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Article 9: Secured Transactions
By ALBERT W. STONE*

INTRODUCTION

Retail clothing, appliances, and furniture stores typically sell merchandise on credit terms to their customers. After credit is given to the customers, the need for cash in the business is frequently acute, even crucial, to continuance. The greatest asset of the business in many cases is the promises of customers to pay for their credit purchases. To raise the needed cash, the merchant needs to utilize this asset—his receivables. Yet, if he discounts them or pledges them he sometimes finds himself paying at a rate in excess of 20 per cent per year for the needed financing. That is a reasonable charge, not exorbitant, because of the uncertainties in the law of receivables financing and the burdens and expenses of policing and even collecting on the accounts. The pity is that financing should be so complicated, burdensome, and insecure as to justify such high charges.

Time was when people looked askance at a merchant who tried to sell, or borrow on his receivables. His appeared to be a shaky business. But in today's credit economy it makes sense. Such transactions grew separately from other security devices such as conditional sales, chattel mortgages, trust receipts, factors' liens, and the like. And the applicable legal rules grew out of the suspicious attitudes which caused people to look askance. Hence the rules of law are unique and require the financer to have control over the receivables lest the merchant's control be construed as deceptive—a secret, fraudulent lien. The merchant's customers should be notified to pay the financer, lest garnishing creditors intervene. As the customers pay their bills, the security will evaporate and must be replaced by new notes, contracts, or accounts. Someone, or some organization, needs to keep track of this for the financer. That can be a full time job. It is a cumbersome and unsettled branch of the law, particularly in Montana where we have

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1In 1954 one credit clothier of the author's knowledge had been discounting his receivables at a bank, paying 6% discount in advance for six months' credit, which is an effective rate of interest at roughly 24% per annum. This particular person entered into a pledge arrangement with a private financer to pay interest on amounts advanced at 20% per annum. He pledged receivables in an amount of

2In the arrangement mentioned in note 1 supra, the financer took actual possession of the conditional sale contracts of the clothier's customers; removed them to an accounting office at another location; returned to the clothier any contracts which were, from time to time, paid up; replaced paid up contracts with additional contracts; checked the clothier's business daily to ascertain "add-ons" to prior accounts; and kept a constant check to make sure that the volume of security was maintained at the proper level. This is expensive financing and can only be afforded by a merchant whose cash needs run toward or into six figures. Otherwise the policing cannot be financed out of the finance charges.

Not the least of the burdens on a discount arrangement is that under Int. Rev. Code of 1954, § 453(d), the merchant's receivables are subject to income taxation in the year in which he discounts them. On the other hand, if the merchant pledges his receivables as security for a debt, the merchant can remain on the installment basis effectively, postponing income taxes on his receivables until he is paid off by his customers. See Helzel, Installment Sales Financing and Taxes, 32 Taxes 139 (1954).

*Note 2 supra.
no statutes nor any settled case law to guide the lawyers for the merchant and his financing. The lack of case law results from lack of use of this means of financing—and this means of financing is not much used, partly because there is so little certain law in Montana or elsewhere on the subject.

Chattel mortgages, conditional sales, trust receipts, pledges, inventory financing plans, and other security devices each differ from receivables financing, and all in turn differ from one another. That is a peculiarity about the "field" of personal property security. Each security device has generally the same purpose—to provide security, usually for the payment of money. Yet each device has grown up as a "field" in itself, with separate statutes, case law, filing requirements, and enforcement provisions.

Article 9 of the Code is a complete overhaul of the law of personal property security. It encompasses all that a lawyer now thinks of along the lines of the different personal property security devices. But instead of maintaining the mass of technical rules applicable to each separate device, this article abolishes distinctions between them and states rules of general application to any such financing transaction. Functionally, a simple secured transaction involves the creation of an indebtedness, an interest in collateral, either possession of the collateral by the creditor or notice to third parties of the creditor's security interest, and if necessary the realization upon the collateral by sale. Selecting the law applicable to these general parts of a secured transaction should not be made to depend either upon the name by which it is called, where "title" happens to be located, or where "title" happens to have shifted during the night as a result of someone's intent. Unifying personal property security along generally functional lines is a long-needed improvement for the commercial world. It is one which will reduce the cost of credit and make potential collateral more useful in financing a business.

Montana could adopt article 9 of the Code with far less adjustment than could almost any other state. Notwithstanding local chambers of commerce, Montana is not yet a leading commercial state and hence our established case law is sparse and our business practices are relatively uncomplicated or unsophisticated. We are not so deeply committed as are most other

"Conditional sales are commonly used to market consumer durable goods; chattel mortgages are likewise most closely associated with consumer goods; trust receipts are used for financing the acquisition of inventory by a dealer; and pledges have been used in one form or another for almost every money raising scheme. Pledges are awkward because possession by the secured party is essential; conditional sales and chattel mortgages differ from each other legally on the basis of the location of "title"; and trust receipts are exclusively a statutory conception in most jurisdictions where they are recognized as a separate form of security. For an excellent summary of the distinctions between these various devices, see Hanna, Cases on Security 130 (3d ed. 1959).

In Montana each security device which is recognized is in a different part of Revised Codes of Montana, 1947; title 45, liens; title 52, mortgages; title 65, ch. 1, pledges; title 65, ch. 2, trust receipts; title 72, railway equipment financing; title 74, conditional sales. In addition, the law concerning fixtures stems primarily from title 67. (Hereinafter Revised Codes of Montana are cited R.C.M.)

Statutes cited ibid.

The unsatisfactory nature of basing rights upon the location of "title" is well illustrated in Pratt v. Pratt, 121 Wash. 298, 209 Pac. 535, 28 A.L.R. 548 (1922).
states to much of the law which is changed by article 9. Most of our law relating to secured transactions is regulatory and would therefore be unaffected by the enactment of article 9. The largest secured transaction which is entered into by most people is a real estate mortgage or a real estate conditional sale. These are not within the scope of article 9 and would remain unaffected. Likewise, suretyship transactions would be unaffected.

THE HIGHLIGHTS OF ARTICLE 9

In General

The idea of a pledge is both simple and functional. Pledges of personal property remain substantially the same under the Code. More important changes are wrought upon non-possessor security interests. There the aim of the Code is to permit persons to simply agree that one party shall have an interest in another's property as security, and to make that expressed intent effective. Of course, the debtor should have an interest in the property in the first place; the creditor should give some value in order to be entitled to a security interest in the debtor's property; and the debtor should sign the agreement. Basically, the creation of a security interest can be as simple as that under the proposed Code. The Code eliminates the many distinctions between different security devices and the technical details applicable to each.

The security agreement may be made more complicated in order to

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\(^a\)No cases have been decided by our supreme court under the following Montana laws: "Farm Storage of Grain as Basis for Farm Credit," title 3, ch. 4; "Farm Storage Public Warehousemen," title 3, ch. 6; "Consumer Loan Act," title 47, ch. 2 (Laws of 1959, ch. 283, at 716); "Leases, Sales and Mortgages of Railroad Equipment and Rolling Stock," title 72, ch. 3; and "Retail Installment Sales," title 74, ch. 6 (Laws of 1959, ch. 282, at 701).

Only one case has been decided by our supreme court under the "Uniform Trust Receipts Act," title 65, ch. 2.

In the area of chattel mortgages (title 52), liens (title 45), pledges (title 65), and conditional sales (title 74), the case law is only relatively more filled in; many areas remain untouched and many unclear or confused.

\(^b\)The railway equipment mortgage act (note 8 supra) has not been much used. The other non-regulatory acts are those to do with chattel mortgages, trust receipts, liens, pledges, and conditional sales (note 8 supra). Of these, the lien law has mostly to do with statutory liens which would not be affected by the enactment of article 9.

\(^c\)Or at least almost unaffected. In dealing with personal property article 9 touches real property where real and personal property law meet, such as with respect to fixtures and crops.

\(^d\)Again, some qualification may be necessary. Frequently a suretyship or guaranty transaction also involves some personal property as security. Incidentally, article 3 of the Uniform Commercial Code (hereinafter cited UCC), dealing with commercial paper, makes it clear that certain suretyship defenses which were generally not recognized under the Uniform Negotiable Instruments Act will be recognized under the proposed new law (UCC §§ 3-601, -606). See BRANNAN & CHAFFEE, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED 887-97 (5th ed. Beutel 1932), and also Union Trust Co. v. McGinty, 212 Mass. 205, 98 N.E. 679 (1912).

\(^e\)See discussion of pledges under Montana law and the Code infra.

\(^f\)UCC § 9-201 provides: "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. . . ."

\(^g\)UCC § 9-204.

\(^h\)Ibid.

\(^i\)UCC § 9-203.

\(^j\)Notes 2 to 5 supra, and discussion of the effect of article 9 on Montana law infra.
contain provisions to suit the convenience of the parties. For example, it may provide that after-acquired property of the debtor shall become part of the security whenever the debtor obtains an interest in such property; and it may provide that future advances by the creditor shall be secured from the date that the creditor obtains any security interest in the property. Moreover, the debtor may be permitted complete control over collateral, as in a floating charge against accounts receivable or against inventory. Thus the debtor may keep the notes and conditional sales contracts of his customers, collect money on these receivables, and spend the money—yet the floating charge shifts to such unpaid receivables as the debtor now has. And what amounts to an agreement to pledge instruments and negotiable documents is good for 21 days without transfer of possession, or for 21 days after the creditor has relinquished possession temporarily to the debtor.

Priorities

Such ease in creating a security interest calls for some examination of how third parties (e.g. other secured creditors, lien creditors, general creditors, and buyers) are protected. Where the secured party has possession of the collateral (as in a pledge) there is generally sufficient protection of third parties. The problems and technicalities arise with respect to non-possessory security interests.

Normally third persons are placed on notice by filing, but a buyer in the ordinary course of business takes free of any security interest created by his seller even though the security interest is perfected and the buyer knows of it. The only other broad generality which seems available is that a person supplying purchase money can always manage to have

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3. UCC § 9-204(3). Montana is fortunate in having such provisions in her laws: R.C.M. 1947, §§ 52-316 (on crops), 52-317 (on increase of livestock), and 45-109 (on personal property more generally). See also Isbell v. Slette, 52 Mont. 166, 169, 155 Pac. 503, 504 (1916); Security State Bank v. Mariette, 69 Mont. 536, 539, 223 Pac. 114, 115 (1924).

4. UCC § 9-204(5). Montana makes provision for this, too, in the chattel mortgage statute, R.C.M. 1947, § 52-301.

5. UCC § 9-205.

6. Ibid.

7. UCC § 9-304(4), but only to the extent that the security interest arises for new value.

8. UCC § 9-304(5). The relinquishment of possession must be for a purpose authorized in UCC § 9-304(5) (a) or (b).

9. The Code recognizes this in UCC §§ 9-203(1) (a), -302(1) (a) and -305.

10. UCC §§ 9-302(1) and -304(1).

11. A buyer in the ordinary course is defined in UCC § 1-201(9) as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind. . . ."

12. UCC § 9-307, with the qualification that this does not apply to a person buying farm products from a person engaged in farming operations.

Note that there is a fine, technical, and subjective line, where a person claims to be a buyer in ordinary course, but he knows of a security interest. He must be shown to know also that the sale is in violation of the security interest with respect to the bought goods to disqualify him from his favored position. See note 26 supra for the definition of "buyer in ordinary course." See a more extended discussion of the subject of this paragraph in the 1958 official text of the Code, at 658.
priority in the collateral which his money purchased. In this latter case, if the collateral is inventory and a prior secured party is relying on a floating charge on the shifting stock of inventory, the prior secured party must be notified of the new purchase money interest before the debtor receives possession of the collateral, and if the collateral is property other than inventory the purchase money security interest must be perfected (usually by filing) at the time the debtor receives possession, or within ten days thereafter. If the collateral was inventory held for sale, a buyer in the ordinary course will take free of both the prior security interest and the purchase money security interest.

Other than the aforementioned generalities involving a buyer in the ordinary course, and purchase money interests, the rules of priority are detailed and technical. The Code substitutes one set of detailed and technical rules for the numerous sets previously existing in the different forms of personal property security. Some of the features will be mentioned.

Usually, in order to perfect a security interest, filing is necessary. However, such an interest is perfected without filing where the collateral is: property in the possession of the secured party (e.g., a pledge); instruments or negotiable documents which are left with or turned over to the debtor for a temporary period not to exceed 21 days; proceeds of the debtor’s sale, exchange, or other disposition of the collateral, but only for 10 days; either farm equipment which is priced at less than $2500 or consumer goods, under a purchase money security agreement; or accounts or contract rights where the transaction is relatively isolated and for a small amount.

It is important to have a perfected security interest (by filing, possession, or such special cases as have just been mentioned) in order to have protection against purchasers, lienors, and subsequent secured parties who perfect their interests first.

Even though perfected, a security interest is subject to a number of superior claims in addition to buyers in the ordinary course and purchase

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Note 27 supra.
See the preceding paragraph.
See discussion in the “Introduction” supra and in “Effect Upon Montana Law” infra.

Notes 26 and 27 supra.
money interests." There is a frailty inherent in each of the situations where a security interest is perfected without either filing or possession: a holder in due course or good faith purchaser will cut off such a non-possessory and unfiled interest in instruments or negotiable documents; the proceeds from the sale of collateral may be dissipated so that they cannot be traced nor replaced, even within a ten day period; one who buys without knowledge for his personal, family household, or farming purposes cuts off such a non-possessory and unfiled purchase money interest in farm equipment priced at less than $2500 and in consumer goods; and in the case of casual financing relying upon an account or contract right, the collateral is subject to subsequent transactions between the debtor and the obligor, such as payment of the account.

Where the security interest is perfected by filing it still will be subordinate to the interest of one claiming under a statutory lien, such as agisters, mechanics, and other such liens. Such a filed and perfected interest in crops to secure an overdue debt will be subordinated to one who subsequently enables the debtor to produce the crops. This is analogous to the priority of a purchase money interest which, like a buyer in the ordinary course of business, can take priority over any prior security interest.

Of particular interest is the handling of fixtures and accessions under article 9. Generally a security interest in goods will follow the goods into the realty and take priority over a prior interest in the realty. Such a security interest in goods which are affixed to realty can only be cut off by subsequent interests in the realty (including prior encumbrancers who make subsequent advances) who have no knowledge or notice of the security interest in goods. Similarly where goods become accessions to other goods, a security interest will follow them as in the case of fixtures. Where goods become commingled or processed so that their identity is lost, the security interest will still follow. Enforcement of the security interest in the case

Note 28 supra.

These are covered generally in UCC § 9-302(b) to (f), and most of them are noted in the text pertaining to notes 37-41 supra.

UCC §§ 9-306, 3-302 to -307, 7-501 to -509.

UCC § 9-306 provides for following goods that have been disposed of, and also identifiable proceeds. But it does not affect the power, albeit unauthorized, of a debtor to destroy collateral, or waste it, as well as the proceeds.

UCC § 9-307.

UCC § 9-302(1) (e).

UCC § 9-310, which conforms to the policy already established in Montana law (R.C.M. 1947, § 45-106, and other specific priority provisions in our lien laws, e.g., R.C.M. 1947, § 45-506).

See discussion of statutory liens under "Effect Upon Montana Law" infra.

UCC § 9-312(2) provides: "A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise. . . ." Note 26 to 30 supra. Note the qualifications to the generality.

UCC § 9-313. Excluded from the operation of these rules are "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like."

UCC § 9-313(4).

UCC § 9-314.

UCC § 9-315.
of fixtures or accessions is fortified by a newly recognized right in the
secured party to remove his collateral from the real estate or from the
other goods, subject only to making reimbursement for any damage done
by way of physical injury incurred in the removal. In the case of com-
mingled or processed goods where there are other security interests they
each take a prorated interest in the product or mass.64

Article 9 permits contracting parties to modify their contract or
substitute another contract, notwithstanding notice to both parties that
one of the parties has assigned his rights under the contract, just so long
as the parties act in good faith and "in accordance with reasonable com-
mercial standards."65 The assignee acquires "corresponding rights" under
the modified or substituted contract.66 It could be that if there are no such
"corresponding rights," this would be evidence of an absence of "reasonable
commercial standards." Hopefully the original parties will not have dif-
fences of opinion on such matters with the assignee. The assignee with
more foresight may, in the assignment, provide that any such modification
or substitution is a breach by the assignor.67 This won't give the assignee
what he bargained for, of course, but it gives him a threat and an action
for breach.

The assignee who wishes to be paid by the obligor should not only
notify the obligor of the assignment, but also that payment is to be made
to the assignee.68 Prohibitions against assignments of accounts or contract
rights are rendered ineffective between an account debtor and an assignor.69

Filing

Central filing in the office of the Secretary of State is adopted for
notice of secured interests in accounts, chattel paper, contract rights, in-
ventory, and equipment.64 This is generally consistent with the present
provisions of the Uniform Trust Receipts Act.64 Local filing is required for
collateral which by custom is usually checked upon locally. Thus the county
court house of the county of the debtor's residence is the place to give notice
of a security interest in consumer goods, farm products, farm equipment,
and farmers' sale accounts.64 That follows prior conditional sale and chattel
mortgage statutes.64 The county where the real estate is located is the place
to give notice of goods which become fixtures.64 Filing requirements are

64UCC §§ 9-313 (5) (fixtures), -314 (4) (accessions). Any such reimbursement for
physical injury is not to include the diminution in value of the reality or the whole
caused by the absence of the goods removed, or by any necessity for replacing them.
65UCC § 9-315 (2).
66Ibid.
67Ibid.
68Ibid.
69UCC § 9-318 (4).
70UCC § 9-401. However this is not the case if such collateral also qualifies for
local filing, e.g., accounts arising from the sale of farm products by a farmer. The
Code also contemplates that a state may elect to do without any local filing ex-
cept for fixtures, and some states may desire some middle ground. Alternatives
are provided to assist in achieving local desires in this respect.
72UCC § 9-401 (1) (a). An alternative may be selected which will eliminate such
local filing, other than for fixtures (note 64 supra).
73R.C.M. 1947, §§ 52-304 (chattel mortgages), 74-204 (conditional sales).
74UCC § 9-401 (1) (b).
simplified: a statement that the creditor has a security interest in a particular class of goods is required. It must give the address of the secured party and the debtor and be signed by both of them. That is all. No affidavits or acknowledgments are required. If it is improperly filed, but there is no bad faith, the filing is nevertheless good to the extent that it is proper, and good against anyone who has knowledge. A statement is deemed filed upon its presentation with tender of the filing fee, or upon its acceptance by the filing officer.

**Enforcement**

Enforcement proceedings are simplified in the Code by allowing as a matter of law what is frequently attempted by contract. Technical and detailed rules are greatly reduced. Generally, upon default the secured party is entitled to possession. He may sell, lease, or otherwise dispose of the collateral, at public or private sale. The property may be sold as it is or after processing—just so the procedures are "commercially reasonable." The secured party may buy at any public sale and at many instances of private sale also.

Strict foreclosure, i.e., retention of the collateral in satisfaction of the obligation, is generally permitted by the Code, with the debtor's acquiescence. Such acquiescence may be established by the debtor's failure to object within thirty days to a written notice expressing the intention of the secured party. If such an objection is made within thirty days, there must be a disposition of the collateral. In the case of security interests in consumer goods where the debtor has paid 60 per cent or more of the cash price or loan, retention of the collateral in satisfaction of the debt is permitted only upon the signed express consent of the debtor.

*UCC § 9-402(1).*
*UCC § 9-402(5).*
*UCC § 9-403(1).*
*UCC § 9-503.* Also, the secured party may proceed to judgment, and any lien resulting therefrom relates back to the date of the perfection of the security interest (UCC § 9-501(1) and (5)). If the collateral relates also to realty, the secured party may proceed under article 9 or under the applicable realty or mortgage statutes (UCC § 9-501(4)). See R.C.M. 1947, § 52-111, which leads to the execution provisions of R.C.M. 1947, title 93, ch. 58 and 60.

*UCC § 9-504(1).*
*UCC § 9-504(3).*
*UCC § 9-504(1).*
*UCC § 9-504(3).*
*UCC § 9-504(1) and (3).*
*UCC § 9-504(3).* The secured party may buy at private sale "if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations." Generally the debtor is entitled to notification, but that is excused if the collateral "is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market."

*UCC § 9-505(2).* It would seem that such a termination of the entire transaction is encouraged by this subsection of article 9.

*UCC § 9-505(1).*
ARTICLE 9: SECURED TRANSACTIONS

EFFECT UPON MONTANA LAW

Generally

Even of those chapters in Montana law having to do with personal property, very few would be directly affected by the enactment of article 9. That is because purely regulatory legislation does not conflict with article 9. For example, the requirements of our farm credit and grain warehouse laws would be unaffected, even though the actual transactions would come under article 9. Our new "Retail Installment Sales Act" is not inconsistent with the proposed article 9, nor is our new "Consumer Loan Act." The laws affecting fraudulent conveyances, assignment for benefit of creditors, and bulk sales do not deal with the same aspects of personal property as does article 9. In general these Montana laws are regulatory; they prescribe licensing requirements and restrict some transactions. Article 9 is not intended to curb abuses or determine who is qualified to enter into particular transactions. It sets out rules defining the relative rights, duties, powers, and privileges of secured parties and debtors.

Any laws which deal with the relative rights in collateral of secured parties and debtors would be directly affected. That would include our laws on liens, chattel mortgages, pledges, trust receipts, conditional sales, and mortgages on railroad equipment.

Statutory Liens — Title 45

Montana’s lien law continues to grow. The legislature has created statutory liens for loggers, mechanics, threshermen, farm laborers, physicians, nurses and hospitals, sellers of realty, sellers of personality, purchasers of realty, agisters, factors, bankers, shipmasters, seamen and officers. We also have laborers’ and materialmen’s liens on oil and gas wells and pipe lines, liens for salaries and wages, crop liens, and liens for dusting and spraying. This body of law is recognized by article 9, and article 9 defers to the provisions of any such statutes when questions of priority arise. This

Notes 8 and 9 supra.

See comments following §§ 9-101 and 9-203 in the 1958 official text of the Code, as well as notes 8 and 9 supra.

R.C.M. 1947, title 3, ch. 4.


R.C.M. 1947, title 74, ch. 6 (Laws of Montana 1959, ch. 282, at 701).


R.C.M. 1947, title 18, ch. 3.

R.C.M. 1947, title 18, ch. 2.

Article 6 would provide a new law for bulk transfers in substitution of our present bulk sales law (R.C.M. 1947, title 18, ch. 2).

Note 84 supra.

Ibid.

No cases have been decided under our law governing the mortgaging of railroad equipment and rolling stock (R.C.M. 1947, title 72, ch. 3), and no special attention will be given to that law here.

R.C.M. 1947, title 45.

Ibid.

UCC § 9-310.

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is consistent with the language of our lien law that "contracts of mortgage or pledge are subject to all the provisions of this chapter." The provisions in our lien statute permitting liens on after-acquired property have been interpreted, properly, to apply to chattel mortgages. Article 9 also permits a secured interest in after-acquired property, so once again enactment of article 9 would result in no significant change in the substance of our law.

The provisions of our present lien law prohibiting forfeiture and voiding restraints on the right of redemption are intended to apply to all secured transactions. Article 9 of the Code is more flexible than this statute, but does not sacrifice any of the rights of a defaulting debtor. This section of our lien law should therefore be limited strictly to statutory liens if article 9 is enacted. Most of the remainder of this title is concerned with particular liens. This remaining body of law should remain intact, as it is not affected by article 9.

Chattel Mortgages — Title 52

Title 52 deals with both real and chattel mortgages. To the extent that it deals with realty alone it is outside the effect of article 9; to the extent that it deals in generalities, such as definitions, it will be made obsolete so far as personal property is concerned by the enactment of article 9. Amendatory legislation to limit the first chapter of title 52 to real estate mortgages and repeal the third chapter (except as to livestock) would be desirable if article 9 is passed.

If article 9 is passed, the location of the "title" to goods would be irrelevant in deciding rights, priorities, remedies, and the like. Such a change would eliminate "chattel mortgages" as a distinct form of security which is subject to a separate set of rules. But the same general attributes of such security would be available under article 9, so nothing would be lost. Then as now a security interest could be taken in personal property to secure past debts, presently executed debts, or future advances.

Some formal requirements would not be replaced by article 9, e.g., to be entitled to recording there would no longer need be an acknowledgment by the mortgagor and an affidavit of good faith by the mortgagee. Filing and recording would no longer be required to protect against creditors in

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90 R.C.M. 1947, § 45-106, and other specific priority provisions of our lien laws, e.g., R.C.M. 1947, § 45-506. Since article 9 does not speak in terms of "mortgage" or "pledge," a change in terminology of R.C.M. 1947, § 45-106, would be desirable; repeal of this innocuous duplication of article 9 would be even better.

90 Note 18 supra.

90 UCC § 9-204 (3).


90 That is, according to R.C.M. 1947, § 45-106. But see Note, 19 MONT. L. REV. 50 (1957), and cases reviewed therein.

90 These are contained generally throughout the mechanics of part 5 of article 9. UCC § 9-506 has to do with redemption rights. Forfeiture is treated in UCC § 9-505.

90 R.C.M. 1947, §§ 52-319 to -323, provide for additional recording of encumbrances upon livestock. See discussion of these sections in particular in the text to which notes 129 and 130 pertain.

90 Ibid.

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the case of consumers goods and less expensive farm equipment. Indeed, the actual financing and security agreement would never need to be filed—only a statement briefly notifying those who take the trouble to look that personal property of a certain type is subject to a security interest. More important, article 9 would terminate the rules of law requiring strict conformity with form and filing procedure. A buyer in the ordinary course, under article 9, can always cut off a secured interest whether or not it is filed. One consumer buying from another will cut off a prior unfiled security interest. No such adjustments based on a value judgment of the commercial significance and frequency of occurrence of such transactions have been recognized under our present law.

Under article 9 personal property security would be good for a maximum period of five years instead of the present two years and sixty days for chattel mortgages. Under either law the maximum period can be extended by renewal for a similar period.

The foreclosure provisions of title 93, chapter 60, would no longer apply to personal property security, under article 9. Those cumbersome procedures would remain only for real estate mortgages and executions. However, since our law already permits parties to provide by contract for power of sale, in most cases there would not be any great practical change in enforcement proceedings. Article 9 is more helpful than our present laws in being more detailed. It tells the secured party when he can simply dispose of the collateral (by sale, lease, or exchange) by himself in a com-

108 UCC § 9-302(1) (d), unless a fixture or a motor vehicle required to be licensed is involved.
109 UCC § 9-302(1) (c), with the same qualifications as in note 108 supra.
110 UCC § 9-402(1) suggests a simple form.
112 UCC §§ 9-402(2) and -402(5) are in marked contrast with the attitude frequently taken with respect to our own recording acts. See First National Bank of Butte v. Beley, 32 Mont. 291, 80 Pac. 256 (1905) ; Doering v. Selby, 75 Mont. 416, 244 Pac. 485 (1926). In the last cited case the appeal was between an alleged converter of the mortgaged property and the mortgagee. The chattel mortgage had been recorded properly in every respect except that the mortgagor's receipt of a correct copy of the mortgage was not attached to the filed mortgage. The case turned on that point. The mortgage was not entitled to record and was therefore not constructive notice to the defendant.
113 UCC § 9-307 (1), and see note 27 supra.
114 UCC § 9-307 (2).
115 UCC § 9-403 (2).
116 R.C.M. 1947, § 52-305.
118 R.C.M. 1947, §§ 52-312, 90-6004; Bice v. Daffern, 88 Mont. 479, 485, 293 Pac. 433, 435 (1930). The power of sale contained in R.C.M. 1947, § 52-312 has only to do with authorizing the sheriff to proceed with a sale, and is of more limited application.
mercially reasonable manner.\textsuperscript{121} This alone should reduce the cost of financing by reducing the expense and time of responding to a default.

Personal property subject to a security agreement which becomes affixed to real property has always caused problems. Under the Code the security interest would follow the personality into the realty and be enforceable against prior interests in the realty.\textsuperscript{122} The owner of the secured interest in the personality could remove the fixtures in order to realize upon them, being liable only for physical injury to the realty caused by the removal.\textsuperscript{123} His interest could be cut off only by subsequent purchasers, encumbrancers, and lienors for value without notice\textsuperscript{124} — and filing as a real estate encumbrance would give notice.\textsuperscript{125} This would be a substantial change from our present general rule, which is that in the absence of a special agreement anything affixed to land belongs to the owner of the land.\textsuperscript{126} Our present law also contains the uncertainty of making the determination of whether or not property is affixed depend upon the intention of the alleged affixer.\textsuperscript{127}

R.C.M. 1947, sections 52-319 to 52-323 inclusive should probably be modified as to terminology but otherwise kept intact notwithstanding the enactment of article 9. These sections provide for the recording with the state recorder of marks and brands, and chattel mortgages on livestock. No livestock market can be held liable to a mortgagee for the proceeds of stock sold through the market by the mortgagor unless such a recording is made.\textsuperscript{128} The statute at present contemplates that this procedure is in addition to the ordinary recording locally in county courthouses of chattel mortgages on livestock as in the case of any other chattel mortgage.\textsuperscript{129} No great harm would be done by repealing this part of chapter 3, as persons connected with livestock auctions could look up secured interests in livestock which are filed as provided in article 9 of the Code.\textsuperscript{130} But in conformity with the spirit of the Code, commercial custom and practice should be observed. Livestock auctions, stockgrowers, and buyers are familiar with the present procedure and should be permitted to have some special rules adapted to their customs and usages. Particularly this should be done where it will not be upsetting to the general scheme of reform for personal property security.

\textsuperscript{121}UCC \$ 9-504, generally.
\textsuperscript{122}UCC \$ 9-313 (2) and (3).
\textsuperscript{123}UCC \$ 9-313 (5), and note 57 \textit{supra}.
\textsuperscript{124}UCC \$ 9-313 (4), which includes a prior encumbrancer of record who makes subsequent advances.
\textsuperscript{125}\textit{Ibid.}, and UCC \$ 9-401 (1) (b), providing for filing where a mortgage on real estate would be filed or recorded.
\textsuperscript{126}R.C.M. 1947, \S 67-1301, excepting only trade fixtures.
\textsuperscript{129}One of the requirements of the notice of chattel mortgage which is to be furnished the general recorder of marks and brands is the date and county when and where the chattel mortgage is filed (R.C.M. 1947, \S 52-320).
\textsuperscript{130}UCC \$ 9-401. If a state elects to continue local filing under the alternatives provided in UCC \$ 9-401 it would be desirable to specify where security interests in livestock should be filed. As presently drafted, UCC \$ 9-401 leaves the question open whether livestock are included within the term "farm products."
These five code sections should be amended to change the words "chattel mortgage" to "security interest" or "security agreement," "mortgagor" to "secured party," and "mortgagor" to "debtor." This will conform the terminology to that used in the Code. With these modifications in terminology, there is no unfortunate conflict with article 9.

Pledges — Title 65

Montana's legislation on pledges has been on the books since 1895, and yet less than two dozen cases have been decided under the law. This area of our law has not become an esoteric subject, but is based on the functional idea that good security can be obtained by obtaining possession of personal property. Article 9 is a functional law, too, and similarly recognizes the utility of a possessory interest. Since both laws are functional, basically the rules are the same. Article 9 is a little less strict with regard to possession, as it contemplates some situations where temporary possession by a debtor will not destroy an unfiled security interest. The major difference in article 9 is in enforcement of the pledge after default. Article 9 is more detailed because it offers more alternatives and more flexibility. Our present law requires a public sale, and prohibits the pledgee from purchasing unless he goes still further and holds a judicial sale. Only by direct dealing with the pledgor may the pledgee become a purchaser without judicial sale, and no cases are reported which tell what sort of deals will be approved. In contrast, under article 9 a secured party may always purchase at a public sale, and frequently at a private sale, and the procedure for such sales is easily understood.

Terminology would be changed under article 9, with the elimination of any statute referring to "pledge," "pledgor" or "pledgee." Rules are stated in terms of "possessory interests" instead. But functionally and substantively the new Code would make no radical changes in our present law.

Trust Receipts—Title 65

Montana has seen but one case decided under the 1945 enactment of the Uniform Trust Receipts Act, but in interpreting the act, Montana is aided by the act's general purpose to make uniform the law of the states which enact it. Article 9 of the Code borrows heavily from the definitions, concepts, and methods of the Uniform Trust Receipts Act. The latter act pioneered in the security field in that it gave to the commercial world

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13 Some of those cases merely cite the law without any helpful interpretation or application of it.
122 UCC § 9-305 guarantees that a security interest may be perfected by taking possession of the collateral. The only exclusions are accounts, contract rights, and general intangibles, as to which there never has been any recognition of possession for such purposes.
123 Notes 37 to 41 supra and the text discussion to which they pertain. No such flexible adjustment to special situations has been incorporated in Montana law.
124 R.C.M. 1947, § 65-120.
127 Note 78 supra and the text discussion to which it pertains.
a statutory technique for financing the acquisition of inventory and using inventory as the security, without possession by the financer (in contrast to a pledge) and without need for filing for 30 days. Essentially it was a "purchase money security" act. It enabled lenders to avoid the problem of figuring out whether the dealer had obtained "title" first, and avoided the inflexibilities inherent in the pledge, the chattel mortgage, and the conditional sales concepts. By so doing it permitted a "pledge without possession" and avoided the likelihood of invalidity inherent in not following either of the other two forms.

Article 9 follows the same trail, and also follows the prior act in always protecting a buyer in the ordinary course of trade. The latter buyer cuts off any secured interest, whether or not it is filed. As in our present law, in order to qualify as a buyer in the ordinary course the person cannot know that the sale is in violation of a security agreement.

Our present law validates for a ten-day period a security interest where the parties unsuccessfully attempted a pledge. It provides that where there is an intent to pledge but neither a pledge nor trust receipt results (e.g., an "equitable pledge") the security interest is valid against creditors for ten days under either of two circumstances: (1) the security interest is acquired for new value; or (2) the debtor's possession of the collateral is reconstituted temporarily and for a limited purpose. But such benefits are not available for "single transactions . . . not constituting a course of business. . . ." Article 9 is less technical and more general. It would lend to anyone who takes a purchase money interest the same sort of protection against bulk transferees and even lien creditors. That protection would cease ten days after the debtor receives possession of the collateral.

The major change that article 9 makes in trust receipt law is to abolish the classification altogether—while retaining the technique which was developed in trust receipt law. The technique is broadened for the use of sellers as well as pure financers who may desire to take security in inven-

15 "But it could not replace these other forms because it was not made available for most of the transactions in which conditional sales, pledges and chattel mortgages occur. The Uniform Trust Receipts Act is a purchase money financing act for persons who have a regular course of business with each other. See this and other limitations at R.C.M. 1947, § 65-215 (U.T.R.A. § 16)."
16 "Without the act the financing transaction was likely to be classed as a pledge, a chattel mortgage, or a conditional sale, because these were the more familiar types of chattel security. Since the financer does not want possession, the pledge concept is unsatisfactory. Chattel mortgage acts and frequently conditional sale acts (as in Montana) require itemized filing. See R.C.M. 1947, §§ 52-304 (chattel mortgages) and 74-204 (conditional sales). Without compliance with such filing provisions the security is unprotected.
17 UCC § 9-307, with the qualification that it does not apply to a "person buying farm products from a person engaged in farming operations."
18 UCC § 1-201 (9) ; R.C.M. 1947, § 65-201(2) (U.T.R.A. § 1).
20 Ibid.
22 UCC § 9-301(2) in particular, and also UCC § 9-301(1). Presumably any interests which are usually inferior to a transferee in bulk or a lien creditor would also be subordinated, e.g., any unperfected security interest and unsecured creditors. Also persons with notice? This subsection seems a trifle ambiguous.
tory, accounts receivable, proceeds of inventory, and replacements of paid-up receivables.¹⁴⁹ No policing is required, for filing puts others on notice and other acquirers of new purchase-money interests in inventory must give the financer notice so that he will not make future advances in reliance upon new acquisitions.¹⁵⁰

The filing called for in article 9 is "notice" filing, copied from the Uniform Trust Receipts Act¹⁵¹—a simple statement that gives the addresses of the parties and a general description of the type of goods covered.¹⁵² The Uniform Trust Receipts Act is also followed in that filing centrally with the Secretary of State is provided.¹⁵³

The Uniform Trust Receipts Act permitted the entruster to obtain security against the trustee's creditors for thirty days without filing.¹⁵⁴ Article 9 reduces that period to ten days,¹⁵⁵ except that in the case of instruments or negotiable documents a security interest arising from new value is recognized for 21 days—after which there must be possession.¹⁵⁶ This 21-day grace period is an exception to the general rule of article 9 that security in instruments can be perfected only by possession.¹⁵⁷ (Note that after the 21 days, security must be preserved by possession, not filing.)

The simplified provisions on repossession and default (remedies) in the Uniform Trust Receipts Act¹⁵⁸ are carried directly into article 9, although article 9 is more full in detailing the rights of the parties and particularly the power of the creditor over the collateral.¹⁵⁹

In eliminating the terms "entruster," "trustee" and the delimiting statement of the application of the act,¹⁶⁰ and substituting therefor "secured party," "debtor," and other such general terms, the Code makes this type of financing directly available to manufacturers and others who are not exclusively financees.¹⁶¹

**Conditional Sales — Title 74**

Until 1959¹⁶² our law of conditional sales consisted of four code sections¹⁶³ and a handful of cases. Filing of conditional sale contracts, notes, and instruments with the county clerk and recorder is required under our

¹⁴⁹UCC § 9-204(3) and (5) permit generally both after-acquired property security and security for future advances. UCC § 9-205 permits the debtor to "use, commingle or dispose of all or part of the collateral" as well as the proceeds of collateral, while still holding that the security interest is neither invalid nor fraudulent against creditors. No limitations are placed upon the persons or transactions to which these sections are made available (note 147 supra). Manufacturers who sell to distributors or retailers could use the technique directly and without the intervening of a financing corporation.

¹⁵⁰UCC § 9-312(3) and (4).


¹⁵²Ibid.


¹⁵⁵UCC § 301(2).

¹⁵⁶UCC § 304(4) and (5).

¹⁵⁷UCC § 304(1).


¹⁵⁹Note 73 supra.

¹⁶⁰Note 147 supra.

¹⁶¹UCC § 9-107 defines "purchase money security interest" functionally, and would include, among others, sellers as well as financing agencies (note 149 supra).

¹⁶²Our new Retail Installment Sales Act was passed then (R.C.M. 1947, title 74, ch. 6; Laws of Montana 1959, ch. 282, at 701).

¹⁶³R.C.M. 1947, §§ 74-204 to -207.
existing law," but in practice apparently only the conditional sale contract is filed. Failure to file renders the contract note or instrument void as to bona fide purchasers, mortgagees or attaching creditors of the property. No case has raised the possibility that the underlying note should be held void where only the contract has been filed.

Upon default by the vendee: (1) the vendor may recover possession in an action of claim and delivery, with no indication in the statutes or the cases whether the vendor may then re-sell for the vendee's account; (2) if the sales contract contains a clause authorizing the sheriff to take possession and sell the property upon default, then the sheriff must do so upon request, the sale being a public one as in the case of a sheriff's sale under executions; (3) provision is made for a deficiency judgment after such a sheriff's sale; and (4) if the vendee surrenders possession to vendor without cost and expense to the vendor, and the vendee has paid at least a third of the price, then no deficiency judgment is allowable.

Any change from our existing law cannot improve upon our law's brevity or the simplicity of our code provisions. Article 9 can improve our law in other respects, however, by filling in gaps, making our law more certain, and simplifying some of the procedures (e.g., upon default) required under our simple code sections.

Article 9 adopts an attitude toward filing that will effectuate financing statements which are not seriously misleading. Article 9 is less technical and more functional than the case law interpretation of our present statute. In Parsons v. Rice the financer filed an assignment of a conditional sale contract together with a copy of the contract itself. Since the law did not then provide for the filing of assignments, but only of the contracts, it was held that no constructive notice was imparted by the filing.

The default provisions of article 9 are specific in allowing the secured party to take possession of the collateral without any court aid where that is feasible, and to sell, lease, or otherwise dispose of it publicly or privately in any commercially reasonable manner. In the case of consumer goods where the debtor has paid 60 per cent of what he owes, there must be a

104 R.C.M. 1947, § 74-204.
105 Eleven cases are cited in the annotations to R.C.M. 1947, § 74-204. Of these, there was no filing in two of them. Coombes v. Letcher, 104 Mont. 371, 66 P.2d 769 (1937); Merrion v. Humphreys, 119 Mont. 495, 176 P.2d 665 (1947). In each of the other cases (including one where there was a filing of the contract in Minnesota but none in Montana [Harvey E. Mack Co. v. Ryan, 80 Mont. 524, 261 Pac. 283 (1927)]) the opinion speaks only of the filing of "the contract" with no reference at all to the filing of "notes and instruments" other than to quote the code section. No doubt some of the transactions involved no notes or instruments separate from the contracts themselves, but that generally cannot be ascertained from the opinions and seems irrelevant to this point, anyhow, in view of the judicial language.

106 R.C.M. 1947, § 74-204.
107 R.C.M. 1947, § 74-207.
108 Ibid.
109 Ibid.
110 Ibid.
111 UCC § 9-402(5).
112 UCC § 9-504, and see note 72 supra.
sale unless the debtor renounces his rights in writing after default. In the case of other classes of collateral (as well as consumer goods where less than 60 per cent has been paid) the new article 9 encourages the practice of the creditor's keeping the collateral in satisfaction of the debt. The debtor's right of redemption is also specific and not so burdensome as to undermine the secured party's interest.

Of greatest significance in getting entirely away from the basic theory of conditional sale (or chattel mortgage, for that matter) is the following: "Each provision of this article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor." An interest held for the purpose of securing a performance is no longer to be treated one way if "title" is in one man, and another way if "title" is elsewhere.

Most of the use in Montana of conditional sale contracts is to finance the purchase of consumer goods. For such transactions it is not required by article 9 that the contract or any financing statement be filed, but if it is not, any buyer without knowledge for value and for his own purposes will cut off the security.

Personal property, secured under a conditional sale contract which becomes a fixture or an accessory, is generally lost to the secured party under our present law. Article 9 would make the same changes in the law with respect to such property as in the case of property held under a chattel mortgage which becomes a fixture or accessory. The personal property security interest would remain and be enforceable against all prior interests in the realty, and if filed as an encumbrance against realty, against all subsequent interests in the realty.

In 1959 Montana's law was enlarged by the addition of a "Retail Installment Sales Act" intended to regulate chattel mortgages, conditional sales, bailments, and leases which appear in substance to be sales of goods. It provides for the licensing of sales finance companies and rather detailed requirements as to retail installment contracts and financing charges. It does not appear that anything in article 9 would affect this new law.

CONCLUSIONS

Discussions with persons in Montana's lending institutions reveal that in this state credit rating and personal knowledge of the borrower and his business are the primary security in most commercial loan transactions. In lending against receivables, quite frequently the idea is more to know the borrower's character, value of the borrower's business, and his volume of receivables, rather than to have any legal priority or right to

176UCC § 9-505(1).
177UCC § 9-506(2).
178UCC § 9-506, by which the debtor's right of redemption is terminated upon sale, or contract to sell the collateral.
180UCC § 9-302(1) (d), except in the case of fixtures or motor vehicles required to be licensed.
181UCC § 9-307(2).
182Notes 126 and 127 supra and discussion to which they pertain.
183Ibid.
184UCC §§ 9-313, -314, -401 (1) (b).
185R.C.M. 1947, title 74, ch. 6; Laws of Montana 1959, ch. 282, at 701.
186See the discussion pertaining to notes 93 and 94 supra.
collect the receivables. Technically, such is not a secured transaction. Occasionally the debtor will be asked to make an assignment to the lending institution, but usually the obligors are not notified, possession is not taken of the receivables, and the books remain unmarked. The loan officers recognize that the effect of such an assignment is primarily psychological.\textsuperscript{186}

The foregoing does not mean that in some areas of business receivables are not used for technically sound commercial secured transactions in Montana. In the first place local banks sometimes feel the need of sharing a particular commitment with another bank, and to do so the local bank will require all formalities and proprieties. In some cases receivables are stamped, or possession is taken and obligors on the receivables are notified. In financing credit sales for lumber companies, frequently the purchaser will pay the bank directly.

Article 9 of the Code is primarily a law for commercial dealings rather than personal or occasional transactions. Therefore its assumptions and the mechanics imported into the proposed article are foreign to Montana. Very likely some of the techniques made available under the article will not be much used in Montana for many years. Yet it must be recognized that article 9 is essentially a simplification and orderly organization of personal property security law. As such it is as well adapted to Montana as to the most frantically commercial state. Certainly Montana can get along better than such other state without article 9, but enactment of the article would not impose a cumbersome complicated commercial law on Montana. Unlike much legislation suggested from more populous states, this legislation does not lead toward more and larger administrative and regulatory bodies with a large bureaucratic hierarchy; it does not involve additional appropriations of public moneys. The new law would simply revise and consolidate a good deal of complicated and uncertain law which we now have.

It is likely that the enactment of article 9 would result in many financial institutions\textsuperscript{187} taking good security where now they take none. In the case of the typical Montana "receivables financing" arrangement, article 9 would permit the parties, by filing, to make their agreement effective with little or no other changes from their present practice.\textsuperscript{188} In some other areas, parties would no doubt take security as a matter of course, where today there is no convenient and effective means of becoming secured.

And yet, although commercial transactions may typically become more prevalently secured, the consumer who buys in the ordinary course of business will do so with more safety and sureness than ever.\textsuperscript{189} Such a result was not easy to obtain, but the care and thought which went into the drafting of article 9 has attained a number of such remarkable objectives.

\textsuperscript{186}But under article 9 of the Code the security interest could be perfected by making a filed statement of the transaction, or better, simplifying the transaction to a statement of mutual intent that the lending institution had a security interest in such collateral and filing a statement saying so. UCC § 9-402.

\textsuperscript{187}Note 186 supra.

\textsuperscript{188}Note 27 supra. Ordinarily such a consumer will not have any idea that there may be a security agreement affecting the goods which he is buying in the ordinary course of business, much less that such an agreement does not authorize the dealer to sell the particular goods involved to a customer. That is sufficient. Of course, the likelihood is that there will be such authorization, too.
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