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CONSUMER TRANSACTIONS UNDER ARTICLE 9

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Any distinction between the problems of secured loans to consumers and wholesale financing is somewhat elusive and tends to disappear under examination. One reason for this is that the typical wholesale transaction has consumer transactions as its nucleus. In other words, the subject matter of most wholesale finance transactions—the assignment, for example, of all his chattel paper by an automobile dealer to a bank—is a large number of secured loans to consumers. A lot of automobiles have been sold to individuals on credit and are presently (it is hoped anyway) in their possession. In addition, there is a certain sameness to the lending of money—a loan is a loan one might say—, and it frequently does not seem to be very significant whether the loan is large or small, the collateral simple or complex. Nevertheless, although the division is not sharp, it does seem possible to discern general differences in the problems of the lender's relation with the consumer borrower as opposed to those arising from relations with other lenders and wholesale borrowers. Consequently, it is the lender-consumer problem that will be dealt with here, the wholesale transaction being considered elsewhere (the problem of crop loans being, for the most part, excluded from consideration[1]). This paper will also be essentially limited to a

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1. Loans on crops should probably be considered separately from all other loans since the Code treats them specially. The Code provides that the debtor has no rights in crops, and hence the lender's security interest cannot attach, until the crops are planted or the young conceived, § 400.9-204(2)(a), (b), RSMo 1963 Supp., and the after-acquired property clause is effective for one year unless connected with a transfer of certain interests in the land, § 400.9-204(4)(a), RSMo 1963 Supp. Recording, as one would anticipate, must be in the office where a real property security interest would be filed, § 400.9-401(1)(b), RSMo 1963 Supp., and the location of the land must be shown on the financing statement, § 400.9-402(3), RSMo 1963 Supp. In general the filing requirements, both for the original statement, and for the subsequent amendments and the like, follow real estate rules, § 400.9-407, RSMo 1963 Supp. If the crops are covered by a security interest which includes real and personal property, procedure on default can be by foreclosure of the real property interest, or by use of Article 9 procedures, § 400.9-501(4), RSMo 1963 Supp. There is a special rule for priority as against an earlier security interest in crops, § 400.9-312(2), RSMo 1963 Supp. It is perhaps well to remember also that crops will generally not be consumer goods since they are not normally bought for "personal, family, or household purposes," § 400.9-109, RSMo 1963 Supp.

consideration of the problems of the lender, and will deal with those of the borrower only indirectly. The reason for this is that it is almost exclusively lenders who seek legal advice for these problems. Similarly, while it may be unfortunate, it is likely to remain the case that the amount is the only term of an installment loan contract which is negotiated. Rather, these contracts are prepared by the lender, and accepted as so drafted by the borrower. In addition, the number of actions brought by borrowers against lenders is very small in comparison with the reverse situation.

Taking the subject as so limited, the first point to emphasize, it seems to me, is that this (as opposed to wholesale financing) is not the area of secured transactions which has caused much trouble, and it is not much affected by the Code. Most transactions can be carried on the same way under the Code as previously, and with the same effect. There are some areas of difference but all are minor. Thus, so far as change in office routine is concerned, the principal effect of the Code will be in connection with the mechanics of filing. This is not to say that a lender would not find it advantageous to change his forms and his routines, both in making and collecting the loan, but only that he need not fear that all his transactions will be seriously affected if he does not, or that the changes will be radical.

I emphasize this because it seems to me to be very important to realize that the Code is meant to be practical, to make life simpler. There are a number of changes in the theory of the law in the Code, and some of its provisions are complex and difficult. Financial transactions are frequently quite complex, and the law that deals with them is not always simple, but this law was designed to be no more difficult than necessary. Indeed the purpose of the Code is, if possible, to simplify the transaction. So too, it is quite important not to approach the Code as a maze of complicated provisions, peculiar definitions and the life, although that is what it may look like at first, for its provisions have internal logic, and it is the common fact pattern that they were designed to deal with. Hence, if one begins with the facts, one is likely to find that the law falls into place rather easily in most cases. I should add that it is more important to see how the Code applies in the normal case than in possible, but unlikely, cases of immense difficulty. This is especially true since the lawyer's task is not primarily to litigate, nor even to draft instruments that provide for every possibility, but to set up forms and ways of doing business which will enable relatively unskilled people (the ones who actually fill out the forms) to do a satisfactory job in the majority of cases. Certainly there will always be difficult cases, regardless of how a law is drafted, but I believe that it is a

mistake in tactics to begin with them. I perhaps ought to add that anyone who plans to work with the Code must, of course, learn to use its system of cross references, definitions and comments.

This approach to the Code by way of the fact situation is not, it should be added, one which has just been thought up by the writer. Rather, it was the approach of the draftsmen, particularly the chief reporter, Karl Llewellyn. The desire was to frame a commercial law which would meet the needs of commerce and help businessmen to do what they wanted unless there was a very strong policy reason preventing it. To this end, there was, in the preparation of the Code, constant consultation with businessmen and their lawyers stretching over many years in order that the draftsmen might frame provisions which would reflect the needs and desires of the business community.[2] In addition, there is frequent provision for escaping from the requirements of the Code if desired, notably the frequent provision that a certain section is to apply, "unless otherwise agreed."[3]

I. The Basic Transaction

In approaching this subject, and before going to the text of Article 9, it seems to me best to consider first the secured transaction with a consumer. Essentially, this transaction is a loan of money in which the lender is not willing to rely on the general credit of the borrower and consequently wishes to acquire a lien on some of the borrower's property. Then, if the borrower does not repay, the lender can seize this property in satisfaction of his debt and not be forced to compete with other creditors for a share in the general assets of the debtor. The majority of these loans are made to enable the borrower to buy a certain chattel such as an automobile or a television set, and the lien will be on that item. Normally the loan will purport to be made by the seller, although of course it need not be. If the loan is made by the seller, the likelihood is that he will immediately assign the loan to a financial agency such as a bank or finance company which will

2. See § 400.1-102(2), RSMo 1963 Supp. See also, Schnader, *Forward* to Uniform Laws Annotated, Uniform Commercial Code vii (1962); Mentschikoff, *High-Lights of the Uniform Commercial Code*, 27 Mod. L. Rev. 167 (1964). And of course Professor Llewellyn's general views on commercial law. See, for example, Llewellyn, The Common Law Tradition 121-57 (1960), especially the quotation from Goldschmidt at 122.

3. See generally § 400.1-102(3), RSMo 1963 Supp., and as examples in Article 9, § 400.9-207(2), RSMo 1963 Supp., rights and duties of pledgee and pledgor as to collateral, § 400.9-204, RSMo 1963 Supp., time when security interest attaches, § 400.9-503, RSMo 1963 Supp., right of security holder to take possession after default, and as to default generally, § 400.9-501(1),(2),(3), RSMo 1963 Supp.

probably have approved the loan in advance, and which is the real lender. There are a smaller number of loans made for purposes other than purchases, in which the lender wants security. Since there is, in such a case, no new property, the lender will try to obtain a lien on property already owned by the consumer. These loans will normally be made directly by a bank or loan company to the borrower.

The lender's principal problem, so far as the secured part of the transaction is concerned, is obtaining possession of the chattel if the loan is not paid, and then disposing of it in some profitable and unimpeachable way. He may face some problems with the debtor who refuses to give him possession, or disputes the amount due. He may also find that he is in competition for possession of the chattel with some other lender who has obtained a lien, or even with the debtor's trustee in bankruptcy. Or he may find that the debtor has sold the chattel so that he (the lender) will be in competition with a bona fide purchaser.

II. Legal Aspects of the Borrower-Lender Relation

The law prior to the Code analyzed these problems primarily in terms of title.[4] The seller retained legal title and surrendered possession (conditional sale) or he conveyed the title and possession and got that title back (chattel mortgage). In some cases he got and retained possession (pledge). And there were also odd variants such as the trust receipt and the bailment-lease. In any event, when the lender sought to obtain possession, he was enforcing a right derived from his title. Since, however, title to chattels is transferable by agreement alone, third parties—purchasers from and creditors of the borrower—could be harmed by not knowing of the transfer. Consequently there was a requirement that a lender, in order to be sure that his interest or title was good against third parties, had generally either to get possession or to record. In this way third parties were put on notice, or so it was thought. In any event, if the lender did either of these things before anyone else, he had, in the case of consumer sales, few problems.

As indicated above, the degree of difficulty in protecting a security interest has not changed greatly under the Code. The title concept and all the old names are discarded. When a lender acquires a lien on a chattel to secure a debt, the interest is simply called a security interest.[5] But names are unimportant. If the lender calls it a chattel mortgage or conditional

4. Probably the best general treatment of the whole subject of chattel security before the Code is in Gilmore & Axelrod, *Chattel Security*, 57 YALE L.J. 517, 761 (1948).

5. See § 400.9-102(1)(a), RSMo 1963 Supp.

sale, it can be perfectly valid security interest, and if it was valid as, say, a chattel mortgage under the old law, it is very likely to be a valid security interest under the Code. Indeed, the general approach of the Code is that every security interest is valid "except as otherwise provided."[6] Only if there is a strong policy reason will it not be valid, hence the law forbids relatively few of them.[7] This is the contract as opposed to the conveyancing approach. In other words, the parties can agree to do almost anything they want, in the way they want, subject to very few restrictions, and the law will enforce their agreement. This is opposed to the former theory that one had to bring himself within a certain category or classification or form in order to obtain judicial assistance. So, whatever the borrower agrees to give the seller, and vice versa, will probably be permitted, and, as between buyer and seller, and borrower and lender, the transaction is almost always valid. Troubles begin only when third parties are involved. Thus the lender may set special requirements for the borrower, such as prohibiting him from taking the goods out of the county, requiring him to maintain them in good condition, to pay taxes, and the like. Similarly, he may indicate what actions of the borrower, such as failing to pay an installment on time, will constitute default. The Code only provides a general framework within which the parties can work most of the variations which they may want.

Whatever the provisions of the security agreement, there is no prescribed form although there must be a writing describing the collateral and containing the security agreement,[8] except where there is delivery of the goods as security for a debt (the pledge).[9] On the other hand, present regulation of such loans by statute or case law is unaffected by the Code.[10] So for usury and similar prohibitions and statutes which regulate the form which consumer time sales must take.[11]

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6. § 400.9-201, RSMo 1963 Supp.

7. In one sense, it does not really forbid any. If, however, a security agreement violates some existing prohibition such as usury, it will suffer whatever penalty is attached thereto by existing law since the Code does not interfere with these present provisions. § 400.9-201, RSMo 1963 Supp. In addition, the Code does not permit security interests in goods that do not exist or are not owned by the debtor, although it does permit the interest to attach to such goods when they come into existence or when the debtor acquires rights in them. § 400.9-204, RSMo 1963 Supp.

8. § 400.9-203(1)(b), RSMo 1963 Supp.

9. § 400.9-203(1)(a), RSMo 1963 Supp.

10. § 400.9-201, 206(1), RSMo 1963 Supp. (for consumer goods).

11. See § 400.9-203(2), RSMo 1963 Supp., where the Missouri small loan laws are expressly reserved from repeal. This would seem to be the case also for two statutes enacted at the same session of the legislature as the Uniform Commercial Code: the Missouri Financing Institution Licensing Act, §§ 364.010-.070, RSMo 1963 Supp., and the Motor Vehicle Time Sales Act, §§ 365.010-.160, RSMo

Assuming that the money is lent and the agreement signed, the lender is in a position to seize the goods if the borrower does not pay in accordance with the agreement. He can also enforce payment if he has lent the money, regardless of whether or not there was a valid security agreement, but he cannot seize the goods before judgment without this agreement. With the security agreement, it is not necessary that he obtain a judgment.[12] After default, he may seize them himself if he can do so without violence, or he may obtain judicial assistance.[13] Having seized them, he may sell them publicly or privately, subject only to notifying the debtor of a proposed sale and accounting for the proceeds.[14] If the debtor has paid 60% of the cash price in the case of a purchase money security interest, or 60% of the loan in the case of another interest in consumer goods, the lender *must* sell within ninety days unless the debtor renounces his rights *after* default.[15] Otherwise, the lender has the option of accepting the goods as satisfaction of the obligation if he notifies the debtor in writing of this intention.[16] The debtor has thirty days thereafter to object and require a sale.[17] The debtor may redeem until the collateral is disposed of, or a contract entered into for the purpose of disposal, or the obligation has been discharged.[18] If the creditor fails to comply with any of the requirements (such as notification of a sale) the debtor can recover for any injury he may have suffered. This injury will probably be an alleged depressed price as a result of which a larger balance than necessary remains owing after the sale, and, in the case of consumer goods, this damage is presumed to be at least the service charge plus 10% of the balance remaining of the debt.[19]

None of this is especially new. Nor should it cause much trouble. If the debtor does not pay, the lender tries to get the debtor's TV set or car, and perhaps tries to get a judgment so that his wages can be garnished if he has any and if he can be found.[20] The only area where one might antici-

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1963 Supp. And so also for the 1961 Retail Credit Charges Act, §§ 408.250-.370, RSMo 1963 Supp., with the exception of § 408.310, assignment of retail time contracts, which would seem to be superseded by the Code.

12. § 400.9-503, RSMo 1963 Supp.

13. *Ibid.*

14. He may also render equipment unusable without removal, § 400.9-503, RSMo 1963 Supp.

15. § 400.9-505(1), RSMo 1963 Supp.

16. § 400.9-505(2), RSMo 1963 Supp.

17. *Ibid.*

18. § 400.9-506, RSMo 1963 Supp.

19. § 400.9-507, RSMo 1963 Supp.

20. Since the sale need not be by court order, the amount of the deficiency will probably not have been determined by a judgment. It will nevertheless be final unless the debtor or some other interested party can prove it is erroneous and the creditor can get a judgment for this amount. Until he does, he is, as to this de-

pate much difficulty is that of fixtures. Admittedly, this is especially important today because of the tendency to have consumer goods built into walls and other parts of houses—*e.g.* stoves, refrigerators, air-conditioners, TV and hi-fi sets. All of these items can be sold on time with security agreements. Hence the problem arises since Article 9, like other chattel security laws, does not govern realty. But again the big problems come with conflicts between creditors, especially between those who hold security interests in the chattels and mortgages and others holding liens on the land. So far as the borrower is concerned, the creditor can remove the articles from the land and need not even compensate for physical injury,[21] although presumably there is a requirement of reasonableness.

In sum, the situation of the borrower and lender in relation to each other, which is by far the most important one in consumer sales, is substantially what it has been previously. Probably the major thing to remember is the necessity to sell the chattel after seizure if more than 60% has been paid, and to notify the borrower of the sale. Probably too, a record of the details of the sale should be kept as a matter of routine with some indication (such as a market quotation) that the price is reasonable. This is important because the persons seizing will probably not be lawyers, will probably be quite careless, and will doubtless not remember much about a particular transaction if litigation should ever arise.

III. Borrower and Assignees of the Creditor

It is common for the initial security interest to be assigned to a third party. Thus the automobile dealer usually assigns the debt and security interest to a bank or finance company. The problem then arises, to what extent does the position of the assignee differ from that of the original lender? To deal with the easy problem first, it is quite clear that the assignee gets all the rights which his assignor had.[22] The difficulty comes when he claims to have *more* rights than the assignor. This problem will arise primarily in connection with breach of warranty (defects in the goods) and fraud. If the buyer had a defense against the original seller for fraud, breach of warranty, or whatever, which would have freed him from liability in an action brought against him by the seller, is he worse off if he is sued by the seller's assignee? The answer is, of course, yes.

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ficiency, a general unsecured creditor, and can take no private remedial action as to any of the debtor's goods.

21. § 400.9-313(5), RSMo 1963 Supp.

22. § 400.9-318, RSMo 1963 Supp., especially subsection 4 and comment to UCC § 9-318 (1962); and see §§ 400.2-210, .3-201, RSMo 1963 Supp.

Traditionally this result has been accomplished by the use of the law of negotiable instruments. The loan is evidenced by a negotiable promissory note to which the chattel mortgage or conditional sale will be attached. The note is then "negotiated" to some financer such as a bank. The bank buys the note and becomes a holder in due course with the result that almost all the defenses that were available to the buyer against the seller are no longer available to him against the assignee.[23] Moreover, by an old real property rule, the "security follows the debt."[24] Hence not only can the lender bring an action on the note, he can also enforce the security obligation free of most defenses.

This technique is still available under the Code.[25] The rights of the holder in due course are essentially unchanged. In addition, however, the Code provides that it is not necessary to go through the process of using a negotiable instrument in order to obtain this result. If, in the original contract between buyer and seller, there is a provision by which the buyer waives his rights against the assignee of the seller, this will be enforced.[26] It is no longer necessary, in other words, to have a separate note and contract so that the note will remain "clean" and hence negotiable. All the provisions can be put in one document, which will have the effect of note and security agreement combined and the whole can be assigned so that the assignee takes free of all except real defenses if he takes for value, in good faith and without notice.

It is difficult to know what effect, if any, this provision will have on the problem of the ability of the buyer to treat the assignee as not being a true assignee but "really" a party to the transaction, and, as such, subject to defenses that were available against the seller.[27] Obviously it eliminates the possibility of achieving this result by arguing that the assignee was not a holder in due course, that there was, for instance, no "negotiation," or that the assignee took with notice of the sale and hence of possible defects, since these arguments are now irrelevant (although, of course, it would be possible to argue that he did not fulfill the requirements of section 400.9-206). But if the real motivating factor behind the decisions that have refused to free the assignee from defenses is the belief that the assignee was in fact a party to the original transaction, and ought to be regarded

23. N.I.L. § 57 and see BRITTON, BILLS AND NOTES § 125 (2d ed. 1961).
24. *Id.* BRITTON at § 15.
25. § 400.3-305, RSMo 1963 Supp. (rights of a holder in due course).
26. § 400.9-206, RSMo 1963 Supp.
27. See Jones, *Finance Companies as Holders in Due Course of Commercial Paper*, 1958 WASH. U.L.Q. 177.

as such, if, in other words, this is one of those instances where the court is "looking through form to substance," then there is nothing to prevent them from continuing to do so (as the Code makes explicit in the case of consumer goods[28]). The automobile dealer is still going to call his financer to find out if it will approve a loan to Joe Doakes before he sells the car to him on credit. And the loan is usually in fact made by the bank or finance company even to the extent of having the blank forms furnished by it. It is put in the form of a loan by the seller only in order to obtain the benefits of a holder-in-due-course or equivalent status for the bank. Thus, in general, the situation is not essentially changed by the Code and could be developed in any direction by case law.

IV. Lender v. Assignees of Borrower

However, as indicated the really difficult problems in chattel security have never been those between borrower and lender, or even the lender's assignee, but rather those between lender and borrower's assignees or creditors. Suppose borrower sells the chattel or borrows money from a second lender, using it as security, does the original lender (or his assignee) or the second buyer or lender prevail?

Doubtless, it is well to emphasize again that in the case of consumers this is not a serious problem. Most consumers do not sell the chattels they have bought on time, and loans made on the security of goods already owned are quite unimportant in relation to loans made to finance purchases. Nevertheless the problem can arise.

Traditionally, there have been two contrary policies to deal with this problem. On the one hand, when an interest in property has been validly transferred, the transferee has obtained a property interest which cannot be destroyed against his will and there is no special formality required for the transfer of interests in personality. On the other hand, if *A* has acquired or retains an interest in goods which are in the possession of *B*—which will always be the case here—there is nothing to indicate to a possible third party, *C*, that *B* is not the owner. Hence the growth of the rules that require that in order for *A*'s interest to be valid against *C*, there must be a public recording of some type, or a transfer of possession.[29]

Both of these rules developed from the law of real property where they function reasonably well. And they are apparently workable for some chattels, notably automobiles, because of the requirement of the use of a docu-

28. § 400.9-206(1), RSMo 1963 Supp.
29. See Gilmore & Axelrod, *Chattel Security*, 57 Yale L.J. 529 n.28 (1948).

ment similar to a deed, the certificate of title, for the transfer. However, as to many other chattels these rules seem somewhat unrealistic, primarily because of the enormous volume of these transactions. In other words, for the wholesale financer—who overwhelmingly dominates this market—it is not really practical to check records before advancing money on an individual sofa or rug (if, indeed, this is an accurate description of what he does—if he is not really advancing money on the credit of the borrower). Moreover, the chances of another buyer or creditor acquiring an interest in the property are so slim that it does not seem worthwhile to many lenders to bother to record.[30] As a result of this, Article 9 protects the first lender, *A*, even though he has not obtained possession or recorded if the goods are "consumer goods" as defined in the Code.[31] These items, such as television sets, household appliances and furniture, will obviously constitute the great bulk of security other than automobiles. Goods not included are automobiles or any other goods for which a certificate of title is issued, or farm equipment that costs less than $2,500, assuming that the goods do not become fixtures. The first lender's interest is valid against subsequent lenders without filing or taking possession.[32] It will not be valid against subsequent bona fide purchasers[33] unless the lender has filed, nor is it valid against liens given a special priority by statute such as repairmen's liens.[34] However, in the case of automobiles, the Code does not affect the existing law in those states that have certificate of title statutes.[35] Hence in Missouri, in order to be effective against third parties, the lien must probably be recorded on the certificate of title.[36] Absent a certificate of title statute, security inter-

30. So, at any rate, I have been informed by some of these lenders.
31. § 400.9-302(1), RSMo 1963 Supp. Of course, this protection is given only if the security interest is a purchase money security interest as defined in § 400.9-107, RSMo 1963 Supp.
32. § 400.9-312(4), RSMo 1963 Supp.
33. § 400.9-307, RSMo 1963 Supp.
34. § 400.9-310, RSMo 1963 Supp.
35. § 400.9-302(3)(b), RSMo 1963 Supp.
36. § 443.480, RSMo 1949. This has been interpreted to exclude the necessity of recording purchase money interests. See McGhee, *Chattel Mortgages—Automobiles—Notation on Certificate of Title,* 16 Mo. L. Rev. 156 (1951). However, even if the purchase money security interest is excluded from the requirement of recording on the certificate in order to constitute notice to all the world, as is apparently the case, it seems unlikely that a court would say that the recorder of deeds *could not* record the security interest on the certificate of ownership, and if he could, then the secured party must have him do so in order to be protected under § 400.9-302(4), RSMo 1963 Supp. The matter is further complicated by the fact that the legislation has apparently repealed § 443.480 in enacting the Code. See Mo. Laws 1963, at 637, § 10-102(1). I say apparently because this section is a part of the act which includes the Code and in § 400.9-302(3)(b) the Missouri legislature selected alternative B from the official draft which would seem to indicate an intention to refer to § 443.480 and hence not to repeal it. However,

ests in automobiles as well as fixtures must be filed.[37] All other security interests, such as those in shares of stock, must either be filed, or possession must be taken of the goods in order for the lender to obtain priority.[38] The phrase used in the Code, it may be noted, is "perfected." Thus the security interest in consumer goods is perfected without filing,[39] but the security interest in fixtures must be filed in order to be perfected.

V. Other Priorities Problems

As has been mentioned, one who is given by statute or rule of law a lien over a chattel because of having performed a service on it, retains this lien under the Code even against a perfected security interest.[40] Thus if the borrower takes his car to the garage to have it repaired, and the garageman is given a lien by Missouri law,[41] this lien is also good against the lender. A similar, but more difficult problem arises with accessions, such as new tires or a new motor installed in a car, or new upholstery placed on furniture. Leaving aside the question of the rights of the holder of a security interest in the inventory out of which the accession comes (the inventory of the tire dealer for instance), which is a problem of wholesale financing, the holder of the security interest in the new part, such as tires, will prevail as to this part over the one who had a security interest in the chattel to which it is attached.[42] Thus a purchase money security interest in a battery would prevail over the existing interest in the car, and the holder of the accession could remove it subject to compensating the other secured parties for physical injury.[43] If the new part becomes commingled with the whole, or the security agreement on the part gives the holder a secured interest in the new whole (as in the case of a machine or food products), the various secured parties share ratably in the value of the whole.[44] The security interest in accessions is subordinate to subsequent purchasers and creditors,

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the clear repealing language of § 10-102(1) doubtless controls. This would not, however, necessarily prevent the recording of the interest on the instrument, and hence such recording would appear still to be the proper means to give notice under § 400.9-302(4), though the safest means would be for the lender to retain the certificate of title.

37. § 400.9-302(1)(d), RSMo 1963 Supp.
38. § 400.9-302, RSMo 1963 Supp.
39. § 400.9-302(1)(d), RSMo 1963 Supp.
40. § 400.9-310, RSMo 1963 Supp.
41. § 430.020, RSMo 1959. There is also a common law repairmen's lien, which prevails over chattel mortgagees, and so also, presumably, over secured parties under the Code. See Mack Motor Truck Corp. v. Wolfe, 303 S.W.2d 697, 700-02 (St. L. Mo. App. 1957).
42. § 400.9-314(1), RSMo 1963 Supp.
43. § 400.9-314(4), RSMo 1963 Supp.
44. § 400.9-315(2), RSMo 1963 Supp.

and a previous creditor who makes subsequent advances, if they are without notice.[45]

The problem of the floating lien in after-acquired property is not nearly as important in the case of consumer loans as it is for wholesale transactions, but it does arise on occasion. It occurs most often by way of a clause in a security agreement, such as that creating a purchase money interest in a sofa and chair, that the interest will apply to any chattels subsequently acquired, or at least any chattels of a certain type. Thus *A* buys a sofa or a chair for $500 which he borrows from bank *B*. At a time when he still owes $400 to the bank, he buys a rug for $200, and pays cash. Does *B* have a lien on the rug too? Yes, since *B* has given "value," it acquires the interest as security for a pre-existing claim.[46] However, this is not a purchase money interest in consumer goods[47] and would in consequence have to be filed to be perfected.[48] It would be more sensible for any lender who wants this protection to file the original security agreement. But such an agreement is probably not very useful even then, because while valid enough against *A*, it is subordinate to a purchase money security interest in the rug,[49] and *A* is unlikely to have paid cash.

Another problem which causes trouble arises when property subject to a security interest is transported from one state to another. Generally, so far as consumer goods are concerned, the Code follows the traditional rule, though with an important change for goods other than automobiles. The validity of the interest is to be determined by the law of the state where it was created unless both parties contemplated that the goods would be kept in this state (as if a St. Louisan bought furniture in Illinois for delivery to his home in Missouri). However, and this is the change, if the interest is perfected in the foreign state, it must be perfected in Missouri within four months after being brought here if the perfection is to continue.[50] With most security interests in consumer goods this causes no problem, since the interest is perfected without filing. However, automobiles present the principal problem in this area, and if the state where the security interest is created has a certificate of title statute which requires indication on the certificate as a condition of perfection, then the perfection is gov-

45. § 400.9-314(3), RSMo 1963 Supp.
46. § 400.9-204(4)(b), RSMo 1963 Supp. "Value" is defined in § 400.1-201 (44), RSMo 1963 Supp.
47. The lender did not make advances or incur an obligation to enable the debtor to acquire it as required by the definition in § 400.9-107, RSMo 1963 Supp.
48. § 400.9-302, RSMo 1963 Supp.
49. § 400.9-312(4), RSMo 1963 Supp.
50. § 400.9-103(3), RSMo 1963 Supp.

erned by the law of that state.[51] Hence a Missouri lender who advances money on the security of an automobile, and who indicates his interest on the certificate of title (if he is permitted to do so[52]), is protected if the borrower attempts to sell the car or use it as collateral for a loan. If he wishes to be protected as the holder of a purchase money security interest, apparently he must file.[53] He must, of course, exercise care in advancing money on a car brought in from another state by checking on the perfection requirements in that state.

VI. Filing

Filing is, or can be, somewhat different under the Code from what it was previously. As a complete reversal from the previous rules, the basic mechanics are designed not for the consumer transactions, since most of these do not need to be filed in order to be perfected, but rather for wholesale financing. Consequently, the normal filing transaction envisaged by the Code consists of filing a financing statement which indicates that the defendant intends to engage in financing with *X*, an indication of the total amount of the lien, the type of goods, an indication of whether the lien is to attach to proceeds, etc.[54] This will give the lender a security interest in all the described goods, accounts, and the like, which are thereafter acquired by *X* during the period of the agreement without the necessity of a filing every time new goods are received.[55] This device could be used, for example, to enable a department store to acquire a lien on everything Joe Doakes may buy in the next year. But it is highly unlikely that it will be so used since, after all, it is not necessary. The store's lien on his stove, washer-drier, and power-mower is already perfected just by having him sign an agreement and receive the goods (unless they are farm equipment costing more than $2,500).[56] At any rate, on any item as to which it is not perfected, or for that matter on any chattel, whether or not the security interest is perfected, the lender can file a financing statement limited to the single item.[57] So, for a thresher costing more than $2,500 on which he is acquiring a lien. In the case of consumer goods, this statement must be

51. § 400.9-103(4), RSMo 1963 Supp.
52. *Supra* note 36.
53. *Ibid.*
54. § 400.9-402, RSMo 1963 Supp.
55. *Ibid.*, and §§ 400.9-204(3), .9-303(1), RSMo 1963 Supp.
56. § 400.9-302(1)(c), (d), RSMo 1963 Supp.
57. And, as a matter of fact, he must do so if he wishes to be protected against certain purchasers from the borrower. See § 400.9-307(2), RSMo 1963 Supp.

filed in the office of the recorder of deeds of the county where the defendant has his residence, or, if he is not a resident of the state, in the county where the goods are kept. If it is on crops, the filing is done in the county where the land is located; if it is on fixtures, the filing is done in the office in which a mortgage on the real estate would be filed. Other interests, such as security interests in shares of stock, must be filed in the office of the Secretary of State.[58] Since, so far as negotiable instruments, documents of title and securities are concerned, the probable form of the transaction will be the pledge, the important provisions to observe will not be those for filing, which is unnecessary, but those which regulate the form which the instrument must have in order to be negotiated by the lender.[59]

VII. Conclusion

Perhaps the best way of summarizing is to mention the things to watch for in the two classes of transactions that have been considered: purchase money security transactions to finance purchases of consumer goods, and personal secured loans which are not purchase money transactions (other than loans on crops). In the case of purchase money security interests in consumer goods (goods, it should be remembered, must be bought for consumption to come within this category),[60] in order to have the interest attach it is necessary only to have a written signed agreement (or transfer of possession) for which there is no specified form, the advance of the money for obtaining the goods, and the obtaining by the borrower of an interest in the goods.[61] Filing is not necessary in order to protect oneself against third parties, although it is permissible to file if one wishes. In case of default, one can, before judgment, resort to peaceable seizure or obtain judicial seizure.[62] One can still sell and sue for the deficiency (or account for the surplus).[63] Or, if one notifies the debtor, in writing, one can

58. § 400.9-401, RSMo 1963 Supp. See Donnellan, *Notice and Filing Under the UCC, infra* this symposium.

59. Security interests in instruments cannot be perfected by filing but only by taking possession, § 400.9-304(1), RSMo 1963 Supp. While one can acquire rights in negotiable instruments, § 400.3-201, RSMo 1963 Supp.; documents, § 400.7-504, RSMo 1963 Supp.; or securities, § 400.8-301, RSMo 1963 Supp.; without negotiation, the only way to be a holder in due course or the equivalent is, of course, to have the instrument negotiated or the equivalent. See § 400.1-201, RSMo 1963 Supp., generally, and for instruments, § 400.3-302, RSMo 1963 Supp.; documents, § 400.7-502, RSMo 1963 Supp.; and investment securities, § 400.8-302, RSMo 1963 Supp.

60. § 400.9-109(1), RSMo 1963 Supp.

61. § 400.9-203, .9-204, RSMo 1963 Supp.

62. § 400.9-503, RSMo 1963 Supp.

63. § 400.9-504, RSMo 1963 Supp.

simply keep the goods unless the debtor has paid 60% of the purchase price, but if this option is exercised, there can be no deficiency judgment.[64] The agreement can contain a clause which waives defenses against assignees of the lender, and if it does, it is no longer necessary to use a combination of negotiable note plus separate security agreement.[65] In the case of automobiles, fixtures and farm equipment costing more than $2,500, there must be recording for validity against third parties, though not, of course, against the borrower.[66]

The position of lenders who do not acquire purchase money interests is, in theory, not so advantageous because there can be outstanding perfected liens which cannot be discovered because they need not be recorded —notably those of the initial sellers of consumer goods. This is unlikely in the purchase money transaction since for the most part these involve new goods except in the case of automobiles where the certificate of title is a protection. It seems doubtful that this is a real problem, however, since those who make personal loans to individual borrowers secured by furniture, household equipment and the like, are not likely to check chattel mortgage records at the present time. Rather, they will check the credit of the individual and this should reveal most debts, or, at any rate, put one on notice that the borrower is the sort of individual who is likely to have outstanding debts. In addition, the borrower is normally required to make a statement as to his debts which is useful in the event of bankruptcy even if it does not cause a debtor to confess all at the time the loan is made.[67] Lenders who do not make credit checks, or who disregard the information which these uncover, presumably charge rates (carefully called something other than interest) which compensate them for their risks. If not, they will doubtless not remain long in the money lending business unless they are exceptionally lucky.

Apart from these situations, the position of these lenders is much the same as that of the purchase money security interest holder except that they must file in order to protect themselves against subsequent purchasers or lenders. So far as their relations with the borrower and the form of the security agreement are concerned they occupy identical positions.

If, therefore, a lender wishes to set up a system which will work well for either sales of consumer goods or personal loans secured by collateral

64. § 400.9-505, RSMo 1963 Supp.
65. § 400.9-206, RSMo 1963 Supp.
66. § 400.9-307(2), RSMo 1963 Supp.
67. If he makes a false statement in order to obtain a loan he may not be discharged as to that debt. See 1 COLLIER, BANKRUPTCY ¶ 17.01 (14th ed. 1962).

already owned by the borrower, he need only make sure that his security agreement is in writing and signed by the borrower, includes a clause in which the borrower agrees not to assert defenses against assignees, and complies with such rules as may exist regarding usury and installment selling. It should be remembered that this sort of regulation, which is becoming more prevalent, is not affected by the Code. In general he need not file except for fixtures and automobiles. He should record an interest in automobiles on the certificate of title (which he can retain in his possession as additional security, since the car cannot be transferred without it). He may, however, always file if he wishes, and it might be worthwhile to study the experience of a particular lender to see if he has had difficulties with a particular type of loan which would be avoided by filing. In general, however, his only special procedure would involve fixtures as to which he should make special arrangements if he thinks the risk demands it. Thus he might attempt to get the salesman to indicate on an attachment to the security agreement that the particular item will be attached to a building in some way, and get the location of the building. He should also arrange to have security agreements with this indication filed as an interest in fixtures. The assignee financer should notify the debtor of the assignment if he wants to have the payments made to him. He should also set up a procedure for seizure on default which must differ depending on whether 60% of the loan has been repaid or not. If he wants in general to have the goods satisfy the debt without bothering about a deficiency, he should set up a form to be sent to the debtor. Otherwise, he should set up a procedure for selling the goods and keeping a record of the way the transaction was handled so that it will look proper if it is ever reviewed.

At least this is the procedure he should follow if he wishes to have his transaction observe the requirements of the Code. If he is not very worried about how the work of the magistrate courts will be affected by the Code (since it is in them that most actions will be brought because of the amounts), he may decide to ignore the whole thing. He probably will not get into too much trouble if he does, but doubtless his attorney ought to tell him of the risks before he takes them.

More difficult problems can and will arise in connection with consumer transactions, chiefly no doubt in connection with bankruptcy proceedings and with priorities among creditors. Some of these will be similar to those that arise in wholesale transactions so that the portion of this symposium which deals with them might prove useful here as well. Some doubtless will simply have to be worked out with the Code and comments and whatever

case-law develops.[68] I would suggest again, however, that it is always useful to be sure that one knows (and that the judge knows) exactly what the fact situation is before attacking the law. And that one should remember that good faith, reasonableness, and commercial usages are always arguments that one should be prepared to make and meet whenever any provision of the Uniform Commercial Code is being interpreted. Any result which does not make commercial sense is to be regarded very suspiciously.

68. It may be worth pointing out that the edition of the UNIFORM COMMERCIAL CODE put out in the UNIFORM LAW ANNOTATED series contains annotations to decisions and law review comments in all states. Decisions are also picked up in the *Boston College Industrial and Commercial Law Review.*