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Variations in the Ohio Enactment of the Uniform Commercial Code

Boris Auerbach and Eli Goldston

INTRODUCTION¹

As an additional number of states adopt the Uniform Commercial Code, there will be an increasing number of departures from the 1958 Official Text.² Various legislators will attempt to adapt the Code to established local rules or to make what they regard as improvements in form or substance.³ Furthermore, as experience with the Code increases, there will be amendments and interpretations diminishing the national uniformity so much desired by the Code's sponsors.

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To restrain these tendencies of the non-uniform past to protrude into the codified present⁴ and of the unruly present to introduce future variety into existing uniformity,⁵ the sponsors of the Code have established a Permanent Editorial Board, which is to consider variations as they arise, to discourage unnecessary ones, and

to consider incorporation of desirable ones into the Official Text, perhaps on an optional basis. Hoping by such adroit canalization of the tidal forces of variety to avoid a defeat similar to that suffered by King

1. In writing this article, the authors have received many useful suggestions from Messrs. Forrest B. Weinberg and Paul J. McKenzie of the Ohio Bar and from Messrs. Peter F. Coogan and Arthur L. Stevenson, Jr. of the Massachusetts Bar.

2. Hereinafter referred to as the Official Text.

3. "As a result of careless proofreading or of individual ideas on the part of some of the draftsmen of the Code acts that have already been enacted, a number of unauthorized, unofficial amendments have crept into some of the acts." Schnader, *Uniform Commercial Code Enactments*, *Prac. Law.*, Dec. 1961, p. 54, 54-55.

4. "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is." HOLMES, *THE COMMON LAW* 37 (1881).

5. As Lord Macnaughten commented on Lord Thurlow's attempt to put the Rule in Shelley's Case in a nutshell, ". . . it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there." Van Grutten v. Foxwell, (1897) A.C. 658, 671, quoted in LEACH, *CASES ON WILLS* 203 (1947).

Canute, the sponsors have emphasized that one of the primary purposes of the Code is uniformity and have succeeded to a remarkable degree in obtaining passage almost verbatim of the Official Text. Even Ohio, which is reputed to have made the largest number of variations from the Official Text with the exception of New York, has few significant departures.⁶

Because the authors of this article were involved in the adaptation of the Official Text for Ohio purposes and in the effort to obtain passage of the Code by the Ohio General Assembly, their comments on the Ohio departures from the Official Text and on the Ohio choices of optional provisions in the Official Text may be of some use and interest to the bench and bar.⁷ It should be emphasized, however, that both authors would encourage, except in the few instances specifically noted, the prompt conforming of Ohio law to the Official Text. The Permanent Editorial Board for the Uniform Commercial Code contemplates a drive to persuade Ohio and other states which have departed from the Official Text in enacting the Code to pass amendatory acts to bring the texts of their acts into conformity with the Official Text.

Much of the apparent variation in Ohio is merely a renumbering of the sections to comply with the general organization of the Ohio Revised Code. This failure to follow the Official Text numbering system should not cause any more difficulty for the Ohio lawyer than if the reverse decision had been made and Ohio's commercial statutes had been numbered and organized differently than all other Ohio statutes.⁸ It is true that most of the literature on the Code follows the Official Text numbering system and that the Ohio numbers must be converted. This, however, is a very minor problem since both publishers of the Ohio Revised Code,⁹ in response to a request from the Ohio State Bar Association, the Ohio Bankers Association, and the Ohio Chamber of Commerce, have placed the Official Text number in parentheses immediately following the official Revised Code number at the beginning of each section. In

6. The Code as published in *Uniform Laws Annotated* (1962) indicates every departure by each adopting state from the Official Text and each adopting state's choice of optional provisions.

7. For a similar article on the State of New York see Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992 (1962).

8. Lawyers outside Ohio, of course, will have more trouble because they are not acquainted with the structure of the Ohio Revised Code. "The basic principle adopted in the Ohio renumbering is fairly simple, but the result — due to omissions and combinations of Sections — is complex." UNIFORM LAWS ANN., UNIFORM COMMERCIAL CODE § 1-101, *Action in Adopting States* (1962). Of the first eighteen states enacting the Uniform Commercial Code, only Ohio renumbered. New Jersey, Oregon, and Rhode Island did, however, add local prefixes to the section numbers of the Official Text and change some divisional designations.

9. W. H. Anderson Company, Cincinnati, Ohio (publisher of PAGE'S OHIO REVISED CODE ANNOTATED); Banks-Baldwin Law Publishing Company, Cleveland, Ohio (publisher of BALDWIN'S OHIO REVISED CODE ANNOTATED).

addition, the Ohio numbering system actually does not vary as widely from the Official Text numbers as at first glance it may seem to do.

The first nine articles of the Official Text simply became the first nine chapters of title 13 of the Ohio Revised Code, article 1 became chapter 1301, article 2 became chapter 1302, and so on. Three of the four provisions of article 10 did not become part of the Revised Code because, under the Ohio Revised Code rules,¹⁰ the effective date, the repealer, and the savings clause, contained in sections 101, 102, and 103 of article 10, do not become part of the "permanent" law which Ohio codifies. Since section 104 of article 10 dealt with some substantive matters in connection with documents of title, it was, however, incorporated into the Ohio Revised Code chapter on that subject as section 1307.02.

In accordance with the rules of the Ohio Revised Code, the definition sections were placed at the beginning of each chapter. The practicality of the Ohio rule of setting forth the definitions before the substantive sections is apparent, and, again, the choice was whether it would be better for Ohio lawyers to have uniformity within their own Revised Code or uniformity with other states. Thus Uniform Commercial Code section 1-201, which contains forty-six definitions that apply throughout the entire Commercial Code, became section 1301.01 of the Ohio Revised Code — the first section of the Ohio version of the Code. In the same manner, sections 2-103, 2-104, 2-105, and 2-106, all of which are definition sections, were combined and became part of section 1302.01 of the Ohio Revised Code.

Another problem was the designation of subsections. As a result of the decision to follow Ohio Revised Code practice, each number and letter used to designate a subsection had to be changed. Thus, for example, subsection (4)(d)(ii) of section 9-306 of the Uniform Commercial Code became division (D)(4)(b) of section 1309.25 of the Ohio Revised Code.

Another type of problem was encountered in renumbering article 2. In order that chapter 1302 not contain more than ninety-eight sections,¹¹ it was necessary to combine several sections in addition to the definition sections. As a result Uniform Commercial Code section 2-603, dealing with the merchant's duties as to rightfully rejected goods, became divisions A, B, and C of Ohio Revised Code section 1302.62, while Commercial Code section 2-604 on the buyer's option as to the salvage of these

10. The "Ohio Revised Code rules" are those drafting principles established and adhered to by the drafters of the Ohio Revised Code and which are still followed by those who would add new material to it. These rules may be found in BUREAU OF CODE REVISION, GENERAL PROVISION AND COMPARATIVE TABLE OF REVISED CODE 31-42 (1952).

11. Under the decimal system employed in the Ohio Revised Code, not more than ninety-nine sections may be included in a chapter. The number "99" is reserved for penalty sections.

goods became division D of section 1302.62. In the same manner, Uniform Commercial Code section 2-723 on proof of market price became divisions A, B, and C of Ohio Revised Code section 1302.97, while Uniform Commercial Code section 2-724 on admissibility of market quotations became division D of section 1302.97. This Procrustean technique permitted the 104 sections of article 2 of the Official Text to be comfortably bedded into the framework of the Ohio Revised Code.

One disadvantage of the structure of the Ohio Revised Code is that it is not possible to divide chapters into parts by prefixed numerical sub-designations. Therefore, all the sections in each article had to be numbered consecutively rather than being neatly compartmentalized as in the Official Text. For example, article 3 of the Official Text is divided consecutively into part 3, "Right of a Holder" — sections 3-301 through 3-307 — part 4, "Liability of Parties" — sections 3-401 through 3-419 — and so on throughout the article. In the Ohio Revised Code, however, section 3-307, the last section in part 3 of the Official Text, became Revised Code section 1303.36, while section 3-401, the first section in part 4, became section 1303.37.

Except as explained above, the structure and numbering of the Ohio Revised Code follows that of the Official Text. As has been pointed out, there is probably no net disadvantage to the Ohio lawyer in using the Revised Code numbering system. To the outsider, however, the system can be confusing, and other states should, if at all feasible, stay as close as possible to the structure of the Official Text. The fairly recent adoption in Ohio of the Ohio Revised Code suggested that an attempt to abandon its formal requirements would have created much unnecessary opposition to the adoption of the Commercial Code, and those responsible for getting the Commercial Code through the Ohio legislature elected to make no unnecessary enemies. With the 20/20 vision of hindsight, this may now appear to have been excessive caution on the part of the sponsors. At the time the bill was introduced, however, much greater opposition was expected than eventually developed.¹²

12. In the latter part of 1958, when the Uniform Commercial Code bill was being prepared in Ohio, only three states had enacted the Code, and many Ohio lawyers were urging that Ohio not adopt it until after New York had done so. Also, it became obvious at that time that, because of various substantive provisions in the Code, there would be considerable opposition to its passage in 1959.

Ohio had enacted the entire Ohio Revised Code with the present decimal system in 1953 and considerable efforts were being exerted to insure that the rules that were followed in preparing the Ohio Revised Code would be religiously adhered to in subsequent legislation. Faced with this situation, the Ohio sponsors of the Uniform Commercial Code decided not to invite more opposition than necessary and elected to follow the rules of the Revised Code including the use of the numbering system.

Although the Commercial Code failed to pass during the 1959 session, it did attract a surprising number of friends among legislators. Since these supporters were acquainted with the Uniform Commercial Code in its Revised Code format, and since the bill to be introduced in 1961 was virtually in final form and there was little time for revision, it was decided that

ARTICLE 1 — GENERAL PROVISIONS

The changes that were made in article 1 of the Uniform Commercial Code, which became chapter 1301 of the Ohio Revised Code, were neither numerous nor of a substantive nature.

Subsection 5 of Official Text section 1-102 was deleted from Ohio Revised Code section 1301.02. This subsection provides that words in the singular include the plural and vice-versa, that words of the masculine gender include the feminine and the neuter, and that, when the sense so indicates, the neuter gender may refer to any gender. Similar provisions denying both quantity and sex their normal force and effect are made applicable to all portions of the Ohio Revised Code, including the Commercial Code, by section 1.10 of the Ohio Revised Code,¹³ so the deletion of Official Text section 1-102(5) has no real effect.

Section 1-101 of the Official Text, as well as the first section of each succeeding article, was deleted.¹⁴ Section 1-101 provides: "This Act shall be known and may be cited as Uniform Commercial Code." This type of official designation of a "short title" was dropped as a matter of drafting policy when the Ohio Revised Code was enacted in 1953. Although lacking statutory status, such references have been and, of course, will continue to be used in Ohio.

In Ohio Revised Code section 1301.04¹⁵ the phrase "deemed to be" was deleted. This simply means that, while in other states no part of the Uniform Commercial Code shall be "deemed to be" impliedly repealed by subsequent legislation, in Ohio no part of the Code shall "be" impliedly so repealed. The Ohio language, if anything, seems to express somewhat more strongly a policy against such implied repeal by subsequent legislation.

Again, in Ohio Revised Code section 1301.01(Q)¹⁶ defining fungible goods, the words "shall be deemed" were deleted and the word "are" was inserted in its place without any real change in meaning. All of these foregoing changes were made in accordance with the Ohio Revised Code drafting standards regarding such terminology.

The section headings of the Official Text as well as section 1-109, which provides that section headings are part of the act, were deleted in Ohio in accordance with the Ohio Revised Code practice. However,

the more than two hundred pages of stencil should be kept rather than return to the Official Text numbering system.

13. OHIO REV. CODE § 1.10 (1953). This deletion was also made in Massachusetts. See UNIFORM LAWS ANN., UNIFORM COMMERCIAL CODE, *Action in Adopting States* § 1-102 (1962).

14. Articles 2 through 9 of the Official Text each contain an initial section which provides a short title citation for the particular article. All of these initial sections were deleted in Ohio.

15. UCC § 1-104.

16. UCC § 1-201(17).

these headings do appear in most editions of the Ohio Commercial Code, having been re-inserted by the publishers, but they do not have any official statutory status.

Finally, the severability clause of Commercial Code section 1-108 was omitted from the Ohio version because this matter is covered elsewhere in the Ohio Revised Code.¹⁷

ARTICLE 2 — SALES

The differences between article 2 of the Official Text and chapter 1302 of the Ohio Revised Code may be divided into three categories. The first consists of changes caused by the omission of the short title section¹⁸ and by the differences in the numbering systems employed.¹⁹ The second category consists of several inadvertent errors which unfortunately crept into the typing or printing of the bill and which were not discovered in time.²⁰ The third consists of the substitution of specific Revised Code references for the general references made in the Official Text. None of these changes are substantive in nature; that is, different results should not be reached because of the changes that have been made.

The first of the reference changes was made in Ohio Revised Code section 1302.03(C).²¹ The Official Text provides that the provisions of the section are subject to any third-party rights provided "by the law relating to realty records." In preparing the Code for introduction to the Ohio legislature, the specific reference to Ohio Revised Code section 5301.25²² was substituted in place of the general reference to "the law," since section 5301.25 is the only section to which the general language is applicable.

The other change of this nature was made in Ohio Revised Code section 1302.98. The Official Text in section 2-725(4) states that "this section [which provides a statute of limitations for sales contracts] . . . does not alter the law on tolling of the statute of limitations. . . ." The

17. OHIO LEGISLATIVE SERVICE COMM'N, BILL DRAFTING MANUAL 29 (1957).

18. UCC § 2-101. See note 14 *supra* and accompanying text.

19. Uniform Commercial Code sections 2-104(2), 2-105(1), and 2-106(1) were integrated into Commercial Code section 2-103 as Ohio Revised Code section 1302.01, and unnecessary cross references were dropped from section 2-103(2). Section 2-604 was added to section 2-603 as a fourth division in Revised Code section 1302.62, and section 2-724 was added to section 2-723 as a fourth subsection in Revised Code section 1302.97.

20. In Ohio Revised Code section 1302.01(B)(1) the reference should be to section 1302.64, not to 1302.62. In section 1302.24(B) the reference should be to "divisions (A) (3) and (C) of section 1302.32" rather than as stated. In section 1302.53(A)(2) the word "not" was mistakenly inserted as the fourth word in Uniform Commercial Code section 2-509(1)(b). (The Banking and Commercial Law Committee of the Ohio State Bar Association has recommended the elimination of the word "not" in section 1302.53(A)(2). *Report of Banking and Commercial Law Committee*, 35 OHIO BAR 1250, 1252 (1962).)

21. UCC § 2-107(3).

22. OHIO REV. CODE § 5301.25 (1953).

Ohio section simply has substituted for the general reference "sections 2305.15 and 2305.16 of the Revised Code," which deal with the tolling of the statute.

ARTICLE 3 — COMMERCIAL PAPER

In addition to the elimination of the short title section²³ and one typographical error,²⁴ the only change in article 3 of the Uniform Commercial Code was the substitution of a specific cross reference for a more general one. In Ohio Revised Code section 1303.55 (C)²⁵ the words, "provisions of this Act concerning restrictive indorsements," were removed, and, in their place, specific reference was made to Ohio Revised Code sections 1303.26, 1303.55, 1303.69, and 1304.11, which concern such indorsements. This change, as is the case with the other changes of this nature, was made in order to provide the more specific reference, whenever possible, in compliance with the drafting practice rules of the Ohio Revised Code.

ARTICLE 4 — BANK DEPOSITS AND COLLECTIONS

Aside from a few organizational changes²⁶ and typographical errors,²⁷ the Ohio version of article 4 differs in only one respect from the Official Text. An additional division, Ohio Revised Code section 1304.29(F), was added to Uniform Commercial Code section 4-406. This division incorporates a former Ohio negotiable instruments law statute of limitations applying to suits against banks.²⁸ The division provides that such suits, arising out of unauthorized signatures or indorsements, must be brought within one year after the customer notifies the bank of his claim.

In addition to the one-year requirement for asserting the claim, Ohio Revised Code section 1304.29(A)²⁹ requires the customer to "exercise reasonable care and promptness" in examining his bank statement upon

23. See note 14 *supra* and accompanying text.

24. In Ohio Revised Code section 1303.01(B)(16), UCC § 3-102(2), "protest" should refer to section 1303.64, not to section 1303.14.

25. UCC § 3-419(3).

26. Uniform Commercial Code section 4-101 was omitted. See note 14 *supra* and accompanying text. In Ohio Revised Code section 1304.01, Commercial Code section 4-105 was combined with section 4-104, thus rendering the cross reference in section 4-104(2) unnecessary, and consequently it was omitted. In Revised Code section 1304.09, UCC § 4-203, the specific cross references in the official Uniform Commercial Code comment were substituted for the general cross references in the Official Text.

27. The phrase, "unless the context otherwise requires," was inadvertently omitted in Ohio Revised Code section 1304.01(A), UCC § 4-104(1), but this omission has no apparent substantive significance. In section 1305.01(A), UCC § 5-103(1), the same error was made. In Ohio Revised Code section 1304.09, UCC § 4-203, the reference to section 1305.55 should be to 1303.55.

28. OHIO REV. CODE §§ 1307.08, .09, repealed effective July 1, 1962.

29. UCC § 4-406(1).

receiving it from the bank and to notify the bank promptly upon discovery of an unauthorized signature or alteration.³⁰ Also, the one-year statute of limitations is an additional requirement to the period, provided by division D of section 1304.29, within which the customer must notify the bank of his claim.³¹

Although this additional limitation of division F could reasonably have been placed elsewhere in the Ohio Revised Code along with other rules concerning the time of commencement of suits³² or along with rules dealing with various rights or immunities of banks,³³ the limitation does relate to the context in which it has been placed and is not at all inconsistent with the Official Text provisions.³⁴ Since the Ohio law retained in division F might under some circumstances shorten the periods of limitation provided in division D,³⁵ it was reasonable to put the provisions of both divisions in the same section of the Revised Code, section 1304.29. Indeed, since a number of states have limitations similar to that in division F,³⁶ the Permanent Editorial Board might do well to offer an optional provision, similar to that division, for the benefit of any state in which the banks insist upon retaining a local law enabling them to treat as stale a claim not brought within a short period.

Article 4 of the Official Text contains two optional provisions to be considered by the adopting states. In section 4-106 the state has the choice of deciding whether a branch bank must maintain its own deposit ledgers in order to be considered "a separate bank for the purpose of computing the time within which and determining the place at or to which

30. This requirement is in accord with Ohio case law. See *Portsmouth Clay Prods. Co. v. National Bank*, 78 Ohio App. 271, 69 N.E.2d 653 (1946); *White Castle Sys., Inc. v. Huntington Nat'l Bank*, 43 N.E.2d 737 (Ohio Ct. App. 1941).

31. Division D establishes a one-year period during which the customer must "discover and report his unauthorized signature or any alteration on the face or back of the item." This period is in accord with former Ohio Revised Code section 1307.08, repealed upon the adoption of the Uniform Commercial Code. But the period during which the customer must "discover and report any unauthorized endorsement" was changed from two years in former Revised Code section 1307.09 to three years in division D. With the exception of this change, the statutes of limitations in regard to unauthorized signatures or alterations are the same under the Ohio version of the Uniform Commercial Code as under the former Ohio law. See Griffiths, *Bank Deposits and Collections Before and After the Uniform Commercial Code*, 23 OHIO ST. L.J. 236, 244 (1962).

32. See OHIO REV. CODE ch. 2305.

33. See OHIO REV. CODE ch. 1105.

34. It is not inconsistent with the format of the Official Text to insert a special statute of limitations. See OHIO REV. CODE § 1302.98, UCC § 2-725.

35. For example, a customer who actually discovers and reports an unauthorized indorsement within ten days after receiving his bank statement has, under Ohio Revised Code section 1304.29(F), only one more year to bring suit even though, pursuant to section 1304.29(D), UCC § 4-406(4), he might have had three years from the time that the statement was made available in which to report his claim. The prompt examination and notice requirement of Revised Code section 1304.29(A), UCC § 4-406(1), however, might also have the effect of shortening the three-year period.

36. See UCC § 4-406, comment 1.

action may be taken or notices or orders shall be given under [article 4]. . . ." Ohio, in Revised Code section 1304.04, did not adopt this deposit ledgers requirement.

Ohio did, however, in Revised Code section 1304.18(B), adopt the optional provision of Uniform Commercial Code section 4-212(2), which sanctions the developing bank practice of "direct returns." Pursuant to this practice, the bank, upon discovering an unpaid item, returns it directly to the depositary bank and receives direct reimbursement from that bank, rather than returning the item via the chain of intermediary banks through which it may have come.

ARTICLE 5 — LETTERS OF CREDIT

No substantive or drafting changes were made in article 5 of the Uniform Commercial Code other than to delete, as in the other articles, the reference to the short title.³⁷

ARTICLE 6 — BULK TRANSFERS

The only significant difference³⁸ between article 6 of the Official Text and chapter 1306 of the Ohio Revised Code is the addition of two divisions, D and E, in Revised Code section 1306.03.³⁹ Division D spells out the requirement of obtaining a certificate from the county recorder indicating that the county taxes have been paid. This requirement had been part of the prior Ohio bulk sales law, and to omit it from the Ohio version would have aroused opposition to the adoption of the Code. The only logical alternative to including it in section 1306.03 would have been to draft a new section containing this requirement, enacting it as part of the Uniform Commercial Code bill but not including it in the Uniform Commercial Code sections. This alternative was not followed because it was believed to be more desirable to have all of the requirements relating to bulk transfers in one part of the Revised Code in order to prevent the overlooking of relevant requirements. This same desire for logical placement prompted the draftsmen to include in division E of section 1306.03 a reference to the sales tax requirements regarding bulk transfers.

Uniform Commercial Code section 6-104(1)(c) provides for the filing of bulk sales lists and schedules "in (*a public office to be here iden-*

37. See note 14 *supra* and accompanying text. There were some inconsequential typographical errors. In Ohio Revised Code section 1305.01(A), UCC § 5-103(1), "unless the context otherwise requires" was omitted. See note 27 *supra*. In section 1305.01(B)(2), UCC § 5-103(2), the reference should be to section 1305.11(C) instead of to 1305.07.

38. The short title section, Uniform Commercial Code section 6-101, was omitted. See note 14 *supra* and accompanying text. In Revised Code section 1306.06(B) the reference should be to section 1306.03, not to 1305.03.

39. UCC § 6-104.

tified)." In the Ohio equivalent, Ohio Revised Code section 1306.03(A)-(3), the county recorder was the public office so identified. Recently the Ohio Attorney General ruled that the county recorder cannot charge a fee for the filing of these lists and schedules since such fees have not been provided for in the Revised Code. He has further ruled that the place for keeping such documents is any safe location in the county recorder's office.⁴⁰

ARTICLE 7 — DOCUMENTS OF TITLE

In addition to the elimination of the short title section,⁴¹ the only change made in this article was the substitution in Ohio Revised Code section 1307.22⁴² of a specific reference to section 1307.23 in place of the word "law" in the phrase "expenses . . . incurred in their sale pursuant to law." Since section 1307.23 sets forth the methods, including the sale of the goods, for enforcing the carrier's lien, the change in section 1307.22 is actually not substantive.⁴³

ARTICLE 8 — INVESTMENT SECURITIES

In addition to the elimination of the short title section,⁴⁴ the Ohio version of article 8 consolidated several Uniform Commercial Code sections in order to place all the article 8 definitions in the first section of the article.⁴⁵ Besides these matters of form, Ohio made three important changes in article 8. These changes were made largely at the insistence of the Corporation Committee of the Ohio State Bar Association, which was very anxious that it be made eminently clear that the Uniform Commercial Code did not impair the relatively new Ohio Corporation Code, which had been sponsored by the Ohio State Bar Association and finally passed in 1955.

Change Incorporated in Section 1308.01 by Addition of Division J

The first of these three changes is the addition of the lengthy division J to Ohio Revised Code section 1308.01. This division provides that cer-

40. 3072 OHIO ATT'Y GEN. OPS. (June 15, 1962).

41. UCC § 7-101. See note 14 *supra* and accompanying text. In addition, typographical errors resulted in "division" instead of "diversion" in Ohio Revised Code section 1307.27(A)(5), UCC § 7-403(1)(e). Also, Ohio Revised Code section 1307.02 is Uniform Commercial Code section 10-104, appropriate changes in the section numbers referred to in section 10-104 having been made in section 1307.02.

42. UCC § 7-307(1).

43. See Goldston & McKenzie, *Documents of Title — Article 7 of the Uniform Commercial Code*, 23 OHIO ST. L.J. 280, 287-88 (1962).

44. UCC § 8-101. See note 14 *supra* and accompanying text.

45. See p. 24 *supra*. Uniform Commercial Code sections 8-102, 8-104(2), 8-302, and 8-303 have been combined in Ohio Revised Code section 1308.01. The word "provisions" was substituted for "rule" in Revised Code section 1308.07(B)(2), UCC § 8-202(2)(b). Since the word merely refers to the content of the preceding subdivision, the substitution apparently has no substantive effect.

tain enumerated Ohio statutory provisions applicable to corporations for profit and to public securities

shall govern to the exclusion of the provisions of [Ohio Revised Code] sections 1308.01 to 1308.36 [the Ohio version of article 8] . . . on the same subject, except where it clearly appears that a special provision is cumulative, in which case it and the provisions . . . of said sections on the same subject shall apply.⁴⁶

Article 8 is devoted primarily to the transfer of investment securities and to the defenses that may be asserted against an issuer for third persons. It is not a corporation code, and there was not sufficient likelihood of conflict to have warranted the addition of division J.⁴⁷

A comparison of each of the provisions of the Ohio Corporation Code enumerated in division J with the relevant provisions of article 8 is necessary to determine if the addition of division J has caused any substantive effects in the Corporation Code or in article 8. Whether such results are effected will not always be certain, however, because it may not "clearly appear that a special provision [of the Corporate Code or the public securities statute] is cumulative" rather than in conflict.

Special Provisions Relating to the Surviving Joint Tenant Record Holder of Shares

The first special provisions are those relating to "the surviving joint tenant record holder of shares . . . as provided in section 1701.24 of the Revised Code." Division D of that section recognizes that a joint estate including the right of survivorship may be created in shares. This provision is clearly not in conflict with any of the provisions of article 8.

Ohio Revised Code section 1701.24⁴⁸ also provides that upon receipt by the corporation of "proof satisfactory to it of the death of one or more of such joint tenants it may execute and deliver a new certificate to the survivor or survivors." In regard to this provision, article 8 does contain provisions relating to the issuance of new certificates. Ohio Revised Code section 1308.31⁴⁹ provides that the issuer is under a duty to register a transfer if the security is indorsed by the appropriate person, reasonable assurance is given that the indorsements are genuine and effective, tax laws have been complied with, and the transfer is in fact rightful or to a bona fide purchaser. Section 1308.31(A)(3) makes reference to section

46. The enrolled bill in an obvious typographical error stuttered at the end of this section and repeated: "provision is cumulative, in which case it and."

47. "It is not a corporation Code, and does not conflict with the Ohio General Corporation Law." Walker, *Investment Securities Article 8 — Uniform Commercial Code*, 23 OHIO ST. L.J. 294 (1962).

48. OHIO REV. CODE § 1701.24 (Supp. 1962).

49. UCC § 8-401.

1308.33,⁵⁰ which provides that an issuer has a duty to inquire into adverse claims under specified conditions.

In spelling out what constitutes an "appropriate person" for indorsement purposes, Ohio Revised Code section 1308.19⁵¹ provides that, where the security specifies persons having the right of survivorship as those entitled to the security and, by reason of death, all cannot sign, the indorsement of the survivor or survivors is appropriate. In addition, Ohio Revised Code section 1308.32⁵² spells out what constitutes an appropriate assurance that the signature is genuine and effective.

Generally, the procedures called for by these provisions of the Uniform Commercial Code are considerably simpler than those previously followed by Ohio issuers. When faced with a joint tenancy situation, Ohio issuers undoubtedly will follow the Uniform Commercial Code procedures since the Commercial Code makes it clear that the issuer is not liable for improper registration if those procedures have been followed.⁵³ It can be argued that, following Ohio Revised Code section 1701.24, the issuer may require any evidence he desires as to change of ownership regardless of the requirement of the Uniform Commercial Code that the issuer must make the transfer if its requirements are followed. The provisions of the Ohio Corporation Code are silent on such matters as, for example, what constitutes notice of an adverse claim. But, if the issuer insists on further proof than that required by the Uniform Commercial Code, he may find himself bound by the information contained in the additional documents he demanded. It would appear then that a prudent issuer would, in most cases, follow the provisions of the Uniform Commercial Code in determining what is satisfactory evidence of a change in ownership, and that the first special provisions of Ohio Revised Code section 1308.01 (J) (1) will not affect the uniform application of the Code throughout the states.

Special Provision Relating to Suspension of Rights as Shareholder on Failure To Surrender Certificates

The second special provision (also contained in Ohio Revised Code section 1308.01(J) (1)) is that relating to "the suspension of rights as a shareholder on failure to surrender certificates for shares for cancellation and exchange, as provided in section 1701.24 of the Revised Code." Ohio Revised Code section 1701.24 provides that the corporation may require the holders of outstanding certificates to surrender them for the

50. UCC § 8-403.

51. UCC § 8-308.

52. UCC § 8-402.

53. See OHIO REV. CODE § 1308.34, UCC § 8-404.

purpose of cancellation and exchange within a reasonable time fixed by the corporation. The order may also provide that until compliance any or all rights as a shareholder shall be suspended with respect to such shares.

The Uniform Commercial Code recognizes that such powers exist. Thus Ohio Revised Code section 1308.08⁵⁴ provides that a purchaser is charged with notice of any defense of the issuer if he takes the security more than one year after the date set for the exchange, and securities were available for such exchange on that date. Sections 1701.24 and 1308.08 do not appear to be in conflict with each other since the former deals only with the suspension of rights while the latter deals only with the situation in which the issuer has a defense or there was a defect in the issuance of shares. Although section 1701.24 deals with suspension of rights and section 1308.08 with notice of defects and defenses, if suspension of rights, such as the right to receive dividends, may be construed as a defense against the claims of a purchaser who obtained the shares before the expiration of the date set for the exchange, the issuer would be justified in asserting such defense pursuant to section 1701.24. Also it is doubtful if the provisions of Ohio Revised Code section 1308.07(D)⁵⁵ that, with certain exceptions, all defenses of the issuer "are ineffective against a purchaser for value who has taken without notice of the particular defense" includes a defense of statutory suspension of rights.

Special Provision Relating to Statements on Certificates for Shares

The third special provision relates to "statements on certificates for shares, restrictions on the right to transfer shares, and reservations of liens on shares, as provided in section 1701.25 of the Revised Code."⁵⁶ Ohio Revised Code section 1701.25⁵⁷ sets forth requirements as to what the certificate must contain and recognizes that express terms, if any, of the shares may be summarized on the certificate or that the certificate may contain a statement that upon request a copy of such terms will be sent or may be attached to the certificate. Ohio Revised Code section 1308.07(A)⁵⁸ recognizes inclusion by reference but provides that

such a reference does not of itself charge a purchaser for value with notice of a defect going to the validity of the security even though the security expressly states that a person accepting it admits such notice.

The Uniform Commercial Code takes the position that it is for the issuer and not the purchaser to make sure that the security complies with

54. UCC § 8-203.

55. UCC § 8-202(4).

56. OHIO REV. CODE § 1308.01(J)(2).

57. OHIO REV. CODE § 1701.25 (Supp. 1962).

58. UCC § 8-202(1).

the law governing its issue. The Commercial Code certainly does not conflict with the requirements for the contents of the certificate, and, since Ohio Revised Code section 1701.25 is silent on the question of notice of a defect, there does not appear to be any conflict between that section and the Code.

The same is not true, however, in regard either to issuer's restrictions on transfer or reservations of liens. Division B of Ohio Revised Code section 1701.25 provides that, in the case of such restrictions on transfer or any reservation of a lien, there must appear on the certificate a statement or summary of the terms or a reference to the documents that set forth such restrictions or reservations. Ohio Revised Code section 1308.02⁵⁹ provides that an issuer's lien is valid against a purchaser only if the right to such a lien is noted "conspicuously" on the security. The official comments to this section make it clear that the section is not intended to override the provisions in an applicable corporation code as to the spelling out of the reservation of such a lien. Also, because of the provisions of division J of Ohio Revised Code section 1308.01 regarding the priority of article 8 and the special provisions, it appears that compliance with the requirements of Ohio Revised Code section 1701.25 is sufficient and that the statement, summary, or reference need not be "conspicuous" as provided in Ohio Revised Code section 1308.02.⁶⁰

On the other hand, it may be argued that, since Ohio Revised Code section 1701.25 is silent as to the conspicuity requirements of the notice, the two provisions are merely cumulative, and, therefore, the "conspicuous" test of the Uniform Commercial Code must be met. The requirement of Ohio Revised Code section 1308.01(J), however, is that the provisions must be "clearly" cumulative. The two provisions on the reservation of liens may not be considered clearly cumulative.

In the case of restrictions on transfers, Ohio Revised Code section 1308.09⁶¹ provides: "Unless noted conspicuously on the security, a restriction on transfer imposed by the issuer even though otherwise lawful is ineffective except against a person with actual knowledge of it." The question asked in contrasting the provisions of Ohio Revised Code sections 1701.25 and 1308.09⁶² is whether the requirements set forth in the two sections are cumulative so that the notice must be "conspicuous." This is the same question which was discussed above with respect to reservations of liens, and it would be expected that the result should be the same in both cases. However, unlike the Uniform Commercial Code provision on reservations of liens, the Commercial Code section on trans-

59. UCC § 8-103.

60. *Ibid.*

61. UCC § 8-204.

62. *Ibid.*

fer restrictions provides that the restriction would be effective against a person with actual knowledge even though such a restriction had not been noted on the certificate. Ohio Revised Code section 1701.25, on the other hand, does not contain any exception in the case of actual knowledge. Therefore, in accord with the provisions of division J of Ohio Revised Code section 1308.01, it seems that section 1701.25 governs to the exclusion of section 1308.09⁶³ so that a transfer restriction which does not meet the notice requirements is invalid even though the person had actual knowledge of the restriction. It was fear of exactly this kind of divergence in result between the Corporation and Commercial Codes which led to the inclusion of division J in the Ohio act.

Special Provision Relating to Employment of Agent To Transfer or Register Shares

The fourth special provision relates to "the employment by a corporation of agents to transfer or register shares, as provided in section 1701.26 of the Revised Code."⁶⁴ There does not appear to be any conflict here between article 8 and the provisions of the Ohio Corporation Code. Ohio Revised Code section 1701.26 provides that the corporation may employ transfer agents and registrars and that the duties and liabilities of these agents shall be as agreed to by the corporation. Ohio Revised Code section 1308.36⁶⁵ spells out the duty of an authenticating trustee, transfer agent, or registrar to both the issuer and to the owner or holder of the security. The duty to the issuer is one of good faith and due diligence in the performance of his duties. It seems clear that these general obligations are not in conflict with the provision of section 1701.26 that the duties and liabilities are those agreed to by the corporation. Under both the Commercial Code⁶⁶ and the Ohio Corporation Code⁶⁷ the parties are free to agree among themselves as to such duties and liabilities. However, insofar as third parties are concerned, it is doubtful that the issuer would have the power under section 1701.26 to make agreements with its agents which would affect third-party rights.

Special Provision Relating to Record Ownership of Shares

The fifth special provision relates to "the recognition by a corporation and its agents of record ownership of shares and other securities, as provided in section 1701.28 of the Revised Code."⁶⁸ Ohio Revised Code

63. *Ibid.*

64. OHIO REV. CODE § 1308.01(J) (3).

65. UCC § 8-406.

66. OHIO REV. CODE § 1301.02, UCC § 1-102.

67. OHIO REV. CODE § 1701.26 (Supp. 1962).

68. OHIO REV. CODE § 1308.01(J) (4).

section 1701.28⁶⁹ spells out in detail the right of a corporation to treat as absolute owner the person in whose name the securities are listed in its record books. It also spells out when the corporation may recognize various types of fiduciaries as the absolute owners, as though they were the holders of record. But section 1701.28 is limited in its coverage to the recognition of record ownership. Pursuant to this section, a fiduciary may be recognized as if he were the owner, but no provision has been included for the registration of transfer or the issuance of new certificates. If the fiduciary were to seek transfer of the security to his own name, the provisions of article 8 would then apply.⁷⁰ Thus there seems to be no conflict between the Commercial Code sections and section 1701.28.

Special Provision Relating to Closing of Share Transfer Books

The sixth special provision relates to "the closing of share transfer books against transfers of shares, as provided in section 1701.45 of the Revised Code."⁷¹ There was some concern by the Corporation Committee of the Ohio State Bar Association that the provisions of article 8 would interfere with the right of corporations under Ohio Revised Code section 1701.45 to close the share transfer books in connection with the setting of a record date. In Ohio Revised Code section 1308.09⁷² it is provided that restrictions on transfer imposed by the issuer must be noted on the security to be effective, and it was feared that it would be held that the closing of the books for a period of time would constitute such a restriction.

This problem was recognized by the draftsmen of the Uniform Commercial Code, who carefully stated in the official comments to section 8-204 that "no interference is intended with the common practice of closing books for proper corporate purposes." Although the official comments are not binding on the courts,⁷³ they would, no doubt, have been sufficiently persuasive on this point without the addition of Ohio Revised Code section 1308.01(J)(5).

In Ohio Revised Code section 1308.12(A)⁷⁴ it is provided that, prior to due presentment for registration of transfer, the issuer may treat the registered owner as the person exclusively entitled to exercise all the rights and powers of an owner. In the light of this provision, it may be argued that an issuer, when due presentment is made, must recognize

69. OHIO REV. CODE § 1701.28 (Supp. 1962).

70. The Commercial Code in Ohio Revised Code section 1308.31, UCC § 8-401, and related sections sets forth the procedure for registering a transfer. See text accompanying note 49 *supra*.

71. OHIO REV. CODE § 1308.01(J)(5).

72. UCC § 8-204.

73. See Goldston & McKenzie, *supra* note 43, at 288, n.41.

74. UCC § 8-207(1).

the rights of the presenter notwithstanding the setting of a record date and the closing of the transfer books. This construction does not necessarily follow from the language of the section, and, to remove any doubts, the official comments to this section again provide: "No interference is intended with the common practice of closing the transfer books or taking a record date for dividend, voting and other purposes, as provided for in by-laws, charters and statutes." In view of the foregoing quotations from the official comments, it is quite doubtful that any mention of the closing of share transfer books was required in division J of Ohio Revised Code section 1308.01. In any event, it is clear that its inclusion does not make any substantive change in the Uniform Commercial Code.

Special Provision Relating to Suspension of Rights After Demand for Relief by Dissenting Shareholder

The seventh provision relates to "the suspension of all rights accruing from shares after a demand for relief by a dissenting shareholder, as provided in section 1701.85 of the Revised Code."⁷⁵ Ohio Revised Code section 1701.85⁷⁶ provides in detail the relief for dissenting shareholders and contains a provision calling for the suspension of rights accruing from the shares, the suspension beginning at the time of the demand by the shareholder for the fair cash value of his shares. If the corporation so requests, the shareholder must mail it his shares in order that a legend indicating that a demand has been made may be placed on them. The Corporation Law Committee comments to section 1701.85 point out that, if the shares are listed on an exchange or are sold frequently on an over-the-counter market, it will be essential that the dissenting claims be earmarked, because after demand they, in effect, do not constitute equity shares but a claim for money. If the distinction is not noted on the certificate itself, it is felt that all trading in the shares of the corporation will be impeded.

Even if there were not a provision for earmarking the certificates, it is doubtful that there would be any conflict with the provisions of the Uniform Commercial Code. To be sure, Ohio Revised Code section 1308.07⁷⁷ does provide that issuer's defenses, with certain exceptions, are ineffective against a purchaser for value who has taken without notice of the particular defense. But it is doubtful that this provision would apply to specific statutory defenses. In any event, by virtue of division J of Ohio Revised Code section 1308.01, a purchaser from a dissenting share-

75. OHIO REV. CODE § 1308.01 (J) (6).

76. OHIO REV. CODE § 1701.85 (Supp. 1962).

77. UCC § 8-202.

holder takes subject to the suspension of rights provided in Ohio Revised Code section 1701.85.

Special Provision Relating to Incontestability of Public Securities

The last special provision relates to "the incontestability of public securities as provided in section 133.46 of the Revised Code."⁷⁸ Unlike the other portions of division J, this provision was not suggested by the Corporation Law Committee of the Ohio State Bar Association but was included as the result of suggestions made by municipal bond specialists in Cleveland. They were concerned that the provisions of Ohio Revised Code section 1308.07⁷⁹ might be construed as impliedly repealing the provisions of Ohio Revised Code section 133.46,⁸⁰ according to which public bonds are incontestable when issued for a lawful purpose pursuant to the provisions of chapter 133 of the Ohio Revised Code (The Uniform Bond Act) and when the fiscal officer has been paid in full. Ohio Revised Code section 1308.07(B)(2), on the other hand, provides that the security will be valid in the hands of a purchaser for value when the issuer is a government or a governmental agency

if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

Both sections are of value in increasing the marketability of such securities, although section 133.46 is framed in terms of marketability while the Code section is framed in terms of the issuer's defenses. The municipal bond specialists were concerned because Ohio Revised Code section 1308.07 establishes requirements for validity of the securities in terms of a purchaser for value while Ohio Revised Code section 133.46 makes no such qualification in determining incontestability. Since the Ohio courts do not as a general rule favor repeal by implication, it is doubtful that a court would find that the enactment of the Uniform Commercial Code repealed section 133.46 without specifically including that section in the repealer clause. This conclusion is bolstered by the fact that the general repealer clause, section 10-103 of the Official Text, was not included in the Ohio act. In any event, the specific reference to section 133.46 in division J of Ohio Revised Code section 1308.01 eliminates any problem.

78. OHIO REV. CODE § 1308.01(J)(7).

79. UCC § 8-202.

80. OHIO REV. CODE § 133.46 (1953).

Change Incorporated in Section 1308.19

In addition to the above provisions of Ohio Revised Code section 1308.01(J), a second important change was made in article 8 in Ohio Revised Code section 1308.19(C)(4).⁸¹ The Official Text provides that an "appropriate person" for indorsement purposes shall be the "executor, administrator, guardian or like fiduciary" of the individual specified to endorse who is without capacity to act because of "death, incompetence, infancy or otherwise."⁸² Ohio Revised Code section 1701.28, on the other hand, states that a minor may be recognized as the absolute owner with full capacity and authority to exercise all rights of ownership. In addition, division D of that section provides that, where the corporation has treated a minor as entitled to exercise any right of ownership in its securities, no subsequent disaffirmance or avoidance is effective against the corporation.

Under the Official Text, a minor could not be considered an appropriate person to indorse the security, and, therefore, the issuer would not be protected as to such a transfer under the provisions of Ohio Revised Code section 1308.34,⁸³ which deals with the issuer's liability for faulty registration of transfers. For this reason, the reference to infancy in division (C)(4) of Ohio Revised Code section 1308.19 was deleted, and a new division H was added, which provides, in language parallel to that of Ohio Revised Code section 1701.28:

When an issuer has treated a minor as entitled to exercise any rights of ownership in its securities no subsequent disaffirmance or avoidance is effective against the issuer.

Since Ohio corporations may issue certificates in the names of minors and may recognize their signatures in making a transfer, the above changes are desirable. It may be argued, however, that even had the reference to infancy been left in Ohio Revised Code section 1308.19-(C)(4), there would have been no change in Ohio law. The Official Text refers to the situation in which a person has no capacity to act by virtue of his infancy, but under Ohio law an infant has the authority and the capacity to act in respect to corporate securities to the extent provided in Ohio Revised Code section 1701.28. Following this interpretation, the signature of the fiduciary would have been required only when no such capacity existed, for example, in a situation in which the minor was not old enough to sign his own name.

81. UCC § 8-308(3)(d).

82. Ohio dropped the word "infancy" in Ohio Revised Code section 1308.19(C)(4), UCC § 8-308(3)(d).

83. UCC § 8-404. See text accompanying note 53 *supra*.

Change Incorporated in Section 1308.35(B)(2)

The final Ohio change in article 8 appears in section 1308.35(B)(2),⁸⁴ which section deals with lost, destroyed, and stolen securities. The Official Text provides that the issuer must issue a new certificate under specified circumstances, which include filing a sufficient indemnity bond with the issuer. This requirement was changed in the Ohio version and now provides for the filing of any indemnity bond which the issuer reasonably requires. It was felt that the requirement for an indemnity bond should not be mandatory and that the issuer should be able to waive such a requirement in light of the particular circumstances involved. In this connection it is interesting to note that, in the case of an action brought for lost, stolen, or destroyed commercial paper, the Uniform Commercial Code provides that the court may require security indemnifying the defendant against loss, but it is not mandatory.⁸⁵

The Ohio corporation law also includes a provision relating to lost, stolen, or destroyed certificates. In this case, however, the Corporation Law Committee agreed that the provisions of the Commercial Code should control. As a result, paragraph (C) was added to Ohio Revised Code section 1701.27,⁸⁶ providing that the provisions of article 8, and particularly Ohio Revised Code section 1308.35,⁸⁷ shall govern to the exclusion of the provisions of section 1701.27 except where it clearly appears that the provisions are cumulative, in which case both provisions would apply. Thus another departure from the provisions of the Official Text was avoided.

ARTICLE 9 — SECURED TRANSACTIONS

The Ohio version of article 9 has a few variations — one unintended⁸⁸ and several more intended⁸⁹ — from the Official Text. There

84. UCC § 8-405(2)(b).

85. See OHIO REV. CODE § 1303.77, UCC § 3-804.

86. OHIO REV. CODE § 1701.27 (Supp. 1962).

87. UCC § 8-405.

88. In Ohio Revised Code section 1309.01(B)(5), UCC § 9-105(2), the cross reference for "lien creditor" should be to Revised Code section 1309.20 rather than to 1309.22.

89. The text discusses the significant intended variations. This note will describe the others. Uniform Commercial Code section 9-101, the short title section, has been omitted. See note 14 *supra* and accompanying text. Section 9-104(b) has been omitted since Ohio law does not recognize the "landlord's lien," granted to property owners in many other states. The definitions in section 9-106 have been added to the other definitions in Ohio Revised Code section 1309.01, UCC § 9-105(1).

In Revised Code section 1309.21(C)(2), UCC § 9-302(3)(b), a specific cross reference to Revised Code section 1701.66 (central filing of mortgages on rolling stock, movable equipment, and airplanes) has been added to the general reference to special statutes which provide for central filing. In section 1309.21(D), UCC § 9-302(4), the words "a statute described" have been omitted as surplusage and, in section 1309.33(A), UCC § 9-314(1), the phrase "(called in this section 'accessions')" has been omitted for the same reason. Commercial

are, however, only three significant variations: (1) the purchase price of farm equipment excluded from the filing requirements was reduced from \$2,500 to \$500; (2) some changes were made integrating the Code with the Ohio law on motor vehicle titles; and (3) some changes were made in an attempt to protect chattel mortgagors. In addition, Ohio chose the alternative of dual rather than local or central filing.

*Ohio Reduction of Price of Farm Equipment Excluded
from Filing Requirements*

The effect of substituting \$500 for \$2,500 in Ohio Revised Code sections 1309.21(A)(3) and 1309.26(B)⁹⁰ is that farm equipment ranging in cost from that in excess of \$500 to that costing \$2,500 is included with the more expensive items of farm equipment for purposes of perfecting a security interest. Uniform Commercial Code section 9-302(1)(a) exempts the less expensive items from the general filing requirements for lien perfection and priority. And Uniform Commercial Code section 9-307(2) permits a buyer for value and for his own farming operations to take free of the security interest, unless he had knowledge of it or unless the secured party filed a financing statement prior to the purchase.

It would, of course, have been preferable to have national uniformity on this dollar amount. However, since it had already been changed to

Code section 9-407 has been incorporated into Revised Code section 1309.40, UCC § 9-403, as the last two divisions, because the decision to include the optional provisions of section 9-407 (filing officers to furnish certificates upon request) was made after the bill had been introduced and insertion into section 9-403 avoided the necessity of extensive renumbering.

From the final sentence of Commercial Code section 9-403(3), OHIO REV. CODE § 1309.40(C), the words "unless a statute on disposition of public records provides otherwise" have been omitted. These words were unnecessary in view of Ohio Revised Code section 144.96 (Supp. 1959). That section provides that the provisions of the Revised Code relating to the Records Commission "shall not impair or restrict the authority given by other statutes over the creation of records, systems, forms, procedures . . ." Thus the omission, eliminating the reference back, will make disposition of records easier, making it clear that the provisions of the Commercial Code prevail.

In Ohio Revised Code section 1309.49, the words, "and to the extent provided in the agreement and not prohibited by law, his reasonable attorney's fees and legal expenses," in the final sentence of Uniform Commercial Code section 9-506 have been omitted. Words to the same effect in Commercial Code section 9-504(1)(a) were omitted in Revised Code section 1309.47(A)(1). Prior Ohio law did not provide, as a condition of redemption, reimbursement by a defaulted mortgagor of anything more than the amount due and unpaid, and Ohio case law generally precludes the recovery of attorney's fees, under most circumstances, as a matter of public policy. The deliberate omission of the quoted language suggests (but certainly does not require as expressly as might have been desirable for complete clarity) that attorney's fees and legal expenses are excluded from "the reasonable expenses of retaking, holding, preparing for sale, selling and the like," which now are permitted to be deducted from the proceeds of disposition as a prior claim and to be collected as a condition of redemption. The amendment which omitted the quoted language was made after the bill was on the floor of the Senate, and thus there was insufficient time for legislative drafting refinements.

90. UCC §§ 9-302(1)(c), 307(2).

\$500 in Massachusetts, New Hampshire, and Rhode Island,⁹¹ the problem may be that the \$2,500 figure in the original text is too high for general acceptance.⁹² The representatives of rural Ohio banks and of some finance companies were uneasy about the the prospect of applying a provision for clear title analogous to the so-called "floor plan doctrine"⁹³ to classes of goods other than automobiles and to transactions in which the seller is not an established dealer. They, therefore, insisted on limiting the exemption to the lower dollar amount.⁹⁴ But even with the exemption so limited, the bank representatives are not entirely satisfied,⁹⁵ and both they and the finance company representatives remain uneasy about the reduced filing requirements of the Uniform Commercial Code. It should be recognized, however, that obtaining the used chattel with greater certainty in a very few cases of default is not as valuable as eliminating the nuisance of filing in hundreds or thousands of other instances.⁹⁶

Changes Integrating Commercial Code with Ohio Motor Vehicle Title Law

The changes from the Official Text made in Ohio Revised Code sections 1309.21(C)(2) and (D)⁹⁷ were intended to make perfectly clear that liens on motor vehicles could be obtained exclusively by compliance

91. UNIFORM LAWS ANN., UNIFORM COMMERCIAL CODE § 9-302, *Action in Adopting States* (1962). Rhode Island, in addition, has restricted the application of Commercial Code section 9-307 to consumer goods "having an aggregate original purchase price of \$300.00 or more."

92. "Excusing the financier of farm equipment from filing with respect to equipment costing as much as \$2,500 is questionable." Coogan, *Public Notice Under the Uniform Commercial Code*, 47 IOWA L. REV. 289 n.17 (1962).

93. According to this doctrine, an innocent buyer of an automobile who relies upon the apparent authority of a dealer having the car on his showroom floor ready for sale acquires clear title in spite of the existence of a lien which is effective against the seller's general creditors; that is, the buyer acquires good title against a secured lender who would, however, prevail against other creditors. See OHIO REV. CODE ANN. § 1309.26, Legislative Service Commission note (Baldwin 1962).

94. There was similar opposition to the expansion by Ohio Revised Code section 1309.26(A), UCC § 9-307(1), of the title approach of the floor plan doctrine to sellers other than automobile dealers.

95. "The two provisions taken together give pause for thought. . . . The provisions discussed can cause problems." Burns, *Secured Transactions: Sales of Accounts, Contract Rights, and Chattel Paper*, 23 OHIO ST. L.J. 308, 325 (1962). In the quoted statements, Mr. Burns, Legislative Counsel for the Ohio Bankers Association, is commenting on the problems which may be caused by the combined effect of section 1309.21(A)(3), (4), which permits perfection of a purchase money security interest in consumer goods and farm equipment having an original purchase price of \$500 or less without possession or filing, and of section 1309.26(B), which permits a good-faith buyer of consumer goods or farm equipment for value and for his own personal, family, or household purposes, or farming operations to take free of the perfected security interest.

96. See statistics on Ohio filings in Freedheim & Goldston, *Article 9 and Security Interests in Accounts, Contract Rights and Chattel Paper*, 14 OHIO ST. L.J. 69, 81 n.52 (1953).

97. UCC § 9-302(3)(b), (4).

with the requirements of the Ohio Certificate of Motor Vehicle Title Law.⁹⁸ In a poll of Pennsylvania lawyers conducted in 1958 by the Ohio State Bar Association Committee on Banking and Commercial Law, it was indicated that some Pennsylvania lawyers felt that the language of Uniform Commercial Code section 9-302, as then in effect in Pennsylvania, was ambiguous. The language of section 9-302(3)(b),⁹⁹ at the time of the poll, excluded property from the filing requirements only if notation on the certificate of title was "required." But, in the opinion of the Pennsylvania lawyers, the Pennsylvania Certificate of Title Law permitted, but did not require, motor vehicle liens to be recorded on the certificate of title.¹⁰⁰ To eliminate any possible ambiguity in Ohio, several changes in the Official Text were made.

First, it should be noted that Ohio selected alternative A under Uniform Commercial Code section 9-302(3)(b). The effect of this selection is to permit a security interest to be perfected in motor vehicles constituting inventory held for sale, through compliance with the procedures set forth in the Certificate of Motor Vehicle Title Law, without the additional obligation of complying with the filing provisions of the Code.¹⁰¹ In the Official Text, however, alternative A exempts only security interests in vehicles which must be indicated on a certificate of title. The Ohio Certificate of Motor Vehicle Title Law in Ohio Revised Code section 4505.13 provides for the perfection of a security interest in a motor vehicle not only by the indication of a lien on a title certificate but also by the retention of possession of a manufacturer's certificate of origin. Therefore, to harmonize alternative A of section 9-302(3)(b) with the Ohio law, the phrase "or which requires possession of a certificate of title" was added to alternative A,¹⁰² and the phrase "or by otherwise com-

98. OHIO REV. CODE §§ 4505.10-13.

99. Pa. Laws 1953, act 3, § 9-302.

100. Although the Pennsylvania problem may have been exaggerated, the lawyers concerned with the adoption in Ohio of the Uniform Commercial Code became alert to the importance of extreme precision in the language concerning the exclusion of motor vehicles.

The language of Uniform Commercial Code section 9-302 as originally adopted in Pennsylvania has been greatly changed in the Official Text. Subsection 4 has been added to make it clear that motor vehicle security interests cannot be perfected under the Uniform Commercial Code.

Kentucky has had some problems in regard to motor vehicles under the Uniform Commercial Code. See Coogan, *supra* note 92 at 309 n.70.

101. There has been some dissatisfaction with the provision of the Certificate of Motor Vehicle Title Law, Ohio Revised Code section 4505.13 (1953), which permits a mortgagee of an automobile dealer's floor stock to prevail over a bona fide retail customer who pays value. See, e.g., *Associates Inv. Co. v. LeBoutillier*, 69 Ohio App. 62, 42 N.E.2d 1011 (1941); *Crawford Fin. Co. v. Derby*, 63 Ohio App. 50, 25 N.E.2d 306 (1939). In *Mutual Fin. Co. v. Kozoil*, 172 Ohio St. 265, 175 N.E.2d 88 (1961), the Ohio Supreme Court indicated that there are extremes of inequity where the express language of the automobile title statutes will, for practical effect, be ignored.

102. OHIO REV. CODE § 1309.21(C)(2).

plying with the procedure set forth in such statute" was added to Ohio Revised Code section 1309.21(D).¹⁰³

Two further steps taken to avoid conflict between the Uniform Commercial Code and the Ohio Certificate of Motor Vehicle Title Law were (1) the insertion of division C in Ohio Revised Code section 1309.26,¹⁰⁴ thus excluding motor vehicles from the rules of that section and (2) the addition of the statement in Ohio Revised Code section 4505.13 that: "Sections 1309.01 to 1309.50, inclusive, of the Revised Code, do not permit or require the deposit, filing, or other record of a security interest covering a motor vehicle."

Ohio Revised Code section 1309.26(A)¹⁰⁵ establishes the right of a buyer of goods in a business inventory to take free of a security interest created by his seller,¹⁰⁶ even though the buyer has knowledge that the interest has been perfected. And Ohio Revised Code section 1309.26(B)¹⁰⁷ establishes the right of a buyer of consumer goods and farm equipment costing \$500 or less, even if not bought from a dealer's inventory, to take free of a perfected security interest provided he pays value without knowledge of the security interest and purchases for his own use.¹⁰⁸ These rules are, of course, inconsistent with the Ohio rules applying to motor vehicles.¹⁰⁹ Therefore, the two steps mentioned in the preceding paragraph were necessary to exclude motor vehicles from these rules of priority as well as from the rules contained in Ohio Revised Code section 1309.21,¹¹⁰ which establish the method for perfecting a security interest.

Although, as stated above, it was intended that adoption of the Uniform Commercial Code should leave undisturbed the Ohio procedures for perfecting security interests in motor vehicles, whether in the hands of a dealer or in the hands of a purchaser, there seem to be a few questions not yet entirely resolved in connection with wholesale automobile financing.¹¹¹ For example, would a financier of an automobile dealer

103. UCC § 9-302(4).

104. UCC § 9-307.

105. UCC § 9-307(1).

106. The seller must, in general, be a dealer in the goods. See UCC § 9-307, comment 2.

107. UCC § 9-307(2).

108. Filing prior to purchase will, however, protect the seller's creditors. See OHIO REV. CODE § 1309.26(B), UCC § 9-307(2).

109. See note 101 *supra*.

110. UCC § 9-302.

111. It has been suggested that the Ohio position in regard to motor vehicles would be more artistically set forth if the phrase "or for a motor vehicle required to be licensed" were stricken from Ohio Revised Code section 1309.21(3), (4), UCC § 9-302(1)(c), (d), and Ohio Revised Code section 1309.21(C)(2), UCC § 9-302(3)(b) (alternative A), were to refer specifically to Ohio Revised Code section 4505.13 in addition to 1701.66 and were to substitute "a manufacturer's or importing certificate" for "certificate of title." *Report of Banking and Commercial Law Committee*, 35 OHIO BAR 1250, 1252 (1962).

Even absent such niceties of draftsmanship (Comparable variations were made in Connecticut, Michigan, and New York to tailor the Uniform Commercial Code to local motor

be protected under Ohio Revised Code section 1309.26¹¹² by filing in regard to the proceeds from the sale of automobiles from inventory, even though Revised Code section 1309.21¹¹³ excludes motor vehicles and section 1309.25(C)(1)¹¹⁴ applies only if "a filed financing statement covering the original collateral also covers proceeds"? Ohio Revised Code section 4505.13 seems explicit enough in its reference to "other record of a security interest covering a motor vehicle" to exclude an automobile from treatment as "original collateral" and, consequently, to exclude the proceeds of the sale from an automobile from treatment as the proceeds from a sale of collateral. A better approach might be to file a financing statement with the automobile dealer as debtor and cover generally both chattel paper and accounts so that the lender would have a security interest in open accounts, leases, and chattel mortgages arising from the sale of vehicles from inventory.

Changes To Protect Chattel Mortgagors

References to Ohio Revised Code section 1319.07¹¹⁵ were added in division C of Revised Code section 1309.44¹¹⁶ and in section 1309.47¹¹⁷ by the addition of division F. These additions to the Official Text were made, after the act had reached the floor of the Ohio Senate, purportedly to preserve for debtors the protections of section 1319.07, which prohibits a deficiency judgment against a "chattel mortgagor" unless: (a) the "mortgage" was foreclosed in a court of record or (b) the "mortgagee" sent the "mortgagor" a ten-day notice prior to a non-judicial sale.

Since only security interests in the form of old-style chattel mortgages would appear to be covered by Ohio Revised Code section 1319.07 as incorporated into the Uniform Commercial Code, the form, or indeed even the caption, of the documents used in the transaction might affect the rights of the parties.¹¹⁸ Such a result is quite inconsistent with the

vehicle statutes.), it seems perfectly clear that Ohio Revised Code section 4505.13 excludes motor vehicle security interests from the Uniform Commercial Code.

It has also been suggested that Ohio Revised Code section 1309.21(C)(2), UCC § 9-302(3)(b), should refer expressly to section 4969.05, so that the conditional sales contract lien on rolling stock would be preserved as is that resulting from a chattel mortgage. *Report of Banking and Commercial Law Committee*, 35 OHIO BAR 1250, 1252 (1962).

112. UCC § 9-307.

113. UCC § 9-302.

114. UCC § 9-306(3)(a).

115. OHIO REV. CODE § 1319.07 (1953).

116. UCC § 9-501(3).

117. UCC § 9-504.

118. Ohio Revised Code section 1319.06 (1953) also refers to "chattel mortgage," but this reference is to a "lien by chattel mortgage or otherwise." (Emphasis added.)

The Ohio Attorney General has ruled that county recorders may accept for filing, instruments executed prior to July 1, 1962, entitled "Chattel Mortgage," if they meet the Uniform

Uniform Commercial Code policy of disregarding the form of the documents in determining the rights of parties to a secured transaction.¹¹⁹

The general protections provided debtors under Ohio Revised Code sections 1309.44-50¹²⁰ seem sufficient without adding these peculiarly limited protections for "chattel mortgagees." In particular, Ohio Revised Code section 1309.48(B)¹²¹ provides that the secured party may keep the collateral as his own and abandon any claim for a deficiency, unless the collateral is consumer goods upon which the debtor has paid sixty per cent or more of the price, but he must give the debtor written notice and thirty days in which to protect his equity. The dangers from non-judicial sale without notice are minimized by Ohio Revised Code section 1309.48(A),¹²² which requires the secured party to dispose of the collateral under the safeguards of section 1309.47¹²³ within ninety days or risk the possible penalty of refunding the credit service charge plus ten per cent of the original price. For the foregoing reasons, references to Ohio Revised Code section 1319.07 in Revised Code sections 1309.44(C) and 1309.47(F)¹²⁴ add no significant protections and should be eliminated by amendment as soon as possible.

Ohio's Choices of Optional Provisions in Article 9

Ohio's choices in regard to two of the four options in the Official Text have already been discussed. As to the first option regarding security interests in motor vehicles, Ohio chose alternative A in Uniform Commercial Code section 9-302(3) but added clarifying language.¹²⁵ In regard to the second option, Ohio chose to require filing officers to furnish

Commercial Code requirements for financing statements. The title of the instrument need not be changed to "Security Agreement" or the like. 3142 OHIO ATT'Y GEN. OPS. (July 13, 1962).

The older documents should be carefully perused, however, because they may fail to meet the definition of a financing statement. For example, they often fail to give the addresses of the debtor and secured party as required in Ohio Revised Code section 1309.39(A), UCC § 9-402(1).

Loose language in the attorney general's opinion suggests a negative inference that documents executed *after* July 1, 1962, *cannot* be used as financing statements if they are captioned "chattel mortgage." Such a conclusion, of course, would be unsound. See OHIO REV. CODE § 1309.02(A)(1), UCC § 9-102(1)(a).

119. See OHIO REV. CODE § 1309.02(A)(1), UCC § 9-102(1)(a). It might be argued that Revised Code section 1319.07 affects all forms of security interest and not merely those cast in the form of chattel mortgages. Such a result, although contrary to the legislative historical facts and to logical statutory construction, is not less satisfactory than the determination that only chattel mortgages are affected by 1319.07.

120. UCC §§ 9-501-07.

121. UCC § 9-505(2).

122. UCC § 9-505(1).

123. UCC § 9-504.

124. UCC §§ 9-501(3), -504.

125. See text accompanying notes 101-02 *supra*.

certificates upon request as provided in optional Uniform Commercial Code section 9-407.¹²⁶

Upon consideration of the third option as to the place of filing, Ohio chose the option of dual filing in Uniform Commercial Code section 9-401. Accordingly, Commercial Code section 9-401(1)(a) appears in the Ohio Revised Code as section 1309.38(A)(1), and Commercial Code section 9-401(1)(c), including the optional language, appears in the Ohio Revised Code as section 1309.38(A)(3).

This choice was dictated largely by the fear that central filing would arouse opposition from the politically potent county recorders.¹²⁷ There was also substantial feeling that lawyers and lenders in small communities would object to the centralization in Columbus of all data on local security interests.¹²⁸

As to the fourth option, alternative subsection 3 of section 9-401 was not adopted. Therefore, a new filing is not required in the Ohio county to which collateral has been removed from another Ohio county.¹²⁹

Finally, the blank in Uniform Commercial Code section 9-203(2) was filled with appropriate statutory references intended to preserve the protections of the Ohio Small Loan and Retail Installment Sales Acts.¹³⁰

ARTICLE 10 — EFFECTIVE DATE AND REPEALER

Article 10 was rearranged for passage in Ohio,¹³¹ and one sentence, the intent and meaning of which have become quite controversial, was

126. Section 9-407 has been included in the Ohio Revised Code as divisions F and G of section 1309.40. See note 89 *supra*.

127. In Massachusetts the Governor, under pressure from the recording officials, refused to sign the bill containing the Code until the General Assembly passed an amendment changing the original central filing provisions to those for dual filing.

128. For an early criticism of central filing for Ohio, see Freedheim & Goldston, *supra* note 96, at 80-82.

129. Under the rejected alternative, the original filing would lapse four months after removal under a rule comparable to that of Uniform Commercial Code section 9-103(3), which governs collateral brought into Ohio from another state.

130. Ohio Revised Code section 1309.14(B) makes a transaction covered by article 9 subject also to sections 1317.01 to 1317.99 and 1321.01 to 1321.99. This is not a variation, of course, but merely a necessary completion of Uniform Commercial Code section 9-203(2).

131. Section 3 of the act, 1961 Ohio Senate Bill 5, which is not part of the Uniform Commercial Code as enacted in the Ohio Revised Code, after setting the effective date as July 1, 1962, omits the statement in the second sentence of Uniform Commercial Code section 10-101: "It applies to transactions entered into and events occurring after that date." It would, of course, seem to be self-evident that transactions and events subsequent to the effective date are covered, and Arkansas and New Jersey also omitted the quoted sentence. Nevertheless, this omission has been interpreted by the Ohio Attorney General as implying an intention of the Ohio legislature to extend the provisions of the Commercial Code to transactions entered into prior to the effective date. See 3072 OHIO ATT'Y GEN. OP. (June 15, 1962).

The specific repealers of Uniform Commercial Code section 10-102(1) have been placed in section 2 of the act, which, pursuant to Ohio practice, is also not part of the Ohio Revised Code. Section 10-103, a general repealer of all acts inconsistent with the Uniform Commer-

added to the Official Text as the second sentence of section 3 of the enabling act. The sentence reads:

Instruments, documents or notices filed prior to July 1, 1962, in accordance with the law at the time of such filings shall be deemed to be filed under [the Uniform Commercial Code] . . . as of the original date of filing and may be continued or terminated as provided in [the Uniform Commercial Code]¹³²

Uniform Commercial Code section 10-102(2) was adopted in Ohio (but not incorporated into the Ohio Revised Code) as the first sentence of section 3 of the act.¹³³ It provides:

Transactions validly entered into before [July 1, 1962] . . . and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment had not occurred.

The intention of this provision clearly seems to be that the substantive rights already existing on July 1, 1962, under pre-Commercial Code liens should not be impaired by the repeal of the old chattel mortgage statute and other statutes. However, the procedure for renewing the filing of existing liens did not seem clear to the Ohio sponsors, and the concern as to existing liens increased when the Ohio Bar Association Committee on Banking and Commercial Law learned in a 1958 poll that there was some confusion among practicing Pennsylvania lawyers in regard to the necessity of and procedure for the refileing of documents which had already been filed in accordance with the previous laws.

Uniform Commercial Code section 10-102(2) is not comprehensive enough. New Jersey, Connecticut, and New York have supplemented the section with detailed provisions,¹³⁴ and the Kentucky Attorney General found it necessary to issue an official clarifying interpretation.¹³⁵ On

cial Code, was omitted because the inclusion of such a provision is contrary to Ohio legislative practice and to the drafting rules of the Ohio Revised Code.

Also section 10-104, which subordinates article 7 on documents of title to the more specialized regulations of particular classes of bailees, was incorporated directly into article 7 as Ohio Revised Code section 1307.02.

132. 1961 Ohio Sen. Bill 5 § 3 (129 Ohio Laws 13, 182 (1961)).

133. 1961 Ohio Sen. Bill 5 (hereinafter referred to as "the act"). Section 3 was not incorporated into the Ohio Revised Code.

134. New York explained its supplementary language as follows: "The addition . . . provides a method for the continued perfection of security interests created before the Act takes effect." N.Y. COMM'N ON UNIFORM STATE LAWS, SUPPLEMENTARY REPORT ON UNIFORM COMMERCIAL CODE 30 (1962).

135. The Kentucky Attorney General concluded: (1) in regard to chattel mortgages filed prior to the effective date of the Uniform Commercial Code, the pre-Uniform Commercial Code procedure for the renewal of chattel liens remains in effect along with the old filing systems; 60-609 KY. ATT'Y GEN. OPS. (July 13, 1960); (2) the passage of the Commercial Code does not extend to five years the effective period, three years under the prior law, of documents filed prior to the effective date of the Code; *ibid.*; (3) renewal of documents filed

the other hand, the Ohio supplementary sentence is also inadequate — and for the same reason. It attempts to solve in a few words a problem the solution to which must be applied to many thousands of instances involving every conceivable variety of unlikely factual situations.¹³⁶

The problem is simple, even if the solution is not. The holder of a security interest created prior to July 1, 1962, wishes to preserve his position — when must he file what and where? Until the expiration of his original filing (which expiration date is not easily determined) he is protected by the first sentence of section 3 of the act, which preserves the validity of his transaction and permits its completion or enforcement as if the old law had not been repealed. If he and his debtor alter their agreement, by adding to the collateral or changing the significant terms of the debt, the altered transaction will constitute a new “transaction . . . intended to create a security interest,”¹³⁷ entered into after July 1, 1962, and subject to the Uniform Commercial Code.¹³⁸ But merely refileing at the expiration of the original filing would not seem to be a “transaction . . . intended to create a security interest.”¹³⁹ Rather it is a unilateral step extending the period of perfection of an already existing security interest and probably is governed by the language of section 10-102(2) of the Official Text in regard to completing or consummating the original transaction as if the old law had not been repealed. But, even if this conclusion is sound the question remains: when must the secured party file what and where?

It could be argued that section 10-102(2) of the Official Text permits the continuation of all the old filing systems for chattel mortgages and the like.¹⁴⁰ But encouraging the continuation of such systems would have imposed immense tasks upon those searching the records for claims. Therefore, it was desirable to facilitate the refileing of old liens in the new filing system. Indeed, to the best of the present authors' recollection, the real purpose of the sentence added by Ohio was to create a simple method of shifting documents filed under prior Ohio laws into the new Uniform Commercial Code filing system without the need for new execution or changes in the initial filing dates. Since refileings under the exist-

after the effective date of the Commercial Code does not require the formalities of the pre-Commercial Code renewals. 60-470 KY. ATT'Y GEN. OPS. (June 15, 1960).

136. The problem is more acute in a state like Ohio where the ordinary chattel liens were short lived and needed frequent refileing (Compare Ohio's three-year effective period for a chattel mortgage with the indefinite life of a Massachusetts chattel mortgage.) and where almost all liens had to be filed to be effective. (In many states, but not Ohio, a conditional sale — and sometimes other security devices — is valid without filing or recordation.)

137. OHIO REV. CODE § 1309.02(A)(1), UCC § 9-102(1)(a).

138. See Coogan, *Article 9 of the Uniform Commercial Code*, 72 HARV. L. REV. 838, 858 n.78 (1959).

139. OHIO REV. CODE § 1309.02(A)(1), UCC § 9-102(1)(a).

140. The Kentucky Attorney General has so construed section 10-102(2). See note 135 *supra*.

ing laws would have perpetuated the multifarious indexes and filing systems, it was regarded as desirable to encourage the shift to the new system. Nevertheless, the word "may" was used in the sentence added in Ohio to indicate that this method of shifting documents would not be the exclusive refiling method. Thus, this new Ohio sentence does not prevent construing Official Text section 10-102(2) to permit refiling in old chattel mortgage records as merely a step in the completion of the original transaction.¹⁴¹

However, the Attorney General of Ohio ruled that the Uniform Commercial Code filing method is exclusive, basing his opinion on a strained inference drawn from the omission in Ohio of the second sentence in Uniform Commercial Code section 10-101, which reads: "[The Commercial Code] applies to transactions entered into and events occurring after [the effective date of the act] . . ."¹⁴² His opinion is also based on the view that "may" is imperative rather than permissive "where the context requires it."¹⁴³ This last circular logic leads to the further conclusion that the higher filing fees of the Uniform Commercial Code are applicable to continuation and termination of existing filings. However, with the exception of the conclusion as to higher fees, the Attorney General's opinion is not controlling and, as the Attorney General recognized,¹⁴⁴ "good legal advice" might proceed from the assumption that the final determination may be any one of the possible constructions of the language and thus all such possibilities should be covered.

When To Refile a Security Interest

In examining these possibilities, let us turn first to the question of when a secured party must refile and consider a chattel mortgage filed July 1, 1961, the filing of which expires three years later on June 30, 1964. The sentence added by the Ohio legislature says that such a chattel mortgage "shall be deemed to be filed under [the Uniform Commercial Code] . . . as of the original date of filing . . ." Does this mean that the expiration date is pushed forward to June 30, 1966, because the Uniform Commercial Code has a five year life for filings?¹⁴⁵ Also one can not assume that the earliest possible date is the safest for refiling. Since the Uniform Commercial Code permits refiling only during the six months immediately preceding the expiration of the original filing,¹⁴⁶ it is just as possible to be too soon as it is to be too late.¹⁴⁷

141. Compare Kentucky construction in Note 140 *supra*.

142. See 3072 OHIO ATT'Y GEN. OPS. (June 15, 1962).

143. *Ibid.*

144. *Ibid.*

145. See OHIO REV. CODE § 1309.40(B), UCC § 9-403(2).

146. See OHIO REV. CODE § 1309.40(C), UCC § 9-403(3).

147. Ohio Revised Code section 1309.40, UCC § 9-403, covers filing of continuation state-

Particularly because a subcommittee of the Ohio State Bar Association¹⁴⁸ has taken the position opposite to that of the Attorney General, the authors must conclude that the only safe course is to refile upon the original expiration and also upon the pro forma expiration five years after the original filing. The authors reach this conclusion although, armed with the unrecorded Ohio history of the statute, they would construe the added Ohio sentence to mean that filings may be continued or terminated in the manner provided in the Uniform Commercial Code rather than at the expiration date which the Uniform Commercial Code would have provided if then in effect.

The authors' position is fortified by the strange problem which the Attorney General's opinion creates for a mortgage on fixtures filed both as a real estate and as a chattel mortgage under Ohio Revised Code section 1319.03, repealed by the Commercial Code. Since such a mortgage had a twenty-one year period of effectiveness,¹⁴⁹ a mortgage filed twelve years prior to the effective date of the Uniform Commercial Code would have had, in accordance with the Attorney General's position, only five years from original filing until expiration, and, therefore, at the effective date of the Uniform Commercial Code it was already seven years too late to refile! Such a result is inconsistent with Uniform Commercial Code section 10-102(2) and is, perhaps, unconstitutional as well.

Where To Refile a Security Interest

Where to refile is no less a thicket of uncertainty than when. Ohio Revised Code section 1309.40¹⁵⁰ does not provide where the continuation statement is to be filed, but a reasonable assumption would be that it should be filed in the same office in which the document intended to be continued is filed. What if the original filing under pre-Uniform Commercial Code law is in a different filing office than would be

ments. It should be noted that a financing statement which expressly states a maturity date of the obligation of five years or less will expire sixty days after the stated maturity, which may be before or after the end of the five-year effective period provided for any other financing statements. Pre-Commercial Code filings must, therefore, be carefully checked for stated maturity dates. For example, a chattel mortgage stating a two-year maturity date will expire one year (minus sixty days) earlier, pursuant to the Attorney General's opinion, than it would have expired under the old law with its three-year effective period.

There may also be a problem with older forms of documents as to whether a particular date in the document amounts to a "stated maturity date." For example, a chattel mortgage might state the total principal amount due, the date of the first principal payment, and the amount of each monthly principal payment. A maturity date would be calculable but would not be expressly stated.

148. See 3072 OHIO ATT'Y GEN. OPS. (June 15, 1962).

149. Ohio Revised Code section 1319.03(E), 66 Ohio Laws 345 (1869), had provided that a mortgage upon both real and personal, but not upon personal property alone, was to be governed by sections 5301.28 to 5301.42 of the Revised Code. Section 5301.30 (Supp. 1962) provides that such a mortgage shall be effective for twenty-one years.

150. UCC § 9-403.

utilized under the Uniform Commercial Code, or if under the Uniform Commercial Code there would be dual filings? Caution, again, would dictate multiple filings.

What To File When Refiling a Security Interest

Even what to file is not altogether clear. Although the Attorney General has ruled that the old form of chattel mortgage can be filed as a financing statement,¹⁵¹ one must be careful that the old form meets all the requirements of Ohio Revised Code section 1309.39.¹⁵² However, these requirements usually will be met since the Uniform Commercial Code generally is less exacting than the old chattel lien statutes.¹⁵³ On the other hand, can one be entirely sure in renewing a chattel mortgage that the old formal renewal requirements need not be met? The authors think that the sentence added to the Ohio version makes it clear that continuation can be accomplished "as provided in [the Commercial Code]," but cautious counsel, faced with all the uncertainties as to when and where, are unlikely to take chances on what. However, before deciding to pursue the old formal requirements, counsel must be practical and consider that continuation under the Uniform Commercial Code merely requires the secured party to execute a notice¹⁵⁴ while refiling under some of the repealed statutes requires greater formalities and, in some instances, a fresh signature by the debtor.

It should be remembered that there is no virtue in preserving the old filings with all the uncertainties they create in searching for outstanding security interests. On major transactions made prior to the effective date of the Uniform Commercial Code, counsel will finally abandon the complexities of extending the old filing and file anew under the Uniform Commercial Code. On minor transactions, in most instances, the debt will be paid or enforcement commenced before the original filing period expires. If, therefore, refiling under the Uniform Commercial Code were required of all old security interests, there would be relatively little burden.

New York Solution

New York has established this requirement in a well organized statutory solution added to Uniform Commercial Code section 10-102(2).

151. 3142 OHIO ATT'Y GEN. OPS. (July 13, 1962).

152. UCC § 9-402.

153. But see note 118 § 3 *supra*. Prior to the adoption of the Uniform Commercial Code, chattel mortgages were often assigned by dealers to finance companies "off the record" with the assignment to be used only in event of default. Care must be taken in such instances that the financing statement indicates the proper parties and, perhaps, that it discloses the existence of the assignment.

154. See OHIO REV. CODE § 1309.40(C), UCC § 9-403(3).

The addition provides: (1) liens filed under a former law which required refiling lapse at the date such refiling is due; (2) liens filed under a former law which required no refiling lapse twelve months after the effective date of the Uniform Commercial Code; and (3) liens good under a former law without any filing lapse twelve months after the effective date of the Uniform Commercial Code.¹⁵⁵

A continuation statement may be filed in New York at the place which Uniform Commercial Code section 9-401(1)¹⁵⁶ provides for the filing of a financing statement, but it must identify the original security agreement by its data under the old law. The effectiveness of the lien is thus continued for five years by virtue of Uniform Commercial Code section 9-403(3).¹⁵⁷

By thus eliminating, with some promptness, all the old filing systems and at the same time stating when, where, and what with precision, New York has established a pattern which Ohio would do well to follow, preferably after the Permanent Editorial Board has adopted the New York solution or some variant of it as part of the Official Text. Some careful consideration of constitutional issues will, of course, be required. However, there would seem to be no impairment of contract, taking of property without due process, or the like in merely making the mortgagee refile sooner at some moderately increased filing fee. Also, pursuant to Uniform Commercial Code section 10-102(2), a mortgagee's rights under the former law would be preserved even though the Uniform Commercial Code would no longer extend to him the same rights in regard to the other party¹⁵⁸ or third parties¹⁵⁹ in transactions entered into after the effective date of the Uniform Commercial Code.

CONCLUSION

The foregoing review, ventilating variations and agonizing ambiguities, unfairly portrays the Uniform Commercial Code as adopted in Ohio. Trying to protect fully a security interest under prior Ohio law was as difficult as identifying an elusive flavor in a mixture of bouillabaisse and mulligatawny stew.¹⁶⁰ The Uniform Commercial Code as adopted in

155. UNIFORM LAWS ANN., UNIFORM COMMERCIAL CODE § 10-102, *Variations from Official Text* (1962).

156. OHIO REV. CODE § 1309.38(A).

157. OHIO REV. CODE § 1309.40(C).

158. See OHIO REV. CODE ANN. § 1309.19 & Legislative Service Commission note (Baldwin 1962), UCC § 9-208.

159. See OHIO REV. CODE ANN. § 1309.26 & Legislative Service Commission note (Baldwin 1962), UCC § 9-307.

160. See Freedheim & Goldston, *Article 9 and Security Interests in Instruments, Documents of Title and Goods*, 15 OHIO ST. L.J. 51 (1954); Freedheim & Goldston, *Article 9 and Security Interests in Accounts, Contract Rights and Chattel Paper*, 14 OHIO ST. L.J. 69 (1953).

Ohio is, beyond dispute, a vast improvement over the previous mixture of statutes and decisions on commercial matters. With experience under the Uniform Commercial Code and with the Committee on Banking and Commercial Law of the Ohio State Bar Association working closely with the national Permanent Editorial Board, the Ohio variations should be reduced and substantial uniformity maintained between Ohio and the other states which adopt the Uniform Commercial Code.