A Localized Treatise On Secured Transactions—
Part II: Creating Security Interests*

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This is the second in a series of articles that systematically analyzes the law of secured transactions under Article 9 of the Uniform Commercial Code and when possible uses cases decided in Arkansas and by the United States Court of Appeals for the Eighth Circuit as principal illustrations. The first article is Nickles, A Localized Treatise on Secured Transactions—Part I: Scope of Article 9, 34 ARK. L. REV. 377 (1980). Three companion pieces dealing with other basic problem areas under Article 9—perfection, priority and default—will be published in subsequent issues of the Arkansas Law Review.

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If Article 9 applies to a transaction, the creditor will have an interest in the debtor's property only if the Article 9 requirements for creating a security interest are satisfied. Creation, therefore, is an important issue not only between the immediate parties, but also between the creditor and third parties (including other secured parties) who may assert claims against the debtor's property. If the parties intended for the creditor to have a security interest but fail to satisfy the requirements for creating one under Article 9, the creditor has no interest in the collateral to assert against the debtor or anyone else. A security interest is created by causing it to "attach" to the collateral. Attachment is "the point at which property becomes subject to a security interest." A security interest attaches only "when it becomes enforceable against the debtor with respect to the collateral," and it does not become enforceable against anyone (and thus does not attach) unless and until certain basic prerequisites are satisfied. These prerequisites are:

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;
(b) value has been given; and
(c) the debtor has rights in the collateral.

A security interest attaches and becomes enforceable against the debtor and third parties as soon as these specified events have taken place. They do not have to occur simultaneously or in any particular order, but no security interest arises until all the events have taken place. These events or requisites for attachment are discussed below. Thereafter follow discussions of other "creation" problems which focus primarily on the reach or scope of a validly created security interest (what obligation does
it secure and to what property does it attach)\textsuperscript{266} and the continuation of a security interest when either party disposes of his interest in the original collateral.\textsuperscript{267}

A. REQUISITES FOR ATTACHMENT

Compared to nineteenth century acts governing chattel security devices, Article 9 "reduces formal requisites to a minimum."\textsuperscript{268} For a security interest to exist, the only requirements are (1) an agreement which must usually be in writing,\textsuperscript{269} (2) value\textsuperscript{270} and (3) property to serve as collateral in which the debtor has rights.\textsuperscript{271} This is a deceptively simple statement of the prerequisites, however; litigants have swarmed the courts seeking to clarify the creation requirements of section 9-203(1)\textsuperscript{272} and to resolve myriad issues arising under this section some of which are discussed here.

1. Agreement
(Herein Primarily Of Possessory Security Interests)

In every case there must be an agreement between the parties whether or not the secured party takes possession of the collateral. The formal requisite listed first in section 9-203(1) is that "the collateral is in possession of the secured party pursuant to agreement, or [if the secured party is not in possession of the collateral] the debtor has signed a security agreement."\textsuperscript{273} containing certain information.\textsuperscript{274} Therefore, a secured party in possession need not reduce to writing his agreement with the debtor because possession by the creditor reduces "the evidentiary need for a written record."\textsuperscript{275} Article 9 thus recognizes "the validity of a com-

\begin{itemize}
\item \textsuperscript{266} See text accompanying notes 609-679 infra.
\item \textsuperscript{267} See text accompanying notes 680-849 infra.
\item \textsuperscript{268} U.C.C. § 9-203, Comment 5.
\item \textsuperscript{269} See U.C.C. § 9-203(1)(a). A writing is required when the secured party is not in possession of the collateral. In most secured transactions, the debtor has possession of the collateral. Thus in most cases a written agreement is required. Regarding verbal and written security agreements, see text accompanying notes 273-504 infra.
\item \textsuperscript{270} See U.C.C. § 9-203(1)(b). This requirement is discussed at text accompanying notes 583-608 infra.
\item \textsuperscript{271} See U.C.C. § 9-203(1)(c). The "rights" requisite is discussed at text accompanying notes 505-582 infra.
\item \textsuperscript{272} U.C.C. § 9-203(1).
\item \textsuperscript{273} U.C.C. § 9-203(1)(a) (emphasis added). The definitions of the italicized terms are quoted in note 271 infra.
\item \textsuperscript{274} The requirements with respect to the contents of a written security agreement are discussed at text accompanying notes 325-504 infra. The principal requirement is a description of the collateral, see U.C.C. § 9-203(1)(a), but this is not the only requirement.
\item \textsuperscript{275} U.C.C. § 9-203, Comment 3. See, e.g., In re Miller, CCH Sec. Trans. Guide ñ 53, 459 (M.D. Fla. 1980) (1973-1980 Transfer Binder). "[C]ustomarily, of course, as a matter of practice the written record will be kept, but, in this Article as at common law, the writing is not a formal requisite." U.C.C. § 9-203, Comment 3.
\end{itemize}
mon-law pledge . . . [and carries forward] the common-law validity of a possessory lien."

Nevertheless, an agreement must exist between the parties to a pledge. Section 9-203(1)(a) literally requires a "security agreement" when the secured party is not in possession of the collateral but only an "agreement" when he is; undoubtedly, however, the sub-

does not differ from possession for purposes and as a means of perfection. ("A security interest in letters of credit and advice of credit, goods, instruments, money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral." U.C.C. § 9-305.) According to the Code drafters, "[p]ossession in the perfection sense may be by the secured party himself or by an agent on his behalf: it is of course clear, however, that the debtor or a person controlled by him cannot qualify as such an agent for the secured party." U.C.C. § 9-305, Comment 2. For discussions about possession for perfection purposes, see I. G. Gilmore, SECURITY INTERESTS IN PERSONAL PROPERTY § 14.2 at 440-41 (1965); J. White & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 23-10 at 935-37 (2d ed. 1980). Where the Code fails to define a term, common law can and must be consulted. See Nickles, Rethinking Some U.C.C. Article 9 Problems—Subrogation; Equitable Liens; Actual Knowledge; Waiver of Security Interests; Secured Party Liable for Conversion Under Part 5, 34 Ark. L. Rev. 1, 15 (1980). According to the common law in Arkansas:

[I]n order to make valid the lien of the creditor as against third parties, . . . the possession of the chattel should be delivered to and retained by the creditor.
In order to constitute such delivery of the property . . . to the . . . pledgee, there must be an actual transfer of the possession and control thereof. The possession should be absolute, unequivocal and notorious, so that all persons may be advised to the change in the possession thereof. Where property is susceptible of actual delivery, that should be made; but where the property is too bulky for an actual change of possession, a symbolical delivery can be made. In a change of possession of bulky articles, there should be a clear and unequivocal designation, so that all persons dealing therewith, especially subsequent purchasers, should not be misled or left in doubt as to the nature of the transaction.

Lee Wilson & Co. v. Crittenden County Bank, 98 Ark. 379, 384-85, 135 S.W. 885, 887 (1911).

Intangible personal property, i.e., accounts and general intangibles, simply cannot be possessed by anybody. Therefore, a written security agreement will always be required under U.C.C. § 9-203(1). See In re Sanelco, 7 UCC Rep. 65 (M.D. Fla. 1969); M. Rutkin Elec. Supply Co. v. Burdette Elec., Inc., 98 N.J. Super. 378, 237 A.2d 500 (1967). Also, since accounts or general intangibles cannot be possessed, perfection by possession is impossible; perfection of such interests requires the filing of a financing statement. See U.C.C. § 9-305, Comment 1. But see U.C.C. § 9-302(1)(e). Property in the form of accounts and general intangibles cannot be possessed because it is not "represented by any writing whose delivery operates to transfer the claim." U.C.C. § 9-305, Comment 1. Any writing associated with an account or general intangible only evidences a right to payment; such a writing does not embody the right. Instruments and some other writings, however, are more than mere evidentiary writings; they are symbolic, i.e., "treated in the ordinary course of business as symbols of contractual rights . . . . These and other writings are 'chattel paper', 'documents' or 'instruments' under the Uniform Commercial Code . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 170, Comment h (Tent. Drafts Nos. 1-7, 1973). Therefore, these symbolic writings can be possessed not only for purposes of perfection (see U.C.C. § 9-305), but also for purposes of § 9-203(1).


277. See U.C.C. § 9-203(1)(a). "'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." U.C.C. § 1-201(3). "'Security agreement' means 'an agreement which creates or provides for a security
stance of the "agreement" required in a pledge transaction is an understanding between the parties that the creditor will hold the property as security for the debtor's obligation. In essence, therefore, a "security agreement" is required whether the security interest is possessory or non-possessory. But for a valid verbal security agreement "the parties need merely agree to create a security interest in the collateral . . . [A]n intent to create a security interest is the sole requisite for a [verbal] security agreement . . . ." This explains the suggestion, in Henson v. Government Employees Finance & Industrial Loan Corp., that a possessory Article 9 security interest may exist when the only evidence of such is that a debtor left property at his creditor's place of business "as security for the debt."

The fact that a creditor has possession of property belonging to the debtor (or property the creditor claims belongs to the debtor) is not sufficient by itself to establish a possessory security interest under Article 9. In Gibbs v. King, King loaned Gibbs money so that Gibbs could pay the cost of repairing a tractor. King later took possession of the tractor. Gibbs contended that he had sold the tractor to King and sued to recover the unpaid purchase price. King argued that he had possession of the tractor because it was pledged to him as security for the debt which

Note that an "agreement" is not necessarily the parties' "contract." Compare U.C.C. § 1-203(3) with § 1-201(11).

278. See generally, e.g., Yorkville Nat'l Bank v. Schaefer, 71 Ill. App. 3d 137, 388 N.E.2d 1312 (1979). Such an agreement was required under the common law of pledges. Professor Gilmore writes that "the only legal requirements were the giving of value and an agreement that the identified property, capable of being pledged, stand as security; possession by or on behalf of the lender perfected the pledge which, absent possession, floated in the limbo of equitable liens." I G. GILMORE, supra note 273, § 1.6 at 23 (emphasis added). See generally, e.g., Umsted Auto Co. v. Henderson Auto Co., 137 Ark. 40, 207 S.W. 437 (1918), where the court failed to list an agreement between the parties as an essential element of a pledge but immediately after listing such elements considered whether the creditor in the case had acquiesced in the debtor's plan that the creditor hold certain property until the debt was paid.


A written security agreement satisfies . . . [U.C.C. § 9-203(1)] if the signed security agreement contains a description of the collateral. The additional requirement of a description of the collateral is necessary to solve the evidentiary problem of identifying the collateral when the secured party lacks possession of it. However, in cases such as the present one [where the secured party is in possession of the collateral], no conditions are imposed on the security agreement other than that the agreement creates a security interest.

280. Id. at 1334-35.

281. Id. at 274, 516 S.W.2d 1 (1974).

282. Id. at 274, 516 S.W.2d at 2. The property involved in Henson was an automobile. Regarding the relationship between U.C.C. § 9-203(1) and Arkansas' certificate of title law, Ark. Stat. Ann. tit. 75, ch. 1 (Repl. 1979), see text accompanying notes 482-504 infra.

283. 263 Ark. 338, 564 S.W.2d 515 (1978).

284. Regarding the true significance of the contract for sale, see text accompanying notes 291-296 infra.
Gibbs owed him. The trial court agreed with King, held that the transaction “was never anything more than a pledge [of the tractor] for the indebtedness of Mr. Gibbs to Mr. King” and dismissed Gibbs’ complaint. The Arkansas Supreme Court reversed after concluding that the lower court’s holding was not supported by substantial evidence: Despite King’s possession of the tractor, the “facts do not support a pledge.”

285. 263 Ark. at 341, 564 S.W.2d at 517 (Arkansas Supreme Court quoting from the oral decision of the Circuit Court of Jefferson County, Arkansas, transcribed for purposes of appeal).

286. 263 Ark. at 342, 564 S.W.2d at 517. The court believed the facts supported a contract of sale whereby Gibbs sold and delivered the tractor to King. See text accompanying notes 291-296 infra regarding the significance the court attached to this fact and the true significance of the sale.

The decision in Commercial Credit Corp. v. National Credit Corp., 251 Ark. 702, 473 S.W.2d 881 (1971) appears to but does not dispute the proposition that possession alone is insufficient to create a possessory security interest. In this case, National financed the inventory of Mathews Motor Company which included a 1966 Buick LeSabre. Mathews sold the car to Kenneth Williams who agreed to give Mathews a security interest in the vehicle to secure the payment of the purchase price. The written security agreement misdescribed the car, however, as a Buick Electra. The agreement was sold to Commercial who, after the default of Williams, took possession of the car when Williams’ wife brought it to Commercial. One of the questions in the case was which credit company had priority with respect to the Williams car. Commercial based its claim to priority on the fact of taking possession of the car when Mrs. Williams brought it to Commercial. National argued, however, “that there is no evidence that either Kenneth Williams, Howard Mathews Motor Company or anyone else consented or agreed that Commercial would have a lien on the 1966 Buick LeSabre 2-door Hardtop as distinguished from the 1966 Buick Electra 4-door Hardtop described in Commercial’s security agreement.” 251 Ark. at 705, 473 S.W.2d at 883. The court responded to this argument by declaring that it “overlooks the provisions of § 85-9-203(a)” and by observing that “the parties stipulated at the beginning of the trial that the Buick LeSabre was in the possession of Commercial.” Id. This response misses the point of National’s argument which, more fully stated, was this:

Notwithstanding its failure to have any written lien instrument covering the automobile in dispute that is referred to as the Kenneth Williams car, [Commercial] contends that it is entitled to the automobile by reason of its having taken possession of the car on or about February 11, 1970. According to [Commercial’s] contention, the taking of possession entitled it to a lien with or without any agreement affecting the automobile. Obviously, if possession alone entitled the holder to a lien absent any agreement, then any person converting a vehicle to his own use would have some sort of lien claim in the vehicle. Whether the agreement is written or oral, there must be some agreement between the owner and the lien claimant upon which the claim of lien is based. There is absolutely no contention or evidence that either Kenneth Williams, Howard Mathews Motor Company or anyone else consented or agreed that [Commercial] would have a lien interest in the 1966 Buick LeSabre.

Brief of Appellee at 3-4, Commercial Credit Corp. v. National Credit Corp., 251 Ark. 702, 473 S.W.2d 881 (1971). National thus recognized that Commercial had possession, but its point was that possession alone is not sufficient to create a security interest. The court’s response to this argument emphasizes Commercial’s possession and implies that possession alone is sufficient under U.C.C. § 9-203. Nevertheless, Commercial’s possession was pursuant to an agreement.

Mathews Motor Company and Williams, the seller and the buyer of the car, did agree between themselves that the seller would have a security interest in the vehicle sold, i.e., the
 loan to Gibbs, King prepared and Gibbs signed an Article 9 financing statement. The document, which was filed for record, listed King as "secured party" and Gibbs as "debtor," and it described the tractor. The execution and filing of the financing statement did not persuade the court that King was a pledgee because he "did not take possession of the tractor when the financing statement was executed." The filing of a financing statement is never a condition to a pledge; and a simple financing statement is ordinarily not the embodiment of a security or other agreement. Nevertheless, the execution of a financing statement by the parties and the filing of it by the creditor who possesses the property described in the document may be some evidence of a verbal pledge agree-

LeSabre. The misdescription of the vehicle in the written security document surely rendered any security interest unenforceable when the secured party was out of possession; but when in possession, the secured party had a valid and enforceable security interest pursuant to the parties' agreement which was not dependent on the writing. Mathews never again had possession on its own behalf, but its assignee, Commercial, did repossess the car. If the agreement between Mathews and Williams was enforceable when Mathews was in possession, the same should be true when Commercial (Mathew's assignee) was in possession. In addition, a verbal security agreement perhaps existed between Williams and Commercial directly. Presumably, Mrs. Williams was acting for her husband, the debtor, when she "surrendered" the LeSabre to Commercial. Why would the Williams surrender the automobile unless they understood and agreed that the car was collateral security for the debt owed to Commercial? Also, there was testimony in the case that the Williams wanted Commercial to hold the car in order that they might redeem. See Brief for Appellant at 18, Commercial Credit Corp. v. National Credit Corp., 251 Ark. 702, 473 S.W.2d 881 (1971). Therefore, it can be argued that Commercial's possession of the collateral was pursuant to an agreement resulting from either (1) the original transaction between the immediate parties Williams the debtor and Mathews the creditor who assigned to Commercial his rights arising from the verbal security agreement or (2) the dealing and understanding between Williams and Commercial directly. An agreement can, after all, be inferred from attendant circumstances. See U.C.C. § 1-201(3).

287. The general rule under Article 9 is that to perfect a security interest, a financing statement must be filed. See U.C.C. §§ 9-302(1) & 9-302, Comment 1. The formal requisites of a financing statement are prescribed in U.C.C. § 9-402, and § 9-401(1) explains where it must be filed.

288. 263 Ark. at 342, 564 S.W.2d at 517.

Note that the court cites and purports to rely on "Ark. Stat. Ann. § 85-9-203 (Add. 1961)." See 263 Ark. at 342 n.1, 564 S.W.2d at 517 n.1. This section is part of a now outdated version of Article 9, but the court presumably applied it because the 1973 amendments did not become effective until January 1, 1974. See 1973 Ark. Acts No. 116, § 6. To the extent that King relied on the financing statement to evidence or establish a pledge arrangement between him and Gibbs, the transaction was entered into in 1973, a year before the effective date of the 1973 amendments, and governed by the old Article 9. See id. § 5. Under either version of Article 9, however, an "agreement" is essential to a possessor security interest. See Ark. Stat. Ann. §§ 85-9-203, 85-9-204 (Add. 1961) (repealed 1973); U.C.C. § 9-203(1)(a).

289. See, e.g., General Elec. Credit Corp. v. Bankers Commer. Corp., 244 Ark. 984, 429 S.W.2d 60 (1968) (cited and relied on by the court in Gibbs); Central Ark. Milk Prod. Ass'n v. Arnold, 239 Ark. 799, 394 S.W.2d 126 (1965). See other authorities and discussion at text accompanying notes 471-481 infra. A "simple" financing statement is one that satisfies the minimum requirements of U.C.C. § 9-402 but includes no explicit language of grant or agreement that creates or provides for a security interest.
ment. Apparently, however, the court intended its Gibbs opinion to teach that (1) the execution and filing of a simple financing statement plus possession of the property by the creditor do not conclusively establish a pledge arrangement but (2) the inference that a verbal pledge agreement exists between the parties is stronger if the creditor takes possession of the property concurrently with the execution and filing of a financing statement.

More important lessons can be learned from Gibbs by understanding that more fundamental reasons explain why King was not a secured party. Twenty months after the financing statement was filed, the parties executed a written contract of sale291 whereby Gibbs, the debtor, purported to sell the tractor to King, the creditor. The contract described the down payment as Gibbs' debt to King. The court apparently viewed this contract merely as evidence which rebutted King's contention that he was a pledgee.292 On the question of whether or not King was a secured party, the sale had much greater significance. The value necessary to support a security interest in King's favor, i.e., Gibbs' debt to him, was lost when Gibbs accepted it as part of the consideration for the contract.293

In addition, when the property was sold and delivered to King, title

290. The Code defines "agreement" as "the bargain of the parties in fact as found in their language or by application from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act." U.C.C. § 1-201(3) (emphasis added). Though a completed financing statement itself may not be sufficient as a written security agreement under U.C.C. § 9-203(1)(a) (see discussion at text accompanying notes 471-481 infra), it is certainly a circumstance to consider when deciding whether or not the parties reached a "security agreement," verbal or written. Cf. cases holding that a completed financing statement, though not sufficient by itself as a written security agreement, is something to consider with other evidence on the question of whether or not the parties satisfied the writing requirement of U.C.C. § 9-203(1)(a). See generally, e.g., In re Bollinger, 614 F.2d 924 (3d Cir. 1980); In re Numeric Corp., 485 F.2d 538 (1st Cir. 1973); In re EJM, Inc., 1 B.R. 119, 28 UCC Rep. 192 (N.D. Ga. 1979); In re Truckers Int'l, Inc., 17 UCC Rep. 1337 (W.D. Wash. 1975); Komas v. Small Business Admin., 71 Cal. App. 3d 809, 139 Cal. Rptr. 669 (1977); Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

291. [A] written agreement prepared by appellee [King] clearly and conclusively shows that the tractor was delivered to appellee on September 12, 1974, in connection with a sale and purchase agreement made between appellant and appellee. The document sets forth in detail the contract price, designates appellant's indebtedness owed to appellee as a down payment and the unpaid balance is to be paid out in 12 monthly installments of $390.00 each.

263 Ark. at 342, 564 S.W.2d at 517.

292. The existence of the written contract was the reason the court gave for finding King's pledge argument "neither persuasive nor convincing." Id. The court viewed the terms of the written contract as "facts [which] do not support a pledge." Id. What the court says in effect is that these facts contradict (and conclusively so) the argument that a pledge agreement was made.

293. A "pre-existing debt" is "value" for purposes of U.C.C. § 9-203(1)(b). See U.C.C. § 1-201(4)(b). See also, e.g., Western Decor & Furn. Indus., Inc. v. Bank of America, 91 Cal. App. 3d 293, 154 Cal. Rptr. 287 (1979). But once the value supporting or underlying the security interest ceases to exist or is satisfied, the security interest itself is extinguished. See, e.g., Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 570 F.2d 1220 (5th Cir. 1978).
passed to him from Gibbs even though King had not fully paid the purchase price.294 A buyer—whether or not he purchases on credit—cannot have a security interest in property which he owns and in which the seller has no rights.295 What would be the purpose of such a person having a security interest? He owes the debt, not the seller. The seller who extends credit needs security, not the buyer. Even if the court in Gibbs had found that King at one time had a security interest, he lost it if and when he purchased the tractor from Gibbs. Value and Gibbs’ rights in the property were extinguished by the sale and so was any security interest in favor of King. None in King’s favor could be resurrected or created anew thereafter.296

If a creditor’s possessory security interest is unsupported by a written security agreement, loss of possession means loss of the security interest.297

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The interest may reattach if value is once again given. See generally, e.g., Associated Business Inv. Corp. v. First Nat’l Bank of Conway, 264 Ark. 611, 573 S.W.2d 328 (1978).

294. See U.C.C. § 2-401.

It is true that a buyer who rejects or revokes his acceptance of goods is given an Article 2 security interest by operation of law. See U.C.C. § 2-711(3). It is also true, however, that when goods are rejected by the buyer or the buyer revokes his acceptance of them, title returns to the seller. See U.C.C. § 2-401(4). Thus the seller has rights in the property.

296. A security interest in favor of Gibbs could have been created to secure King’s obligation to pay the purchase price, inasmuch as King had title to the tractor after it was sold and delivered to him. But none was created because the parties did not agree in writing that Gibbs would have a security interest in the tractor. A written security agreement would be required in such a case because the creditor, Gibbs, surrendered possession of the property to the debtor and thus would not be in possession of the collateral. See U.C.C. § 9-203(1)(a).

297. This is the negative implication of U.C.C. § 9-203(1). For a possessory Article 9 security interest to exist apart from a written security agreement, the secured party must be in possession of the collateral. See, e.g., Tate v. Gallagher, 116 N.H. 165, 355 A.2d 417 (1976). If the existence of the interest depends initially on possession, its perpetuation depends on continued possession unless the parties execute a written security agreement. See, e.g., In re Republic Engine & Mfg. Co., 3 UCC Rep. 655 (N.D. Ohio 1966).

The general common law rule was that “surrender of the pledged chattel to the pledgor terminates the pledge.” RESTATEMENT OF SECURITY § 111(1) (1941). See generally, e.g., United Auto Co. v. Henderson Auto Co., 137 Ark. 40, 207 S.W. 437 (1918). Exceptions to this common law rule existed, however. A pledgee not in possession was sometimes given an equitable lien on the collateral. Regarding the pre-Code uses of the equitable lien as a remedial security device, see Nickles, supra note 275, at 41-47. Equitable liens are enforceable between the immediate parties and against third parties with notice. See id. at 61-67 nn.556 & 557. Most courts take the position that at least in one important context, the equitable liens doctrine is displaced under U.C.C. § 9-203, but this position should be reconsidered. See generally id. at 41-71. The common law apart from equity also protected the interest of a pledgee (even as against third parties) when the pledgee surrendered possession of the collateral for certain limited purposes. For example, “[a] pledge is not terminated by delivery of the chattel to the pledgor for a temporary and limited purpose relating to the maintenance of the value of the pledgee’s interest and having to do with the protection, improvement or sale of the chattel, or where the chattel is an instrument or document, its handling or collection.” RESTATEMENT OF SECURITY § 111(2) (1941). See also, e.g., Harrison v. Merchants Nat’l Bank of Fort Smith, 124 F.2d 871 (8th Cir. 1942). The courts have yet to consider whether or not U.C.C. § 9-203 displaces these exceptions to the general rule of common law that a pledgee out of possession loses his interest. But see Howick v. Bank of
The court ignored or forgot the first part of this proposition when it decided *McIlroy Bank v. First National Bank of Fayetteville, 298* or, at the very least, the court overlooked an important fact or failed to recognize the legal significance of the fact. In this case, Watson borrowed money from First National and pledged as collateral a negotiable promissory note, *i.e.*, an "instrument," 299 which was made by Carney and payable to Watson. When Carney’s obligation on the note became due, First National delivered the instrument to Watson for the purpose of collection. Watson thereafter successfully sued Carney on the note. McIlroy Bank, an unsecured creditor of Watson, learned of Watson’s judgment against Carney and sought to garnish it. "First National intervened in the garnishment proceedings, asserting its security interest in the note which was the basis of the Carney judgment." 300 The Arkansas Supreme Court reversed the trial court’s holding that First National had priority. The appellate court decided that "when First National surrendered possession of the note it lost the security interest it previously held." 301 If First National lost its security interest it had no claim against anyone to the note or the proceeds of the note, *i.e.*, the right represented by Watson’s judgment against Carney. 302 This decision is probably wrong because the court’s reasoning is faulty. 303

When First National made the loan to Watson, it took possession of the note; a financing statement was also executed. 304 First National obviously wanted to "perfect" its security interest. 305 Perfection is not a con-

Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1972). In cases where the collateral is instruments or negotiable documents, however, a good argument exists that the common law rules of exception are displaced, at least with respect to the rights of third parties, because of U.C.C. § 9-304(4)(5).

298. 252 Ark. 558, 480 S.W.2d 127 (1972).

299. The definition of instrument in Article 9 includes "a negotiable instrument" as defined in Article 3, see U.C.C. §§ 9-105(1)(a), 3-102(1)(e), 3-104, which definition obviously includes a negotiable promissory note.

300. 252 Ark. at 559, 480 S.W.2d at 128.

301. Id.

302. See Nickles, *A Localized Treatise on Secured Transactions—Part I: Scope of Article 9, 34 Ark. L. Rev. 377*, at text accompanying notes 163-178 regarding the right represented by Watson’s judgment against Carney as proceeds of First National’s security interest in the note and the continued applicability of Article 9 vis-a-vis the security interest in this property.

303. The court’s decision on another issue in the case, *i.e.*, the applicability of Article 9 after Watson obtained judgment on the note, was wrong, too. See Nickles, *supra* note 302 at text accompanying notes 163-178.

304. See 252 Ark. at 558, 480 S.W.2d at 127, and see note 287 supra.

305. "Perfected" means that the secured party has taken all the steps required by this Article [for perfection]. A perfected security interest may still be or become subordinate to other interests . . . but in general after perfection the secured party is protected against creditors and transferees of the debtor and in particular against any representative of creditors in insolvency proceedings instituted by or against the debtor.

U.C.C. § 9-303, Comment 1.
dition to the attachment or enforceability of a security interest; perfection ordinarily has nothing to do with the existence of an interest or the relationship and rights between the immediate parties; perfection only guarantees that a secured party with a validly created interest will have the maximum protection which Article 9 provides against the claims of the debtor’s other creditors and transferees. 306 Filing a financing statement does not perfect a security interest in an instrument, however. Except in rare cases, a secured party perfects such an interest by taking possession of the instrument307 as First National did.308 As a general rule, the only way to perpetuate the perfection of a security interest in an instrument is to maintain possession.309 There are two exceptions to this general rule that sustain perfection for 21 days even though the secured party is not in possession of the instrument.310 In the McIlroy Bank case, however, First National never again had possession of the note after Watson took it for the purpose of suing the maker, Carney. More than a year passed before Watson obtained his judgment;311 thus First National lost its perfected status with respect to the note. But the court held that because First National was without possession for more than 21 days, “it lost [not just its perfected status but also] the security interest [itself] it previously held.”312 This would have been true if the existence of First National’s interest depended solely on its possession of the note as did its perfected status, but this was not the case. The court reported that at the time the loan was made to Watson, First National not only took possession of the instrument and completed a financing statement; the parties also executed a


308. See 252 Ark. 558, 480 S.W.2d at 127.

309. “A security interest is perfected by possession [which, except in rare cases, is the only way to perfect an interest in an instrument] from the time possession is taken without a relation back and continues only so long as possession is retained, unless otherwise specified in this Article.” U.C.C. § 9-305 (emphasis added).

310. See U.C.C. § 9-304(4)(5). These exceptions are discussed by the drafters at U.C.C. § 9-304, Comment 4.

311. See 252 Ark. at 559, 480 S.W.2d at 128.

312. See id.
written security agreement. This fact is important and legally significant in this case. If this security agreement satisfied the requirements of 9-203(1)(a) regarding the writing which is necessary when a secured party is not in possession of the collateral, then First National's interest in the note existed apart from its possession of the instrument. Surrendering possession of the note, as First National did, would mean losing its perfected status; this would not mean, however, that the interest itself was lost because the existence of the security interest was not dependent on First National's possession of the note. Since First National's interest in the instrument thus continued after Watson took it and, also, continued in the proceeds of the collateral, First National had an Article 9 security interest in the right represented by Watson's judgment against Carney. McIlroy Bank had no interest whatsoever in the judgment. Therefore, First National should have prevailed in this case. Although First National's security interest became unperfected, the interest itself survived, and the security agreement with Watson was effective between the parties and against the rest of the world.

The worst that can be said about the McIlroy Bank case is that the court simply confused the concepts of attachment and perfection of security interests. If the interest itself ceases to exist, i.e., unattaches, there can be no perfection; but, contrary to what the court holds, loss of

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313. See 252 Ark. at 559, 480 S.W.2d at 127.
314. See U.C.C. § 9-203(1)(a). The requirements of a written security agreement are discussed at text accompanying notes 325-504 infra.
315. See text accompanying notes 307-311 supra.
316. Nothing in Article 9 directs that U.C.C. § 9-203(1)(a) can be satisfied with respect to instruments only when the secured party takes and keeps possession. Unless the collateral is a type of property which no one can possess (see note 275 supra), § 9-203(1)(a) can be satisfied in any case either by the secured party taking possession of the collateral pursuant to agreement or by the parties executing a written security agreement even though someone other than the secured party or his agent has possession. Lenders usually take possession of instruments that serve as collateral but only as a matter of custom and good business practice, not because the law requires possession. A number of reported cases suggest the correct rule of law that a valid security interest in instruments can exist pursuant to a written security agreement despite the secured party's lack of possession of the collateral. See generally, e.g., In re Mathews, 25 UCC Rep. 305 (E.D. Va. 1978); In re Chapman, 5 UCC Rep. 649 (W.D. Mich. 1968); Copeland v. Stewart, 52 Cal. App.3d 217, 124 Cal. Rptr. 860 (1975); Estate of Hinds, 10 Cal. App.3d 1021, 89 Cal. Rptr. 341 (1970); Lipkowitz & Plaut v. Affrunti, 95 Misc.2d 849, 407 N.Y.S.2d 1010 (N.Y. Sup. Ct. 1978).
317. See Nickles, supra note 302, at text accompanying notes 163-178.
318. See id. at note 166.
319. See U.C.C. § 9-201.
320. See text accompanying notes 261-265 supra.
321. See note 305 supra.
322. A security interest cannot be perfected unless it has attached. See U.C.C. § 9-303(1). If it becomes unattached, there is no longer any interest in the property to perfect.
perfection does not mean ipso facto loss of the interest. The "best" that can be said about the Melroy Bank case is that the court deliberately established a unique, non-traditional doctrine with respect to the creation and maintenance of security interests in instruments, i.e., that no such security interest can be created or maintained absent possession by the secured party despite the existence of an enforceable written security agreement. If this is what the court intended to do in Melroy Bank, its decision is unprecedented under Article 9, contrary to the relevant statutory provisions and unsupported by clear reason, logic or purpose.

2. Writing

In most cases someone other than the secured party has possession of the collateral; the debtor usually has it. Thus a written security agreement that satisfies the requirements of section 9-203(1)(a) is necessary to create a security interest. At first glance, the section appears to require only that the writing describe the collateral (and, in some instances, the land concerned) and be signed by the debtor. There is another requirement, however: The writing must be a "security agreement" which means that it (its language) must evidence the parties' (or at least the debtor's) intention to create security. Although the parties may include a number of other terms and bits of information in the writing.

323. This is true because the existence of a security interest does not depend on its perfection. See generally authorities cited note 306 supra.

324. To perfect a security interest in an instrument, Article 9 ordinarily requires that the secured party take and maintain possession of the collateral. See U.C.C. §§ 9-304(1), 9-305. But Article 9 does not require possession of an instrument by the secured party in order to create and perpetuate an interest in it when a valid written security agreement exists between the parties. See text accompanying notes 304-319 supra.

325. See U.C.C. § 9-203(1)(a).

326. When the secured party is not in possession, a security interest does not attach unless "the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned." U.C.C. § 9-203(1)(a). Does a tape recording constitute a signed writing? Apparently not, at least not for purposes of Article 8's statute of frauds. See Swink & Co. v. Carroll McEntee & McGinley, Inc., 266 Ark. 279, 584 S.W.2d 393 (1979). But see Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972).

327. According to U.C.C. § 9-203(1)(a), that which the debtor must sign is a "security agreement," i.e., "an agreement which creates or provides for a security interest." U.C.C. § 9-105(1)(d).

328. See discussion at text accompanying notes 461-481 infra. See also, Nickles, supra note 275, at 47-52.

329. The agreement might well contain representations by the debtor along the following lines: that the debtor owns the collateral free from any ownership or security rights of another; that the collateral is in the debtor's possession; that there are no liens obtained by legal proceedings on any assets of the debtor; that no notice of liens for any federal taxes have been filed, nor have additional federal taxes been assessed against the debtor; that the debtor has not signed or filed any other security agreement or financing statement which mentions (collateral of the
these three basics—description, debtor's signature and evidence of agreement—are the only legal requirements of a written security agreement under Article 9. A section 9-203(1)(a) writing is required not only for evidentiary purposes;\textsuperscript{330} it is in the nature of a Statute of Frauds.\textsuperscript{331} Thus the parties' failure to execute a written security agreement that satisfies the requirements of section 9-203(1)(a) can be raised as a defense to the enforcement of a security interest not only by third parties, but also by the debtor.\textsuperscript{332} Since, therefore, a writing sufficient under this section is absolutely essential to the enforcement of a non-possessory security interest against anyone, each of the minimum requirements of a written security agreement deserves close study.

a. Descriptions

(Of the Collateral and Land Concerned)

If the description of the collateral in a written security agreement is legally insufficient, the parties have failed to satisfy fully the requirements of section 9-203(1)(a). In such a case, no security interest attaches to or is enforceable against the property which the creditor thought was his collateral. A description is legally sufficient "if it reasonably identifies what is described."\textsuperscript{333} It need not be "specific"\textsuperscript{334} as long as it does "the job assigned to it—that it make possible the identification of the thing described."\textsuperscript{335} The "serial number" test that prevailed in some jurisdictions types securing the present indebtedness); that all proper corporate steps have been taken to make the agreement effective and enforceable according to its terms; and that the making of the agreement does not violate any of the provisions of any other agreement or instrument binding on the debtor. The agreement would, of course, describe the debt secured; and might or might not include other indebtedness from time to time due to the bank. It certainly should contain a specific promise to pay or a reference to a note which does so. The agreement might also contain a few of the standard covenants as to caring for and insuring the collateral. . . . Although the Code covers default and remedies generally, the parties will want to specify what is a "default" and might want to fill in some permissive points of Article 9's default provisions. Generally a serious breach of one of the debtor's covenants or representations should be made a default.

Coogan, \textit{How to Create Security Interests Under the Code—And Why}, 48 \textit{Cornell L. Q.} 131, 146-47 (1962). But the Code does not require, however, that a security agreement disclose such information as the amount of the obligation secured or the maturity date of the obligation.

\begin{itemize}
  \item \textit{See}, e.g., \textit{In re Cooley}, 624 F.2d 55 (6th Cir. 1980).
  \item \textit{See U.C.C. § 9-203, Comment 3.}
  \item \textit{See U.C.C. § 9-203, Comment 5.}
  \item \textit{See U.C.C. § 9-203(1).} "Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies [§ 9-203(1)(a), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like."
  \item \textit{U.C.C. § 9-110.} For an argument that despite this comment, the equitable liens doctrine is not entirely displaced by this section, see Nickles, supra note 275, at 41-71.
  \item \textit{U.C.C. § 9-110.} For a collection of cases dealing with the sufficiency of descriptions of collateral in security agreements, see Annot., 100 A.L.R.3d 940 (1980).
  \item \textit{See U.C.C. § 9-110.}
  \item \textit{U.C.C. § 9-110, Comment.}
\end{itemize}
under pre-Code law was rejected by the drafters of Article 9.336 Therefore, descriptions of collateral need not be "of the most exact and detailed nature."337 Nevertheless, even a test of reasonable identification may establish some outside limits with respect to the generality of descriptions.

A recurring issue under Article 9 is whether or not broad, generic descriptions such as "equipment" or "inventory" are sufficient for purposes of the section 9-203(1)(a) writing. The Eighth Circuit has taken a liberal position on this issue. In United States v. First National Bank in Ogalalla,338 the debtors, in order to secure a loan from the Farmers Home Administration, executed a security agreement which described the collateral as "all farm and other equipment (except hand tools and horses drawn and hand equipment) now owned or hereafter acquired by the Debtor."339 A non-exclusive listing of specific property was also included in the definition, and on this list was "pipe and a pump with motor." Some time after the execution of this agreement, the debtors acquired certain devices which together formed farm irrigation equipment. Eventually, the debtors conveyed their farm and equipment to a bank in satisfaction of debts owed it. The bank then sold all the property without accounting to the United States for the value of the irrigation equipment in which the government claimed a superior interest. The government ultimately sued the bank for conversion of the equipment,340 and the issue in the case was "whether the description of the collateral in the controverted security agreement is adequate under §§ 9-110, 9-203(1) . . . of the Uniform Commercial Code [U.C.C.] to create a security inter-

336. See id.
337. U.C.C. § 9-110, Comment. Even mistakes regarding serial numbers of the collateral are forgivable. See, e.g., In re Vintage Press, Inc., 552 F.2d 1145 (5th Cir. 1977), where an incorrect serial number was given as part of a description of equipment, and the court holds that stating an incorrect serial number will not vitiate the security agreement if the key to the property's identification is otherwise contained within the document. Cf. cases where such mistakes were forgiven when the incorrect serial numbers appeared in the description of the collateral in the financing statement: In re Siravo, 27 UCC Rep. 584 (D. R.I. 1979); Chapman v. Bank of Cumming, 150 Ga. App. 85, 256 S.E.2d 601 (1979); Appleway Leasing, Inc. v. Wilken, 39 Or. App. 43, 591 P.2d 382 (1979); McGehee v. Exchange Bank & Trust Co., 561 S.W.2d 926 (Tex. Civ. App. 1978). But compare Bank of Middleton v. Town & Country Ford Tractor, Inc., 27 UCC Rep. 588 (Wis. Cir. Ct. 1979). And remember that Article 9 explicitly requires the courts to overlook "minor errors" in financing statements. See U.C.C. § 9-402(8). There is no such provision with regard to security agreements.
338. 470 F.2d 944 (8th Cir. 1973).
339. Id. at 945.
340. A third party who takes collateral subject to the security interest of the secured party and who does not take the property free of the encumbrance or with priority over the secured party is liable to the secured party for conversion. See, e.g., People's State Bank v. Pioneer Food Indus., Inc., 253 Ark. 277, 486 S.W.2d 24 (1972). This case, though not the conversion issue associated with it, is discussed fully at text accompanying notes 402-41 infra. For a discussion of third parties' liability to secured parties for conversion, see Nickles, infra note 273, at 104-106 n.647; see also text accompanying notes 692-701 infra.
est in certain property [i.e., the irrigation equipment].”341 Whether or not specific property is within the definitional boundaries of the parties' description of the collateral may be an issue in some cases,342 but this was not the issue in Ogallala. In this case the bank argued that the government had no interest in the irrigation equipment but not because the irrigation devices were something other than "farm and other equipment." It argued that the description of the collateral, i.e., "all farm and other equipment," in the parties' security agreement was too broad and legally insufficient under sections 9-110 and 9-203(1) so that no enforceable security interest attached to the property.343 The court concluded, however, that the description was adequate.

[The purpose of a description of collateral in a security agreement is only to evidence the agreement of the parties and therefore it need only "make possible the identification of the thing described."

.... [W]e think the quoted description of collateral in the security agreement sub judice "makes possible the identification of" the after-acquired water irrigation equipment as collateral in which the United States has a security agreement. That is all that is required.344

341. 470 F.2d at 945.
342. See, e.g., Boudreau v. Borg-Warner Accept. Corp., 616 F.2d 1077 (9th Cir. 1980); In re K. L. Smith Enterprises, Ltd., 2 B.R. 280, 28 UCC Rep. 534 (D. Colo. 1980); In re J.A.G.G., Inc., 25 UCC Rep. 1172 (D. Conn. 1979) (whether security agreement covered only inventory financed by creditor or all inventory from whatever source); Empire Mach. Co. v. Union Rock & Materials Corp., 119 Ariz. 145, 579 P.2d 1115 (Ct. App. 1978) (whether caterpillar motor grader was within the description "all earthmovers, blades, rollers, laydown machines, trucks, automobiles and pickup trucks"); Milwaukee Mack Sales, Inc. v. First Wis. Nat'l Bank of Milwaukee, 93 Wis.2d 589, 287 N.W.2d 708 (1980) (whether "all debtor's equipment" described a truck); Brown v. Green, 618 P.2d 140 (Wyo. 1980) (were certain after-acquired accessorials equipment within the definitional scope of the terms "accessions and additions").
344. 470 F.2d at 947-48. An equally broad description was upheld in United States v. Pirnie, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. 1973). In this case the description was
All livestock, fish, supplies and other farm products including those in inventory, now owned or hereafter acquired by Debtor, together with all increases, replacements, substitutions, and additions thereto, including but not limited to the following: (Itemized list followed.)
All farm and other equipment now owned or hereafter acquired by Debtor, together with all replacements, substitutions, additions and accessions thereto, including but not limited to the following: (Itemized list followed.)
339 F. Supp. at 703. Accord, United States v. Southeast Miss. Livestock Farmers Ass'n, 619 F.2d 435 (5th Cir. 1980) ("all livestock"), in which case the court also approved the description "livestock" in the financing statement. Several recent cases approve such broad descriptions as "all inventory," see, e.g., In re Cosco, 612 F.2d 276 (6th Cir. 1980); Young v. Golden State Bank, 560 F.2d 855 (Ct. App. 1977); and "all equipment." See, e.g., In re Cooley, 624 F.2d 55 (6th Cir. 1980); Milwaukee Mack Truck Sales, Inc. v. First Wis. Nat'l Bank of Milwaukee, 93 Wis.2d 589, 287 N.W.2d 708 (1980). But see In re Fairway Wholesale, Inc., 21 UCC Rep. 1429 (D. Conn. 1977) ("all goods, wares and merchandise" insufficient description); In re Laminated Veneers, Inc., 8 UCC Rep. 602 (E.D. N.Y. 1970), aff'd 471 F.2d 1124
Courts that condemn broad descriptions of collateral are probably motivated by "an unstated (and even unconscious) desire to protect debtors against dragnet clauses subjecting all or virtually all of their property to the claim of a single creditor." In Mammoth Cave Production Credit Association v. York, for example, the court held that the description "all farm equipment" was inadequate because it seems doubtful that it was really agreed that tractors and other large farm equipment were to be security for the loan. This seems more like a provision inserted by an over-anxious lending officer to encompass as much security as possible, rather than an actual agreement that a security interest was to attach to all farm equipment.

The Eighth Circuit in Ogallala specifically rejected the result and reasoning of the Mammoth Cave decision.

[W]e are not convinced that the requirement in Section 9-203...that the collateral be described, is a device for minimizing the amount of collateral a creditor can secure.

If the debtor himself is willing to give a creditor a security interest in everything he owns, the code does not prevent it, whether his action is prudent or not.

The court’s rejection of Mammoth Cave does not necessarily mean that the

(2d Cir. 1973) ("all equipment" insufficient). Courts are often encouraged to uphold such descriptions on the basis that "equipment," "inventory," "farm products" and "consumer goods" are all terms which have clearly defined meanings under Article 9 as sub-classes or "types" of goods. See U.C.C. § 9-105. This entire problem is essentially a matter of comparative degree, however. It is true that the description "all equipment" is more specific than the description "all goods" because "equipment" is a type of "goods". It is also true, however, that "goods," a term defined in U.C.C. § 9-105(1)(a), is more specific than "personal property," the former being a sub-type of the latter. Does this mean that "all goods of the debtor" is a legally sufficient description of collateral? The courts disagree about the answer to this question. Compare, e.g., In re Fagan, 26 UCC Rep. 1004 (S.D.N.Y. 1979) with James Talcott, Inc. v. Franklin Nat'l Bank of Minneapolis, 292 Minn. 277, 194 N.W.2d 775 (1972).

One would think that this is as far as the argument could be extended, that a description such as "all personal property" is not descriptive at all since Article 9 only applies to transactions involving personal property and, except for fixtures, not at all to real property. But cf. Leasing Serv. Corp. v. American Nat'l Bank & Trust Co., 19 UCC Rep. 252 (D. N.J. 1976) ("any and all property"). Compare In re Fuqua, 461 F.2d 1186 (10th Cir. 1972) (holding that the description "all personal property" is insufficient for the purpose of perfecting a security interest. If the description is inadequate for that purpose, it is surely inadequate for the purpose of creating a security interest under U.C.C. § 9-203(1)(a).) See other authorities cited note 364 infra. In no case, however, should a description be upheld simply because there is a generally broader alternative. The question in every case should always be whether or not the description adopted by the parties reasonably identifies the collateral, and the emphasis should be on the facts and circumstances of the particular case. See also note 364 infra regarding the problem of the sufficiency of descriptions of collateral.

346. 429 S.W.2d 26 (Ky. 1968).
347. 429 S.W.2d at 29.
348. 470 F.2d at 947 (quoting James Talcott, Inc. v. Franklin Nat'l Bank of Minneapolis, 292 Minn. 277, 194 N.W.2d 775, 782 (1972)).
Eighth Circuit intends willy nilly in every case to enforce dragnet descriptions of collateral. In *Ogallala* the court relied principally on *James Talcott, Inc. v. Franklin National Bank of Minneapolis*. In this case the Minnesota Supreme Court upheld a description that is even broader than the one challenged in *Ogallala*. The description in *Talcott* was "all goods (as defined in Article 9 of the Uniform Commercial Code) whether now owned or hereafter acquired." The court in *Talcott* was apparently convinced, however, that the parties actually intended to create a security interest in substantially all of the debtor's property. Remember that section 9-203(1)(a) requires a written security agreement, a bargain between both parties. A debtor should always be free to argue that in fact he did not agree to give the creditor as much security as the description in the security agreement pretends. The parol evidence rule does not necessarily bar the introduction of evidence to support such an argument. If it is true that the written description is inaccurate, the secu-

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349. 292 Minn. 277, 194 N.W.2d 775 (1972).
350. 194 N.W.2d at 778. *But see*, e.g., *In re Fagan*, 26 UCC Rep. 1004 (S.D. N.Y. 1979) (holding that the description "all goods" is insufficient for purposes of a security agreement). And *see* other authorities cited note 344 *supra* and 364 *infra* regarding the sufficiency of such broad descriptions.
351. The court's conclusion in *Talcott* was this: "The parties sought to create a security interest in substantially all the debtor's property. That is what was stated and that is what was meant. The parties did not particularize any further, and the statute does not require it." 194 N.W.2d at 782. This conclusion was quoted with approval by the Eighth Circuit in its *Ogallala* opinion. *See* 470 F.2d at 947.
352. When the secured party is not in possession, the debtor must have "signed a security agreement." U.C.C. § 9-203(1)(a) (*emphasis added*).
353. *See* U.C.C. § 1-201(3).
354. When a debtor attempts to introduce parol evidence to support his argument that the agreed collateral was something less than what the written description in the security agreement suggests, he will certainly face this three pronged argument: (1) The written security agreement is an "integrated agreement," *i.e.*, the writing constitutes a final expression of one or more terms of the parties' agreement. *See* RESTATMENT (SECOND) OF CONTRACTS § 235(1) (Tent. Drafts Nos. 1-7, 1973) (2) Whether "completely" or only "partially integrated," *see id.* § 236, "evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing." *Id.* § 241. (3) Evidence that the agreement regarding collateral was something other than what the writing describes is evidence which contradicts the writing.

Nevertheless, the fact that the debtor has signed a written security agreement which describes the collateral does not in itself conclusively and forever establish that the parties intended what is said there to be the final expression with respect to the terms included therein. "Where the parties reduce an agreement to writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." *Id.* § 235(3) (*emphasis added*). "Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence." *Id.*, Comment c (*emphasis added*). Thus a debtor can introduce parol evidence showing that a final expression with respect to the description of collateral was not intended (see *id.* § 240(a)) and, if he succeeds on this issue, can then introduce evidence showing what in fact the parties agreed to. Even if the court finds that the parties intended the security agreement to operate as an integration, the debtor has another line of attack, particularly if
ity interest is unenforceable at least with respect to that property not covered by the parties’ actual agreement. The reason, however, is not because the description is too broad and legally insufficient under sections 9-110 and 9-203(1)(a); the reason is that the parties simply failed in fact to reach a security agreement with respect to such property, regardless of the breadth of the description of the collateral in the written security document. Therefore, though the Eighth Circuit has apparently approved very broad, general descriptions of collateral, it retains some leeway to protect debtors from overreaching creditors.\footnote{355}

the writing is a standardized form or document. “Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.” \textit{Id.} § 237(3). In addition, the debtor is also free, even if the writing is integrated, to introduce parol evidence for the purpose of establishing “the meaning of the writing.” \textit{Id.} § 240(c). Such evidence may have the effect of reducing the amount of the collateral from that described in the security agreement as the creditor interprets the description. Some courts have permitted the introduction of parol evidence to explain the description of collateral in a security agreement when the writing is ambiguous. \textit{See, e.g., In re Amex-Protein Dev. Corp.,} 504 F.2d 1056 (9th Cir. 1974); \textit{In re Webb,} 13 UCC Rep. 394 (S.D. Tex. 1973); \textit{Rivera Equipment, Inc. v. Omega Equipment Corp.,} 30 UCC Rep. 339 (Ga. Ct. App. 1980). Other courts blindly follow a rule that parol evidence is inadmissible to contradict a description of collateral in a written security agreement. \textit{See, e.g., In re California Pump & Mfg. Co.,} 588 F.2d 717 (9th Cir. 1978); \textit{Mitchell v. Shepherd Mall State Bank,} 458 F.2d 700 (10th Cir. 1972). These courts apparently fail to appreciate fully the relationship between a statute of frauds and the parol evidence rule and have not attempted to distinguish their separate functions under Article 9. It is undoubtedly true that parol evidence cannot be relied on to supply a description of collateral demanded by U.C.C. § 9-203(1)(a) when the writing fails to contain a legally sufficient description. \textit{See U.C.C. § 9-203, Comment 5 (last sentence). See also, e.g., In re Delta Molded Prods., Inc.,} 416 F Supp. 938 (N.D. Ala. 1976). This is because the writing requirement of § 9-203(1)(a) is in the nature of a statute of frauds. \textit{See U.C.C. § 9-203, Comment 5.} But if the writing contains a description of collateral that is legally sufficient under §§ 9-203(1)(a) and 9-110, the fact that § 9-203 serves a statute of frauds function does not mean that the parol evidence rule and its exceptions are displaced. “The statute of frauds does not exclude any parol evidence, such evidence always being admissible to show that the writing does not correctly represent the agreement actually made; the ‘parol evidence rule,’ as commonly stated, purports to exclude such evidence [and then only if the writing is an integrated one].” \textit{3 A. Corbin, Corbin on Contracts} § 575 at 381 (1960). If there is a legally sufficient description of collateral in a written security agreement and if the writing also satisfies the other requirements of § 9-203(1)(a), then the statute of frauds function has been fully served. No statute of frauds notion, rule or principle then prohibits the admissibility of parol evidence to determine the true agreement between the parties. The admissibility of this evidence is determined by the parol evidence rule which allows the introduction of extrinsic evidence for the purposes discussed earlier in this footnote.

355. There are additional ways to protect debtors against overreaching. For example, “When overreaching occurs, independent rules, such as the unconscionability doctrine, provide protection for the debtor.” \textit{J. White & R. Summers, supra} note 275, § 23-3 at 911. These authors cite no authority for this proposition. The view shared by most courts is that the unconscionability provision of Article 2, U.C.C. § 2-302, has no direct applicability to secured transactions. \textit{See, e.g., Tinsman v. Moline Beneficial Fin. Co.,} 531 F.2d 815 (7th Cir. 1976); \textit{In re Advance Printing & Litho Co.,} 387 F.2d 952 (3d Cir. 1967); \textit{In re Johnson,} 13 UCC Rep. 953 (D. Neb. 1973); \textit{Anderson v. Mobile Discount Corp.,} 595 P.2d 203 (Ariz. App. 1979); \textit{Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank,} 237 Ga. 37, 226 S.E.2d

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The Supreme Court of Arkansas has decided only a few cases involving the issue of the adequacy under Article 9 of descriptions of collateral. In *Security Tire and Rubber Co. v. Hlass*, the challenged description was "Company owned inventory of Stephens Tire Company, 2517 Alma Highway, Van Buren, Arkansas." The trial court held that this description was insufficient as a matter of law to create a security interest. The appellate court reversed because "we believe that a fact issue was made by which the goods involved here could possibly be identified under the agreement given." The court's opinion in this case is particularly interesting for this reason: The lower court apparently decided that the description was inadequate under section 9-203(1), but its decision was reversed because the description was not necessarily insufficient under section 9-402(1). This latter section establishes the requirements for an Article 9 financing statement which must also include a description of the collateral. The description requirement is stated differently in section 9-402(1), however. Instead of requiring generally a "description of

583 (1976). *But see, e.g., In re Gawthorn, 27 UCC Rep. 1416 (W.D. Va. 1979); New York v. Avco Fin. Serv. of New York, Inc., 418 N.Y.S.2d 52 (1979), rev'd on other grounds, 50 N.Y.2d 383, 406 N.E.2d 1075, 429 N.Y.S.2d 181 (1980). Nevertheless, U.C.C. § 2-302 could be applied by analogy to secured transactions cases. In some situations it is appropriate to apply provisions of Article 2 to transactions not within the scope of that Article. *See, e.g.* Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968) (applying U.C.C. § 2-316 to a lease of goods). *See also,* Murphy v. McNamara, 27 UCC Rep. 911 (Conn. Super. Ct. 1979) (U.C.C. § 2-302 can be applied to a true lease transaction). Apart from U.C.C. § 2-302, a common law or equitable notion or principle regarding unconscionability can supplement Article 9 on the basis of U.C.C. § 1-103. *See, e.g., Restatement (Second) of Contracts § 234 (Tent. Drafts Nos. 1-7, 1973); Tinsman v. Moline Beneficial Fin. Co., 531 F.2d 815, 818 n.5 (7th Cir. 1976). *See also, e.g., In re Johnson, 13 UCC Rep. 953 (D. Neb. 1973) (regarding equitable powers of bankruptcy court). 356. 246 Ark. 1113, 441 S.W.2d 91 (1969). 357. *Id.* at 1114, 441 S.W.2d at 92. 358. *Id.* at 1117, 441 S.W.2d at 94. 359. The trial court specifically found "that the attempted assignment to the Plaintiffs-creditor [of accounts and inventory as collateral] was not validly executed under the terms of the Uniform Commercial Code, and a lien predicated on the security instrument is found to be null and void as a secured transaction and this plaintiff is therefore in the same category as any other unsecured creditor." *Id.* at 1116; 441 S.W.2d at 93. And on appeal the appellant's first point for reversal was that the trial court "erred in holding that appellant's lien did not qualify as a security interest under the Uniform Commercial Code." *Id.* So the lower court must have held that no security interest attached under section 9-203(1), and thus none existed. Failure to comply with the requirements of a financing statement under U.C.C. § 9-402(1) would only mean that the security interest was not perfected, not that none ever existed. 360. To support the trial court's summary judgment in their favor, the appellees argued that the description of the collateral was sufficient under U.C.C. §§ 9-110 & 9-402(1). *See* 246 Ark. at 1116, 441 S.W.2d at 93. The Arkansas Supreme Court quotes these sections and ultimately concludes in the opinion "that the trial court erred in holding as a matter of law that the description given in the security instrument was insufficient under the statute above." 246 Ark. at 1118, 441 S.W.2d at 94 (emphasis added). 361. *See* U.C.C. § 9-402(1). Filing a financing statement is the usual method of perfecting a security interest under Article 9.
the collateral” as does section 9-203(1)(a), section 9-402(1) specifically requires “a statement indicating the types, or describing the items, of collateral.” The court recognizes in Security Tire that the better practice under section 9-402(1) is “to describe the collateral by types or items of inventory when a security interest is taken in inventory.” If this better practice constitutes a general rule established by the court, a broad description such as “all inventory” will ordinarily be inadequate in a financing statement. Since the court apparently equates the description requirements under section 9-203(1) and 9-402(1), such a broad

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363. U.C.C. § 9-402(1).
364. 246 Ark. at 1117, 441 S.W.2d at 94. (The court cites Meek, Secured Transactions Under the Uniform Commercial Code, 18 Ark. L. Rev. 30 (1964). Under the topic “Security Interest—How Created . . . . (6) Property Description,” Mr. Meek discussed U.C.C. § 9-402 dealing with the description required in financing statements for the purpose of perfecting a security interest. See id. at 35-36.) Note that the court suggests describing the inventory by types or items. Some courts take the position, however, that the broad categories of personal property defined by Article 9 constitute “types” of collateral in themselves. Thus the description “all inventory,” for example, would be sufficient under U.C.C. § 9-402(1) because “inventory” is a type of collateral. See, e.g., In re American Plating & Mfg. Co., 468 F. Supp. 103 (W.D. Ky. 1979), where part of the description was “[a]ll present and future accounts, inventory, equipment, contract rights and chattel paper.” See also In re Indian Springs Farm & Ranch, Inc., 27 UCC Rep. 832 (D. Utah 1979) (“all crops” and “all equipment”). But see, e.g., In re Werth, 443 F. Supp. 738 (D. Kan. 1977) (“all equipment” insufficient); In re Lehner, 303 F. Supp. 317 (D. Colo. 1969), aff’d, 427 F.2d 357 (10th Cir. 1970) (“all consumer goods” insufficient).

On the other hand, however, most courts believe “that a financing statement . . . which lists collateral less specifically than by reference to the categories of personal property contained in Article 9, does not comply with the statutory imperative of identification by ‘types’.” In re H. L. Bennett Co., 588 F.2d 389 (3d Cir. 1978) (emphasis in original). In the case the court found insufficient the description “‘all assets as contained in the security agreement executed even date herewith.’” See also, e.g., In re Fuqua, 461 F.2d 1186 (10th Cir. 1972); Mogul Enterprises, Inc. v. Commercial Credit Business Loans, Inc., 92 N.M. 215, 585 P.2d 1096 (1978). See other authorities cited note 344 supra. According to Professor Gilmore, these courts are right to demand more specificity and so was the Arkansas court when it suggested in Security Tire that the various types of inventory should be identified:

The description by “types” is understood to require a certain degree of specificity: it would not be sufficient for the notice to claim “all the debtor’s property.” Thus if a secured party is financing a dealer’s inventory which includes washing machines, television sets, phonographs, radios and refrigerators, it would be advisable for the notice to list each of these “types” of collateral separately.

1 G. GILMORE, supra note 275, § 15.3 at 477. See also id. § 11.4 at 350.
365. See supporting and contrary authorities cited note 364 supra.
366. See text accompanying notes 359 & 360 supra. Not all courts agree with this equation.

The security agreement is the contract between the parties; it specifies what the security interest is. Because of its different function, greater particularity in the description of collateral is required in the security agreement than in the financing statement.

description will also be inadequate for purposes of the written security agreement necessary to create a security interest. Also, there is no good reason for limiting the "types or items" description to cases involving inventory. Thus it can be argued that the better practice and, perhaps, the general rule in Arkansas after Security Tire is to avoid broad descriptions and in every case describe the collateral in terms of more specific types or items of property.

If the court in Security Tire adopts a general rule requiring a specific "types or items" description of collateral, it also creates an exception to the rule in the same case. A "types or items" description was unnecessary in Security Tire because the debtor's inventory did not include a wide variety of goods. "The record does not say but it is possible that the Stephens Tire Company is the only business at the address given and that its only business has to do with tires. The record does show that the inventory consisted of tires and tubes." The court fashioned its own test for judging the sufficiency of descriptions. "[A] description is sufficient which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property." Thus a more detailed description was

Milwaukee, 93 Wis.2d 589, 287 N.W.2d 708 (1980). Professor Gilmore suggests that the standards under U.C.C. §§ 9-203 and 9-402 regarding the description of collateral should not be different. See 1 G. GILMORE, supra note 275, § 11.4 at 349-50.

367. 246 Ark. at 1118, 441 S.W.2d at 94.

368. Id. at 1117, 441 S.W.2d at 94. This was the test frequently used by the courts under pre-Code law to decide the adequacy of descriptions in chattel mortgages and conditional sales contracts. See 1 L. JONES, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES, § 54 (6th ed. R. Bowers ed. 1933); 3 L. JONES, supra §§ 982, 1061. The test makes sense for a chattel mortgage or a conditional sales contract in a state where the recitation of such contracts was required. The instrument was not only evidence of the parties' agreement; the document itself was often filed for record and doubled as the instrument designed to notify third parties of the secured creditor's interest. See 1 L. JONES, supra, §§ 190-235; 3 L. JONES, supra §§ 1004-1072; Uniform Conditional Sales Act §§ 5-6, 10 (act withdrawn 1943). Thus, if the description of collateral in such an instrument was insufficient in terms of aiding a third person's identification of the property, the instrument and the creditor's interest were invalid (at least against third parties within the protection of the recording acts).

A financing statement serves the notification function under Article 9, not the parties' security agreement. Thus it makes little, if any, sense to apply to Article 9 security agreements the pre-Code test for judging descriptions in instruments that were themselves often filed for record for the benefit of third parties. Nevertheless, the courts regularly use the pre-Code "third persons" test when judging the adequacy of descriptions in Article 9 security agreements. See, e.g., Empire Mach. Co. v. Union Rock & Materials Corp., 119 Ariz. 145, 579 P.2d 1115 (Ct. App. 1978); American Restaurant Supply Co. v. Wilson, 371 So.2d 489 (Fla. Dist. Ct. App. 1979); Freeman v. Decatur Loan & Fin. Corp., 140 Ga. App. 682, 231 S.E.2d 409 (1976); Aronson Furniture Co. v. Johnson, 47 Ill. App.3d 648, 365 N.E.2d 61 (1977). This test seems better suited for judging the sufficiency of the description in a financing statement because that document is designed to put third parties on notice, not the parties' security agreement. See U.C.C. § 9-402, Comment 2. Logically, however, the tests under U.C.C. §§ 9-203(1)(a) and 9-402(1) will be the same in Arkansas since the court apparently equates the description requirements under the two sections. See text accompanying notes 359 & 360 supra.
unnecessary in *Security Tire* because little possibility for confusion existed. Why describe the inventory collateral by type or item when the debtor's inventory encompassed only two closely related types of property that everyone knows are the stock in trade of a tire business? "Inventory" includes goods held by a person for sale; most persons understand that the principal enterprise of a tire dealer is selling tires and tire tubes; since tires and tire tubes were the only inventory of the debtor in *Security Tire*, no third person would have difficulty identifying and locating the collateral based on the parties' description of it. Thus, despite the failure to identify the types or items of inventory, the description of the collateral was adequate in this case.  

The parties need not execute a unique, specialized form labeled "security agreement" that satisfies in one document the basic requirements of the section 9-203(1)(a) writing. Many courts have held that a composite of writings can constitute a security agreement for purposes of this section. Therefore, "there is no requirement that the description of the collateral be complete within the four corners of the security agreement or other single document." The parties may, for example, execute one document and in it refer to the financing statement for the whole or a fuller description of collateral. This referencing technique can also be used to clarify ambiguity in the description of collateral. The debtor in *In re Nickerson & Nickerson, Inc.* operated fifty stores in twelve states. The secured party sold the debtor $250,000 worth of inventory on credit, and the parties executed a security agreement which showed a Missouri

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369. See U.C.C. § 9-109(4). The fact that Article 9 defines the term "inventory," as well as "consumer goods," "equipment" and "farm products," may influence courts to approve broad descriptions such as "all inventory" or whatever. See note 344 supra. The court observed in *Security Tire* that the term "inventory" was specifically defined in Article 9. See 246 Ark. at 1117, 441 S.W.2d at 94.

370. This decision was made even easier because the collateral was not described simply as "all inventory;" it was described as "all inventory" at a certain address. U.C.C. § 9-203(1)(a) does not require an address at which the collateral will be kept (except in the case of crops or timber when a description of the land concerned is required). See text accompanying notes 380-388 infra. Nevertheless, describing the collateral as certain property located at a specific address may have the effect of particularizing the description and enhancing the chances of its being found sufficient. See generally, e.g., *In re Fuqua*, 461 F.2d 1186 (10th Cir. 1972); *In re Fairway Wholesale, Inc.*, 21 UCC Rep. 1429 (D. Conn. 1977).


373. 452 F.2d 56 (8th Cir. 1971).
address for the debtor and described the collateral as "[a]ll gifts, novelties, souvenirs, and other merchandise inventory held for resale including but not limited to: See attached schedules for a list of property covered by this Security Agreement." The agreement also provided that the "collateral will be kept at the Debtor’s Stores as stated above." Attached to the security agreement were copies of financing statements the secured party ultimately filed in each state where the debtor operated stores. "These financing statements showed the collateral to be "* * * gifts, novelties, souvenirs, and other merchandise inventory held for resale and situated in debtor’s stores located in [each particular] state." Creditors of the debtor argued in Nickerson "that the language of the security agreement is inadequate to describe Nickerson’s merchandise inventory other than the merchandise located in its Missouri stores." Since the debtor gave a Missouri address in the security agreement, the creditors contended that the term in the document providing "the collateral will be kept at the Debtor’s Stores as shown above," limited the description of the collateral so that the collateral covered by the agreement was only the merchandise inventory held by [the debtor] in the city of Eldon, Missouri." The Eighth Circuit rejected their argument, however, for this reason: "[T]he parties, by attaching the financing statements to the security agreement, incorporated the clarifying language of the financing statement into the security agreement, and clearly created a lien in [the secured party’s] favor upon the inventory in all [the debtor’s] stores." The Nickerson decision does not mean that a secured party must always identify all or any of the places where collateral described in the security agreement might possibly be kept. Identifying the other states

374. 452 F.2d at 56.
376. 452 F.2d at 57.
377. Id. Thus it necessarily followed that the secured party’s “security interest attached only to the inventory of the type described which was located in the State of Missouri.” 329 F. Supp. 93, 94 (D. Neb. 1971), aff’d, 452 F.2d 56 (8th Cir. 1971).
378. 329 F. Supp. 93, 94 (D. Neb. 1971), aff’d 452 F.2d 56 (8th Cir. 1971). The city of Eldon, Missouri was the debtor’s address listed in the security agreement.
379. 452 F.2d at 57. But compare, e.g., In re Door Supply Center, Inc., 29 UCC Rep. 318 (D. Idaho 1980). Instead of relying on the description in the financing statement to expand the description in the security agreement, the secured party in In re Fagan, 26 UCC Rep. 1004 (S.D. N.Y. 1979) attempted just the opposite, i.e., to particularize the description in the financing statement by reference to the security agreement. The court would not allow it. Compare In re Indian Springs Farm & Ranch, Inc., 27 UCC Rep. 832 (D. Utah 1979), where the court said that “the descriptions of the security agreement are typically an important part of the evidence by which the sufficiency of the financing statement is tested.” Id. at 838.
380. It is true, however, that a financing statement (though not a security agreement) must contain addresses of both the secured party and debtor. See U.C.C. § 9-402(1). Nevertheless, not even this section requires an address of where the collateral will be kept, except
was important in *Nickerson* because the language of the security agreement created an ambiguity; arguably, it limited the collateral to that situated in Missouri. Ordinarily, according to the lower court in *Nickerson*, "it is unnecessary to set forth the address where collateral is to be located, in the description of the collateral, whenever it is obvious or readily inferable that the type of collateral covered would naturally be located in [all] those places where the debtor does business." This pronouncement is probably an overstatement, however. Inventory is inventory, and equipment is equipment wherever it is located. Classification of collateral depends on its use, not its location. Usually, therefore, the situs of collateral or its location at several different sites (whether or not the sites belong to or are used by the debtor) are not legitimate factors to consider when judging the legal sufficiency of a description of collateral. Such factors may be relevant in a case like *Nickerson* where perhaps the parties intended to create security in property located in a specific place. Even in this case, however, the situs factor is relevant not on the issue of the legal sufficiency of the description, but on the issue whether or not some specific property is within the definitional boundaries of the parties’ description of the collateral. The collateral was described in the security agreement as "[a]ll our inventory and equipment," following this were the words "wherever located." The court observed that all the essential elements of a security agreement “are fully set forth” and that the location of the collateral at several different locations was an insignificant fact.

Descriptions both broad and specific sometimes fail to isolate the collateral from property of like kind, and the courts usually conclude that

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383. But compare cases cited note 370 infra.
384. See, e.g., *In re California Pump & Mfg. Co.*, 588 F.2d 717 (9th Cir. 1978). In this case the collateral was described as "[a]ll of the furniture, fixtures, leasehold improvements, inventory, and accounts receivable . . . located at [a certain address in California]." But the property claimed by the secured party had never been located at that address, although it had been at other business locations operated by the debtor. The court held that the creditor’s security interest did not attach to property other than that located at the address listed in the security agreement. Compare *Inter Mountain Ass’n of Credit Men v. The Villager, Inc.*, 527 P.2d 664 (Utah 1974).
385. 501 F.2d 459 (8th Cir. 1974).
386. Id. at 462.
387. Id.
388. Id.
such descriptions are legally inadequate to create security interests. In American Restaurant Supply Company v. Wilson, for example, the security agreement under consideration describes the collateral as:

"Food service equipment and supplies delivered to San Marco Inn at St. Marks, Florida." Many courts have held that a description of collateral is sufficient when the agreement covers all of a certain type or types of assets. However, the agreement before us does not cover all of the food service equipment and supplies located at San Marco Inn or owned by the debtor. The agreement attempts to cover some food service equipment and supplies, but the description does not do its assigned job of making possible the identification of the equipment and supplies in which American claims a security interest.

How can a person identify which items among perhaps many pieces of kitchen equipment and supplies were delivered to the debtor by a particular secured party? It is an impossible task without further identifying information which the security agreement does not provide. Thus the description in American Restaurant failed reasonably to identify the collateral, and no security interest attached to any of the debtor's property. The Arkansas case Piggott State Bank v. Pollard Gin Co. also involved the problem of a description that fails to isolate the collateral from property of like kind. The collateral in this case was growing crops. Here, as in other cases, the collateral must be described; in addition, in any case where the collateral is crops growing or to be grown or timber to be cut, there must also be "a description of the land concerned." With respect

390. Id. at 490.
391. See also, e.g., In re Fairway Wholesale, Inc., 21 UCC Rep. 1429 (D. Conn. 1977) (all goods, wares and merchandise, i.e., all inventory, delivered to the debtor from time to time by the particular secured party); Material Serv. Corp. v. Bogdajewicz, 69 Ill. App.3d 742, 367 N.E.2d 1057 (1979) (assignment of interests in certain land trusts held by a particular bank which held many such trusts). Both the American Restaurant Supply Co. case discussed in the text and the Fairway Wholesale case cited supra herein suggest that such a description, though insufficient for purposes of a security agreement, may be sufficient for purposes of an Article 9 financing statement. But see, e.g., Georgia-Pacific Corp. v. Lumber Prods. Co., 590 P.2d 661 (Okla. 1979). Professor Gilmore writes that a description such as "[o]ne of the machines now in the factory at 50 Federal Street . . . should be held insufficient, whether it appears in a security agreement or a financing statement." 1 G. GILMORE, supra note 275, § 11.4 at 350 (emphasis added). The reason is that the description fails to "identify (by serial number or otherwise) the particular machine which is meant," i.e., it fails to isolate the collateral from other property of like kind. Id.
392. 243 Ark. 159, 419 S.W.2d 120 (1967).
393. A written security agreement must contain "a description of the land concerned" whenever the collateral is "crops growing or to be grown or timber to be cut." U.C.C. § 9-203(1)(a). In such cases a financing statement filed to perfect the security interest must also include a description of the land. See U.C.C. §§ 9-402(1), 9-402(5).

The legal sufficiency of land descriptions for purposes of U.C.C. § 9-203(1)(a) is a topic discussed later in this article. See text accompanying notes 399-422 infra. Presumably, however, the test for judging the legal sufficiency of land descriptions is the same under both U.C.C. § 9-203(1)(a) and § 9-402(1). With respect to crops, the identical requirement is spelled out in both sections, i.e., "a description of the land concerned." Also, the Arkansas
to collateral, the Piggott State Bank’s security agreement and financing statement provided:

“CROPS. All of the following crops to be planted or growing within one year from the date hereof on the lands hereinafter described: 7 acres of cotton and 53 acres of soybeans to be produced on the lands of S. E. Karnes; 11.6 acres of cotton and 50 acres of soybeans to be produced on the lands of Mary Gilbee; 4½ acres of cotton and 11 acres of soybeans to be produced on the lands of George Nixon; all of the above crops to be produced in Clay County, Arkansas during the year 1965.”

This description describes the collateral by types, i.e., cotton and soybeans; therefore, the issue about the sufficiency of broad descriptions such as “all crops” was not raised in this case. There is also a description,

Supreme Court has equated the requirements under both sections for descriptions of the collateral, see text accompanying notes 356-366 supra; thus it is logical to conclude that the court will not establish different requirements with respect to land descriptions, at least not in cases where the collateral is crops. After all, in cases where the collateral is crops, the land description “is merely part of the description of the crops concerned.” U.C.C. § 9-402, Comment 1. The presumption can be challenged when the collateral is timber to be cut. U.C.C. § 9-203(1)(a) requires in such a case “a description of the land concerned.” But a financing statement covering timber “must contain a description of the real estate sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state.” U.C.C. § 9-402(5). Does this different requirement establish a different, stricter standard, perhaps a legal description of the land concerned? “The general rule [in Arkansas] as to the sufficiency of a description to pass title to land under deed or mortgage in this State is that it shall be described with sufficient certainty to identify it.” Snyder v. Bridewell, 167 Ark. 8, 11, 267 S.W. 561, 561 (1924). There is no requirement that the mortgage contain a legal description of the land. In Snyder, for example, the court approved the description “all property owned by the Nashville Lumber Company, or afterwards acquired by it, in Howard and other counties in Arkansas.” This, the court concluded, “is definite enough to satisfy our registration laws, and was constructive notice to all parties dealing with lands owned by said company in said counties.” Id. at 11, 267 S.W. at 562. A description in a real estate mortgage is sufficient if it “furnishes a key whereby a person, aided by extrinsic evidence, can ascertain what property is covered.” United States v. Westmoreland Manganese Corp., 194 F. Supp. 898, 919 (E.D. Ark. 1955); quoted with approval in Caraway Bank v. United States, 258 Ark. 859, 859, 529 S.W.2d 351, 352 (1975).

Interpreting the requirement in U.C.C. § 9-402(5) that the description be “sufficient if it were contained in a mortgage of the real estate,” the court in Corning Bank v. Bank of Rector, 265 Ark. 68, 576 S.W.2d 949 (1979), said that the description is sufficient “only if it reasonably identifies the real estate.” 265 Ark. at 75, 576 S.W.2d at 953. (The Corning Bank case concerned the sufficiency of a description in a financing statement filed as a fixture filing. Fixtures and all of the Article 9 issues associated with them are topics discussed under a separate heading in a subsequent article in this series.) This test is no more stringent than the general test Article 9 prescribes for judging the sufficiency of a description of personalty or realty, i.e., that “it reasonably identify what is described.” U.C.C. § 9-110. See also U.C.C. §§ 9-110, Comment; 9-203, Comment 2; 9-402, Comments 1 & 2. Thus no different test is applicable in the case of a land description in a financing statement covering timber.

394. 243 Ark. at 160, 419 S.W.2d at 121.

395. In several cases where crops were the collateral, descriptions in security agreements or financing statements have been approved which described the collateral as simply “all crops, annual and perennial, and other plant products, growing or grown.” See generally, e.g., United States v. Oakley, 483 F. Supp. 762 (E.D. Ark. 1980); United States v. Smith, 22 UCC Rep. 502 (N.D. Miss. 1977); United States v. Minster Farmers Coop. Exch., Inc., 430 F. Supp. 566 (N.D. Ohio 1977); United States v. Big Z Warehouse, 311 F. Supp. 282 (S.D. Ga.
albeit a general one, of the land concerned, *i.e.*, that belonging to certain persons in Clay County, Arkansas. Nevertheless, the court held that the description was legally insufficient. The description refers merely to seven acres of cotton to be produced on the lands of S. E. Karnes (together with two other references). Neither the security agreement nor the proof adduced at trial sheds any light whatever upon the questions (a) whether [the debtor] grew exactly seven acres of cotton on the S. E. Karnes land in 1965 and (b) whether anyone else was also growing cotton upon the S. E. Karnes land.

The description thus failed to isolate precisely those seven acres (perhaps among many hundreds) on Karnes' land that were to produce the cotton in which the secured party claimed an interest. The principle followed in the *Piggott State Bank* case applies whatever the collateral may be, and this principle is "that 'a mortgage of a specific number of articles out of a larger number will not be allowed to prevail, unless it furnishes the data for separating the property intended to be mortgaged from the mass.'"

*Piggott State Bank* is an important case because it suggests both the independence of and the interrelationship between two issues that often arise in Article 9 cases where the collateral is crops or timber and a description of land is required. One issue concerns the adequacy of the description generally in terms of isolating the collateral from other property of like kind; the other issue deals with the sufficiency of the land description itself. Full blown legal descriptions are never required *per
the collateral is crops, i.e., to help identify the specific collateral by telling where the collateral is growing and by separating it from other property of like kind. A particular grove of trees is as difficult to describe without a land description as is a particular field of soybeans.


The decision in People’s Bank v. Pioneer Food Indus., Inc., 253 Ark. 277, 486 S.W.2d 24 (1972) is consistent with the cases holding that legal descriptions of the land concerned are not required when the collateral is crops. In People’s Bank, the Bank’s collateral was described as

“All crops of every kind grown or to be planted, heretofore or hereafter, within one year from date of the execution hereof, on lands commonly know and referred to as the Dewey Beavers Farm in Chicot and Ashley Counties, Arkansas, or at any other place in Chicot and Ashley Counties, Arkansas.

“Said crops to consist of 1,200 acres of soybeans, 28 acres of cotton, and 30 acres of rice. These crops to be planted on the following lands.”

253 Ark. at 278-79, 486 S.W.2d at 25. This was followed by accurate legal descriptions of three tracts of farm lands in Chicot and Ashley counties. Part of the debtor’s crops were ultimately purchased by Pioneer Food which was sued by the Bank for converting its collateral. Pioneer bought 7.6 acres of rice grown on one of the three tracts of land described in the security agreement; it also bought 360 acres of rice and soybeans grown in Chicot County on three other tracts of land which were not specifically described in the agreement. The Bank argued that Pioneer had converted all of these crops, but the trial court disagreed. It held that “the lands on which the crops were grown, harvested and sold to . . . . Pioneer were not described in the security agreement and under Section 85-9-203 . . . . Pioneer did not have the proper notice to be held liable in this action for conversion of the crops, except for the 7.6 acres of rice planted and harvested from certain lands that were specifically described in the security agreement.” Trial Court Findings as reported in Appellant’s Abstract and Brief at 11, People’s Bank v. Pioneer Indus., Inc., 253 Ark. 277, 486 S.W.2d 24 (1972). The Bankthus had no interest in the majority of the crops since the land where the crops grew was not sufficiently described for purposes of U.C.C. § 9-203(1). The Supreme Court of Arkansas affirmed this decision.

The casual reader of the opinion in People’s Bank might conclude that it requires legal descriptions of the land concerned when the collateral is growing crops. After all, the Bank prevailed only with respect to crops grown on a tract of land which was specifically described in the security agreement. Nevertheless, the court does not hold in this case that legal descriptions are the only sufficient descriptions of the land concerned under U.C.C. § 9-203(1). Nor does the court hold that general descriptions such as “all the crops grown in a certain county or on a certain farm” are always inadequate as a matter of law. The court does hold that when the land is described several different ways in a security instrument, the more specific description will control. In People’s Bank, the more general descriptions “all crops grown on the Dewey Beavers Farm or at any other place in Chicot and Ashley Counties” were expressly limited by another, more precise description. This other description describes the collateral by types of crops and gives exact locations of the tracts of land where
similar land description from the security agreement was not itself the basis of the holding in Piggott State Bank. Nevertheless, the description in the case would have been sufficient had it contained legal descriptions of the various plots of land where crops that served as collateral grew. This would have pinpointed the specific seven acres of cotton claimed as collateral by the secured party and isolated them among perhaps hundreds of acres of cotton growing on Karnes’ land. A legal description is probably the best way to describe the land concerned whenever a security interest is claimed in crops (or timber to be cut) that cover less than all of a geographically defined and recognizable unit. Suppose, however, that the debtor in Piggott State Bank grew exactly seven acres of cotton on Karnes’ land and that no one else was growing cotton there.\footnote{401} Suppose, also, that the collateral and the land were described as “all cotton grown by the debtor in 1965 on the lands of S. E. Karnes in Clay County, Arkansas.” This description does not run afoul of the principle enunciated in Piggott State Bank. No legal or other more specific description of the land concerned is needed for the purpose of isolating the collateral from other property of like kind. The collateral consists of all the cotton grown on Karnes’ land in Clay County, not a part of the cotton grown there which must be separated from the rest of the mass.

The only way to attack a description such as “all the cotton grown by the debtor in 1965 on the lands of S. E. Karnes in Clay County, Arkansas” is to argue that the description of the land itself, separate and apart from the description for isolation purposes, is legally insufficient. In

reach the argument made by the appellant [the Bank] that the general description, which encompasses “all crops” grown by Beavers on his farm or elsewhere in Chicot County, is alone sufficient inasmuch as appellant restricted this general description by limiting it to three crops (soybeans, cotton and rice) and specifying the exact number of acres of these different crops and then proceeded to give a legal description of only three of the six tracts on which these named crops and an unnamed crop (milo maize) were admittedly grown. We think the recited limitations restrict and control the general description, “all crops,” which is relied upon by appellant as being a sufficient description.

253 Ark. at 280, 486 S.W.2d at 27. Since the Bank thus restricted the description of the collateral, its security interest attached only to crops growing on lands specifically described in the security agreement. The lesson taught by People’s Bank is not that legal descriptions of the land concerned are required when the collateral is growing crops. The lesson is that if a secured party elects to describe the land by giving legal description, he had better be certain to so describe every tract where crops intended as collateral are growing.

401. The total acres of land the debtor was cultivating and whether or not other persons were also working the lands of Karnes and other landlords were questions unanswered by the facts in Piggott State Bank. See text accompanying note 397 supra. The court thus refused to “speculate upon what might have been the posture of the case if both these possibilities had been explained, for that is not the situation before us.” 243 Ark. at 161, 419 S.W.2d at 121.
People’s Bank v. Pioneer Food Industries, Inc., 402 the secured party argued that the following general description was sufficient: “‘All crops of every kind grown or to be planted . . . on lands commonly known and referred to as the Dewey Beavers Farm in Chicot and Ashley Counties, Arkansas, or at any other place in Chicot and Ashley Counties, Arkansas.’”403 (The court did not reach this argument, however, for the reason that other more specific language in the agreement narrowed the description.404) A description as general as this one in People’s Bank would probably have been sufficient under pre-Code chattel mortgage law in Arkansas.405 Litigants are still debating whether or not such a general description is a sufficient “description of the land concerned” under Article 9. In Channe Production Credit Association v.

402. 253 Ark. 277, 486 S.W.2d 24 (1972).
403. 253 Ark. at 278, 486 S.W.2d at 26.
404. The People’s Bank case is fully discussed at note 400 supra.
405. The Arkansas Supreme Court upheld the following descriptions of collateral contained in chattel mortgages covering crops: “‘All corn and cotton to be grown by him . . . [the debtor] on the farm belonging to Earl Keich.’” Blankenship v. Modglin, 177 Ark. 388, 389, 6 S.W.2d 531, 532 (1928) (This description was held valid despite the fact that Earl Keich had several farms in Craighead County, Arkansas); “‘Entire crop of cotton grown during the year 1920 on the Belmore Place, in Water Township, Conway County, Arkansas or any and all of corn and cotton I may have an interest in during the year 19— in said county, Arkansas.’” Lesser-Goldman Cotton Co. v. Hembree, 163 Ark. 88, 90, 259 S.W. 5, 6 (1924) (The court labeled “inmaterial” a mistake in naming the place on which the cotton was grown or the township where the place was located); “‘[F]ifteen acres of growing cotton, also seed in said cotton and four acres of growing corn, and ___ acres of growing wheat, and ___ of growing oats, and all other crops or produce I may have an interest in for the year 1914, to be planted and grown on the Anderson farm in Van Buren township, controlled by Louis Bryan, or anywhere else in Crawford County.’” First Nat’l Bank of Van Buren v. Cazort & McGhee Co., 123 Ark. 605, 186 S.W. 86 (1916) (The description was held adequate despite the fact that 25 acres of cotton were planted, not 15 as reported in the mortgage); “‘[E]ntire crop of cotton, cotton seed, corn, oats, small grain, and all other products which shall be grown or cultivated’ (by the mortgagor) ‘on S. G. Smith’s farm, or elsewhere, in Faulkner County, Arkansas, during the year 1911.’” Storthz v. Smith, 109 Ark. 552, 555, 161 S.W. 183, 184 (1913) (Description valid though the crop was not raised on the Smith farm because it was raised in Faulkner County); “‘All my crop of corn, cotton or other produce that I may raise, or in which I may have an interest, for the year 1884, in Faulkner County, Arkansas.’” Johnson v. Grissard, 51 Ark. 410, 11 S.W. 585, 585 (1889).

Pre-Code cases are, of course, not always controlling precedents on issues arising under Article 9. The Supreme Court of Arkansas has indicated, however, that “we have no hesitancy in relying upon such [pre-Code] decisions when they help us to decide whether, in the language of the Code, a description "reasonably identifies what is described."” Piggot State Bank v. Pollard Gin Co., 243 Ark. 159, 161, 419 S.W.2d 120, 121 (1967). It is questionable, however, whether decisions such as Henderson v. Gates, 52 Ark. 371, 12 S.W. 780 (1889) can be relied on for this purpose. The description held valid in Henderson was “‘[m]y entire crops, of cotton and corn to be raised by me the present year, or contracted by me.’” 52 Ark. at 372, 12 S.W. at 781. This description does not contain even a general “description of the land concerned” as Article 9 requires and might not be sufficient today. See generally, e.g., In re Mount, 5 UCC Rep. 653 (S.D. Ohio 1968); First Nat’l Bank of Atoka v. Calvin Pickle Co., 316 P.2d 283 (Okla. 1953). But compare generally, e.g., Farmers Nat’l Bank of Danville v. Bank of Danville, 29 UCC Rep. 1020 (Ky. 1980).
Weir Grain Supply, Inc.\textsuperscript{406} the land was described as “land owned or leased by the debtor in Cherokee County, Kansas.”\textsuperscript{407} Though the court conceded that something less than a legal description of the land would suffice under Article 9, it held that this description in a financing statement was insufficient as a matter of law. The \textit{Chanute} description is not as specific as that part of the general description in \textit{People’s Bank} which described the land by giving a common name of a particular farm, \textit{i.e.}, the Dewey Beavers Farm.\textsuperscript{408} Referencing a particular farm or lands makes it easier to identify the land concerned and the collateral growing on it by easing the burden of finding it. An interested third person would not be “required to make a general search of the record or a general inquiry in the county as to the lands leased [or owned or worked] by the debtor.”\textsuperscript{409} Requiring such an investigation might be so burdensome as to be unreasonable in some cases depending on the size of the county, the notoriety of the debtor and other factors. Thus a description which does not refer to a particular farm or lands might not “reasonably identify” what is described\textsuperscript{410} and, therefore, be legally insufficient for that reason alone.\textsuperscript{411}

Several courts have approved a standard form that the federal government sometimes uses when describing land in security documents. The form provides an additional detail not found in any part of the \textit{People’s Bank} general description. The additional detail is the location of the place where the crops are growing in relation to a geographical landmark such as a town. The Farmers Home Administration used the standard form in \textit{United States v. Oakley}\textsuperscript{412} when it loaned money to the debtor (Alfred Langer) and took a security interest in

\begin{quotation}
All crops, annual and perennial, and other plant products now planted, growing or grown, or which are hereafter planted or otherwise become growing crops or other plant products (a) within the one-year period or
\end{quotation}
any longer period of years permissible under state law, or (b) at any time hereafter if no fixed maximum period is prescribed by State law, on the following described real estate:

<table>
<thead>
<tr>
<th>Farm(s) or Other Real Estate Owner</th>
<th>Approximate No. of Acres</th>
<th>County and State</th>
<th>Approximate Distance and Direction from a Named Town or other Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alois Ledwig</td>
<td>260</td>
<td>White, Arkansas</td>
<td>3 1/2 Miles Southeast of McRae</td>
</tr>
</tbody>
</table>

Relying on Arkansas law, the federal district court concluded in *Oakley* that this description was legally sufficient under Article 9 for the purpose of perfecting a security interest.

"The object of the Code is to dispense, so far as possible, with long and laborious property descriptions." Nothing in the Arkansas statutes or case law indicates that a full legal description of real estate is required in a financing statement covering crops. The information in the financing statement, together with inquiry suggested therein, would enable a stranger to the transaction . . . to identify the crops.\(^\text{414}\)

The court was right insofar as it held that Arkansas law does not require a full legal description and that the description in this case as a description of the land concerned was satisfactory. This does not mean, however, that the description as a whole was legally sufficient under Article 9. No description is sufficient "unless it furnishes the data for separating the property intended to be mortgaged from the mass."\(^\text{415}\) The court appears to recognize that an isolation-of-collateral problem is lurking in *Oakley* and thus tried to distinguish *Piggott State Bank*:

The "carving out" of acreage found in the earlier case [*Piggott State Bank*] is not present here. The description under consideration covers "all crops" to be grown on the land in question.\(^\text{416}\)

Arguably, however, the description is still ambiguous. Do the "260 acres" referred to in the description constitute the total acres of the Ledwig farm? Only if the answer to this question is "yes" will the description be sufficient under the principle followed in *Piggott State Bank*. The reference to "260 acres" may well indicate the total size of the Ledwig farm, but the entry is labeled "approximate number of acres," not "approximate number of acres of the farm."\(^\text{417}\) The reference to "260 acres" may only be a general indication of the size of the farm.\(^\text{418}\)

\(^{413}\) 483 F. Supp. at 763 (emphasis added).
\(^{414}\) 483 F. Supp. at 765.
\(^{416}\) 483 F. Supp. at 764.
\(^{417}\) Undoubtedly, the whole purpose of the four separate entries ("farm(s) or other real estate owner," "approximate no. of acres," etc.) is, according to the instrument itself, to describe the real estate. But is the real estate there described the Ledwig farm generally or...
indicate (a) the total number of acres of crops grown by the debtor on the Ledwig farm (regardless of the total acres that comprise the farm) or (b) the number of acres the debtor grows on the farm which are covered by the government’s security interest (regardless of the total acres the debtor cultivates on the farm). The Ledwig farm may be many hundreds of acres of land leased to several different tenants, and the debtor himself may have been cultivating more than 260 acres there. A reasonable interpretation of the description in Oakley is “all the crops to be produced on 260 acres of Alois Ledwig’s farmland” or “260 acres of all crops to be produced on the farmland of Alois Ledwig.” Neither of these descriptions nor the actual one is more precise than the one in Piggott State Bank. The problem with such a description, i.e., failing to pinpoint specific acreage, is not remedied simply by modifying “crops” with the word “all.”419 “All crops growing on . . . 260 acres” does not describe the particular 260 acres of all crops in which the government claimed a security interest. The “all” modifier as used in this case does not serve to isolate which acres among perhaps many hundreds were the ones where the specific crops grew. Any ambiguity as to the meaning of the reference to “260 acres” should have been resolved against the drafter of the security instrument,

despite the particular real estate, i.e., the number of acres on that farm, where the crops will grow? This is the ambiguity. The answer may be “both,” meaning that the Ledwig farm consists of 260 acres all of which are cultivated by the debtor. The document, however, does not clearly establish that this is true nor completely dispel legitimate doubts about how the reference to “260 acres” should be interpreted. The ambiguity caused by the format of the government’s standard form is obvious to more than one person. See In re Colbert, 22 UCC Rep. 511 (N.D. Miss. 1977), where the court said “one cannot help but wonder . . . whether the number of acres stated opposite the name of each land owner constitutes all of the land which that land owner owns in the particular vicinity, or whether the acreage mentioned is only part of a larger tract.” Id. at 513 n.3. See also United States v. Riceland Foods, Inc., 504 F. Supp. 1258 (E.D. Ark. 1981). The court in Colbert was prevented from finding that the security instrument was legally insufficient because, said the judge deciding Colbert, “I am bound by [Chief] Keady’s decision in Smith.” Id. The case he refers to is United States v. Smith, 22 UCC Rep. 502 (N.D. Miss. 1977). Smith also involved the sufficiency of a description in a crops case where the government used a standard form security instrument apparently identical to that used in Oakley. The court in Smith failed completely to realize the existence of an ambiguity in the description and, in its discussion of the sufficiency of the description of the collateral, did not even cite, much less discuss the relevance of, the decision in Piggott State Bank.

418. The average size farm in Arkansas is 287 acres, but in some counties the average farm size is far more than this. For example, in Crittenden County, the average is 960 acres; in Washington, it is 1,305 acres; but in White County, where the Ledwig farm was located, the average is only 236 acres. See U.S.D.A. Economics, Statistics and Cooperatives Service, 1978 Agricultural Statistics for Arkansas 10-11 (1979).

419. The description in Piggott State Bank also provided that the collateral consisted of “all of the following crops.” Piggott State Bank v. Pollard Gin Co., 243 Ark. 159, 160, 419 S.W.2d 120, 121 (1967). Therefore, the collateral was all of the 7 acres of cotton to be produced in the lands of S. E. Karns. This fatally defective description is no worse than “all of the crops to be grown on 260 acres of A. Ledwig’s farmland” or “all of the 260 acres of crops to be grown on the farmland of A. Ledwig.”
the government, which produced no evidence concerning what was meant by the reference or showing that, in fact, the Ledwig farm consisted of only 260 acres. Arguably, therefore, the Oakley case was wrongly decided because, to paraphrase language from the Piggott State Bank opinion, neither the security instrument nor the stipulated facts and other evidence shed sufficient light on the questions (a) whether the debtor Langer grew exactly 260 acres of crops on the Ledwig farm and (b) whether anyone else was also growing crops there.

420. This seems especially true in a case such as Oakley. The defendant was not a party to the security agreement between the Farmers Home Administration and the debtor, Langer. The issue in the case was the validity of the description in a financing statement, the very purpose of which is to notify third parties such as the defendant that the creditor may have an interest in the property there described. Third parties should be able reasonably to identify the collateral on the basis of the description, and not be confused or trapped by ambiguities created by draftsmen with whom the third party never dealt.

421. The Oakley case was submitted to the court for decision on a set of stipulated facts, exhibits and affidavits. The government argued in one of its motion briefs that “the secured debtor, Alfred C. Langer, leased all of the property owned by his lessee, Alois Ledwig, in White County, Arkansas, for the 1977 crop year.” Plaintiff’s Memorandum Brief in Support of Motion for Summary Judgment at 3, United States v. Oakley, 483 F. Supp. 762 (E.D. Ark. 1980). The evidence considered by the court, however, is devoid of proof to support the government’s assertion. The stipulated facts do not establish the size of Ledwig’s farm, and no exhibit or affidavit filed with the court contains information regarding this issue. Rather than clarifying the factual issue, the evidence itself demonstrates the ambiguity concerning the meaning of the reference in the security document to “260 acres.” The person who made the loan to the debtors in the Oakley case stated in his affidavit that the collateral consisted of “all crops grown by them during the year 1977, upon a certain 260 acres of land in White County, Arkansas, owned by Alois Ledwig.” Affidavit of George W. Smith (Farmers Home Administration Supervisor for White County), id. (emphasis added). A description of the land as a certain 260 acres does not reveal whether those acres comprised all the land owned by Ledwig, nor does it explain whether 260 acres was the total size of the farm where the debtors’ crops were growing. The word “certain” is most often used in a context such as this when the speaker wishes to avoid giving descriptive details; instead of answering questions, use of the word creates them as in this case.

Suppose that there had been extrinsic evidence favorable to the government concerning this issue. It is not clear that the court could have legitimately considered the evidence for the purpose of clarifying the description in the security instrument. The opinion in Piggott State Bank v. Pollard Gin Co., 243 Ark. 159, 419 S.W.2d 120 (1967), might be read to imply that such evidence is admissible, but the court in Piggott State Bank did not decide this issue. The courts have generally failed to agree about the admissibility of extrinsic evidence to aid in the interpretation of a description of collateral in disputes between the immediate parties, i.e., the creditor and the debtor. See authorities cited note 354 supra. Considering extrinsic evidence is even more difficult to justify in a case such as Oakley where the issue is the sufficiency or interpretation of a description as against a third party who played no role whatsoever in drafting or executing the security instrument.

422. See Piggott State Bank v. Pollard Gin Co., 243 Ark. 159, 161, 419 S.W.2d 120, 121 (1967). Other cases where the security instrument is equally as ambiguous as the one in Oakley and that suffer from the lack of similar evidence are perhaps also wrongly decided. See generally, e.g., In re Colbert, 22 UCC Rep. 511 (N.D. Miss. 1977); United States v. Smith, 22 UCC Rep. 502 (N.D. Miss. 1977); United States v. Big Z Warehouse, 311 F. Supp. 283 (S.D. Ga. 1970); Mammoth Cave Prod. Credit Ass'n v. Oldham, 569 S.W.2d 833 (Tenn. App. 1977). Only one of these courts realized that lurking in the security instrument was an ambiguity of the sort discussed in this article. See text accompanying notes 389-422 supra.
b. Debtor’s Signature

A written security agreement must be signed by the debtor.423 If the “debtor” fails to “sign” the agreement, the requirements for creating a security interest have not been satisfied; no security interest attaches; and none exists to enforce against anyone.424 The signature requirement

The judge deciding the Colbert case recognized the problem but felt compelled to follow the decision in Smith, a case decided by the chief judge in the judicial district who apparently failed to recognize the ambiguity. It is also important to consider that some courts may implicitly reject the reasoning of Piggott State Bank and believe that despite the isolation-of-collateral problem, a description such as the one involved in that case is sufficient to put the world on notice of an interest in at least some of the crops. Courts obliged to follow Arkansas precedents are not at liberty to depart from them, however. (And in the recent case United States v. Riceland Foods, Inc., 504 F. Supp. 1264 (E.D. Ark. 1981), involving a security agreement essentially identical to that in Oakley, Judge Henry Woods applying Arkansas law recognized that “substantial questions involving ‘isolation of collateral’ often are involved in cases wherein security interests in crops are at issue.” But, perhaps unfortunately, the parties in the Riceland Foods case failed to raise this issue for Judge Woods’ decision.) It may have been true in Oakley, for example, that Ledwig’s farm consisted of only 260 acres; it may be true that the financing statement revealed enough information to warrant a third person such as the defendant going to the farm and discovering this fact for himself. Similar truths were possible in Piggott State Bank, but the court still concluded that the description was legally insufficient.

There is one way arguably to reconcile the decisions in Piggott State Bank and Oakley even if the ambiguity in the latter case concerning the meaning of the reference to “260 acres” is construed against the secured party. In Piggott State Bank, the court held that the land description in a combined security agreement and financing statement was insufficient. The court did not explain whether the description was inadequate for purposes of U.C.C. § 9-203 or § 9-402 or both sections. The same result would have been reached if the court had held only that the description was insufficient under § 9-203(1)(a). (Because it failed to satisfy the requirements of this section, the Bank acquired no interest in the crops to assert against anyone. See text accompanying notes 325-332 supra.) Thus the Piggott State Bank decision may have precedential value only on the issue of the adequacy of a description of collateral in a security agreement. In the Oakley case, too, the same description appeared in the security agreement and financing statement; but the only issue argued or decided was the sufficiency of the description in a financing statement. Therefore, the two cases can arguably be reconciled on the basis that a description in a financing statement need not be as precise as that in a security agreement. Some courts take this position with respect to descriptions of the collateral itself. See authorities cited note 366 supra. The Arkansas Supreme Court apparently does not, however. See text accompanying notes 356-366 supra. (The assumption is that the test for the sufficiency of land descriptions also does not vary under U.C.C. §§ 9-203(1)(a) and 9-402(1). See note 393 supra.) Thus Piggott State Bank and Oakley cannot be reconciled under Arkansas law unless the ambiguity lurking in Oakley is ignored completely or interpreted in favor of the document’s drafter.


424. See U.C.C. § 9-203(1). The debtor’s approval of changes in the security agreement must also be evidenced by the debtor signing the document again. See In re Dykes, 20 UCC Rep. 524 (E.D. Tenn. 1976).

Sometimes the debtor signs an incomplete document in the form of a security agreement which the secured party later completes. Most courts hold that such a document
poses few problems. Occasionally, the courts are asked to consider whether or not a debtor has "signed" a document if his name is typed or printed there. The Code defines "signed" to include "any symbol executed or adopted by a party with present intention to authenticate a writing." Thus the issue is never the sufficiency of the graphic mark itself; rather "[t]he question always is whether the symbol was executed or adopted by the party with present intention to authenticate the writing." This is consistent with the common law rule in Arkansas which is that a person can freely use any character, symbol, figure or designation he [thinks] proper to adopt as a signature and be bound thereby, provided it [is] used as a substitute for his name. A signature may be by initials only. Printing, typing or stamping a name in the place where a signature should appear is sufficient, if it is intended as a signature.

In some cases another person may sign for the debtor. Such a signature is legally effective and binding if made by an authorized representative or adopted by the debtor. A representative will always sign the security agreement when the debtor is a corporation. The representative will usually name the corporation and indicate his representative capacity; but Article 9 does not require him to do this or to follow any other particular form in order to bind the corporate entity.


426. U.C.C. § 1-201(39).

427. [A] complete signature is not necessary. Authentication may be printed, stamped or written; it may be by initials or by thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. No catalog of possible authentications can be complete and the court must use common sense and commercial experience in passing upon these matters. U.C.C. § 1-201, Comment 39. Even a telex test key verifying code may operate as a signature. See Miller v. Wells Fargo Bank Int'l Corp., 406 F. Supp. 452, 483 n.36 (S.D.N.Y. 1975).

428. U.C.C. § 1-201, Comment 39.


430. Cf. Provident Fin. Co. v. Beneficial Fin. Co., 36 N.C. App. 401, 245 S.E.2d 510 (1978). In this case the debtor's wife signed a financing statement for him. The court said that this did not operate as the debtor's signature because (1) no suggestion of agency could be found in the wife's signature (and the mere fact of a marital relation does not establish agency) and (2) nothing suggested that the debtor had adopted his wife's signature as his own. Also, cf. Southwest Bank of Omaha v. Moritz, 203 Neb. 45, 277 N.W.2d 430 (1979) (another case involving the sufficiency of a financing statement where the wife of a debtor signed for him).

Sometimes there may be a problem deciding who is a “debtor” required to sign a security agreement for purposes of section 9-203(1)(a).\(^{432}\) Ordinarily, the person who owns the collateral is the person who owes the obligation to the secured party; occasionally, however, the owner and the obligor are not the same person. In this situation, when “one person furnishes security for another’s debt,”\(^{433}\) each of them may be a “debtor” which is defined as

the person who owes payment or other performance of the obligation secured, whether or not he owns or has the rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term “debtor” means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.\(^{434}\)

When the transaction involves an obligor who is not the owner of the collateral, are the obligor and owner “debtors” who must both sign the security agreement? The answer is “yes” if section 9-203(1)(a) is a “provision”\(^{435}\) which “deals with”\(^{436}\) both the obligation and the collateral. At

90 S.D. 467, 242 N.W.2d 666 (1976) (but corporate seal was impressed on the document near the representative’s signature). State law other than Article 9 may require that a certain form be followed. The general rule under non-Code law is that “[t]he signature of a properly authorized agent, with or without an indication of the existence or identity of the principal is sufficient to satisfy the terms of the usual Statute of Frauds,” W. Seavey, HANDBOOK OF THE LAW OF AGENCY § 56 at 102 (1964), and U.C.C. § 9-203 is in the nature of a statute of frauds. See U.C.C. § 9-203, Comment 5. Nevertheless, state statutory law may provide otherwise. See, e.g., Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976). State law may also prevent a corporate entity from being bound by any representative or from effecting a security interest until the entity is legally established. See generally, e.g., Framingham Sav. Bank v. Szabo, 617 F.2d 897 (1st Cir. 1980).

Most agents have gotten in the habit of signing for their principals by naming the person represented and indicating the representative capacity in which they sign. Representatives must do this to avoid personal liability when they sign negotiable instruments. See U.C.C. § 3-403. See also, e.g., Fanning v. Hembree Oil Co., 245 Ark. 825, 434 S.W.2d 822 (1968); Rushton v. U.M. & M. Credit Corp., 245 Ark. 703, 434 S.W.2d 81 (1968); Chiles v. Mann & Mann, Inc., 240 Ark. 527, 400 S.W.2d 667 (1966). Can a representative be liable on a security agreement for the debt created or evidenced by a non-negotiable security agreement if he fails to follow the form prescribed by U.C.C. § 3-403? The answer should be “no” because this section has no direct applicability to Article 9 transactions; it deals only with liabilities on negotiable instruments. That aside, why should a representative be held liable for such a debt if the law is that no special form is necessary to bind a corporation or other principal on a security agreement? But see generally Blayton v. Ford Motor Credit Co., 118 Ga. App. 517, 164 S.E.2d 262 (1968).

432. This same problem arises in other contexts under Article 9. For example, an often litigated issue concerns who is a debtor entitled to notice of a foreclosure sale conducted pursuant to Part V of Article 9. See, e.g., Norton v. National Bank of Commerce of Pine Bluff, 240 Ark. 143, 398 S.W.2d 538 (1966). The problem of deciding who is the “debtor” may also arise in contexts other than Article 9 but related thereto. See generally, e.g., International Harvester Credit Corp. v. Hurst, 267 Ark. 624, 594 S.W.2d 582 ( Ct. App. 1980).

433. U.C.C. § 9-105, Comment 2.

434. U.C.C. § 9-105(1)(d) (emphasis added).

435. Each section of Article 9 is presumably a “provision.” But is each numbered and
least indirectly, the section has to do with the obligation. The writing it
requires is a prerequisite to the existence of a non-possessory security in-
terest that has only one purpose, i.e., to secure the payment or perform-
ance or an obligation.\textsuperscript{437} There can be no security interest or any need
for one without an obligation to secure. The obligation arises in the usual
case because the creditor has given value to the obligor, a fact frequently
documented in the security agreement along with other terms dealing
with the obligation. Even in the absence of a nexus between section 9-
203(1)(a) and the obligation, the obligor's signature is arguably required
at least in those cases where (a) the obligor and the owner of the collateral
reach some independent understanding about the obligor's use of the
property as collateral and (b) the security arrangement is negotiated only
by the creditor and the obligor who is the person who purports to grant a
security interest in the property concerned. Neither the evidentiary nor
statute of frauds function of the section 9-203(1)(a) writing is fully served
in these cases unless the obligor's signature is required regardless of who
owns the collateral.\textsuperscript{438} This is true because in such cases the security
agreement itself is between the obligor and the creditor, and it exists at
least in part to evidence their own understanding with respect to all the
terms of the secured transaction, including those terms having to do with
the collateral.\textsuperscript{439} Contrast these cases with those where the owner serves
as a limited \textit{quasi in rem} guarantor, dealing directly with the secured party
and pledging his property (though not his personal liability) to secure the
obligor's obligation to the creditor. Here the security arrangement is ne-
lettered sub-part of every section also considered a provision? When deciding whether a
provision deals with the collateral or the obligation or both should the entire section be con-
sidered or only the sub-part that contains the term "debtor"? This is an interesting issue,
but it makes no real difference in the present context whether § 9-203 generally or § 9-
203(1)(a) is the unit that is analyzed.

\textsuperscript{436} Neither U.C.C. § 9-105(1)(d) nor the commentary to the section gives any hint
about what is meant by "dealing with." Obviously, the provision must have something to
do with the collateral or obligation or both; presumably, it must relate to, prescribe or postulate
something about one or both of them. But there is no suggestion about how clear and
strong the nexus must be. Perhaps the problem is more easily solved by considering com-
mmercial, practical and policy reasons on the question of who is included within the term
"debtor" as it is used in a particular provision and context.

\textsuperscript{437} \textit{See} U.C.C. § 1-201(37) (the definition of "security interest").

\textsuperscript{438} It is clear that the U.C.C. § 9-203(1)(a) writing serves both these functions. \textit{See}
U.C.C. § 9-203, Comments 3 & 5.

\textsuperscript{439} Perhaps relevant, too, is the notion that when the owner non-obligor reaches an
agreement with the obligor about the use of the owner's property as collateral, the obligor
has some right of his own with respect to the collateral, i.e., a license to use the property for a
limited purpose. It can be argued that in this limited sense, the obligor himself becomes an
"owner" of the collateral. Therefore, whether U.C.C. § 9-203(1)(a) deals with the obligation
or the collateral, the obligor is a "debtor" whose signature is required on the security agree-
ment. This argument is weakened by the definition of "debtor" which itself suggests a clear
distinction between an "owner" (who presumably has title) and someone who only has
negotiated by the owner and the creditor who reach their own agreement. Even in this type case, however, the obligor has an interest in the terms of the security agreement which may somehow ultimately affect his own responsibility to the creditor. Thus, for reasons of policy if no others, the obligor’s signature may always be required on the security agreement regardless of how the arrangement is negotiated and structured.

An argument can easily be made that the owner non-obligor must also sign the section 9-203(1)(a) writing in every case as a condition to enforcing a security interest against his property. First, the section arguably “deals with” the collateral because it requires a description of the property in the written security agreement; thus the term “debtor” as used in the section means at least the owner of the collateral.\textsuperscript{440} Second, one of the purposes of the section 9-203(1)(a) writing is to minimize “the possibility of future dispute as to the terms of the security agreement and as to what property stands as collateral for the obligation secured.”\textsuperscript{441} Avoiding such disputes is obviously important to both the obligor and the owner of the collateral, but the owner’s concern is perhaps greater than the obligor’s. It is, after all, the owner’s property that will be repossessed and sold when the obligor defaults. There is, on the other hand, an argument that the owner non-obligor need never sign a security agreement. The drafters apparently envisaged the possibility of a creditor having an enforceable security interest in property that unbeknownst to him is owned by someone other than the obligor. This situation would be impossible if the owner non-obligor’s signature is always required on the security agreement. No security interest could attach to the owner’s property absent his signature; and once he signed the document, the secured party would know who actually owns the collateral. Section 9-112 provides that the secured party owes certain duties to the owner of collateral who is not the obligor only “when a secured party knows that collateral is owned by a person who is not the debtor [\textit{i.e.}, the obligor].”\textsuperscript{442} Only the duties imposed by this section “are conditioned on the secured party’s knowledge of the true state of facts;”\textsuperscript{443} the existence and enforceability of the security interest against the owner non-obligor are not so conditioned. This strongly implies (1) that a security interest can exist though the secured party does not know who actually owns the collateral (which would never be the case if the owner’s signature is required on the security agreement) and thus (2) that the owner non-obligor need not sign the section 9-203(1) writing as a condition to the enforceability of a security interest in

\textsuperscript{440} See generally, \textit{e.g.}, Little v. County of Orange, 31 N.C. App. 495, 229 S.E.2d 823 (1976).

\textsuperscript{441} U.C.C. § 9-203, Comment 3.

\textsuperscript{442} U.C.C. § 9-112.

\textsuperscript{443} \textit{Id.}, Comment.
property that he owns and has allowed the obligor to use as collateral.\textsuperscript{444} There is also a meta-Code argument\textsuperscript{445} to the effect that in a typical case the owner non-obligor need not sign a security agreement. The obligor himself usually has some right with respect to the collateral even though he does not "own" the property, i.e., the right given him by the owner of the property to use it as collateral. This right is perhaps a "right in the collateral"\textsuperscript{446} and thus sufficient in itself to support the existence of a security interest. If the owner is estopped to deny this right in the obligor because of an explicit agreement between the owner and the obligor or for some other reason, perhaps the security interest is enforceable against the property concerned even though the owner has not signed a security agreement.\textsuperscript{447} The obligor in such a case has "rights in" or at least, rights with respect to the collateral that are given by the owner but that are independent of his own rights in the property.

If an owner non-obligor is a "debtor" as that term is used in section

\textsuperscript{444} Mauch v. First Nat'l Bank of Prague, 4 UCC Rep. 831 (Okla. 1967), suggests that an owner non-obligor need not sign a security agreement. In this case, the obligor's loan from a bank was secured by an interest in cattle which belonged to the obligor's brother. Apparently the owner did not sign any security agreement, and the bank was unaware of the brother's ownership until it attempted to establish its priority with respect to the collateral. This case is not clear authority on the issue of the need for an owner non-obligor's signature on a security agreement because the court does not discuss the issue directly, though it does cite U.C.C. § 9-112. The issue may not have been raised. It appears that the owner defended not on the basis of a lack of a writing between him and the bank, but on the basis that no writing was executed between him and the obligor. This case is also suspect authority on any Article 9 issue because the security arrangement between the bank and the obligor was first effected in 1956, several years before Oklahoma adopted the Code. Thus Article 9 might not have been the applicable law on the secured transactions issues.

In Recchio v. Manufacturers & Traders Trust Co., 55 Misc.2d 788, 286 N.Y.S.2d 290 (1968), a corporation was the obligor, and the collateral was a motor home owned by the corporation's president, Barbara Dee. Ms. Dee signed the security agreement and indicated that she was president of the company which was listed as the debtor on the security agreement. If Ms. Dee signed in a representative capacity and not for herself individually, this case also suggests that the owner non-obligor need not sign a security agreement. If she signed for herself, then it suggests that the obligor need not sign. Could she in a single stroke have signed for both herself and the corporation?

\textsuperscript{445} A meta-Code argument is one based in whole or in part on common law rules and equitable principles that supplement provisions of the Code unless displaced by them. \textit{See} U.C.C. § 1-103. The term "meta-Code" as used in this context is attributable to Columbia's Professor William F. Young, Jr. \textit{See} Young, \textit{Bank Review}, 66 \textit{COLUM. L. REV.} 1571 (1966).

\textsuperscript{446} \textit{See} authorities cited at notes 521 & 522 \textit{infra}. One of the prerequisites to the attachment of a security interest is that the debtor have "rights in the collateral." \textit{See} U.C.C. § 9-203(1)(c). This requirement generally is discussed later in this article at text accompanying notes 505-582 \textit{infra}.

\textsuperscript{447} \textit{See} authorities cited at note 526 \textit{infra}. U.C.C. § 1-103 specifically provides that estoppel is among the principles of law and equity that supplement the Code unless displaced by its provisions. Estoppel is one of the meta-Code doctrines courts have traditionally used to avoid injustice and harsh results caused by statutes of frauds, including such statutes that are part of the Code. \textit{See generally} authorities cited in Nickles, \textit{supra} note 275, at 70-71 n.568.
9-203(1)(a), no security interest is enforceable against his property (aside from the meta-Code estoppel theory)\(^{448}\) unless the owner has signed a security agreement.\(^{449}\) A secured party who fails to obtain the owner’s signature may not be totally unsecured, however. The obligor (who presumably has signed the agreement) may have some right or interest of his own in the collateral that exists independently of any right given him by the owner non-obligor to use the property as collateral. This is also true if an obligor purports to use the property of another as collateral without the owner’s approval to do so. In \textit{Clearfield State Bank v. Contos},\(^{450}\) a bank loaned James Contos money and collateralized the loan with a security interest in household goods that the borrower owned jointly by the entirety with his wife. Mrs. Contos did not sign the security agreement or otherwise consent to the transaction. This was a case where “the debtor (defendant James Contos) pledge[d] someone else’s (his wife’s) property without authority to do so.”\(^{451}\) Thus the court held that

Mrs. Contos had an ownership interest in this property superior to the plaintiff’s [the bank’s] interest therein. . . . The general rule is that where a husband and wife hold property so acquired as joint owners, they are presumed to be tenants by the entirety. However, it is also true that either spouse may transfer his interests in the property so held without affecting the interests of the other.\(^{452}\)

Nevertheless, the bank prevailed in this action to foreclose its security interest, an interest that attached only to whatever alienable interest Mr. Contos had in the property. The existence of the wife’s joint property interest that was unencumbered by the bank’s security interest did not prevent the bank from winning possession of the property. The court concluded in this case that “we are not aware of any doctrine of law or equity which enables a party to an action . . . to assert as an effective defense the fact that a third person, not a party to the action, . . . also has an interest in the property.”\(^{453}\) Suppose, however, that the wife had been a party to the action and resisted the bank’s attempt to gain possession of

\footnotesize{\(^{448}\) See text accompanying notes 445-447 supra.  

\(^{449}\) When the owner of the collateral and the obligor are not the same person, the cautious secured party will always have both of them sign a security agreement. He should also have both the owner and the obligor sign the financing statement if such a document is needed to perfect the security interest. U.C.C.§ 9-402(l) requires that the debtor’s name (along with an address) and signature appear on the financing statement. Several courts have suggested that “debtor” in this context means both the obligor and the owner of the collateral. \textit{See generally, e.g.}, K.N.C. Wholesale, Inc. \textit{v.} AWWCO, Inc., 55 Cal. App. 3d 43, 127 Cal. Rptr. 208 (1976); White Star Distrib., Inc. \textit{v.} Kennedy, 66 A.D. 2d 1011, 411 N.Y.S.2d 751 (1978).  

\(^{450}\) 562 P.2d 622 (Utah 1977).  

\(^{451}\) 562 P.2d at 624.  

\(^{452}\) \textit{Id.}  

\(^{453}\) \textit{Id.} at 625. \textit{But see generally, e.g.}, Robinson \textit{v.} Calloway, 4 Ark. 94 (1842); J. Cobbe, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN §§ 219-243 (1890).}
the property. Would the court have reached the same ultimate decision to give possession of the property to the secured party for the purpose of foreclosing the husband's interest? An Arkansas court might not reach this decision in such a case. Tenancies by the entirety in personal property are recognized in Arkansas.\footnote{Undoubtedly, each spouse can convey or encumber his or her own interest (including the right of survivorship) but cannot unilaterally transfer or otherwise affect the interest of the joint owner. This is certainly the rule when the tenancy is in real property, and there is no reason to question its applicability to tenancies by the entirety in personality. It is also the rule with respect to such estates in real property that A purchaser of the interest of one tenant cannot oust the other tenant from possession, and can only claim one-half of the rents and profits. The remaining tenant is not only entitled to possession plus one-half of the rents and profits, but the right of survivorship is not destroyed or in anywise affected.} \footnote{See generally, e.g., \textregistered United States v. 339.77 Acres of Land, 240 F. Supp. 545 (E.D. Ark. 1965); \textregistered Sieb's Hatcheries, Inc. v. Lindley, 111 F. Supp. 705 (W.D. Ark. 1953), \textregistered 209 F.2d 674 (8th Cir. 1954); \textregistered Freeman v. Freeman, 250 Ark. 909, 467 S.W.2d 703 (1971); \textregistered Gardner v. Bullard, 241 Ark. 75, 406 S.W.2d 368 (1966); \textregistered Ellis v. Ashby, 227 Ark. 479, 299 S.W.2d 206 (1957); \textregistered Franks v. Wood, 217 Ark. 10, 228 S.W.2d 480 (1950); \textregistered 207 Ark. 940, 184 S.W.2d 259 (1944); \textregistered Campbell v. Carlisle, 190 Ark. 1103, 38 S.W.2d 536 (1944); \textregistered Moore v. Benson, 167 Ark. 134, 268 S.W. 609 (1924); \textregistered Dennis v. Dennis, 152 Ark. 187, 238 S.W. 15 (1922); \textregistered Roulston v. Hall, 66 Ark. 305, 50 S.W. 690 (1899); \textregistered Simpson v. Biffle, 63 Ark. 289, 38 S.W. 345 (1896); \textregistered Branch v. Polk, 61 Ark. 388, 33 S.W. 424 (1895); \textregistered Foshee v. Murphy, 593 S.W.2d 486 (Ark. Ct. App. 1980). For a good general discussion, see \textregistered Laster, Estates by the Entirety in Arkansas, 6 U. Ark. L. Sch. Bull. 13 (1937).} 

\footnote{Sieb's Hatcheries, Inc. v. Lindley, 111 F. Supp. 705, 716 (W.D. Ark. 1953), \textregistered 209 F.2d 674 (8th Cir. 1954). And see authorities among those cited in note 455 supra. Thus the rule in Arkansas is that Each spouse . . . has a one-half interest which he or she can convey or encumber as he desires, or which may be subjected to sale to satisfy his or her individual debts. Such conveyance, whether voluntary or involuntary, or encumbrance will not operate, however, to deprive the other cotenant of either his right to possession or his contingent right of survivorship.} 

\footnote{\textregistered American Law of Property § 6.6 at 28-29 (A. Casner ed. 1952). These authorities do not explain whether or not the debtor-tenant's creditor or buyer from him is entitled to share the right of possession with the debtor's spouse.} 

But compare the rights of a trustee in bankruptcy. In some cases, the trustee may partition or sell property held by the entirety in order to satisfy claims against the individual estate of the debtor spouse. See \textregistered 11 U.S.C.A. § 522(b)(2)(B) (1979). For discussion, see \textregistered Ackerly, Tenants by the Entirety Property and the Bankruptcy Reform Act, 21 W. & M. L. Rev. 701 (1980); Comment, The Bankruptcy Code of 1978 and Its Effect Upon Tenancies by the Entireties, 13 IND. L. REV. 761 (1980).}
Thus, when a debtor owns real estate in the entirety with his spouse, a creditor can reach the debtor's interest and sell it;\textsuperscript{457} but the buyer of such an interest only acquires an immediate right to one-half the rents and profits. He cannot dispossess the non-debtor tenant of possession, and this tenant retains the right of survivorship. The buyer's gamble\textsuperscript{458} pays off fully only if the non-debtor tenant predeceases his or her spouse. If this rule is applied to tenancies by the entirety in personal property, a security interest in only one tenant's ownership rights may not be enforceable by seizing the property itself and selling it to realize on just the debtor's interest; and though the debtor does have an interest that can be sold, its value as collateral will in many cases be next to nothing. Personal property rarely produces rents and profits; and while a right of survivorship in real estate may be worth buying,\textsuperscript{459} seldom will such a right be valuable when the property is personality which lacks the durability and infiniteness of realty.\textsuperscript{460}

\textsuperscript{457} See generally authorities among those cited in note 455 supra.

\textsuperscript{458} Here is the gamble:

Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survives the conveyance becomes effective to pass the whole estate as it would had he been sole seized at the time of the conveyance.


[A conveyance of an undivided half interest by one tenant [of the entirety] does not purport to convey his whole interest. The deed [of one of the tenants] can have no effect after his death. When that happen[s], [the other tenant becomes] the sole owner, [the interest of the grantor tenant] passing to her by right of survivorship. If [the grantor's grantee] has any lien upon [the survivor's] land, it must be by force of her own deed, for she did not join in the deed of her husband, and is not affected by it.

Branch v. Folk, 61 Ark. 388, 392-93, 33 S.W. 424, 425 (1895).

If the nondebtor spouse survives, the survivor takes free from the claims of the deceased spouse's creditors. If, however, the debtor-spouse survives, the purchase of his interest on execution sale has complete ownership.


\textsuperscript{459} But see Jennings v. Tankersley Bros. Packing Co., 218 Ark. 776, 238 S.W.2d 625 (1951), where one of the issues concerned the sufficiency of a sale of a right to survivorship in real property worth $5000 that rented for as much as $55 per month. The sale of the interest of one tenant by the entirety brought only $250. The trial court refused to order another sale, and this decision was affirmed.

460. How do you value one tenant's interest in property owned by the entirety with a spouse? "Since the estate cannot be ended by the act of either tenant alone, the value of either covenanted interest in the property must be calculated actuarially and depends upon the relative age of each covenanted." Warner, Tenancies by the Entirety—An Estate Planner's Dilemma, 23 Ark. L. Rev. 44 (1969).

As Mr. Warner suggests, a tenancy by the entirety cannot ordinarily be partitioned involuntarily without the consent of both tenants. See generally, e.g., Davies v. Johnson, 124 Ark. 390, 187 S.W. 323 (1916); 4 G. Thompson, supra note 458, § 1824 at 298; 2 H. Tiffany, The Law of Real Property § 436 (3d ed. B. Jones ed. 1939). (There are statutory
c. Language Granting Or Creating A Security Interest 
(Stuff An "Agreement" Is Made Of)

Section 9-203(1)(a) literally provides that the debtor must sign a "security agreement" defined as "an agreement which creates or provides for security." Therefore, the view shared by most courts is that the section 9-203(1)(a) writing is sufficient only if it contains language actually creating or providing for a security interest. Many of these courts are satisfied as long as there is some "language . . . in the instrument which when read and construed leads to the logical conclusion that it was the intention of the parties that a security interest be created." Other exceptions to this general rule. See, e.g., Ark. Stat. Ann. § 34-1215 (Supp. 1979); Ark. Stat. Ann. § 34-1801 et seq. (Repl. 1962 & Supp. 1979.) Thus, for example, "[a] purchaser of one tenant's interest on execution sale becomes a tenant in common with the other spouse, but, like the debtor tenant, cannot force partition." 44 A. Powell, supra note 458, ¶ 623 at 703. See also, regarding the right of a bankruptcy trustee to force partition, note 456 supra.


462. U.C.C. § 9-105(1)(b). "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act. U.C.C. § 1-201(3).

463. See generally cases cited in Nickles, supra note 275, at 50-51 nn.530-531. But the U.C.C. § 9-203(1)(a) requirement

that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security. Under this Article as under prior law a debtor may show by parol evidence that a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgement of satisfaction.

U.C.C. § 9-203, Comment 4. The rule in Arkansas is "that one who seeks to convert an absolute conveyance into a defeasance instrument has the burden of proving the defeasance by evidence that is clear, unequivocal, and convincing." Geominerals Corp. v. Grace, 232 Ark. 524, 529, 338 S.W.2d 935, 938 (1960).

464. In re Nottingham, 6 UCC Rep. 1197, 1199 (E.D. Tenn. 1969). The "Nottingham Rule" is frequently quoted and applied by the courts. See generally authorities among those cited at Nickles, supra note 275, at 50-51 nn.530-531. See also, e.g., Sommers v. International Business Machs., 640 F.2d 686 (5th Cir. 1981). A slightly different rule or test was expressed by the Third Circuit in In re Bollinger Corp., 614 F.2d 924 (3d Cir. 1980). The issue the court pursued in this case was whether or not the collection of writings "demonstrates an intent to create a security interest in the collateral." Id. at 925. The court looked not only at the words and language used by the parties, it sought to discover the parties' intent by examining the context and circumstances which produced the writings. The Code supports such an approach. The question is whether or not the debtor signed a security agreement. See U.C.C. § 9-203(1)(a). The Code not only defines "security agreement," (see U.C.C. § 9-105(1)(b)) it also defines "agreement," which means the parties' bargain as found in their language "or by implication from other circumstances." U.C.C. § 1-201(3).

All courts deciding whether or not a "security agreement" was signed by the debtor are looking for evidence that the debtor actually intended to and did consent to giving the creditor security. The only real difference among the courts is the type and quantum of evidence required to prove this intention. Some look to the language used by the parties and insist that the intention be clearly expressed, such as by the use of words of grant; others, too, look primarily to the parties' language but require no particular words, only words that logically suggest the requisite intention; (see, e.g., In re Triangle Associates, 4 CCH Sec.
courts appear to be more particular and exacting about the language necessary to transform a writing into a legally sufficient Article 9 security agreement. The question in Shelton v. Erwin was whether or not a security interest had attached to an automobile. The only documents executed by the parties were a bill of sale and "an application for . . . [a certificate of] Title showing [the seller-creditor] as holder of the first lien and [the buyer-debtor] as owner." The Eighth Circuit did not doubt the purpose of the seller and debtor. They "clearly intended," "indeed even attempted, to create a security interest in favor of [the seller]." Nevertheless, the court held that no security interest had attached to the automobile because the parties failed to satisfy the section 9-203(1)(a) requirement that the debtor sign a "security agreement."

Although no precise words are required in the Code, the definitions given [of "agreement" and "security agreement"] indicate that there must be some language in the agreement actually conveying a security interest. We fail to find such language in the bill of sale or the title application before us. The notation on the title application that a lien in [the seller's] favor existed is not sufficient.

Many other authorities also suggest that to satisfy the section 9-203(1)(a) requirement that the debtor sign a "security agreement," the writing must contain language explicitly conveying or granting a security interest.

The requirement that a security agreement contain language creating or providing for a security interest is not satisfied by the wording of a simple, standard form financing statement.
Although a financing statement conceivably could create a security interest they usually do not contain the necessary grant of a security interest section 9-203(1) . . . requires. The financing statement is merely evidence of the creation of a security interest, not the agreement itself.\footnote{472}

Reasoning such as this formed the basis for the decision in \textit{Central Arkansas Milk Producers Association v. Arnold}.\footnote{473} In this case, the Association (CAMPA) sold to Minnick a 500 gallon vacuum tank. Minnick signed a promissory note for the purchase price, and the parties executed an Article 9 financing statement which was filed for record.\footnote{474} When CAMPA sued to replevy the tank from Minnick's transferee, it apparently based its right to possession on the existence of an enforceable Article 9 security interest. CAMPA lost; it had no security interest because there was no security agreement.\footnote{475}

Even if it can be said that the Uniform Commercial Code . . . is applicable, [CAMPA's] position would not be improved, because the financing statement which was filed merely gave notice of the security agreement, and here the instrument relied on as a security agreement is simply a promissory note, nothing more. It does not purport to retain title or to create a lien.\footnote{476}

It may be true that neither a typical, straight promissory note nor a simple financing statement standing alone is sufficient as a security agreement.\footnote{477} It is also true, however, that a financing statement considered

\begin{itemize}
\item \textit{Shelton v. Erwin}, 472 F.2d 1118, 1120 (8th Cir. 1973).
\end{itemize}


474. One fact in the case was that CAMPA retained title to the vacuum (suggesting that the transaction was in the form of a conditional sale) and that the claimant alleged the execution of a security agreement (perhaps a conditional sales contract). See 239 Ark. at 800, 394 S.W.2d at 127. If a conditional sales contract or other security agreement was in fact executed, CAMPA did not rely on it as the instrument which created its interest and gave it the right to repossess the property. See text accompanying note 476 \textit{infra}.

475. CAMPA may have had no Article 9 security interest for the additional reason that the sale to Minnick occurred on January 15, 1961, almost a full year prior to the effective date of the Code in Arkansas. The court nevertheless responds to the merits of CAMPA's argument that it had an Article 9 security interest, an argument that necessarily assumes the applicability of the Code and Article 9.

476. 239 Ark. at 801, 394 S.W.2d at 128.

477. A note or financing statement that is signed by the debtor and describes the collateral is insufficient as a security agreement only if it fails to contain language creating or providing for a security interest. If this language is contained in such a note or financing statement, the document satisfies all the requirements of \textsection{} 9-203(1)(a) and is adequate as a security agreement. \textit{Compare}, e.g., First County Nat'l Bank & Trust Co. v. Canna, 124 N.J. Super. 154, 305 A.2d 442 (1973); Mosley v. Dallas Enter. Co., 496 S.W.2d 237 (Tex. Civ.
together with additional documents (such as a note) or other evidence may satisfy all the requirements of section 9-203(1)(a) even though none of the documents is sufficient in itself. "The cases uniformly hold that a series of documents intended to reflect a security transaction, executed reasonably contemporaneously, none of which is sufficient standing alone, may collectively qualify as a security agreement." A security agreement thus need not be in the form of a separate, unitary and formal writing and can be based on a composite of related writings. Can it then


479. An issue concerning linkage among the various documents may arise in cases where a secured party relies on a composite of writings to satisfy the written security agreement requirement of section 9-203(1)(a). Writing about statutes of frauds applicable to contracts generally, Corbin said:

A "note" or "memorandum" may be sufficient to satisfy the requirements of the statute even though it consists of several separate papers and documents, not all of which are signed by the party to be charged, and no one of which is a sufficient memorandum in itself. . . . At least one of the separate papers must be signed by the party to be charged, under such circumstances and in such fashion as to authenticate the contract. This requirement . . . has led some courts to say that the signature will not be regarded as a sufficient authentication unless in the signed paper there is an internal reference to the unsigned papers sufficient to identify them without the aid of parol evidence.

2 A. CORBIN, CORBIN ON CONTRACTS § 512 at 744-45 (1950) (emphasis added). Since U.C.C. § 9-203(1)(a) is in the nature of a statute of frauds, is such a rule as this, i.e., an internal reference rule, applicable under Article 9? When none of several documents is sufficient in itself, can they together suffice as a security agreement only if one or more of them refer to and thus establish a connection with the others? The court that has given this issue the most thought is the Maine Supreme Judicial Court. See Casco Bank & Trust Co. v. Cloutier, 398 A.2d 1224 (Me. 1979). Corbin concluded that with respect to contracts generally, no such rule is necessary. The necessity of any internal reference at all, much more the necessity of a completely identifying internal reference, is dependent on the character of the surrounding facts. If in the light of this accompanying evidence, the court is convinced that no fraud is being perpetrated and that the several writings, taken together, evidence with reasonable certitude the terms of the contract, internal references can be dispensed with.

2 A. CORBIN, supra, § 512 at 746-47.
be successfully argued in cases such as Arnold that a standard form financing statement and a simple note collectively qualify as a legally sufficient security agreement? Probably not. A security agreement may be pieced together from a collection of documents, but all of the pieces required by section 9-203(1)(a) must be found among the various writings. The debtor in Arnold presumably signed both the note and the financing statement; the financing statement described the collateral; but neither document contained language creating or providing for a security interest. The fact that both a note and a financing statement were executed does perhaps justify a stronger belief that the parties intended to create a security interest, but the union of these two documents in the Arnold case does not reveal masked phrases or reorder the parties' choice of words and thereby magically cause to appear the requisite language that creates or provides for security. With respect to the documents and what they provide, Arnold is not a case where the sum of the whole is greater than the sum of the component parts. Thus, whether the documents in Arnold stood alone or together, they failed to satisfy all of the requirements of a written security agreement.

480. The filing of a financing statement may in itself indicate only that the parties are contemplating or considering a financing arrangement. After all, a financing statement can be filed before value is given or a security agreement exists. See U.C.C. § 9-402(1). But when a note has been executed, too, the inference that the parties intended to create security is stronger because value has been given by the creditor who presumably wants (or believes he already has) collateral to secure the obligation. The inference may be even stronger when the financing statement gives detailed descriptions of the debtor's property. See In re Bollinger Corp., 614 F.2d 924 (3d Cir. 1980). But no matter how strong it may be, an inference is not considered by most courts to be a sufficient substitute for language actually creating or providing for a security interest.

481. When no language of either the note or the financing statement is considered by the courts as adequate for the purpose of creating or providing for a security interest, the inevitable conclusion is that the writings are insufficient to qualify even collectively as a security agreement. See, e.g., In re Shoreline Elec. Supply, Inc., 18 UCC Rep. 231 (D. Conn. 1973); In re Taylor Mobile Homes, Inc., 17 UCC Rep. 565 (E.D. Mich. 1975); In re Rand, 6 UCC Rep. 1129 (D. Me. 1969); Kaiser Aluminum & Chem. Sales, Inc. v. Hurst, 176 N.W.2d 166 (Iowa 1970); L & V Co. v. Asch, 267 Md. 251, 297 A.2d 285 (1972); Crete State Bank v. Lauhoff Grain Co., 195 Neb. 605, 239 N.W.2d 789 (1976); Barth Bros. v. Billings, 68 Wis. 2d 80, 227 N.W.2d 673 (1975). Compare cases where the courts concluded that the language in either the note or financing statement or other document was sufficient in terms of creating or providing for a security interest or the sufficiency of the language used was not an issue, e.g., In re Amex-Protein Dev. Corp., 504 F.2d 1056 (9th Cir. 1974); In re EJM, Inc., 28 UCC Rep. 192, 1 Bankr. L. Rep. (CCH) 119 (N.D. Ga. 1979); In re Modern Eng'r & Tool Co., Inc., 25 UCC Rep. 580 (D. Conn. 1978); In re Center Auto Parts, 6 UCC Rep. 398 (C.D. Cal. 1968); Casco Bank & Trust Co. v. Cloutier, 398 A.2d 1224 (Me. 1979); Evans v. Everett, 279 N.C. 352, 183 S.E.2d 109 (1971). See also other authorities cited note 478 supra. This second group of citations involves cases where the note and financing statement or other writing collectively qualified as a security agreement. Some of the cases in this second group may appear inconsistent with some of those in the first group of citations. The one real inconsistency is on the issue of what language is sufficient for purposes of creating or providing for a security interest. Remember that some courts are more particular than others regarding what language is adequate. See text accompanying notes 461-470 supra.
d. Security Agreement Involving Motor Vehicles

Ordinarily, secured transactions involving automobiles and other motor vehicles are not only within the scope of Article 9, but also of registration and certificate of title laws. Therefore, some separate comments about creating security interests in such property may be helpful, especially since motor vehicles are so frequently used as collateral. Arkansas non-Code law prescribes a procedure whereby the state issues certificates of title to vehicles subject to registration. Among other information, this certificate gives "the name of the owner and a statement of all liens or encumbrances certified to the department as herein provided as existing against said vehicle." Noting an encumbrance on an automobile's certificate of title is important because

No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a vehicle, of a type subject to registration under the laws of this state other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrancers with or without notice until the requirements of this article have been complied with.

The legislative purpose behind the certificate of title statute is to protect third parties; "it does not apply as between the parties." Therefore, while a certificate of title law provides a means for perfecting and thus protecting an Article 9 security interest against the claims of third parties, the applicable law for creating a security interest is U.C.C. section


483. Id. § 75-160(c). See also id. § 75-133.

484. Id. § 75-160(a).

485. "[W]e are firmly of the opinion that the legislative purpose in enacting the legislation found in § 75-160 was to protect bona fide purchasers." Benton County Motors, Inc. v. Felder, 236 Ark. 356, 360, 366 S.W.2d 721, 724 (1963).


487. Filing an Article 9 financing statement is the usual way of perfecting a security interest. See U.C.C. § 9-302(1). This subsection "states the general rule that to perfect a security interest under this Article a financing statement must be filed." U.C.C. § 9-302, Comment 1. But complying with the Arkansas certificate of title law by having the secured party's interest noted on a vehicle's paper title is the required substitute for filing an Article 9 financing statement. See Ark. Stat. Ann. § 85-9-302(3)(b) (Supp. 1979). That certificate of title and similar laws in many states provide the means for perfecting an Article 9 security interest is confirmed expressly and impliedly by many cases. See generally, e.g., In re Keidel, 613 F.2d 172 (7th Cir. 1980); In re Kerr, 598 F.2d 1206 (10th Cir. 1979); In re Littlejohn, 519 F.2d 356 (10th Cir. 1975); In re Unger, 28 UCC Rep. 1173 (S.D. Fla. 1980); In re Corsi, 24 UCC Rep. 216 (D. Vt. 1978); In re Kerr, 443 F. Supp. 219 (D. Kan. 1977); In re Nellis, 23 UCC Rep. 221 (D. Pa. 1977); Security Sav. Bank of Marshalltown v. United States, 440 F. Supp. 444 (S. D. Iowa 1977); In re Park, 22 UCC Rep. 1074 (W. D. Mich. 1977); In re Bosson, 432 F. Supp. 1013 (D. Conn. 1977); In re Farmers Grain Exch., Inc., 20 UCC Rep. 1054 (W. D. Wis. 1976); In re McCroskey, 19 UCC Rep. 1394 (W. D. Va. 1976); In re Butler's Tire
9-203(1). The Arkansas certificate of title law has nothing whatsoever to do with the creation of an Article 9 security interest in a motor vehicle. If the requirements of section 9-203(1) have been satisfied, the secured party’s failure to comply with the certificate of title law does not affect the enforceability of the security interest against the debtor.489


In a state without a certificate of title or similar law, filing a financing statement under Article 9 is the normal means of perfecting security interests in motor vehicles. See, e.g., White Star Distrib., Inc. v. Kennedy, 66 A.D.2d 1011, 411 N.Y.S.2d 751 (1978); Recchio v. Manufacturers & Traders Trust Co., 35 A.D.2d 769, 316 N.Y.S.2d 915 (1970); Albany Discount Corp. v. Mohawk Nat’l Bank of Schenevuctady, 54 Misc.2d 238, 282 N.Y.S.2d 401 (1967); General Motors Acceptance Corp. v. Washington Trust Co. of Westerley, 386 A.2d 1096 (R.I. 1978). It is possible that a state may require a secured party to comply with both Article 9 and a certificate of title law in order to perfect a security interest. See In re Graham, 18 UCC Rep. 1318 (W.D. Mich. 1975); In re Radny, 12 UCC Rep. 583 (W.D. Mich. 1975).


Although unique questions often arise regarding the parties' success at satisfying the section 9-203(1) requirements, there are no special Article 9 rules that apply when a creditor and debtor wish to create a security interest in a motor vehicle. As in all other cases, the parties' security agreement must be in writing unless the secured party has possession of the collateral. In the absence of a written security agreement, possession of the certificate of title will not suffice; the secured party must possess the automobile itself pursuant to a verbal security agreement, or he must require the debtor to sign a written one. The writing must, of course, be legally sufficient under section 9-203(1)(a). It must be a "security agreement" that adequately describes the collateral and is signed by the debtor. An officially issued certificate of title which recites that the creditor holds an encumbrance on the vehicle is not in itself a sufficient writing in most cases. This is true because in many states, including Arkansas,

under the provisions of the Code and the Motor Vehicle Act [or certificate of title law], such notation is the method utilized to perfect a security interest which has been created in a motor vehicle by virtue of an appropriate and valid security agreement, in lieu of the financing statement customarily required to be filed to perfect a security interest in other type collateral. Quite apart from the fact that it does appear that the notation on the certificate of ownership was signed by "the debtor," the notation is no more than that—namely, a notation. It does not itself grant or purport to grant a security interest in the automobile.


492. See U.C.C. § 9-203(1)(a). These requirements are discussed generally at text accompanying notes 325-481 supra.


493. First County Nat'l Bank & Trust Co. v. Canna, 124 N.J. Super. 154, —, 305 A.2d 442, 445 (1973). In Arkansas, the name and address of the owner appears on the certificate of title, but not his signature. See Ark. Stat. Ann. § 75-133 (Repl. 1979). Nor does the certificate contain language whereby the debtor grants, creates or provides for a security interest. The state, not the debtor, issues the certificate which includes only "[a] statement of the applicant's title and of all liens and encumbrances upon said vehicle and the names and
A few courts have also held that an application for a certificate of title is not a sufficient writing, even though the application is signed by the debtor and asks that the creditor be shown on the certificate as a lienholder.\textsuperscript{494} In \textit{Shelton v. Erwin},\textsuperscript{495} the Eighth Circuit reasoned that the title application and subsequent Certificate of Title showing [the seller-creditor] as lienholder were at best \textit{financing statements}. [T]hese were sufficient to perfect a security interest, if one existed . . . . But no interest existed to perfect. Although a financing statement conceivably could create a security interest they usually do not contain the necessary grant of an interest section [9-203(1)(a)] requires. The financing statement is merely evidence of the creation of a security interest, not the agreement itself.\textsuperscript{496}

But an Article 9 financing statement and an application for a certificate of title that lists a creditor as a secured party are significantly different. A financing statement may be filed before a security agreement exists.\textsuperscript{497} This may be done when parties are negotiating a secured loan, for example, and the lender wishes to establish priority with respect to third parties in the event that he and the prospective borrower reach an agreement.\textsuperscript{498} “The notice itself indicates merely that the secured party who has filed [a financing statement] \textit{may} have a security interest in the collateral described.”\textsuperscript{499} The negotiations may fall through, however, and an agreement between the parties regarding financing or security may never be reached. This is rarely, if ever, the case when a debtor executes an application for a certificate of title that lists a creditor as an encumbrancer. When the debtor signs his name to such a document, he is evidencing his present intent that the creditor have an interest in the vehicle, not his consent to the filing of a document that merely notifies the world of the possibility of an interest. Clear evidence of such a present intent is all that many courts believe is necessary to transform a writing into a “security agreement.”\textsuperscript{500} “Certainly, nothing in § 9-203 requires that the ‘security

\begin{footnotes}
\item addresses of all persons having any interest therein and the nature of every such interest.” 
\item Id. § 75-133(3) (emphasis added).
\item \textsuperscript{495} 472 F.2d 1118 (8th Cir. 1973). This case is also discussed at text accompanying notes 465-472 supra.
\item \textsuperscript{496} 472 F.2d at 1120.
\item \textsuperscript{497} See U.C.C. § 9-402(1).
\item \textsuperscript{498} If a security interest is ultimately created in the lender's favor, his priority with respect to other secured parties, for example, dates from the time a financing statement was first filed. See U.C.C. § 9-312(5)(a). For explanation and illustrations of this first-to-file-or-perfect rule, see U.C.C. § 9-312, Comments 4, 5.
\item \textsuperscript{499} U.C.C. § 9-402, Comment 2 (emphasis added).
\item \textsuperscript{500} This intent may be found in the language used by the parties in the writings associated with their transaction and in the circumstances that surround the transaction. See note 464 supra and text accompanying it.
\end{footnotes}
agreement’ contain a ‘granting clause;’ 501 and ‘[t]here is nothing in legis-
"ative history or grammatical logic for the substitution of the word
‘grant’ for the phrase ‘creates or provides for’ [in the definition of security
agreement].’ 502 The issue is always whether or not the debtor intended
to create security and reached an agreement with the creditor in this re-
spect. Undoubtedly, words of grant are strong, perhaps conclusive, evi-
dence on this issue; but such words are not the only credible evidence.
Language in a certificate of title application whereby the debtor asks the
state to show the creditor as an encumbrancer ought usually to be suffi-
cient evidence of the debtor’s intention and the parties’ agreement, and
the more recent and better reasoned cases so hold.503

Sometimes a debtor may purport to grant a security interest in a
motor vehicle even though no certificate of title exists that lists the debtor
as the owner of the collateral. These cases often raise the question
whether or not the debtor has “rights in the collateral” which is another
requisite to the attachment of a security interest. The section 9-203(1)
requirement that the debtor have such rights is the next topic of discus-
sion. Part of this discussion considers some of the “rights” problems asso-
ciated with cases involving collateral covered by certificates of title.504

3. Rights In the Collateral

A creditor and debtor may enter into a security agreement that satis-
fies fully every requirement of section 9-203(1)(a),505 but no security inter-
est will attach until “value has been given” 506 and “the debtor has rights
in the collateral.” 507 The Code does not define “rights,” although it does
provide that “[r]ights’ includes remedies.” 508 The drafters delegated to the
courts the task of deciding when a debtor has an interest in property
sufficient to constitute “rights” that will support a security interest. In
Lonoke Production Credit Association v. Bohannon,509 the Arkansas Supreme
Court equated “rights” with “some ownership in the collateral which [the

Bollinger Corp., 614 F.2d 924 (3d Cir. 1980).
504. The discussion of these problems is at text accompanying notes 529-541 infra.
505. The U.C.C. § 9-203(1)(a) requirements of an agreement and a writing are dis-
cussed at text accompanying notes 268-504 supra.
506. U.C.C. § 9-203(1)(b). This prerequisite to the creation of a security interest is dis-
cussed at text accompanying notes 583-609 infra.
508. U.C.C. § 1-201(36). “‘Remedy’ means any remedial right to which an aggrieved
party is entitled with or without resort to a tribunal.” Id. § 1-201(34).
509. 230 Ark. 206, 379 S.W.2d 17 (1964).
debtor] can encumber.\textsuperscript{510} This equation does not help to clarify the issue because "some ownership" and "rights" are equally nebulous concepts. Rather the Bohannon restatement of the rights requirement creates confusion. Some might conclude that by using the word "ownership," the court meant "title." This conclusion cannot be supported by the Code or case law, however. The statute expressly declares that the location of title is an immaterial issue under Article 9;\textsuperscript{511} and all the courts and commentators agree that some interest less than full legal title to the property is sufficient to constitute rights in the collateral for the purpose of creating a security interest.\textsuperscript{512} When the debtor's rights are something less than full legal title, "the secured party will get whatever rights the debtor had" (or possibly, if the collateral is negotiable or the debtor has power to convey title to a good faith purchaser, more rights).\textsuperscript{513}

Not every legally recognized right in, claim to or power over property is tantamount to "rights in the collateral" for the purpose of creating a security interest. A lessee has the right to possess and use rental prop-

\textsuperscript{510} Id. at 208, 379 S.W.2d at 19. One court reported that this "some ownership" test is "based directly upon language inserted into the uniform statute by the Arkansas legislature as it enacted the Code." In re Bosson, 21 UCC Rep. 1456, 1463 n.15 (D. Conn. 1977). This simply is not true. No statute in Arkansas, past or present, equates "rights in the collateral" for purposes of creating a security interest with "some ownership" of the property.

\textsuperscript{511} See U.C.C. § 9-202. According to the Eighth Circuit's interpretation of this section,

The UCC does not classify the debtor's interest in the collateral securing the debt as "property" or "rights to property," the terms traditionally used by the Supreme Court. . . . The UCC focuses on rights and duties of the secured party, the debtor, and third parties, rather than on the location of title. As a result, the craftsmen found it unnecessary to classify the legal interest held by the secured party and by the debtor in the collateral.


\textsuperscript{513} J. G. Gilmore, supra note 275, § 11.5 at 353. Some possibilities suggested parenthetically by Gilmore are explored elsewhere. See text accompanying notes 569-582 infra.

The notion that the secured party gets "whatever rights the debtor had" is the conventional wisdom, but perhaps this notion is not precisely accurate. It tends to suggest that a security interest is an amorphous thing; that it is the creditor's claim to the debtor's rights in the collateral whatever those rights may be in a particular case; and that the extent of this interest or claim is neither standard nor predetermined for all cases. But a security interest is a well-defined claim. Once a security interest has attached, the incidents and priority of the security interest are determined by Article 9 and do not depend on the nature, character or, perhaps, even the extent of the debtor's rights that underlie the interest. The results in a few rare cases might be different if this proposition and not the conventional wisdom is followed. See text accompanying notes 555-567 infra.
property, for example, but he cannot convey a security interest in the leased goods. The result is different if the lease is not a true lease but one intended for security. In such a case the lease is actually a sale whereby title ordinarily "passes to the buyer [lessee] at the time and place at which the seller completes his performance with respect to the physical delivery of the goods." Another example involves a buyer who without rejecting the goods returns them to the seller for repairs. In this case, the seller may acquire the rights of a bailee who has a possessory interest for a limited purpose; but these rights do not constitute "rights in the collateral" sufficient to support a security interest in the bailed goods. This result, too, may be different if the buyer rejects the

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Leases intended as security are discussed at Nickles, supra note 302, at 379-83.

If the transaction is not a true lease but a secured transaction, the secured party who assigns his security interest in the property has no interest or rights remaining in the collateral that will support a security interest. See, e.g., C.I.T. Fin. Serv. Corp. v. First Nat'l Bank of Jackson, 344 So.2d 125 (Miss. 1977).


518. Regarding a buyer's rights and duties with respect to rejection, see U.C.C. §§ 2-601 through 605. See also U.C.C. § 2-711 which describes a buyer's remedies when he rightfully rejects goods. A buyer who accepts goods cannot reject them (see U.C.C. § 2-607(2)) but he may in some cases revoke his acceptance of them. See U.C.C. §§ 2-607(2), 2-608. "A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them." U.C.C. § 2-608(3).

goods because in such a case title reverts to the seller.\textsuperscript{520}

The lease and bailment examples might be explained on the basis that the debtor only has rights \textit{with respect to} the collateral but no rights \textit{in} the collateral. Yet, despite the literal language of section 9-203(1)(c), several courts have suggested that in at least one case, a debtor has sufficient rights to grant a security interest even though he himself has no property or other interest \textit{in} the collateral, i.e., none attaching or otherwise clinging to or emanating from the property itself. The case involves an obligor who collateralizes the obligation he owes with property owned completely by someone else. In \textit{General Motors Acceptance Corp. v. Washington Trust Co. of Westerly},\textsuperscript{521} for instance, the court said that "a debtor who does not own the collateral may nevertheless use the collateral as security, thereby acquiring 'rights in the collateral,' when authorized to do so by the actual owner of the collateral."\textsuperscript{522} This case is puzzling because the term "debtor" as used in section 9-203(1)(c) probably means the actual owner of the collateral, not the obligor-debtor who owes the obligation.\textsuperscript{523} Why then would a court in such a case need to find that the obligor-debtor himself has rights in the collateral since the owner-debtor surely does?

\begin{footnotesize}


A couple of cases have held that possession of property with contingent rights of ownership is sufficient to support a security interest. \textit{See In re County Green Ltd. Partnership,} 483 F. Supp. 693 (W.D. Va. 1977); \textit{Amlac Mortgage Corp. v. Arizona Mall of Tempe, Inc.,} 618 P.2d 240 (Ariz. Ct. App. 1980). In each of these cases, the debtor hired a contractor to build a structure. The contractor bought goods that were delivered to the construction site but that were not incorporated into the building before the debtor's default under a security agreement with the creditor financing the construction. The issue was whether the debtor had rights in the delivered but unused property sufficient to support a security interest. Both courts held "yes."


Nor can he create an interest in property after it has been successfully and rightfully reclaimed by its seller. \textit{See Chapman Parts Warehouse, Inc. v. Guderian,} 609 S.W.2d 940 (Tex. Civ. App. 1980). \textit{But compare} discussion at text accompanying notes 568-575 infra.

\textsuperscript{520} \textit{See} U.C.C. § 2-401(4).

\textsuperscript{521} 386 A.2d 1096 (R.I. 1978).

\textsuperscript{522} 386 A.2d at 1098. Also, \textit{see generally, e.g., In re Pubs, Inc. of Champaign,} 618 F.2d 432 (7th Cir. 1980); K.N.C. Wholesale, Inc. v. AWNCO, Inc., 56 Cal. App.3d 315, 128 Cal. Rptr. 343 (1976).

\textsuperscript{523} "Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the Article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires." U.C.C. § 9-105(1)(d).

\end{footnotesize}
One possible reason relates to the requirement in section 9-203(1)(a) that the “debtor” sign a security agreement.\textsuperscript{524} If “debtor” as used in this subsection means the owner of the collateral\textsuperscript{525} and if, as was true in the \textit{Washington Trust Co. of Westerly} case, the actual owner, \textit{i.e.}, the title owner, has not signed the security agreement, the court must find that the obligor-debtor also has some independent interest or “rights” in the collateral. In the absence of such rights, there is nothing to which a security interest can attach or against which a security interest can be enforced. None is enforceable directly against the owner-debtor’s interest in the property because he did not sign a security agreement. If, however, the obligor-debtor has his own rights in the property because of the authority to use it as collateral, there is a right which underlies the creditor’s security interest and which can be enforced by him. The absence of the title owner’s signature from the security agreement will arguably not prevent the enforcement of this security interest against his property in such a case; since he gave his permission, he will be estopped to deny the obligor’s right to use the property and the secured party’s right to foreclose.\textsuperscript{526}

Even though some interest less than title may constitute “rights in collateral” under section 9-203(1)(c), many decisions often seem to hinge on the question of whether or not the debtor acquired title to the property. Suppose, for example, that a debtor operates a feed lot. He is hired by others to acquire and fatten cattle for eventual slaughter. Does a bank that has a security interest in all the debtor’s property have a security interest in cattle acquired by the debtor on behalf of others or cattle delivered to the debtor by those who hire him? According to the cases, the answer depends on whether or not the debtor himself acquired title to the collateral.\textsuperscript{527} He may have been acting only as an agent who acquires no title in goods bought for his principal.\textsuperscript{528} Deciding whether or not a debtor has title to and thus rights in collateral is sometimes more difficult

\textsuperscript{524} See U.C.C. § 9-203(1)(a). This prerequisite to the attachment of a security interest is discussed at text accompanying notes 423-460 supra.

\textsuperscript{525} Whether U.C.C. § 9-203(1)(a) deals with the obligation or the collateral and whether the obligor-debtor or the owner-debtor or both debtors are required to sign the security agreement are issues considered elsewhere in this article. See text accompanying notes 432-447 supra.

\textsuperscript{526} See generally, \textit{e.g.}, \textit{In re} Pubs, Inc. of Champaign, 618 F.2d 432 (7th Cir. 1980); Aceo Delta Corp. v. United States, 459 F.2d 436 (7th Cir. 1972). See also text accompanying notes 445-447 supra.

\textsuperscript{527} See generally, \textit{e.g.}, Swift & Co. v. Jamestown Nat’l Bank, 426 F.2d 1099 (8th Cir. 1970) (which involves a waiver of interest issue discussed subsequently herein at text accompanying notes 705-728 infra); Lonoke Prod. Credit Ass’n v. Bohannon, 238 Ark. 206, 379 S.W.2d 17 (1964); National Livestock Credit Corp. v. First State Bank of Harrah, 503 P.2d 1283 (Okla. Ct. App. 1972); Poteet v. Winter Garden Prod. Credit Ass’n, 546 S.W.2d 650 (Tex. Civ. App. 1977).

\textsuperscript{528} “Where the agent buys goods for his undisclosed principal title passes at once to the latter, and the agent acquired no title therein.” Swift & Co. v. Jamestown Nat’l Bank,
when the property is subject to certificate of title laws. Suppose that a car dealer sells an automobile but fails to deliver to the buyer a certificate of title covering the vehicle. Suppose, also, that the buyer sells the car to the debtor who purports to grant a security interest in the vehicle to a bank. Does the bank have a security interest in the automobile? Under the general rules of Article 9, the title passed from the dealer to the buyer and ultimately to the debtor.\(^{529}\) Therefore, the answer to the question is "yes;" the bank acquired a security interest because the debtor had title to and thus rights in the collateral.

Registration laws in some states provide, however, that a purchaser of a motor vehicle acquires no interest in the vehicle unless he obtains a certificate of title.\(^{530}\) Faced with a statute such as this, a court might logically hold that the bank in the supposed facts did not acquire a security interest in the automobile. The reasoning would be that the buyer obtained no certificate of title to and thus no interest or "rights" in the vehicle and neither did the buyer's transferee, the debtor.\(^{531}\) But in *Wood Chevrolet Co. v. Bank of the Southeast*,\(^{532}\) a case involving facts similar to the supposed ones, the court rejected this result and reasoning. It concluded

\(^{529}\) 426 F.2d 1099, 1102 (8th Cir. 1970) (quoting 2 S. Williston, *Contracts* § 286 n.13 (3d ed. 1959)).

In the *Swift* case, the court assumed for purposes of argument that the feed lot operator acquired title to the goods, at least some ownership sufficient "to convey an equitable interest in them to the Bank under the security agreement." 426 F.2d at 1102. "For this reason," the court said, "it is not necessary to discuss the Bank's [the secured party's] claim that Swift [the person for whom the debtor purchased and fattened the cattle] is estopped to claim ownership by reason of the doctrine of equitable estoppel." *Id.* at 1102 n.2. The notion that a debtor can have "rights in the collateral" because the true owner is estopped for some reason to claim otherwise is discussed at text accompanying notes 445-447 infra & note 582 infra.

\(^{530}\) See U.C.C. §§ 2-401, 2-403(1). This is true under the provisions of Article 9 unmodified by a contrary certificate of title or similar law even though the buyer pays for the goods with a check that is later dishonored. The buyer's title in such a case is voidable, but he has the power to convey good title to a good faith purchaser for value. *See id.* See also text accompanying notes 568-575 infra. *But see* Gicinto v. Credithrift of America, No. 3, Inc., 249 Kan. 766, 549 P.2d 870 (1976), where the applicable certificate of title law prevented the passage of any kind of title or interest until a certificate was delivered to the buyer.

\(^{531}\) Colorado law, for example, provides that "no purchaser or transferee shall acquire any right, title or interest in or to a motor vehicle purchased by him unless and until he obtains from the transferor the certificate of title thereto, duly transferred to him in accordance with the provisions of this part 1." *Colo. Rev. Stat.* § 42-6-108 (1973). In Missouri, "the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void." *Mo. Ann. Stat.* § 301.210 (Vernon 1972). Kansas law provides essentially the same thing. *See Kan. Stat. Ann.* § 8-135(c)(7) (Supp. 1979).

\(^{532}\) 352 So.2d 1350 (Ala. 1977).
that non-delivery of a certificate of title at the time of a sale does not prevent the passage of title from the seller to the buyer. This is true even where a state's certificate of title act provides that no title can be acquired in an automobile until the certificate of title has been issued.\footnote{Id. at 1352-53 (citations omitted).}

There are two reasons why an Arkansas court would probably find that a buyer-debtor has title to and rights in a vehicle even though no certificate of title has been issued or transferred to him. First, Arkansas statutory law does not literally condition the passing of title to a motor vehicle purchaser on his acquisition of a certificate of title covering the vehicle. It simply provides that no lien or encumbrance on the vehicle is valid against third parties unless it is noted on the vehicle's certificate of title.\footnote{See Ark. Stat. Ann. § 75-160(a) (Repl. 1979).}

The second reason is the Arkansas Supreme Court's interpretation of the state's registration and certificate of title laws which is that nothing in the Motor Vehicle Act . . . states that a bona fide sale of a vehicle cannot be made except by an immediate assignment of certificate of title. It is true that the purchaser cannot obtain a license, nor legally operate the vehicle without obtaining such certificate, and one so doing would be guilty of a misdemeanor . . . . The failure of the [transferee] to obtain title at the time he received the bill of sale does not deprive him of title, for the certificate of title is \textit{not title itself} but only evidence of title.\footnote{House v. Hodges, 227 Ark. 458, 462, 299 S.W.2d 201, 204 (1957). This rule is also cited in other cases such as Masterson v. Tomlinson, 244 Ark. 208, 424 S.W.2d 380 (1968). Courts in some other jurisdictions also take the position that non-delivery of a certificate of title will not prevent the passing of title between parties to the sale of a motor vehicle. \textit{See generally, e.g.}, A.C. Rent-A-Car, Inc. v. American Nat'l Bank & Trust Co. of Mobile, 339 F. Supp. 506 (S.D. Ala. 1972); Security Pac. Nat'l Bank v. Goodman, 24 Cal. App. 3d 131, 100 Cal. Rptr. 763 (1972); Bunch v. Signal Oil & Gas Co., 505 P.2d 41 (Colo. App. 1972); Central Nat'l Bank of Mattoon v. Worden-Martin, Inc., 90 Ill. App.2d 601, 413 N.E.2d 539 (1980); National Exchange Bank of Fond du Lac v. Mann, 81 Wis.2d 352, 260 N.W.2d 716 (1978).


Consider a different problem concerning the rights of a debtor in collateral covered by a certificate of title. Suppose that one spouse (the husband) signs a security agreement which purports to grant a security interest in an automobile to a creditor. Suppose, also, that the automobile certificate of title only lists the other spouse (the wife) as the owner of the vehicle. Does the absence of the husband's name from the certificate of title mean that he has no rights in the automobile sufficient to support a security interest? The answer is "no," at least in those states where such a certificate is only evidence of title and not title itself. If there is proof that the husband in fact had or acquired some interest or right in or title to the vehicle, a security interest can attach to the husband's interest.
therein.\textsuperscript{537} In the ordinary case, none can attach to the wife's interest (if she has any) unless she, too, signs a security agreement.\textsuperscript{538} In the case of \textit{In re Bosson},\textsuperscript{539} a husband and wife negotiated the purchase of two cars, but only the husband signed security agreements that purported to give the seller security interests in the vehicles. The wife alone signed the applications for certificates of title as purchaser, and certificates were issued that noted the encumbrances and listed her as owner. After the couple filed for bankruptcy, the creditor attempted to reclaim the cars from the trustee. The parties agreed that the creditor "acquired no security interest in the vehicles in question through [the wife], . . . for the simple reason that the wife never signed the security agreement."\textsuperscript{540} The husband had signed the security agreements, however, and the principal issue was whether or not he had "rights in the collateral" for Article 9 purposes.

The court in \textit{Bosson} was obligated to apply Connecticut law on the issue of whether or not the husband had "rights in the collateral," and under this law, the absence of his name from the certificate of title was an important fact but not conclusive of the issue.

In some states, notably Ohio and Colorado, the issue in this case could be resolved solely on the basis of the state's CTA. In both states the legislature has expressly provided that its motor vehicle title statute is meant to be exclusive. Under the statutes in question, no interest may

\textsuperscript{537} See, e.g., Peninsula State Bank v. Beneficial Fin. Co. of New York, 15 UCC Rep. 503 (N.Y. Sup. Ct. 1974); General Motors Accept. Corp. v. Washington Trust Co. of Westerley, 386 A.2d 1096 (R.I. 1978). But there may be no legal theory on which to base the husband's claim of interest. \textit{See, e.g., In re Bosson}, 432 F. Supp. 1013 (D. Conn. 1977). In the \textit{General Motors Acceptance Corp. case, supra}, the husband's rights were based on the authority to use the property as collateral. Various issues associated with this type case are discussed at text accompanying notes 432-460, 521-526 \textit{supra}.

\textsuperscript{538} See generally, e.g., \textit{In re Corci}, 24 UCC Rep. 216 (D. Vt. 1978); \textit{In re Bosson}, 432 F. Supp. 1013 (D. Conn. 1977). In the \textit{Corci} case, the court held that a person purporting to be a secured party could not reclaim an automobile from the trustee of a husband and wife because the wife had not signed the security agreement. The husband had signed the agreement, however, and the court ignores the question whether or not the creditor had a security interest in the husband's interest in the vehicle. \textit{Compare In re Magrey}, 25 UCC Rep. 868 (D. Conn. 1979), where the bankruptcy judge makes the right decision that a security interest in a car is enforceable against the wife but is overly concerned that the wife's signature on the security agreement was only in the capacity of a co-maker. \textit{Compare also Peninsula State Bank v. Beneficial Fin. Co. of New York, 15 UCC Rep. 503 (N.Y. Sup. Ct. 1974); General Motors Accept. Corp. v. Washington Trust Co. of Westerley, 386 A.2d 1096 (R.I. 1978). In those cases the debtor-husbands and their wives had rights in the collateral, but the courts failed to consider if the wives had signed security agreements sufficient under U.C.C. § 9-203(1)(a) so that security interests were also enforceable against their interests.}

\textsuperscript{539} 432 F. Supp. 1013 (D. Conn. 1977).

\textsuperscript{540} \textit{Id.} at 1017. The wife did sign an application for a certificate of title that showed an encumbrance in favor of the secured party; and a certificate of title was issued that noted the security interest and listed her as owner. The court thus implies that neither such an application nor certificate of title is sufficient to create a security interest. Authority exists that expressly holds what is only implied by the court in \textit{Bosson}. \textit{See cases cited in notes 493 & 494 \textit{supra}.}
be asserted in an automobile, either legal or equitable, except through
documents of title, absent direct evidence of fraud. In a state adopting
this principle, [the husband's] failure to ever acquire certificates of title
to the automobiles in question would preclude the bank's claim under
Article IX.

Connecticut's CTA contains no such limiting provision, however.
Indeed, the approach of the Uniform Act (adopted in Connecticut in
1959) is to specify that [the certificate of] title is "prima facie," but not
irrebuttable, evidence of true ownership. While the level of rebuttal nec-
essary to overcome the presumption is not clearly defined, the Connecti-
cut CTA provides some room for the operation of supplementary
principles of law and equity and such principles must therefore be ex-
amined.541

The court then undertook to discover if the husband in fact acquired any
rights in the automobiles, and one of the sources it considered was the
Code's Article 2.542 The court concluded on the basis of section 2-401543
that title to the vehicles passed directly from the seller to the wife and
never vested in the husband.544 Yet there are other rights acquired by a
buyer under Article 2, "special prerogatives afforded the buyer in spec-
ified circumstances surrounding the sales transaction."545 These rights in-
clude those given a buyer of goods under sections 2-501, 2-502, 2-711, 2-
716, 2-722.546 Perhaps the most important question raised in Basson was
whether or not any of these non-title rights under Article 2 are sufficient
to constitute "rights in the collateral" under Article 9. This issue is im-
portant not only in cases such as Basson where the debtor may have no
rights whatsoever in the collateral for Article 9 purposes unless the Article
2 non-title rights are sufficient. The issue is also important in cases involv-
ing priority disputes where a buyer-debtor ultimately acquires title to
goods, but the critical question is when he first acquired sufficient rights in
the property to support a security interest.547 Does a buyer have such

541. 432 F. Supp. at 1019-20.
542. The court also considered but rejected the arguments that a resulting trust could
be imposed on the property in the husband's favor or that the husband had some rights vis-
av-vis the property as the promisee in a third party beneficiary contract. See id. at 1019-20,
1022.
543. The court relied on the general rule regarding the passing of title from a seller, i.e.,
"title passes to the buyer at the time and place at which the seller completes his performance
with respect to the physical delivery of the goods." U.C.C. § 2-401(2).
544. The evidence was that the husband intended to make a gift to his wife, and, since
physical delivery of the goods was completed by the seller transferring possession of the cars
to the wife, the court determined that title passed directly to her. See 432 F. Supp. at 1021.
545. Id.
546. See U.C.C. §§ 2-501 (giving buyer a special property and insurable interest in
goods identified to the contract of sale); 2-502 (buyer's right to recover goods in which he has
an insurable interest in the event of the seller's insolvency); 2-711 (index of buyer's remedies
in general for breach of contract by seller); 2-716 (establishing buyer's right to specific perfor-
ance and replevin); 2-722 (giving buyer cause of action against person causing injury to
identified goods).
547. Suppose, for example, that a debtor buys goods from a seller and takes possession
Or does he acquire sufficient "rights in the collateral" at an earlier time so that a security interest can attach even before title passes to him? If the Article 2 non-title rights are sufficient to support a security interest under Article 9, such an interest can attach prior to the point at which title vests in the buyer-debtor. This is true because the Article 2 non-title rights of a buyer ordinarily accrue before title passes to him.

The court in Bosson concluded that most of the proposed Article II rights would be insufficient from the standpoint of establishing Article IX "rights in the collateral." With one exception not immediately relevant, the proposed pre-delivery rights are either highly contingent, partial as to the collateral, or not uniquely available to the buyer. Such rights would provide a tenuous foundation upon which to erect a meaningful law for secured transactions. But the Bosson decision is not strong authority on this issue because the of them. The debtor's secured party claims an interest in the goods on the basis of an after-acquired property clause in a security agreement with the debtor. [The topic of a secured party's interest in after-acquired property is discussed at text accompanying notes 615-658 infra.] Undoubtedly the secured party acquired an interest in the goods at the latest when the seller delivered the goods to the buyer. At this point the buyer acquired title. See U.C.C. § 2-401 and authorities cited at note 548 infra. Third parties may claim interests in the collateral, however, and to establish his absolute priority the secured party may need to establish that his security interest attached earlier than the point at which the debtor acquired title. Article 2 non-title rights usually arise before title passes to the buyer. See text accompanying notes 548-556 infra.

court concluded that the husband was not a "buyer" of the automobiles.\(^{550}\) For the most part, Article 2 prescribes rights, duties and remedies of sellers and buyers of goods.\(^{551}\) Thus the husband in Bosson acquired neither title to the goods nor any of the Article 2 non-title rights of a buyer.\(^{552}\) Consider a case where no one doubts that the debtor was a buyer of goods from a seller. Suppose, for instance, that a debtor grants a security interest in all his equipment to a bank, including equipment he hopes to acquire in the future. The debtor then enters into a contract for the purchase of new equipment from a seller. At what point does the debtor have sufficient rights in the new equipment such that the bank's security interest attaches to the goods? As soon as the contract is made, the debtor has remedial rights which will compensate him for any loss should the seller breach the contract.\(^{553}\) Except in rare cases, however, Article 2's remedial rights are rights with respect to the contract and not rights with respect to the goods themselves.\(^{554}\) The former rights are only

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\(^{550}\) The court believed that a "buyer" is someone to whom title passes under Article 2 (see 432 F. Supp. 1013, 1021) and the court decided that title never passed to the husband. See notes 543 & 544 supra. If title had passed to the husband before reaching the wife, the secured party undoubtedly would have had an interest in the automobiles on the basis of the husband's title, not his Article 2 non-title rights. A security interest would have attached as soon as he acquired title, and this interest would have continued in the collateral even though the automobiles and title to them were transferred to the wife. See U.C.C. § 9-306(2).

\(^{551}\) Although Article 2 is supposed to apply to "transactions in goods," (U.C.C. § 2-102) many courts agree that the Article applies literally only to those transactions which are sales of goods. See, e.g., O J & C Co. v. General Hosp. Leasing, Inc., 578 S.W.2d 877 (Tex. Civ. App. 1979). Compare, e.g., Murphy v. McNamara, 27 UCC Rep. 911 (Conn. Super. Ct. 1979), where the court takes a different approach regarding the applicability of Article 2 to non-sales transactions. For yet another approach, see, e.g., Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); Walter E. Heller & Co., v. Convalescent Home of the First Church of Deliverance, 49 Ill. App.3d 213, 365 N.E.2d 1265 (1977). Whatever the applicability generally of Article 2, many of its provisions specifically provide that they apply only to "sales" or a "seller" or a "buyer."

\(^{552}\) See 432 F. Supp. at 1021.

\(^{553}\) If the seller repudiates the contract, for example, the buyer may "resort to any remedy for breach." U.C.C. § 2-610(b). The buyer's remedies generally are indexed in U.C.C. § 2-711.

\(^{554}\) Among the rare cases where the buyer has remedial rights with respect to goods themselves is the sales transaction involving "unique goods." In such a case "or in other proper circumstances," specific performance of the contract may be decreed. U.C.C. § 2-716(1). But the potential availability of this remedy cannot be considered a reliable or sound source of "rights in the collateral" in most cases. The availability of the remedy is limited; and, in addition, the remedy ordinarily relates to no specific goods, none that are existing and identified at the time the remedy is sought. The remedy is usually sought for the very reason that no goods have been produced and identified to the contract. When the goods are existing and identified, the buyer's remedy is replevin. See U.C.C. § 2-716(3). "In a normal sales transaction, the replevin remedy could be particularly promising as a basis for ascribing "rights in the collateral" to an incipient buyer. Replevin is a purely statutory remedy . . . . It is not so restricted in its availability as specific performance." In re Bosson, 432 F. Supp. 1013, 1021 n.28 (D. Conn. 1977). Yet there was a problem with using the replevin remedy as the basis for finding that the husband in Bosson had rights in the collat-
compensatory and substitutional remedies designed to satisfy the buyer's economic expectations under the contract. Except in exceptional circumstances, these remedial rights give the buyer no interest or power with respect to the goods; they are not rights to or in the goods themselves. Arguably, therefore, they are not "rights in the collateral" sufficient to create a security interest.

As soon as goods are identified to a contract of sale, however, "[a] buyer obtains a special property and an insurable interest in the goods."555 Professor Gilmore has suggested that this interest is sufficient "rights in collateral" to support the attachment of a security interest.556 This is meaningful in a case where the buyer-debtor ultimately acquires more substantial rights in the property such as title, and the existence of the insurable interest is important only for the purpose of determining when his creditor's security interest first attached to the collateral.557 But what does it mean in other cases to say that an Article 2 "insurable interest" is a sufficient right in collateral for Article 9 purposes. Consider, for example, a case where a buyer-debtor of ordinary goods never acquires title, and the only interest he gets in the goods is a special property, insurable interest under Article 2. Presumably the debtor's secured party acquired a security interest in the goods because the buyer had an insurable interest therein. Is a security interest in such a case of any practical value,

555. U.C.C. § 2-501(1).


557. See note 547 supra for an explanation of why this issue of timing may be important to secured parties.
however? The answer is "no" for two reasons. First, if the buyer acquired only an insurable interest and nothing more, the explanation may be that he breached the contract of sale before additional rights or title vested in him. At this point a buyer loses the right to have the seller perform the contract and deliver the goods, and logic suggests that he also loses his special property and insurable interest in the goods. It seems unlikely that a person can have any interest in goods which are the subject of a contract he has renounced, goods that the person no longer has a right to demand from the seller. Logic also suggests that if the buyer loses his insurable interest and his only right in the goods, the secured party loses his security interest that was based on the debtor's rights in the collateral. Because a secured party's interest is (presumably) derivative of the debtor's rights in the collateral, there is a second reason why a security interest predicated solely on an insurable interest and nothing more is of no practical value. The conventional wisdom is that a secured party gets only the rights his debtor has in the collateral. This suggests that in a case where the debtor's only right in the collateral is an insurable interest under Article 2, his secured party's interest is limited accordingly. In a contest between a title holder and someone with only an insurable interest in goods, the smart money would undoubtedly be bet on the party with title. There is an argument, however, that the priority of an attached security interest is not affected by the extent of the debtor's rights that underlie the interest. The argument is based on the rule that an attached security interest is enforceable according to the terms of the security agreement; it can be enforced "between the parties, against purchasers of the collateral and against creditors." This is the general rule among the priority provisions of Article 9; and unless Article 9 provides otherwise, a secured party always has the superior interest. Article 9 does

558. When a buyer breaches by repudiating the contract or failing to make a payment due before delivery, the seller may withhold delivery of the goods and cancel the contract. See U.C.C. § 2-703. A general principle of contract law is "that the failure of one party to perform its contractual obligations releases the other party from its obligations." Stocker v. Hall, 269 Ark. 468, 472, 602 S.W.2d 662, 664 (1980). This principle is not displaced by the provisions of Article 2. A variety of other specific but obvious consequences results. For example, neither the buyer nor one representing him can replevy goods identified to the contract from the seller. A breaching buyer is not entitled to possession of the goods. The seller is. See note 554 supra.

559. The result is different when the debtor has rights in collateral and loses them because he disposes of the collateral. In this case, the security interest continues in the property unless the secured party has authorized the disposition. See U.C.C. § 9-306(2). And see discussion at text accompanying notes 686-728 infra.

560. See text accompanying notes 511-513 supra.

561. U.C.C. § 9-201.

562. See generally, e.g., Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank, 184 Colo. 166, 519 P.2d 354 (1974); Citizens Nat'l Bank of Whitley County v. Mid-States Dev. Co., 380 N.E.2d 1243 (Ind. App. 1978). Cases such as those involving leased goods, for example, are distinguishable. One with an interest in a leasehold (if that is possible) does not have
not provide that a seller who holds title to goods that were identified to a contract of sale has priority over a secured party of the buyer who had only an insurable interest in the property. The fundamental weakness in this argument is the assumption that the secured party’s interest attaches to the goods beyond the extent of the debtor’s rights in them. There is no authority to support this assumption. Yet there is virtually no authority clearly to the contrary. Since, however, one cannot ordinarily convey an interest in property that he does not own, it follows that no one can in the usual case convey a greater interest in property than he himself can claim. On the basis of this principle, it would seem that an insurable interest in itself with nothing more is a meaningless right on which alone to predicate a security interest. A secured party may have a theoretically valid and enforceable security interest to this extent in the goods, but such a limited interest ordinarily entitles its holder to nothing of practical commercial value.

There are a few cases where a secured party’s rights in collateral may be greater than those of his debtor. The classic case involves a buyer who

priority with respect to the goods over the owner-lessee. See generally the authorities cited at note 514 supra. A security interest in a leasehold is not an interest in the leased goods themselves, only in the bundle of rights with respect to the property that is created by the lease arrangement.

Another weakness is that U.C.C. § 9-201 provides only that a security agreement is enforceable against the debtor, purchasers and creditors; sellers of property (to the debtor) who never parted with title are not specifically mentioned.


There are exceptions to this principle. For example, one may consent to the use of his property by another to secure the other’s debts. See text accompanying notes 432-460 supra for discussion of issues associated with such an arrangement. Additional exceptions exist that are based on estoppel or other special rules. See text accompanying notes 568-582 infra.

Some unusual cases are discussed at text accompanying notes 568-582 infra.

This is not true, of course, when the debtor ultimately acquires more substantial rights such as title but, for priority purposes, his secured party wishes to argue that a security interest attached when the debtor first acquired an insurable interest in goods. See note 547 supra.

Other rights or interests less than title that a debtor has in collateral may be more valuable in themselves to a secured party who bases his security interest thereon. See generally, e.g., State Bank of Young America v. Vidmar Iron Works, Inc., 292 N.W.2d 244 (Minn. 1980); Morton Booth Co. v. Tiara Furniture, Inc., 564 P.2d 210 (Okla. 1977).
fails to pay his seller for the goods and a creditor of the buyer who claims a security interest in the goods usually by virtue of an after-acquired property clause in a security agreement. If the sale was on credit terms, good title passed to the buyer at the time the seller delivered the goods; an unsecured credit seller has no claim or interest to assert with respect to the goods if the buyer fails to pay for them. Compare the situation where the sale is for cash, and the buyer gives the seller a check that is later dishonored. In this case, the buyer acquires only voidable title to the goods and the seller has the right to reclaim possession of them. Is the interest of the buyer’s secured party affected inasmuch as his debtor

568. See U.C.C. § 2-401(2). This is true even though the seller purports to retain title. See U.C.C. § 2-401(1). The most that he can retain after delivery of goods to the buyer is a security interest which requires that he and the debtor comply with U.C.C. § 9-203(1) regarding the creation of security interests. See generally U.C.C. § 9-113.

569. U.C.C. § 2-702(2) creates an exception to this rule. It provides:

> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller within three months before delivery the ten day limitation does not apply. Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer’s fraudulent or innocent misrepresentation of solvency or of intent to pay.

“Section 2-702(2) is generally regarded as a qualified reenactment of the common law remedy of rescission for fraud.” Mann & Phillips, The Reclaiming Seller Under the Bankruptcy Reform Act: Resolution or Renewal of an Old Conflict, 33 VAND. L. REV. 1, 8-9 (1980). This right of the credit seller to reclaim is, however, “subject to the rights of a buyer in the ordinary course of business or other good faith purchaser under this Article (Section 2-403).” U.C.C. § 2-702(3). A secured party can be a “good faith purchaser for value.” See notes 572-574 infra and text accompanying them. See also, e.g., In re Bowman, 25 UCC Rep. 738 (N.D. Ga. 1978); B & P Lumber Co. v. First Nat'l Bank of Atlanta, 147 Ga. App. 762, 250 S.E.2d 505 (1978); Kennett-Murray & Co. v. Pawnee Nat'l Bank, 598 P.2d 274 (Okla. Ct. App. 1979). Compare generally In re Murdock Mach. & Eng'r Co. of Utah, 28 UCC Rep. 1351 (10th Cir. 1980), which suggests that the rights of an unpaid seller may be greater against the claims of the buyer's transferees when the seller exercises his reclamation rights under U.C.C. § 2-702(1).

The rights of a seller under U.C.C. § 2-702(2) are often tested in bankruptcy against the buyer’s trustee. Usually, but not always, the reclaiming seller won under the old Bankruptcy Act. Compare In re PFA Farmers Mkts. Ass’n, 583 F.2d 992 (8th Cir. 1978) with In re Kravitz, 278 F.2d 820 (3d Cir. 1960), which reach different results and illustrate different approaches to the priority problem. For discussion of how the new Bankruptcy Reform Act affects the rights of a reclaiming seller, see Mann & Phillips, supra at 45-69. For a general discussion of the avoiding powers of the trustee under the Reform Act, see Aaron, The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers Bill Part IV: Avoiding Powers of the Trustee, 1980 UTAH L. REV. 19.

A seller also has a limited right apart from Article 9 to recover goods that have been sent to the buyer but not received by him or his designate. See U.C.C. § 2-705. This right, too, may be successfully asserted against the buyer's trustee in bankruptcy. See In re Summit Creek Plywood Co., 29 UCC Rep. 860 (D. Or. 1980).


571. The right of the unpaid cash seller to reclaim in this case results from the obvious inferences drawn from U.C.C. §§ 2-507(2) & 2-511(3). For helpful discussions, see Mann & Phillips, supra note 569 at 11-16; Wallach, The Unpaid Seller's Right to Reclaim Goods: The
only has "voidable title" to the collateral and, as against the seller, no rights to the goods? In most such cases, the creditor's security interest and secured position are unaffected. Under section 2-403 of the Code,

A person with voidable title has the power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . . the delivery was in exchange for a check which is later dishonored.572

The buyer's secured party is a "purchaser."573 If this purchaser acquired his interest in good faith and for value which is usually the case,574 his security interest is valid and enforceable against the seller and has priority over the seller's right to reclaim the goods.575

A different provision in section 2-403 also permits a person in another situation to transfer greater rights to goods than he himself has in them. A "merchant"576 to whom goods have been "entrusted"577 has the "power to transfer all rights of the entruster to a buyer in the ordinary course of business."578 Does this mean that such a merchant can grant a

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572 U.C.C. § 2-403(1).
573 "'Purchaser' means a person who takes by purchase. '" U.C.C. § 1-201(33).
574 "'Purchase' includes taking by sale, discount, negotiation, mortgage, pledge lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." U.C.C. § 1-201(32). An Article 9 secured transaction is such a voluntary, i.e., consensual, transaction whereby the creditor takes an interest in the debtor's property.
575 Very often, that given by the secured party is a loan or other value made before the debtor acquires the collateral to which the security interest ultimately attaches under an after-acquired property clause in the security agreement. This is sufficient "value" for section 2-403(1) purposes because, according to the Code's general definition, "a person gives 'value' for rights if he acquires them . . . as security for . . . a pre-existing claim." U.C.C. § 1-201(19).
577 "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by the employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." U.C.C. § 2-104(1).
578 "'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law." U.C.C. § 2-403(3).
579 U.C.C. § 2-403(2). For examples of cases where the section is relied on by persons
security interest in the goods that will have priority over the interest of the true owner? The answer under this provision is "no" because a secured party ordinarily is not a "buyer in the ordinary course of business."579 Under other rules and principles of law, however, someone who clothes another with apparent ownership of property may somehow be estopped to claim ownership or rights superior to the security interest of the other's creditor. A true consignment of goods for sale or return, for example, may not be intended by the parties as a sale or other arrangement whereby the consignee acquires rights in or title to the goods.580 Yet the consignor risks subordinating his property interests in the goods to security interests or other claims of the consignee's creditors unless the consignor gives notice of his interest in a legally prescribed manner.581 A few courts have suggested that in other situations the common law principle of estoppel may be asserted by a secured party to prevent the true owner of the collateral from challenging the enforceability of a security interest.582 In these cases, as in most others, whether or not the debtor has

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580. For a discussion of the differences between a true consignment and one intended for security and the applicability of Article 9 to both types, see Nickles, supra note 302, at 384-89.


582. See generally, e.g., In re Pubs. Inc. of Champaign, 618 F.2d 432 (7th Cir. 1980); Avco
4. Value Must Be Given

Before a non-possessory security interest can exist, the parties must reach a security agreement, reduce this agreement to writing and the debtor must have rights in the collateral.\textsuperscript{583} Something else must also happen: A security interest cannot attach in any case until "value has been given."\textsuperscript{584} The Code gives a clear and detailed definition of "value,"\textsuperscript{585} and the reported cases suggest virtually no troublesome issues in connection with this prerequisite to the existence of a security interest. A notable exception is \textit{In re Terminal Moving \\& Storage Co.} \textsuperscript{586} The facts of the case are uncomplicated. Terminal Moving \\& Storage Company (Terminal) was wholly owned by Terminal Distribution Centers, Inc. (Terminal Distribution) which sold all of the stock of Terminal to Walker, an individual. In exchange for the stock, Terminal Distribution got a promissory note signed by Walker and a security agreement executed by Terminal which purported to pledge all its assets to secure Walker's note. Terminal ultimately filed a Chapter XI plan in bankruptcy for corporate reorganization, and Terminal Distribution's assignee attempted to assert a security interest in Terminal's assets. Terminal's trustee resisted this attempt. The issue in the case was whether or not Terminal Distribution

\textsuperscript{583} See U.C.C. § 9-203(1). These prerequisites to the existence of a security interest are discussed at text accompanying notes 268-282 supra.

\textsuperscript{584} U.C.C. § 9-203(1)(b). But the security agreement need not disclose the amount of the value given. See \textit{In re Cooley}, 624 F.2d 35 (8th Cir. 1980).

\textsuperscript{585} A person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

U.C.C. § 1-201(44). Ordinarily, the value given to support a security interest creates some obligation for which the debtor is liable. This obligation need not be liquidated or non-contingent in order for it to support the security interest. See generally Jenson v. Continental Fin. Corp., 591 F.2d 477, 482 n.7 (8th Cir. 1979).

\textsuperscript{586} 28 UCC Rep. 1146, \textit{rev'd on rehearing en banc}, 631 F.2d 547 (8th Cir. 1980).
acquired an enforceable security interest pursuant to the security agreement with Terminal.

A panel of Eighth Circuit judges held that "Terminal's execution of the security agreement was an ultra vires act under Arkansas law, and, at least, voidable by existing or subsequent creditors who are adversely affected." On rehearing, the court en banc reversed this holding for the reasons that (1) no fraud was alleged; (2) creditors had been put on notice of the secured transaction; and (3) "the assent of all the stockholders to the security agreement bars any claim, in the right of the corporation, to defeat it." In an attempt to avoid the security interest, Terminal's trustee made an alternative argument that "a security interest did not attach to Terminal's assets in favor of Terminal Distribution since Terminal did not receive any consideration for executing the security agreement." The Eighth Circuit panel accepted this argument which has two basic flaws. First, section 9-203(1)(b) does not require that consideration must be given before a security interest can attach to collateral; the requirement is the giving of value. The definition of "value" includes but is not limited to consideration. The value requirement may be satisfied, for example, by the taking of security to collateralize a pre-existing debt, and this in itself does not amount to consideration under the law.

588. See 631 F.2d at 550 (en banc decision).
589. Terminal Distribution had filed Article 9 financing statements locally and with the Secretary of State; in addition, it took possession of some of the assets owned by Terminal (certain stock) which had been pledged to Terminal Distribution. See id. at 550 (en banc decision).
590. Id.
591. 28 UCC Rep. at 1150 (panel decision).
592. See U.C.C. § 1-201(44). One way in which a person can give value for rights is to acquire them "in return for any consideration sufficient to support a simple contract." U.C.C. § 1-201(44)(d). But this is only one way to give value; U.C.C. § 1-201(44) lists three additional ways. "The majority's reliance [in Terminal] on [U.C.C. § 1-201(44)] subsection (d) overlooks the other provisions of the Act. If the majority view were correct, there would be no need to define value under Ark. Stat. Ann. § 85-1-201(44) as anything other than something in return for any consideration sufficient to support a simple contract." 28 UCC Rep. at 1152 n.2 (panel decision) (Lay, C.J., dissenting) (citation omitted). U.C.C. § 1-201(44) makes it clear that "[t]he UCC does not require, in the strict common law sense, that consideration be given as a prerequisite for a security interest to attach to collateral—only 'value' need be given." Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 570 F.2d 1220, 1224 (5th Cir. 1978).
common law. The panel that first decided the Terminal case on appeal was simply wrong to equate "value" under section 9-203(1)(b) with "consideration" under the common law. On rehearing, the court en banc avoided having to accept or reject this equation because it determined that consideration had in fact been given.

Consideration has been defined by the Arkansas Supreme Court as either a benefit accruing to a party or a detriment sustained by a party. Consideration for a contract may be found not only in benefits moving to the promisor but also in legal detriment suffered by the promisee. It is a detriment in the legal sense if the promisee at the request of the promisor and upon the strength of that promise performed any act which occasioned him any trouble or inconvenience and which he was not obliged to perform.

In this case we hold that there was consideration sufficient to support a simple contract and therefore the security interest attached. Terminal Distribution promised to extend credit to Walker to the extent of the $90,000 promissory note. In doing so it incurred a detriment to itself in extending credit in exchange for the pledge of Terminal's assets.

This does not fully answer the alternative contention of Terminal's trustee, however. His argument was not simply that no consideration or other value had been given; he argued that none had been given to Terminal itself. The trustee assumed that when the obligor and the owner of the collateral are not the same person, the owner must receive the value given in connection with the transaction. This assumption is the other flaw in the alternative argument made by the trustee and accepted by the Eighth Circuit panel. Section 9-203(1)(b) demands simply that value must be given; this section does not dictate who must give or who must receive it. In the Terminal case, value in the form of consideration was exchanged by Terminal Distribution and Walker, the debtor-obligor.


594. A bargained for exchange is the essence of consideration. See RESTATEMENT (SECOND) OF CONTRACTS § 75(1)(2) (Tent. Drafts Nos. 1-7, 1973). There is no exchange if a debtor grants a security interest to a creditor to secure a pre-existing debt and the creditor gives nothing in return.


596. 631 F.2d at 550-51 (en banc decision).

597. See trustee's argument stated at text accompanying note 591 supra.

598. Sometimes a court, when it lists the prerequisites to the existence of a security interest, may recite that value must be given by the secured creditor. See, e.g., Peterson v. Ziegler, 39 Ill. App. 3d 379, 350 N.E.2d 356 (1976); In re Maple Contractors, Inc., 172 N.J. Super. 348, 411 A.2d 1186 (1979). In virtually every case value is given by the secured creditor, but Article 9 does not specify who must give the value and the cases cited above do not hold that it must be the secured party.

599. See text accompanying notes 586-87 supra, and see also text accompanying note 596 supra.
Value was thus given in this case. Yet the panel of judges that first heard
the case on appeal did not find that the value running to Walker (the
debtor-obligor) was sufficient to support a security interest in the assets of
Terminal (the debtor-owner).

Fortunately, on rehearing en banc, the Eighth Circuit did make this
finding and reached the following conclusion which is undoubtedly cor-
rect:

The fact that the benefit of this agreement accrued to Walker, the sole
stockholder of Terminal and not the corporation does not detract from
the fact that the secured party gave value for the security interest. Since
consideration sufficient to support a simple contract was present, value
was given and the security interest attached. The focus of Ark. Stat.
Ann. § 85-9-203(1)(b) . . . is on whether the secured party gives values
and not on whether the person whose assets are pledged received consid-
eration.

There is no requirement under the U.C.C. that the entity whose
assets are pledged must receive consideration. Under the U.C.C., it is
even permissible for a debtor who does not own the collateral to use it
for security.660

660. 631 F.2d at 550 (en banc decision). But see Miller’s Shoes & Clothing v. Hawkins
Furniture & Appliances, Inc., 300 Minn. 460, 221 N.W.2d 113 (1974) (but here the court
found that some value had been given to the company that pledged its assets; thus the
security interest it granted was enforceable). But see generally First Fin. Co. v. Akathiotis, 110
Ill. App. 2d 377, 249 N.E.2d 663 (1969). The court only implies in this case that value must be
given to the owner of the collateral when he is not the obligor.

Despite this reasoning (that quoted at the text accompanying this note), some might
attempt to justify the panel’s decision by focusing on the lack of consideration between the
owner of the collateral (Terminal) and the obligor (Walker) and basing the decision on
common law principles and not Article 9. Consider the following train of thought: First,
before a security interest can attach to collateral that the obligor does not own and in which
he has no rights, there must be an agreement to this effect between him and the property’s
owner. Compare text accompanying notes 570-582 infra. Second, such an agreement is gov-
erned by the common law and not the Code. Third, the common law requires that this
agreement be supported by consideration. Fourth, no such agreement is enforceable by the
obligor unless consideration supports it. Finally, if the agreement to use the owner’s property
as collateral is unenforceable by the obligor, the obligor’s creditor cannot enforce a security
interest in the property. A fundamental common law rule undermines this line of reasoning.
Though it is true that under the common law a surety’s pledge of collateral is not binding
without consideration (see J. Elder, THE LAW OF SURETYSHIP §§ 2.2, 7.2 (3rd ed. 1951);
L. Simpson, HANDBOOK ON THE LAW OF SURETYSHIP §§ 18, 26 (1950)), in cases such as Termi-
nal “the consideration which supports the principal’s promise supports that of the surety
also.” Id. § 26 at 75. An analogous situation involves a surety who signs a promissory note
as an accommodation party. “Every court and every treatise writer . . . agrees that the
liability of an accommodation endorser is supported by the consideration which flows from
the creditor to the principal debtor and the fact that no consideration flowed directly to the
accommodation endorser is irrelevant.” Gavin v. Hinrichs, 375 So. 2d 1063, 1065 (Ala.
1979). See also, e.g., Burke v. Burke, 89 Ill. App. 3d 803, 412 N.E.2d 204 (1980); Gemmer v.
Anthony Wayne Bank, 391 N.E.2d 1185 (Ind. App. 1979), rehearing denied, 393 N.E.2d 784
(Ind. App. 1979); Stockwell v. Bloomfield State Bank, 367 N.E.2d 42 (Ind. App. 1977); War-
The end result of the *Terminal* case was that the court en banc reversed the panel's decision and affirmed the trial court's judgment that a valid and enforceable security interest attached to Terminal's assets.

In many cases where the value requirement is discussed by the courts, the critical issue is seldom whether or not value was given or who gave and received it. The important issue is more likely to be *when* value was given. The giving of value is a prerequisite to the attachment of a security interest, and attachment is a prerequisite to the perfection of the interest. Perfection, therefore, can occur no earlier than the time when value is given. Suppose, for example, that a lender and a borrower execute a legally sufficient security agreement and financing statement covering collateral owned by the borrower. The financing statement is immediately filed in the proper place. Suppose, however, that several weeks pass before the loan proceeds are actually advanced to the borrower. Undoubtedly, value was given when the borrower actually received or had the use of the loan proceeds. If this is the earliest that value was given, perfection occurred at that time because no security interest attached until then. The only way to establish that perfection occurred earlier is to show that value was given sooner. This may not always be too difficult a task. Lenders frequently give value before the time that loan proceeds are actually disbursed. If, for example, a lender commits himself to make a loan at a certain time or on the happening of a certain event, he gives value when he makes the commitment itself if this commitment to extend credit is "binding." Similarly, a secured seller may give value when he is bound to make a sale on credit terms, not at some later point such as the time when the goods are actually delivered to

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601. See U.C.C. § 9-203(1).
602. See U.C.C. § 9-303(1).
603. Assume, for purposes of this hypothetical problem, that the filing of a financing statement is the applicable step for perfection of the security interest. The usual method of perfection is such a filing, but this is not the only method. See U.C.C. §§ 9-302, 9-304, 9-305. Where a financing statement is filed depends on such facts as the use of the collateral and the debtor's location or that of his business. See U.C.C. § 9-401(1). Although Article 9 specifically provides for the filing of a financing statement before a security interest attaches (see U.C.C. § 9-402(1)) doing so may not perfect a security interest if the facts that controlled the place of filing have changed during the time before the interest attached. See *In re Hammons*, 614 F.2d 399 (5th Cir. 1980).
the buyer-debtor.605

Another important issue results from the principle that the giving of value is a prerequisite to the attachment of a security interest. What happens to a security interest when the value that gave it life is no longer outstanding? Article 9 does not provide an expressly articulated answer to this question, but the obvious answer is necessarily inferred from its scheme and purpose.

The UCC defines security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation." A security interest thus has no validity absent its underlying obligation; the satisfaction of that obligation extinguishes the security interest.606

A security interest may be revived, however, if value is again given.607 Such a revival usually requires a new security agreement or language in the original one that extends its coverage to "future advances."608 The coverage or scope of a security agreement and the interests that it creates are the principal topics of the ensuing discussion.609

B. SCOPE OF A SECURITY INTEREST

The parties to a security agreement may intend for the security interest to reach not only property in which the debtor has rights at the time the agreement is made; they may intend for the interest to reach property

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608. See generally, e.g., In re Sanelco, 7 UCC Rep. 65 (M.D. Fla. 1969). This may not be true in the case of renewal notes which "are secured under the original agreement even in the absence of a 'future advances' clause since the renewal continues the same debt and not a new 'advance.'" State Bank of Young America v. Vidmar Iron Works, Inc., 292 N.W.2d 244, 249 (Minn. 1980). See also, e.g., In re Cooley, 624 F.2d 55 (6th Cir. 1980); Mid-Eastern Electronics, Inc. v. First Nat'l Bank of Southern Maryland, 455 F.2d 141, 7 UCC Rep. 1089 (4th Cir. 1970); In re Cantrell Const. Co., 418 F.2d 705 (6th Cir. 1969). Compare Hackworth v. First Nat'l Bank of Crossett, 264 Ark. 568, 580 S.W.2d 643 (1979) (court seems to have relied on future advances clause in original security agreement).

609. See text accompanying notes 610-679 infra. For discussion of future advances problems, see specifically text accompanying notes 659-679 infra.
the debtor acquires after the agreement is executed. The parties may also
intend for the collateral to secure advances of other value given after this
time. By including appropriate language in their security agreement, the
secured party and debtor can expand the reach or scope of the security
interest in one or both of these ways because "a security interest created
under the Uniform Commercial Code does not necessarily reflect a static
relationship between the [parties]."\textsuperscript{610} Article 9 expressly sanctions a pro-
vision in a security agreement "that any and all obligations covered by
the security agreement are to be secured by after-acquired collateral."\textsuperscript{611}
Article 9 also provides that "[o]bligations covered by a security agreement
may include future advances or other value whether or not the advances
are given pursuant to commitment."\textsuperscript{612} Thus security agreements almost
always include language which gives the secured party an interest in the
debtor's property that is described in the agreement and in property of
the same type that the debtor may acquire in the future;\textsuperscript{613} additional
language provides that this collateral, presently owned and after-ac-
quired, will secure advances or other value whenever it is given.\textsuperscript{614} The
limits on the parties' right to expand the scope of a security interest are
few; yet numerous issues arise in connection with the use and interpreta-
tion of after-acquired property and future advance clauses in security
agreements. These limitations and some of the issues are considered in
the following discussion.

1. After-Acquired Property

The courts did not always give effect to after-acquired property
clauses in chattel mortgages or other pre-Code security agreements.\textsuperscript{615}
The early common law rule was that "nothing can be mortgaged that is
not in existence and does not at the time belong to the mortgagor, for a
person cannot convey that which he does not own."\textsuperscript{616} A creditor was
often forced to rely on equitable principles and remedies to enforce a lien
on property that the debtor acquired after the security agreement was

\textsuperscript{610} Texas Kenworth Co. v. First Nat'l Bank of Bethany, 564 P.2d 222, 224 (Okla.
1977).

\textsuperscript{611} U.C.C. § 9-204(1). \textit{But see id.} § 9-204(2), discussed at text accompanying
notes 634-645 infra.

\textsuperscript{612} U.C.C. § 9-204(3).

\textsuperscript{613} This results in what is often called a "floating charge" or "floating lien" on the
collateral which U.C.C. § 9-204(1) expressly validates. \textit{See} U.C.C. § 9-204, Comment 2.

\textsuperscript{614} When the security agreement provides that collateral acquired at any time will
secure advances whenever made, this provision is often called a "cross-security" or "cross-
collateralization" clause. \textit{See} U.C.C. § 9-204, Comment 3.

\textsuperscript{615} \textit{See generally}, e.g., U.C.C. § 9-204, Comment 2; 1 G. GILMORE, supra note 275,
§§ 2.2-2.5, 11.6-11.7.

\textsuperscript{616} Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 282, 63 S.E. 1045, 1047 (1909).
\textit{See also}, e.g., other authorities cited in Nickles, supra note 275, at 45-47 n.511.
made.617 Article 9 does not purport to change the principle that a person can convey a present interest in property only if he has rights in it; section 9-203(1)(c) expressly perpetuates this principle by providing that a security interest attaches only to property in which the debtor has rights. Yet Article 9 expressly validates agreements whereby a debtor consents today that a creditor shall have an interest in property in which the debtor may not acquire rights until tomorrow or thereafter. The key provision is section 9-204(1): “[A] security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired property.”618 This means that a security interest arising by virtue of an after-acquired property clause has equal status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement. That is to say: the security interest in after-acquired property is not merely an “equitable” interest; no further action by the secured party—such as the taking of a supplemental agreement covering the new collateral—is required.619

Section 9-204(1) only sanctions an agreement reached by the parties with respect to after-acquired collateral; it does not give the secured party by operation of law a security interest in any of the debtor’s after-acquired property. When a debtor subsequently acquires additional property of a type described in the security agreement, no security interest attaches to this property unless a new agreement covering this property is executed or the original agreement contains language that gives the secured party an interest in the after-acquired property.620 If the original security agree-

617. See generally discussion and authorities cited in Nickles, supra note 275, at 45-47 n.511.
618. U.C.C. § 9-204(1). But see id. § 9-204(2), discussed at text accompanying notes 634-643 infra.
619. U.C.C. § 9-204, Comment 1.

[If] after-acquired property is to be included as collateral, the security agreement is where the matter should be provided for. Such is the case law interpreting the . . . Code; the debtor’s intent to create a security interest in after-acquired property must be ascertained and judged by the language of the security agreement, not the financing statement.

Drysdale v. Cornerstone Bank, 562 S.W.2d 182, 185 (Mo. App. 1978) (emphasis added). But Compare In re Penn Housing Corp., 367 F. Supp. 661 (W.D. Pa. 1973), where financing statement covering after-acquired property was considered part of the documents comprising the security agreement. Except in this type case, however, coverage of after-acquired property need not be mentioned in the financing statement either to create or perfect an interest in such property. See U.C.C. § 9-204, Comment 5; see also, e.g., In re Door Supply Center, Inc. 29 UCC Rep. 318 (D. Idaho 1980); In re Taylored Prods., Inc., 5 UCC Rep. 286 (W.D. Mich. 1968); In re Platt, 257 F. Supp. 478 (E.D. Pa. 1966); National Cash Register Co. v. Firestone & Co., 191 N.E.2d 471 (Mass. 1963); James Talbot, Inc. v. Franklin Nat’l
ment contains such language, the security interest attaches to the after-acquired property as soon as the debtor has rights in it; 621 a separate


There are some exceptions to the rule that no security interest attaches to after-acquired property unless a new agreement covering the property is executed or the original agreement contains language that gives the secured party an interest in after-acquired property. If the property the debtor later acquires is proceeds of the original collateral, a security interest attaches by operation of law. See U.C.C. § 9-306(2). This may also be true if the after-acquired property is an accession. See discussion at note 638 infra. U.C.C. § 9-306(5) may create an exception to the rule, too. See note 628 infra.


Since a security interest cannot attach to after-acquired property until the debtor has "rights" in it, the security interest cannot be perfected until that time. See U.C.C. §§ 9-203(1); 9-303(1). Nevertheless, as long as a security interest has in fact attached to and been perfected in after-acquired property, the critical fact when determining the priority of the interest may be the time when a financing statement was filed, not the time at which the debtor acquired rights in the collateral thereby perfecting a secured party's interest. This is
agreement specifically covering the newly acquired collateral is not needed. Nor is it necessary that additional value be given to support a security interest in the after-acquired collateral; 622 the existence of a pre-existing debt which the property secures is itself "value." 623

Whether or not a secured party's interest attaches to after-acquired property of the debtor depends on the provisions of the parties' security agreement. To be sufficient for the purpose of creating a security interest in the original collateral, the agreement must describe the particular property in a fashion that "reasonably identifies what is described;" 624

the case when the priority conflict is between two secured parties and one or both of them have perfected their interests. See U.C.C. § 9-312(5)(a). Also, see generally, e.g., Dubay v. Williams, 417 F.2d 1277 (9th Cir. 1969); Grain Merchants of Ind., Inc. v. Union Bank & Sav. Co., 408 F.2d 209 (7th Cir. 1969), both of which concern the priority between a secured party with an interest in a debtor's present and after-acquired accounts and a bankruptcy trustee trying to avoid the security interest by alleging that with respect to after-acquired collateral, the interest amounts to a preference under § 60 of the Bankruptcy Act 11 U.S.C. §§ 1 et seq. (1970) (act superceded 1978).


623. See U.C.C. § 1-201(44). Thus the § 9-203(1)(b) "value" prerequisite to the existence of a security interest (see discussion at text accompanying notes 583-609 supra) is satisfied with respect to after-acquired property if there is some already existing debt which the newly acquired collateral secures.

624. U.C.C. § 9-110. Without such a description, a secured party acquires a nonpossessory interest in neither the debtor's present property nor property of the same type later acquired by him. A legally sufficient description of the collateral is a prerequisite to the attachment and enforcement of a security interest. The §9-203(1)(a) requirement that a
very often, this is accomplished by describing the collateral by types or items of property.\textsuperscript{625} In order for the security interest to reach after-acquired property of the type covered in the parties' agreement, the security agreement must ordinarily include language extending the interest to such property.\textsuperscript{626} Typically, therefore, security agreements include language expressly providing that the collateral also includes property of the type described that is "hereafter acquired by the debtor." Explicit after-acquired property language or other special language in the security agreement is not always necessary, however.\textsuperscript{627} A number of courts have held, for example, "that when a security interest is taken in inventory of a business, after-acquired inventory is automatically covered by the agreement."\textsuperscript{628} The courts reason that

security agreement contain a description of the collateral is discussed at text accompanying notes 333-422 supra.

\textsuperscript{625} See generally text accompanying notes 338-370 supra.

\textsuperscript{626} See U.C.C. § 9-204, Comment 5, and see authorities cited note 620 supra.

\textsuperscript{627} As a general rule, creation of an after-acquired right does not demand the use of any special language." Whitworth v. Krueger, 558 P.2d 1026, 1033 (Idaho 1976) (McFadden, C.J., specially concurring). "We reject the notion that the security agreement must specifically contain the talisman of 'after-acquired property,' or its equivalent ... ." Frankel v. Associates Fin'l Serv. Co., Inc., 281 Md. 172, 377 A.2d 1166, 1168 (1977). Also, see generally, e.g., United States v. Southeast Miss. Farmers Ass'n, CCH Sec. Trans. Guide ¶ 53,434 (5th Cir. 1980) (1973-1980 Transfer Binder) ("increase" of hogs sufficient to cover piglets born after security agreement executed).


What about reacquired inventory, inventory sold by the seller-debtor but returned by his customers or repossessed by him? Does the seller-debtor's inventory financier get a security interest in this property? First, there is the question whether or not the debtor acquires rights in this property sufficient to support a security interest under U.C.C. § 9-203(1)(c). If the goods are rejected by the buyer, title reverts to the seller-debtor. See U.C.C. § 2-401(1). This is undoubtedly true, too, if the seller-debtor simply allows a buyer to return the goods for whatever reason. If, however, the goods are repossessed by the seller-debtor who retained a security interest in them, title does not revert to the seller-debtor; he is merely in possession pursuant to his own security interest for the purpose of foreclosing on the collateral. Nevertheless, the seller-debtor's inventory financier may acquire an interest in the repossessed goods. See U.C.C. § 9-306(5); In re Frontier Mobile Home Sales, Inc., 635 F.2d 726 (8th Cir. 1980). But compare generally In re Toppo 474 F. Supp. 48 (W.D. Penn. 1979); Mother Lode Bank v. General Motors Accept. Corp., 46 Cal. App. 3d 807, 120 Cal. Rptr. 429 (1975). This is probably true whether or not the security agreement between the seller-debtor and the inventory secured party covers such returned goods; U.C.C. § 9-306(5) applies by operation of law, and its application is not dependent on the parties agreement. But compare generally Citizens & S. Factors, Inc. v. Small Business Admin., 375 So. 2d 251 (Ala. 1975).
inventory subject to a security agreement should be looked upon as a single entity and not as a collection of individual items. "In other words, the res which is the subject of the lien * * * is the merchandise or stock in trade, conceived of as a unit presently and continuously in existence—a 'floating mass', the component elements of which may be constantly changing without affecting the identity of the res." Inventory is like a river, the water in which continually flows, rises and falls, but which always constitutes a river.629

Though no special language is necessary to create security in after-acquired property, loosely drafted, narrowly phrased or ambiguous language may in some cases limit the reach of a secured party's interest in such property. Suppose, for example, that the security agreement describes the collateral as the debtor's "cattle"; and, instead of providing that the collateral includes such property "hereafter acquired by the debtor," the agreement provides only that it covers "replacements of the collateral." The security interest may attach only to after-acquired cattle that are in fact replacements for animals which comprised the original herd and not other cattle subsequently acquired by the debtor.630 But not every problem can be averted even by a careful drafter who always

629. In re Nickerson & Nickerson, Inc., 329 F. Supp. 93, 96 (D. Neb. 1971), affd, 452 F.2d 56 (8th Cir. 1971). This is sometimes called the Mississippi River theory of inventory financing. See Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp., 501 F.2d 459, 465 n.11 (8th Cir. 1974). This "flowing river," "floating lien" analysis can be applied to security interests in accounts. See id. Also, see generally, e.g., DuBay v. Williams, 417 F.2d 1277 (9th Cir. 1969); Grain Merchants of Ind., Inc. v. Union Bank & Sav. Co., 408 F.2d 209 (7th Cir. 1969). Yet one important case held that the description " 'all of the Debtor's Accounts Receivables' " did not extend the security interests to after-acquired accounts. See In re Middle Atl. Stud Welding Co., 503 F.2d 1133 (3d Cir. 1974).

630. As a general rule, creation of an after-acquired right does not demand the use of any special language. . . . The word "replacement" appears to be commonly used in the creation of livestock after-acquired rights. . . . [But] the word limits the after-acquired right to only certain after-acquired cattle.

In this sense, it is important to realize that "after-acquired" is not freely interchangeable with "replacement." Had the term "after-acquired" been used, it would have included all subsequently purchased cattle, ad infinitum. The [secured parties] desired only to assume a security interest in the specified herd size. Thus, the use of "replacement" was more appropriate.

uses the standard "and hereafter acquired" language. A security interest does not necessarily attach to all property subsequently acquired by the debtor simply because the parties' security agreement includes an explicit after-acquired property clause; an interest attaches only if the later acquired property is of a type described in the security agreement. Thus in Milwaukee Mack Sales, Inc. v. First Wisconsin National Bank of Milwaukee,\(^{631}\) the court had to decide "whether a description of collateral as 'equipment' now owned or hereafter acquired covers an after-acquired truck."\(^{632}\) One way to avoid such problems is to describe the collateral as "all the debtor's property, present and after-acquired"; but broad, all-encompassing descriptions such as this are probably insufficient under sections 9-203(1)(a) and 9-110 and thus create a security interest in none of the debtor's property, present or after-acquired.\(^{633}\)

Section 9-204(2) limits the reach of an after-acquired property clause, but it applies only to cases involving consumer goods. This section provides that "[n]o security interest attaches under an after-acquired property clause to consumer goods other than acquisitions when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value."\(^{634}\) Suppose, for example, that a finance company makes a consumer loan and that the debtor signs a security agreement. The agreement describes the collateral as "all the debtor's household furniture, household appliances, home entertainment devices such as radios, record players and televisions, and any and all other such furniture, appliances and home entertainment devices that the debtor may in the future own or in which he may acquire rights."\(^{635}\) Two weeks later the debtor purchases a television set for use in his home. No security interest in favor of the finance company will attach to the newly acquired television on the basis of the original security agreement.\(^{636}\) This is because the additional collateral was acquired by the

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631. 93 Wis. 2d 589, 287 N.W.2d 708 (1980).
632. 287 N.W.2d at 714. The court decided that the after-acquired vehicle was subject to the secured party's interest in the debtor's equipment. But compare generally, In re Laminated Veneers Co., 471 F.2d 1124 (2d Cir. 1973).
634. U.C.C. § 9-204(2) (emphasis added).
635. Even if this description is adequate for Article 9 purposes, it may be inadequate under federal consumer protection law. See note 637 infra.
636. See, e.g., White v. Household Fin. Corp., 158 Ind. App. 394, 302 N.E.2d 828 (1973). The consequences to the secured party may, however, be even more severe. See In re Johnson, 13 UCC Rep. 953 (D. Neb. 1973), where the court found that a secured creditor acted without good faith and that a security agreement was unconscionable because it purported to cover after-acquired consumer goods beyond those permitted by U.C.C. § 9-204(2).
debtor more than ten days after the secured party gave value. Section 9-204(2) overrides any contrary provision in the security agreement.637 Suppose, however, that three weeks after receiving the loan the debtor buys a new picture tube for a television that he owned at the time the security agreement was executed; the finance company's security interest will attach to it because the 10-day limit in section 9-204(2) does not apply to accessions.638

remedy, the court said, was to refuse to enforce the security agreement in toto, not simply the agreement with respect to after-acquired property acquired more than ten days after the secured party gave value.

637. Most consumer credit transactions are within the scope of the federal Truth-In-Lending Act, 15 U.S.C. §§ 1601 et seq. (1968). A creditor in a closed end credit transaction is required to disclose certain information to the debtor including

A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . . . If after-acquired property will be subject to the security interest . . . . this fact shall be clearly set forth in connection with the description or identification of the type of security interest held, retained or acquired.

12 C.F.R. § 226.8(b)(5) (1980). In a great many cases, the courts have held that a creditor violates federal Truth-In-Lending if he takes an interest in after-acquired consumer goods but fails to make a clearly expressed reference to the ten-day limitation imposed by U.C.C. § 9-204(2). See, e.g., Jackitch v. Redstone Fed. Credit Union, 615 F.2d 679 (5th Cir. 1980); Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407 (7th Cir. 1980). A similar disclosure requirement imposed by state law may also be violated unless reference is made to the ten-day limit. See, e.g., Holmes v. No. 2 Galesburg Crown Fin. Corp., 77 Ill. App. 3d 785, 396 N.E.2d 583 (1979).

638. "An accession is literally something added." R. Brown, The Law of Personal Property § 6.1 at 49 (3d ed. W. Raushenbush 1975). The law with respect to accessions is generally that "the accession follows the title to the principal thing to which it is annexed. To put it another way, an owner of a chattel has title to lesser things united to that chattel either artificially or naturally." Id.

The modern law clearly follows the Justinian view that: . . . "[T]he owner of the principal thing, by which the accessory has been absorbed, becomes the owner of the accessory. . . . The owner of the principal thing thus becomes the sole owner of the new thing."

Arnold, The Law of Accession of Personal Property, 22 Colum. L. Rev. 103, 118 (1922). The accession becomes a part of the whole, and its title merges with that of the principal thing. Thus, for example, under pre-Code law when a debtor added some part to an automobile that was subject to a conditional sales contract, the part if an accession was subject to the security interest in the whole. See C. Berry, The Law of Automobiles §§ 6.387, 6.408 (7th ed. 1935). Article 9 does not displace the common law of accessions except by providing priority rules to resolve some disputes between competing claimants. See U.C.C. § 9-314. See, e.g., Ford Motor Credit Co. v. Howell Bros. Truck & Auto Repair Inc., 325 So. 2d 562 (Ala. Ct. Civ. App. 1975); Municipal Equip. Co. v. Butch & Son Deep Rock, 185 N.W.2d 756 (Iowa 1971). Presumably, a security interest in the whole reaches an accession by operation of law despite the absence of an agreement to that effect between the secured party and debtor; yet standard form security agreements typically provide for the coverage of "accessories" and "additions." These terms are not necessarily exact synonyms for "accessions," however. For instance, "[i]t has been stated by the courts that the principle of accession does not apply when the attached articles can be removed and separated from the principal thing without material damage to the latter," R. Brown supra § 6.3 at 52; but compare U.C.C. § 9-314(4), so that the articles do not become an integral part of the principal thing. See generally, e.g., In re Williams, 12 UCC Rep. 990 (Bankr. E.D. Wis. 1973); Mixon v. Georgia Bank, 154
In a few cases, secured parties have argued that the 10-day limit does not apply to replacements of consumer goods covered by security agreements. The courts have rejected this argument apparently for the reason that a rose by any other name is still a rose. A replacement of collateral is nonetheless after-acquired property under section 9-204(2) if the replacement is acquired after the original transaction.\textsuperscript{639} A better tactic in such a case is to argue that the replacement, though after-acquired property, is not given as "additional security" but stands in the place of the original collateral. The problem with this argument is that the creditor may in fact have more collateral than he started with; if the original item of security still exists, the security interest may follow it despite its disposition by the debtor.\textsuperscript{640} The creditor may thus have an interest in both the original goods (and perhaps the proceeds thereof)\textsuperscript{641} and the replacement which arguably, therefore, is "additional security." The best argument in such a case is that the replacement itself is "proceeds" of the original collateral.\textsuperscript{642} If this is true, the secured party can claim that his interest attached to the replacement goods for this reason\textsuperscript{643} and not "under an after-acquired property clause."\textsuperscript{644} One major hurdle for the secured party is proving that the replacement was in fact received upon the sale or other disposition of the original collateral or proceeds of it.\textsuperscript{645}

Article 9 imposes no other limitations on the reach of after-acquired


\textsuperscript{640} See U.C.C. § 9-306(2) and discussion at text accompanying notes 686-728 infra.

\textsuperscript{641} A security interest continues not only in the original collateral, it continues also in whatever proceeds result from the disposition of the original collateral. \textit{See U.C.C. § 9-306(2) and discussion at text accompanying notes 729-765 infra.}

\textsuperscript{642} This argument was alluded to by the court in \textit{White v. Household Fin. Corp.}, 158 Ind. App. 33, 302 N.E.2d 828, 836 n.9 (1973).

\textsuperscript{643} When collateral is disposed of, the security interest continues by operation of law "in any identifiable proceeds . . . received by the debtor." \textit{U.C.C. § 9-306(2)}.

\textsuperscript{644} U.C.C. § 9-204(2) (emphasis added).

\textsuperscript{645} \textit{See, e.g., In re Dykes}, 20 UCC Rep. 524 (E.D. Tenn. 1976).
property clauses. The Florida Supreme Court decided, however, that "[u]pon principles of equity and in the avoidance of unjust enrichment," the extent of an earlier secured party’s priority (if not interest) in after-acquired property should be limited to the debtor’s equity in the collateral. In International Harvester Credit Corporation v. American National Bank of Jacksonville, the court reasoned that when a debtor buys after-acquired property on credit from a subsequent secured creditor, "[t]he debtor, while acquiring the physical property, only acquires an interest therein under a credit sales contract; it is this interest only then which is 'after-acquired' and thereby subject to the earlier security rights." This case is an aberration which has been overruled by the Florida legislature. The court’s decision and reasoning have been rejected by other courts because "there is nothing in the Code which limits security interests in after-acquired property to the debtor’s equity." The Florida court was undoubtedly correct when it suggested in International Harvester that it is the debtor’s after-acquired property which becomes subject to the security interest; but it is a debtor’s “rights in the collateral” that support a security interest, and nothing in Article 9 suggests that the existence of these rights depends on the extent of the debtor’s equity in the property. Occasionally, a dispute arises as to whether or not the person who acquires rights in the after-acquired property is the debtor. In American Heritage Bank & Trust Co. v. O. & E., Inc., for example, Wine Shop, Inc.


648. 296 So.2d 32 (Fla. 1974).

649. Id. at 34. See also Smith v. Atlantic Boat Builder Co., 356 So. 2d 359 (Fla. Dist. Ct. App. 1978).


652. See U.C.C. § 9-203(1)(c).

gave to the bank a security interest in all the company’s inventory and other assets “now owned or hereafter to be acquired.” Another party, Ellickson, took over the assets of the Wine Shop and began operating the business. He assured the bank that the obligations owed to it by Wine Shop would be fully satisfied. Eventually, Ellickson formed a separate, wholly owned corporation, O. & E., Inc., and transferred to this new entity certain of Wine Shop’s assets. O. & E., Inc. sold inventory that originally belonged to Wine Shop, and it acquired new inventory that was commingled with Wine Shop’s existing stock in trade.

One of the issues in the American Heritage case was whether or not the bank’s security interest in Wine Shop’s present and after-acquired inventory attached to new inventory acquired by O. & E., Inc. The court decided that the bank’s interest did attach to O. & E.’s after-acquired property even though this company had never executed a security agreement with the bank. The court gave several reasons for its decision. It cited sections 9-311 and 9-306(2) providing that while a debtor may transfer collateral, 654 the disposition does not destroy the security interest which continues in the property. 655 Yet these statutory provisions establish only that a security interest given by Wine Shop in its own property would be valid against third parties, including transferees. Undoubtedly, therefore, the bank’s security interest continued (1) in the inventory owned by Wine Shop on the date that O. & E. took it over and began selling it and also (2) in any inventory acquired by Wine Shop itself after this date. 656 Similar types of property acquired by the transferee, O. & E., will not for this reason, however, be subject to the bank’s security interest. Nothing in Article 9 permits the parties to a security agreement to encumber property in which the debtor itself never acquires rights. Perhaps this is why the court suggested another reason for its decision: “[A] debtor cannot destroy the . . . security interest of a secured party by merely changing its name or corporate structure . . . .” 657 The court

654. See U.C.C. § 9-311. This is true “notwithstanding a provision in the security agreement prohibiting any transfer [of the collateral] or making the transfer constitute a default.” Id.

655. “Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise.” U.C.C. § 9-306(2).

656. The Bank’s security interest would also continue in proceeds that were received upon the disposition of any of Wine Shop’s inventory. See U.C.C. § 9-306(2).

657. 40 Colo. App. at 309, 576 P.2d at 368, quoting Inter Mt. Ass’n Credit Men v. Villager, Inc., 527 P.2d 664, 671 (Utah 1974). In the Inter Mountain case, the corporate debtor merged with another corporation, and the court held that a security interest in the original corporate debtor’s after-acquired property extended to property acquired after the merger by the surviving corporation. A similar case is Walter E. Heller & Co. v. Salerno, 168 Conn. 152, 362 A.2d 904 (1975), but in this case the surviving corporation agreed to assume the performance of the security agreement executed by the merging corporate debtor. In the American Heritage case, the owner of the O. & E., Inc., Ellickson, promised the
also pointed to the security agreement between the bank and Wine Shop which provided that it would bind the parties' "'successors and assigns.'" The court must have believed that Wine Shop and O. & E. were in fact one and the same legal entity. Such a determination suggests an easy solution to the after-acquired property issue in the American Heritage case. It was this entity, Wine Shop a/k/a O. & E., that gave the bank a security interest in all its present and after-acquired inventory. The fact that the debtor (Wine Shop) got a new name (O. & E.) and a new owner (Ellickson) did not terminate its agreement with the bank or extinguish the bank's security interest in the debtor's property, present or after-acquired. This solution makes more sense than one based on sections 9-306(2) and 9-311; and, though it may offend technical rules of corporations law, this solution emphasizes form over substance and is consistent with a fundamental Article 9 principle, i.e., a security interest attaches to after-acquired property if the debtor agrees that it will but only if the debtor acquires rights in the property.

secured party that Wine Shop's debt would be fully paid; but neither he nor his corporation assumed Wine Shop's security agreement with the bank.) Also, see generally In re West Coast Food Sales, Inc., 637 F.2d 707 (9th Cir. 1981) (security agreement executed by proprietorship continued effective as to accounts acquired after the firm incorporated); Ryan v. Roland, 434 F.2d 353 (10th Cir. 1970) (held that a secured party's interest in the debtors' after-acquired inventory continued in inventory thereafter acquired by a corporation organized by the debtors); Fliegl v. Associates Capital Co. of Del., Inc., 272 Or. 434, 537 P.2d 1144 (1975) (held that security agreement covering after-acquired property executed by sole proprietor was effective against partnership he formed and continued effective against corporation which was formed by the partners). See also In re Serrins Automotive Warehouse, Inc., 29 UCC Rep. 1418 (W.D. Pa. 1980) (security interest continues in inventory of a partnership that incorporates). But compare In re Environmental Elec. Systems, Inc., 2 B.R. 583, 29 UCC Rep. 271 (N.D. Ga. 1980).

638. A security agreement containing this language cannot, however, be interpreted to bind the separate property of a successor or assignee of the debtor for the sole reason that the successor or assignee is a transferee of property subject to a security interest. The security interest follows the collateral and continues in its proceeds under U.C.C. § 9-306(2), but this does not in itself give the secured party an interest in the transferee's other and separate property. Yet the separate property of a successor legal entity can be bound by a security agreement executed by its predecessor if (1) the successor is in fact the embodiment of the predecessor which continues to exist in a different form or if (2) the successor agrees to assume the security agreement thereby making such an agreement itself. This apparently is the holding of the cases cited at note 657 supra and the American Heritage case. (Compare generally Cummings, Inc. v. Beardsley, 271 Ark. 596, 609 S.W.2d 66 (1980).) See text following this note suggesting that the court in American Heritage considered Wine Shop and O. & E. to be one and the same legal entity. The decision in none of these cases, however, is based solely on U.C.C. § 9-306(2) and the fact that the transferee of the collateral took the property subject to an existing security interest.

A successor or surviving entity may also be bound by contracts of its predecessor if specially so provided by law. See generally White Motor Credit Corp. v. Euclid Nat'l Bank, 17 Ohio Op. 3d 312, 63 Ohio Misc. 7, 409 N.E.2d 1063 (1978), aff'd, 30 UCC Rep. 331 (Ohio Ct. App. 1980).
2. Future Advances (Or Other Value)

Under section 9-204(3), "collateral may secure future as well as present advances when the security agreement so provides." This section provides that "[o]bligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment." Thus, on the basis of only one security agreement, collateral may secure not only the repayment of value given to the debtor before or at the time the parties' agreement is executed, it may also secure obligations to the creditor that the debtor may thereafter incur, obligations which may result from (but are not limited to) future advances of money. Consequently, as long as some value covered by the security agreement is outstanding, the creditor will have an interest in the collateral even though the debtor has fully satisfied the initial secured obligation. This is true, however, only if the security...
agreement covers or provides for the future advances that are made by the secured party or other further obligations that are incurred by the debtor. Some language of the security agreement must evidence the parties’ intention that the collateral secure future obligations, and, to be secured, the subsequent advance or other value must be of a type described by this future advance language.

664 The fact that a security interest has attached on the basis of a future advance clause in a security agreement does not necessarily mean that this interest is superior to the claims of third parties. The principal provisions governing priorities of future advances are U.C.C. §§ 9-301(4), 9-307(3) & 9-312(7). Priority problems involving future advances are discussed separately in another article in this series to be published in a subsequent issue of the Arkansas Law Review. The article deals primarily with priority disputes under Article 9.

664. See, e.g., Safe Deposit Bank & Trust Co. v. Berman, 393 F.2d 401 (1st Cir. 1968); Barksdale v. People’s Fin’l Corp. of Alpharetta, 393 F. Supp. 112 (N.D. Ga. 1975); In re Jenne Fixture Co., 6 UCC Rep. 1202 (M.D. Fla. 1969); Ingram v. Ingram, 214 Kan. 415, 521 P.2d 254 (1974); Georgia-Pacific Corp. v. Lumber Prods. Co., 590 P.2d 661 (Okla. 1978); Texas Kenworth Co. v. First Nat’l Bank of Bethany, 564 P.2d 222 (Okla. 1977). Cf. Stone v. First Wyo. Bank, N.A., Lusk, 625 F.2d 332 (10th Cir. 1980) (even though this case involved pledged stock so that no written security agreement was required, there was a fact question as to whether the collateral secured one loan or that plus other future advances). But see authorities cited note 608 supra regarding the securing of renewal notes. In Texas Kenworth, supra, the court held that the language “and all other indebtedness from Buyer to Secured Party” was insufficient to subject the collateral to future advances. The court recited the rule “that in order for a security agreement to cover future advances, the security agreement must clearly specify that the security interest in the collateral is meant to secure future advances.” Id. at 225 (emphasis added). But the security agreement need not state the maximum amount of unpaid future advances that may be secured at any one time. See Mason v. Avdoyan, 299 So. 2d 603 (Fla. Dist. Ct. App. 1974). A financing statement filed to perfect a security interest in collateral need not provide that it covers future advances in order for a security interest based on such advances to be perfected. See U.C.C. §§ 9-204, Comment 5; Moody Day Co. v. Westview Nat’l Bank, 452 S.W.2d 572 (Tex. Civ. App. 1970).

665 In a number of cases the courts have considered whether or not a subsequently incurred obligation was of a type or kind described in the security agreement. See generally, e.g., In re Apollo Travel, Inc., 567 F.2d 841, 845 n.14 (8th Cir. 1977) (whether attorneys’ fees incurred by the secured party fell within the class of expenses that the debtor promised in the security agreement to pay); In re Ria Tanning Corp., 468 F.2d 1211, 1213 (2d Cir. 1972) (is a deficiency resulting from a real estate mortgage foreclosure an “obligation . . . due or to become due whether now existing or hereafter arising?”); Thorp Sales Corp. v. Doleson Bros. Co., 453 F. Supp. 196 (W.D. Okla. 1978) (whether a debt owed by debtor to third party and assigned to secured party was within scope of future advance language in security
“Dragnet” language in a standard form security agreement is usually all encompassing both because it is broadly phrased and because it specifically covers a variety of additional obligations that the debtor might later incur such as 

all costs and expenses incurred by the Secured Party in the collection of the value initially given and secured by the collateral and in the enforcement of the Secured Party’s rights under the security agreement; all future advances made by the Secured Party for taxes, levies, insurance and repairs to or maintenance of the collateral; all other money heretofore or hereafter advanced by the Secured Party to or for the account of the Debtor at the option of the Secured Party, and all other present or future, direct or contingent liabilities of the Debtor to the Secured Party of any nature whatsoever; and interest on all of the above obligations.666

But, as Professor Gilmore reports, the courts often refused under pre-Code law to enforce “dragnet clauses” such as this one

agreement between debtor and secured party) (see also on this issue Wood v. Parker State Square Bank, 400 S.W.2d 898 (Tex. 1966), noted in Kimbell Foods, Inc. v. Republic Nat'l Bank of Dallas, 557 F.2d 491 (5th Cir. 1977), aff'd sub nom. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)); Malone & Hyde, Inc. v. Maxwell, 557 S.W.2d 908 (Ky. Ct. App. 1977) (whether or not open account came within language of future advance clause); Community Bank v. Jones, 278 Or. 647, 566 P.2d 470 (1977) (were overdrafts and attorneys’ fees “any other obligations of the debtor to the secured party”); Estate of Beyer v. Bank of Pa., 449 Pa. 24, 295 A.2d 280 (1972) (advances made to relative of the debtor); John Miller Supply Co., v. Western State Bank, 55 Wis. 2d 385, 199 N.W.2d 161 (1972) (were secured party’s rights following debtor’s breaches of sales contracts a “liability” that would be secured by the collateral). In addition, see generally, e.g., In re Midas Coin Co., 264 F. Supp. 193 (E.D. Mo. 1967), aff’d sub nom. Zuke v. St. Johns Community Bank, 387 F.2d 118 (8th Cir. 1968) (regarding coverage of bank overdrafts); Hollan v. American Bank of Commerce & Trust Co., 168 Ark. 939, 272 S.W. 654 (1925) (whether liability of parties as indorsers on note was secured by real estate mortgage executed by them).

Deciding whether or not a particular future obligation falls within the terms of a future advances clause in a security agreement is very often only the first step in deciding if the obligation is secured by the collateral. Even if the obligation is possibly within the literal terms of the clause, the court may decide on the basis of the “same class of indebtedness rule” or for some other reason that the subsequent obligation is not secured. See discussion of “same class” rule at text accompanying notes 667-670 infra. See also notes 666 & 675 infra for other reasons why a court might decide that a future advance is not secured even though language of the security agreement perhaps describes or otherwise covers it.

666 Most of this language was borrowed from the future advances clause of a standard form security agreement purchased from McRoy & McNair, Inc., an office supplies store in Fayetteville, Arkansas. This form provides that the security interest will secure, among other items, “all costs and expenses incurred by the Secured Party . . . in the enforcement of the Secured Party’s rights under the security agreement.” Assuming that local law allows these expenses to be assumed by the debtor, any such expenses incurred by the secured party are in fact obligations of the debtor, obligations that the debtor has agreed will be secured by the collateral. If they are the debtor’s obligations, the secured party is presumably advancing value by initially paying them, value the secured party intends to recoup directly from the debtor or indirectly by looking to the debtor’s property. But compare In re Apollo Travel, Inc., 567 F.2d 841 (8th Cir. 1977) where the court held that in some bankruptcy cases, secondary, contingent liabilities (which the secured party may incur with respect to the secured transaction and which the debtor has agreed to pay) will not for reasons of policy be secured by the collateral.
when a lender, relying on a broadly drafted clause, seeks to bring within the shelter of his security arrangement claims against the debtor which are unrelated to the course of financing that was contemplated by the parties. In the dragnet cases, the courts have regularly curbed such abuses: no matter how the clause is drafted, the future advances, to be covered, must "be of the same class as the primary obligation . . . and so related to it that the consent of the debtor to its inclusion may be inferred." \(^{667}\)

Gilmore argued in his treatise that this "same class of indebtedness" rule should be perpetuated under Article 9. \(^{668}\) A number of courts have agreed with him. \(^{669}\)

There is an argument, however, that Professor Gilmore overstated the pre-Code "same class" rule when he wrote that the courts followed it "no matter how the [future advances] clause [in the security document] is drafted." \(^{670}\) He cites a case interpreting Arkansas law as support for his summary of the rule, \(^{671}\) but a careful analysis of the Arkansas cases suggests that the rule is applied only in the absence of clear and specific language expressly covering unrelated or different classes of advances. This was the court's conclusion in In re Dorsay Electric Supply Co. \(^{672}\) where the "same class" rule was not applied because

the language of the Deed or Trust makes it clear that the parties intended it to secure "the payment, of all other indebtedness of every kind and nature, direct and indirect . . . whether predicated upon future loans or advances or obligations" of the bank to the mortgagor . . . it being specifically agreed that the Deed of Trust "shall stand as security for all such indebtedness whether or not the same shall be similar or dissimilar or related or unrelated to the primary indebtedness." \(^{673}\)

The reason for the "same class" rule is that mortgages, by the use of general terms, ought never to be so extended as to secure debts which the debtor


\(^{668}\) See id.


\(^{670}\) 2 G. GILMORE, supra note 275, § 35.5 at 932.


\(^{673}\) Id. at 1175.
did not contemplate."674 But when the parties' language is specific and clearly demonstrates their intention to extend the coverage of their security agreement to other kinds of indebtedness, there is no need to rely on the "same class" rule as an interpretative aid;675 as in the Dorsey Electric case, "there is no need to 'infer' the intent of the debtor since that intent is expressed in clear and unambiguous language."676 If a future advance clause is more generally phrased, the reasoning of Dorsey Electric cannot be relied on to avoid application of the "same class" rule. The rule was applied, for example, in Security Bank v. First National Bank.677 In this case, the security instrument provided that the collateral secured "'not only the indebtedness hereinafter described but any other indebtedness now or hereafter owing by the [debtor] . . . to the [creditor].' "678 The language must clearly, specifically and unquestionably include unrelated and different classes of advances or other debts among the obligations secured by the collateral. This was not true of the future advance clause in the Security Bank case; nor is it true of the "dragnet" language sometimes found in standard form security agreements.679 If the language is ambiguous or


675. \"[T]he general rule [is] that where the terms of a contract are clear and unambiguous there is no reason to resort to rules of construction.\" In re Public Leasing Corp., 488 F.2d 1369, 1377 (10th Cir. 1973). The likelihood exists, however, that though the rule may not be used strictly as an aid to interpretation, it may be applied despite specific and expansive dragnet language as a consumer protection device; courts may find it a useful weapon to guard against overreaching by savvy creditors in cases involving unsophisticated debtors. Other rules of law are specifically designed and better suited for such a battle, however. The statutory (see U.C.C. § 2-302) and common law doctrines of unconscionability are examples, see note 355 supra. Restatement (Second) of Contracts § 237 (Tent. Drafts Nos. 1-7, 1973) is another example. This Restatement section deals with standardized agreements and provides in part that \"[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.\" Id. § 237(3). In some cases, the courts have suggested that extrinsic evidence (in addition to the language of a future advances clause) can be considered to determine the parties' "true" intentions regarding what value the collateral should secure. See generally, e.g., In re Iredale's Ltd., 476 F.2d 938 (9th Cir. 1973); In re Sanelco, 7 UCC Rep. 65 (M.D. Fla. 1969); Hancock County Bank v. American Fletcher Nat'l Bank & Trust Co., 150 Ind. App. 513, 276 N.E.2d 580 (1971). But see generally, e.g., regarding use of parole evidence to contradict terms of a future advances clause in a security agreement, Kimbell Foods, Inc. v. Republic Nat'l Bank of Dallas, 557 F.2d 491 (5th Cir. 1977), aff'd sub nom. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979); In re Public Leasing Corp., 488 F.2d 1369 (10th Cir. 1973).

676. 344 F. Supp. at 1175.


678. Id. at 527, 565 S.W.2d at 624.

679. In the following cases, for example, the courts applied the "same class" rule, and the language of the future advances clause involved in each case is typical and fairly standard: Kimbell Foods, Inc. v. Republic Nat'l Bank of Dallas, 557 F.2d 491 (5th Cir. 1977), aff'd sub nom. United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) ("all other indebtedness at any time hereafter owing by Debtor to Secured Party as well as the discharge of all obligations imposed upon Debtor hereunder"); In re Ehleman, 10 UCC Rep. 750 (E.D. Pa. 1972) ("all other liabilities of the debtor now existing or hereafter incurred"); Community
leaves any room for doubt regarding the parties' intentions, a court will probably infer, on the basis of the "same class of indebtedness" rule, that they intended to secure only future debts which are of the same kind as the initial obligation and related to it.

C. CONTINUATION OF A SECURITY INTEREST UPON DISPOSITION OF COLLATERAL

"The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default." 680 A debtor thus retains the power to dispose of the collateral and transfer his interests or rights in it. 681 This does not mean that the debtor's disposition of the collateral terminates the security interest attached to the property. The general rule is that "a security interest continues in collateral notwithstanding sale, exchange or other disposition." 682 This rule does not prevent the debtor's interest or rights in col-

Bank v. Jones, 278 Or. 647, 566 P.2d 470 (1977) ("any other obligation of the debtor to the secured party"); John Miller Supply Co. v. Western State Bank, 55 Wis. 2d 385, 199 N.W.2d 161 (1972) ("all other obligations" and "obligations" was defined to mean "all Debtor's present and future debts, obligations and liabilities to Bank, of whatever nature"). But compare these cases where despite the broad language used in the future advance clause, the "same class" rule was not mentioned. In re Midas Coin Co., 264 F. Supp. 193 (E.D. Mo. 1967), aff'd sub nom. Zuke v. St. Johns Community Bank, 387 F.2d 118 (8th Cir. 1968); Hollan v. American Bank of Commerce & Trust Co., 168 Ark. 939, 272 S.W. 654 (1925) ("any other indebtedness of whatever kind or character that may be owing [by the debtor] up to the time of foreclosure of this deed of trust").

680. U.C.C. § 9-311. See also Ark. Stat. Ann. § 30-219 (Repl. 1970) providing that "any property, real, personal and/or mixed, may be subjected to seizure under execution, garnishment, attachment and/or other process, even though the same may be subject to mortgage, deed or trust, vendor's lien, conditional sales contract, chattel mortgage or other lien . . . ."

681. A debtor has the power to transfer his interest in collateral even though the security agreement purports to limit his right to do so. See U.C.C. § 9-311. See also, e.g., Sturdevant v. First Security Bank of Deer Lodge, 606 P.2d 325 (Mont. 1980).

A debtor risks criminal liability for disposing of collateral only if he does so with the purpose of hindering enforcement of the secured creditor's interest. See Ark. Stat. Ann. § 41-2304 (Repl. 1977). Defense to criminal liability under such a statute include the creditor's consent to the disposition, see Hill v. State, 253 Ark. 512, 487 S.W.2d 624 (1972), and the absence of a valid lien on the property at the time of its disposition. See generally Austin v. State, 259 Ark. 802, 536 S.W.2d 699 (1976). See also United States v. Grisom, 645 F.2d 461 (5th Cir. 1981), interpreting 18 U.S.C.A. § 658 (1976) which proscribes certain conduct with respect to FmHA collateral.

lateral from passing to his transferee; but it does provide that the property nevertheless remains subject to the security interest.\footnote{683} The property thus continues to be collateral for the debt owed the secured party despite the debtor's disposition of the property; and, because of the disposition, the secured party may acquire additional collateral. If the debtor receives "identifiable" "proceeds" as a result of the disposition, the security interest will also attach to and continue in this property,\footnote{684} as well as in the original collateral. To satisfy the obligation owed him, the secured party

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There are two principal caveats to the security interest continues in collateral despite its disposition: "Except where this Article otherwise provides" or "unless the disposition was authorized by the secured party in the security agreement or otherwise." U.C.C. § 9-306(2). See discussion relating to these caveats at text accompanying notes 686-728 infra. For other exceptions to the rule, see note 704 infra.

U.C.C. § 9-402(7) provides that "[a] filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows and consents to the transfer." So if a security interest that continues in collateral is perfected, the perfected status is not lost because of the disposition; this is undoubtedly true regardless of how perfection is achieved (except perfection by possession) even though no Article 9 provision explicitly states such a rule for perfection other than by filing.

\footnote{683} This is true unless Article 9 provides otherwise or the secured party authorized the disposition. See U.C.C. § 9-306(2) and text accompanying notes 686-728 infra. Regarding additional exceptions to the rule that a security interest continues in collateral notwithstanding disposition, see note 704 infra.

\footnote{684} "[A] security interest ... continues in any identifiable proceeds including collections received by the debtor." U.C.C. § 9-306(2).

"Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "non-cash proceeds." U.C.C. § 9-306(1). The topic of security interests continuing in proceeds of collateral is discussed at text accompanying notes 730-765 infra.
may, therefore, be able to "claim both proceeds and [the original] collateral, but may of course have only one satisfaction." In many cases, however, proceeds are hard to trace, identify or locate. For this and other reasons, secured parties often continue to rely primarily or totally on the original collateral and attempt to reclaim it or its value from the debtor's transferee.

1. Security Interest Continuing in the Original Collateral Itself

When a secured party seeks to reach collateral that the debtor has transferred to a third party, his principal argument will be that "a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof." If the transferee ignores a demand for the return of the property, the secured party may attempt to repossess the property. When the debtor-obligor has defaulted, section 9-503 gives a secured party "the right to take possession of the collateral," and the property in the hands of the transferee is "collateral" if, as the secured party argues, it is "subject to a security interest." Repossession may be effected by self-help or, in the alternative, "by action," e.g., replevin in a case involving goods. The security interest is a sufficient "interest" in the property that will support an action to replevy the collateral.

686. U.C.C. § 9-306(2), and see authorities cited note 682 supra. He will also argue that this interest was created pursuant to a security agreement which "is effective according to its terms between the parties, against purchasers of the collateral and against creditors." U.C.C. § 9-201.
687. U.C.C. § 9-503. A transfer of the collateral by the debtor-obligor does not in itself constitute a default. "[A] debtor's transfer of property which is subject to a security interest is not wrongful in itself and does not result in automatic default." Production Credit Ass'n of Chippewa Falls v. Equity Coop. Livestock Sales Ass'n, 82 Wis. 2d 5, 261 N.W.2d 127 (1977). Generally speaking, what constitutes a default by the debtor is a matter of contract for the parties to decide. Therefore, if the security agreement specifies that a debtor's disposition of the collateral is a default, then a default occurs when the collateral is transferred by the debtor without the secured party's consent. See, e.g., Production Credit Ass'n of Madison v. Nowatzki, 90 Wis. 2d 344, 280 N.W.2d 118 (1979). In Sturdevant v. First Security Bank of Deer Lodge, 606 P.2d 525 (Mont. 1980), the security agreement presumably provided that a transfer of the collateral by the debtor was an event of default.
688. U.C.C. § 9-105(1)(c). Following the disposition, the transferee, who acquired his transferor's rights in the collateral, is also a "debtor." See U.C.C. § 9-105(1)(d).
689. U.C.C. § 9-503.
691. The fundamental prerequisites to the maintenance of a replevin action in Arkansas are "[t]hat the plaintiff is the owner of the property, or has a special ownership or interest therein, . . . and that he is entitled to immediate possession of the property." Ark. Stat. Ann. § 34-2102 (Third) (Repl. 1962) (emphasis added). A security interest in his favor gives the plaintiff an interest in the property, and the debtor's default under the security agreement entitles the plaintiff to possession of the collateral. The plaintiff is not entitled to possession, however, unless his security interest has priority over the interest or claim of the defendant. See text accompanying notes 702-704 infra.
of trying to recover the collateral itself, the secured party may sue the transferee for conversion and seek to recover damages based on the collateral's value.\textsuperscript{692} This alternative is often available to the secured party despite language suggesting the contrary in \textit{Citizens Bank of Lavaca v. Perrin & Sons, Inc.}\textsuperscript{693} In this case, the court observed that

Before the U.C.C. was adopted one who bought mortgaged personality without the mortgagee's consent was liable for conversion. Similarly, the debtor's interest in mortgaged personality was not subject to sale by attachment or execution.

Such restrictions upon the alienability of encumbered personal property were abrogated by the U.C.C.\textsuperscript{694}

The court then quoted section 9-311,\textsuperscript{695} but this section provides only that property subject to a security interest can be sold or encumbered. Neither it nor any other provision of Article 9 eliminates a transferee's liability in conversion for dealing with collateral in a manner that is inconsistent with a secured party's superior interest. The drafters themselves recognized that a secured party has a cause of action in conversion against a transferee who takes the collateral subject to a prior security interest:

In most cases when a debtor makes an unauthorized disposition of collateral, the security interest under prior law and under this Article continues in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, \textit{the secured party may repossess the collateral from him or in an appropriate case maintain an action for conversion.}\textsuperscript{696}

A number of courts have recently held that it is \textit{appropriate} for a secured party to maintain a conversion against a transferee in cases where the secured party is entitled to possession but the transferee either (1) refuses to give up possession of the property\textsuperscript{697} or (2) cannot return the collateral

\textsuperscript{692} "Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." \textit{RESTATEMENT (SECOND) OF TORTS} § 222A(1) (1965). For discussion and citations of authority regarding conversion actions by secured creditors against transferees and others under pre-Code law and under Article 9, see 
Nickles, supra note 275, at 104-06 n.647.

\textsuperscript{693} 253 Ark. 639, 488 S.W.2d 14 (1972).

\textsuperscript{694} \textit{Id.} at 640, 488 S.W.2d at 15.

\textsuperscript{695} \textit{Id.} U.C.C. § 9-311 is quoted at text accompanying notes 680 supra.

\textsuperscript{696} U.C.C. § 9-306, Comment 3 (\textit{emphasis added}).

\textsuperscript{697} \textit{See, e.g., Production Credit Ass'n of Madison v. Nowatzki, 90 Wis. 2d 344, 280 N.W.2d 118 (1979). Cf. United States v. Smith, 22 UCC Rep. 502 (N.D. Miss. 1977) (indicating that mere claim of ownership without possession does not constitute conversion); Imperial NH3, Div. of W. Farm Serv., Inc. v. Central Valley Feed Yards, Inc., 70 Cal. App. 3d 513, 139 Cal. Rptr. 8 (1977) (concerning proceeds). A secured party is not limited to a conversion action in such a case, however. As long as the transferee has possession of the collateral to which the secured party has a superior, prior right, an action for possession or foreclosure is an alternative remedy that the secured party may pursue. When "the transferee takes subject to the security interest, the secured party may
because he himself has made a further disposition of it. Another appropriate case is one where the secured party is entitled to proceeds resulting from the collateral’s disposition yet the transferee of the property remits the proceeds to someone other than the secured party (usually the debtor). In none of these cases is the transferee’s liability for conversion based solely on the fact that he bought or otherwise took property which was subject to a prior encumbrance, in all these cases the transferee is liable because he dealt with collateral in a manner that is inconsistent with the superior interest and rights of a secured party.

repossess the collateral from him, or, in an appropriate case, maintain an action for conversion.”

Get It Kwik of America, Inc. v. First Alabama Bank of Huntsville, 361 So. 2d 568, 573 (Ala. App. 1978). See also text accompanying notes 686-691 supra. In Production Credit Ass’n of Minnesota v. Melland, 278 N.W.2d 780 (N.D. 1979), the secured party brought a foreclosure action against the holder of collateral in which the plaintiff held a superior interest.


700. These cases are, therefore, consistent with the court’s observation in Citizens Bank (see text accompanying note 694 supra) which implies only that a transferee can no longer be liable for conversion solely for the reason that he bought property subject to a prior security interest. The court in this case did not suggest that a transferee escapes liability even though he deals with the property in a manner that is inconsistent with the secured party’s superior interest or rights such as by refusing a demand for the return of the property or by disposing of it.

701. Transferees of collateral are not the only ones who may be liable to the secured party for conversion. Persons who sell collateral for the debtor may be liable, too. See, e.g., United States v. Gallatin Livestock Auction, Inc., 589 F.2d 353 (8th Cir. 1979); United States v. Friend’s Stockyard, Inc., 600 F.2d 9 (4th Cir. 1979); Security Nat’l Bank v. Belleville Livestock Comm’n Co., 619 F.2d 840 (10th Cir. 1979); United States v. Burnett-Carter Co., 575 F.2d 587 (6th Cir. 1978); United States v. Midwest Livestock Prods. Coop., 493 F. Supp. 1001 (E.D. Wis. 1980); United States v. Bunker Livestock Comm’n, Inc., 22 UCC Rep. 1055 (D.N.M. 1977); Mammoth Caves Prod. Credit Ass’n v. Oldham, 569 S.W.2d 833 (Tenn Ct. App. 1977). But compare, e.g., United States v. Public Auction Yard, 637 F.2d 613 (9th Cir. 1980); United States v. Lindsey, 24 UCC Rep. 1309 (N.D. Tex. 1978); Prod. Credit Ass’n of Chippewa Falls v. Equity Coop. Livestock Sales Ass’n, 82 Wis. 2d 5, 261 N.W.2d 127 (1977). A secured party can recover in conversion from someone who seizes and sells the collateral though he has no interest in or right to the property, or someone who otherwise exercises dominion and control that amounts to conversion. See, e.g., Hartford Fin’l Corp. v.
Whether the secured party seeks to repossess the collateral from a transferee or to recover damages for conversion, he can rightfully prevail only if the security interest (1) continued in the collateral when the debtor disposed of it and (2) has priority over the transferee’s claim to the property. A security interest continuing in his favor in the collateral does not in itself always give the secured party an absolute and superior right to the collateral.\footnote{702} If a debtor has conveyed collateral and the security interest continues in it, a priority conflict results between the secured party (asserting his security interest) and the transferee (asserting title or some other interest in the property). Contests such as this are usually decided according to Article 9’s priority rules and principles under which secured parties sometimes lose.\footnote{703} This is the principal reason for the language of section 9-306(2) that reads “[e]xcept where this Article otherwise provides.”\footnote{704} But the transferee will win without having to resort to Article

\footnote{702}{See generally U.C.C. § 9-201, Comment. See also U.C.C. § 9-306, Comment 3 regarding transferees and others “taking free” under Article 9’s priority sections which may mean that such third party interests are superior to an Article 9 security interest.}

\footnote{703}{Article 9’s priority rules are discussed later in this series of articles in a separate piece that deals primarily with priority disputes under Article 9. This separate article will be published in a subsequent issue of the ARKANSAS LAW REVIEW.}

\footnote{704}{See U.C.C. §§ 9-201, Comment; 9-306, Comment 3. There is another reason for the “except” clause of U.C.C. § 9-306(2), a reason in addition to that of making allowance for Article 9’s priority rules. The general rule is that a security interest will continue in collateral unless the secured party has authorized the disposition. See U.C.C. § 9-306(2). In some exceptional cases, however, a security interest will not follow the collateral despite the secured party’s failure to authorize its disposition. In these exceptional situations, the security interest, terminates by operation of law, not because of the creditor’s authorization of the collateral’s disposition or because of a rule of priority. The pre-Code rule in some jurisdictions was that a security interest in chattels was lost if the goods were confused with others. See generally U.C.C. § 9-315, Comment 2. Regarding the “doctrine of confusion of goods” generally, see R. BROWN, THE LAW OF PERSONAL PROPERTY §§ 6.8-6.14 (W. Raushenbush 3d ed. 1975). Article 9 changes this rule: U.C.C. § 9-315 provides that a security interest continues in the product or mass when collateral loses its identity after being commingled or processed with other goods. Compare U.C.C. § 9-314 regarding security interests in acces-}
9's priority provisions if for some reason the security interest did not continue in the collateral after its disposition. In such a case there is no priority conflict because the secured party has no interest in the property to assert against anyone.

A security interest will not continue in collateral if "the disposition was authorized by the secured party in the security agreement or otherwise." Security agreements seldom authorize the debtor to dispose of collateral and, to the contrary, frequently contain an express prohibition against sales or other dispositions of the collateral by the debtor. Security agreements covering inventory are exceptions. An inventory financer expects to be repaid from the collateral's proceeds, and in the security agreement he will usually express his consent to sales of the inventory in the ordinary course of the debtor's business. A sale consistent with the terms of such an authorization frees the property of the security interest for the reason that "the disposition was authorized by the secured party in the security agreement." Authorization for the debtor to dispose of collateral is sometimes withheld from security agreements covering inventory and usually denied in those covering other types of collateral. In these cases a security interest will terminate on the basis of section 9-306(2) and not continue in the collateral only if the disposition was in some other way, i.e., "or otherwise," authorized by the secured party. A secured party may, for example, expressly give the debtor verbal permission to dispose of collateral, or, the secured party may sell the collateral hriptions. But § 9-315 does not apply to cases where the collateral not only loses its identity but also ceases to exist. Thus a security interest in feed does not continue in the cattle that eat the collateral. See First Nat'l Bank of Brush v. Bostrom, 39 Colo. App. 1071, 564 P.2d 964 (1977). Neither does U.C.C. § 9-315 apply if the collateral consists of ordinary building materials that are incorporated into an improvement on land. In this case, too, the security interest in the goods terminates and ceases to continue in them upon their subsumption. See U.C.C. § 9-313(2).

705. U.C.C. § 9-306(2).
706. Id. See, e.g., Swift & Co. v. Jamestown Nat'l Bank, 426 F.2d 1099 (8th Cir. 1970); In re Frank Meador Leasing, Inc., 30 UCC Rep. 361 (Bankr. W.D. Va. 1980); Commercial Credit Corp. v. National Credit Corp., 251 Ark. 541, 473 S.W.2d 876 (1971); Surety Sav. & Loan Co. v. Kanzig, 53 Ohio St. 2d 108, 372 N.E.2d 602 (1978); Graves Constr. Co., v. Rockingham Nat'l Bank, 263 S.E.2d 408 (Va. 1980). But compare cases cited note 726 infra where conditions on authority to dispose of collateral have not been satisfied. In the typical case of sales from inventory, a buyer will ordinarily take free of the security interest even though the secured party does not in the security agreement authorize the debtor to dispose of the collateral. See U.C.C. § 9-307(1); also, see generally Nickles, supra note 275, at 116-133.
707. Even though the secured party does not in any way authorize disposition of the collateral and thus a security interest continues in collateral, the secured party's interest may not necessarily prevail over the interest of a transferee or other third party who for some reason claims the property. The secured party may lose to a third party under Article 9's priority rules. See text accompanying notes 702-703 supra.
self. But perhaps the most common argument is that a secured party "or otherwise" authorized disposition by impliedly consenting to the debtor's sale of the collateral and, consequently or alternatively, that the secured party waived his security interest in the property.

This waiver argument is often based on the pre-Code rule that a mortgagee waives his lien against a purchaser of the collateral by a course of conduct which allows the debtor in possession to sell the property at will. The argument is most frequently advanced in cases where the collateral is farm products. In Planters Production Credit Association v. Bowles, the PCA had a security interest in the debtor's 1971 crop. When the debtor sold this crop, he failed to remit the proceeds to the secured party and defaulted under his security agreement. The PCA then

Cent. Kan. Prod. Credit Ass'n v. Boese, 2 Kan. App. 2d 231, 577 P.2d 824 (1978). But compare cases cited note 726 where conditions on authority to dispose of collateral have not been satisfied. Also, but compare, e.g., United States v. Lindsey, 24 UCC Rep. 1309 (N.D. Tex. 1978) (regarding consent of government representative as ineffective to bind the government; see also authorities cited at Nickles, supra note 275, at 107 n.651). In Milnes v. General Elec. Credit Corp., 377 So. 2d 725 (Fla. Dist. Ct. App. 1979), the debtors defaulted under their security agreement covering a motor home. The home was returned by them to the dealer who had sold it to them. The secured party consented to the resale of the collateral by the dealer, and the court held that the ultimate purchasers from the dealer took free of the secured party's interest. The court could have decided this case on the basis of U.C.C. § 9-306(2) and the secured party's authorization of the resale by the dealer; but the reason the court gave for its decision was the entrustment doctrine of U.C.C. § 2-403(2). Accord, Commercial Credit Corp. v. Associates Discount Corp., 246 Ark. 118, 436 S.W.2d 809 (1969). See generally, U.C.C. § 9-306, Comment 4 (last two paragraphs). But compare cases cited in support of discussion in Nickles, supra note 275, at 118-19.

The best basis for decision in a case such as Milnes may be U.C.C. § 9-504(4), recognizing that, despite what the court suggests in the opinion, the secured party in essence foreclosed on its security interest in the collateral by having the dealer resell the motor home. See, e.g., Masssey-Ferguson, Inc. v. First Nat'l Bank of Franklin County, 27 UCC Rep. 1473 (1978).

For a thorough discussion of "or otherwise" authorizations to dispose of collateral on the bases of implied authority and waiver, see Nickles, supra note 275, at 103-136. It is also possible for a secured party to waive his security interest in collateral as against a third party even though no disposition of the property has occurred. See generally Weisbart & Co. v. First Nat'l Bank of Dalhart, 568 F.2d 391 (5th Cir. 1978) (but no waiver found in this case).

See authorities cited Nickles, supra note 275, at 109-10 n.659.

"Goods are... 'farm products' if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations." U.C.C. § 9-109(3). Arkansas adds "fish grown for sale on any fish farm" to this definition. See Ark. Stat. Ann. § 85-9-110(3) (Supp. 1979).


256 Ark. 1063, 511 S.W.2d 645 (1974).
sued him and his purchasers. For 20 years the debtor had financed his farming operations by borrowing money from the PCA and repaying the loans with the proceeds resulting from the sale of his crops. For this many years, the PCA had allowed this debtor and others to borrow, sell and repay in this way. Although the security agreement between the PCA and the debtor did not authorize sales of the collateral by the debtor, there was "simply no question and no doubt that PCA, as a general practice and as a general course of procedure, permitted all its members to sell or dispose of collateral at will, and relied on the member-debtor’s honesty and integrity in applying the proceeds from such sale or disposition to the payment of his indebtedness to PCA."714 Because of this general practice and procedure and a similar course of dealing with the debtor in this case, the trial court decided that the PCA "‘waived its lien under the financing statement and security agreement . . . [on] the crops involved in this lawsuit.’"715 On appeal, the Arkansas Supreme Court phrased the issue as "whether [under section 9-306(2)] a secured creditor may waive its security interest in collateral in favor of a third party purchaser of the collateral simply by his course of dealing with the debtor rather than by express or written waiver under the Uniform Commercial Code."716 The court concluded that authority to dispose of collateral may be based on a course of conduct between the secured party and the debtor; determined that the course of dealing between the parties in this case and the trade usage "or otherwise" authorized the debtor to dispose of his crops; and affirmed the trial court’s decision that the PCA had "waived” its security interest.717

Many courts agree that generally and theoretically, at least, section 9-306(2) does not displace the common law doctrine of waiver.718 In

714. Id. at 1070, 511 S.W.2d at 649.
715. Id. at 1066, 511 S.W.2d at 647, quoting trial court’s decree. The lower court refused to find, however, that the secured party waived its security interest in some of the crops sold by the debtor to his wife.
716. Id. at 1067, 511 S.W.2d at 647.
718. The undoubtedly correct reasoning is that

Before adoption of the Uniform Commercial Code, a secured party could impliedly consent to the sale of collateral. . . . Nothing in the Code itself suggests that recognition of the implied authorization doctrine was intended to be withheld and § 9-306(2) places no limit upon the manner in which authorization may be "otherwise" given. In accord with § 1-103 of the Code, . . . the doctrine of implied authorization has been allowed to remain in force under the Uniform Commercial Code.

Poteau State Bank v. Denwalt, 597 P.2d 756, 760 (Okla. 1979). Whether or not a secured party has impliedly authorized the collateral's disposition and thus waived his security interest is a question of fact, however, to be inferred from "the circumstances of the parties, the nature of the collateral, the course of dealing of the parties, and the usage of trade." Platte Valley Bank of Brighton v. B & J Constr., Inc., 606 P.2d 435, 457 (Colo. App. 1980). The transferee who argues that the secured party waived the security interest has the burden of
cases involving farm products, however, the majority of courts have refused to find that a secured party waived his interest solely because of a course of previous dealing which sanctioned sales by the debtor. 719 In most of these cases, the security agreements contained a provision prohibiting sales of crops or livestock by the debtor without the prior, written consent of the secured party. The courts have been quick to conclude that such a provision in the parties' agreement abrogates the significance of a previous course of conduct and the relevance of any trade usage. This conclusion is supported by one of the Code's general rules of interpretation which provides that

[the express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade. 720

This section is not applicable where, as was true in the Bowles case, the security agreement fails expressly to prohibit sales by the debtor; thus Bowles is distinguishable from the majority of cases that reject the waiver argument with respect to farm products collateral. Yet the Bowles decision is not the latest statement of Arkansas law governing waivers of security interests in farm products cases. The legislature overruled Bowles by adding this sentence to Arkansas' section 9-306(2):

A security interest in farm products shall not be considered waived nor shall authority [to] sell, exchange, or otherwise dispose of farm products be implied or otherwise result from any course of dealing between the parties or by any trade usage. 721


720. U.C.C. § 1-205(4).

The argument of waiver based on a previous course of dealing will be rejected by the majority of courts if the security agreement prohibits sales by the debtor; many of these courts will follow the rule that express contract terms control any contrary course of dealing or trade usage.\textsuperscript{722} Even if the agreement is silent with respect to sales by the debtor, this waiver argument must be rejected by Arkansas courts in cases involving farm products because of the state's "no waiver" rule embodied in its non-uniform section 9-306(2).\textsuperscript{723} Both of these rules are limited ones, however; they preclude a waiver only when it is predicated solely on a previous course of dealing or a usage of trade.\textsuperscript{724} Neither rule precludes a finding based on some other ground that a secured party "or otherwise" authorized the debtor to dispose of collateral and thus waived his security interest. Whether or not the security agreement expressly forbids the debtor from disposing of collateral, the secured party may lose his interest if a course of performance has evolved under which the debtor is permitted to sell the collateral,\textsuperscript{725} or, despite a provision in the security agreement requir-
ing the secured party's prior, written consent to any disposition by the
developer, the security interest may be terminated by a sale to which the
secured party verbally agreed.\textsuperscript{726} A subsequent course of performance or
a verbal authorization of sale can have the dual effect of authorizing the
developer to dispose of collateral and, at the same time, waiving any provi-
son in the security agreement to the contrary, even a provision requiring
the creditor's prior, written consent.\textsuperscript{727} It is also possible that a sale in no

\begin{footnotesize}
other grounds. 92 Wash. 2d 30, 593 P.2d 167 (1979) (the other ground being that any authorization
to dispose of the collateral was conditioned on the debtor remitting the proceeds to
the secured party which was not done in this case; the higher appellate court does not willi-
nilly reject the notion suggested by the intermediate one that a course of performance can
constitute an "or otherwise" authorization under U.C.C. § 9-306(2). \textit{But cf.} Community
Bank v. Jones, 278 Or. 647, 566 P.2d 470 (1977) (involving inventory). A "course of per-
formance" refers to the parties' conduct under the present contract, while "course of dealing"
concerns their actions under previous agreements between them. \textit{Compare} U.C.C. §§ 2-208(1)
& 1-205(1). While it is true that any inconsistency between an express term of the parties'
agreement and their course of performance is to be resolved by reference to the express
provision, \textit{see} U.C.C. § 2-208(2), the course of performance may have the effect of waiving
the express term altogether. \textit{See} U.C.C. § 2-208(3). According to the drafters, "[w]here it is
difficult to determine whether a particular act merely sheds light on the meaning of the
agreement or represents a waiver of the term in the agreement, the preference is in favor
of 'innocent' whenever such construction . . . is needed to preserve the flexible character of com-
mercial contracts and to prevent surprise or other hardship." U.C.C. § 2-208, Comment 3
(\textit{emphasis added}).

689, 577 P.2d 35 (1978); Cessna Fin. Corp. v. Skyways Enterprises, Inc., 580 S.W.2d 491, 494
528 (10th Cir. 1979) (noting the possibility of authorization based on express consent though
78 Cal. App. 3d 855, 144 Cal. Rptr. 367 (1978); Oxford Prod. Credit Ass'n v. Dye, 368 So.
2d 241 (Miss. 1979), both of which suggest that a secured party's mere acquiescence in the
disposition of the collateral by the debtor does not amount to an "or otherwise" authoriza-
tion under U.C.C. § 9-306(2). \textit{Also, but compare} North Cent. Kan. Prod. Credit Ass'n v.
Seattle-First Nat'l Bank, 92 Wash. 2d 30, 593 P.2d 167 (1979), both suggesting that any
conditions imposed by a secured party on his "or otherwise" authorization (\textit{e.g.}, that the
proceeds be paid to him) must be satisfied in order to find that the security interest termin-
ated because of the disposition. \textit{But see and compare} First Nat'l Bank and Trust Co. of
Oklahoma City v. Iowa Beef Processors, Inc., 626 F.2d 764 (10th Cir. 1980); Commercial
Credit Corp. v. National Credit Corp., 251 Ark. 541, 473 S.W.2d 876 (1971). This was not the
rule under pre-code law; if the secured creditor somehow waived his interest in the col-
lateral, the failure of the debtor to satisfy any conditions to the waiver was inmaterial. \textit{See}
Nickles, \textit{supra} note 275, at 109-10 n.659, 124-25 n.700. Finally, \textit{but compare} Weisbart & Co. v.
First Nat'l Bank of Dalhart, 568 F.2d 391 (5th Cir. 1978) (consent to contract of sale irrele-
vant if in fact no sale or other disposition occurred).

Kan. 689, 577 P.2d 35 (1978) (by implication in a case where the secured party expressly
(where a secured party's conduct both (1) stopped her from enforcing a requirement that
the debtor obtain prior, written consent to sale of the collateral and (2) at the same time,
implicied her authorization for the debtor to sell the property.) Regarding an "or otherwise"
authorization based on course of performance, U.C.C. § 2-208(3) explicitly provides that a
"course of performance shall be relevant to show a waiver or modification of any [express]
term of the parties' agreement inconsistent with such course of performance."

\end{footnotesize}
way authorized by the secured party prior to the disposition can in any case be ratified by him thereafter, and this should be true despite whatever the security agreement or the law provides regarding the validity or requirement of an a priori waiver.

Whether or not a secured party authorized the disposition of the original collateral, he may have a security interest in the proceeds that result from the disposition. What "proceeds" are and which ones are subject to the secured party's interest are the principal issues that are addressed in the following discussion.

2. Security Interest Continuing In Proceeds Of Collateral

A security interest "continues in any identifiable proceeds including collections received by the debtor" which result from disposition of collateral. This interest in proceeds arises by operation of law, and it attaches to the property that constitutes proceeds even though the disposition of the original collateral was authorized by the secured party. "Proceeds' include whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." Thus, there can be no proceeds in which a security interest continues unless

A secured party's words or conduct which implies authority for the debtor to sell could conceivably, if relied on by the transferee, estop the secured party from asserting his security interest against the transferee. But the courts have been reluctant to accept estoppel arguments made by transferees trying to take free of a security interests. See generally, e.g., Security Nat'l Bank v. Belleville Livestock Comm'n Co., 26 UCC Rep. 528, 336 n.4 (10th Cir. 1979); In re Ocean Elec. Corp., 22 UCC Rep. 1270 (S.D. Cal. 1977); Montgomery v. Fuquay-Mouser, Inc., 647 S.W.2d 268 (Tex. Civ. App. 1978). But compare generally, e.g., United States v. Gleaners & Farmers Coop. Elev. Co., 341 F. Supp. 1148 (N.D. Ind. 1970) [but a subsequent and ultimate decision for the secured party was affirmed on appeal at 481 F.2d 104 (7th Cir. 1973)]; also, regarding estoppel of the government, see authorities cited at Nickles, supra note 275 at 107 n.651]; Poteau State Bank v. Denwalt, 597 P.2d 756 (Okla. 1979).


729. See U.C.C. § 9-306(2).

730. U.C.C. § 9-306(2).

731. This is true unless the parties agree otherwise. See U.C.C. § 9-203(3).

732. See, e.g., Commercial Credit Corp. v. National Credit Corp., 251 Ark. 541, 473 S.W.2d 876 (1971); Barnett Bank of Tallahassee v. Applegate, 25 UCC Rep. 320 (Fla. Dist. Ct. App. 1978) vacated, 377 So. 2d 1150 (Fla. 1979); In re Yealick, 69 Ill. App. 3d 353, 387 N.E.2d 399 (1979). A secured party's authorization to dispose of collateral results in the termination of his interest in that particular property; the authorization does not prevent the continuation of the interest in the proceeds of the property that was disposed of.

733. U.C.C. § 9-306(1).
property subject to a security interest is sold, exchanged or otherwise disposed of.\textsuperscript{734} In Mechanics National Bank of Worcester v. Gaucher,\textsuperscript{735} the Bank had a security interest in a dealer's (Wauwinet's) inventory of mobile homes. The dealer made a contract to sell one of the mobile homes to Garneau who made a down payment and arranged for Westover Credit Union to loan her the balance of the purchase money. Garneau signed a promissory note payable to the Credit Union, and, at about the same time, the dealer executed and delivered to her a bill of sale to the mobile home. Before the mobile home itself was actually delivered to her and before the purchase money had been paid by the Credit Union to the dealer, Garneau died. Her administratrix and the Bank both claimed the purchase money which was being held by the Credit Union's lawyer.

The Bank in the Gaucher case argued that its security interest in the mobile home as inventory continued in the purchase money as "proceeds." The court disagreed for the reason that no "sale" or other "disposition" of the mobile home had occurred. There had been no sale because title never passed to the buyer. In the absence of a contrary agreement, title does not pass until "the seller completes his performance with reference to the physical delivery of the goods."\textsuperscript{736} In this case, the mobile home was never delivered to Garneau, and she and the dealer never agreed that title would pass before delivery was completed. Nor was "the collateral . . . 'disposed of' since the mobile home stayed on Wauwinet's lot. Disposition implies a permanent transfer of possession."\textsuperscript{737} But the


"Disposition" means more than simply a voluntary transfer of collateral by the debtor. Collateral is disposed of within the meaning of U.C.C. \S 9-306(1) when, for example, it is lost or damaged because of an involuntary disposition. See generally, e.g., In re Brown, 617 F.2d 581 (10th Cir. 1980). But compare In re Continental Trucking, Inc., 16 UCC Rep. 526 (Bankr. M.D. Fla. 1974). Collateral in the form of a collectible intangible is disposed of and produces proceeds when a judgment is rendered against the account debtor or other primary obligor, see, e.g., Third Nat'l Bank in Nashville v. Par-Lac Corp., 27 UCC Rep. 255 (Tenn. Ct. App. 1979), or when money is advanced against accounts discounted to a lender. See National Acceptance Co. of America v. Virginia Capital Bank, 498 F. Supp. 1078 (E.D. Va. 1980).

\textsuperscript{736} U.C.C. \S 2-401(2).
\textsuperscript{737} 386 N.E.2d at 1055.
court must not have truly believed that no disposition of the mobile home had occurred because tucked away in a footnote of the Gaucher opinion is this observation: "The Bank, no doubt, had a security interest in Wauwinet’s contract right against the Garneau estate for breach of the sales contract." The reported facts do not suggest that the security agreement between the dealer and the Bank covered property other than inventory. Consequently, the Bank could have an interest in the contract right only if it was proceeds of the mobile home; but there can be no proceeds of any kind unless collateral has been disposed of. Thus the court’s observation that the Bank had a security interest in the contract right against the Garneau estate seems inconsistent with its conclusion that there had been no disposition of the mobile home.

The court in Gaucher was apparently prepared to hold, however, that even if the dealer had effected a disposition of the mobile home, the purchase money loaned by the Credit Union was not “proceeds” as this term is defined by section 9-306(1). The court believed that in addition to the “disposition” requirement of this section, property that results from the disposition is not “proceeds” unless it is received by the debtor-obligor. The court reasoned that

Under this statute [section 9-306(1)] the term “proceeds” includes whatever is “received when collateral is sold, exchanged, collected or otherwise disposed of.” . . . Manifestly, Wauwinet [the debtor-obligor] did not “receive” anything from Garneau, except the original deposit, since what the Bank now pursues is the money which the Bank argues Wauwinet was entitled to receive from her.

Section 9-306(1) does require that the property resulting from the disposition be “received,” but the provision does not specify by whom. Arguably, the purchase money loaned by the Credit Union in Gaucher was

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738. Id. at 1057 n.9. Compare generally, e.g., Imperial NH3, Div. of W. Farm Serv., Inc. v. Central Valley Feed Yards, Inc., 70 Cal. App.3d 513, 139 Cal. Rptr. 8 (1977) (when debtor transferred collateral to third party to satisfy pre-existing debt owed by debtor to that party, right to payment or credit for the collateral was proceeds in which security interest continues). But compare, e.g., regarding causes of action with respect to collateral as proceeds, In re Continental Trucking, Inc., 16 UCC Rep. 256 (Bankr. M.D. Fla. 1974); Bank of N.Y. v. Margiotta, 99 Misc. 2d 423, 416 N.Y.S.2d 493 (1979); Hoffman v. Snack, 37 Pa. D & C:2d 145 (1964).

739. If the dealer’s cause of action against the buyer’s estate for breach of contract was collateral, the property would be classified as a “general intangible” under the 1972 official version of Article 9. See U.C.C. § 9-106.

740. See U.C.C. § 9-306(1).

741. 386 N.E.2d at 1055.

742. “‘Proceeds’ includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds.” U.C.C. § 9-306(1) (emphasis added). Thus a secured party with an interest in cattle feed could claim no security interest in proceeds after the feed was consumed by the debtor’s animals for the reason that nothing was received from this disposition. See First Nat’l Bank of Brush v. Bostrom, 39 Colo. App. 107, 564 P.2d 964 (1977).
not received by anyone because it had not left the hands of the lender or the lender's representative, its lawyer. This argument assumes, of course, that property can be "received" within the meaning of section 9-306(1) only when the propagator parts with possession and control. Nevertheless, suppose a case in which property resulting from a disposition is actually "received" (whatever this term means) but by someone other than the debtor-obligor. Does the property constitute "proceeds" in such a case? Is "received by the debtor-obligor" an implicit component of the definition of proceeds as the court in Calcher suggests that it is? Several other courts have considered these questions and concluded, as did the Supreme Judicial Court of Maine, that nothing supports the "contention that the words 'whatever is received' in line one of 9-306(1) means 'whatever is received by the debtor.'" Still, however, the question of whether or not the debtor must receive the proceeds is a persistent one because of an ambiguity in the language of section 9-306(2).

A security interest does not continue in property solely for the reason that the property is "proceeds." A security interest does not continue in all proceeds, only in those that are "identifiable proceeds including collections received by the debtor." Does the phrase "received by the debtor" in section 9-306(2) modify only the word "collections," or does the phrase modify the word "proceeds?" If it modifies "proceeds," then a security interest will continue in proceeds of whatever kind only if they are identifiable and have been received by the debtor. The better view, however, is that the phrase "received by the debtor" in section 9-306(2) modifies "collections" and not "proceeds." If the other view is taken, it is worth

742a. If this assumption is true, its validity and application are unclear in cases involving intangible personality other than money and perhaps, instruments and documents of title. The court in Calcher did not explain if or how the dealer received the right of action he acquired against the estate. Surely, however, in the case of a general intangible or similar intangible property, the proceeds are "received" within the meaning of U.C.C. § 9-306(1) when the right arises and exists in favor of the debtor because there can be no physical possession or transfer of such a right itself.


744. U.C.C. § 9-306(2) (emphasis added).


While there is some ambiguity here, perhaps the proper resolution of the problem is to recognize the continuing security interest in proceeds even though they are not "received by the debtor," since they would not be received by the debtor in any sense if they were deposited directly in a special account, or if a receiver or trustee were appointed and such a person actually received the proceeds, or if the appointment of a receiver or trustee resulted in the secured party's withholding
emphasizing that the phrase uses the term “debtor,” not “debtor-obligor.” This is important in cases where the debtor-obligor transfers collateral in which a security interest continues, and the transferees makes a further disposition of the original collateral. If the debtor-obligor receives identifiable proceeds because of the transfer of the original collateral to the transferee, the secured party’s interest will continue in these proceeds.\footnote{If the transferee owned the original collateral because of the transfer from the debtor-obligor, then the transferee himself, though not an obligor, is a “debtor” with respect to the original collateral that he disposed of and, also, with respect to the proceeds if a security interest continues in them. This line of reasoning assumes that section 9-306(2) is a provision “dealing with” the collateral so that the term “debtor” as used there includes a debtor owner who is not the obligor. Presumably, it is such a provision since it explains amounts due pending a determination of entitlement or payment into court. In these unusual circumstances when the security interest in proceeds is needed most strongly by the secured party, it would be anomalous to cut off the security interest because of inartistic drafting which is at best ambiguous. R. Henson, \textit{Handbook on Secured Transactions} § 6-1 at 197-98 (2d ed. 1979). But in their commentary to U.C.C. § 9-306, the drafters wrote: “This section states a secured party’s right to the proceeds received by a debtor on disposition of collateral and states when his interest in such proceeds is perfected.” U.C.C. § 9-306, Comment 1 (emphasis added). Notice that in this comment, the “received by the debtor” language clearly modifies “proceeds,” not just collections that constitute proceeds.\footnote{If the debtor-obligor disposes of these original proceeds, the identifiable proceeds of this disposition will also be subject to the secured party’s interest. “‘Proceeds’ includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds.” U.C.C. § 9-306(1). See, e.g., C.O. Funk & Son, Inc. v. Sullivan Equipment, Inc., 4 CCH Sec. Trans. Guide ¶ 53,529 (Ill. App. 1981). But the secured party will, as always, have the burden of proving that the property received did in fact result from the disposition of collateral or proceeds. See, e.g., id.; Chrysler Credit Corp. v. Bank of Wiggins, 358 So. 2d 714 (Miss. 1978).}\footnote{This assumes, of course, that the transferee took the original collateral subject to the secured party’s interest and did not, for one reason or another, take free of the interest. If he took free of the security interest, the original collateral was not “collateral” in his hands for the reason that the property was not subject to a security interest. See U.C.C. § 9-105(1)(c).}

\footnote{See U.C.C. § 9-105(1)(d).}

\footnote{The definition of debtor provides that “[w]here the debtor and the owner of the proceeds are not the same person, the proceeds become a part of the secured collateral if the debtor at the time of the receipt thereof has no security interest in the proceeds.” U.C.C. § 9-401(b). It is questionable whether this is limited to receivables. If so, does it mean that in chattel mortgages, in which the debtor is the owner of the collateral, the proceeds are never a part of the secured collateral? One might argue that chattel mortgages are not true security interests. The practice is to treat chattel mortgages as collateral and the proceeds as part of the secured collateral. See 3 E. Moore, \textit{Uniform Commercial Code} ¶ 9-105(1)(c), at 9-105:8 (2d ed. 1980). See also R. Henson, \textit{Handbook on Secured Transactions} § 6-1 at 197-98 (2d ed. 1979).}

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when security interests will continue in property and thereby establishes the property as collateral. If the secured party could have reached the original collateral in the hands of the transferee, it seems logical that he should be able to reach the proceeds of that property. Notwithstanding the logic of this proposition, Article 9 explicitly provides that in one situation, property received by a transferee of the debtor-obligor upon disposition of collateral will not be subject to the secured party’s interest. This situation involves insurance payable by reason of loss or damage to collateral. Such insurance is “proceeds” under the 1972 official version of Article 9, “except to the extent that it is payable to a person other than a party to the security agreement.” In the ordinary case, a debtor-obligor who acquires casualty insurance covering the collateral will name himself and the secured party as loss payees. Even if the secured party is not named as loss payee, he will be able to assert his interest in any identifiable insurance payment for the reason that the insurance is payable to

collateral are not the same person, the term ‘debtor’ means the owner of the collateral in any provision of this Article dealing with the collateral, and the obligor in any provision dealing with the obligation, and may include both where the context so requires.” Id. (emphasis added). If U.C.C. § 9-306(2) is not a provision “dealing with” the collateral, the term “debtor” as used in the phrase “received by the debtor” means only the debtor-obligor.


The 1972 version of U.C.C. § 9-104(g) expressly provides that this exclusion does not cover claims of security interests in insurance payments that constitute proceeds of collateral. Therefore, Article 9’s applicability is not discontinued when collateral is lost or destroyed and the secured party asserts a security interest in insurance proceeds. National Bedding & Furniture Indus., Inc. v. Clark, 252 Ark. 780, 481 S.W.2d 690 (1972) holds to the contrary, but this case was decided before the 1972 amendments to Article 9 were effective in Arkansas.
the debtor, a party to the security agreement.\textsuperscript{752} Suppose, however, that the debtor-obligor transfers the collateral to a third person and that this transferee takes the collateral subject to the security interest. Suppose, also, that the transferee procures insurance covering the collateral, that the collateral is lost or damaged and that the transferee's insurer makes payment for the casualty. The secured party's interest does not attach to this payment because it is not proceeds, and this is true even though the transferee is a "debtor."\textsuperscript{753} Insurance is proceeds in which a security interest can continue only when it is payable to a party to the security agreement, which in the usual case is not true of a transferee.

This insurance proviso of section 9-306(1) is an explicit but limited exception to the general principle established by sections 9-306(1) and 9-306(2). This principle is that a security interest continues in whatever identifiable personal property results from any disposition of collateral no matter when or how the disposition occurs and, arguably at least, no matter who receives the resulting property. The principle places virtually no limits on the type property that can constitute proceeds or on the nature or remoteness of the disposition that may spawn them. The only clearly established and generally applicable limitation is that the proceeds must be "identifiable."\textsuperscript{754} "Identifiable" is nowhere defined in Article 9 or

\textsuperscript{752} Whether or not the secured party is listed as a loss payee on an insurance policy covering collateral, he is not entitled to insurance that is payable for the loss of or damage to property which is not subject to his security interest. See generally Wilbanks & Wilbanks, Inc. v. Cobb, — Ark. —, 601 S.W.2d 601 (Ct. App. 1980). When such property is lost or damaged, the insurance is not proceeds under U.C.C. § 9-306(1) in which a security interest will continue because the property is not "collateral," i.e., it is not property subject to a security interest. See U.C.C. §§ 9-106(1)(c); 9-306(1).

\textsuperscript{753} See, e.g., McGraw-Edison Credit Corp. v. All State Ins. Co., 68 A.D.2d 872, 406 N.Y.S.2d 337 (1978), holding that under the 1972 version of Article 9 and also under the pre-1972 version, insurance received by a transferee of the debtor-obligor is not proceeds in which a security interest continues.

\textsuperscript{754} See U.C.C. § 9-306(2). A judicially created limitation on the principle of U.C.C. §§ 9-306(1) & (2) was announced recently in the case Chemical Bank v. Miller Yacht Sales, 173 N.J. Super. 90, 413 A.2d 619 (1980). Chemical Bank had a security interest in a Luhrs motorboat owned by Muller. Muller bought another, more expensive motorboat, a Marine Trader, from Miller Yacht Sales and traded in the Luhrs. Jersey Bank financed Muller's purchase of the Marine Trader. Eventually, Muller defaulted under his security agreements with both banks. Jersey Bank repossessed and sold the Marine Trader, and Chemical Bank sued for conversion of the Marine Trader which it claimed was proceeds of the Luhrs. The court conceded that under a literal interpretation of the § 9-306(1) definition, the Marine Trader was "proceeds" of the Luhrs. Nevertheless, the court believed that in this case the term "proceeds" should not be interpreted as covering the Marine Trader, even though by definition it includes whatever is received when collateral is exchanged or otherwise disposed of and may consist of property other than cash.

The purchase price of the Luhrs was $29,000. It was used as a down payment on the much more substantial Marine Trader, the purchase price of which was $47,500. Jersey Bank financed $23,000 of that purchase price remaining after the trade-in. In the rather extraordinary circumstances here, its relationship to the
elsewhere in the Code; thus the courts have been forced to rely on extraneous sources of law and meta-Code principles in order to give meaning to the term. The issue of identifiability has arisen most often in cases where “cash proceeds” such as money and checks have been deposited in a debtor’s bank account and commingled with other funds which were not proceeds. Does this commingling prevent a security interest from continuing in proceeds in a debtor’s bank account for the reason that they are no longer “identifiable” within the meaning of section 9-306(2)? The majority of courts say “no” and hold that despite commingling, proceeds can be identified by using common law tracing principles. But a secur-

Luhrs was so attenuated and remote that it reasonably cannot be considered as having financed the “proceeds” of that boat. It is accordingly inappropriate to conclude that as against Jersey Bank the Marine Trader represented the proceeds of the smaller boat so that Chemical’s perfected security interest in the Luhrs attached to the Marine Trader as “proceeds” thereof.

413 A.2d at 625. Since the Marine Trader was much more valuable, why should not the court have decided that it could support the interests of both banks and, possibly upon foreclosure have sold for a sum sufficient to satisfy both claims or a substantial part of each? Is the “proceeds” issue in this case in any way comparable to the question in First Nat’l Bank of Brush v. Bostrom, 39 Colo. App. 107, 564 P.2d 964 (1977) (cattle are not proceeds of feed that the animals eat). Can the cases be explained on the basis that neither the Marine Trader in Miller Yacht Sales nor the cattle in Brush were received solely as a result of the disposition of collateral? But does U.C.C. § 9-306(1) require that in order to constitute proceeds, the property must result solely from the disposition of collateral?

755. “Money, checks, deposit accounts, and the like are ‘cash proceeds.’ All other proceeds are ‘non-cash proceeds.’” U.C.C. § 9-306(1).


Section 9-104(1), “excluding bank deposits from the UCC provisions on secured transactions, does not apply to bank deposits which are the proceeds of collateral.” Morris Plan Co. of St. Joseph v. Broadway Nat’l Bank of Kan. City, 28 UCC Rep. 1112, 1115 (Mo. App. 1980). “[I]t is only the use of bank accounts as original collateral which is proscribed.” Domain Indus., Inc. v. First Sec. Bank & Trust Co., 230 N.W.2d 163, 167 (Iowa 1975). The exclusion provides that Article 9 does not apply “to a transfer of an interest in any deposit account except as provided with respect to proceeds and priorities in proceeds.” U.C.C. § 9-104(1) (emphasis added).

Since commingling does not preclude identification of proceeds under U.C.C. § 9-306(2) by tracing them, a secured party can assert his security interest in all the proceeds that he can thereby segregate from other funds in the debtor’s account. This is not true, however, in cases where insolvency proceedings have been instituted by or against the debtor. In such a case, U.C.C. § 9-306(4)(d)(ii) limits the security interest that can be claimed in proceeds that have been commingled with other funds in an account. On the relationship between U.C.C. § 9-306(2) (particularly its “identifiable” requirement) and § 9-306(4)(d)(ii), compare...
ity interest in identifiable proceeds that have been traced into a debtor's bank account does not follow the proceeds when they are "paid out" of the account in the ordinary course. The commentary to section 9-306 states that

    Where cash proceeds are covered into a debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments in the ordinary course.\textsuperscript{757}

This comment is undoubtedly correct even though nothing in the text of Article 9 supports it. A general rule of law which supplements the Code and supplies the priority rule in such a case is that money cannot be recovered from bona fide holders for value.\textsuperscript{758}

    If the transfer of proceeds out of the account is for some reason mala fide, the section 9-306 commentary suggests a different result: "The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party."\textsuperscript{759} The law of secured transactions arguably supports such a recovery, too. If a security interest continued in the proceeds while they were part of the debtor's bank account, the proceeds were "collateral."\textsuperscript{760}

According to the first clause of section 9-306(2), a security interest continues in collateral notwithstanding disposition by the debtor.\textsuperscript{761} Consequently, an unauthorized disposition of proceeds in a debtor's bank account to a fraudulent transferee does not result in the termination of the secured party's interest. Nor do general common law principles cut off claims to money that is received by a mala fide transferee or one who gave less than valuable consideration for it.\textsuperscript{762} Thus the security interest will follow this collateral (and, also, continue in any identifiable proceeds of it)\textsuperscript{763} and be accorded whatever priority the law of secured transactions


\textsuperscript{757} U.C.C. § 9-306, Comment 2(c). This commentary was relied on by the court in Anderson, Clayton & Co. v. First Am. Bank of Erick, 614 P.2d 1091 (Okla. 1980).


\textsuperscript{759} U.C.C. § 9-306, Comment 2(c).

\textsuperscript{760} See U.C.C. § 9-105(1)(c).

\textsuperscript{761} The first clause of U.C.C. § 9-306(2) applies to continue the interest in the collateral, not the second or "proceeds" clause. The object at this point is to establish that the interest in the original proceeds continues in them when they leave the debtor's bank account, not to determine whether property resulting from this disposition of the original proceeds (proceeds of the proceeds) is also subject to the secured party's interest.

\textsuperscript{762} See generally A. Nussbaum, supra note 758, at 55-57.

\textsuperscript{763} If the transferee disposes of proceeds that are collateral, the resulting "proceeds of proceeds" will be subject to the secured party's interest. See U.C.C. §§ 9-306(1)(2). "Proceeds of proceeds" are "proceeds" within the definition of § 9-306(1); and § 9-306(2) pro-
gives it over the claims of the transferee and other claimants. So it can be argued that when identifiable proceeds are paid out of an account to a fraudulent transferee, the secured party has two theories on which to base an action against the transferee, one theory grounded in fraudulent conveyances law and the other in Article 9. Under the law of Article 9, collateral in the hands of the transferee can be recovered from him; and, if he cannot or will not return the property, the transferee may be liable in conversion for the property's value.

D. ASSIGNMENT OF SECURED OBLIGATIONS
(PRIMARILY, SALES OF CHATTEL PAPER)

A secured party may sell or otherwise assign a secured obligation. This provides that a security interest continues in identifiable proceeds. Even if a security interest continues only in identifiable proceeds "received by the debtor," this requirement is satisfied for the reason that the transferee is a "debtor" because he owned the collateral (the original proceeds) which produced the new proceeds. See text accompanying notes 744-750 supra.

764. See text accompanying notes 686-701 supra. If the collateral in the hands of the transferee is money, the secured party will probably seek the imposition of a constructive trust or an equitable lien. This will require the secured party to trace and identify the specific funds that are subject to his security interests. See generally D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 5.16 (1973). Money can be replevied only when "it is marked or designated in some manner as to become specific as regards the power of identification, such as being in a bag or package." Spear v. Arkansas Nat'l Bank of Hot Springs, 111 Ark. 29, 32, 163 S.W. 508, 509 (1914) (quoting J. Cobbey, REPLEVIN § 72 (2d ed 1900)).

765. See text accompanying notes 686-701 supra. These remedies under Article 9 are not significantly different from the remedies that a secured party would have against the transferee if a fraudulent conveyances theory were pursued. If a conveyance is set aside as fraudulent, the transferee must return the specific property that he received if it can be located and identified; if the transferee cannot reconvert the specific property, the secured party is forced to settle for a general money judgment against him. Yet in a case where the specific property conveyed to the transferee can be identified, the secured transactions theory may be preferred over the fraudulent conveyances one for the reason that Article 9's priority scheme may give the secured party greater protection than that established by fraudulent conveyances law. This may be especially true when the transferee's creditors are asserting claims to assets held by him.

766. An assignment of a security interest alone and apart from the debt that it secures is a nullity, and the assignee takes nothing. This was the rule with respect to pre-Code security interests, see, e.g., L. Jones, A TREATISE ON THE LAW OF MORTGAGES ON PERSONAL PROPERTY § 505 (3d ed. 1888), and it remains the rule with respect to real estate mortgages. See Bryan v. Easton Tire Co., 262 Ark. 731, 561 S.W.2d 79 (1978). Presumably, this rule is perpetuated under Article 9, and security only assignments ordinarily have no legal effect.

See In re Jackson, 29 UCC Rep. 1137 (Bankr. M.D. Tenn. 1980); Epstein, Security Transfers By Secured Parties, 4 GA. L. REV. 527, 537-41 (1970). But, on the other hand, an assignment of the debt alone carries with it the security that collateralizes the debt. "We have held that an assignment of a note or debt automatically effects an assignment of an instrument or conveyance given as security therefore and confers upon the assignee all rights of the assignor." Ragge v. Bryan, 249 Ark. 164, 166, 458 S.W.2d 403, 405 (1970).

Except to the extent that assignments of secured obligations are themselves within the scope of Article 9 and thus governed by U.C.C. § 9-203, no provision establishes formalities for effecting assignments of secured obligations. So the courts sometimes recite and apply the principle "that no particular words or forms are necessary for the creation of an assign-
The most common assignment scenario is the focus of the following discussion. The scenario involves a seller of goods on credit who retains a security interest in the goods to secure the balance of the purchase price. The buyer signs a sales contract that evidences both a monetary obligation and a security interest, and this writing, which constitutes "chattel paper," is assigned, i.e., sold for a discount, to an assignee. The transaction between the seller and buyer of goods is within the scope of Article 9 because the parties intended to create a security interest in personal property; the assignment transaction between the assignor and assignee of the chattel paper is also covered by Article 9 because it applies to security transfers and sales of accounts and chattel paper. The

See U.C.C. §§ 9-403, 9-404, 9-406. But a § 9-405 filing is only a permissive device, and in no case is such a filing required to continue against the claims of the original debtor's creditors the perfected status of a security interest that is effectively assigned. See U.C.C. §§ 9-302(2), 9-405, Comment; In re Bollinger, 614 F.2d 924 (3d Cir. 1980); In re Chusman Bakery, 526 F.2d 23, 30 n.6 (1st Cir. 1975); In re Davidoff, 351 F. Supp. 440 (S.D.N.Y. 1972); Chemical Bank v. Miller Yacht Sales, 173 N.J. Super. 90, 413 A.2d 619 (1980). U.C.C. § 9-302(2), however, only continues the perfected status of the interest in property that secures the assigned debt; it does not perfect the assignee's interest in the secured obligation itself which may be claimed or garnished by creditors of the assignor. As against these creditors, the assignee must take steps to perfect his interest in the assigned secured obligation if the assignment transaction itself is within the scope of Article 9.

See U.C.C. §§ 9-105(1)(b). Consumer installment sales contracts arising from retail sales of goods are chattel paper, Morse Electro Prods. Corp. v. Beneficial Indus. Loan Co., 90 Wash. 2d 195, 579 P.2d 1341 (1978), assuming, of course that the contracts reserve or otherwise "evidence a security interest" in the goods.

"Discounted" means that the paper is sold to the assignee for less than its face value. Therefore, the assignee will profit by collecting from the buyer who executed the chattel paper the balance of the face value or principal and the interest that accrues on the total amount of the principal.

Not all assignments of chattel paper involve sales of it. But for purposes of the textual discussion that follows, the assumption is that the chattel paper was sold to the assignee.

buyer in the sale of goods transaction is both a "debtor"771 and an "account debtor."772 The chattel paper assignee in the assignment transaction is a "secured party" for the reasons that (1) because of the sale of the security interest as part of the chattel paper, he becomes the one in whose favor there is a security interest773 and (2) the definition of "se-

Plumbing Co., 80 Ill. App. 3d 179, 398 N.E.2d 1176 (1979). But see U.C.C. § 9-104(f). Therefore, assuming compliance with U.C.C. § 9-203(1), the interest acquired by a buyer of accounts and chattel paper is an Article 9 security interest. See U.C.C. § 1-201(37).

771. See U.C.C. § 105(1)(d). The buyer owes the obligation that is secured; and, in addition, the buyer owns the collateral because, despite the reservation of a security interest by the seller, title passes when the seller completes his performance with respect to the physical delivery of the goods. See U.C.C. § 2-401(1)(2).


773. "Secured party" is defined as a "person in whose favor there is a security interest." U.C.C. § 9-105(1)(m). When an assignee buys chattel paper, he acquires absolutely the account debtor's obligation and the security interest in the goods that secures this obligation. Therefore, this security interest now runs in favor of the assignee, and he is thus a secured party with respect to the goods.

If, instead of being sold, chattel paper is assigned for security purposes only, the assignee is a secured party if only for the reason that he acquires a security interest in the secured obligation which the account debtor owes the assignor. Thus the assignee is a secured party at least with respect to this secured obligation. But is the assignee also a secured party with respect to the goods which collateralize the account debtor's debt to the assignor? The traditional common law rule with respect to assignments generally is that an assignment of an obligation carries with it every remedy and security that is available to the assignor. In other words, the assignee gets the assignor's shoes and his collateral. But this common law rule is qualified by another one governing assignments for security: "[T]he assignee's right against the obligor [account debtor] is conditional on nonperformance of the duty to which the assignment is collateral." 4 A. Corbin, CORBIN ON CONTRACTS § 881 at 541 (1951).

Arguably, therefore, when chattel paper is assigned as security, the assignee's rights against the account debtor and the goods (and perhaps an interest in the goods) do not arise or mature until the assignor defaults on his obligation to the assignee. It would seem, therefore, that until such a default, the assignor retains an interest in or rights with respect to the goods in the sense that, absent a contrary agreement, he is the only one who can effect repossession and disposition of the goods upon the account debtor's default. Compare generally In re Nixon Machinery Co., 30 UCC Rep. 690 (Bankr. E.D. Tenn. 1980). There is pre-Code authority for the general proposition that one who assigns as security a debt secured by personal property retains an interest in the collateral. See generally, e.g., Johnson v. Barrett, 177 Ark. 779, 7 S.W.2d 773 (1928). But see generally A.J. Armstrong, Inc. v. Janburt Embroidery Corp., 97 N.J. Super. 246, 234 A.2d 737 (1967).

U.C.C. § 9-502(1) tends to confirm this analysis with respect to assignments for security for it implies that unless the assignor and assignee have agreed otherwise, an assignee of chattel paper can himself collect payments from the account debtor only upon the assignor's default. (This is consistent with the common law rule that the assignor of a chose in action for collateral retains enforceable substantive rights against the obligor. See generally, e.g., Ralston Purina Co. v. Como Feed & Milling Co., 325 F.2d 844 (5th Cir. 1963); United States v. Verrier, 179 F. Supp. 336 (D. Me. 1959).) U.C.C. § 9-502(1) does not explain the rights of a chattel paper assignee in the event that the account debtor thereafter defaults on his obligation; but presumably, the assignee can enforce the security interest in the goods that collateralized the account debtor's obligation by respossessing and selling them. If, upon the assignor's default, a chattel paper assignee succeeds to the assignor's right to collect the debt directly from the account debtor, it seems illogical to deny the assignee the benefit of the collateral that secured the debt and the remedies available to enforce the security
secured party" specifically includes a "person to whom accounts or chattel paper have been sold."774 Because he is a secured party, the assignee who purchases chattel paper may repossess the goods upon the buyer's default and dispose of them.775 This is true even though the assignment was "with recourse" so that the assignee could, if he wished, simply force the assignor to repurchase the chattel paper when the buyer defaults.776 Since an assignor who sells chattel paper loses all his rights and interests with respect to the collateral,777 it seems logical to assume that such an assignor who has not repurchased the paper and, therefore, has not reacquired the security interest has no authority in himself to effect repossession and foreclosure of the goods.778 The security interest in the collateral

interest. If the assignee is allowed to enforce this security interest, he can sell the goods and apply the proceeds to the account debtor's obligation to the assignor and, thus, ultimately to the assignor's debt to the assignee. Compare generally In re Nixon Mchnery Co., supra. If the assignor's debt is not thereby fully satisfied, the assignee can sue the account debtor for any deficiency that remains on the account debtor's obligation to the assignor and apply the proceeds of this suit to satisfy the balance of the assignor's debt to the assignee. If this debt is still not fully satisfied, the assignee can, presumably, sue the assignor directly for the balance.

If the assignee of chattel paper for security is not allowed upon defaults by the assignor and account debtor to proceed directly against the goods, there is an alternative: Force the assignee to dispose of the secured obligation itself, i.e., the chattel paper, in which the assignee undoubtedly has a security interest. The drafters of Article 9 apparently envisaged such dispositions. See, e.g., U.C.C. §§ 9-502(2); 9-504(2). This alternative may be theoretically sound and technically consistent with the scheme of Part 5 of Article 9, but, in a practical sense, it is commercially unrealistic. To whom, other than himself, can the assignee sell chattel paper under which the account debtor has already defaulted? Who will want to buy what amounts to a right to foreclose and, probably, a lawsuit for a deficiency? If the assignee himself buys the paper, will he not in most cases occupy the same position as would an assignee who is allowed to proceed directly against the goods upon the account debtor's default under the chattel paper?

774. U.C.C. § 9-105(1)(m). See also U.C.C. § 1-201(37) which describes the interest of a buyer of accounts or chattel paper as a "security interest."

775. The rights to repossess and dispose of collateral belong only to secured parties. See U.C.C. §§ 9-503, 9-504(1). Presumably, however, a secured party-assignee of chattel paper can repossess and dispose of the goods only if he is a secured party with respect to the goods themselves. Undoubtedly, the assignee is such a secured party if the nature of the assignment was a sale of the chattel paper to him. See note 773 supra. With respect to pre-Code law, compare generally Perry County Bank v. Rankin, 73 Ark. 589, 84 S.W. 725, rev'd on rehearing, 73 Ark. 589, 86 S.W. 279 (1905) with Wilson v. McCown & Co., 103 Ark. 422, 147 S.W. 451 (1912).


is not in the assignor's favor because he transferred it to the assignee as part of the chattel paper assignment transaction; consequently, the assignor is not a "secured party" as Article 9 defines the term and cannot repossess and dispose of the collateral for these rights belong only to secured parties. But in Tucker v. Scarbrough, a case involving the sale of chattel paper, the Arkansas Court of Appeals held that an assignor of chattel paper who guaranteed payment by the account debtor was a "secured party" and could repossess the collateral even though the assignor had not repurchased the paper or otherwise paid any of the account debtor's obligation.

The court in Tucker reasoned that such an assignor is "a 'secured party' within the definition of Ark. Stat. Ann. § 85-9-504(5)." This section contains no definitions, however; it provides that a person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party.

Apparently, therefore, the court in Tucker meant to say that the assignor had the rights of the secured party who was the assignee of the chattel paper in whose favor there was a security interest. Since this assignee had not reassigned the chattel paper or otherwise transferred the collateral to the assignor, subrogation was the only way under section 9-504(5) by which the assignor could have acquired the rights of the secured party-assignee. This section does not itself provide for subrogation in a case

M.D. Tenn. 1980) (where secured party assigned some but not all secured notes); In re Nixon Machinery Co., 30 UCC Rep. 690 (Bankr. E.D. Tenn. 1980) (which involved not a true sale of chattel paper but only an assignment of it for security). The assignee may, however, authorize the assignor to act for the assignee and effect repossession or foreclosure on the assignee's behalf. See discussion at text accompanying notes 793-795 infra.

779. See U.C.C. § 9-105(1)(m).
781. 268 Ark. 736, 596 S.W.2d 4 (Ct. App. 1980).
782. The facts state only that "Appellees assigned the conditional sales contract to the First National Bank at Siloam Springs, and guaranteed payment to the bank in the event of appellant's default." Id. at 737, 596 S.W.2d at 5. But the attorneys for the appellant-account debtor report that the chattel paper was discounted, i.e., sold for less than its face value, to the bank. Telephone conversation among Messrs. Hubert Bauch and Richard Hardwicke (attorneys for appellant in Tucker v. Scarbrough, 268 Ark. 736, 596 S.W.2d 4 (Ct. App. 1980) and Steve H. Nickles (November 13, 1980). Also, the senior vice president of the assignee-bank testified that the bank purchased the chattel paper from the assignor-seller. See Transcript at 4-5 (Testimony of Art Nelson), Tucker v. Scarbrough, — Ark. —, 596 S.W.2d 7 (Ct. App. 1980).
783. 268 Ark. at 740, 596 S.W.2d at 7.
784. U.C.C. § 9-504(5) (emphasis added).
785. The assignor might have been a secured party had he assigned the chattel paper as security and not sold it, see discussion in note 773 supra, or he might have had the rights of the secured party-assignee had the assignee authorized the assignor to act on its behalf. See discussion at text accompanying notes 794-795 infra.
such as *Tucker* or in any other case. Section 9-504(5) only recognizes that on the basis of extra-Code legal principles, a surety can be subrogated to the rights and duties of an Article 9 secured party. The court’s conclusion in *Tucker* that the assignor was subrogated to the rights of the secured party-assignee is contrary to common law principles governing suretyship. The assignor-guarantor in the *Tucker* case had not paid any of the account debtor’s obligation. The established common law doctrine is that with respect to collateral, a surety does not occupy the position of his principal’s creditor until the principal’s debt to the creditor is paid. The court in *Tucker* failed even to mention this doctrine; it also failed to reconcile its decision with that in *Baber v. Williams Ford Co.*

In the *Baber* case, a car dealer (Williams) assigned chattel paper to Ford Motor Credit Company (Ford). The account debtor defaulted, and Ford repossessed the collateral (an automobile) and delivered it to Williams who was bound by agreement to repurchase the chattel paper from Ford. In essence, therefore, Williams was a guarantor. Under the reasoning of the *Tucker* case, Williams should have had the rights of the secured party whether or not it had repurchased the chattel paper from Ford. A secured party’s rights include the right to dispose of collateral by selling it. But the Arkansas Supreme Court concluded in *Baber* that the assignor Williams did not have this right, at least “not until Williams reacquired the paper from Ford.” This conclusion in *Baber* makes sense because an assignor of chattel paper which is sold to an assignee cannot be or have the rights of a secured party in himself until the assignor either (1) reacquires the security interest by repurchasing the chattel paper or (2) is subrogated to the assignee's position by paying the account debtor's obligation. If the chattel paper and thus the security interest is assigned back to him, the assignor is a “secured party” as Article 9 defines this

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786. "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." U.C.C. § 1-103. The fundamental equitable doctrine of subrogation is one principle that has not been displaced by the Code, and it has been perpetuated and applied in a number of different situations arising under Article 9. See, e.g., First Nat'l Bank of Siketon v. Jefferson Sales & Distr., Inc., 341 F. Supp. 659 (S.D. Miss. 1971), aff'd per curiam, 460 F.2d 1059 (5th Cir. 1972); Alaska State Bank v. General Ins. Co. of Am., 579 P.2d 1362 (Alaska 1978); Finance Co. of Am. v. United States Fidelity & Guar. Co., 277 Md. 177, 353 A.2d 249 (1976); Ertel v. Radio Corp. of Am., 261 Ind. 573, 307 N.E.2d 471 (1974); Kaplan v. Walker, 164 N.J. Super. 190, 395 A.2d 897 (1978). For a full discussion of the subrogation principle perpetuated under Article 9, see Nickles, supra note 275, at 10-41.


788. 239 Ark. 1054, 396 S.W.2d 302 (1965).

789. See U.C.C. § 9-504.

790. 239 Ark. at 1058, 396 S.W.2d at 304.

790a. But compare generally cases cited note 778 supra.
term for the reason that once again there is a security interest in his favor;\textsuperscript{791} if he pays the account debtor's obligation, common law principles will subrogate him to the rights of a secured party as section 9-504(5) recognizes.\textsuperscript{792} In either case, the assignee must be paid what is owed to him. Since, in the \textit{Tucker} case, nothing had been paid by the assignor to the assignee, the decision that the assignor was a "secured party" or had been subrogated to the rights of one is without authority or substantial precedent.\textsuperscript{793}

One way to defend the result in \textit{Tucker} is to argue that the secured party-assignee authorized the assignor to act for it with respect to the repossessions. In such a case, the assignor would have the right to repossess collateral\textsuperscript{794} but not in himself, only as an agent for the secured party. There was testimony in the \textit{Tucker} case "that the [assignee-secured party] was looking to [the assignor] ... for payment, rather than to the [account debtor]."\textsuperscript{795} but when he testified, the vice president of the assignee-bank


\textsuperscript{792} See U.C.C. § 9-504(5) and authorities cited notes 786 & 781 supra. But compare In re Central Pipeline & Cable Co., 8 UCC Rep. 426 (W.D. Okla. 1970) (one paying the debt of another was labeled a volunteer, thus making it ineligible for subrogation rights). For succinct explanations of the doctrine of subrogation generally, see Cox v. Wooten Bros. Farms, 271 Ark. 735, 610 S.W.2d 278 (Ct. App. 1981); Baker v. Leigh, 238 Ark. 918, 385 S.W.2d 790 (1965); Southern Cotton Oil Co. v. Napoleon Hill Co., 108 Ark. 555, 158 S.W. 1082 (1913).

\textsuperscript{793} The court in \textit{Tucker} said that the result it reached "is supported by sound reasoning" in two cases decided by the Kansas Supreme Court. 268 Ark. at 740, 596 S.W.2d at 7. One of these cases is Mountain Iron and Supply Co. v. Jones, 201 Kan. 401, 441 P.2d 795 (1968). This case involves the right of subrogation to rights under a real estate mortgage and is clearly distinguishable from \textit{Tucker} in several important respects. Most important are the facts that the sureties tendered in full the amount of the indebtedness owed to the prior mortgagee to whose position they aspired on the basis of subrogation and that the plaintiff-mortgagee was attempting to hold the sureties liable for a separate indebtedness they did not guarantee. The other case relied on by the court in \textit{Tucker} is Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975). The court in \textit{Tucker} itself admits that this case is distinguishable for the reason that the guarantor in Benschoter had paid at least part of the debt owed the principal. See 268 Ark. at 740, 596 S.W.2d at 7. It is also distinguishable for the reason that the principal or creditor apparently authorized the guarantor to repossess the collateral from the debtor. See 542 P.2d at 1051. Such authorization would permit the guarantor to effect repossession but only on behalf of the secured party, not because the guarantor himself is a secured party. In \textit{Tucker}, however, evidence that the assignee authorized the assignor to take the collateral is, at best, weak. \textit{See} discussion in text immediately following this note.

\textsuperscript{794} See generally, e.g., Garoogian v. Medlock, 592 F.2d 997 (8th Cir. 1979); N.J. Scott Excavating & Wreckings, Inc. v. Rosenbrant, 107 N.H. 422, 223 A.2d 322 (1966). Interpreting Arkansas law, the court held that an assignor of chattel paper is entitled to the goods upon the account debtor's default when the assignor (1) is contractually bound to repurchase the chattel paper from the assignee and (2) has the assignee's permission to attempt to repossess the goods.

\textsuperscript{795} 268 Ark. at 739, 596 S.W.2d at 5. Compare Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975), a case relied on by the court in \textit{Tucker}. In Benschoter, the guarantor's authority to effect repossess was much clearer:

Here the record discloses no objection was made by the bank [secured party] concerning the [seller-guarantor's] right of subrogation upon partial payment. Rather the record indicated that [the seller] was instructed or requested, or would
denied that the assignor had been authorized to repossess the goods from the account debtor.\footnote{Transcript at 15-16 (Testimony of Art Nelson), Tucker v. Scarbrough, 268 Ark. 736, 596 S.W.2d 4 (Ct. App. 1980).} Fortunately, the Tucker case can be distinguished and its precedential value limited on the ground that the account debtor expressly consented to repossession of the collateral by the assignor.\footnote{See 268 Ark. at 738, 596 S.W.2d at 6.} Whether or not the assignor had an existing interest in the goods or a right to them, the account debtor should not be heard to complain since he gave his permission for the assignor to repossess the collateral. Arguably, therefore, the court did not need to decide in Tucker if the assignor was a secured party or had been subrogated to the rights of one and, therefore, its decision on this particular issue is merely dictum.\footnote{The same is true of Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975), a case that the court relied on heavily in Tucker. In Benschoter, the court repeatedly emphasized that the debtor agreed to repossession of the collateral by the guarantor. Such consent may be a defense to a conversion action against the repossession, but this consent does not establish the guarantor-surety or assignor of chattel paper as a "secured party."} Since a chattel paper assignee who purchases the secured obligation is undoubtedly a "secured party" with respect to the goods, there is no question that he may repossess and dispose of the goods upon the buyer's default. Article 9 provides that following the disposition of collateral, "the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency."

The buyer of the goods is the "debtor" for purposes of this provision because he owns the collateral that is disposed of.\footnote{U.C.C. § 9-504(2).} Thus the assignee can sue the buyer-

be instructed or requested, to repossess the security because of the [debtor-obligor's'] default under the note.

542 P.2d at 1051.

\footnote{Transcript at 15-16 (Testimony of Art Nelson), Tucker v. Scarbrough, 268 Ark. 736, 596 S.W.2d 4 (Ct. App. 1980).}

\footnote{See 268 Ark. at 738, 596 S.W.2d at 6.}

\footnote{The same is true of Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042 (1975), a case that the court relied on heavily in Tucker. In Benschoter, the court repeatedly emphasized that the debtor agreed to repossession of the collateral by the guarantor. Such consent may be a defense to a conversion action against the repossession, but this consent does not establish the guarantor-surety or assignor of chattel paper as a "secured party."}

\footnote{U.C.C. § 9-504(2).}

\footnote{The buyer of the goods is a "debtor" because he owns collateral, i.e., the goods which are subject to a security interest, and because he owes the obligation that was assigned. See U.C.C. § 9-105(1)(d). But the assignor who sold the chattel paper is also a "debtor" because the definition specifically "includes the seller of . . . chattel paper." Id. So in a case involving the sale of chattel paper where the buyer-debtor has defaulted and the assignee has disposed of the goods, which "debtor" is referred to in the first sentence of U.C.C. § 9-504(2)? It must be the buyer-debtor, not the assignor-debtor. The buyer-debtor is the "debtor" with respect to the goods, and the assignor-debtor is the "debtor" with respect to the chattel paper itself. The collateral sold was the goods which the buyer-debtor owned, and the drafters indicated that "[i]n any security transaction the debtor (or the owner of the collateral . . .) is entitled to any surplus which results from realization on the collateral; the debtor will also, unless otherwise agreed, be liable for any deficiency." U.C.C. § 9-504, Comment 3 (emphasis added). Since the buyer-debtor was the owner of the collateral that was sold, i.e., the goods, he must be the debtor referred to in the first sentence of U.C.C. § 9-504(2). The second sentence of this section governs the situation where the chattel paper itself is sold. See U.C.C. §§ 9-504(2) (second sentence); 9-502(2); 9-502, Comment 2 (first two sentences). In such a case, the "debtor" for purposes of the provision is the "debtor" with respect to the chattel paper itself who is the assignor.}

None of this means, however, that the assignor who sells chattel paper cannot be a
debtors for any deficiency that exists after the collateral's disposition. The buyer-debtor is seldom defenseless, however. He can hold the secured party-assignee accountable for failing to comply with Part 5 of Article 9 when retaking and disposing of the collateral.\textsuperscript{800} Also, the assignee's rights are subject to claims and defenses that the buyer could have asserted against the seller-assignor, such as those arising from a breach of warranty by the seller.\textsuperscript{801} This is true because the buyer of goods is not simply and only a "debtor,"\textsuperscript{802} he is, also, an "account debtor,"\textsuperscript{803} and

Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 9-206 the rights of an assignee are subject to (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.\textsuperscript{804}

Section 9-206 provides that "an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense."\textsuperscript{805} But it is unlikely in a transaction involving consumer goods that the buyer will make a valid, comprehensive section 9-206 waiver.\textsuperscript{806}

\textsuperscript{800} "debtor" with respect to the goods themselves for other purposes under Part 5 of Article 9. For example, an assignor who is liable to repurchase the secured obligation from the assignee upon the account debtor's default may be a "debtor" entitled to notice of any intended disposition of the goods by the assignee under U.C.C. § 9-504(3). \textit{See}, \textit{e.g.}, \textit{Norton v. National Bank of Commerce of Pine Bluff}, 240 Ark. 143, 398 S.W.2d 538 (1969). \textit{See} discussion at text accompanying notes 843-849 \textit{infra}. Also, because such an assignor is bound to make good on the debt owed by the account debtor, the assignor will be liable for any deficiency that remains following the assignee's disposition of the goods.

\textsuperscript{801} For a full discussion of a secured party's liability for wrongful repossession and foreclosure of collateral, \textit{see} \textit{Nickles, supra} note 275, at 136-77.

\textsuperscript{802} \textit{See}, \textit{e.g.}, \textit{Arnold v. Ford Motor Co.}, 90 N.M. 549, 566 P.2d 98 (1977). \textit{Also, see generally} authorities cited note 804 \textit{infra}.

\textsuperscript{803} \textit{See} U.C.C. § 9-105(1)(d) and discussion note 799 \textit{infra}.

\textsuperscript{804} "Account debtor" means the person who is obligated on an account, chattel paper or general intangible. U.C.C. § 9-105(1)(a).


\textsuperscript{806} U.C.C. § 9-206(1). One reason for this is U.C.C. § 9-206(1)'s invitation to the states to invalidate waivers of claims and defenses in consumer credit transactions. The section's introductory clause subjects the rule authorizing waivers "to any statute or decision which establishes a different
This is true principally for the reason that the Federal Trade Commission precludes such waivers in most consumer transactions; an FTC trade regulation rule requires that consumer credit contracts include this notice which becomes a term of such a contract and binds any subsequent holder of it:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.  

A waiver of defenses clause may also be invalidated under state law on the basis of the "close connectedness" doctrine. This doctrine has been applied in Arkansas to prevent a holder of a negotiable instrument from asserting immunity to defenses on the ground that he is a holder in due course. A holder who is too closely connected with the transaction between the maker and the payee of the note cannot be said to have purchased the instrument in good faith, which is a prerequisite to holder in due course status. Good faith on the part of the assignee is also a prerequisite to the enforceability of a section 9-206 waiver of defenses clause. Presumably, therefore, the "close connectedness" doctrine will be a relevant test by which to judge a chattel paper assignee's good faith under this section.

Even though, under section 9-318(1), an assignee's rights may be
"subject to" an account debtor's claims against the assignor, a long established principle is that these claims can only be asserted defensively to effect a set-off or recoupment in an action brought by the assignee. They cannot be asserted affirmatively against the assignee to effect a net recovery in a separate action or counterclaim prosecuted by the account debtor.\textsuperscript{813} This is due to the rule that an assignee is not affirmatively liable to an obligor for breaches of contract by the assignor unless the assignee has assumed the assignor's contractual duties to the obligor.\textsuperscript{814}

Such an assumption does not ordinarily occur when the assignment of chattel paper is essentially a financing arrangement between the assignor and assignee.\textsuperscript{815} Recently, however, exceptions to this established common law principle have been created. For example, the Federal Trade Commission intended that pursuant to its trade regulation rule mentioned above, an assignee of a consumer credit contract which contains a preservation of defenses clause should be affirmatively liable to the account debtor.\textsuperscript{816} There is also some limited authority under section 9-318(1) itself that an assignee exposes himself to affirmative liability when he somehow participates in or shares responsibility or blame for the conduct that gives an account debtor a claim against the assignor.\textsuperscript{817}

Even in cases where an enforceable section 9-206 waiver has been


\textsuperscript{814} Ordinarily, when the assignee not only assumes the rights but also the duties under the contract that is assigned to him, the obligee-account debtor becomes a third party beneficiary of the assignee's promise to assume and perform the duties. These duties thus may be enforced affirmatively against the assignee-delegate by the intended beneficiary-obligee. See Restatement (Second) of Contracts § 135 (Tent. Drafts Nos. 1-7 (1973)). The assignor who delegates his duties to the obligee-account debtor is not thereby relieved of his responsibility and liability with respect to the duties, however. See id. § 150(3).

\textsuperscript{815} See generally U.C.C. §§ 2-210(4); 2-210, Comment 5; 9-317.

\textsuperscript{816} See Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20022, 20023-24 (1976). But the assignee is only required to answer to those claims arising from the transaction that produced the consumer credit contract, and the account debtor's affirmative recovery is limited to the amount that he has paid under the contract.

made, it can never shield the assignee from certain defenses that the account debtor has against the assignor. Regardless of the nature of the transaction, a waiver of "defenses of a type which may be asserted against a holder in due course of a negotiable instrument"\textsuperscript{818} is never effective under section 9-206. These so-called "real defenses" that cannot be waived and that even a holder in due course takes subject to are

(a) infancy, to the extent that it is a defense to a simple contract; and
(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
(d) discharge in insolvency proceedings; and
(e) any other discharge of which the holder has notice when he takes the instrument.\textsuperscript{819}

Usury is a real defense in Arkansas. The Arkansas Supreme Court has held that a note usurious in the hands of the payee is also usurious in the hands of a subsequent purchaser, though he purchased in good faith, before maturity of the note, and without any notice of the usury; and . . . the reason for such holding is that the [state] Constitution [of 1874, Article 19, section 13] makes a usurious note void, and, therefore it can gain no validity by circulation.\textsuperscript{820}

Violation of Arkansas' "Wingo Act"\textsuperscript{821} is a real defense, too, because a company's failure to register before doing business in the state renders its transactions "not merely unenforceable but void ab initio. Accordingly, there can be no holder in due course of a negotiable instrument arising out of [such an] illegal transaction."\textsuperscript{822}

A deficiency action brought by a chattel paper assignee may also be defended by the account debtor on the ground that the secured obligation was paid in whole or in part to the assignor.\textsuperscript{823} This defense will be good to the extent that payments were made to the assignor before the account debtor received "notification that the amount due or to become due has been assigned and that payment is to be made to the assignee."\textsuperscript{824} The

\begin{itemize}
\item \textsuperscript{818} U.C.C. § 9-206(1).
\item \textsuperscript{819} U.C.C. § 3-305(2).
\item \textsuperscript{820} Hare v. General Contract Purchase Corp., 220 Ark. 601, 603, 249 S.W.2d 973, 975 (1952).
\item \textsuperscript{822} Pacific Nat'l Bank v. Hernreich, 240 Ark. 114, 118, 398 S.W.2d 221, 223 (1966). For discussion of this and related cases, see Note, 25 Ark. L. Rev. 518 (1972).
\item \textsuperscript{823} See U.C.C. § 9-318(3). For collection of cases construing and applying this provision, see Annot., 100 A.L.R.3d 1218 (1980).
\item \textsuperscript{824} A waiver of claims and defenses clause that is valid under U.C.C. § 9-206 does not necessarily preclude an account debtor from asserting a defense of payment to the assignor based on § 9-318(3). See generally, e.g., Chemical Bank v. Penny Plate, Inc., 144 N.J. Super. 390, 365 A.2d 945 (1976).
\item \textsuperscript{825} U.C.C. § 9-318(3). See generally, e.g., First Fin. Co. v. Akathiotis, 110 Ill. App. 2d
\end{itemize}
notification must also "reasonably identify the rights assigned." The assignee has the burden of proving that the account debtor was notified. Therefore, an assignee who regularly purchases a seller's chattel paper may supply the seller with standardized sales contracts forms that contain assignment language; presumably, one of the purposes for doing this is to satisfy the section 9-318(3) notification requirements at the time when a buyer signs the sales agreement and thus protect from the


When an assignee takes a security interest in accounts or chattel paper, he must perfect his security interest in this collateral in order to protect himself against other creditors of the assignor who might assert claims against these intangibles. When the collateral is accounts or chattel paper the ordinary means of perfection is filing a financing statement. See U.C.C. §§ 9-302(1), 9-304. Notifying the account debtor as per U.C.C. § 9-318(3) is not a substitute for such a filing. See generally, e.g., M.D. Hodges Enterprises, Inc. v. First Ga. Bank, 243 Ga. 664, 256 S.E.2d 350 (1979). And filing a financing statement covering the accounts or chattel paper is not sufficient in itself to satisfy the notice requirements of U.C.C. § 9-318(3) and make the account debtor liable to the assignee for payments made to the assignor. See generally, e.g., Judan AMC & Jeep, Inc. v. Old Republic Ins. Co., 293 N.W.2d 212 (Iowa 1980); In re Chase Manhattan Bank v. New York, 40 N.Y.2d 590, 357 N.E.2d 366, 388 N.Y.S.2d 896 (1976); Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (Utah 1975).


227. For example, Ford Motor Credit Company prepares an "Arkansas Automobile Retail Installment Contract" used by Ford dealers. Directly below the buyer's signature line on the front of the contract is this message:

ASSIGNMENT: The Seller accepts this contract. If no other Assignee is named at the top of this contract the Seller assigns it to Ford Motor Credit Company under the Assignment on the back of this contract. When the Assignee buys this Contract, it will be the Creditor.

Ford Motor Credit Company, Arkansas Automobile Retail Installment Contract (FMCC 16003 April, 1979).
very inception of the contract the assignee's right to receive the account debtor's payments.828 Regardless of how and when the notification is given, however, it must not only reveal that an assignment has in fact been made for the rule is that an account debtor "may pay the assignor though he may know of the assignment."829 The notification must also contain a demand that payment be made to the assignee.830 A notice of assignment that fails to include such a demand does not satisfy the requirements of section 9-318(3) and imposes no liability on the account debtor for payments made to the assignor.831

Only an "account debtor" can avoid liability for payments made to the assignor on the ground that he (the account debtor) did not receive the section 9-318(3) notification.832 Not every obligor is an account

828. If the underlying transaction involves an extension of consumer credit within the scope of the federal Truth in Lending Act, another purpose may be to identify the assignee as a "creditor." See 15 U.S.C.A. §§ 1604, 1931 (1974 & Supp. 1979); 12 C.F.R. § 226.6(d) (1979); Ford Motor Credit Co. v. Cenance, 5 CCH Consumer Cr. Guide ¶ 97, 187 (U.S. 1981); Augusta v. Marshall Motor Co., 614 F.2d 1085 (6th Cir. 1979); Milhollin v. Ford Motor Credit Co., 588 F.2d 753 (9th Cir. 1978), rev'd on other grounds, 444 U.S. 555 (1980); Murphy v. Ford Motor Credit Co., 477 F. Supp. 59 (E.D. Mo. 1979). But compare Whitlock v. Midwest Acceptance Corp., 575 F.2d 652 (8th Cir. 1978). A third purpose of assignment language in a standardized sales contract prepared by the assignee may be to effect or evidence the assignment between the assignor and assignee. The back side of the standard form contract prepared by Ford Motor Credit Company for use by Ford dealers is devoted almost entirely to the terms of the assignment under which the Credit Company will purchase the chattel paper from the dealer. See Ford Motor Credit Company, Arkansas Automobile Retail Installment Contract (FMCC 16603, April 1979).

829. U.C.C. § 9-318, Comment 3.


The assignment language in the contract prepared by Ford Motor Credit Company for use by Ford dealers (see note 827 supra) does not contain such a demand. Even if it did, the assignment language in the Ford contract would probably not be sufficient. U.C.C. § 9-318(3) requires that the account debtor receive notification of an assignment; when a buyer signs the Ford contract, no assignment has yet occurred. Notice of an assignment before it actually occurs is not sufficient under § 9-318(3). See generally, e.g., Citizens Bank of Corrigan v. J.M. Jackson Corp., 537 S.W.2d 120 (Tex. Civ. App. 1976).

831. See authorities among those cited notes 824 & 830 supra. But the account debtor may be estopped to question the validity of the notification under U.C.C. § 9-318(3) if, despite a defective notice, he makes payments to the assignee. See, e.g., Florida First Nat'l Bank at Key West v. Fryd Constr. Corp., 245 So. 2d 883 (Fla Dist. Ct. App. 1970). The other side of the coin is that despite a valid § 9-318(3) notification, the assignee may be estopped to object to payments made to the assignor if the assignee knew about the practice of the account debtor paying the assignor but failed to object. See, e.g., Estate of Haas v. Metro-Goldwyn-Mayer, Inc., 617 F.2d 1156 (5th Cir. 1980). But compare Bank of Commerce v. Intermountain Gas Co., 96 Idaho 29, 523 P.2d 1375 (1974).

832. "The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee." U.C.C. § 9-318(3) (emphasis added). Likewise, the defenses avail-
debtor, only a “person who is obligated on an account, chattel paper or general intangible.” The maker of a negotiable promissory note that is an “instrument” under Article 9 is not an account debtor. The long established rule now codified in Article 3 is that a maker of a promissory note that is assigned (negotiated) to a holder in due course cannot justify making payments to the payee (assignor) on the ground that he (the maker) was not notified of the assignment (negotiation). But there is good reason for caution here. Article 3’s provisions are subject to those of Article 9, and, in some cases, a note that is negotiable under Article 3 is classified for Article 9 purposes not as an “instrument,” but as or part of “chattel paper.” Thus the obligor-maker of a negotiable promissory note that is properly classified as chattel paper will be an “account debtor” who can raise the lack of notification defense under section 9-318(3). Suppose that a seller of goods on credit requires the buyer to sign two documents, a negotiable promissory note and a separate security agreement that gives the seller a security interest in the goods sold. These two writings together constitute “chattel paper” for Article 9 purposes. The seller may, however, require the buyer to sign one writing which is a “secured note.” That is, the writing is sufficient to satisfy the negotiability requirements of Article 3 and, in addition, it satisfies Article 9’s pre-

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 Able under U.C.C. § 9-318(1) (see discussion at text accompanying notes 801-822 supra) can be asserted only by an “account debtor.” See generally, e.g., Citizens Nat’l Bank of Orlando v. Bornstein, 374 So. 2d 6 (Fla. 1979).


834. This is true for the reason that if the writing is an “instrument” under U.C.C. § 9-105(1)(i), it cannot be an account, chattel paper or general intangible; and the obligor on anything other than an account, chattel paper or general intangible is not an account debtor. See U.C.C. § 9-105(1)(a). Cf. Citizens Nat’l Bank of Orlando v. Bornstein, 374 So. 2d 6 (Fla. 1979) (a certificate of deposit is an “instrument” under Article 9 and thus the issuing bank was not an “account debtor” for purposes of § 9-318).

835. A maker or other party liable on an instrument can discharge his liability by payment or satisfaction only “to the extent of his payment or satisfaction to the holder.” U.C.C. § 3-603(1) (emphasis added). The assignor is no longer the “holder” after he has negotiated the instrument to a holder in due course. That payment was made to the assignor after the negotiation is a personal defense of which the holder in due course will take free under U.C.C. § 3-305. For a summary discussion, see R. Braucher & R. Riegert, INTRODUCTION TO COMMERCIAL TRANSACTIONS 192-94 (1977).

836. See U.C.C. § 1-103(2).

837. See notes 838, 839 & 840 infra and text accompanying them. See also U.C.C. § 9-105, Comment 3 and the definitions of “chattel paper” and “instrument.” An instrument under Article 9 includes “a negotiable instrument (defined in Section 3-104) . . . or any other writing which evidence a right to payment and is not itself a security agreement.” U.C.C. § 9-105(1)(j) (emphasis added).

838. See U.C.C. § 9-105(1)(b) (last sentence).
requisites for a written security agreement.\textsuperscript{839} Apparently, this one

\textsuperscript{839} Some might argue that such a "secured note" is impossible because a writing that is sufficient under U.C.C. § 9-203(1)(a) as a security agreement will surely violate a basic principle of negotiability as stated in U.C.C. § 3-104(1)(b). This principle is that a negotiable instrument must "contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article." U.C.C. § 3-104(1)(b) (emphasis added). Undoubtedly, a note buried among the countless provisions, conveants, warranties and so forth of a typical, full-blown conditional or installment sales contract or standard form security agreement is not negotiable; such a writing contains, in addition to a promise to pay, other promises, obligations and powers not authorized by Article 3. See, e.g., International Harvester Credit Corp. v. Hill, 496 F. Supp. 329 (M.D. Tenn. 1979); Geiger Fin. Co. v. Graham, 123 Ga. App. 771, 182 S.E.2d 521 (1971); Chrysler Credit Corp. v. Friendly Ford, Inc., 535 S.W.2d 110 (Mo. Ct. App. 1975); Wickware v. National Mortgage Corp. of Am., 570 P.2d 330 (Okl. 1977); Discount Purchasing Co. v. Porch, 12 UCC Rep. 600 (Tenn. App. 1973); Insurance Agency Managers v. Gonzales, 578 S.W.2d 803 (Tex. Civ. App. 1979).

Consider, however, a writing that is (a) signed by the debtor-maker, (b) payable to the order of the creditor-secured party, (c) payable at a definite time and that (d) contains an unconditional promise to pay a sum certain in money and (e) no other promise, order, obligation or power given by the maker. So far, so good. The writing is a negotiable instrument. See U.C.C. § 3-104(1). Suppose that the writing also contains these statements followed by a description of certain personal property: "This note is secured by property that is described herein and is collateral for the obligation created hereby. If the maker defaults on this obligation the holder may repossess and dispose of this collateral." The negotiability of this writing is not destroyed by these statements. See U.C.C. §§ 3-105(1)(e); 3-112(1)(b). Thus the writing satisfies the requirements of a negotiable instrument under Article 3, unless the description of collateral is itself considered to be an additional and unacceptable "promise, order, obligation or power given by the maker."

Arguably, this writing also satisfies the requirements for a written security agreement under U.C.C. § 9-203(1)(a) because it (a) is signed by the debtor, (b) describes the collateral and (c) contains language such as the words "secured" and "collateral" from which it may be inferred that the parties thereby intended to create or provide for security. See U.C.C. §§ 9-203(1)(a); 9-105(1)(c); 1-201(3). Most courts do not require specific, explicit language of grant or conveyance to find that the writing constitutes a security agreement. See text accompanying notes 461-481 supra; Nickles, supra note 275, at 50-52, especially at 51 n.531. Harry Meek wrote that "[a]ny written agreement signed by a debtor, which recites that certain described personalty is being encumbered as security for a debt, will operate to create a security interest; and such an instrument would be a 'security agreement' as defined in [Article 9]." Meek, Secured Transactions Under the Uniform Commercial Code, 18 Ark. L. Rev. 30, 34 (1969).

Most definitely, the note would be a security agreement if it contained explicit words of grant; and, arguably, though not certainly, such language would not affect the negotiability of the instrument even though grant language is something more than a simple statement that the instrument is secured or collateral which Article 3 expressly authorizes. See U.C.C. §§ 3-105(1)(e); 3-112(1)(b). Language explicitly conveying an interest is not itself a "promise, order, obligation or power given by the maker" within the prohibition of U.C.C. § 3-104(1)(b). It merely evidences in the clearest manner a debtor's intention to transfer an interest in personal property.

Therefore, a "secured note" as defined in the text is technically possible, one that satisfies the requisites of negotiability under Article 3 and meets the requirements of a written security agreement under U.C.C. § 9-203(1)(a). But compare Jefferson v. Mitchell Select Furniture Co., 321 So. 2d 216 (Ala. Ct. App. 1975) indicating that the security aspect of a collateralized promissory note precludes negotiability not because the U.C.C. § 3-104(1)(b) prohibition against additional promises is violated, but because the security aspect destroys the note's essential character as a negotiable instrument. If this view is correct, there can never be a secured negotiable note as defined in the text. But nothing in the Code supports
writing by itself is "chattel paper," too. \textsuperscript{840} Therefore, whether the note itself contains a security agreement or accompanies one, the obligor-maker is, for Article 9 purposes, an "account debtor" who can raise a defense based on section 9-318(3) \textsuperscript{841} and, presumably, those defenses and claims that an account debtor can assert under section 9-318(1). \textsuperscript{842}

Because an account debtor has an array of defenses available to him, an assignee of chattel paper who has repossessed and disposed of the goods may decide not to sue the account debtor for any deficiency that remains. Instead, if a repurchase or other guaranty agreement was part of the chattel paper assignment transaction, the assignee may decide to sue...
the assignor for the deficiency. But, as Norton v. National Bank of Commerce of Pine Bluff\textsuperscript{843} illustrates, the assignor is not defenseless, either. In this case, an automobile dealer, Norton, sold an automobile to Goldsmith. Goldsmith signed both a promissory note and a conditional sales contract covering the unpaid contract price. The note and contract were sold to the Bank, and, as part of this transaction, Norton promised that he would repurchase the contract if Goldsmith defaulted. Goldsmith ultimately did default; the Bank repossessed the automobile and sold it at a private sale without notifying either Goldsmith or Norton. A deficiency remained after the collateral’s disposition, and the Bank sued Norton for it. Norton’s defense was that the Bank had failed to comply with Part 5 of Article 9 by neglecting to notify him beforehand of the sale. Section 9-504 requires that “reasonable notice of the time and place of any public sale or reasonable notice of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor.”\textsuperscript{844} The court decided that Norton was a “debtor” entitled to notice under this section \textsuperscript{845} and, therefore, that he could recover from the assignee “any loss” caused by this failure to comply with the section 9-504(3) notice requirement.\textsuperscript{846} Presumably, an assignor of chattel paper who is a “debtor” entitled to notice under this section is also entitled to have the assignee-secured party comply with the other requirements for a valid disposition under Part 5 of Article 9. Thus, whether the assignee of chattel paper sues the account debtor or the assignor for a deficiency, the assignee will be liable for failing to conduct a disposition of the goods that is in “every respect . . . commercially reasonable.”\textsuperscript{847} This explains why an assignee who buys chattel paper “with recourse” against the assignor will ordinarily not dispose of the collateral himself; instead, upon the account debtor’s default, the assignee will usually force the assignor to repurchase the secured debt (before or soon after repossession of the goods) and shift back to the assignee the burden of collecting it.\textsuperscript{848} After the chattel paper (and thus the security interest) is

\textsuperscript{843} 240 Ark. 143, 398 S.W.2d 538 (1969).
\textsuperscript{844} U.C.C. § 9-504(3) (emphasis added).
\textsuperscript{845} Debtor is defined under Article 9 as “the person who owes payment or other performance of the obligation secured . . . and includes the seller of accounts or chattel paper.” U.C.C. § 9-105(1)(d). The court decided that Norton was a person who owed “other performance” because he had promised to repurchase the chattel paper from the Bank if the account debtor defaulted. \textit{See} 240 Ark. at 146, 398 S.W.2d at 540. \textit{Accord}, State Nat’l Bank of Evanston v. Northwest Dodge, Inc., 86 Ill. App. 3d 90, 408 N.E.2d 1 (1980). \textit{See also} discussion at note 799 supra. \textit{But compare} discussion at note 799 supra regarding who is a “debtor” for purposes of U.C.C. § 9-504(2) governing liability for deficiency and entitlement to surplus after disposition of collateral.
\textsuperscript{846} \textit{See} U.C.C. § 9-507(1). \textit{See also} Nickles, supra note 275, at 142-77, for discussion of how to measure this “any loss” recoverable by a debtor.
\textsuperscript{847} U.C.C. § 9-504(3).
\textsuperscript{848} “Such a transfer of collateral [by the assignee to the assignor under repurchase
reassigned to him, the assignor is once again the secured party,\textsuperscript{849} and he must look to the collateral for satisfaction and face the buyer-debtor's defenses in a suit for a deficiency.

\textsuperscript{849} See discussion at text accompanying notes 777-797 supra on the issue of when an assignor who sells chattel paper can be regarded as a "secured party" or as having the rights of one.
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