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The Corporate Mortgage Under Article 9 of the Uniform Commercial Code and the New York Solution

New York's Uniform Commercial Code went into effect on September 27, 1964.[1] The decade of study and debate preceding its adoption was accompanied by the most extensive hearings and consequent recommendations undertaken in any state so far,[2] and, as in most states adopting the Code, New York's version includes many important variations from the 1958 and 1962 Official Texts. Among other deviations in Article 9,[3] New York has added to section 9-302(1) two provisions[4] which are intended to cope with the long-term financing problems of both existing and future corporate indentures.[5] These problems have been severely neglected by Article 9, which was designed primarily to solve the complexities of short-term lending.[6]

A corporate mortgage has been defined as "an indenture intended to convey property, real and personal, tangible and intangible, to a trustee for bondholders, as security for the bonds issued and to be issued thereunder" by a corporation.[7] This financing device,

1. N.Y. Sess. Laws 1962, ch. 553 (effective Sept. 27, 1964).

2. See the 1954-56 N.Y. LAW REVISION COMM'N REP.; Report of the Law Revision Commission to the Legislature Relating to the Uniform Commercial Code, N.Y. LEG. Doc. No. 65(A) (1956). See generally Braucher, *The Legislative History of the Uniform Commercial Code*, 2 AMERICAN BUSINESS L.J. 137, 143-48 (1964); Braucher, *The 1956 Revision of the Uniform Commercial Code*, 2 VILL. L. REV. 3 (1956); Panel Discussion, *Report of the New York Law Revision Commission—Areas of Agreement and Disagreement*, Bus. Law., Nov. 1956, p. 49.

3. The changes in New York's version of Article 9 are explained in Penney & Hogan, *Commercial Law*, 15 SYRACUSE L. REV. 273 (1963); Penney, *New York Revisits the Code—Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992 (1962); *cf.* Auerbach & Goldston, *Variations in the Ohio Enactment of the Uniform Commercial Code*, 14 W. RES. L. REV. 22 (1962); 5 VILL. L. REV. 465 (1960).

4. N.Y. UNIFORM COMMERCIAL CODE §§ 9-302(1)(h), (k). The changes in § 9-302(1) were responsive to the 1962 Report and Recommendation of the Permanent Editorial Board, S. INT. No. 2135, Pr. No. 4110; A. INT. No. 3531, Pr. No. 5829. The 1962 Official Text of the Uniform Commercial Code will hereinafter be cited U.C.C., and the New York version will hereinafter be cited N.Y. U.C.C.

5. See notes 148-57 *infra* and accompanying text.

6. See, *e.g.*, 1 COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE §§ 3.13, 13.01, at 1342 n.2 (1963). The late Professor Karl Llewellyn recognized these problems in the early stages of the drafting of the Code, Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROB. 687, 691 (1948), but his limited warning seems to have gone unheeded. Mr. Peter Coogan, a member of the Permanent Editorial Board's Subcommittee No. 3 to consider Article 9, has written many excellent articles in various law reviews during the past decade concerning Article 9 and its application. These articles, together with contributions from other prominent authors on secured transactions, have been collected and updated in two volumes, 1 & 2 COOGAN, HOGAN & VAGTS, *op. cit. supra* (1963-64). References to the articles included in the book will hereinafter be cited as 1 or 2 COOGAN.

7. MCCLELLAND & FISHER, CORPORATE MORTGAGE BOND ISSUES 11 (1937). New York defines a corporate mortgage as "a mortgage creating a lien upon real and personal

utilized by many large corporate organizations, has grown to be of paramount importance in the field of corporate financing,[8] and the lack of attention given by the Code to the long-term debts of corporations has raised serious questions of filing procedures. Discussion of the novel treatment accorded by New York to the problem of perfecting security interests in corporate mortgages will constitute the main part of this comment. That state's treatment deserves scrutiny both because of the magnitude of effort expended by New York on the study of the Code before its adoption and because of its traditional role as a commercial and financial leader. The New York statutory provisions relevant to the problems of perfecting the indenture will be reviewed and an attempt will be made to explain their practical effect on mortgages executed subsequent to the Code. The problems associated with the transition to the Code from the conglomerate pre-Code New York lien law for indentures existing at the effective date of the Code will be discussed, and methods concerning the alleviation of these difficulties suggested. However, before dealing with the various ramifications of the New York version, it may prove helpful to explore the broad background of the relationship generally between Article 9 and the corporate mortgage.

I. General Effect of the U.C.C. on Post-Code Corporate Indentures

A. *Filing*

The Code will increase the utility of the corporate mortgage as a financing tool for both the borrower and the secured party.[9] But filing requirements present several problems to the corporate prac-

property, exceuted by a corporation . . . ." N.Y. Lien Law § 190. It is clear that the use of the term and the applicability of the aforementioned statutes are not limited to railroad or utility corporations in New York, but apply to the mortgage of a manufacturing company as well. *In re* F. & D. Co., 256 Fed. 73 (2d Cir. 1919). The terms corporate mortgage, corporate indenture, combined mortgage, and package mortgage, will be used synonymously in this comment, and no reference will be made to an unsecured indenture.

8. For the historical development of the corporate indenture, see McClelland & Fisher, *op. cit. supra* note 7, at 1-5; Gilmore, *The Purchase Money Priority*, 76 Harv. L. Rev. 1333-69 (1963); Draper, *A Historical Introduction to the Corporate Mortgage*, 2 Rocky Mt. L. Rev. 71 (1930); Drinker, *Concerning Modern Corporate Mortgages*, 74 U. Pa. L. Rev. 360 (1926). The entire spectrum of the corporate indenture field has been concisely treated in Kennedy, Corporate Trust Administration (1961).

9. Article 9 is intended to replace prior law dealing with various forms of chattel security including mortgages, conditional sales, trust receipts, factors liens, etc. For general approaches and explanations of Article 9, see 1 Coogan §§ 1.01-4.10; Kripke & Felsenfeld, *Secured Transactions—A Practical Approach to Article 9 of the Uniform Commercial Code*, 17 Rutgers L. Rev. 168 (1962); Kripke, *The Modernization of Concepts Under Article 9 of the Uniform Commercial Code*, 15 Bus. Law. 645 (1960).

titioner working under the Official Text, which offers no special filing rules for this form of transaction.[10]

Since the indenture involves real estate as well as other property, the mortgagor must record it in the appropriate real property records.[11] For all personal property subject to the mortgage, filing is required in the central filing system of the state[12] and, in certain states, in the local records also if the mortgagor has a place of business in one county only.[13] Pre-Code filing requirements for corporate mortgages frequently appeared to be singularly stringent. Unless special filing provisions had been made for these indentures,[14] the security interest in personal property embodied in the indenture became subject to the local chattel mortgage filing statutes. Most such statutes required, in addition to filing wherever the property was located, periodic refiling.[15] The seeming stringency of these statutes was illusory, however, since the chattel mortgage refiling requirements were largely ignored by the mortgagor, whose inaction was acquiesced in by the trustee.[16] Several states alleviated the burden either by not requiring the refiling of chattel mortgages or by giving a special filing exemption to railroad and public utility corporations,[17]

10. The law in most states prior to the Code also lacked special provisions for the filing of corporate indentures. *E.g.*, MINN. STAT. § 511.01 (1947); MO. REV. STAT. § 443.460 (1952). *But cf.* DEL. CODE ANN. tit. 25, § 2317 (1953). See generally Comment, *Uniform Commercial Code Article 9 Filing Procedures for Railroad, Utility, and Other Corporate Debtors*, 62 MICH. L. REV. 865 (1964). It should be remembered that an important goal of Article 9 is to do away with the many artificial distinctions of pre-Code law relating to liens on personal property, many of which were based only on the form that the transaction had taken. Comment to U.C.C. § 9-101. While there is no disagreement with the basic soundness of such an ideal, this does not mean that the corporate indenture does not merit a special filing provision on the basis of form alone or intrinsic difference, such as New York has provided.

11. The Code exempts real estate transactions from its coverage specifically in U.C.C. § 9-104(j), and by implication in § 9-102(1), (2), except insofar as rights and duties pertaining to personal property or fixtures are involved, as in combined mortgages. Filing problems will be of concern to the corporate mortgagor as well as to the indenture trustee and bondholders because the agreement typically imposes on the mortgagor a duty to comply with filing requirements to avoid default.

12. U.C.C. § 9-401(1).

13. U.C.C. § 9-401(1)(c) (optional paragraph). The official text offers three alternatives for subsection (1). If the third is selected in the adopting state, the double filing for all personal property except fixtures is required if the debtor ". . . has a place of business in only one county of this state" or ". . . if the debtor has no place of business in this state, but resides in the state, also in the office of . . . the county in which he resides." *Ibid.* For a list of the options adopted by the several code states, together with other filing rules in those states, see 1 COOGAN § 6.13. Some states have forsaken central filing in favor of exclusively local filing, a very questionable alternative. *E.g.*, GA. CODE ANN. § 109A-9-401(1) (1962).

14. See the statutes cited note 10 *supra*.

15. *E.g.*, IOWA CODE § 556-12 (1950).

16. Letter from Frank H. Heiss of the New York Bar to Frank R. Kennedy, Nov. 18, 1963, on file in the offices of the *Michigan Law Review*. See Comment, *supra* note 10, at 869-70.

17. *E.g.*, IOWA CODE § 476.15 (1949); LA. REV. STAT. §§ 45:382-.384 (1951). The financing of public utilities, railroads, and other carriers and the filing of the security

to all corporations,[18] or to all mortgagors of real and personal property.[19] Among states adopting the Code, some of these exemptions have been retained,[20] and some are of doubtful status,[21] but many Code states have not given any type of exemption to corporate mortgages. In these latter jurisdictions, the burden placed on corporate mortgagors by the relatively short duration of the perfected security interest recognized by some chattel mortgage filing statutes will be partially lessened by the Code's section 9-403, requiring a continuation statement to be filed only once every five years. No additional periodic filing is required if the original post-Code indenture filing perfects a security interest in after-acquired property.[22] The filing requirements of the Code relative to the perfection of security interests in purely personal property included in the indenture generally impose no insuperable burden on the corporate mortgagor.

On the other hand, the Code's treatment of filing requirements for fixtures, items which will almost certainly be included in the indenture, has created considerable confusion.[23] Lack of clarity in the fixture section of the Code will ultimately necessitate multiple filing and recording in Code states not utilizing a special exemption for corporate indentures. While the provisions for fixture filing seem clear on the surface, certain deficiencies of draftsmanship have generated many problems for those charged with the responsibility of filing in the appropriate records. Section 9-401(1)(b) provides simply for the proper place to file to perfect a security interest: "when the collateral is goods which at the time the security interest

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interests on the assets thereof present many specialized problems. See generally Adkins & Billyou, *Developments in Commercial Aircraft Equipment Financing*, 13 BUS. LAW. 199 (1958); Adkins & Billyou, *Current Developments in Railroad Equipment Financing*, 12 BUS. LAW. 207 (1957); Comment, *supra* note 10; Comment, *Mobile Equipment Financing—Federal Perfection of Carrier Liens*, 67 YALE L.J. 1024 (1958).

18. DEL. CODE ANN. tit. 25, § 2317 (1953); HAWAII REV. LAWS §§ 196-2, 343-52 (Supp. 1963); N.Y. LIEN LAW § 231.

19. Ohio Acts, 1959, § 1319.03, at 9.

20. *E.g.*, N.Y. U.C.C. § 9-302(1)(k); OHIO REV. CODE ANN. § 1309.21(C)(2) (Page Supp. 1964). Also, some states have added provisions, usually to § 9-302(3)(b), which are meant to exempt various classes of mortgages from filing, but the clarity and effectiveness of these additions are still in considerable doubt. Comment, *supra* note 10, at 872 n.36.

21. *E.g.*, GA. CODE ANN. § 94-301(10) (1958); MONT. REV. CODE ANN. § 72-211 (Supp. 1963); OKLA. STAT. tit. 66, §§ 14, 15 (1961); PA. STAT. ANN. tit. 67, § 523 (1930). See Comment, *supra* note 10, at 872.

22. U.C.C. § 9-204(3).

23. See, *e.g.*, Gilmore, *supra* note 8; Hollander, *Imperfections in Perfection of Ohio Fixture Liens*, 14 W. RES. L. REV. 683 (1963); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964); Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 61 (1964); Shanker, *An Integrated Financing System for Purchase Money Collateral—A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788 (1964).

attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded."

Subsection 9-313(1) is the root of the fixture filing problem because it carries over much of a state's pre-Code law concerning whether and when various items become fixtures.[24] Subsequent subsections set out specific priority rules, but their effectiveness depends upon first ascertaining the category of property into which the item in question belongs. The difficulty in relying on pre-Code fixture law for classification guidance is that much prior fixture law is on the precipice of anarchy.[25] The New York fixture rule, accepted by the majority of states, has long recognized and defined the fixture category and has generally granted priority to the fixture-secured party over the holder of a prior real estate security interest.[26] In the states following New York, the transition to the Code will create less confusion regarding fixtures than in other states since the category of "fixtures" has an accepted meaning and applicability.[27] However, a minority of states have refused to recognize a specific class of property called "fixtures." Some have determined priority purportedly by reference to whether the installation has become part of realty or remained personal property,[28] but the actual determination of priority has been judged by the equities of the particular situation.[29] A strong influence on these minority states has been the nebulous "material injury to the freehold" test,

24. U.C.C. § 9-313(1): "The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. The Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate." See generally 2 COOGAN § 17.09; Kripke, *supra* note 23, at 47; Gilmore, *supra* note 8, at 1391-1400.

25. 2 COOGAN §§ 16.06, 17.09. For pre-Code articles vainly attempting to construct a coherent system from the morass, see Bingham, *Some Suggestions Concerning the Law of Fixtures*, 7 COLUM. L. REV. 1 (1907); Friedman, *The Scope of Mortgage Liens on Fixtures and Personal Property in New York*, 7 FORDHAM L. REV. 331 (1938); Kratovil, *Fixtures and the Real Estate Mortgagee*, 97 U. PA. L. REV. 180 (1948); Niles, *The Rationale of the Law of Fixtures*, 11 N.Y.U.L. REV. 560 (1934).

26. *E.g.*, Madfes v. Beverly Dev. Corp., 251 N.Y. 12, 166 N.E. 787 (1929); Tifft v. Horton, 53 N.Y. 377 (1873). *But cf.* Roche v. Thurber, 246 App. Div. 850, 285 N.Y. Supp. 82 (1936), *aff'd mem.*, 272 N.Y. 582, 4 N.E.2d 814 (1936). See also 2 COOGAN § 17.03, at 1789 n.13; Gilmore, *supra* note 8, at 1365 n.75. There is an exception to this general rule in the case of construction mortgages. See *e.g.*, Grupp v. Margolis, 153 Cal. App. 2d 500, 504, 314 P.2d 820, 823 (Dist. Ct. App. 1957); Gilmore, *supra* at 1367-69. It would appear that the U.C.C. draftsmen contemplated only the majority rule when drafting § 9-313(1). Gilmore, *supra* at 1395.

27. See *id.* at 1394.

28. *E.g.*, Clary v. Owen, 81 Mass. (15 Gray) 522 (1860). See 2 COOGAN § 17.03; Gilmore *supra* note 8, at 1355-58. Some of the uncertainty in Massachusetts was dispelled by Mass. Acts & Resolves 1943, ch. 52 § 1 (repealed by the U.C.C.). Professor Gilmore has concluded that the difference between the majority and minority views was more of form than substance. Gilmore, *supra* at 1357.

29. For an illustration, see Carpenter v. Walker, 140 Mass. 416, 5 N.E. 160 (1886).

which generally classifies property in a priority dispute by whether its removal would substantially lessen the value of the remaining real estate. Some jurisdictions have conceived other unfortunate doctrines.[30] Within a single jurisdiction, the same installation occasionally has been held to be in several different property categories,[31] and buildings have even been classified as personal property.[32]

The basic remedy for default provided by the Code is removability of fixtures;[33] many states, however, have previously termed a removable fixture "a contradiction in words,"[34] thus defeating the Code's remedial cornerstone because of the section 9-313(1) loophole. The priority rules provided in subsections 9-313(2), (3), and (4) are weighted on the side of the fixture financier, but in light of the pre-Code ideological morass concerning whether and when an item is a fixture, it is uncertain to what extent this priority will be effective.[35] It will often be difficult for the lawyer in a Code jurisdiction to be able to ascertain, with any appreciable degree of certainty, into which category of property a given item may later be held to have been included.[36] Therefore, in order to be safe where the possibility of a classification dispute exists, it is necessary for the practitioner to file both in the fixture side of the real estate records office and in the personal property filing system.[37] If many transactions involving fixtures are expected, multiple filing may become inconvenient, but inconvenience is preferable to a later invalidation of the security interest.[38] This filing burden will be encountered only infrequently when the transaction is a corporate mortgage, how-

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30. For example, the infamous Pennsylvania "industrial plant" doctrine and the New Jersey "institutional" doctrine. See Gilmore, *supra* note 8, at 1360; Leary, *Financing New Machinery for Mortgaged Pennsylvania Industrial Plants*, 4 VILL. L. REV. 498 (1959); Robinson, McGough & Scheinholtz, *The Effect of the Uniform Commercial Code on the Pennsylvania Industrial Plant Doctrine*, 16 U. PITT. L. REV. 89 (1955). Gilmore maintains that the Code has abolished these aberrations. Gilmore, *supra* at 1397-98. *But see* 2 COOGAN § 16.06(1), at 1712 n.68; Kripke, *supra* note 23, at 63 n.65.

31. *Compare* Hunt v. Bay State Iron Co., 97 Mass. 279 (1867), *with* Lorain Steel Co. v. Norfolk & B. St. Ry., 187 Mass. 500, 73 N.E. 646 (1905). *Compare* Farrar v. Stackpole, 6 Me. 154 (1829), *with* Carpenter v. Walker, 140 Mass. 416, 5 N.E. 160 (1886). See also 2 COOGAN § 17.09.

32. Thompson Yards, Inc. v. Bunde, 50 N.D. 408, 196 N.W. 312 (1923); Royal Store Fixture Co. v. Patten, 183 Pa. Super. 249, 130 A.2d 271 (1957).

33. U.C.C. § 9-313(5).

34. See Teaff v. Hewitt, 1 Ohio St. 511 (1853). See 2 COOGAN § 16.06(1).

35. See Gilmore, *supra* note 8, at 1395.

36. *Id.* at 1392-93.

37. See generally 2 COOGAN §§ 16.04-.05, 16.09, 17.07; Kripke, *supra* note 23, at 61. Suggestions for the improvement of the Code's treatment are found in 2 COOGAN §§ 17.08-.09; and the authorities cited in note 23 *supra*. Massachusetts has provided that present or future fixtures included in a mortgage of real property need not be filed in the fixture records, but that a real estate recording will perfect the security interest therein. MASS. ANN. LAWS ch. 106, § 9-409(3) (1963).

38. For an analysis of the treatment accorded and to be accorded fixture interests in bankruptcy, see 2 COOGAN § 17.06.

ever, since the multiple filing and recording need be made only at the time the original indenture is executed, at whatever interval supplemental mortgages[39] are to be executed (if at all) and at the time continuation statements[40] are due.

B. *Security in Fixed Assets*

Security interests in equipment and machinery have long been recognized as valid in the corporate indenture, both as to items originally included in the mortgage and after-acquired property of this nature.[41] Under the U.C.C., a timely filing of the indenture will subordinate all subsequent liens on these items.[42] However, security interests in after-acquired equipment and machinery, although generally safe, can be subjected to a purchase-money security interest in that equipment.[43] The indenture trustee may not learn of subsequent purchase-money liens,[44] but the problem presented is relatively small because it is highly unlikely that the total amount of purchase-money security in equipment outstanding at any given time will be appreciably great. The turnover of these larger items is usually slow.[45]

C. *Security in Current Assets*

The Code's greatest potential for change lies in the area of long-term security interests in current assets. Pre-Code law was generally harsh on the bondholders under an indenture which included an after-acquired property clause[46] that was intended to apply to inventory, accounts receivable, or other intangibles, *i.e.*, a "floating lien."[47] Draftsmen long ago gave up the attempt to include con-

39. See notes 136-47 *infra* and accompanying text.

40. U.C.C. § 9-403. See notes 125-35 *infra* and accompanying text.

41. See Gilmore, *supra* note 8, at 1349-50, 1354.

42. U.C.C. § 9-312(5) (the "first-to-file" rule).

43. U.C.C. § 9-312(4). See generally Gilmore, *supra* note 8, at 1385-88. A closely-related area is the purchase-money priority in fixtures. See *id.* at 1388-1400.

44. 1 COOGAN § 13.06(4), at 1379 n.104.

45. *Ibid.*

46. For pre-Code treatments of the after-acquired property clause in the corporate indenture, see generally Blair, *The Allocation of After-Acquired Mortgaged Property Among Rival Claimants*, 40 HARV. L. REV. 222 (1926); Cohen & Gerber, *The After-Acquired Property Clause*, 87 U. PA. L. REV. 635 (1939); Foley & Pogue, *After-Acquired Property Under Conflicting Corporate Mortgage Indentures*, 13 MINN. L. REV. 81 (1929); Israels & Kramer, *The Significance of the Income Clause in a Corporate Mortgage*, 30 COLUM. L. REV. 488 (1930).

47. See, *e.g.*, Benedict v. Ratner, 268 U.S. 353 (1925); Lee v. State Bank & Trust Co., 38 F.2d 45 (2d Cir. 1930); Brown v. Leo, 12 F.2d 350 (2d Cir. 1926); Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907); COOGAN §§ 3.03(2), 3.07, 3.08; Gilmore, *supra* note 8, at 1334-35. *Compare* Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894), *with* Kribbs v. Alford, 120 N.Y. 519, 24 N.E. 811 (1890). See generally Burman, *Practical Aspects of Inventory and Receivables Financing*, 13 LAW & CONTEMP. PROB. 555 (1948); Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588 (1949). For a comparison of the English and American floating liens, see 1 COOGAN § 13.08. Some of the English legal literature on the subject has been compiled in Gilmore, *supra* note 8, at 1334 n.2.

tinuing liens on such assets in the corporate mortgage,[48] for any of a number of factors could invalidate all or part of the indenture. The most notable of these factors was the "dominion rule" of *Benedict v. Ratner*.[49] In that case, Mr. Justice Brandeis, purporting to apply New York law,[50] held that an attempted assignment of accounts receivable in an indenture was void as to other creditors where the secured party had not kept sufficient control over the collateral to demonstrate his interest therein to other creditors.[51] The typical indenture trustee has neither the power nor the resources to maintain the policing system called for by *Benedict*.[52] Even if such a system were feasible under pre-Code law, the security in the assets would provide an uncertain priority at best. The buyer of the merchandise inventory in the ordinary course of business would defeat the prior mortgage. Other current assets or the proceeds accruing from their sale would likely become "commingled" and render the collateral "unidentifiable."[53] Further, an established judicial doctrine has frequently subordinated the indenture trustee's claim against current assets, especially income, to the claims of current creditors,[54] and it can be said there has been a long-standing judicial distaste for the "floating lien."

The New York rule was that a clause purporting to include any after-acquired property under the mortgage lien was invalid as to other creditors unless some further step had been taken to perfect it.[55] The practice in New York then became to include the dubious

48. See 1 COOGAN § 13.06(3); Gilmore, *supra* note 8, at 1349.

49. 268 U.S. 353 (1925).

50. However, the only New York case on point at that time, Stackhouse v. Holden, 66 App. Div. 423, 427, 73 N.Y. Supp. 203, 205 (1901) (*mem.*), was directly *contra*.

51. Benedict v. Ratner, 268 U.S. 353 (1925). *Cf.* Zinman, *Dominion and the Factor's Lien—Does Section 45 of the New York Personal Property Law Abrogate the "Dominion Rule"?*, 30 FORDHAM L. REV. 59, 63 (1961). A recent application of the *Benedict* doctrine is found in Matter of Cut Rate Furniture Co., 163 F. Supp. 360 (N.D.N.Y. 1958). For a discussion of the relation between the dominion rule and N.Y. PERS. PROP. LAW § 45, see Zinman, *supra*. The difference between accounts receivable financing and factoring is pointed out in Moore, *Factoring—A Unique and Important Form of Financing and Service*, 14 BUS. LAW. 703, 724-25 (1959).

52. See 1 COOGAN § 13.06(3).

53. See *id.* § 13.06(4).

54. See *id.* § 13.06(3); Israels & Kramer, *supra* note 46. Another potential problem for the indenture draftsman is the federal tax lien. See 1 COOGAN § 13.07(4): ". . . the indenture draftsman must at least be aware that the danger of the tax collector making a successful attack on a security transaction may be somewhat increased when that transaction involves a 'floating lien' on current assets." See also United States v. R. F. Ball Constr. Co., 355 U.S. 587 (1958); Kennedy, *The Relative Priority of the Federal Government—The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1954); MacLachlan, *Improving the Law of Federal Liens and Priorities*, 1 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 73 (1959); Plumb, *Federal Tax Collection and Lien Problems*, 13 TAX L. REV. 247 (1958).

55. Zartman v. First Nat'l Bank, 189 N.Y. 267, 82 N.E. 127 (1907); Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894); MCCLELLAND & FISHER, *op. cit. supra* note 7, at 284-85, 336-38; Stone, *The "Equitable Mortgage" in New York*, 20 COLUM. L. REV. 519 (1920); Zinman, *supra* note 51, at 67, n.50. For a public utility

clause in the indenture and to execute subsequent supplemental mortgages to complete the perfection. Noncompliance with this procedure resulted in the partial[56] or total[57] invalidation of the mortgage in bankruptcy, even as to assets on which the lien had been perfected.[58] Most other jurisdictions, however, have allowed the indenture trustee considerably more leeway in including after-acquired property under the mortgage lien.[59]

The draftsmen of the Code have attempted to alter radically the status of the floating lien.[60] *Benedict's* dominion rule is expressly abrogated.[61] The Code deals with the problem of the "gap creditor"[62] by generally trying to eliminate the instances which would allow the gap to be created.[63] Section 9-108 purports to circumvent a bankruptcy preference problem in respect to after-acquired collateral. That section states that, under certain conditions, sub-

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corporation the rule was otherwise. Pintsch Compressing Co. v. Buffalo Gas Co., 280 Fed. 830 (2d Cir. 1922); *In re* Adamant Plaster Co., 137 Fed. 251 (N.D.N.Y. 1905); McClelland & Fisher, *supra* at 337. See generally Fagan, *Sales and Security Law*, 26 St. John's L. Rev. 72, 81-95 (1951); Hart, *Commercial Law*, 35 N.Y.U.L. Rev. 1477 (1960).

56. *E.g.*, Zartman v. First Nat'l Bank, *supra* note 55.

57. *E.g.*, Benedict v. Ratner, 268 U.S. 353 (1925); Brown v. Leo, 12 F.2d 350 (2d Cir. 1926); Arbury v. Kocher, 18 F.2d 588 (W.D.N.Y. 1927).

58. *Ibid.*

59. McClelland & Fisher, Corporate Mortgage Bond Issues 340-42 (1937). For an old judicial criticism of the New York rule, see Lister v. Simpson, 38 N.J. Eq. 438, 441 (Ch. 1884), *aff'd*, 39 N.J. Eq. 595 (Ct. Err. & App. 1885).

60. See generally 1 Coogan §§ 7.01-.12, 11.01-.09, 13.06; Kripke, *Current Assets Financing as a Source of Long-Term Capital*, 36 Minn. L. Rev. 506 (1952); Sutkowski, *Inventory Financing Under the U.C.C., the Secured Creditor's Dream?*, 68 Com. L.J. 95 (1963). For analyses and discussions on the treatment Article 9 has been and will be accorded in bankruptcy proceedings, see generally Friedman, *The Bankruptcy Preference Challenge to After-Acquired Property Clauses Under the Code*, 108 U. Pa. L. Rev. 194 (1959); Kennedy, *The Impact of the Uniform Commercial Code on Insolvency—Article 9*, 67 Com. L.J. 113 (1962); Levy, *Effect of The Uniform Commercial Code Upon Bankruptcy Law and Procedure*, 60 Com. L.J. 9 (1955); Raphael, *The Status of the Unsecured Creditor in the Modern Law of Secured Transactions*, 2 Boston College Industrial & Commercial L. Rev. 303 (1961); Schwartz, *The Effect of the Uniform Commercial Code on Secured Financing Transactions and Bankruptcy*, 38 Ref. J. 124 (1964); Note, *Some Possible Areas of Conflict Between the Illinois Uniform Commercial Code and the Bankruptcy Act*, 1962 U. Ill. L.F. 418.

61. U.C.C. § 9-205 and comment. The extension of the *Benedict* doctrine in Lee v. State Bank & Trust Co., 54 F.2d 518 (2d Cir. 1931), had previously been nullified in New York by the 1943 amendment to § 45 of its personal property law. See Zinman, *supra* note 51, at 84. It has been argued that the original passage of § 45 in 1911 nullified the dominion rule, Stone, *supra* note 55, at 532, but the opposite conclusion is more persuasive. See Zinman, *supra* at 92.

62. A gap creditor is one who extends credit during the period between execution and perfection of the security interest. In New York, the protection of general creditors was extended by Karst v. Gane, 136 N.Y. 316, 32 N.E. 1073 (1893), which held that a chattel mortgage filing after the expiration of a reasonable time gave no protection against creditors existing at the time of execution. The adoption of the Code in New York abolishes this rule. See 1 Coogan § 3.03.

63. U.C.C. §§ 9-201, -301. See Hawkland, *The Impact of the Commercial Code on the Doctrine of Moore v. Bay*, 67 Com. L.J. 359 (1962).

sequently acquired collateral shall be deemed to be taken for new value and not for an antecedent debt,[64] but to what extent this attempt will be effectuated by the courts is uncertain.[65] The problems of "commingling" and "unidentifiable proceeds" have been provided for,[66] albeit with uncertain results.[67] To the extent the relevant Code provisions do not conflict with federal bankruptcy statutes or policy, it will be possible for indenture draftsmen to create a valid continuing lien on all of the debtor's assets without requiring control over them to be exercised by the secured party.

However, it is highly unlikely that long-term financing with current assets will be widely utilized. Though many of the problems have apparently been solved, considerations of the quality of the security interests created will tend to keep financiers within the traditional pattern of extended lending. For example, the security obtained by an indenture on inventory will not be equal either to that achieved by the lender who exercises control over the inventory[68] or that provided by assets with more permanent attributes.[69] Where little control over the debtor is exercised, there is the risk that he will have dealt with his inventory and receivables in such a manner that these assets will not be in existence when bankruptcy occurs.[70] The priority of the buyer in due course[71] and the purchase-money security interest[72] are continued under the U.C.C., and, even in view of the Code's attempt to afford more protection to the secured party in bankruptcy, the extent to which the draftsmen have succeeded is uncertain.[73] These factors should tend to induce hesitance on the part of the lender desiring to simplify his usual methods of financing current assets by executing a long-term mortgage on the current assets with a broad after-acquired property clause.[74] Even if he decides such a system is feasible, however, the added problem of the debtor's liquidity may cause many financiers to forego the

64. U.C.C. § 9-108. Acquisition of collateral under a contract of purchase pursuant to the security agreement within a reasonable time after new value is given is also characterized by this section as not for an antecedent debt, but this saving provision is not likely to be important in connection with corporate mortgages. For a discussion as to whether an indenture trustee will prevail over the bankruptcy trustee as to inventory acquired within four months of bankruptcy, *compare* 1 COOGAN § 13.07, *with id.* § 10.03.

65. See *id.* § 10.03(7)(c).

66. U.C.C. §§ 9-315, -306 respectively.

67. See 1 COOGAN § 13.06(4).

68. *Ibid.* See also Moore, *supra* note 51; Silverman, *Factoring as a Financing Device*, 27 HARV. BUS. REV. 594 (1949); Zinman, *supra* note 51.

69. See 1 COOGAN § 13.06(4).

70. *Ibid.* But one claiming a purchase-money priority in the inventory will be required to give notice to the indenture trustee. U.C.C. § 9-312(3).

71. U.C.C. § 9-307.

72. U.C.C. § 9-312(3). See 1 COOGAN §§ 11.01-.09; Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1377-85 (1963).

73. See the authorities cited note 60 *supra*.

74. See 1 COOGAN § 13.06(4); Gilmore, *supra* note 72, at 1336.

scheme. If the borrower has encumbered all of his assets, he will have no collateral on which to finance a short-term loan to ease him over a period when he needs ready cash to avoid impending trouble. This resulting loss in liquidity, unless carefully provided for in an emergency future advance clause from the indenture trustee,[75] may increase the debtor's chances of winding up in bankruptcy. The diminution or destruction of the value of the business entity as a going concern caused by the bankruptcy proceedings would tend to inflict an unnecessarily large loss on all creditors.[76] Many lenders have already recognized that imposing this economic straitjacket on the debtor by greedily encumbering all available assets will be detrimental to themselves as well as the borrower and have, for the most part, continued to use the other operative financing methods which were utilized prior to the Code.[77]

II. The New York Treatment of Corporate Indenture Filing

Prior to the Code, the filing of corporate mortgages in New York was governed by section 231 of the lien law.[78] That section provided that a mortgage of real and personal property, executed by a corporation, need be recorded only in the real estate records of the counties in which the mortgaged real estate was located.[79] Originally limited to railroad and utility mortgagors,[80] the liberal filing requirements were extended to all domestic corporations,[81] and later, in 1960, to foreign companies as well.[82] The pressure for this liberalization of filing requirements was generated by the burden of the chattel mortgage refiling section,[83] which originally required a yearly refiling and then, by amendment, a filing every three years.[84] Section 231 reduced substantially this repetitive and time-consuming

75. This type of clause would be contrary to the usual practice. See 1 Coogan § 13.06(3), at 1375 n.92.

76. The Code has provided a set of alternative foreclosure remedies for the holder of a mortgage on both real and personal property, U.C.C. § 9-501(4). See 1 Coogan § 8.07(5). But it is highly unlikely that these remedies will be utilized, as foreclosure is economically impractical for corporate indentures, the questions relating to which will ordinarily be settled in bankruptcy proceedings. Rather than a significant interest in the corporate assets, the bondholder actually receives a strong bargaining position when trouble occurs. *Id.* § 13.10.

77. See Malcolm & Funk, *Pennsylvania and Massachusetts Experience Under the Uniform Commercial Code*, 16 Bus. Law. 525, 539-41 (1961).

78. N.Y. Lien Law § 231.

79. See generally Kripke, *Fixtures Under the Uniform Commercial Code*, 64 Colum. L. Rev. 44 (1964).

80. N.Y. Laws 1868, ch. 779.

81. N.Y. Laws 1895, ch. 529. See note 10 *supra*.

82. N.Y. Laws 1960, ch. 1004, § 12; N.Y. Laws 1960, ch. 1004, § 6. See Kripke, *supra* note 79, at 77.

83. N.Y. Laws 1915, ch. 608, § 1; Kripke, *supra* note 79, at 76.

84. N.Y. Laws 1943, ch. 451, § 1.

task for counsel and greatly lessened the indenture trustee's fears of subsequent liability for failure to file.[85] While comforting to the trustee and to counsel, the effect of this section was to create an apparently insuperable search problem for a lender seeking to ascertain prior liens on a chattel ostensibly owned free and clear by the corporation,[86] for the lien could often have been filed in any one of a number of county real estate records. This burden was largely theoretical, however, because lenders to corporate borrowers are a special class of financiers likely to be aware of and to avoid pitfalls of overextension of credit.[87] Immediately prior to the adoption of the Code in New York, the primary benefit conferred by section 231 on corporate mortgagors was the exemption from chattel mortgage refiling requirements.

When the U.C.C. was adopted in New York, section 231 was renumbered section 190,[88] amended,[89] and specifically excepted from the general repeal of article ten of the lien law by the U.C.C.[90] as part of a comprehensive statutory scheme to regulate the filing of long-term corporate indentures. Section 190-1 of the lien law now provides that all mortgages of real and personal property executed by a corporation subsequent to the adoption of the Code will be recorded as before; and any security interests in personal property or fixtures contained therein will further be required to be perfected by the single additional filing of a financing statement in the department of state,[91] which is the central filing office for all security interests in personal property. Section 190-2, which seems to apply to mortgages executed both prior and subsequent to the effective date of the Code,[92] requires that supplemental mortgages executed pursuant to the original mortgage must also comply with the dual filing and recording procedure set out for future mortgages in the first subsection. In the Code itself, New York has added two provisions to section 9-302(1) which are meant to control the filing of both existing and future combined mortgages. In the case of indentures recorded prior to the date the Code took effect, section 9-302(1)(h) stipulates that no financing statement need be filed, but that such mortgage shall continue to be governed by 231, the pre-

85. These fears stemmed from two old cases, Miles v. Vivian, 79 Fed. 848 (2d Cir. 1897); Green v. Title Guar. & Trust Co., 223 App. Div. 12, 227 N.Y. Supp. 252, *aff'd mem.*, 248 N.Y. 627, 162 N.E. 552 (1928). See generally Kripke, *supra* note 79, at 76; Posner, *The Trustee and the Trust Indenture*, 46 YALE L.J. 737 (1937).

86. Kripke, *supra* note 79, at 76.

87. 2 COOGAN § 16.05. These lenders would have realized ordinarily that it would be necessary to check the real property records in the county where the debtor owned real estate or to ask the debtor what prior debt he had incurred and where to find it.

88. N.Y. Laws 1963, ch. 1003, § 45 (McKinney 1963).

89. *Ibid.*

90. N.Y. U.C.C. § 10-105.

91. N.Y. LIEN LAW § 190-1.

92. See text accompanying notes 136-39 *infra*.

Code section of the lien law. Section 9-302(1)(k) looks to future combined mortgages and provides that a financing statement for the personal property and fixtures covered shall be filed in the Department of State only and will be governed by post-Code section 190. In the Code repealer provisions, New York has attempted to bring the outstanding mortgages into the dual filing system within one year of the effective date of the Code, sections 9-302(1)(h) and 231 notwithstanding.[93] Other Code provisions of interest to parties to a corporate mortgage are 9-403(2) and 9-403(3), under which any filed security interest will lapse on its stated maturity date or at the end of five years, whichever is earlier, unless a continuation statement is filed within six months before or sixty days after the maturity date.

Filing continuation statements will tend to be slightly more burdensome than under section 231, which demanded no further recording or filing.[94] One writer has already proposed an addition to the Code to alleviate this relatively minor problem.[95] The net intended effect of these provisions is to retain the convenience of ease of filing and refiling long-term corporate indentures, but to impose some additional requirements, and to incorporate these security interests into the central filing system for security interests in personal property. In summary, the differences in filing between the pre-Code law and the Code in New York are essentially twofold: First, all original and supplemental corporate mortgages will now have to be recorded in the applicable real estate records and filed in the central filing system, whereas previously only the former was required; second, a continuation statement will henceforth have to be filed every five years during the duration of the indenture, whereas pre-Code law required no further filing or recording except for supplementals.

Although the author of the New York Practice Commentary to

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93. See notes 124-35 *infra* and accompanying text.

94. Although not explicitly stated in the statutes, the assumption has uniformly been made that § 9-403 applies to indentures on file in the Department of State. 1 COOGAN § 13.04(5); Kripke, *supra* note 79, at 78 n.112. Section 9-403(2) refers to "a filed financing statement," which would surely seem to include a filed corporate indenture. Also, § 10-102(2)(b) explicitly requires continuation statements to be filed to extend the perfection of existing indentures, but the effectiveness of this provision is doubtful. See notes 124-33 *infra* and accompanying text. But since the indentures will be recorded in accordance with N.Y. LIEN LAW § 190 and the only filing required is in the department of state office, it may conceivably be argued that this evidences a desire to liberalize the filing requirements for the corporate indenture and, as § 190 nowhere states that continuation statements shall be demanded, the courts should accommodate this desire. This argument is refuted, however, both by the language of § 9-302(1)(k), which in terms requires the filing of a financing statement in this case and by § 190-1, which requires "filing in accordance with part four of article nine."

95. Kripke, *supra* note 79, at 78 n.112.

Article 9[96] suggests that the main reason for the promulgation of this system, based primarily on the retention of the liberal requirements embodied in section 190 of the lien law, is to accommodate the desire of counsel to avoid the problems associated with fixture filing,[97] a better procedure would have been to resurrect a central filing system for railroads and utilities, without relieving "run-of-the-mill" corporations from the problems faced by other borrowers and lenders generally.[98] Fixture filing will present many difficulties to the practitioner dealing with corporate indentures in other Code states, as has been discussed above.[99] The problems would have been considerably less in New York had no separate filing provisions for corporate indentures been made, because there the law of fixtures, for all its perplexities and the relative inconveniences it engenders,[100] is reasonably settled on a fairly rational basis.[101] Although avoidance of fixture filing problems was doubtless a strong motivating factor in retaining the essence of the statute, it would also appear[102] that the New York legislators were conscientiously trying to solve the broader question posed by the requirements of long-term finance ignored by the Code. Until it is generally recognized, as it has been in New York, that the corporate mortgage is

96. Mr. Homer Kripke, also a member of the Permanent Editorial Board's Subcommittee No. 3 To Consider Article 9.

97. Kripke, *supra* note 79, at 77.

98. *Ibid. Cf.* the Transmitting Utility Place of Filing Act, recently approved by the American Bar Association. Section 2 (a) states: "If filing is required under the Uniform Commercial Code, the proper place to file in order to perfect a security interest in personal property or fixtures of a transmitting utility is in the office of (the Secretary of State)." *Cf.* also the addition to U.C.C. § 9-302 prepared by the Association of American Railroads:

> "(5) Except as provided in this subsection, the filing provisions of this Article do not apply to a security interest in property of any description or any interest therein created by a mortgage made by a corporation which is a railroad or a public utility . . . but the mortgage shall be recorded and filed in accordance with the following requirements:
>
> "(a) The mortgage shall be recorded in (the appropriate office of each county in this state) in which any real estate described in the mortgage is situated; and . . .
>
> "(b) the mortgage shall be filed in the office of the (Secretary of State or appropriate state official) if the mortgage includes any rolling stock, movable equipment or machinery or any other personal property. . . .
>
> "To the extent that any mortgage heretofore executed has been filed or recorded as provided herein, it need not be re-filed or re-recorded thereunder, and nothing hereunder shall be deemed to impair the lien or effect of any mortgage heretofore executed which has been recorded or filed in accordance with the laws of this state applicable thereto prior to the effective date of this Act."

See also Billyou, *A Proposal for a Federal Railroad Mortgage Recording Statute,* 26 ICC PRACTITIONERS J. 424 (1959).

99. See notes 23-40 *supra* and accompanying text.

100. Even in New York, borderline cases would require the multiple filing and recording discussed in the text accompanying notes 36-40 *supra.*

101. See the cases and authorities cited note 26 *supra.*

102. No information as to the relevant legislative debates and hearings has been discovered. *Cf.* Breuer, *Legislative Intent and Extrinsic Aids to Statutory Interpretation in New York,* 51 L. LIBRARY J. 2 (1958).

fundamentally different from the conditional sale and other short-term security devices and should be treated differently, the Code's goal of conceptual unity for all transactions creating security interests cannot be effectively achieved. The Code draftsmen, while eliminating many of the difficulties of the pre-Code law, have, in this instance, refused to acknowledge important conceptual and practical differences.

The statutory scheme that has been enacted in New York in an attempt to fill the void left by the Code creates two partial exceptions to the Code's goal of one uniform filing system for all security interests in personal property. The debtor with a place of business in one county only will not be required to file locally if his assets are encumbered by a combined mortgage[103] although if the mortgage covered only personal property, such a debtor would have to file in the county where he was doing business.[104] This exception dims considerably in importance when it is recalled that the new system requires central filing.[105] It will not be an oppressive burden on the searcher looking for a corporate debt to utilize the central records at the state capital instead of relying exclusively on the local records.[106] Further, the requirement of local filing for debtors having a place of business in only one county is of dubious value in the first instance,[107] although it has many supporters.[108] The other filing exception in New York is the absence of any requirement of a record of secured corporate debt in the local fixture records. This exception is also relatively unimportant, not only for the reason previously noted, but also because the indenture itself will be located in the same office in which fixture filings are to be made.[109]

Mr. Coogan has suggested an Ohio recording and filing system, now repealed, as a possibly desirable alternative to the present New York system.[110] The Ohio statute was unique in that it applied to any combined mortgage of both real and personal property regard-

103. N.Y. U.C.C. § 9-302(1)(k); N.Y. LIEN LAW § 190-1.

104. N.Y. U.C.C. § 9-401(1)(c).

105. See the statutes cited note 103 *supra.*

106. Searching services will provide a rapid and efficient way of discovering any security for earlier debts if the practitioner finds it inconvenient to search the central records personally. Even if the local filing exception for corporate mortgagors did not exist, complete reliance on local records is fraught with traps for the unwary. See, *e.g.*, In the Matter of J & J Baking Co., 18 App. Div. 2d 691, 236 N.Y.S.2d 17 (1962) (pre-Code local filing).

107. See 1 COOGAN § 6.11(3).

108. See, *e.g.*, *Panel Discussion*, 19 BUS. LAW. 5, 27 (1963) (remarks of Mr. Coogan).

109. Fixture filing is to be done "in the office where a mortgage on the real estate . . . would be . . . recorded," N.Y. U.C.C. § 9-401(1)(b), and N.Y. LIEN LAW § 190-1 requires that all corporate indentures be recorded "in each county where such real property is located." It would be a small burden for the fixture searcher to check both sets of records in the same office.

110. 1 COOGAN § 3.13.

less of the nature or status of the mortgagor.[111] Mr. Coogan acknowledges, however, that the entire area of long-term finance under the Code requires restudy.[112] It would appear that extending the benefits of the liberal filing requirements of section 190 to any mortgagor of both real and personal property, whether or not incorporated, would be somewhat more democratic, but also unnecessary, inasmuch as the combined mortgage on both kinds of property is utilized principally by large corporations with good credit ratings. Mr. Coogan's suggestion seems to run counter to the prevalent sentiment that favors a statute considerably more restrictive in scope than that adopted in New York.[113] Although the system promulgated by New York is a departure from the Official Text of the Code, and to that extent involves a disregard of the Code's goal of uniformity among all states,[114] these provisions attempt to solve a problem ignored by the Code. They should be considered an appropriate addition to the Official Text, rather than a radical departure therefrom.

Aside from the question of where to file, another problem incident to filing post-Code corporate mortgages in New York is that of ascertaining *what* must be filed in order to perfect the security interest. The Code now permits "notice filing" for most secured transactions, whereas prior New York law allowed this type of filing only for transactions in inventory.[115] The security agreement,[116] the indenture itself, typically runs to many pages, but only a brief "financing statement" need be filed, the requisites for which are enumerated in section 9-402.[117] While the generality of description of the collateral allowed in that section is highly beneficial to the short-term lender financing goods with a rapid turnover,[118] it does not serve the corporate mortgagor and its lender so well. If a very broad description as permitted by section 9-402 is utilized in perfecting a corporate mortgage, a subsequent potential lender on

111. Ohio Acts, 1959, § 1319.03, at 9.

112. 1 COOGAN § 3.13.

113. See note 98 *supra*. On the problem of the filing of corporate indentures, four positions have been taken: (1) The Official Text of the Code admits of no exception for corporate debt; (2) Many feel that an exception should be made for only the most far-flung of the corporate mortgagors, *i.e.*, the railroads and public utilities; (3) New York excepts all corporate mortgages; (4) Ohio previously excepted *any* mortgage which included both real and personal property. Michigan has chosen the second alternative. Unless the Permanent Editorial Board or a legislature can effectively classify corporations by size and distribution of its property, a seemingly hopeless task, the New York solution seems the most desirable of the four alternatives. Geographical distribution of property is certainly not restricted to railroads and public utilities. The aforementioned fixture filing questions will be posed for all large debtors.

114. U.C.C. § 1-102(2)(c).

115. 1 COOGAN § 3.06(1). See generally *id.* §§ 6.01-.15.

116. N.Y. U.C.C. § 9-105(1)(h) broadly defines a security agreement as "an agreement which creates or provides for a security interest."

117. N.Y. U.C.C. § 9-402.

118. 1 COOGAN § 13.04(1).

collateral not intended to be covered in the earlier indenture may shy away because of the possibility that the collateral may be later found to have been included.[119] The subsequent lender will have no legal means of obtaining further information about the existing corporate mortgage[120] and, even if such information is given to him, he may still refuse to take the chance.[121] Therefore, the indenture draftsman should be careful not to over- or underdescribe the collateral in the indenture;[122] and the entire indenture, or at least the granting clauses, should be filed as the financing statement.[123] In sum, the filing scheme for corporate indentures enacted by New York, while deficient in several transitional particulars discussed below, is a constructive response to a need pertaining to an important category of secured transactions largely ignored by the Code.

III. Problems of Transition in New York

To perfect the security interest in personal property and fixtures, corporate mortgages recorded in New York prior to the effective date of the Code had to be recorded in accordance with section 231 of the lien law. That section required merely that the mortgages be recorded in the real estate records where the real property covered in the mortgage was located,[124] with a like procedure for supplementals.[125] Thereafter, no further filing or recording was demanded of the borrower. New York has attempted to provide a statutory system to aid the transition to the Code whereby the original validity of the indenture on record will be continued and,

119. *Id.* § 13.04(2).

120. U.C.C. § 9-208 gives the debtor the right to demand further information from the secured party, but no such procedure has been provided for one not a party to the original transaction. See 1 Coogan § 6.08(5).

121. *Id.* § 13.04(2). Mr. Coogan also points out that the lender may be able to obtain a purchase-money priority, but that this expedient is inconvenient and otherwise undesirable. *Id.* at 1357 n.45.

122. *Id.* § 13.04(1); *cf.* McClelland & Fisher, Corporate Mortgage Bond Issues 243-56 (1937). The customary drafting method is broadly to include collateral and thereafter specifically to exclude items. *Id.* at 244 n.28. If, on the other hand, the draftsman wishes to be certain that no further liens on any type of collateral will be perfected on any of the mortgagor's assets, he can include all the assets in the filing statement, even though these are not covered by the indenture. The debtor has to sign the financing statement. U.C.C. § 9-402(1). For additional safeguards, see Kennedy, Corporate Trust Administration 61-62 (1961).

123. 1 Coogan §§ 3.13, 13.04. Another aspect of New York law benefiting corporate mortgagors is the abrogation of the rule requiring consent of the corporation's shareholders prior to the execution of a mortgage on any or all of the corporation's assets, unless otherwise specified in the articles of incorporation. N.Y. Bus. Corp. Law §§ 202(a)(7), 911. *Cf.* N.Y. Stock Corp. Law § 16. It should be noted that the New York practitioner will also have to consider the possible effect of New York's new Civil Practice Law and Rules (CPLR). N.Y. Civ. Prac. Law (effective Sept. 1, 1963). See 2 Coogan § 21.03.

124. N.Y. Lien Law § 231.

125. *Ibid.*

in addition, whereby the security interests in personal property represented by the indenture will be transferred to the central filing system within one year from the date on which the Code took effect. Section 9-302(1)(h) states that no financing statement need be filed to perfect the security interest in personal property in an existing indenture. Section 10-102(2) initially provides that prior transactions creating security interests under prior laws will continue to be governed by those prior laws. Section 10-101 makes explicit the fact that the U.C.C. applies only to transactions entered into subsequent to the date it takes effect.[126] These and other provisions, while seemingly clear as to the transition procedure, leave open several questions.

A. *Continuation Statements*

New York has appended several subsections to 10-102 which, in addition to continuing the validity of prior security interests under prior law repealed or modified by the U.C.C.,[127] are clearly intended to force the holders of all outstanding security interests in personal property to file a continuation statement in the central filing system.[128] If such a statement is not filed, the security interest will lapse twelve months after the effective date of the Code or at the expiration date set forth in the instrument, whichever is earlier.[129] Because of a seeming error of draftsmanship, it is doubtful whether the purpose of incorporating existing security interests into the central filing system has been effectuated. Section 10-102(2) provides that "the perfection of a security interest . . . (b) which was perfected when this Act takes effect by a filing, refiling or recording under a law repealed by this Act and requiring no further filing, refiling or recording to continue its perfection, continues until and will lapse twelve months after the date this Act takes effect . . ."[130] unless a continuation statement is filed in the interim.

An existing corporate indenture, duly perfected pursuant to old section 231, would seem to fit this description inasmuch as it is a security interest which took effect by a recording prior to the U.C.C. and which requires no further filing or recording. But the indenture did not become perfected by a law *repealed* by the Code. Its perfection stemmed from section 231 of the lien law, which was specifically *exempted* from repeal.[131] The draftsmen apparently

126. *Cf.* N.Y. U.C.C. § 9-102.

127. N.Y. U.C.C. § 10-102(2).

128. N.Y. U.C.C. § 10-102(2)(a)-(c).

129. *Ibid.*

130. N.Y. U.C.C. § 10-102(2)(b). *Cf.* CONN. GEN. STAT. ANN. § 42a-10-102 (Supp. 1964); N.H. REV. STAT. ANN. § 382-A: 9-401 (1961); N.J. STAT. ANN. § 12A:10-101 (Supp. 1964).

131. N.Y. U.C.C. § 10-105. New York practice makes mandatory specific, as

assumed that the amending and renumbering of 231 had "repealed" it sufficiently to bring corporate mortgages that were outstanding when the Code took effect within the terms of section 10-102(2)(b) (quoted above), but the express repealer provisions of section 10-105 seem to negate that construction. The draftsmen added the words "or modified" after the word "repealed" in the initial part of 10-102(2) in 1964,[132] and the omission of the same phrase in subsections (a), (b), and (c) has apparently impaired the goal of incorporation.[133] Therefore, notice of these outstanding mortgages will not necessarily be found in the central filing system after September 27, 1965, and it seems unlikely that the existing indentures will lapse on that date if no continuation statement has been filed.[134]

However, the filing of the continuation statement in this situation offers relatively little inconvenience to the practitioner[135] and may spare him much subsequent difficulty. In a case arising after September 27, 1965, where the continuation statement has not been filed within the prescribed period, a bankruptcy court, zealous in protecting general creditors, may conceivably void the mortgage as having lapsed on that date by the rationale that the draftsmen of section 10-102(2) succeeded in spite of themselves. This could be done only by finding that section 231 had been "repealed" sufficiently for the purposes intended by the draftsmen, and that the holders of security interests who did not comply by filing the continuation statement had consequently lost their security. In light of applicable language, this holding seems unlikely, but in the interest of safety it is advisable to file the continuation statement to eliminate the possibility of the security interest lapsing.

B. *After-Acquired Property*

The language of new section 190-2 of the lien law seems to indicate that it applies to outstanding corporate indentures; it

opposed to general, repeal. *Cf.* U.C.C. § 10-103. For a short discussion of the problems involved in repeal by implication, see 47 IOWA L. REV. 496 (1962).

132. N.Y. LAWS ch. 476 § 21 (McKinney 1964).

133. All that would be needed to rectify this oversight would be the insertion of the words "or modified" after the word "repealed" in each of these subsections.

134. *Cf.* Comment, *Uniform Commercial Code Article 9 Filing Procedures for Railroad, Utility, and Other Corporate Debtors—Some Suggestions*, 62 MICH. L. REV. 865, 876-78 (1964).

135. At this point, it should be noted that § 10-102(2) requires filing in accordance with § 9-401(1) and not § 9-302(1), which may mean that the simplistic filing procedures of N.Y. LIEN LAW §§ 190, 231 are arguably not applicable in this situation. If this construction is sound (it is opposed to common sense), multiple filing of the continuation statement therefore will be required if the indenture includes fixtures, N.Y. U.C.C. § 9-401(1)(b), or if the debtor has a place of business in only one county, N.Y. U.C.C. § 9-401(1)(c). Requirements for the contents of these special continuation statements are also enumerated in § 10-102(2), as is a reference to § 9-403(3), which requires an additional continuation statement to be filed every five years.

refers to "*any* such original mortgage" which "provides *or provided*" for the inclusion of after-acquired property.[136] That section further stipulates that subsequent supplemental mortgages picking up such after-acquired property will have to be recorded where the original was recorded, filed in the department of state, and also recorded in any county in which the after-acquired property is located.[137] This provision, however, with its apparent reference to both existing and future mortgages, is somewhat incongruous in light of the Code subsections 9-302(1)(h) and (k). Subsection (k), which applies only to future mortgages, states that they shall be governed by section 190. But subsection (h), dealing with mortgages recorded prior to the Code, refers only to 231 and does not mention 190. The question of whether section 190-2 was intended to apply to both existing and future indentures or only to the latter will become important in a situation where a supplemental executed subsequent to the Code under a mortgage executed prior to the Code has been recorded in accordance with section 231 but has not met the more stringent requirements of section 190-2. Except insofar as the security in the collateral secured by the supplemental can be salvaged by section 9-401(2) (the provision purporting to save a partial security interest in the collateral for the party who has filed erroneously) it seems likely that the supplemental will not effectuate the lien on the after-acquired property.

Bankruptcy courts can become quite strict on the question of filing, and there seems to be no way to defeat the proposition that the supplemental is to be covered by section 190-2. By its terms, the only supplementals meant to be governed by section 9-302(1)(h), and, by reference, section 231, are those "heretofore" recorded,[138] a category into which this hypothetical supplemental cannot logically be construed to fit. The mere absence of reference to section 190 in subsection (h) does not necessarily support the implication that supplementals executed subsequent to the Code are to be regulated only by section 231, the section to which express reference is made, especially in light of the language of section 9-302(1)(k), whose mention of "a supplemental mortgage . . . hereafter recorded," can easily be construed to be applicable. Further, the language of section 190-2 indicates that its provisions were intended to govern this situation.[139]

It might be argued that a supplemental is not covered by the Code because it is not a "transaction" within the meaning of section 10-101; therefore, it would be in violation of section 10-101 to allow section 190-2, a provision intended to augment the Code, to predom-

136. N.Y. LIEN LAW § 190-2. (Emphasis added.)

137. *Ibid.*

138. N.Y. U.C.C. § 9-302(1)(h).

139. See note 136 *supra* and accompanying text.

inate. This argument, however, will probably not be accepted because a supplemental is virtually certain to be a transaction under the broad definition in section 9-102(1)(a).[140] In any event, section 190 is not a section of the Code and section 10-101 is inapplicable as to it. Therefore, supplemental mortgages to a pre-Code mortgage executed subsequent to the adoption of the Code should be filed in the manner specified by section 190-2 to ensure their validity in the event of the debtor's bankruptcy.

The preceding discussion of supplementals is relevant only if the practitioner desires to continue utilizing that system of validation. That practice prevailed in pre-Code New York; frequently an after-acquired property clause of dubious validity was inserted into the indenture, and thereafter the lien on the property subsequently obtained by the debtor was perfected with a supplemental mortgage, usually executed at yearly intervals.[141] The question now arises as to what effect the Code will have on one of these possibly invalid after-acquired property clauses in a prior mortgage which, if it had been executed under the aegis of the Code, would be valid. It is clear that the mere passage of the U.C.C. will generally not affect the rights and duties flowing from the terms of a pre-Code indenture.[142] Although section 10-102(2)(b), quoted earlier, evidences the desire of the legislators to incorporate the outstanding mortgages into the central filing system, the filing of a continuation statement pursuant to that section, whether or not it is necessary, will not serve to bring the indenture itself under the substantive provisions of the Code, but will merely prevent an early lapse of the security interest.[143] This interpretation is reinforced by a subsequent subsection of 10-102 which, in another situation, provides that the prior security interest in question "continues under" the Code.[144] The apparently deliberate omission of this phrase in subsection (b) demonstrates that the Code was not intended to extend blanket coverage to the pre-Code transactions defined in that subsection. On the other hand, the language of section 10-102(2) does make possible an argument that the parties are given an election as to the law under which their indenture is to be governed and could therefore validate the questionable clause merely by expressing a desire to be ruled by the Code. Utilization of the word "may"[145] in the phrase pertaining to the enforce-

140. See also 1 COOGAN §§ 13.03(2), 13.03(3): "9-204(1) seems fairly clear in recognizing that separable security interests arise as each new lot of collateral comes under the indenture."

141. *Id.* § 13.04 at 1362 n.53(2). *Cf.* N.Y. Laws 1954, ch. 754, § 1.

142. See 1 COOGAN § 13.03(2).

143. N.Y. U.C.C. § 10-102(2): ". . . [the] security interest . . . (b) . . . will lapse . . . unless . . . a continuation statement is filed . . . ."

144. N.Y. U.C.C. § 10-102(3)(a).

145. N.Y. U.C.C. § 10-102(2): ". . . the rights, duties and interests flowing from [prior secured transactions] . . . remain valid thereafter and *may* be terminated,

ability of prior transactions, instead of the more definite "shall," created the question. However, it is unlikely that this construction would be adopted by any court in view of the confusion that would inevitably result and the ease with which the subsection can be construed to be absolute rather than permissive.[146] To bring the prior indenture under the terms of the Code, it is necessary to enter into a transaction or an event as required by section 10-101;[147] the Code does not automatically include it in its coverage.

The parties to an outstanding mortgage with an after-acquired property clause when the Code took effect will, in all probability, wish to bring the indenture within the Code's coverage. Besides the obvious advantage of validating the after-acquired property clause, the Code generally makes secured transactions easier, cheaper, and more secure for all parties concerned.[148] But there may be reason for the secured party under a prior indenture to wish also to remain within the coverage of pre-Code law. Many of the provisions of Article 9 have yet to be tested in court,[149] and doubts have been expressed as to the efficacy of some of the security interests created by the Code,[150] since, in several instances, a possible conflict with the

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completed, consummated or enforced as required or permitted by any statute or other law repealed or modified by this Act as though such repeal or modification had not occurred . . . ." (Emphasis added.)

146. 1 COOGAN §§ 13.02(2); 2 *id.* § 16.04(3). Another possible but rather far-fetched argument could be made that § 10-102(3)(a) would suffice to bring the indenture within the Code's coverage automatically. That subsection requires that a security interest filed prior to the Code under a law repealed by the U.C.C. for which the Code would require no filing "continues under" the U.C.C. The lawyer attempting to obtain the Code's coverage for a pre-Code indenture for which no filing has been made could argue that no financing statement need be filed for indentures executed pursuant to § 9-302(1)(k) because such filing would be made in acordance with § 190 of the lien law rather than the Code. Therefore, the prior indenture is governed by the Code's provisions since no further *Code* filing is required. This argument would appear to be fallacious for at least two reasons. Any reasonable construction of § 9-302(1)(k) has to admit that that subsection, standing alone, requires the filing of a financing statement; also, the law under which the security interests of the indenture were perfected, old § 231 of the lien law was not "repealed."

147. 2 COOGAN § 16.04(3). *Cf.* N.Y. U.C.C. §§ 9-102(1)(a), 9-204(1); 2 COOGAN § 16.04(4).

148. See, *e.g.*, 1 *id.* §§ 1.01-4.10; Kripke & Felsenfeld, *Secured Transactions—A Practical Approach to Article 9 of the Uniform Commercial Code*, 17 RUTGERS L. REV. 168 (1962); Kripke, *The Modernization of Concepts Under Article 9 of the Uniform Commercial Code*, 15 BUS. LAW. 645 (1960); Schnader, *The Case for the Uniform Commercial Code*, 77 BANKING L.J. 633 (1960). For the viewpoint of the commercial lender, see Stidham, *Secured Loans Under the Uniform Commercial Code (Article IX)*, 75 BANKING L.J. 475 (1958).

149. Pennsylvania has the longest experience under the Code, and her courts have not yet been deluged by cases arising out of Article 9. See generally Goodwin, *Article 9, Uniform Commercial Code—Pennsylvania Decisions on Secured Transactions*, Corporate Practice Commentator, Nov. 1961, p. 71; Kauffman, *Section 9-401(2) of the Uniform Commercial Code as Interpreted by the Courts*, 68 COM. L.J. 253 (1963).

150. See the authorities cited note 60 *supra*.

Bankruptcy Act awaits the unwary. Also, where a choice exists, many practitioners hesitate to abandon the familiar law under which they have practiced to venture forth into the unknown ramifications of this complex statute.[151]

If the parties prefer to rely on the virtues of Article 9, the best method for obtaining the Code's coverage is to re-execute the original indenture and go through a regrant of the collateral, both extant and after-acquired.[152] This procedure would certainly meet the aforementioned transaction requirement and would dispel any doubt as to what collateral is governed by which law. However, the negotiation, expense, and inconvenience this method will usually entail will prompt counsel to attempt to find an easier solution. The filing of either a financing or a continuation statement alone which merely refers to the existence of the prior indenture would not appear to be an adequate transaction for the purposes of section 10-101 and would therefore not suffice to bring the indenture under the Code.[153] On the other hand, if a financing statement were filed containing a regrant of the after-acquired collateral, this action arguably would serve to validate the inclusion of property thereafter acquired,[154] but the uncertainty inhering in this procedure will probably limit drastically its wide utilization.[155]

The New York practitioner wishing to have the best of both statutory worlds, *i.e.*, to have the original collateral governed by the liberal pre-Code filing rules and also to have the after-acquired property clauses come under the provisions of Article 9, may possibly accomplish this coup by fulfilling the continuation statement filing requirement of section 10-102(2) and executing a supplemental mortgage pursuant to section 190-2, which picks up the property acquired since the last supplemental and also contains a regrant of after-acquired property. The continuation statement would insure that the prior mortgage would not lapse[156] and would continue to be governed by prior law.[157] Whether the subsequent supplemental mortgage will be adequate to bring within the Code the after-acquired collateral will depend upon whether such supplemental is determined to be a transaction.[158] It would appear that a supplemen-

151. That Article 9 requires much new thought can be shown by the volume of literature it has generated. See, *e.g.*, the annotations periodically printed in the *Boston College Industrial & Commercial Law Review* and the Article 9 bibliography in 9 WAYNE L. REV. at 666-72 (1963). *But cf.* 1 COOGAN §§ 2.01-.07 where it is argued that the changes are more of terminology than substance, and that the transition to the Code can be relatively painless.

152. 1 COOGAN § 13.03(2), at 1351 n.36.

153. N.Y. U.C.C. § 10-101. See 1 COOGAN § 13.03(2).

154. 1 COOGAN § 13.03(2).

155. *Ibid.*

156. N.Y. U.C.C. § 10-102(2)(b).

157. See notes 142-51 *supra* and accompanying text.

158. See notes 140 and 147 *supra.*

tal would not be adequate to bring the original under the U.C.C.,[159] but section 9-204 makes explicit the proposition that either the inclusion of subsequent collateral or the making of a future advance will create a separable security interest[160] and will suffice to bring that collateral or that advance within the substantive terms of Article 9.[161] In this connection, subsection 190-2 and -3 of the lien law could be argued apart from the above considerations in attempting to convince a court that a subsequent supplemental mortgage containing a regrant of after-acquired property is all that is necessary to perfect both the security interest in the actual property covered by the supplemental and a lien on any other appropriate property thereafter acquired by the debtor. The latter subsection stipulates that after-acquired property clauses that were valid without filing or recording prior to the Code will continue to enjoy the same validity, indicating that the legislative intention was to give a broad effect to these clauses.[162] The former subsection by its terms covers the situation.

To summarize, where a previously invalid after-acquired property clause in an indenture existing at the effective date of the Code is sought to be validated, the safest procedure for implementing this goal is the re-execution of the indenture and a regrant of the collateral. If this method is not utilized, a supplemental containing a regrant of after-acquired property should be executed, recorded, and filed pursuant to section 190 of the lien law. The mere filing of a financing or continuation statement which only refers to the existence of the prior indenture will be ineffective for this purpose, as will be merely doing nothing in the belief that nothing further is required.

IV. CONCLUSION

The Code will generally be beneficial to the holders of long-term security interests in corporate assets. Indenture trustees' fears of the uncertain conglomerate pre-Code law have been somewhat allayed by provisions making the security interest more secure. It is now theoretically possible in Code states to create a valid continuing lien on any or all of the debtor's assets while no dominion over them need be maintained by the secured party. However, an authoritative judi-

159. 1 COOGAN § 13.03(2).

160. See *id.* § 13.03(3).

161. *Ibid.*

162. It would appear that the main motivation behind the enactment of § 190-3 was to reassure the railroads and public utilities, somewhat unnecessarily, that the after-acquired property clauses in their indentures, generally enforceable before the Code without the further recording of supplementals, would retain their validity. A possible interpretation of § 10-102(2)(c) would require the filing of a continuation statement for the security in property under these clauses acquired subsequently to the original indenture, but such a construction would be both linguistically dubious and contrary to § 190-3.

cial determination that the draftsmen of the Code have succeeded in their aim is necessary before the lender will place complete reliance in the more controversial sections of Article 9. Even with this assurance, it is uncertain whether financiers will radically depart from their traditional lending procedures. One respect in which the Code is unsatisfactory is that, by neglecting to provide suitable rules for the filing of security in long-term debt, the Code imposes a large burden of multiple filing on the shoulders of corporate debtors. New York has attempted to treat this problem ignored by the draftsmen of Article 9. The New York statutory sections relating to this problem as a whole give a coherent and intelligent solution. It is recommended that those states considering adoption of the Code and other Code states not having made similar provision should study carefully the ramifications of the question together with the New York enactment. The goal of uniformity among the states is an important one, but it would be realized in a more desirable manner if other states were to follow New York's lead in this area rather than if all unreservedly accept the Code's lack of treatment. Other states should take cognizance, however, of certain deficiencies in the New York system, especially regarding the transition to the Code. More specifically, the seemingly inadvertent omission in section 10-102(2)(b) which sheds doubts on its effectiveness in requiring continuation statements could have been prevented had the draftsmen thought the problem through more completely in terms of corporate indentures. Other progeny of insufficient drafting consideration include both the uncertainty in reference embodied in the dichotomy of sections 9-302 (1)(h) and 190 and the lack of a concrete procedure for handling transitional problems. Such deficiencies are perhaps inevitable in the course of extended statutory tinkering, but at least some needed tinkering has taken place, and other states can profit both by New York's gains and mistakes.

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