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Secured Comsumer Goods Transactions under New York Law and the Uniform Commercial Code

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Introduction

At the outset it seems appropriate to quote from a reporter[1] of the Secured Transaction Article [2] of the Uniform Commercial Code.[3] "No other Article of the Code proposes so radical a departure from prior law. . . . (I)t proposes to integrate, under a single system of legal propositions and a single system of terminology, the entire range of transactions in which money debts are secured by personal property."[4] Under present New York law, the rights and duties of the parties depend on whether the form of the transaction is a conditional sale or a chattel mortgage —on whether the secured party has retained title or conveyed title.[5] The Code proposes a single set of rules based on the substance of the transaction.

In the ensuing discussion it is proposed to compare the present New York law on chattel mortgages and conditional sales with the Uniform Commercial Code in their application to consumer goods financing, and in so doing to highlight the distinguishing and similar features of the present New York law on security transactions.

Because of the Code's complete change in terminology, it is advisable to define certain basic terms used throughout. The *security interest* is what is now known as the lien or retained title in some species of personal property that the Code calls *collateral.* The *secured party* is today either the chattel mortgagee or conditional seller of the *debtor,* who is known as the chattel mortgagor or conditional buyer.

The Security Agreement

The parties to the transaction may agree to have title in either the secured party or the debtor.[6] For the form of an enforceable security interest, the Code requires that the debtor sign a security agreement containing a simple description of the collateral.[7] For

1. Prof. Grant Gilmore, Associate Reporter, Art. 9, UNIFORM COMMERCIAL CODE.
2. U. C. C. Art. 9.
3. Hereafter to be referred to as the "Code."
4. Gilmore, *The Secured Transaction Article of the Commercial Code,* 16 LAW AND CONTEMP. PROB. 27 (1951).
5. A chattel mortgage is a present transfer of *title* to the mortgagee defeasible by the mortgagor's payment of the debt, and in default of performance by the mortgagor the title becomes absolute. *Parshall v. Eggert,* 54 N. Y. 18, 23 (1873); *Prudential Ins. Co.,* 256 App. Div. 205, 9 N. Y. S. 2d 515 (1st Dep't 1939), *aff'd,* 281 N. Y. 595, 22 N. E. 2d 166 (1939).
6. U. C. C. § 9-202. This is immaterial for the incidence of the security interest.
7. U. C. C. § 9-203 (1).

states that lack legislation regulating the formalities of the written contract, the description is the minimum requirement. However, the Code[8] further permits individual states to legislate on the matter.[9] In New York a contract to secure the purchase price of $1500 or less,[10] in addition to naming the parties and describing the collateral, must satisfy such formalities as eight and ten point type, an itemized statement of the transaction, and the amount of each payment with the place where such payments are to be made.[11]

It is the general rule in this state that a conditional sale agreement or chattel mortgage is in all respects valid and binding between the parties when executed.[12] The Code provides that the security agreement "attaches" or becomes valid between the parties when an agreement is made that it attach and value is given and the debtor has rights in the collateral.[13]

Under the Code, after-acquired property clauses are effective in dealing with consumer goods as additional security when the debtor acquires rights in the property within ten days after the secured party gives value, but are void thereafter.[14] The present law in New York is different in that such after-acquired property clauses are effective against the debtor without a restriction of ten days for acquisition of his rights in such property.[15] The Code follows present New York law[16] in that a security agreement may provide that collateral under it shall secure future advances.[17]

Filing

The place of filing under the proposed Code[18] corresponds to present provisions of the New York law.[19] Both state that where the collateral is consumer goods, filing is to be made in the place of the debtor's residence, and if the debtor is a non-resident, then

8. U. C. C. § 9-203 (2).
9. U. C. C. § 10-102 provides for specific repeal of all acts regulating chattel mortgages and conditional sales. It would seem § 9-203 (2) leaves the form of the contract to the individual states. Thus uniformity as to *form* is neither sought nor achieved.
10. Where purchase is not for commercial or business use.
11. PERS. PROP. LAW § 64-a; LIEN LAW § 239-i.
12. *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144, 148, 30 N. E. 736 (1892).
13. U. C. C. § 9-204 (1). The parties can by explicit agreement postpone the time of attachment.
14. U. C. C. § 9-204 (3) (4).
15. *Diana Paper Co. v. Wheeler-Green Elect. Co.*, 228 App. Div. 577, 240 N. Y. Supp. 108 (4th Dep't 1930).
16. *Brown v. Kiefer*, 71 N. Y. 610 (1877); *Gray v. Brasee*, 14 N. Y. S. 2d 687 (Sup. Ct. 1939).
17. U. C. C. § 9-204 (5).
18. U. C. C. § 9-401.
19. PERS. PROP. LAW § 66; LIEN LAW § 232.

in the place where the goods are to be kept within the state.[20] If the collateral is goods which are to be affixed to realty, then filing is to be made in the office where a mortgage on the realty would be filed.

The Code further states that filing made in good faith but in the improper place or not in all the necessary places is good as to any collateral in so far as the filing was proper and also against a person with actual knowledge of the filing of a financing statement which indicates that a security interest in all collateral wherever located was intended.[21]

Present New York law requires the conditional seller, within ten days after notice of removal of the goods from the original filing district within the state, to another filing district of the state (or from outside this state to a place within this state when the contract has not been filed), to file the conditional sales contract in the district to which the goods have been moved. Failure to file after notice voids the conditional seller's reservation of the property as to purchasers and creditors of the buyer without notice.[22] Dealing with this same problem the proposed Code submits two alternative provisions.[23] The first states that once filing has been perfected in the Code state it shall remain perfected even though the debtor's residence or the location of the goods is subsequently changed to another county. The other alternative of the Code is to the effect that filing becomes ineffective after 120 days if there is no filing in the new residence or new location of the goods.[24]

The present law[25] may have the same effect in different situations as each proposed alternative provision of the Code. That is, it may be possible that under present law the conditional seller may never learn of the removal of the goods and thus filing, once perfected, would remain effective even though the goods have been moved.[26] On the other hand, once the conditional seller receives notice of removal of the goods, under present law he is met with a time limit within which to act to maintain his interest in the goods.[27] Thus, the dubious result under present law, which gives the purchasers and creditors of the debtor varying rights depending on the indeterminable knowledge of the creditor, would be

20. The Code does not attempt to solve the problem of ascertaining the debtor's residence.
21. U. C. C. § 9-401 (2).
22. PERS. PROP. LAW § 74.
23. U. C. C. § 9-401 (3).
24. This is the only rule for goods brought into the Code state from another state. U. C. C. § 9-103 (3).
25. PERS. PROP. LAW § 74.
26. This corresponds to the first alternative in effect.
27. This corresponds to the second alternative in effect.

resolved one way or the other by enactment of either (but not both) of the alternative provisions of the proposed Code.[28]

Some change in present law regarding duration of the perfected security interest would be effected by enactment of the proposed Code. Under present law the filed chattel mortgage or conditional sales contract remains valid for three years.[29] However, a conditional sales contract may be renewed annually by refiling within thirty days of the expiration of previous filing. A chattel mortgage may likewise be renewed within thirty days of expiration of previous filing.

Under the proposed Code a financing statement filed, showing the date of maturity, will be valid until that date and thereafter until it lapses.[30] Any time after maturity, or five years from the date of filing where there is no maturity stated, the filing officer may notify the secured party that the security interest will lapse if a continuation statement is not filed within sixty days.[31] Thus, the filing officer is given discretion as to when a security interest will lapse since his power to give notice at "any time" after maturity or five years may be interpreted literally and cause serious complications not possible under present law, which makes it the secured party's duty to refile within thirty days of expiration without any notice from a filing officer. The continuation statement need only be signed by the secured party identifying the original statement by file number. When timely filed, the effectiveness of the original is renewed for five years. After expiration of this period the procedure may be repeated.

Under the Code, *filing* is perfection[31a] but the converse does not hold. When filing is required, however, the security interest is not perfected until there is a filing, except that if filing occurs before the security interest attaches the security interest is perfected on attachment.[32] Where filing is not a requisite for perfection (*e. g.*, a purchase money security interest in consumer goods) the time the security interest attaches is the time of perfection.[33] The New York statutes, not speaking in terms of perfection, make the security interest valid against third persons on filing.

28. Present law when requiring filing of a secured transaction specifies that the chattel mortgage or conditional sales contract itself must be filed. PERS. PROP. LAW § 66; LIEN LAW § 230. A motor vehicle chattel mortgage is an exception. LIEN LAW § 230-c. The same is not true under the proposed Code. The security agreement itself need not be filed when filing is required for perfection—filing of a financing statement is sufficient. U. C. C. § 9-302.

29. PERS. PROP. LAW § 71; LIEN LAW § 235.

30. U. C. C. § 9-403 (2).

31. U. C. C. § 9-403 (3).

31a. *Infra* n. 34.

32. U. C. C. § 9-303 (1) (a).

33. U. C. C. § 9-303 (1) (b).

Perfection

The main purpose of a security arrangement is to give the secured party a special, definite and exclusive interest in the particular chattel—an interest that the courts will recognize as effective against other creditors of, or purchasers from the debtor. The contract which prescribes the security interest between the debtor and the secured party, in of itself, will not usually bind third parties; some additional act after the creation and attachment of the security interest is necessary to "perfect"[34] the security interest.

The rights of a conditional seller or a chattel mortgagee against third parties are briefly prescribed by the Personal Property Law and the Lien Law. Personal Property Law § 64 provides:

> Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, *shall be valid as to all persons,* except as hereinafter otherwise provided. [Italics added.]

§ 65 continues:

> Every provision in a conditional sale reserving property in the seller *shall be void* as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods, or acquires by attachment or levy a lien upon them, before the contract shall be filed . . . unless such contract is so filed within ten days after the making of the conditional sale. [Italics added.]

In the Lien Law, § 230, it is provided:

> Every mortgage or conveyance intended to operate as a mortgage of goods and chattel . . . which is not accompanied by an immediate delivery . . . is *absolutely void* as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith and for a fair consideration, unless the mortgage is filed . . . [Italics added.]

It should be noted that the rules for the validity of chattel mortgages and conditional sales differ under the present New York law. Under the statute for chattel mortgages, where there has not been a filing the chattel mortgage is *void,* and void as to almost every conceivable third party. However, a conditional sale is presumed to be *valid* and is only void as to certain creditors and

34. As in the 1950 Amendment to § 60-a of the Federal Bankruptcy Act, the term "perfect" as used in the Code, describes a security interest that cannot be defeated by other creditors. A security interest is perfected when the secured party has taken whatever steps are necessary to give such an interest.

purchasers if there is no filing within ten days from the making of the contract.

Under the Code there is a general validity statement reading: "Except as otherwise provided by this Act or by other rule of law or regulation, a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors."[35] Filing is necessary to perfect the security interest as a general rule.[36] But if the transaction gives rise to a *purchase money security interest in consumer goods,* filing is not required and the interest is perfected against every third party except a buyer without knowledge of the security interest, who gives value, *and* who buys for his own personal, family or household purpose.[37]

Possession of the collateral by the secured party, without filing, perfects the secured party's interest.[38] This is the rule under the Lien Law[39] and under the Personal Property Law.[40] It is apparent that possession of the collateral by the secured party, be he a mortgagee or conditional seller, is warning of some interest in the one with possession; the purpose of filing is thereby satisfied.

The Code provides that an unperfected security interest is subordinate to the rights of a lien creditor who becomes such without knowledge of the security interest.[41] The Code defines lien creditor as one who secures the issuance of process which within a reasonable time results in attachment, levy or the like—the lien is effective from the time of issuance of process.[42] Compare this with the Personal Property Law, by which an unfiled conditional sales contract is also void as to a creditor who acquires a lien without notice[43]—the lien is not effective until there is an actual physical attachment or levy.[44] An unfiled chattel mortgage is absolutely void as to creditors of the mortgagor even if the creditor had knowledge[45] and the claim has not been merged in

35. U. C. C. § 9-201.
36. U. C. C. § 9-302 (1).
37. U. C. C. §§ 9-302 (1) (d), 9-307 (2). Filing is required for perfection if the purchase money security interest is in consumer goods that are part of the realty or a motor vehicle required to be licensed. U. C. C. § 9-302 (1) (d).
38. U. C. C. § 9-302 (1) (a).
39. LIEN LAW § 230; *Castlemen v. Pryor,* 55 App. Div. 515, 67 N. Y. Supp. 229 (4th Dep't 1900), *aff'd,* 168 N. Y. 354, 61 N. E. 282 (1901).
40. PERS. PROP. LAW § 61; *Baker v. Hall,* 250 N. Y. 484, 166 N. E. 175 (1929).
41. U. C. C. § 9-301 (1) (c).
42. U. C. C. § 9-301 (3).
43. PERS. PROP. LAW § 65.
44. *Baker v. Hall, supra* n. 40; *Stallknecht v. Gilbert Appliance Corp.,* 144 Misc. 626, 259 N. Y. Supp. 189 (Co. Ct. 1932).
45. LIEN LAW § 230; *Gandy v. Collins,* 214 N. Y. 293, 108 N. E. 415 (1915). *Best v. Staple,* 61 N. Y. 71 (1874). However, the unfiled chattel mortgage is valid against subsequent purchasers and mortgagees who are not in good faith.

judgment,[46] although to enforce his right the claim would have to be reduced to judgment and execution issued.[47]

If the secured party under the Code files a *purchase-money* security interest within ten days of his giving value, he takes priority over the lien creditor whose lien becomes effective between the time the security interest attaches and the time of filing.[48] This gives the secured party a more limited priority than under a conditional sales situation where the ten day period operates to cut off *all* intervening interests. Under the Lien Law there is no such relation back.[49]

When the debtor sells the collateral with or without the authority of the secured party, the security interest continues in any identifiable cash proceeds, and it is perfected if the interest in the original collateral was perfected.[50] The perfected security interest in the proceeds ceases to be perfected after the expiration of ten days unless the original financing statement that was filed covered the proceeds, or the secured party perfects his interest in the proceeds *(i. e.,* by filing or taking possession).[51] The security interest does not continue in the proceeds where insolvency proceedings have been instituted against the debtor; the secured party has a right to the debtor's cash and bank accounts equal to the amount of cash proceeds received within ten days before insolvency proceedings were instituted less the amount of cash proceeds received by the debtor and paid over to the secured party during the ten day period.[52] The security interest after sale of the collateral continues therein, unless the debtor's action was authorized by the secured party, or the purchaser of the collateral is one who takes free of security interests because there has been no perfection or filing.[53] The secured party may have only one satisfaction; he may not claim both the proceeds and the collateral.

Under present New York law, when the chattel mortgagor is in lawful possession of the property, and there is no express agreement to the contrary, he may sell the mortgaged property, subject of course, to the existing chattel mortgage;[54] and such a

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46. *Russel v. St. Mart,* 180 N. Y. 355, 73 N. E. 31 (1905); *Nucci v. McCullom,* 194 Misc. 1025, 88 N.Y.S. 2d 619 (Sup. Ct. 1949).
47. *Sullivan v. Miller,* 106 N.Y. 635, 13 N.E. 772 (1887); *Karst v. Gane,* 136 N.Y. 316, 32 N.E. 1073 (1893).
48. U.C.C. §9-301 (2). He also takes preference over a transferee in bulk.
49. *Nucci v. McCullom, supra* n. 46.
50. U.C.C. §9-306 (1).
51. *Ibid.*
52. U.C.C. §9-306 (2).
53. U.C.C. §9-306 (1).
54. *Moore v. Prentiss Tool and Supply Co., supra* n. 12.

sale does not constitute a conversion.[55] If the mortgagee gives authority to sell the mortgaged property, the mortgage cannot be enforced against the purchaser.[56] The mortgagee has no right to recover from a purchaser of the collateral for conversion where that purchaser subsequently resells the collateral;[57] the mortgagee must follow the property and recover it from the last purchaser.[58] The mortgagee has a right to the proceeds upon the sale if the parties so agree.[59] If a conditional buyer sells the personal property without giving notice to the conditional seller, he is in default,[60] and the rights and remedies of a conditional seller on default take effect.

The general rule on priority among secured parties is that conflicting security interests rank in the order they are perfected.[61] Of course, nothing in the Code prevents subordination by agreement of any person entitled to priority.[62] The Code sets out certain specific priorities between secured parties—priorities that differ from the general rule of *prior tempore.*

A secured party with a perfected security interest who makes subsequent advances to the debtor on the same collateral and under the same security agreement takes priority as to the later advances from the time when his security interest was originally perfected.[63] The same is true where the secured party acquires rights in after-acquired collateral; the priority is from the time the security interest was originally perfected whether or not he advances on the after-acquired collateral.[64] But if the conflict is with a purchase money security interest, the purchase money security interest takes priority over the security interest claimed under the after-acquired property clause, if the purchase money security interest is perfected at the time the debtor receives the collateral or within ten days.[65] Where there are conflicting purchase money security interests, the interest of a seller or of a secured party whose advance was used to pay a seller, takes priority.[66]

55. *Hamill v. Gillespie,* 48 N.Y. 556 (1872).
56. *Schmidt v. Weeks,* 142 App. Div. 83, 127 N.Y. Supp. 39 (3d Dep't 1910); *Jefferson Credit Corp. v. National Bronx Bank,* 98 N.Y.S. 2d 333 (City Ct. 1950).
57. *Hathaway v. Brayman,* 42 N.Y. 322 (1870); *Martin v. Lewinski,* 54 App. Div. 563, 66 N.Y. Supp. 995 (2d Dep't 1900).
58. *Ibid.*
59. *Skilton v. Codington,* 185 N.Y. 80, 77 N.E. 790 (1906). Sale of mortgaged property with intent to defraud mortgagee is a misdemeanor. PENAL LAW § 940. *People v. Koon,* 275 App. Div. 991, 91 N.Y.S. 2d 332 (4th Dep't 1949).
60. PERS. PROP. LAW § 73.
61. U.C.C. § 9-312.
62. U.C.C. § 9-316.
63. U.C.C. § 9-312 (2).
64. U.C.C. § 9-312 (3).
65. U.C.C. § 9-312 (4).
66. U.C.C. § 9-312 (5).

An after-acquired property clause of a chattel mortgage, otherwise conforming to the New York Lien Law, is valid between the parties.[67] It will not be enforced against attaching and execution creditors[68] nor a conditional seller of the after-acquired property,[69] but it will take priority from the date of original filing against a subsequent chattel mortgagee of the after-acquired property.[70] An agreement that the chattel mortgagee shall have his lien on the chattel apply to future advances is also valid,[71] and the present state of the law indicates he will take priority over subsequent mortgagees who expect to obtain a security interest junior only to the original debt.[72] By statute the conditional seller can agree with the buyer that previous goods sold to the consumer and not yet paid for, will be security along with the additional purchases for the entire amount owing.[73]

The Code[74] provides that a security interest in goods which are deemed to be part of the realty, takes priority over all *prior* realty interests provided that it attaches *before* the goods become part of the realty. Filing perfects the security interest as to *subsequent* realty claims.[75] If, however, there is no filing, the security interest will be subordinated[76] to: (a) a subsequent purchaser[77] for value of any interest in the realty; (b) a subsequent judgment creditor with a lien on the realty; (c) a prior encumbrancer of the realty to the extent that he makes subsequent advances. These same rules for fixtures apply to accessions.[78] It is still left to other law to determine what are accessions and fixtures.

These simplified rules would replace those for conditional sales and chattel mortgages that provide a different rule depending on whether the fixture was severable or not. If the goods are so affixed as not to be severable without material injury to the realty, the security interest is void against all who have not agreed to such security. If the goods are severable without material harm, then it is void after affixed only against subsequent

67. *Supra* n. 15.
68. *Rochester Distilling Co. v. Rasey*, 142 N.Y. 570, 37 N.E. 632 (1894).
69. *Gridley v. Gates*, 228 App. Div. 579, 240 N.Y. Supp. 260 (4th Dept. 1930).
70. *Titusville Iron Co. v. City of New York*, 207 N.Y. 203, 100 N.E. 806 (1912).
71. *Supra* n. 16.
72. *Carpenter v. Blate*, 1 E.D. Smith 491 (N.Y.C.P. 1868).
73. PERS. PROP. LAW § 81.
74. U.C.C. § 9-313 (1).
75. In case of repossession, the secured party is liable for cost of repairing any physical injury to the realty where the owner of the realty is not the debtor. U.C.C. 9-313 (2).
76. U.C.C. § 9-313 (1).
77. "Purchaser" includes "mortgagee." U.C.C. § 1-201 (32).
78. U.C.C. § 9-314.

purchasers of the realty without actual notice of the security interest unless it was filed where a deed to the realty would be filed.[79] The security interest is also void against the owner of realty who is not the buyer of the goods to be affixed,[80] even if severable without material harm, unless filed in the same manner.[81]

Default

The rights of the secured party in the collateral after the debtor's default are the rights which distinguish the secured from the unsecured lender. There has been no material change in the provision for retaking possession on default, except that presently the breach of contract must have been such that the contract provided expressly for repossession[82] whereas under the Code repossession is a right of the secured party unless otherwise agreed.[83] In either case the creditor may proceed without judicial process.[84] The Code provides additionally, that the secured party may render the equipment unusable without removal and dispose of it on the debtor's premises in accordance with the Act.[85]

The creditor may give twenty to forty days' notice of intention to retake, which will cut off the debtor's redemption rights.[86] If there is repossession of the goods without such notice, the creditor is required to hold them for ten days during which time the debtor, on payment of all sums due, may redeem and continue the contract.[87] The Code proposes that the debtor may reclaim the collateral at any time before the secured party has disposed of it.[88] Inasmuch as consumer goods repossessed must be disposed of within ninety days if sixty per cent. of the cash price has been paid,[89] and reasonable notice must be given,[90] it is apparent that the debtor is given a longer time to redeem under the Code. The secured party on default may lease or otherwise dispose of the of the collateral, as well as sell, with the secured party accounting for any surplus; the debtor being liable for any deficiency unless

79. With certain formalities. See PERS. PROP. LAW § 67.
80. *Madfes v. Beverly Development Corp.*, 251 N.Y. 12, 166 N.E. 787 (1929); *General Synod v. Bonac Realty Corp.*, 297 N.Y. 119, 123, 75 N.E. 2d 841, 842 (1947).
81. The rules for accessions also revolve about severability without material harm. This is true both for chattel mortgages and conditional sales. See EAGER, CHATTEL MORTGAGES AND CONDITIONAL SALES 107, 495 (1941).
82. PERS. PROP. LAW § 76; LIEN LAW § 239-a.
83. U.C.C. § 9-503.
84. *Supra* n. 82, 83.
85. U.C.C. § 9-503.
86. PERS. PROP. LAW §§ 77, 78; LIEN LAW §§ 239-b, 239-c.
87. PERS. PROP. LAW § 78; LIEN LAW § 239-c.
88. U.C.C. § 9-506.
89. U.C.C. § 9-505.
90. U.C.C. § 9-504 (2).

otherwise agreed.[91] The secured party may proceed at a public sale or may make a privately negotiated transaction;[92] he may treat the collateral as a unit or may divide it into parcels;[93] he may choose the time and place, and the terms (cash or credit);[94] he may buy at a public sale and may even buy at a private sale if the collateral is of a type which is the subject of widely distributed standard price quotations.[95] There are only two general limitations which are imposed for the benefit of the debtor: (a) reasonable notice must be given to the debtor;[96] and (b) "every aspect of the disposition, including the method, manner, time, place and terms, must be commercially reasonable."[97]

This is contrasted with the present twenty to forty day notice of intent to retake or the ten day holding period.[98] Under the Personal Property Law,[99] where fifty per cent of the purchase price has been paid, there must be a *public* sale not more than thirty days after retaking. The ten day notice of resale may be given during the period of redemption.[100] There are elaborate provisions in addition to the notice of sale to the debtor, including notice to the public.[101] A foreclosure action may be had for either a conditional sale or a chattel mortgage.[102] The advantage of the foreclosure proceeding is obvious in that the sale and deficiency are assessed in one action. This is one instance where no distinction is made between a conditional sale and a chattel mortgage.[103] In the case where the chattel mortgage is more than $1,500 the only course is a foreclosure.[104]

It should be noted that the Code does not restrict the disposition to a sale.[105] It is provided in the Personal Property Law[106] that where fifty per cent. of the purchase price has not been paid the seller need not resell the goods unless the defaulting buyer

91. U. C. C. § 9-504 (1).
92. U. C. C. § 9-504 (2).
93. *Ibid.*
94. *Ibid.*
95. *Ibid.*
96. U. C. C. § 9-504 (2). Notice must also be given to any other secured party who has a security interest in the collateral and who is known (or has filed).
97. U. C. C. § 9-504 (2). For "commercially reasonable" see *infra.*
98. *Supra* n. 86.
99. PERS. PROP. LAW § 79.
100. *Eisenberg v. Commercial Credit Corp.*, 267 N.Y. 80, 195 N.E. 691 (1935); *Fisk Discount Corp. v. Brooklyn Taxicab Trans. Co.*, 270 App. Div. 491, 60 N.Y.S. 2d 453 (2d Dep't 1946).
101. Three notices in different public places and if more than $500 paid, a newspaper notice of the sale at least five days prior to the sale.
102. LIEN LAW § 206.
103. This is the modern tendency, for Lien Law § 206 became effective Sept. 1, 1952.
104. Lien Law §§ 239-a—239-1 apply only to chattel mortgages of $1,500 or less.
105. U. C. C. § 9-504 (1).
106. PERS. PROP. LAW § 80.

demands such sale within ten days of the retaking.[107] If the transaction is a chattel mortgage and eighty per cent. of the purchase price has been paid, the mortgagee has the election of taking the goods in satisfaction of the debt or an action for the balance of the debt.[108] Thus it is apparent that the distinction between a chattel mortgage and a conditional sale under the present New York law is important.

Under the Code, where the debtor has paid sixty per cent. of the cash price[109] in the case of a purchase money security interest in consumer goods, the secured party must dispose of the collateral within ninety days.[110] The debtor has the privilege to release his right to insist upon a resale, by a written agreement to that effect made *after* default.[111] This will also release the debtor from further liability.

If less than sixty per cent. of the cash price of the goods is covered by a purchase money security interest and in the case of all other collateral, the secured party in possession after default may propose that he retain the collateral in satisfaction of the obligation. If an objection is made within thirty days, the secured party must dispose of the collateral as provided by the Article;[112] if no objection is made the offer is deemed accepted.[113] The seller is under no duty to resell if less than fifty per cent. of the price has been paid under the Personal Property Law, unless the debtor demands the sale within ten days.[114]

Conclusion

In conclusion there are certain essential changes that will be wrought in commercial law that require value judgments.

(1) Presently the form of the security transaction controls the substance; the Code abolishes this by creating one simple "security interest." If the Code accomplishes nothing else it

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107. *Interstate Ice and Power Corp. v. United States Fire Ins. Co.*, 243 N.Y. 95, 100, 152 N.E. 476, 478 (1926); *Moth v. Moldenhauer*, 261 App. Div. 724, 726, 27 N.Y.S. 2d 563, 566 (3d Dep't 1941).

108. LIEN LAW § 239-d.

109. The use of the term "cash price" rather than "purchase price" will avoid litigation on the matter. See *Ellner v. Commercial Credit Corp.*, 136 Misc. 398, 240 N.Y. Supp. 832 (City Ct. 1930).

110. Otherwise, the debtor may sue for conversion or for a return of the finance charge plus 10% of the cash price of the goods. U.C.C. §§ 9-505 (1), 9-507 (1). *Cf.* PERS. PROP. LAW § 80-e.

111. U.C.C. § 9-505 (1).

112. U.C.C. § 9-504.

113. U.C.C. § 9-505 (2).

114. PERS. PROP. LAW § 80. There is no like provision for chattel mortgages in the Lien Law.

will be of great value for this one virtue. It is unfortunate, however, that the Code does not set up a single contract form for security transactions which would have brought uniformity throughout the forty-eight states.

(2) The Code allows "notice filing" by the filing of a financing statement in lieu of the security agreement. This will facilitate the maintenance of records by the recording officer but will be of greatest service to the secured party involved in transactions where the collateral changes from day to day, *i. e.* accounts receivable and inventory financing.

(3) Today, on the removal of the collateral from the state the security interest continues to be perfected until the creditor receives knowledge of the removal and does not file in the new State. Under the Code, perfection ceases unless perfected in the new State, four months after the collateral is removed from the State wherein it was first perfected. This clarifies the position of a purchaser from the debtor—the rights of the secured party are limited in favor of the bona fide purchaser. A more realistic approach to the entire situation, however, would hold the secured party responsible for a new filing upon the default of the debtor—usually the only time there would be actual knowledge of the removal of the collateral.

(4) One of the greatest advantages to the secured party under the Code is the possibility of perfection without filing where there is a purchase money security transaction in consumer goods. As a practical matter subsequent purchasers and creditors rarely check the records before entering into a household goods transaction.[115] Great savings on filing fees will be effected by the elimination of the necessity of filing.

(5) The Code simplifies matters concerning the secured party's rights in fixtures; but it would seem that courts cannot escape making distinctions regardless of the Code for they are in the habit of trying to work out each individual problem on its merits. In its attempt for definitiveness in this area, the Code may be less elastic than the present situation.

(6) The restrictions on the secured party's freedom of action in dealing with the collateral after default have been abandoned. In place of many of the protective devices against fraud, there is only the safeguard that the secured party must observe a standard of "commercial reasonableness"[116]— a term of no

115. See C. P. A. § 665 (5) that exempts all necessary household furniture from levy.
116. U. C. C. § 9-504 (2).

known legal meaning.[117] Nevertheless, it is only fair to add that the aim of the default procedures of Article 9 is to promote disposition of collateral at the highest possible price, both for the benefit of the secured party and the debtor, by providing for sale through regular market channels rather than through public sale where collusive agreements are not uncommon.

It is felt that the advantages of the Secured Transactions Article of the Code outweigh its disadvantages. What is lost in new and revolutionary terminology, and in spelling out too minutely the rights and obligations of the parties, is gained in certainty, simplicity and uniformity.*

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ELIMINATION OF ACCRUED DIVIDENDS—COMPARISON OF NEW YORK AND DELAWARE LAW

Introduction

Corporations emerging from a general economic depression or the profitless first years of business are confronted with the problem of heavy arrearages on cumulative preferred shares. To the corporate management these arrearages constitute a millstone: they drag down the market price of the corporation's stock, thereby undermining any attempted venture to raise new capital by sale of stock; they depreciate the corporation's credit status; and lastly, the aggravate the impatience of the common shareholders. Is there any legal way the corporation can shake off this dead weight? The answer given by the courts of New York and of Delaware is the scope of this comment.[1]

117. But see U. C. C. § 9-507 (2): "The term commercially reasonable includes, among other things, obtaining approval of the secured party's place of disposition in a judicial proceeding or by a bona fide creditors' committee or representative of the creditors." The fact that a better price could have been obtained is not in itself sufficient to establish that the sale was not commercially reasonable.

*The New York State Law Revision Commission will undertake a study of the proposed Code before it is presented to the New York legislature. N. Y. Times, Feb. 9, 1953, p. 37, col. 5. It is contemplated that this study will be divided into three phases: a comparison with present law, public hearings, and a recommendation to the legislature. It is understood that this will not be completed for the 1954 session of the New York legislature.

1. The historical background of this problem began in 1819. In that year the U. S. Supreme Court, per Chief Justice Marshall, decided that a corporate charter was a contract, protected by the Constitution from impairment in its essential form. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819). Story, J., added that