Chattel Mortgages in Illinois v. Secured Transactions under the Uniform Commercial Code

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ARTICLE 9, Secured Transactions, of the Uniform Commercial Code is the broadest statute ever proposed in the field of the law regulating security interests in personal property. Terminologically, old forms, concepts, and distinctions are abandoned. Article 9 applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. While traditional financing devices may still be used, distinctions between them based solely on the "form" used are largely abandoned in favor of differentiations based on the status of the debtor and the kind of collateral.

While the application of Article 9 is far broader than the field of chattel mortgages, its provisions are contrasted in this paper with the Illinois law on chattel mortgages to show the differences and similarities in this important area of secured transactions.

The chattel mortgage is an old security device, not as old as the pledge, by any means, but a logical extension of the pledge concept: where a transfer of possession of property for security purposes is not feasible and the property remains with the debtor, the recording of an instrument setting forth the terms of the arrangement gives notice to third parties of the secured party's interest. The Code terms "secured
party” and “debtor” are at least as descriptive of the relationships involved as “mortgagee” and “mortgagor.”

As between the mortgagor and mortgagee in Illinois, probably few if any formalities are necessary for a valid chattel mortgage. Where rights of third parties are involved, it is necessary that possession be transferred to the mortgagee or else, if the property is to remain with the mortgagor, for an instrument so providing to be duly recorded or filed.1 The Code’s requirements for an enforceable security interest are substantially the same. The Code provides, roughly, that a security interest is not enforceable against the debtor or third parties unless (1) the collateral is in the possession of the secured party or (2) the debtor has signed a security agreement describing the collateral;2 and usually filing of a financing statement is required to perfect a security interest in collateral where possession is not transferred to the secured party.3

No particular form is specified for the financing statement. It is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information about the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types or describing the items of collateral.4 A copy of the security agreement is sufficient as a financing statement if it contains this information and is signed by both parties.5 Such a statement may be signed only by the secured party if

1 Ill. Rev. Stat., Ch. 95, § 1 (1959). A security interest in a motor vehicle is perfected, on the “consumer” level, by certificate of title notation and delivery to the Secretary of State. Ill. Rev. Stat., Ch. 95¾, § 3-202 (1959).

2 UCC § 9-203(1). (References are to the 1958 Official Text of The Uniform Commercial Code with comments, hereinafter cited as UCC). Unless postponed by agreement, a security interest attaches when an agreement is made that it attach, value is given, and the debtor has rights in the collateral: UCC § 9-204(1).

3 UCC § 9-302(1). Filing is not required to perfect a purchase money security interest in consumer goods or in farm equipment having a purchase price not in excess of $2,500 unless the goods or equipment is a fixture or a motor vehicle required to be licensed. Nor do the filing provisions apply to an assignment of a perfected security interest, or to a security interest in property subject to federal registration, or to filing of security interests where a state statute requires indication on a certificate of title of a security interest, as in the case of motor vehicles [Ill. Rev. Stat., Ch. 95¾, § 3-201 et seq. (1959)], and in the last case perfection can be had only by compliance with the statute. See UCC §§ 9-302(1), (2), (3), (4).

4 UCC § 9-402(1). An acceptable form is set out in UCC § 9-402(3). Where the collateral is growing crops or fixtures, the statement must give a description of the real estate concerned.

5 UCC § 9-402(1). The security agreement may, of course, be cast in some traditional mold [UCC § 9-102(1)(a)] but the provisions of the Code will govern regardless of form.
it is filed in a Code state to perfect a security interest in collateral already subject to a security interest in another jurisdiction which has been brought into the Code state and the statement indicates such facts.\textsuperscript{6}

In other words, the Code provides for simple notice filing. It is not necessary that the instrument provide for possession of the collateral to remain with the debtor or that it be acknowledged. An acknowledgment of a chattel mortgage adds nothing whatsoever to its effect or validity; it is simply a historical remnant worked into a patch-work quilt of similar odds and ends in the field of secured financing. It is anomalous that it should be required on a chattel mortgage in Illinois, when there are no formal requirements whatsoever for the existence of a sister security device, the conditional sale.\textsuperscript{7} Under the Code, conditional sales would be subject to the same requirements as other secured transactions, so that this secret lien would no longer exist. The provisions of Article 9 apply without regard to whether title to the collateral is in the secured party or the debtor.\textsuperscript{8}

In Illinois, a conveyance of personal property having the effect of a mortgage or lien upon the property is a chattel mortgage,\textsuperscript{9} so that if the parties have misnamed or misjudged their creation and failed to comply with the statutory requirements for the creation of a valid chattel mortgage, the conveyance will not be valid as to third parties, regardless of notice.\textsuperscript{10} If a seller transferred possession of a refrigerator to a buyer, he would be protected against third parties acquiring subsequent rights in the chattel without recording any document whatsoever if the transaction were a conditional sale, but if it were a chattel mortgage situation, third parties could acquire superior rights in the chattel even though an instrument were recorded and they had

\textsuperscript{6} Or when the filing is to perfect a security interest in proceeds where collateral, subject to a perfected security interest, has been sold. UCC § 9-402(2). Consult also UCC § 9-306. A security interest continues in collateral disposed of without authority and also in identifiable proceeds, but the interest in proceeds ceases to be a perfected security interest ten days after the debtor has received the proceeds unless: (1) a filed financing statement covers proceeds as well as collateral or (2) the security interest in proceeds is perfected before expiration of the ten-day period.

\textsuperscript{7} Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925).

\textsuperscript{8} UCC § 9-202.


\textsuperscript{10} Martin v. Duncan, 156 Ill. 274, 41 N.E. 43 (1895).
actual notice of it, if it were not in proper form. It is often said by the Illinois courts that the chattel mortgage statute, being in derogation of the common law, is strictly construed. The results of a number of Illinois cases indicate that this is not always merely gratuitous information.

The Illinois statute does not, as the Code does, require the addresses of the parties. Nor does the Illinois statute require any particular description of the property, so long as third parties are able to identify the property by means of inquiries suggested by the mortgage. The Code does not require any specific description of the property either. Whether operating under the Code or under the Illinois statute, however, ordinary prudence would suggest using as much particularity in description as is feasible.

Since 1955 the Illinois statute has provided that a chattel mortgage must be filed or recorded in the "proper county or counties" within twenty days of its execution in order to be valid as against creditors of the mortgagor, subsequent purchasers, mortgagees, or lienors, and when duly filed or recorded, it is good and valid against such persons from the time of filing or recording. A properly executed and acknowledged mortgage filed twenty-one days after its execution would not be valid even against the creditors of the mortgagor who extended credit after the mortgage appeared of record and who thus had constructive, or even actual, notice of the lien. There is no need to penalize a secured party for late filing or recording merely to benefit a class of third parties who were aware of the security interest, where the secured party's failure misled no one. The Code adopts the more realistic view that, where filing is necessary to perfect the security interest, perfection dates from the time of filing. This would appear perfectly equitable to all parties and misleading to none. It would obviate the ordinary solution in Illinois of taking a new chattel mort-


14 Collateral Finance Co. v. Braud, 298 Ill. App. 130, 18 N.E.2d 392 (1938). The execution date is not necessarily the date stated on the mortgage. Execution is not effective until the instrument is signed, acknowledged and delivered by mortgagor and accepted by mortgagee. Illinois Nat. Bank v. Holmes, 311 Ill. App. 286, 35 N.E.2d 823 (1941).
gage securing the antecedent debt, getting it promptly filed or recorded, and then waiting four months to see if bankruptcy intervenes.\textsuperscript{15}

There is no problem about \textit{when} to record a chattel mortgage in Illinois, but there may be a considerable problem about \textit{where}. The mortgage must be “filed or recorded with the recorder of the county either in which the mortgagor resides, or in which the property is situated (if different from the county in which the mortgagor resides), at the time when the instrument is executed and recorded and a certified copy of said instrument or a true and correct copy thereof sworn, by the mortgagee, to be such and to have been filed as aforesaid, shall be filed in such other county; or in case the mortgagor is not a resident of this State, then said instrument shall be filed in the county where the personal property is situated at such time. . . .”\textsuperscript{16}

Where there is a resident individual mortgagor residing in the county where the property is located, there is no problem about where to record a mortgage, if the mortgagor and the property are in the same county both at the time of execution and of recording. Nor is there any problem when the mortgagor is a non-resident individual and the property is located in only one county. The problems increase with multiple individual mortgagors residing in different counties, as in a partnership, or where the chattels are located in different counties or are ambulatory. The statute simply does not answer satisfactorily the multitude of questions which arise. It will probably be safe to file duplicate originals of the mortgage in every county where mortgagors reside, both at the time of execution and recording, and certified copies in other counties where the chattels are also located at such times, but this procedure is not clearly set forth in the statute, and if the chattels are ambulatory the mere mechanics of recording or filing may be quite perplexing. Whether to file or record is in itself something of a problem in the Illinois statute; the words are not always used in the alternative.

The place of filing under the Code depends on the kind of collat-

\textsuperscript{15} McGraw, Chattel Mortgages and Conditional Sales, 42 Illinois Bar Journal 738, 740 to 741 (1954). A chattel mortgage given to secure a pre-existing debt is not void as to other creditors. Whitaker Paper Co. v. Schrag, 21 Ill. App.2d 121, 156 N.E.2d 877 (1959).

\textsuperscript{16} Ill. Rev. Stat., Ch. 95, § 4 (1959). A mortgage executed by a public utility may include both real and personal property and will be a valid lien on the property, wherever situated in the state, if recorded in the manner provided for real estate mortgages. Ill. Rev. Stat., Ch. 95, § 1 (1959).
eral involved. Insofar as the collateral could now be subject to a chattel mortgage, the Code requires: If the collateral is inventory\textsuperscript{17} or equipment\textsuperscript{18} (other than equipment used in farming operations), the filing would be in the office of the Secretary of State and, in addition, unless the debtor has places of business in more than a single county, in the office of the recorder of that county where he has his business, if any, and otherwise in the county of his residence;\textsuperscript{19} if the collateral is consumer goods,\textsuperscript{20} equipment used in farming operations, or farm products,\textsuperscript{21} the filing would be in the office of the recorder of the county of the debtor's residence, or if the debtor is not a resident of the state then in the office of the recorder of the county where the goods are kept and, in addition, when the collateral is crops, in the office of the recorder of the county where the land is located on which the crops are growing or are to be grown;\textsuperscript{22} and if the collateral is goods, which are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded.\textsuperscript{23}

The greater detail and clarity of the Code provisions, contrasted with current Illinois law, would make proper filing much more simple, but in the event that a good faith filing is made in an improper place or not in all of the required places, the filing is still effective with regard to any collateral as to which the filing complied with the Code and with regard to collateral covered by a financing statement against anyone who had knowledge of the contents of the financing statement.\textsuperscript{24}

On intra-state removal of property, the Code provides that if the

\textsuperscript{17} "Inventory" is goods held by a person who holds them for sale or lease, raw materials, work in process, or materials used or consumed in a business; if goods are inventory of a person they are not to be classified as his equipment. UCC § 9-109(4).

\textsuperscript{18} "Equipment" is goods used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency, or goods which are not included in the definitions of inventory, farm products, or consumer goods. UCC § 9-109(2).

\textsuperscript{19} UCC § 9-401(1) (c). The provision for local filing may be omitted on enactment.

\textsuperscript{20} "Consumer goods" are goods used or bought for use primarily for personal, family or household purposes. UCC § 9-109(1).

\textsuperscript{21} "Farm products" include crops or livestock or supplies used or produced in farming operations or products thereof in unmanufactured states, etc. UCC § 9-109(3).

\textsuperscript{22} UCC § 9-401(1) (a). This is an optional provision and if it is omitted, filing would be in the office of the Secretary of State under UCC § 9-401(1) (c), with the additional omission of the requirement for local filing in UCC § 9-401(1) (c).

\textsuperscript{23} UCC § 9-401 (1) (b).

\textsuperscript{24} UCC § 9-401 (2).
filing is made in the proper place, it remains effective even though the debtor’s place of business or residence or the location or use of the collateral is thereafter changed.\textsuperscript{25} This is usually considered to be the law in Illinois, although there are no new cases on the problem and the statute is silent.\textsuperscript{26}

Where personal property already subject to a security interest is brought into a Code state, the validity of the security interest is usually determined by the law of the jurisdiction where the property was when the interest attached.\textsuperscript{27} If the interest was perfected elsewhere, it continues perfected in the Code state for four months and thereafter if it is perfected in the Code state within the four-month period. If the security interest is perfected after the four-month period has expired, perfection dates from the time of perfection in the Code state. If the security interest was not perfected under the law of the jurisdiction where the property was kept before being brought into the Code state, perfection dates from the time of perfection in the Code state.\textsuperscript{28} Except for motor vehicles, which are regulated by provisions similar to the Code, the Illinois law in this field is not clear. The chattel mortgage statute does not provide for recording where neither the chattel nor the mortgagor is in this state at the time of execution or within twenty days thereafter. As a general rule, where the mortgage lien has been properly perfected by the filing or recording required by the state where the mortgage was executed and the property was located at such time, the mortgage is usually enforced on the principle of comity after removal of the property to a foreign state.

\textsuperscript{25} UCC § 9-401(3). An alternative provision, which was adopted in its original form in Pennsylvania [Purdon’s Pa. Stat., Title 12A, § 9-401(3) (1954)], states that a filing made in the proper county remains effective for 120 days after the debtor’s residence or place of business or the location of the collateral is changed, but it becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new county within that period. A change in use does not impair the effectiveness of the original filing.

\textsuperscript{26} See Bailey v. Godfrey, 54 Ill. 507 (1870); Mumford v. Canry, 50 Ill. 370 (1869).

\textsuperscript{27} However, if the parties, when the security interest attached, intended for the property to be kept in a Code state and the property was brought into the Code State within thirty days, the validity of the interest in the Code state is determined by its law. UCC § 9-103(3). The language of the present Illinois Motor Vehicle Law is similar. Ill. Rev. Stat., Ch. 95½, § 3-202(b), (c) (1959). Compare Restatement, Conflict of Laws, § 265. In Vervaris v. Egan, 226 Ill. App. 500 (1922), a chattel mortgage was held void as to third parties when the mortgage was filed in Cook County, Illinois, where the mortgagor and chattel were at the time the mortgage was executed, but the mortgagor was an Indiana resident and the property was customarily kept there.

without the knowledge or consent of the mortgagee.\textsuperscript{29} If a statute of the state of removal requires local recording of the mortgage to preserve the lien, the statute may prevent operation of the rule of comity,\textsuperscript{30} but no such statute exists in Illinois. Such statutes usually provide a time limit for recording within the state of removal, and third parties cannot, within the time allowed, acquire rights superior to the mortgagee, if the mortgage is finally recorded as required.\textsuperscript{31} Such is the policy of the Code, and it would appear to be a desirable protection for local creditors and lienors, without putting an undue burden on the mortgagee to look after his collateral.

Ambulatory chattels present exceedingly troublesome questions. The Code attempts to solve the riddle of where to record by providing that the validity and perfection of a security interest and the effect of proper filing with regard to goods of a type normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery, and the like) are governed by the law of the jurisdiction where the debtor's chief place of business is located.\textsuperscript{32}

If a debtor, a Delaware corporation having its chief place of business in Illinois, is acquiring 10,000 ambulatory tanks for liquefied petroleum gas storage and desires financing from an institutional lender, the lender very likely will require security from the time the debtor acquires title to the tanks, which might be in Pittsburgh. The tanks might be designed for use and re-use throughout Illinois, Indiana, and


\textsuperscript{32} UCC § 9-103 (2). If the property is covered by a certificate of title on which a security interest must be noted for perfection in the issuing state, perfection is governed by the law of the issuing jurisdiction. UCC § 9-103 (4).
If the lender took a chattel mortgage, where should it be recorded? Under the Code, the tanks would be "equipment" and the secured party would file the financing statement in the office of the Secretary of State of Illinois. Anyone wanting to know the status of the debtor's property would have to look in only one place to find the existence of the security interest. Under the present Illinois statute, there is probably no way to secure a valid lien by recording in Illinois unless the chattels should be moved into the state within twenty days after the mortgage has been executed, and the mortgage can be recorded or filed within that time in the counties where the chattels are located at that time. Even if this is done, the status of the lien is doubtful because the statute requires recording in the counties where the property is located at the time the mortgage is executed, as well as recorded, and if the chattels are not in the state at the time the mortgage is executed, Illinois law might not be effective to require and protect a recording in Pennsylvania, where the Code would require recording in Illinois in any case. It is not certain that a foreign corporation could be considered an Illinois resident for recording purposes. The Illinois statute was not designed to cover this kind of situation, and in the present state of Illinois case law, the outcome is somewhat uncertain. It would not be beneficial to Illinois creditors to protect a foreign filing on these facts.

Formerly a chattel mortgage could not be effective for more than five years plus ninety days, which period might include one extension if the debt matured in four years or less. This provision presented numerous problems where a lender made one loan secured by both a real estate and a chattel mortgage, and the term of the loan was over five years. This difficulty has been alleviated by a change in 1955 which allows the filing of extension affidavits by the mortgagee, so that in the event of a long-term debt, successive affidavits may be filed

33 Babcock & Wilcox Co. v. Spaulding, 86 F.2d 256 (C.C.A. 1st, 1936) at 258: "It is generally held in this country, and particularly in the federal courts, that a corporation's residence is in the State of its incorporation 'and can be no where else.'" There appear to be no Illinois cases on this point, but in the case of an Illinois corporation, its registered office, as disclosed in its articles of incorporation, is its residence for recording purposes. Fairbanks Steam Shovel Co. v. Will's, 240 U.S. 642 (1915); In re National Mills, 133 F.2d 604 (C.C.A. 7th, 1943). But see Garbe v. Humiston, Keeling & Co., 242 F.2d 923 (C.A. 7th, 1957) and compare Bristol v. C.& A.R.R. Co., 15 Ill. 436 (1854).

34 Ill. Rev. Stat., Ch. 95, § 4 (1953). A chattel mortgage, which, by its terms, matured more than five years from date of recording was not void ab initio and was enforceable by the mortgagee within the restricted period. In re Beale, 117 F. Supp. 149 (N.D. Ill., 1953).
within five years and ninety days of the filing of the original mortgage and each successive extension, so that a mortgage may now be valid for a total period of twenty years and ninety days from the date of the first filing or recording. The mortgage will be effective, now, until ninety days after its maturity date or five years plus ninety days from the last previous filing of the original mortgage or an extension affidavit, whichever is earlier. The Code provides the same general arrangement: A filed financing statement is effective until its maturity date, if less than five years, plus sixty days, or for a period of five years from filing. Its effectiveness lapses after sixty days from such maturity date or on the expiration of such five-year period, as the case may be, unless a continuation statement is filed prior to the lapse, and such a statement may be filed within six months prior to the lapse date. Succeeding continuation statements may be filed for five-year periods until the maturity of the obligation. The Code and the current Illinois provisions limiting the effectiveness of a filing to five years, with extensions allowed, appear reasonable in that, without limiting the duration of the mortgage lien, they limit the period for which a search of the records must be made to ascertain the existence of a lien or security interest.

When an Illinois mortgagee has received full satisfaction, he is required, at the mortgagor's request, to execute a release which may be recorded if the mortgage was recorded, or if the mortgage was filed, the release is to be filed under the number of the released or withdrawn mortgage. The Code requires a secured party to give a signed statement, at the debtor's request, whenever the secured obligation has terminated, and the filing officer will note the termination statement on the index, mark the financing statement "terminated," and send it to the secured party. The Code provides a penalty of $100 plus any other loss caused the debtor if the secured party fails to send a termination statement within ten days after proper demand; the Illinois statute provides a penalty of $50 for failure to give a release

85 Ill. Rev. Stat., Ch. 95, § 4 (1959). Under a former statute providing that a renewal affidavit had to be filed within ninety days after maturity of the debt, a renewal affidavit filed four days before the mortgage was due was ineffective. McKesson-Fuller-Morrison Co. v. Chapell Ice Cream Co., 285 Ill. App. 472, 2 N.E.2d 561 (1936).

86 UCC §§ 9-403 (2), (3).

87 Ill. Rev. Stat., Ch. 95, § 9 (1959).

88 UCC § 9-404 (1), (2).

39 UCC § 9-404 (1).
within a month after payment of the debt and request and tender of the mortgagee's reasonable charges.\textsuperscript{40}

One of the most significant changes the Code would make in Illinois would be the validation of the so-called "floating lien."\textsuperscript{41} Quite likely a valid lien could not be obtained on a shifting stock of goods in Illinois under the present law which requires either the possession of the mortgaged property to be transferred to the mortgagee or else the mortgage must provide for the property to remain with the mortgagor. Even if such a mortgage were not void, the problem of describing the property would be practically insuperable. Where an Illinois mortgage is intended to cover after-acquired property, the only ways the mortgagee can perfect a legal, as contrasted with an equitable, lien are by taking possession of the chattels\textsuperscript{42} or by taking a new mortgage. The first method would not normally be practicable and either method would probably create a lien which is subject to intervening rights of third parties. The Code allows a security agreement to provide that collateral under it shall secure future advances,\textsuperscript{43} which is not against public policy in Illinois,\textsuperscript{44} but at the present time a mortgage so providing should state on its face that future advances may be made and the outside limit of such advances should be stated.\textsuperscript{45} In line with the simplifications made by the Code, the rule of Benedict v. Ratner\textsuperscript{46} is repealed: a security interest is not invalid or fraudulent against creditors because the debtor has the right to use, com-

\textsuperscript{40} Ill. Rev. Stat., Ch. 95, § 11 (1959).

\textsuperscript{41} The floating lien is made possible by simple notice filing [UCC § 9-402] and by the first-to-file priority rule [UCC § 9-312(5)(a)] which usually applies in cases of conflicting security interests in the same collateral, with certain exceptions in the case of purchase money security interests [UCC §§ 9-312(3) and (4)]. Both of these provisions provide practical implementation to the sections validating a security agreement in after-acquired assets and expressly validating the security interest in a "shifting stock." Consult UCC §§ 9-204 and 9-205 and comments thereto.


\textsuperscript{43} UCC § 9-204 (5).

\textsuperscript{44} See, e.g., Frye v. Bank of Illinois, 11 Ill. 367 (1849).

\textsuperscript{45} McGraw, Chattel Mortgages and Conditional Sales, 42 Illinois Bar Journal 738, 742 (1954). Under real estate mortgages, obligatory future advances made within eighteen months after the mortgage is recorded relate back to the original recording date. Ill. Rev. Stat., Ch. 30, § 37a (1959). There is no comparable provision for chattel mortgages.

\textsuperscript{46} 268 U.S. 353 (1925).
mingle or dispose of part or all of the collateral or the proceeds from
the disposition of the collateral, or because the secured party has not
required the debtor to account for proceeds or replace collateral.47

The Code and the Illinois statute seem to be striving for much the
same end result in the field of defenses available against assignees, but
the approaches are vastly different. Illinois requires notes secured by
chattel mortgages to so state on their faces and when endorsed or
assigned, the notes are subject to any defenses existing between the
original parties, and if the notes do not state on their faces the fact
that they are secured by a mortgage, the mortgage is void in the hands
of an assignee; but these provisions do not apply to notes made by
corporations.48 Where the maker of the note is an individual, if the
note does not state on its face that it is secured by a chattel mortgage,
the note should be enforceable by a holder in due course in the ab-
sence of real defenses, although the security will not be available to
such holder. Where the maker is a corporation, assignment or negotia-
ton of the note should carry the security with it, and the note, if
negotiable, should be enforceable according to the provisions of the
N.I.L. If the note remains in the payee's hands, it will not, of course,
be any more or any less enforceable whether it is or is not negotiable,
and whether it does or does not state that a chattel mortgage was
given for security.49

The Secured Transactions Article of the Code formerly did not
limit the rights of a holder in due course of a negotiable instrument
except in one situation; an agreement by a buyer of consumer goods,
in the contract for sale, that he would not assert against an assignee
any defense or set-off arising out of the sale was not enforceable by
any person, but where the buyer signed both a negotiable instrument
and a security agreement, even a holder in due course was subject to
defenses or set-off if he sought to enforce the security interest either
by proceeding under the security agreement or by attaching or levy-
ing on the goods in any action on the instrument.50 The consumer

47 UCC § 9-205.
48 Ill. Rev. Stat., Ch. 95, § 26 (1959). Nor do these provisions relating to defenses on
notes apply after "assignment" of the notes, if they are secured by chattel mortgages on
livestock or agricultural crops, etc. Ibid. See Mattoon Grocery Co. v. Stuckemeyer
& Olson, 326 Ill. 602, 158 N.E. 422 (1927); Chance v. Hudson, 233 Ill. App. 542 (1924).
event the trend is probably away from holding a finance company assignee to be a
thus retained the right to set-off on his defenses against an assignee seeking to enforce the security interest but could not assert affirmative claims when he had agreed not to. As revised, the Code provides that subject to any local statute or decision establishing a different rule for buyers of consumer goods and except for those defenses which may be asserted against a holder in due course, an agreement by a buyer that he will not assert against an assignee any claim or defense available against the seller is enforceable by the assignee who takes for value, in good faith, and without notice of the claim or defense. A buyer who signs both a negotiable instrument and a security agreement, as part of one transaction, is considered to have made such an agreement not to assert claims or defenses. The Code further provides that when a seller retains a purchase money security interest in goods, the Article on Sales governs the sale and any disclaimer, limitation or modification of the seller's warranties. The palpable intention of both the Code and the Illinois statute is the protection of individual purchasers of consumer goods. The Code's scope is far broader, however, since it applies to all secured transactions and not just to chattel mortgages.

Probably because of its Topsy-ish development, the foreclosure procedure in the Illinois statute is not a model of clarity. Certainly a chattel mortgage may contain a power of sale, but one section provides that the mortgagor may insert a clause in the mortgage authorizing the sheriff of the county where the property is situated (presumably at the time of sale) to execute the power of sale granted to the mortgagee, and at such sale, the mortgagee may purchase the property, while another section provides that all sales under a power of sale shall be made in the county where the mortgagor resides (apparently at the time when the mortgagee takes possession of the property) or where the property is situated when mortgaged. In the latter instance there is no specific requirement of a public sale, but there are requirements that the mortgagor be given advance notice

holder in due course in the consumer finance field, even without statutory changes in the law. See, e.g., Commercial Credit Corp. v. Orange County Machine Works, 34 Cal.2d 766, 214 P.2d 819 (1950); Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940).

51 UCC § 9-206(1). The change has the effect of leaving to each state the treatment to be given defenses to payment asserted because of defects in consumer goods.

52 UCC § 9-206(2).


54 Ill. Rev. Stat., Ch. 95, § 27 (1959).
of the sale as well as details of the sale within ten days after it is held, and on failure to supply the required information on the sale, the "owner" of the property may recover one-third of the "value" of the property sold from the mortgagee or the assignee-seller, and no such sale shall be valid as against the mortgagor's creditors unless the mortgage is recorded at least five days before taking possession of the property, and a sale made within five days of recording is fraudulent and void as against the mortgagor's creditors.\(^{55}\) A chattel mortgage on household goods executed by a married person is not valid unless the spouse joins in the execution, and a mortgage on necessary household goods, wearing apparel, or mechanic's tools cannot be foreclosed except in a court of record.\(^{56}\)

Of course foreclosure and sale are not the exclusive means of satisfying an obligation secured by a mortgage. The mortgagee may bring an action on the note to collect the balance due or else sue to recover the property.\(^{57}\)

Under the Code, on default a secured party may reduce his claim to judgment, foreclose the security interest, take possession of the collateral, sell the collateral and recover a deficiency, or accept, by agreement, the collateral in discharge of the obligation.\(^{58}\) The principal difference between the Code and the present Illinois law is that the Code is clear whereas an Illinois mortgagee cannot determine his rights by reading the statutes alone and must resort to a considerable body of case law.

The Code gives the debtor a right of redemption at any time before the secured party has disposed of the collateral or entered into a contract to dispose of it or before the obligation has been discharged by retention of the property in satisfaction of the debt.\(^{59}\) There is no provision for redemption in the Illinois statutes but courts of equity recognize it to exist before foreclosure and sale.\(^{60}\)

On default, the Code gives a secured party the right to take possession of the collateral, unless the parties have agreed otherwise, and

\(^{55}\) Ibid. The provisions of the Act do not apply to the "sale of furniture by regular dealers on the so-called installment plan."

\(^{56}\) Ill. Rev. Stat., Ch. 95, §§ 24, 25 (1959).


\(^{58}\) UCC §§ 9-501 (1), 9-503, 9-504, 9-505.

\(^{59}\) UCC § 9-506.

\(^{60}\) Whittemore v. Fisher, 132 Ill. 243, 24 N.E. 636 (1890); Wylder v. Crane, 53 Ill. 490 (1870).
possession may be taken without judicial process, if it can be done without a breach of the peace. The collateral may be sold, leased, or otherwise disposed of, either in its existing condition or following commercially reasonable preparation, and the proceeds must be applied (1) to the expenses of retaking and selling the property, (2) to satisfaction of the indebtedness secured by the security interest under which disposition is made, and (3) to the satisfaction of indebtedness secured by any subordinate security interest in the collateral, if demand has been received before the proceeds have been distributed. If there is a surplus the debtor is entitled to it, and if there is a deficiency, the debtor is liable for it, unless otherwise agreed. The disposition may be by public or private proceedings. The secured party is unfettered in his discretion so far as disposition of collateral is concerned; the only test is whether the disposition is "commercially reasonable." The standard of commercial reasonableness is incapable of precise definition, but it almost certainly would be more beneficial to a debtor than a sheriff's sale of property under a chattel mortgage power.

Unless the collateral is perishable or threatens to decline speedily in value, or is a type customarily sold on a recognized market, the secured party must give the debtor and other known secured parties reasonable notice of the time and place of a public sale or the time after which a private sale or other disposition is to be made. The secured party may buy at a public sale or at a private sale, if the collateral is of a kind whose price is easily established. Where the purchaser acts in good faith or, in the case of a public sale, without knowledge of any defects in the sale and without collusion, the purchaser acquires all of the debtor's rights in the collateral, discharged of the security interest under which the disposition is made and all subordinate interests or liens, even though the secured party has not complied with all requirements of the Code or of any judicial proceeding in connection with the disposition. Of course, although a purchaser is protected, the secured party remains liable to the debtor or any other person entitled to notification for any loss caused by a failure to comply with the Code's requirements. Where the collateral

61 UCC § 9-503.
62 UCC §§ 9-504(1), (2), (3); 9-507(2).
63 UCC § 9-504(3), (4). In the case of consumer goods, notice to other secured parties is not required.
is consumer goods, the debtor has a right, in any event, to recover not less than the credit service charge or time price differential plus ten per cent of the cash price or principal amount of the debt.\textsuperscript{64}

In the case of a purchase money security interest in consumer goods, where the debtor has paid sixty per cent of the cash price or in the case of another security interest in consumer goods, where the debtor has paid sixty per cent of the loan, and has not, after default, signed a statement renouncing his rights, a secured party who has taken possession of the collateral must dispose of it within ninety days or else he will be liable in conversion or under the Code for any loss due to a failure to comply with the Code's requirements. In any other case, a secured party in possession of the collateral may propose to retain the collateral in satisfaction of the obligation by giving written notice of such intention to the debtor and to other known secured parties. If no objection is received within thirty days, the secured party may hold the collateral or dispose of it free from the requirements of Article 9. If there is an objection to retention, the secured party must dispose of the collateral under the requirements of Section 9-504 outlined above.\textsuperscript{65}

During the period when the debtor has possession of the collateral, his rights are alienable.\textsuperscript{66} That this should be the case is inevitable from the range of transactions covered by the Code,\textsuperscript{67} but the se-

\textsuperscript{64} UCC § 9-507(1). The term "time price differential" is used in Retail Instalment Sales Acts and Motor Vehicle Sales Finance Acts to mean the difference between the cash price and the time price for the goods in question, usually automobiles. Such statutes, in varying forms, have been enacted in Alaska, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, and Wisconsin. See Warren, Regulation of Finance charges in Retail Installment Sales, 68 Yale Law Journal 839 (1959).

\textsuperscript{65} UCC § 9-505.

\textsuperscript{66} UCC § 9-311.

\textsuperscript{67} As in the case of inventory financing. But the Code's security interest covers not only the collateral subject to the agreement, but also the proceeds arising from the debtor's sale or disposition of the collateral, although the interest in proceeds becomes unperfected ten days after their receipt by the debtor, unless the original filed financing statement covering proceeds or a security interest in them is perfected within the ten-day period. UCC § 9-306. This is comparable to provisions of the Uniform Trust Receipts Act [Ill. Rev. Stat., Ch. 121 1/2, § 175 (1959)] and the Factors Lien Act [Ill. Rev. Stat., Ch. 82, § 107 (1959)]. UCC § 9-306 now states the secured party's rights in proceeds in terms of perfected security interest rather than priority, perhaps to avoid such problems as were raised in In re Harpeth Motors, Inc., 135 F. Supp. 863 (D.C. Tenn., 1955).
security agreement may, of course, provide that unauthorized disposition will be a default. In Illinois if the mortgagor makes a transfer of the property without the mortgagee's written consent, he may incur criminal penalties.  

The Code recognizes that the debtor's rights in the collateral may be reached by attachment, levy, garnishment or other appropriate judicial process. An attaching or executing creditor of an Illinois mortgagor can reach the mortgagor's equity of redemption, but cannot interfere with the mortgagee's rights. The Code gives priority to a person who furnishes services or materials, in the ordinary course of his business, to goods subject to a security interest, unless the lien is statutory and the statute expressly provides otherwise, and this is contrary to the Illinois view that an artisan's lien cannot have priority over a recorded chattel mortgage, even though the mortgage has a covenant that the mortgagor will keep the goods in "first-class condition at all times at the expense of the mortgagor."  

While by no means exhaustive, the comparisons discussed above point out many of the important similarities and dissimilarities between Illinois chattel mortgage law and Article 9. It must be remembered that even though a particular security transaction cannot be handled as a chattel mortgage in Illinois, although this might have been the only possibility historically, some other financing means may be found. For instance, the invalid mortgage on a shifting stock—and "shifting" is doubly descriptive for some of the financed stocks—could possibly be recast as a field warehousing transaction, or brought under the Uniform Trust Receipts Act or the Factors Lien Act. The Code brings a symmetry of treatment into the financing field where grand confusion formerly grew.  

The Code would require less re-education of the bar than is sometimes supposed. Satisfactory security agreements currently in use could still be used under the Code, although some of the consequences might be different. Where specific security interests are now advisa-

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68 Ill. Rev. Stat., Ch. 95, § 8 (1959).
69 UCC § 9-311.
70 Pike v. Colvin, 67 Ill. 227 (1873); Spaulding v. Mozier, 57 Ill. 148 (1870).
71 UCC § 9-310.
72 Ehrlich v. Chapple, 311 Ill. 467, 468, 143 N.E. 61 (1924). A properly recorded or filed mortgage is "good and valid . . . as against creditors of the mortgagor and subsequent purchasers, mortgages or lienors." Ill. Rev. Stat., Ch. 95, § 4 (1959).
ble, devices that provide them—such as chattel mortgages—could still be used. The Code does, however, permit a debtor using one agreement and one filing to subject all of its assets, present and future, to a valid security agreement, if this is desirable. Whether the so-called floating lien would ever be used is a matter of conjecture. A security interest is good only to the extent of the "obligation" outstanding, so that an onerous agreement does not tie a debtor's hands indefinitely, and even though a debtor has given a floating lien on his present and future assets, he may still acquire property subject to a purchase money security interest. It may be doubted that the Code would radically affect the secured financing of personal property, but it would simplify the procedures and, where advisable, would permit a fuller use of old techniques plus a few new ones. Many problems raised by critics of the Code are purely theoretical and have not been found to exist in actual practice.

Law, with its precious intricacies, does not exist for the lawyer alone. In the financing field it must meet the needs of the business world, protecting borrower and lender alike in an efficient and sensible way.

Professor Denis W. Brogan has recently remarked, with his usual sagesness, "... I am advocating the continual discussion in public ... of the necessary adjustments of the law to modern conditions, and not leaving these adjustments entirely in the hands of laymen, or politicians, or administrators, or businessmen, or union leaders, who are very tempted indeed, because that is the nature of their education, to choose the immediate, quick, short-term solution, which turns out to be a solution that no free society will wisely accept and which, even if the honest act of the administrator or businessman, or lawyer, produces immediate practical and long-term social and political evils."73

It was argued in the hearings of the New York Law Revision Commission that the Code would require "mass re-education of the general public and that no one could, to quote the critic, 'contend that the truck driver and grocery clerk, or even the small businessman, can pick up Article 9 of this Code and get a quick, easy and clear picture of the rights of borrower and secured lender,'" and the Code's draftsmen replied: "We never thought anyone believed

73 Brogan, Law and Social Change in a Democratic Society, 1956 U. of Ill. Law Forum 242, 249.
that any layman could pick up any of our present security laws and get a quick, easy and clear picture of what was involved therein. Even those trained in the law sometimes have difficulty."

While much of the Code is simply a codification of existing law and business practices, Article 9 is innovative. In some ways it is complex and difficult to understand—although this is less true of the Code than of the statutes it replaces—but once grasped it should prove far more satisfactory in use, to both lawyers and their clients, than the current hodgepodge of Illinois law regulating, or purporting to regulate, the field. Comment from Pennsylvania, after several years' experience with the Code, indicates it is operating quite satisfactorily. Eminent Massachusetts lawyers agree. It is not the last piece of legislation we shall ever need in the commercial field but it is the best and most complete answer currently available.

74 Supplement No. 1, p. 176 (1955). While the New York Commission did not recommend enactment of the Code in its form at the time of the Commission's study, it was concluded, as to Article 9, that "Article 9 would accomplish a significant reform of the law of personal property security. The Commission believes that the approach taken by Article 9 as a whole is sound in theory and satisfactorily developed in most of its elements." Report of the Law Revision Commission to the Legislature Relating to the Uniform Commercial Code, Legislature Document No. 65 (A), p. 90 (1956). The Code has been in effect in Pennsylvania since July 1, 1954 (1952 Edition), and in Massachusetts since October 1, 1958; it will become effective in Kentucky on July 1, 1960, in New Hampshire on July 1, 1961 and in Connecticut on October 1, 1961. The following articles are of special interest in connection with security problems: Bane, Chattel Security Comes of Age, 1 De Paul L. Rev. 91 (1951); Symposium on Chattel Security Transactions, 1956 U. of Ill. Law Forum 531 et seq.; Symposium on the Uniform Commercial Code and Illinois Law, 53 N.U.L. Rev. 381 et seq. (1958); Trumbull, The Uniform Commercial Code in Illinois, 8 De Paul L. Rev. 1 (1958); Coogan, Article 9 of The Uniform Commercial Code: Priorities Among Secured Creditors and The "Floating Lien," 72 Harv. L. Rev. 838 (1959); Coogan and Bok, The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture, 69 Yale L. J. 203 (1959).