Serv. 327 (D.Me. 1968), the court made the following observation:

> We must look to the provisions of Article 2 governing sales for guidelines as to when the debtor acquired rights in this mobile home. It is clear that the debtor acquired a special property and an insurable interest in the mobile home when the contract of sale was made. *See* 11 MRSA § 2-501(1)(a). The debtor, upon tender of the unpaid balance of the purchase price, would also have been entitled to recover the mobile home in the event of the insolvency of the seller. *See* 11 MRSA § 2-502. Moreover, under certain circumstances the debtor could have recovered the goods, obtained specific performance, or replevied the mobile home. *See* 11 MRSA §§ 2-711(2)(a)(b) and 2-716. The debtor would have had a right of action against a third party for injury to the mobile home. 11 MRSA § 2-722. These rights in the collateral, it would seem, existed in the debtor prior to delivery of the mobile home.

*Id.* at 337. *See also In re* Automated Book Bindery Servs., Inc., 471 F.2d 546 (4th Cir. 1972); Douglas-Guardian Warehouse Corp. v. Esslair, 10 UCC Rep. Serv. 176 (W.D. Mich. 1971); Engelsma v. Superior Prods. Mfg. Co., 298 Minn. 77, 212 N.W.2d 884 (1973); Stanley v. Fabricators, Inc., 459 P.2d 467 (Alas. 1969).

should be sufficient to qualify as rights in the collateral under section 9-203(1)(c).[148] For example, goods must be both existing and identified before any interest in them can pass.[149] In the absence of explicit agreement, identification[150] occurs when the contract is made if it is for the sale of goods already existing, or in the case of future goods, when the goods are shipped, marked or otherwise designated by the seller as belonging to the buyer.[151] Identification thus occurs before the buyer-debtor obtains possession of the goods.[152] The buyer-debtor obtains a special property interest in the goods upon identification.[153] Assuming the special property interest would be sufficient to constitute rights in the collateral under section 9-203(1)(c),[154] the buyer-debtor would, therefore, obtain rights in the collateral upon the formation of the contract for the sale of existing goods.[155] The problem with this theory is that the special property interest is not necessary: the buyer already has a sufficient quantum of rights by virtue of having the power to transfer good title.[156] It is not the lack of quantum of rights that is fatal to the theory; rather it is the buyer's lack of possession. An examination of the nonpossessing buyer's rights indicates the importance of the debtor's possession of the collateral for vest-

148. Douglas-Guardian Warehouse Corp. v. Esslair, 10 UIC Rep. Serv. 176 (W.D. Mich. 1971); Engelsma v. Superior Prods. Mfg. Co., 298 Minn. 77, 212 N.W.2d 884 (1973); Stanley v. Fabricators, Inc., 459 P.2d 467 (Alas. 1969).

149. U.C.C. § 2-105(2). U.C.C. § 2-501, comment 4, provides some insight into the state the goods must be in for identification to occur, by stating that

> in view of the limited function of identification there is no requirement in this section that the goods be in deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur.

150. U.C.C. § 2-501(1).

151. U.C.C. § 2-105(2).

152. Identification cannot occur any later than the moment the buyer-debtor obtains possession of the goods. *See* First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203 (1972).

153. U.C.C. § 2-501(1), comment 3, which provides:

> The "special property" of the buyer in goods identified to the contract is excluded from the definition of "security interest"; its incidents are defined in provisions of this Article such as those on the rights of the seller's creditors, on good faith purchase, on the buyer's right to goods on the seller's insolvency, and on the buyer's right to specific performance or replevin.

154. This assumption is not necessary because the buyer already has the power to transfer good title and the special property interest adds nothing.

155. For future goods, the buyer-debtor would obtain rights in the collateral upon the seller's shipping, marking or otherwise designating the goods for the buyer.

156. *See* text accompanying footnotes 26 through 35, *supra*.

ing the debtor with rights in the collateral.

Article 2 provides a predelivery right of recovery for a buyer. A buyer who has paid part or all of the price of goods in which he has a special property interest may, on making a tender of any unpaid portion of their price, recover them from the seller if the seller becomes insolvent[157] within ten days after receipt of the first installment on their price.[158] Thus, the prepaying buyer has the right to recover the goods from the seller while they are in the seller's possession. The question, then, is whether the buyer-debtor's right to recover the goods also prevails over the seller's creditors?

The rights of the seller's unsecured creditors in the goods identified to the contract are subject to the buyer's right to recover.[159] In other words, the buyer can recover the goods as against unsecured creditors of the seller. On the other hand, the rights of the seller's secured creditors in the goods identified to the contract are not subject to the buyer's right to recover. The buyer cannot recover the goods as against the secured creditors of the seller.[160] Even if the buyer and seller entered into a contract for the sale of the goods before the seller created a security interest in the goods in favor of a secured party, the secured party of the seller would still have priority over the buyer's right to recover.[161] As long as the seller has this ability to create security interests superior to the buyer's right to recover, the buyer does not have rights in the collateral sufficient to create security interests. A buyer will, however, be able to create security interests when his rights in the collateral are superior to those of the seller and any secured parties of the seller.

A buyer can acquire these superior rights by attaining the status of a buyer in the ordinary course of business.[162] This status allows a buyer to take goods free of a security interest created by the seller even though the security interest is perfected and the buyer knows of its existence.[163] The buyer-

157. U.C.C. § 1-201(22).

158. U.C.C. § 2-502(1).

159. U.C.C. § 2-402(1).

160. Chrysler Corp. v. Adamatic, Inc., 59 Wis. 2d 219, 208 N.W.2d 97 (1973).

161. U.C.C. § 2-402(3)(a) provides that nothing in Article 2 (Buyer's right to recover) shall be deemed to impair the rights of creditors of the seller. In addition, the reverse of U.C.C. § 2-402(1) suggests that the buyer's right to recover goods is subject to the secured creditor's claims.

162. U.C.C. § 1-201(9).

163. U.C.C. § 9-307(1).

debtor, therefore, prevails over the secured parties of the seller.

In *Chrysler Corp. v. Adamatic, Inc.*,[164] a buyer contracted with a seller to buy three machines to be custom-built by the seller. The buyer made substantial payments before delivery as required by the contract. Upon the seller's insolvency, a dispute arose between the prepaying buyer and a secured party of the seller's regarding priority to the machines. At the time of the dispute, one of the machines was in a deliverable state while the other two were only partially assembled. The prepaying buyer claimed that it became a buyer in the ordinary course of business at the time of contracting. The secured party claimed a bona fide transfer[165] was necessary for the buyer to achieve that status. The Wisconsin Supreme Court held the buyer did not qualify as a buyer in the ordinary course of business.[166] The court reasoned that the status of a buyer in the ordinary course of business must be determined as of the time the buyer actually takes possession of the goods.[167] In this case

164. 59 Wis. 2d 219, 208 N.W.2d 97 (1973).

165. The prepaying buyer had obtained possession of the equipment through a replevin action. The secured party claimed that possession secured though replevin was not proper. *See also* Evans Prods. Co. v. Jorgenson, 245 Or. 362, 421 P.2d 978 (1966), where the court held a buyer not to be a buyer in the ordinary course because he did not take in the ordinary course.

166. 59 Wis. 2d at 241, 208 N.W.2d at 108. A prepaying buyer's only right to the goods is through U.C.C. § 2-502(1), the buyer's right to recover. The prepaying buyer's right to recover, however, is subordinate to the claims of secured parties of the seller. *Id.* at 239-40, 208 N.W.2d at 106. The prepaying buyer thus looks to U.C.C. § 9-307(1) to cut off the rights of the seller's secured parties. But, there is another way to protect the prepaying buyer. The prepaying buyer should structure the transaction so as to qualify as a financing buyer. A financing buyer would be one who provides value or makes advances to enable the seller to acquire the components to satisfy the financing buyer's order. The financing buyer could then claim a purchase money security interest in the components and the finished product under U.C.C. § 9-107(b). The only caveat in obtaining such a purchase money security interest is to be careful to trace the advances made to the seller to the purchase of the component parts for assembly of the good. Once the purchase money security interest is obtained, it is a simple matter to perfect it by filing. The financing buyer's priority would be assured under U.C.C. § 9-312(3) since the component parts will be inventory in the hands of the seller. If the financing buyer merges his prior right to the collateral based on his perfected purchase money security interest with his rights as a buyer in the ordinary course upon receiving possession, the financing buyer will always defeat secured creditorsof the seller.

167. 59 Wis. 2d at 241, 208 N.W.2d at 107. But, the court also had the following language in its opinion: "It seems clear that, if there is a sale and the buyer has obtained title to the goods, his status as a buyer in ordinary course will not be defeated merely because he has not taken possession." *Id.* at 239, 208 N.W.2d at 107.

Also, on the issue of whether possession is necessary to become a buyer in the ordinary course of business, *see* International Harvester Credit Corp. v. Associates Fin.

the buyer had not taken possession, and therefore was not a buyer in the ordinary course of business.

Thus, a buyer in the ordinary course of business has superior rights to the goods as against any secured parties of the seller. A buyer achieves this status by properly possessing the collateral. Possession, then, is a requisite element for a buyer-debtor to obtain rights in the collateral.

Additional predelivery rights of the buyer include the right to specific performance[168] and the right to replevin.[169] Specific performance may be decreed where the goods are unique or in other proper circumstances.[170] The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover.[171] The buyer-debtor's rights to replevin and specific performance, however, are subject to the same

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Servs. Co., 133 Ga. App. 488, 211 S.E.2d 430 (1974). In *Associates,* a buyer agreed to buy two trucks from a dealer whose inventory was financed by a secured party. The buyer paid for the trucks, but never took physical possession of them from the dealer. The dealer and buyer agreed to deliver the trucks to the dealer so that dealer could store them until buyer could pick them up. Dealer became insolvent while possessing the trucks and the secured party claimed priority to the trucks. The court held that the buyer did qualify as a buyer in the ordinary course of business notwithstanding that the buyer never received possession of the trucks. The court reasoned that title passed to buyer and that was the critical factor.

The Wisconsin Supreme Court in *Adamatic* felt that possession was a critical factor for a buyer in the ordinary course because they placed great reliance upon "apparent or ostensible ownership." They reasoned that "people should be able to deal with a debtor upon the assumption that all property in his possession is unencumbered, unless the contrary is indicated by their own knowledge or by public records." 59 Wis. 2d at 240-41, 208 N.W.2d at 107.

*Associates* obviously runs contrary to the policy basis upon which *Adamatic* was decided upon because the debtor in *Associates* remained in possession of the collateral upon which third parties usually rely. *Associates,* however, can be reconciled with *Adamatic.*

First, there was no reliance by the secured party in *Associates* on the collateral in the possession of the debtor. In fact, the secured party had marked the trucks "sold" on their inventory listing sheets.

Second, it is possible to argue "constructive possession" had been accomplished by the buyer. The buyer and dealer did agree that the dealer would store the trucks for the buyer. This would convert the dealer into a bailee.

The question still remains largely unsolved. *Compare* Smith, *Title and the Right to Possession Under the Uniform Commercial Code,* 10 B.C. INDUS. & COM. L. REV. 39, 61 (1968) (possession necessary), *with* Skilton, *Buyer in the Ordinary Course of Business Under Article 9 of the Uniform Commercial Code,* 1974 WIS. L. REV. 1, 20 (possession not necessary).

168. U.C.C. §§ 2-716(1) and (2).

169. U.C.C. § 2-716(3).

170. U.C.C. § 2-716(1).

171. U.C.C. § 2-716(3).

deficiency as the buyer's right to recover. They are subordinate to those of any secured parties of the seller. Until the buyer-debtor's rights are no longer subordinate to the rights of secured parties of the seller, the buyer-debtor will not have rights in the collateral under section 9-203(1)(c). Furthermore, the court in *Adamatic* specifically stated that the right of replevin alone cannot in any way affect the rights of a prior secured creditor.[172]

There are additional statutory arguments which support the theory that the debtor must satisfy the possession element to have rights in the collateral. The voidable title-buyer who has the power to transfer good title[173] must be involved in a transaction of purchase.[174] A transaction of purchase includes the creation of a security interest.[175] The voidable title-buyer has the power to create a security interest when the goods have been delivered.[176] Therefore, possession of the collateral is necessary for the voidable title-debtor to have rights in the collateral.

The consignee-debtor under a sale or return consignment has the power to transfer good title,[177] thereby satisfying the quantum element. The goods held by the consignee-debtor under a sale or return consignment are subject to creditor's claims while in the consignee-debtor's possession.[178] The consignee-debtor under a sale on approval has the power only to use the collateral,[179] and does not satisfy the quantum element. However, upon acceptance of the goods by the consignee-debtor under a sale on approval consignment, the goods become subject to the claims of the consignee-debtor's creditors.[180] Since the consignee-debtor under the sale on ap-

172. 59 Wis. 2d at 241, 208 N.W. 2d at 107.

173. U.C.C. § 2-403(1).

174. U.C.C. § 1-201(32).

175. *Id.*

176. U.C.C. § 2-403(1). Delivery is defined as voluntary transfer of possession in U.C.C. § 1-201(14). That definition, naturally provides no assistance for the delivery term as used with reference to goods. For delivery of goods, U.C.C. § 2-503(1) is the tender of delivery section in Article 2. But, the language in U.C.C. § 2-403(1) "when the goods have been delivered" is being interpreted literally to mean transfer of possession. This interpretation of § 2-403(1) is further supported by § 2-403(3) which interprets delivery as transferring of possession. *See* U.C.C. § 2-403(3).

177. *See* text accompanying footnotes 124 through 136, *supra.*

178. U.C.C. § 2-326(2).

179. U.C.C. § 2-326(1).

180. U.C.C. § 2-326(2).

proval consignment has been using the goods, he will have possession when he accepts. In addition, when the consignee-debtor accepts, he satisfies the quantum element by attaining the full rights of a buyer.

An examination of a seller's remedies on discovery of the buyer's insolvency indicates that possession is a critical factor in determining whether the seller or buyer has rights in the collateral. A seller may stop delivery of goods in the possession of a carrier or other bailee until receipt of the goods by the buyer.[181] The seller's right of stoppage is not subordinate to claims of secured parties of the buyer.[182] The seller, however, loses the right of stoppage upon delivery to the buyer. After delivery, a credit seller may reclaim goods from an insolvent buyer-debtor upon demand made within ten days.[183] The credit seller's reclamation right, however, is subordinate to claims of the buyer's secured parties which attached to the goods in the buyer's possession.[184] Possession thus determines who has rights in the collateral: the seller has rights in the collateral while he maintains possession; the buyer has rights in the collateral upon obtaining possession from the seller.

Typically, a secured party possesses a security interest in the debtor's inventory as collateral. Goods are inventory if they are held by a person who holds them for sale or lease.[185] Before the debtor (seller or lessor) can have rights in the collateral (inventory), he must possess the collateral.[186] Therefore, a debtor cannot have rights in the collateral (inventory) prior to having possession. Similarly, a secured party may claim a security interest in collateral through an after-acquired property clause.[187] In many cases, the after-acquired clause will identify the category of after-acquired collateral intended to be covered — equipment, for example. The test to determine in which

181. U.C.C. §§ 2-705(1) and (2).

182. U.C.C. § 2-702(3) provides that the seller's right to reclaim is subject to the rights of good faith purchasers (secured parties), but no reference is made to the seller's right of stoppage.

183. U.C.C. § 2-702(2).

184. U.C.C. § 2-702(3).

185. U.C.C. § 9-109(4).

186. First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203 (1972).

187. U.C.C. §§ 9-204(1) and (2). *See* United States v. Wyoming Nat'l Bank, 505 F.2d 1064 (10th Cir. 1974); Cain v. Country Club Delicatessen, 25 Conn. Supp. 327, 203 A.2d 441 (1964); First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203 (1972).

category the collateral falls is the use made of the property.[188] The debtor must possess the property for use before it can be categorized.[189] Once the collateral is found to be in the debtor's possession and is categorized, it can be determined whether it is within the purview of the after-acquired property clause. Possession would therefore be required before the debtor has rights in the collateral sufficient to permit the secured parties' security interest to attach under the after-acquired property clause.

The proposition that a debtor can acquire rights in the collateral under secton 9-203(1)(c) without first obtaining possession does not withstand analysis. A buyer-debtor does not have rights in collateral still in the seller's possession. The seller's secured creditors have priority to the goods until the buyer-debtor obtains possession of them. At that point, the buyer assumes a superior status to the seller's secured creditors and truly has rights in the collateral. Possession is thus an essential element in obtaining rights in the collateral.

## CONCLUSION

The debtor's creation of a security interest in favor of a secured party is the foundation on which all Article 9 rights and remedies rest. While the Code provides meanings for two of the three requirements for the creation of a security interest, it does not provide a meaning for the tautology that the debtor has rights in the collateral. Its meaning, however, can be ascertained by examining its two components — the quantum element and the possession element.

The Code does not define the quantum of rights that a debtor must have to satisfy the quantum element. This quantum can be discerned by analyzing the different relationships of the debtor to the proposed collateral — that of buyer, lessee, voidable title holder, bailee, consignee and agent. The debtor

188. U.C.C. § 9-109, comment 2 states that

> The classes of goods are mutually exclusive; the same prolerty cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases — a physician's car or a farmer's jeep which might be either consumer goods or equipment — the principal use to which the property is put should be considered as determinative.

189. This argument is not as compelling as the inventory syllogism because the possessory requirement is not stated in the Code. In addition, the use to which the property will be put may be clearly evident before the debtor obtains possession.

having the power to transfer a good title to the collateral has the requisite quantum of rights to satisfy the quantum element.

Article 2 does not provide a basis for the buyer-debtor to acquire rights in the collateral without possession. The buyer-debtor finally acquires rights in the collateral upon obtaining possession because at that point his rights in the collateral are superior to those of the seller and any secured parties of the seller. The possession element, therefore, is an essential counterpart of the quantum element.

A debtor's possession of the collateral alone is not sufficient to provide the debtor with rights in the collateral. Likewise, a debtor's possession of the power to transfer good title to the collateral alone is not sufficient to provide the debtor with rights in the collateral. However, upon the coalescence of the debtor's power to transfer good title and his possession of the collateral, the debtor has rights in the collateral under section 9-203(1)(c) of the Uniform Commercial Code sufficient to create a security interest.