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SECURED TRANSACTIONS UNDER THE COMMERCIAL CODE

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SCOPE AND GENERAL POLICY

Article Nine of the Uniform Commercial Code provides a comprehensive and unified set of rules for most types of personal property security.[1] Personal property, for this purpose falls into four principal categories: 1) goods or chattels; 2) documents which in effect represent and control goods or chattels such as warehouse receipts and bills of lading; 3) instruments which embody and control causes of action such as promissory notes, checks, and stock certificates; 4) intangibles such as accounts receivable and rights under executory contracts.[2] If enacted in Wyoming it would supplant existing statutes on chattel mortgages,[3] conditional sales,[4] trust receipts,[5] and assignments of accounts.[6] It would also provide for pledges of commercial paper, and assignments of contracts for which there is presently no statutory regulation or guidance.

The Commercial Code does away with most of the conceptual distinctions between the various types of security devices. For example under present law retail sales may be financed by either a chattel mortgage or a conditional sale. If a chattel mortgage is used title is considered as passing from the seller to the buyer and then either a security title or a lien is transferred back. On the other hand if a conditional sale contract is used, title is considered as remaining in the seller and the buyer receives only possession and the right to receive title upon payment in full of the purchase price. Apart from this conceptual distinction there are significant practical differences between the two types of transactions with respect to filing, the significance of nonfiling and remedies on default. By way of contrast the Commercial Code recognizes only a single type of personal property security transaction which is designated as a "security agreement."[7] The old terms and forms may be used under the

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1. Uniform Commercial Code, 1957 Official Text with Comments, § 9-192. Hereafter the Code will be cited merely at U.C.C.
2. See definitions in U.C.C. §§ 9-105 and 9-106. Section 9-105 (b) introduces a useful property concept, "chattel paper," which is defined to mean, ". . . a writing or writings which evidence both a monetary obligation and a security interest. . . ." An obvious example is a note secured by a chattel mortgage.
3. Wyoming Statutes. 1957, §§ 34-242 to 34-271. Hereafter the Wyoming Statutes, 1957, will be cited merely as, W.S. Session Laws 1959, Chapter 70, should also be repealed. This expanded the provisions for chattel mortgages securing future advances to include real estate mortgages. If such provisions are desirable they should be included in the statutes on real estate mortgages.
4. W.S. §§ 34-239 to 34-241. In addition, §§ 1-428 and 1-429 providing a special method for levying execution on the purchasers interest in chattels held under a conditional sales contract, should probably be repealed.
5. W.S. §§ 34-296 to 34-314.
6. W.S. §§ 34-272 to 34-287.
7. U.C.C. §§ 9-105 (1) (h) and 9-201.

Code but it will apply to them indifferently and without reference to the prior law.[8] Likewise the rules of the Code apply in the same fashion without regard to the situs of title, and the Code states no rules for determining such situs although it may be significant in taxation and other matters.[9]

The Code eliminates most formalities presently required in the execution of chattel mortgages, conditional sales and other security arrangements. Thus under present Wyoming statutes a chattel mortgage must be acknowledged or signed by two witnesses with some further formalities.[10] A conditional sales contract must be accompanied by a somewhat complex affidavit of the seller.[11] The Commercial Code, on the other hand, only requires that the security agreement be signed by the debtor and describe the property which constitutes the security.[12]

The impact of Article Nine on existing law and practice can be most easily considered in terms of particular types of financing arrangements. It will also be necessary to consider in detail certain problems more or less common to all types of personal property security arrangements.

INVENTORY FINANCING

The problems of inventory financing have given the greatest difficulty under present law and are probably responsible for most of the more difficult provisions of Article Nine. Broadly speaking inventory financing includes a manufacturer financing on his raw material and goods in process as well as a merchant financing on his stock of goods. The discussion which follows will assume the latter. Under the present law it is necessary to make a further subdivision of the subject.

So called "hard goods," i.e., goods such as automobiles where each unit has a relatively high value and is identifiable by serial number, have largely been financed for dealers under the Uniform Trust Receipts Act which was adopted in Wyoming in 1947.[13] The Trust Receipts Act has two principal advantages over the prior law. First only a single notice needs to be filed and this will perfect all transactions between the parties for a period of one year[14] as compared to a separate filing for each transaction as in the case of chattel mortgages and conditional sales. This so-called notice filing is carried over into the Code for inventory financing.[15] Secondly the Trust Receipts Act expressly provides for sales in the ordinary course of business free of the inventory lien without at the same time endangering the security interest as to the dealer's creditors

8. See U.C.C. § 9-102, Comment 2.
9. U.C.C. § 9-202. See § 2-401.
10. W.S. § 34-245.
11. W.S. § 34-239.
12. U.C.C. § 9-203 (1) (b).
13. W.S. § 34-296 forward.
14. W.S. § 34-309.
15. U.C.C. § 9-402.

and other persons.[16] Similar provisions are included in the Code.[17]

The Trust Receipts Act has been somewhat unsatisfactory however in a number of respects. Some of its provisions are extremely difficult to understand. This is especially true of those which define trust receipt transactions or, stated differently, those which attempt to spell out the types of transactions in which the trust receipt may be used. For example the Act requires that the trust receipt be executed more or less contemporaneously with the delivery of the goods to the dealer.[18] The apparent purpose of this requirement is to prevent the use of trust receipt as a substitute for a chattel mortgage when the debtor is borrowing on the security of previously owned property.[19] In other words the trust receipt is supposed to be a sort of purchase money security arrangement and each inventory item is to stand as security for the advance made to purchase it. However, the act is not clear as to what time interval, if any, is permissible and this makes it difficult as a practical matter to set up a workable system to finance incoming inventory.[20] Problems of this sort will not arise under the Code, largely because it covers the entire field of personal property security.

The Act has also proven unsatisfactory in resolving the rather numerous disputes which have arisen between inventory financers and retail financers. The Wyoming case, *General Credit Corporation v. First National Bank of Cody*,[21] provides a good illustration of such disputes. There an incorporated dealership financed the purchase of an automobile with the bank on a trust receipt. Subsequently the dealership sold the automobile to its sole shareholder taking his note and a chattel mortgage for the full purchase price. The note and mortgage were discounted with the finance company. The debt owing to the Bank and secured by the trust receipt was not paid, and the question litigated was whether the Bank or the Finance Company had the better right to the automobile. Under the provisions of the Trust Receipts Act the inventory lien in effect shifts to the proceeds of sale including the retail installment paper, but the Act is not clear as to the validity of such lien as against a later purchaser of the paper.[22] The court held for the Finance Company on

16. W.S. § 34-305.
17. U.C.C. § 9-307.
18. W.S. § 34-298 (1). The availability of the trust receipt device is further limited by paragraph (3) of this section which enumerates certain limited purposes for which the debtor may have possession, the principal one, of course, being sale.
19. See, "Commissioners Prefatory Note," to the Uniform Trust Receipts Act, under the heading, "Scope of the Act." 9C Uniform Laws Annotated 223. In re San Clemente Electric Supply, 101 F.Supp. 252 (D.C. S.D. Calif., 1951).
20. Rohr, "Some problems in Trust Receipt Financing," 3 Wayne L. Rev. 22 (1956).
21. 74 Wyo. 1, 283 P.2d 1009 (1955).
22. W.S. § 34-306 in effect gives the holder of the trust receipt a lien on the proceeds of sale to the same extent and with equal validity as his security interest in the original goods. However, § 34-305 (1) (a) provides that purchasers from the trustee (borrower in the trust receipt transaction) who take . . . "for value in good faith and by transfer in the customary manner instruments in such form as are by common practice purchased and sold as if negotiable, . . ." will take free of the security interest of the trust receipt holder regardless of filing. Sub-paragraph (b).

the basis of a provision in the statute protecting susequent *bona fide* purchasers of negotiable instruments and other instruments of like character even though the instruments are subject to a prior perfected trust receipt.[23] However, courts in other states have reached the opposite result, either by ignoring the section relied on by the Wyoming court or by determining that it is not applicable to this type of transaction.[24] The provisions of the Code governing this sort of problem are much clearer.[25] On the facts stated above, the Code would give the same result as that reached by the Wyoming Courts. It should be noted that the Code will make one substantive change from the Trust Receipts Act in this area. Under the Code the retail financer will take free of the inventory financer's substitute lien on proceeds even though he has knowledge of it.

The Trust Receipt Act is not useful for the financing of inventories of goods like groceries or clothing. In such situations the inventory consists of numerous low cost items which cannot be separately identified and described, and furthermore such an inventory is constantly shifting as goods are sold and new goods are added. Over the years considerable legal difficulties have arisen in attempting to provide effective security interests in such inventories.[26] First, it has been difficult to frame descriptions of such inventories which the courts would accept as legally adequate. Second, such mortgages to be effective must cover later additions to the inventory and some courts have refused to recognize such coverage without the execution of further documents. This is on the

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of the same paragraph states in effect that the inventory lien will shift to instruments which the trustee receives as proceeds and ". . . negotiates to a purchaser in good faith and for value."

23. See note 22 supra.

24. Universal Credit Company v. Citizens State Bank, 224 Ind. 1, 64 N.E.2d 28 (1945), held for the Trust receipt holder on the Indiana equivalent of W.S. 34-306 and did not mention the section comparable to 34-305.

Canadaigua National Bank and Trust Company v. Commercial Credit Corporation, 285 App.Div. 7, 135 N.Y.S.2d 66 (1954), and several other lower and intermediate New York cases, reach similar results on the ground that conditional sales contracts and chattel mortgages are not instruments of the type provided for by 34-305 (1) (a), note 21 supra. See Rudolph, "Judicial Construction of the Trust Receipts Act and its Reflection in the Commercial Code." 19 Pitt. L. Rev. 1, 7 ff (1957).

25. U.C.C. § 9-306 deals with substitute liens on proceeds although it seems in need of a definite statement affirming such liens generally. The important provision on the present problems is the second sentence of § 9-308 which reads as follows: "A purchaser of chattel paper who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in chattel paper which is claimed merely as proceeds of inventory subject to a security interest, even though he knows that the specific paper is subject to a security interest." The big improvements over the Trust Receipts Act are first that there is a single section which definitely covers the matter, and second the concept of "chattel paper" (see note 2 supra) which avoids the difficulties discussed in notes 21 and 22 supra. On the other hand the words, "merely as proceeds" in the above quoted sentence would seem to raise some problem since § 9-306 recognizes that the inventory financer may expressly contract for a lien on proceeds and that proceeds may be covered by the filed financing statement. The Comment to 9-308 says that such cases are subject to the rule of the section.

26. See Friedman, "The Bankruptcy Preference Challenge to After-Acquired Property Clauses Under the Code." 108 U. of Pa. L. Rev. 194 (1959), for a discussion of these difficulties.

general theory that one cannot mortgage property which he does not then own. Third, such mortgages have frequently been held fraudulent as to the retailers' other creditors because of the permission to make sales in the ordinary course of business free of the mortgage, even though such permission is necessary for an arrangement of this sort to be workable. It should be pointed out that these problems are not so difficult in Wyoming because of a number of statutory provisions which expressly authorize mortgages of this type.[27] The Wyoming court has sustained such mortgages in several cases on the basis of these statutes.[28]

The Code provisions for inventory financing of this type are clear and more comprehensive than the Wyoming statutes. The Code expressly authorizes after-acquired property provisions[29] and also provisions for future advances,[30] thus permitting an inventory lien to secure a continuing line of commercial credit. It also spells out the rights of purchasers in the ordinary course of business[31] and expressly provides that permission to make such sales free of the inventory lien will not invalidate the lien as to the debtors' other creditors.[32] The Code also provides for the in-

27. W.S. § 34-242 authorizes after-acquired property provisions generally, limited only to property of "like kind of character" as that presently mortgaged; § 34-255 provides more directly for inventory mortgages by expressly authorizing provisions permitting sales in the course of business and providing for the replacement of the property sold with other property of "like kind of character"; §§ 34-266 to 34-269, as amended by Session Laws 1959, c. 70, authorizes provisions for future advances.

28. McCord Brady and Co. v. Albany County National Bank, 6 Wyo. 507, 46 Pac. 1093 (1896), rehearing denied, 7 Wyo. 9, 48 Pac. 1058 (1897). This case is particularly interesting in that the mortgage covered accounts as well as inventory. The court gave its effect as to after-acquired accounts as against a later mortgage which likewise purported to cover both present and future inventory and accounts. This seems to be a clear recognition, at an early date, of an exceptionally broad type of "floating lien." Carroll v. Anderson, 30 Wyo., 217, 218 Pac. 1038 (1923), held that an inventory mortgage was neither presumptively nor conclusively fraudulent even though the mortgagor was permitted to make sales without accounting for the proceeds since he was required to keep up the mortgaged stock. See also Citizens National Bank of Cheyenne v. Puckett, 36 Wyo. 232, 254 Pac. 128 (1927); and Hasbrouck v. La Febre, 23 Wyo. 367, 152 Pac. 168 (1915).

29. U.C.C. § 9-204(3). Section 9-108 should also be considered. It provides that a security interest in after-acquired property ". . . shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral . . . in the ordinary course of business. . . ." The purpose of this provision is to prevent the security interest in after-acquired property from being nullified as a preference when the debtor acquires the property within four months of his bankruptcy. There is some doubt as to whether the provision will be effective for this purpose. See Friedman, The Bankruptcy Preference Challenge to After-Acquired Property Clauses Under the Code, 108 U. of Pa. L. Rev. 194.

Under § 9-312 an after-acquired property security interest in inventory will generally be subordinate to a later purchase money security interest, as there defined, providing the creditor claiming the latter gives notice to the former before the particular collateral comes into the debtor's possession. The notice requirement is to protect the creditor with the after-acquired property security agreement against the danger of making future advances against the property subject to the purchase money security interest.

30. U.C.C. § 9-204(5). Under this provision the security interest for all future advances will date from the time the security interest first attaches for any obligation even though the creditor is not obligated to make the advances. Although it is not clear, the rule would probably be the same under the present Wyoming statutes, W.S. §§ 34-266 to 34-269, except that the mortgage must state the maximum amount of advances, and the times within which all will be made and will mature.

31. U.C.C. § 9-307(1).

32. U.C.C. § 9-205.

ventory financiers lien to shift to the proceeds of sales and states rather complete rules for settling conflicting claims to such proceeds as between the inventory financer and other persons.[33] The Wyoming chattel mortgage statutes are silent on this point and, while the Wyoming Supreme Court has considered the question, the case law is confusing and inconclusive.[34]

ACCOUNTS RECEIVABLE FINANCING

Accounts receivable financing in Wyoming is now governed by a modern and comprehensive statute enacted in 1957.[35] Similar statutes have been enacted in many states in recent years. Two developments in bankruptcy law have bee responsible for this.

The first began with the case of *Benedict v. Ratner*[36] which held that an assignment of accounts was fraudulent and void because the assignor could collect the accounts and use the proceeds for his own purposes instead of accounting for them to the assignee. Later cases extended the doctrine to invalidate assignments if the assignor was not required to

33. U.C.C. § 9-306. The inventory financers lien on proceeds has been previously considered in situations where the proceeds consist of conditional sales contracts or chattel mortgages. See notes 21-23 supra. The lien of the inventory financier under the Code also extends to other types of proceeds including cash proceeds which are defined to include money and checks. If cash proceeds have been commingled or deposited in a bank account, and are therefore no longer identifiable, then the Code provides that in the event of the debtor's bankruptcy the inventory financer shall have a lien on all the debtor's cash and bank accounts to the extent of the proceeds received and commingled or deposited within ten days prior to bankruptcy less amounts paid over to the financer within such ten day period. There is some possibility that this provision will be construed by bankruptcy courts as creating a priority instead of a lien and will therefore be ineffective since priorities created by state law are not recognized in bankruptcy. See In re Harpeth Motors, 135 F. Supp. 863 (Tenn. 1955), in which a similar lien under § 10 of the Uniform Trust Receipts Act was attacked unsucessfully by a trustee in bankruptcy on this ground. See also Rudolph, "Judicial Construction of the Trust Receipts Act and Its Reflection in the Commercial Code," 19 Pitt. L. Rev. Rev. 1, at p. 17, ff.

With reference to proceeds generally, the lien is perfected for ten days without filing, if the inventory lien was perfected, and may be perfected beyond that period by filing. It will also be perfected indefinitely if proceeds are covered by the filed financing statement for the inventory lien.

34. Rock Springs National Bank v. Luman, 6 Wyo. 123, 42 Pac. 874 (1895), involved a mortgage of sheep which permitted the mortgagor to make sales and required him to account to mortgagee for proceeds. The mortgagor sold a part of the sheep and deposited the proceeds to his account with the Bank which then set the deposit off against an indebtedness of the mortgagor. The court found that the Bank had notice of the source of the deposit and allowed the mortgagee to recover from the bank. The court considered the mortgagor as a trustee for the mortgagee because of the requirement that he account for proceeds. The dissenting judge discussed the question of whether the lien of the mortgage transferred to the proceeds but did not attempt an answer. Thex v. Shreve, 38 Wyo. 285, 267 Pac. 92 (1928), also involved a livestock mortgage permitting the mortgagor to sell and requiring him to account. The mortgagor deposited the proceeds of a sale to his account with a bank whereupon one of his creditors garnished the bank. The court held in favor of the mortgagee as against the creditor. In this case the court considered the question largely in terms of agency. Since both of these decisions depended on the provision of the mortgage requiring the mortgagor to account they are of limited significance on the broad question. McCord, Brady and Co. v. Albany County National Bank, discussed in note 25 supra, may be interpreted as sustaining a lien on proceeds in the form of accounts receivable when expressly provided for in an inventory mortgage.

35. W.S. §§ 34-272 to 34-287.

36. 268 U.S. 353, 45 S.Ct 566 (1925).

account to the assignee for returned goods when such return had the effect of eliminating assigned accounts.[37] Since the rule of *Benedict v. Ratner* was purportedly based on the state law of fraudulent conveyances it was within the reach of state legislation. Both the Wyoming statute and the Code provide that assignments shall not be held fraudulent on such grounds.[38]

The second development leading to the wide enactment of accounts receivable statutes was the Supreme Court's decision in *Corn Exchange Bank v. Klauder*,[39] holding an assignment of accounts voidable in bankruptcy as a preference. Under Section 60a of the Bankruptcy Act, as it then stood, a transfer was to be deemed made, for the purpose of determining if it was within the four month period, when it became so far perfected as to be good against a bona fide purchaser. Since under the applicable state law (Pennsylvania) a later assignee who first gave notice to the account debtors would prevail over an earlier assignee, the court held that without such notice the assignment was not perfected within the meaning of Section 60a, and therefore in the words of that section should ". . . be deemed to have been made immediately prior to bankruptcy." The various state legislatures took care of this either by providing that assignments should be good against all parties without notice to the account debtors, or by providing for perfection by some type of recording or filing.[40] The problem was also taken care of by an amendment to the Bankruptcy Act which eliminated the bona fide purchaser test in favor of a lien creditor test.[41]

The most significant element of the Wyoming accounts receivable statute is the notice filing provision[42] similar to that of the Uniform Trust Receipts Act discussed above. Similar notice filing is provided by the Code for accounts receivable financing.[43] In general the Code and statutory provisions are quite similar in other respects also, except that the Code provisions are more comprehensive. Thus the Code spells out in more detail the rights and obligations of the assignee, or creditor, both before and after default.[44] It also covers assignments of rights to payment under executory contracts,[45] whereas such assignments are expressly excluded from the coverage of the Wyoming statute.[46] The Code, because of its comprehensiveness also makes it possible to include accounts with

37. Lee v. State Bank and Trust Co., 38 F.2d 45 (2d Cir. 1930).
38. W.S. § 34-280, U.C.C. § 9-205. Both the statute and the Code recognize that the assignee of the account has a lien on the returned goods but that such lien should not be valid as against subsequent purchasers of the goods or lien creditors. The Code provisions are more comprehensive. See W.S. § 34-285 and U.C.C. § 9-306 (5).
39. 318 U.S. 434, 63 S.Ct. 679 (1943).
40. See generally, "A Comment on Wyoming's New Accounts Receivable Statute," 12 Wyo. L.J. 144 (1958).
41. Act of March 18, 1950, P.L. 461, 81st Cong.
42. W.S. §§ 34-274 to 34-277.
43. U.C.C. §§ 9-302, 9-303 and 9-402.
44. U.C.C. §§ 9-318 and 9-502. Compare W.S. § 34-284.
45. U.C.C. §§ 9-102 (1) (a) and 9-106.
46. W.S. § 34-272.

inventory in a single float-lien.[47] A significant provision of the Code states that any term in any contract between an account debtor and an assignor which attempts to prohibit assignment of the account is ineffective.[48] This also applies to other contract rights.

LIVESTOCK AND CROP FINANCING

As would be expected Wyoming has rather extensive statutory provisions on livestock and crop financing. The most troublesome questions in connection with these mortgages concern adequate descriptions and the after-acquired property problem discussed above in connection with inventory financing. The present Wyoming statute on crop mortgages provides that the lien shall continue after harvest but that such mortgage shall attach only to crops maturing in the summer or fall following its execution.[49] Similarly the Commercial Code in effect limits crop mortgages to those planted within one year.[50] The Code requires that the security agreement must describe the land on which the crops are to be grown.[51] Under the Code, as under present statutes, the crop lien apparently survives harvest even as against later purchasers although this is none too clear.[52]

The Wyoming statutes provide that mortgaged livestock may be described by brand and that such a mortgage will cover subsequently acquired livestock bearing the same brand whether it is the natural increase of the original livestock or is acquired by purchase or otherwise.[53] The Code has no comparable provisions. However such a description would probably be adequate under the general rule of the Code that any description is sufficient that reasonably identifies the property.[54] Under the Code a livestock mortgage will cover increase and subsequently acquired animals if, and only if, it includes a suitable after-acquired property clause.[55]

PLEDGES

The provisions of Article Nine apply to pledges of negotiable instruments and documents.[56] The secured parties interest in these transactions is generally perfected by taking possession of the collateral rather than by filing.[57] The Code provides for filing in the case of documents

47. U.C.C. §§ 9-203, 9-306 and 9-402. In an early case the Wyoming court gave recognition to such a lien created by chattel mortgage. See note 25 supra. It seems doubtful that this could be done now since assignments of accounts have been recognized as a separate type of security transaction.
48. U.C.C. § 9-318 (4).
49. W.S. § 34-270.
50. U.C.C. § 9-204 (4) (a).
51. U.C.C. § 9-203 (1) (b).
52. U.C.C. § 9-307 (1) and § 9-109.
53. W.S. § 34-243. See P. J. Black Lumber Co. v. Turk, 50 Wyo. 361, 62 P.2d 519 (1936).
54. U.C.C. § 9-110.
55. U.C.C. § 9-204.
56. U.C.C. § 9-102.
57. Possession is an alternative method of perfection generally. See U.C.C. §§ 9-302 (1) (a) and 9-305.

such as warehouse receipts but not for negotiable instruments.[58] The Code further provides that a security interest in such documents or instruments will be perfected for twenty-one days without possession or filing and further will remain perfected for twenty-one days after redelivery to the debtor for certain specified purposes such as collection and renewal.[59] These latter provisions are patterned after similar ones presently included in the Uniform Trust Receipts Act.[60] However, since the Trust Receipts Act was primarily designed for inventory financing of automobiles and similar goods, it is difficult to determine what transactions are intended to be covered by these so-called pledge provisions.[61] In view of the comprehensive scope of Article Nine no comparable question of coverage arises under the Code.

The Code states rules, much like those now prevailing, for the pledging of goods in the possession of a third party bailee. The basic proposition is that under such circumstances a valid pledge can be created by giving notice to the bailee who will thereafter hold for the pledgee as well as the pledgor.[62] The Code also provides that the same result may be accomplished by the bailee issuing a non-negotiable document of title, such as a straight bill of lading, in the name of the pledgee.[63] Additionally the Code, in effect, provides that when the goods are represented by a negotiable document of title, the security interest is to be effected by pledge of the document and that such a security interest will be prior to any other securing interest in the goods themselves.[64] These provisions should of course be considered along with Article 7 on Documents of Title.

The provisions discussed in the above paragraph will govern field warehousing transactions. In these transactions the debtor leases a part of his premises to a warehouse company for the storage of inventory or raw materials, and the warehouse company then issues a warehouse receipt to the debtor who pledges it as security. Earlier drafts of the Code required filing, in the same manner as for other inventory liens, to perfect such arrangements.[65] However, these provisions met opposition and have been eliminated. Therefore under the Code, as under present law, the validity of a field warehousing transaction will depend on the genuineness of the warehouse company's possession.[66]

58. U.C.C. § 9-304(1).
59. U.C.C. § 9-304(4) and (5).
60. W.S. § 34-299. These provisions and those of the Code developed out of common law rules concerning the redelivery of pledged property to the pledgor for temporary and limited purposes. See Restatement of Security, § 11.
61. See W.S. § 34-312 and Sammet v. Mayer, 108 F.2d 337 (2d Cir. 1939), footnote 7 at p. 341.
62. U.C.C. §§ 9-305 and 9-304(3); see Restatement of Security, § 8.
63. U.C.C. § 9-304(3). This provision also recognizes filing as a means of perfection in such circumstances.
64. U.C.C. § 9-304(2).
65. U.C.C. 1952 Official Draft, § 9-305(2).
66. See U.C.C. § 9-205, last sentence. For a leading case see, Union Trust Company, and Security Warehousing Company v. Wilson, 198 U.S. 530, 25 S.Ct. 766 (1904).

RETAIL FINANCING

The financing of retail sales has not presented as great difficulties under the present law as inventory and accounts receivable financing. The Commercial Code would make one significant change in the law respecting such financing. No filing would be required to perfect purchase money security interests in most consumer goods, other than motor vehicles, and in farm equipment having a purchase price of not more than $2500.[67] In such cases the security interest will be valid against all third persons except a buyer in good faith who purchases for his own use.[68] In addition the Code will make one significant change in remedies which, although not restricted to retail financing, will have its principal impact in such cases. Under the present law of conditional sales, the seller, or assignee of the contract, may simply keep the chattel upon repossession, thereby forfeiting the buyer's equity. Under the Code the buyer will always have the right to require a sale and to receive any surplus above expenses and the unpaid balance of the debt.[69]

The earlier drafts of the Code invalidated agreements by retail purchasers not to assert sales defenses such as breach of warranty against assignees of the retail paper.[70] It further provided that such defenses would be available against the assignee of the retail installment paper when he attempted to enforce the security agreement, even though the retail purchaser's obligation was evidenced by a negotiable instrument as to which the assignee was a holder in due course. These provisions aroused opposition among the finance companies and have been eliminated.[71]

The Code will not supplant usury nor small loan laws nor laws regulating retail installment sales with respect to contents of the contract and the amount of the time price differential.[72] Laws of the latter type have been widely adopted but Wyoming does not yet have one.[73]

The two sections which follow deal with problems that arise most frequently in retail financing transactions.

FIXTURES AND ACCESSIONS

Fixtures may be broadly defined as chattels which become a part of real estate through physical attachment, but which never-the-less retain

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67 U.C.C. § 9-302.
68. U.C.C. § 9-307 (2).
69. U.C.C. § 9-505 (1). See the detailed discussion of this question under the heading "Rights and Obligations Between the Parties to the Secured Transaction," infra.
70. Uniform Commercial Code, 1952 Draft, § 9-206.
71. The present provision says that such agreements not to assert defenses are enforceable by assignees for value and without notice of such defenses "subject to any statute or decision which establishes a different rule for buyers of consumer goods." U.C.C. § 9-206.
72. See note to U.C.C. § 9-102.
73. See, "Protection for the Automobile Installment Buyer," 13 Wyo. L.J. 83 (1958). In Conway v. Skidmore, 48 Wyo. 73, 41 P.2d 1049 (1935), the Wyoming court held that "carrying charges" or the "time price differential" in the conditional sales transactions are not within the reach of the usury statutes.

their separate identity and can be severed. For present purposes the best illustrations are certain household appliances and equipment such as furnaces, washing machines which bolt to the floor, venetian blinds and wall to wall carpeting. The Code states a number of rules with respect to fixtures but, except for excluding building materials, leaves the problem of whether particular property is a fixture to be determined by general law.[74] The courts have generally considered the question to be largely factual, depending upon the degree of attachment, the adaptibility of the chattel to the particular real estate, the damage occasioned to both the real estate and the chattel through removal and the intention of the parties as evidenced principally by the relationship between them.[75]

The problems of particular interest here involve disputes between persons who obtained security interests in the chattels before they were affixed and mortgage of the real estate. Actually there are two classes of such cases depending upon whether the real estate mortgage was executed before or after the annexation of the fixture. If the real estate mortgage was executed prior to the attachment of the fixure, the Code provides that the person having the personal property security interest in the fixture shall have priority over the real mortgagee and may sever the fixture.[76] A majority of courts, including the Wyoming Court, have reached the same result.[77] The reason usually given in support of this rule is that the real mortgagee did not bargain for the additional security of the fixture.

On the other hand if the real mortgage is executed subsequent to the attachment of the fixture the real mortgagee will prevail under the Code unless he has knowledge of the security interest in the fixture or it is perfected before the execution of the real mortgage.[78] In order to perfect a security interest in fixtures by filing, the Code requires that the financing statement describe the land to which the fixtures are to be annexed and that it be filed with the real estate records as well as in the other office or offices provided generally by the Code.[79] Although there are apparently no Wyoming cases on this problem, the cases in other states are generally consistent with the provisions of the Code. It should be noted that neither the Wyoming chattel mortgage statute nor the conditional sales statute provides for recording with the real estate records.

As previously stated the above rules apply only when the security interest in the chattel is created before it becomes a fixture. Most cases will be of this sort since the security interest will generally secure a

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74. U.C.C. § 9-313 (1).
75. See "Some Aspects of the Law of Fixtures in Wyoming," 10 Wyo. L.J. 119 (1956).
76. U.C.C. § 9-313 (2).
77. Holland Furnace Co. v. Bird. 45 Wyo. 471, 21 P.2d 825 (1933). "Some Aspects of the Law of Fixtures in Wyoming," supra note 75 at p. 122.
78. U.C.C. § 9-313 (4).
79. U.C.C. §§ 9-401 and 9-402.

purchase money obligation. However the Code also states rules governing priority when a personal property security interest is created after the fixture is annexed. In general such security interests will be subordinate to existing liens on the real estate, but will be prior to subsequent real mortgages and other liens if perfected or if such mortgagees or lienors have actual knowledge.[80]

A further provision of the Code should be noted. The secured party claiming a personal property interest in the fixture may, assuming that he has priority, sever it regardless of the injury to the real estate, but he must reimburse the real mortgagee for such injury and the latter may require security for such reimbursement as a condition to removal.[81] Other persons having interests in the real estate, excluding the debtor of course, are given similar rights to reimbursement and security.

The Code states rules, almost identical to those for fixtures, to govern the conflicts which arise when goods are added as accessions to other goods.[82] Probably the most frequent example of this is the purchase of tires on a conditional sales contract for installation on an automobile which is encumbered by either a chattel mortgage or conditional sales contract. Under the Code the seller of the tires will prevail over the mortgagee or seller of the automobile. The latter will be particularly unhappy if, as usually happens, the original tires were traded in on the new ones.[83]

Somewhat similar problems arise when goods subject to a security interest are either commingled with like goods or combined with other goods in a manufacturing process. However, since in either case the identity of the original goods is lost, rules of the sort provided for fixtures and accessions will not work. The Code provides that the security interest in the original goods "continues in the product or mass."[84] If two or more persons had security interests in different original goods then they have security interests in the product or mass of equal priority and in proportion to the relative costs of the original goods.[85] It is not clear whether the security interest in the product or mass is valid against later purchaser, however, except in cases where the filed financing statement for the original goods also covers the product into which they are processed.[86]

80. U.C.C. § 9-313 (3).

81. U.C.C. § 9-313 (5).

82. U.C.C. § 9-314.

83. In Holland Furnace Co. v. Bird, supra note 77, the original furnace was traded in and was removed by the conditional seller of the new one. After holding that the conditional seller had the better right to the new furnace as against the prior real mortgage, the court indicated that the conditional seller would be liable in a proper action to the real mortgagee for waste in removing the old furnace.

84. U.C.C. § 9-315 (1) (a).

85. U.C.C. § 9-315 (2).

86. See U.C.C. §§ 9-315 (1) (b) and 9-402.

MOTOR VEHICLE LIENS

The peculiar problems under this heading result from two causes. The first is the propensity of automobiles to move readily from place to place, and particularly from state to state under their own power. The second is the rather unsatisfactory nature of the certificate of title statutes. Needless to say the most complicated problems arise from the interaction of the two causes.

There are a considerable number of cases dealing with the problem presented when an automobile has been mortgaged in one state, the mortgage properly recorded in that state, and the automobile then taken to another state by the mortgagor and there sold. Under the generally accepted rule the mortgagee will prevail over the subsequent purchaser under these circumstances even though the latter would have no practical means for determining the existence of the mortgage. This result is ordinarily reached in two steps. First, the validity of a security interest is to be determined by the law of the state where the property is situated when the security interest is created and second, the law of that state will ordinarily provide for recording at the situs of the property.[87] These two propositions are carried over into the Code except that the Code requires filing in the State to which the property is removed after it has been there for four months.[88] The latter requirement is similar to the rule sometimes recognized under the present law which requires filing in the second state when the property is removed to such state permanently and with the knowledge or consent of the mortgagee.[89]

The Wyoming statutes, like those of a considerable number of states, require that all liens be noted on the motor vehicle certificate of title.[90] In the case of chattel mortgages or conditional sales this results in a sort of dual filing system. Although it probably does not occur frequently it is entirely possible that a chattel mortgage might be properly filed with the county clerk, but not noted on the certificate of title. Unfortunately the Wyoming statute does not prescribe the significance of the failure to note the lien on the certificate and therefore it is possible that in such a situation the mortgage could be enforced against a purchaser for value who bought in reliance on the clear certificate.[91]

Adoption of the Code would have no direct effect on the Certificate of Title Law.[92] However the Code would eliminate the dual filing described above by a provision which, in effect, exempts liens on motor vehicles which are required to be noted on the certificate of title from

87. Mosko v. Smith, 63 Wyo. 239, 179 P.2d 781 (1947). See "Automobiles — Chattel Mortgages — Recording," 3 Wyo. L.J. 92.
88. U.C.C. § 9-103. These provisions apply to all movable goods but motor vehicles are the most important type.
89. See Leary, "Horse and Buggy Lien Law and Migratory Automobiles," 96 U. of Pa. L. Rev. 455 (1948).
90. W.S. §§ 31-37. The certificate of title statute includes §§ 31-30 to 31-48.
91. See "Motor Vehicle Certificates of Title in Wyoming," 11 Wyo. L.J. 47 (1956).
92. U.C.C. § 9-103(4).

the filing requirements of the Code.[93] Although it is not entirely clear, it would seem that liens properly noted on the certificate would be considered perfected within the meaning of the Code and therefore valid as against later purchasers and creditors. On the other hand it is by no means clear that liens not noted on the certificate would be unperfected and therefore vulnerable under the provisions of the Code to attack by subsequent purchasers and lien creditors.[94] The draftsmen of the Code apparently assumed that the certificate of title law would itself prescribe the results of failing to note the lien on the certificate. As has been seen this is not the case in Wyoming.

FILING AND THE EFFECTS OF NON-FILING

The Code provisions concerning filing, especially notice filing, have been referred to occasionally under the previous headings. Nevertheless it seems advisable to consider the subject separately in order to cover fully the principal features of the Code.

In general, and without making the distinction express, the Code provides for two types of filing. The first is notice filing which requires the filing of a single notice, or financing statement, naming the parties and describing the type of property serving as collateral.[95] This single notice serves to protect all secured transactions between the parties with respect to such property for a period of one year. This system is useful principally for inventory and accounts receivable financing. Separate filings for separate transactions, such as retail financing and isolated instances of commercial financing not constituting part of a regular course of business, are impliedly authorized by the provision permitting the security agreement itself to be filed as a financing statement.[96] This set up corresponds closely to the present Wyoming situation since the Trust Receipts Act and the Accounts Receivable Act provide for notice filing,[97] and the chattel mortgage and conditional sales statutes require separate local filing for each transaction.[98]

The purpose of notice filing is to expedite commercial financing when there are large number of transactions in a continuing course of business. While it is a desirable solution to this problem it should be recognized that it has one inherent undesirable feature.

93. U.C.C. § 9-302 (3) (b). Alternative B.
94. Section 9-302 (3) merely provides that the filing provisions do not apply to liens required to be noted on a certificate of title by another statute. It does not seem to incorporate the provisions of the Certificate of Title Law into the requirements for perfection.
95. U.C.C. § 9-402.
96. U.C.C. § 9-402 (1).
97. See discussions under headings "Inventory Financing" and "Accounts Receivable Financing," supra. One difference should be noted. Under the Trust Receipts Act only filing with the Secretary of State is required. W.S. § 34-309. Under the Accounts Receivable Statute copies of the notice must be filed both with the Secretary of State and the County Clerk where the assignor has his principal place of business. The Code provides generally for filing with the Secretary of State but contains optional provisions for local filing. U.C.C. § 9-401
98. W.S. §§ 34-249 and 34-239.

If two or more creditors file financing statements for the same debtor and with respect to the same kind of property then difficult questions of priority may arise since such filings will likely have been made before any security interests have been created and even before the debtor obtained the collateral. If both creditors make advances on the same property then the Commercial Code provides that the creditor who first filed shall have priority regardless of the order in which the advances were made and the security agreements executed.[99] An exception to this is made if the one who filed last has a "purchase money security interest" in the property in question. Even then, if the property is inventory, his priority is conditioned upon giving notice to the one who filed first.[100] The practical result of this would probably be to give the one filing first a monopoly in financing that particular debtor. Since such monopolies are probably customary in inventory and accounts receivable financing anyway this may be not a serious objection. The only case on this question under the Trust Receipts Act reached a result opposite that provided for by the Code.[101] On the other hand the Wyoming Accounts Receivable Statute includes an express rule similar to that of the Code.[102]

Two other provisions of the Code which bear on the problem discussed above should be noted. If at any time there is no outstanding secured obligation the debtor may require the secured party to furnish a "termination statement" which, when filed, will terminate the effectiveness of a filed financing statement.[103] This will be helpful if a debtor wishes to obtain secured credit from another lender. Likewise the debtor may require the secured creditor to furnish a statement of the amount of the debt, and also a list of the collateral if the secured party does not claim a security interest in all the property of the debtor of the specified kind.[104] Such a statement will often be useful in obtaining unsecured credit. The Wyoming Statute on accounts receivable has somewhat similar provisions[105] but the Trust Receipts Act does not.

The Code provides generally that if the security interest is not perfected, either by filing or change of possession, then it is subordinate to persons who become lien creditors without notice and also purchasers for value without notice who receive delivery.[106] The term, lien creditor, is defined to include one who acquires a lien by attachment or levy of execution.[107] The Wyoming law with respect to chattel mortgages is substantially the same[108] although there does not seem to be any square

99. U.C.C. § 9-312 (5).
100. U.C.C. § 9-312 (3) and (4).
101. Donn v. Auto Dealers Inv. Co., 385 Ill. 211, 52 N.E.2d 695 (1944).
102. W.S. § 34-281.
103. U.C.C. § 9-404.
104. U.C.C. § 9-208.
105. W.S. §§ 34-276 and 34-286.
106. U.C.C. § 9-301.
107. U.C.C. § 9-301 (3).
108. Barber v. Reina Nash Motor Co., 72 Wyo. 65, 260 P.2d 928 (1953).

holding on the effect of notice so far as the rights of creditors are concerned. Nor is there any requirement that a purchaser receive delivery. The Wyoming statute on conditional sales is somewhat different, however, since it refers to "judgment creditors."[109] The Wyoming Court has never interpreted this language except to hold that attaching creditors are also protected.[110] In the same case the court held that the creditor must prove that he did not have actual knowledge of the conditional sale at the time of levy in order to prevail.[111]

The Code also includes assignees for the benefit of creditors, equity receivers and trustees in bankruptcy within the definition of "lien creditors." This would not result in any change in the law as a practical matter.[112] Theoretically it does not seem that a state, through the adoption of the Commercial Code, can validly prescribe the rights of a trustee in bankruptcy in this manner.

The Code makes one exception to the rules stated in the preceding paragraphs. In the case of a purchase money security interest the secured creditor is given ten days within which to file, and if he files within that time the security interest will be good against both intervening lien creditors and purchasers.[113]

RIGHTS AND OBLIGATIONS BETWEEN THE PARTIES TO THE SECURED TRANSACTION

Except for the provisions concerning statements of the debt and collateral[114] the rules concerning the rights of the parties prior to default relate largely to pledges. The Code provisions respecting the pledgee's duties as a bailee of the pledged property[115] are generally similar to the common law rules.[116] Two provisions should be noted. While the pledgee is entitled to retain any increase or income as additional security, if income in the form of cash is received it must either be paid over to the debtor or applied in reduction of the debt even though the debt is not due and even though it will therefore result in some loss of expected interest.[117] If the pledgee wrongfully converts the property or otherwise is responsible for its loss or injury he is liable for such loss or injury but does not lose his right to security.[118]

The remedies available to the secured party after default will depend largely upon the nature of the property constituting the collateral. In

109. W.S. § 34-239. This provision is rather unusual. It should be considered along with § 1-428 giving an attaching or judgment creditor a lien upon property in the possession of the judgment debtor as purchaser under a conditional sales contract.
110. Cumrine v. Reynolds, 13 Wyo. 111, 78 Pac. 402 (1904).
111. See also, Casper Motor Co. v. Marquis, 31 Wyo. 115, 223 Pac. 764 (1923).
112. This is consistent with both § 70c and § 60a of the Bankruptcy Act.
113. U.C.C. § 9-301 (2).
114. See notes 103 and 104, supra.
115. U.C.C. § 9-207.
116. See Restatement of Security, §§ 17 and 18.
117. U.C.C. § 9-207 (2) (c).
118. U.C.C. § 9-207 (3). Compare Restatement of Security, § 20.

assignments of accounts, or pledges of instruments, the Code provides that the secured party on default may notify the account debtor or obligor on the instrument to make payments to him.[119] In the case of a pledged negotiable instrument, it would seem that the pledgee could collect only if the instrument was endorsed to him or payable to bearer. The creditor in exercising this right of collection is required to act in a commercially reasonable manner which will be of importance chiefly in the compromising of claims.[120] He is also permitted to reimburse himself for his reasonable expenses of collection.[121] At this point it should be mentioned that the Code provisions govern absolute sales of accounts as well as security assignments.[122] In such a case the purchaser assumes the credit risks involved in the accounts and, on the other hand, is under no obligation to account to the assignee for any surplus. In such cases the rules last stated obviously do not apply.[123]

The Code provides that upon default the secured party has the right to take possession of the collateral, if he does not already have it, and that he may exercise this right without judicial process if it can be done without breach of the peace.[124] This would make no substantial change as a practical matter since chattel mortgages and conditional sales contracts uniformly provide for a similar right of possession and the Uniform Trust Receipts Act includes a similar provision.[125]

The Code would apparently make some changes in the procedure for foreclosure sales although the extent of such changes is not clear. Under the Code the secured party, on default, may sell at either public or private sale. He may purchase at public sale and also at private sale if the collateral is "of a type customarily sold in a recognized market or is the subject of widely distributed standard price quotations." In the case of a public sale reasonable notification of the time and place of sale must be given to the debtor and also, except in the case of consumer goods, to junior lienors. In the case of private sale similar notification must be given of the time after which the sale will be made. The Code does not specify what will constitute reasonable notice. The notice requirements do not apply if the collateral is perishable or of a type customarily sold on a recognized market. While formalities are thus kept to a minimum the Code requires that the sale in all its aspects, "method, manner, time, place and terms," must be "commercially reasonable."[126] The Code does not include any comprehensive definition of the term, "commercially reasonable," although it does provide that cer-

119. U.C.C. § 9-502 (1). This will also apply where an inventory financer claims accounts or chattel paper as proceeds.
120. U.C.C. § 9-502 (2).
121. Ibid.
122. U.C.C. § 9-102 (1) (b).
123. U.C.C. § 9-502 (2).
124. U.C.C. § 9-503.
125. W.S. § 34-302.
126. All these requirements are included in U.C.C. § 9-504 (3).

tain described conduct shall be deemed commercially reasonable.[127] Since this is a wholly new legal concept it will probably require considerable judicial construction. If the secured party does not comply with these requirements, including the one phrased in terms of "commercially reasonable," he will be liable to the debtor for damages.[128] In the case of consumer goods such damages will not be less than the time price differential plus ten per cent of the cash price.[129]

Consideration of the Wyoming law on foreclosing chattel mortgages must begin with the statutes. These are patterned closely after the statutes concerning foreclosure by advertisement of real estate mortgages and include detailed provisions concerning notice and the time, place and manner of sale.[130] While these provisions provide for public sale the Wyoming Supreme Court has held that the statutory method is not exclusive and that private sale is permissible if authorized by the mortgage.[131] Presumably other details of the foreclosure procedure could be controlled by the terms of the mortgage. However, if the statutory procedure is used the mortgagee may purchase,[132] and it is at least doubtful if this could be done otherwise. The Supreme Court has also held that if the mortgagee sells at an unreasonably low price he may be liable for damages to the mortgagor but the sale will not be a conversion.[133] This seems similar in end result, to the Code provision discussed above.

Wyoming has no statutory provisions governing the rights of a conditional seller upon the buyers default. These rights will therefore depend on the terms of the contract. Typically the contract will provide either that the seller can repossess, terminate the buyers rights in the chattel and retain amounts previously paid, or that, upon repossession, the seller will resell the chattel as agent of the buyer, apply the proceeds to the expenses of the repossession and sale and then to the unpaid balance of the price, and account to the buyer for the surplus or hold the buyer for the deficiency. Frequently the contract will give the seller an election between these two courses of action.[134] Adoption of the Code would result in a considerable change in the right of the seller to retain the property without sale. In general the Code provides that the secured creditor may retain the collateral in satisfaction of the obligation only if the debtor or a junior lienor fails to object within thirty days after

127. U.C.C. § 9-507. Sale in the "usual manner in any recognized market" or sale "at the price current in such market" or sale "in conformity with reasonable commercial practices among dealers in the type of property sold" are commercially reasonable. Also sales approved in any judicial proceeding or by a "bona fide creditors committee or representative of creditors."
128. U.C.C. § 9-507 (1).
129. Ibid.
130. W.S. §§ 34-256 to 34-263.
131. McInerney and Conway Finance Corp. v. Smith, 42 Wyo. 380, 295 Pac. 273 (1930).
132. W.S. § 34-262.
133. McInerney and Conway Finance Corp. v. Smith, supra note 96. A somewhat similar result was reached in a case involving a conditional sales contract. Conway v. Skidmore, 48 Wyo. 73, 41 P.2d 1049 (1934).
134. See Conway v. Skidmore, supra note 133.

receiving written notice of the creditor's intention to do so. If objection is made then the collateral must be sold. In addition, if the collateral is consumer goods and more than sixty per cent of the obligation has been paid, the creditor may retain the collateral in satisfaction of the obligation only if the debtor consents in writing after default.[135]

CONCLUSION

Adoption of Article Nine would result in relatively few changes of substance in the Wyoming law of personal property security. Certainly the extent of such changes would be much less in Wyoming than in many other states. This is attributable to several factors. First in importance is the fact that the Wyoming statutes have long included provisions authorizing mortgages on inventory, and these statutes have been liberally applied by the Wyoming Supreme Court to sustain such mortgages. Secondly, Wyoming has the Uniform Trust Receipts Act and the new Accounts Receivable Statute, both of which are similar to Article Nine in many important respects. Lastly, the Wyoming Court has followed the majority rule on several important questions and these majority rules have been carried over into the Code. The rule which gives the conditional seller of a fixture priority over a prior mortgagee of the real estate is a good illustration of this. Another is the rule which makes an unperfected security interest void only as to a creditor who obtains a lien while it remains unperfected.

Nevertheless, the Code would make several important changes. Probably the most significant would be the elimination of the necessity for filing in the case of most retail installment sales. Almost as important would be the elimination of the rather complex formalities required in the execution of chattel mortgages and conditional sales under the present law. Other changes are pointed out throughout the body of the paper.

In addition the Code would provide detailed and precise rules for many questions on which there either is no law at all presently or on which the present law is not clear. The best illustrations of this are the numerous questions with respect to the inventory financer's substitute lien on proceeds.

Another result of the adoption of the Code should probably be mentioned. Persons long accustomed to the present law would no doubt feel they have been cut loose from their moorings because of the almost completely different terminology employed in the Code. However, this new terminology is undoubtedly necessary if the Code is to achieve its intended result of simplifying and coordinating the law of personal property security.

135. All of these rules are stated in U.C.C. § 9-505.