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Pennsylvania - 1959 Session - Amendments to Article 9 of the Uniform Commercial Code

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LEGISLATION

Pennsylvania—1959 Session—Amendments to Article 9 of the Uniform Commercial Code.

The Uniform Commercial Code was enacted in Pennsylvania in 1953, effective July 1, 1954, and has since generated a tremendous volume of discussion and much constructive criticism. The most important review of the Code was the study of the New York Law Revision Commission which culminated in 1956 with a report based on its three-year study of the Code.¹ Such criticism together with inadequacies brought to light by cases under the Code pointed to the need for revision, and the American Law Institute and the National Conference of Uniform State Laws met this need by extensively revising various provisions of the Code.²

Subsequently, a bill serving to amend the Code as adopted in Pennsylvania was approved by the Pennsylvania legislature³ on October 2, 1959, effective January 1, 1960. Most of the revisions were merely for the purposes of clarification, but several changes of substance were made, many such changes being found in Article 9. It is the purpose of this Comment to aid a reader interested in Article 9 by pointing out changes therein and their effect. No reference will be made to the more obvious formal changes.

Part I. Short Title, Applicability and Definitions.

Section 9-102.

The language in this section, which deals with the policy and scope of Article 9, has been revised to avoid any conflict with section 9-103 on multiple state transactions and section 9-104 on excluded transactions, stating the latter sections control where there is a conflict. Subsection (1) (a) also adds "general intangibles" to the scope of Article 9, and (1) (b) makes clear by deleting the word "financing" that all sales of accounts, contract rights, and chattel paper are covered by Article 9.


(465)
Subsection (2) has been changed to expressly exclude statutory liens from the scope of Article 9, and makes it clear that the Article deals only with contractual security interests. This revision was aimed at avoiding subordination or invalidation of contractual security interests under section 67(c) of the Bankruptcy Act. It has been suggested that the lien created or recognized by statute within the meaning of section 67 arises primarily from an economic relationship defined by the legislature and not from the terms of a contract providing security. Further, under the test of *ejusdem generis*, it was stated that the secured transaction under Article 9 is contractual rather than statutory, even though without the statute the agreement of the parties would not effectively create a lien valid under non-bankruptcy law. The only concern which Article 9 has with "statutory liens" is in the determination of the relative priority between an Article 9 security interest and the statutory lien. Section 9-313, for example, gives priority to a mechanics lien, which is statutory, against the creation of a subsequent interest in fixtures. Nevertheless, the characterization, whether a given interest is a "statutory lien," is a question of federal law, and therefore the weight to be given to a state characterization is doubtful.

Subsection (3) is new. Under it the application of this Article to a security interest in a secured obligation is valid even though the obligation is itself secured by collateral to which Article 9 does not apply. For example, a security assignment of a bond secured by a real-estate mortgage would be within the Article.

**SECTION 9-103.**

Subsection (1), dealing with accounts and contract rights, substitutes the word "jurisdiction" for "state." Therefore, under the revised section it is evident that the Code will apply the law of a foreign province even though that province is not a juristic state.

Subsection (2) retains the chief place of business test and provides that when such is located within this state, the validity of a security interest in the mobile goods is governed by Article 9. "General intangibles" are now added to this section and the place of business test is applied to them also. "General intangibles" are defined in the revised section 9-106. Finally, goods held for leasing are also included within the revision.

If the place of business is in another jurisdiction, this state will apply the law, including the conflict of laws rules, of that jurisdiction in deciding

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5. 4 Collier, Bankruptcy § 67.20 (Moore ed., 1940).

See Matter of Quaker City Uniform Co., 238 F.2d 155 (3d Cir. 1956), where the court reserved its opinion as to whether a chattel mortgage perfected under Pennsylvania law prior to the Code was a "statutory lien" within section 67(b), (c) of the Bankruptcy Act. In a prior unpublished opinion, found at 135 Legal Intelligencer No. 25, p. 1, col. 3 (3d Cir. 1956), the court had expressly held that such lien was "statutory." This opinion was later withdrawn.
upon the perfection of the interest in mobile property. This is so even though the mobile property is located within this state.

The last sentence of this subsection is new. The creditor, according to this sentence, may perfect his security interest in mobile property by filing in this state if the debtor's chief place of business is in a jurisdiction which does not provide for perfection of the security interest by filing. This would seem to be intended only to constitute perfection in this state.

Subsection (3), which is expressly subordinated to subsections (1) and (2), states that when referring to the law of the jurisdiction where the property was when the security interest attached, the conflict of laws rules of that jurisdiction are included.

Subsection (4) is an addition to section 9-103 and its purpose is to avoid the possibility of duplicating perfection in the case of vehicles subject to a certificate of title law which requires only compliance therewith to achieve perfection of the security interest. Pennsylvania's Motor Vehicle Code is an example of such a law. The validity of such perfection is governed by the law of the jurisdiction which issued the certificate.

SECTION 9-104.

This section's list of transactions excluded from the scope of Article 9 has been expanded. The most significant change takes place in paragraph (f). Now excluded are contract rights or chattel paper, the sale of which was part of the sale of the business out of which they arose. Also excluded is an assignment of accounts, contract rights, or chattel paper which is for the purpose of collection only.

Paragraphs (h), (i), (j), and (k) are new. They further exclude from the scope of the Code a right represented by a judgment, a right of set-off, a creation or transfer of an interest or lien on real estate, and finally, a transfer in whole or in part of tort claims, deposits, savings passbooks and the like. The revisers evidently thought that all of the aforementioned could better be controlled by local statutes and therefore the removal from coverage under the Code would have no adverse effect on the principle of uniformity, which is the goal of the Code.

SECTION 9-105.

The amendments to this section of definitions are mainly for clarification. The term "general intangibles" is added to subsection (1) (a) to conform to its addition in section 9-102 (1).

In response to an assertion by those testifying at the New York Law Revision Commission's hearings on Article 9 that the definitions of "chattel paper" and "instrument" were conflicting, the definition of chattel paper has been changed in subsection (1) (a). The term "chattel paper" is now

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restricted to those transactions arising from a sale or lease of specific goods, *i.e.*, a chattel mortgage transaction or a conditional sale transaction. The term means a writing which evidences the security interest or the lease, and if there is an instrument also, these writings taken together constitute the chattel paper.

The definition of “instrument” contained in subsection (1) (g) has been changed to avoid any confusion between it and “chattel paper.” It is now defined as a “negotiable instrument or any other writing evidencing a right to the payment of money and which is not itself a security agreement or a lease and which is ordinarily transferred by delivery with any necessary endorsement or assignment.”

**SECTION 9-106.**

A definition of the term “general intangibles” is now included within this section. It is a right in personal property, and therefore appropriately brought within the operation of Article 9.

In addition to the previously mentioned change, the sentence referring to a right to wages, salary, or other compensation of an employee has been deleted since these have been expressly excluded from the scope of Article 9 by section 9-104 (d) and (h).

**SECTION 9-107.**

Paragraph (c) has been deleted from this section defining a “purchase money security interest.” This paragraph had allowed the creditor to obtain a purchase money security interest in goods where he lent the purchase money to the debtor even though the money was not used to purchase the goods for which it was lent. The only limitation was that the consideration had to be advanced within ten days after the debtor received the goods. As a result of this deletion, there can be no purchase money security interest where the lender fails to see to it that the money lent is used to acquire the goods for which it was lent. Therefore, although the lender could still attain a security interest in that which may be purchased without his money by means of a floating lien provision in the agreement, it would not be a purchase money security interest.

**SECTION 9-108.**

This section defines when after-acquired collateral shall not be deemed as security for an antecedent debt. In answer to criticisms made at the New York Law Revision Commission’s hearings on the Code, a more uniform definition of value is now contained in section 1-201 (44), and the definition in this section deleted.\(^8\) The new definition is fundamentally the same as that contained in the former section 9-108 (1). Although

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supposedly uniform, the definition of value as stated in section 1-201 (44) does not apply to Articles 3 and 4.

The wording of subsection (2) has been changed. The words “an antecedent debt” have been added to make it clear that the secured party’s floating lien would stand up against preference charges in bankruptcy proceedings involving the debtor. The first sentence of section 60 (a) of the Bankruptcy Act defines as an element of a preference “a transfer for or on account of an antecedent debt.” Though the test of section 60 (a) is a test of state law, the meaning of “on account of an antecedent debt” is a federal question. Since it is true that no “contemporaneous consideration” has been advanced by the secured party, the statute expounds a fiction which may not stand attack in a bankruptcy proceeding. An authority has questioned whether section 9-108 is necessary since a Code-sanctioned, after-acquired property interest might of itself negate the preference challenge; if unnecessary, it is said that in directing attention to a problem which does not exist the whole concept of floating liens is jeopardized.10 This author further points out that many commentators predict that section 9-108 will be treated “as a sham and that a preference hazard will remain to face Code financers.”11

SECTION 9-109.

The definition “farm products” under subsection (3) has been expanded to include supplies used in farming. Goods are farm products if they are in the possession of a debtor who is engaged in farming. This changes the test of the 1953 Code under which goods were farm products if the debtor raised or used the goods in farming.

Subsection (4) has been broadened to include within the definition of inventory those goods held by the debtor for lease to another. Under the former Code, the determination as to whether goods were inventory turned on whether they were held for immediate or ultimate sale. In other words, the goods had to be held for sale or under a contract for services (even though not a sale) to be classified as inventory.

SECTION 9-110.

The term “real estate” has been added to the provision requiring reasonable identification of collateral, since, under section 9-402, there must be a description of the real estate where the financing statement covers crops or fixtures. Since the 1953 Code rejected the “serial number” test as to personalty, a general description, rather than by metes and bounds, will presumably suffice.

11. Id. at 220.
SECTION 9-112.

This section has been revised to adequately define the rights of an owner of the collateral who is not the debtor. Such an owner is entitled to the surplus resulting from its sale under section 9-502 (2), but is not liable for a deficiency.

Paragraph (c) is new, and it allows such owner of the collateral a right of redemption in accordance with section 9-506.

SECTION 9-113.

This section is new. It places limitations on the application of Article 9 where the debtor has not obtained possession of the goods. In such a case no security agreement is a prerequisite to enforceability of the security interest, no filing is necessary for the perfection of such an interest, and upon default the secured party’s rights are governed by Article 2.

PART II. VALIDITY OF SECURITY AGREEMENT AND RIGHTS OF PARTIES THERE TO

SECTION 9-201.

The phrase “or by other rule of law or regulation” has been deleted from this section dealing with the general validity of the security agreement. The revised section makes reference to “statute or regulation thereunder” and provides that such statute and not the Code will determine the legality of certain practices and charges such as usury, small loans, retail installment sales, or the like.

SECTION 9-203.

This section concerns the enforceability of security interests. Subsection (1) (a) has been revised to provide that the application of this section is subject to section 4-208 on the security interest of a collecting bank and section 9-113 on a security interest arising under Article 2 on sales.

The words “or timber to be cut” have been added to subsection (1) (b), making it necessary to describe the land in order to have a valid security interest enforceable against the debtor. The insertion of these words conforms to section 9-204 (2) (b). The last sentence of this subsection is new, and it provides that in claiming the proceeds of collateral it is unnecessary to describe the proceeds because of the uncertainty involved. One need only use the word “proceeds” in describing them.

Subsection (2) has been amended to provide for any conflicts arising between the Code and the Motor Vehicle Sales Finance Act, and other non-Code statutes; in which case, the rule now is that the latter should prevail. It has been suggested that the provisions of the Code should be made to prevail over the Motor Vehicle Sales Finance Act in the interest of uni-
formity. But this would circumvent the policy of the latter which is to protect the purchaser of an automobile from unscrupulous and oppressive practices of some dealers by requiring that the instruments of sale conform to the provisions as set out in the act. The buyer would have a copy of this instrument, and would be better acquainted with it than with the Code itself, simply because he would have the former in his possession and could consult it at any time.

SECTION 9-204.

An important change occurs in subsection (4) (a). The attaching of an interest in crops under an after-acquired property clause after one year from the granting of such interest and when the interest has been given as part of a land improvement transaction is valid if so agreed and the crops grown on the land are so grown during the period of the improvement transaction. Now included as evidence of the transaction is a deed of trust, an instrument which in many states takes the place and serves the use of a common-law mortgage.

The only other significant change occurs in subsection (5) concerning future advances. The new phrase is “or other value whether or not the advances or value are given pursuant to commitment.” The words “or other value” have been added to give subsection (5) the same generality now included in subsection (3) by the addition of the words “all obligations covered by the security agreement.” The latter part of the phrase, beginning with the word “whether,” makes it clear that future advances no longer have to be made pursuant to a term in the security agreement as was required by the old Code.

SECTION 9-205.

It should be noted that the Commissioners’ Comments to the 1953 Code that this section expressly validating the floating charge or lien on the shifting stock repeals the rule of Benedict v. Ratner has not been tested in a federal bankruptcy proceeding under section 60 (a) of the Bankruptcy Act. The holding of the Benedict case appears to be that a security interest wanting in control is a mere contract to give a favored creditor a preference or priority and so, a fraud on other creditors who have not assented. Whether Benedict was merely a declaration of state law or was in fact an enunciation of federal law pursuant to the policy of the Bankruptcy Act which is to achieve equality among the creditors still remains unanswered.

15. 268 U.S. 353 (1925).
16. See note 9 supra.
The last sentence of this section on debtor's use of collateral is new.\textsuperscript{17} It states that this section is inapplicable where perfection of the security interest depends on the secured party's possession of the collateral, such as a field warehouse arrangement. Under the 1953 Code, a field warehousing arrangement could be perfected only by filing and thus the need for physical control was obviated. However, since the filing requirement has been deleted in the revised section 9-305, physical control by the creditor becomes necessary.

\textbf{SECTION 9-206.}

This section concerns agreements not to assert defenses and modification of warranties. Subsection (1), which provided that a purchaser of consumer goods cannot waive against the assignee any defenses arising out of the sale, has been completely changed. This subsection met with rigorous opposition during the New York Law Revision Commission's hearings because it would make the bank a joint venturer with the dealer who makes the sale.\textsuperscript{18} Those who objected gave as their reasons that the bank has no idea of the dealer's representations, and that it would place too much power in the hands of the consumer over the bank to compel the dealer to meet every demand of the buyer. Consequently, the new provision states that anyone may waive defenses, the only restriction being that if other state law prevents it, then that law governs. The only other such law in Pennsylvania is the Motor Vehicle Sales Finance Act.\textsuperscript{19}

Former subsection (3), now subsection (2), has been revised to clarify that when a seller retains a purchase money security interest in goods, Article 2 governs the sale along with any disclaimer, limitation, or modification of the seller's warranties.\textsuperscript{20}

\textbf{SECTION 9-207.}

Subsection (4) permits the lender not only to take steps to preserve the collateral from physical harm when it is in his possession, but also to \textit{use} the collateral for the purpose of maintaining its value.

\textbf{PART III. RIGHTS OF THIRD PARTIES; PERFECTED AND UNPERFECTED SECURITY INTERESTS; LIEN CREDITOR.}

\textbf{SECTION 9-301.}

Subsections (1) (a) and (1) (b) of the prior Code have been deleted and the new subsection (1) (a) subordinates the rights of the holder of an

\textsuperscript{17} For the contention that section 9-205 and other sections of the Code which simplify filing requirements may not protect a corporate indenture from attack by the debtor's trustee in bankruptcy, see Coogan and Bok, \textit{The Impact of Article 9 of the Uniform Commercial Code of the Corporate Indenture}, 69 \textit{Yale L. J.} 203, 237 (1959).

\textsuperscript{18} N. Y. LEG. Doc. No. 65(H), 98 (1954).

\textsuperscript{19} PA. STAT. ANN. tit. 69, § 615 (g) (1958).

\textsuperscript{20} See § 2-316 of the revised Code.
unperfected security interest to the rights of all persons entitled to priority under section 9-312.

Paragraphs (c) and (d) of subsection (1) provide that a transferee in bulk not in the ordinary course of business will take priority over an unperfected security interest to the extent that he "gives value" in addition to receiving delivery of the collateral without knowledge of the security interest and before it is perfected. Therefore, although mere delivery was the critical fact in the original section, payment of value without knowledge has been added as a further requirement that the transferee must fulfill before he has priority over the unperfected security interest.

The last sentence of subsection (3) has been deleted because it changed local procedure. The deletion has the effect of reviving the rule that the lien attaches when the writ is delivered to the sheriff. The original wording of subsection (3) providing that a trustee in bankruptcy becomes a "lien creditor" from the date of the filing of the petition in bankruptcy has been retained, and is consistent with the hypothetical creditor clause of section 70(c) of the Bankruptcy Act.21 A 1954 Second Circuit decision, Constance v. Harvey,22 held that the trustee could relate back his hypothetical extension of credit to any time prior to the filing of the petition in bankruptcy so as to defeat a belatedly filed security interest, even though there were no actual creditors in existence who could defeat the security interest under state law. However, the relation back was restricted to the rights of a hypothetical unsecured creditor, and since subsection 1 (b) provides that only a lien creditor can subordinate a belatedly filed security interest, it would seem that such relation back would be ineffective under the Code.

SECTION 9-302.

Subsection (1) (b) has been broadened to exclude from the necessity of filing to perfect the security interest the proceeds received by the debtor from the sale of the collateral. However, this protection only extends for a ten day period immediately following the sale, after which the security interest becomes unperfected, unless the original statement provided for an interest in proceeds.23

Subsection (2) is new. It provides that a perfected security interest will continue to be such after the secured party makes a further assignment.

22. 215 F.2d 571 (2d Cir. 1954), cert. denied, 348 U.S. 913 (1955). However, the Third Circuit has refused to apply section 70(c) as it was applied in the Constance case. In the case of In Re Consorto Constr. Co., 212 F.2d 676 (3d Cir.), cert. denied, 348 U.S. 333 (1954), the court held that the recording of a chattel mortgage, though late, prior to the petition in bankruptcy was sufficient and that the trustee would be deemed a subsequent lienor. This case applied state law prior to the Code, however. For a discussion of the problem raised by Constance v. Harvey, see Comment, 5 VILL. L. REV. 437 (1960).
23. See revised § 9-306.
even though the assignee has not filed. This perfection is good only against creditors of the original debtor.

Paragraph (b) of subsection (3) in effect states that the filing provisions of Article 9 do not apply to the perfection of a security interest in a motor vehicle which is not inventory held for sale, and where other statutes of the Code state require a notation on the certificate of title to protect the security interest. Subsection (4) provides that a security interest in a property described by subsection (3) can be perfected only by notation of the security interest on the certificate of title. The combined effect of these sections remedies a problem caused by sections 9-302 (2) and 10-102 of the former Code. At the time the Code was adopted in Pennsylvania, the Pennsylvania Motor Vehicle Certificate of Title Act\(^{24}\) required all liens and encumbrances for the purchase price of an automobile to be noted on the certificate of title in order that the holder be protected. The Pennsylvania Chattel Mortgage Act\(^{25}\) which was superseded by adoption of the Code, required the same when the transaction concerned a loan rather than a sale. Under section 9-302 (2) of the former Code, filing was not necessary to protect the security interest if the appropriate notation was made on the certificate of title. But section 10-102 repealed the Chattel Mortgage Act. The problem, then, was whether a secured party in a loan transaction had to file to protect his security interest even in the case where a notation had been made on the certificate of title. Conjunctively, paragraph (3) (b) and subsection (4) now require a secured party in a loan transaction only to make an appropriate notation showing the security interest on the certificate in order to perfect his security interest in the collateral.\(^{26}\)

**SECTION 9-303.**

This section has been completely rewritten. Under subsection (1), both attachment and the applicable steps, such as filing, specified in sections 9-302, 9-304, 9-305, and 9-306 are required before a security interest may be considered as perfected. The second sentence of this subsection continues the theory of the former Code that perfection occurs when there has been either filing or possession coupled with attachment regardless of their chronological order.

Subsection (2) provides for a continuous perfection of a security interest once perfected according to Article 9, but subsequently perfected


\(^{26}\) In the case of Girard Trust Corn Exchange Bank v. Warren Lepley Ford, Inc. (No. 2), 13 D. & C.2d 119 (C.P. Phila. 1957), the court held that a notation on the certificate of title of the encumbrance of petitioner bank was equivalent to the filing requirement under section 9-302 of the Code, and that petitioner had a perfected security interest in the vehicles good against the debtor’s receivers in equity, who had the status of lien creditors.
in some other way permitted by this Article where there has been no intermediate period when the interest was unperfected. Thus, a party’s security interest in a negotiable document will be considered as perfected from the time he took possession of it even though section 9-304 (1) now permits perfection of such document by filing.

SECTION 9-304.

This section has been completely revised. Subsection (1) permits a security interest in negotiable documents to be perfected by filing. This is a substantial change from section 9-303 of the former Code, which required possession by the creditor as the means of perfecting an interest in such paper. This change is in accord with section 7 (1) of the Uniform Trust Receipts Act, which permitted the entruster in a trust receipts transaction to file in order to protect his security interest in the documents. This provision also permits the lender to extend the period of the security interest in negotiable documents which it releases to the borrower beyond the twenty-one day period allowed by the former Code if the lender files a financing statement covering such documents. The second sentence of this subsection requires that the creditor take possession of an instrument in order to perfect his security interest in it. This does not refer to an instrument which constitutes part of the chattel paper, but only one as defined by section 9-105 (g).

Subsection (2) states that a security interest in the goods, while in the possession of the issuer of the negotiable document is perfected by perfecting a security interest in the document. Therefore, a perfected security interest in the goods described may be attained by filing of the interest in the document as permitted by the previous subsection. Any other security interest in such goods perfected during such period of possession is subordinate to the one attained under this subsection.

If a bailee other than one who has issued a negotiable document for the goods has possession of the goods in question, a security interest in the goods can be acquired under subsection (3) by the secured party’s issuance of a document covering them in his name, or by notifying the bailee of his interest or by filing as to the goods.

Under the former Code, it was provided that a perfected security interest could remain in commercial paper for a period of twenty-one days after the holder turned such paper over to the borrower. No restrictions were placed on the purpose for which such paper could be turned over to the borrower. However, the Code, as revised, places restrictions on this right of the lender.

28. In the case of negotiable documents of title, see § 9-304 (5) (a). With regard to an instrument, see 9-304 (5) (b).
SECTION 9-305.

Perfection of a security interest by possession has been made expressly applicable by this section to letters of credit and advices of credit. This is in accord with section 5-116 (2) (a), which makes possession by the assignee of a letter of credit or an advice of credit a prerequisite to perfection of his security interest.

Former subsection (2), providing that a field warehousing arrangement constitutes protection against the debtor's creditors only where the secured party has filed, has been deleted. Therefore, the secured party must follow the common law requirements as to the field warehousing arrangement if he wishes to be protected under the Code, cases saying the test is whether the field warehouse is properly carried out so as to effect a pledge. This would appear to be the better means of perfection, since field warehousing arrangements are a convenient means of securing inventory loans and giving the public adequate notice. The provision as it formerly was stated was strongly criticized at the New York Law Revision Commission's hearings.

SECTION 9-306.

This section stating rules as to proceeds has been entirely revised for purposes of clarity. Under subsection (1) the definition of "proceeds" has been expanded to include an account arising when the right to payment is earned under a contract right. "Proceeds" also includes non-cash proceeds arising from a sale of goods.

Subsection (4) changes the rule of former section 9-306 (2), which dealt with the disposal of cash proceeds upon insolvency. Formerly, the secured party's interest continued in all identifiable cash proceeds except where insolvency proceedings had been instituted. If this occurred, all the secured party could acquire was a right to the debtor's bank account or cash equal to the amount of cash proceeds received by the debtor within ten days before the institution of bankruptcy proceedings. Subsection (4) now permits the retention of the security interest in all identifiable cash proceeds and non-cash proceeds in the insolvent's possession regardless of insolvency proceedings. The former ten day rule has been limited to unidentifiable cash proceeds. The subject matter of former subsection (4) is now dealt with in section 9-308.

Subsection (5) (c) reverses the rule of former subsection (5) (c). Under the revised subsection, the security interest of an unpaid transferee of an account, although good against the transferor, is subordinated to the interest which a party claims in the debtor's inventory. This subsection also makes it clear that if the lender has a perfected security interest in an

account and the proceeds, the lender also has a perfected security interest in any goods which the account debtor may return to the transferor of the account.

SECTION 9-307.

The opening language of section (1) has been deleted. The use of the word “inventory” was not necessary because the definition of “buyer in the ordinary course of business” refers to a buyer who purchases from a “person in the business of selling goods of that kind.” This would exclude any sales of consumer goods by a consumer as well as the sale of farm goods. Therefore, where the goods are inventory, as here they must necessarily be, a buyer of such goods in the ordinary course of business is protected against the holder of a perfected security interest in such goods even though he knew of the existence of the security interest.

SECTION 9-308.

This section has been completely rewritten. The first sentence retains the rule of former section 9-308, but adds non-negotiable instruments to chattel paper and gives the holder of either priority over a security interest in them based on filing, or on temporary filing under section 9-304 (4). The second sentence contains the rule of former section 9-306 (4), under which the security interest in chattel paper as proceeds of inventory is subordinate to the interest of a purchaser of the chattel paper who takes possession of it in the ordinary course of his business and who gives value for it, even though he knows that the paper is subject to a security interest.

SECTION 9-309.

The limitation on this section by section 9-206 (1), dealing with a waiver of defense agreement, has been eliminated. This deletion is necessary since a state may make its own rules as to the validity of a waiver of defense agreement under the new section 9-206 (1).

SECTION 9-310.

The words “upon goods in the possession of such persons” have been added to make it clear that the validity of such liens as mechanics or artisans liens depends upon possession by the person who renders the services or gives the materials.

SECTION 9-312.

This section, dealing with priorities among conflicting security interests, has been entirely rewritten. Subsection (3) provides that the

31. See § 1-201 (9).
purchase money security interest must be perfected at the time the debtor receives the collateral and does not allow a ten day period subsequent to the debtor's receipt of the collateral for perfection as did subsection (4) of the former Code. Notification to the prior secured creditor is required only where the collateral concerned is inventory.

Subsection (4) of section 9-312 concerning conflicting purchase money security interests has been deleted. Since paragraph (c) of section 9-107 has also been deleted, it seems that all questions of priority between conflicting purchase money security interests in the same collateral will be governed by the rules of section 9-312 (5). This is necessarily so because subsection (5) begins with the words "In all other cases not governed by other rules stated in this section," and there are no other rules concerning conflicting purchase money security interests in the same collateral within section 9-312.

Although this section sets up a scheme of priorities among conflicting security interests in the same collateral, there is an absence of any language which would subordinate the perfected security interest to the rights of the trustee under section 60 of the Bankruptcy Act. Section 60(a) (2) in effect arms the trustee, as against security interests in personal property, with the rights of a lien creditor. The latter section goes on to state that a transfer of property shall be deemed to have been made at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. Section 60(a) (4) excludes from its purview liens which under applicable law are given special priority over other liens which are prior in time. Therefore, a perfected security interest falling without the four month period will not be deemed a preference because it is followed by a purchase money security interest within the four month period which is entitled to priority under section 9-312 (4). This follows because the latter interest is not included within "a lien . . . obtainable by legal and equitable proceedings on a simple contract."

SECTION 9-313.

There has been an extensive revision of this section and two significant changes occur. Subsection (1) is new and establishes the rule that no security interest may be had in certain listed chattels which have become an integral part of the realty. The one exception is that a security interest may be obtained in such goods if the entire structure is considered personalty under local law. As to other goods, this subsection leaves the question as to whether they have become fixtures to local law.

The other significant change occurs in the new subsection (3). A security interest in goods which become fixtures may be had after the

32. See note 9 supra
goods become part of the realty against those acquiring subsequent interests in the realty or against those which prior interests who have consented in writing to the security interest or who disclaim an interest in the goods as fixtures.

Section 60(a)(2) of the present Bankruptcy Act submits the security interest in real property to the bona fide purchaser test as contrasted with the lien creditor test as to personalty. The clear implication of subsections (2) and (4) is that the secured party by perfecting his interest by filing will take priority over subsequent realty claims. This indicates that such perfected security interests will not be treated as preferences under section 60(a)(2) of the Bankruptcy Act.

SECTION 9-314.

The only significant change in this section takes place within subsection (2). A security interest is now allowed to attach to goods after they have become part of the whole, but only under the same conditions that exist in section 9-313 (3).

SECTION 9-315.

Subsection (1) permits a perfected security interest in goods which have become part of a product or mass itself if the goods have lost their identity or if, as provided by subsection (1)(b), the financing statement covering the goods also covers the product into which the goods have been assembled or manufactured. In the latter situation, section 9-315 rather than 9-314 will be applicable.

SECTION 9-318.

Subsection (3) has been changed to provide that a notification of the assignment should be given to the account debtor which must reasonably identify the rights assigned if the assignee wishes immediate payment from the account debtor. The account debtor may also demand proof of the assignment from the assignee, without which he is free to pay the assignor.

Under subsection (4) of the former Code it was stated that a term prohibiting an assignment of contract rights or an account would be ineffective. This was criticized in hearings conducted by the New York Law Revision Commission because it was thought that the provision as stated would have the effect of prohibiting such assignments in a term loan agreement. The text as revised limits the subsections application to a contract to which the account debtor and assignor are parties.

33. Ibid.

34. N. Y. L.R.C. Doc. No. 65 (H), 87-88 (1954).
SECTION 9-401.

Paragraph (c) of subsection (1) is new and merely states the filing rules which were contained in paragraph (a) of the former Code.

Subsection (2) makes it clear that a “proper” filing in one place will not be sufficient if subsection (1) requires filing in two places. In *The Matter of Luckenbill*, where the security agreement concerned equipment and the secured party and his assignee both failed to file with the Secretary of the Commonwealth, the court held that the local filing was inadequate against a trustee in bankruptcy.

The 120 day period in subsection (3) has been changed to four months to conform to section 9-103 (3). Further, a filing will continue to be effective despite a change in the use of the collateral. This change would dictate a different result than that reached in *Girard Trust Corn Exchange Bank v. Warren Lepley Ford, Inc.*, where the petitioner agreed to finance the debtor on the same automobile under a subsequent installment plan contract rather than its former wholesale credit plan with the same debtor. The installment credit plan permitted automobiles to be used as demonstrators which would be a change in the use of the collateral as contemplated by the wholesale credit plan as filed, although the creditor had actually permitted such use. The court held that a novation had been created and that the petitioner had lost its perfected security interest because it had not filed the installment plan contract.

SECTION 9-402.

Subsection (1) has been revised to make it clear that a financing statement may be filed before a security agreement is made. This subsection no longer requires a description of fixtures to be by item rather than type, clearly eliminating an onerous exception in recording which had no apparent purpose.

Subsection (4) is new and provides that filing for perfection of an amendment to the original financing statement is not necessary unless it concerns new collateral not covered by the original perfected security interest.

Subsection (5) is new and sets out a rule of liberal construction to be applied in sustaining the filing of a financing statement where the inadequacy of such a statement does not impair its function as notice.
SECTION 9-403.

One of the major filing changes occurs in subsection (2). Under the prior Code a filed financing statement could contain a maturity date of greater than five years, and if no time were mentioned the filing of the financing statement would be good for only five years. The revised provision permits a sixty day grace period for filing after a stated maturity date of five years or less. If the financing statement fails to state a maturity date or sets one at greater than five years, the filing is effective for a period of five years only and a sixty day grace period is not allowed.

SECTION 9-404.

Subsection (1) has been expanded to include situations in which there has been an assignment of the security interest. In such a case, the assignee who signs the termination agreement must see to it that the assignment or a statement by the original secured party that he has assigned is sent to the debtor.

SECTION 9-405.

This section is new. It permits the secured party of record to assign any part of his rights by an appropriate indication on the financing statement or by the filing of a separate statement setting forth the circumstances of the assignment. The importance of this section is diminished by the fact that section 9-302 (2) of the revised Code does not require filing of assignment in order to continue the perfected status of the interest against creditors or transferees of the original debtor.

SECTION 9-406.

This section is also new and permits the secured party to release any part of the collateral to which the financing statement applies by presenting and filing a signed statement showing such an intention.

PART V. DEFAULT.

SECTION 9-501.

Subsection (1) makes it clear that the remedies of the secured party are cumulative, i.e., he may take several of the courses available under Part V and the use of one will not bar the use of another.\(^{38}\)

Subsection (3) allows the secured party and debtor not only to vary the rights and duties between them in accordance with Part V but also to establish standards by which the fulfillment of these rights and duties is to be measured.

\(^{38}\) It has been held that the secured party's execution on the collateral constituted an election of his remedies. See the opinion in Matter of Adrian Research & Chemical Co., 169 F. Supp. 357 (E. D. Pa. 1958).
Subsection (5) provides that in a situation where a secured party reduces his claim to judgment and levies upon the collateral the lien of the levy will relate back to the date of the perfection of the security interest. The creditor at whose instance the levy is made will have priority over any security interest occurring after the time he perfected his interest.

SECTION 9-503.

The secured party is expressly permitted by this section to designate the place at which the debtor is to assemble the collateral although it still must be reasonably convenient to both parties.

The provision relating to the debtor’s request to the secured party to remove the collateral from the debtor’s premises after a reasonable time has passed for its disposition has been deleted. The following provision which dealt with the storage of the collateral by the debtor has also been deleted. This would indicate that it is the duty of the debtor to store such collateral because such storage results from the debtor’s own default. Furthermore, it is a reasonable implication that the debtor should be liable for such storage charges.

SECTION 9-504.

Attorney fees and legal expenses have been added to subsection (1) (a) providing for the application of the proceeds of disposition.

Subsection (1) (c) requires the holder of the subordinate security interest to furnish proof of such upon demand of the holder of the prior interest if the former wishes to have his demands satisfied.

Subsection (3) no longer requires that notification of the time and place of a private sale be given to the debtor, but only reasonable notification of the time after which a private sale may be made. Such notification must also be given to holders of the junior interests in the collateral.

Under the new subsection (5), a transfer of collateral by the secured party to a surety or any other person secondarily liable on the contract is not a sale, but has the effect of subrogating such a party to the rights and duties of the secured party.

SECTION 9-505.

Subsection (2) now permits the secured party to retain consumer goods in satisfaction of the obligation even where sixty percent of the purchase price has been paid if he gives notice of this election to the debtor. Where the collateral is other than consumer goods, this notice must also be given to all filed security interests in such collateral, and to all those known to the secured party who have not filed. The debtor and the junior secured party have a right to object to such an election if they do so in writing. The debtor’s right ceases thirty days after
the secured party obtains possession. However, if such rights are exercised, the secured party must dispose of the collateral under section 9-504.

CONCLUSION.

The revised Code provides for a greater degree of flexibility and simplification in the rules of law governing commercial transactions. Certain inadequacies, such as the varying definitions of value, have been eliminated. Other definitions, such as those of an instrument and chattel paper, have been revised for purposes of greater clarity and consistency.

The three main provisions disapproved by the New York Law Revision Commission, i.e., section 9-206 (1), subjecting a holder in due course of a negotiable instrument to the defense or set-off of a buyer of consumer goods in certain cases; section 9-305 (2), requiring public filing to perfect a field warehousing arrangement; and section 9-318 (4), denying effect to a term in a contract right, have been revised in accordance with the criticisms of the Commission.

At least one important problem remains, however. Can an Article 9 security transaction withstand the threat posed by the trustee in bankruptcy under section 60 of the Bankruptcy Act? The Code has overturned the “reservation of dominion” rule of the case of Benedict v. Ratner. If the test of state law under section 60 is upheld, then Article 9 is the final word. But, judicial subversion of Article 9 is to be anticipated as a result of the case of United States v. Ball Construction Co. In that case, the Court held that the instrument involved was inchoate and unperfected and therefore not protected under section 3672 (a) of the Revenue Act of 1939, as amended. The Court’s holding was a per curiam opinion and so rendered in spite of the fact that the law of Texas, where the questioned assignment was made and to be performed, made the assignment a valid mortgage and therefore within the scope of section 3672. The problem then is whether the trustee in bankruptcy will be accorded the same rights under federal law as this Court accorded federal tax liens.

Finally, it is submitted that the Uniform Commercial Code will be uniform in name only unless the adopting states decide to accept one version of it. If Massachusetts adopts one version, Kentucky another, and Pennsylvania still a third, the only uniformity will be within each state and not among the states. The Code as presently revised would be a good starting point, since it provides for the deficiencies of its predecessor as indicated by criticism and experience.

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39. See note 15 supra and accompanying text.