THE DRAFT ONTARIO PERSONAL PROPERTY SECURITY ACT

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I. Introduction.

It is a commonplace that there has been an enormous expansion in the volume and value of short and medium term credit since the end of the war. The vital part which the availability of credit plays in our modern economy is not however always sufficiently appreciated and it may be helpful for me to cite some figures with which to emphasize its importance. At the end of 1964 the outstanding balance of general loans and consumer credit extended by the chartered banks, finance companies and other credit institutions, and by retail outlets, amounted to at least 12,377 million dollars,¹ of which the chartered banks accounted for over eight billion dollars.² Business loans and loans to farmers extended by the banks amounted to 5,639 million dollars³ and consumer credit extended by all credit agencies amounted to not less than 5,948 million dollars.⁴ It is fair to assume that a large percentage of these loans was secured by some form of security in personal property. The figures are even more impressive when they are compared

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² Bank of Canada, Statistical Summary, May 1965, pp. 285-286, 293, 321-322. The figure is only approximate because the 1964 statistics for loans extended by credit unions and caisses populaires were not then available; the 1963 statistics have been used instead. The term “general loans” is used only with reference to bank loans and covers business and personal loans and loans to farmers, but excludes call and “short” loans to investment dealers and brokers and loans to grain dealers and exporters, municipal and provincial governments, and loans to instalment finance companies. “Consumer credit” covers direct loans and instalment sales.

³ “Finance companies” comprehends sales finance companies and small loans companies. “Other credit institutions” covers credit unions, caisses populaires, Quebec savings banks, and life assurance companies.

⁴ The exact figure was $8,222 million dollars: ibid., pp. 285-286, 287-288.

⁵ Ibid., pp. 289-290.

⁶ Ibid., pp. 321-322.
with the value of Canada's gross national product during the same period and with some other significant financial statistics. The value of gross national product in the third quarter of 1964 amounted to 48,016 million dollars.\(^8\) Mortgage loans approved by lending institutions on new non-farm residential construction amounted in 1964 to 1,541 million dollars.\(^6\) Finally, the net issues of total government of Canada, provincial, municipal, corporate and "other" securities amounted to 3,087 million dollars.\(^7\) What emerges from these figures is the impressive fact that the outstanding balance of the type of credit usually secured by some kind of personal property represents more than a quarter of the gross national product and exceeds by a very large margin long term credit and credit secured by real property.

In the light of this evidence it is natural to ask, what has been the legal reaction to this phenomenon? Has the law kept abreast of the dynamic changes in our credit structure? The answer unfortunately is an emphatic no, and it is no exaggeration to claim that credit plays the dominant role in our economy not because of the law but despite of it. The inadequacies in our present laws have in recent years been expounded so often\(^8\) that it would be a task of supererogation for me to repeat them here, and I will therefore content myself with a summary of the more important reasons so as to provide the necessary framework for the main theme of my article. The first reason is the absence of a generic concept of "security" in the common law and the multiplicity of devices\(^9\) which are designed to serve the same economic function but which in point of law differ sharply from one another. A proliferation of statutes has accentuated and increased these differences.\(^10\) A second reason is the jaundiced view towards the taking of security, as if it were some unnatural and fraudulent phenomenon, which

\(^{8}\) Ibid., p. 326.
\(^{6}\) Ibid., pp. 315-316.
\(^{7}\) Ibid., p. 330.

\(^{9}\) Such as a pledge, chattel mortgage, conditional sale, hire-purchase agreement, equipment lease, fixed and floating charge, and a "Section 88" Bank Act security.

\(^{10}\) See e.g., The Conditional Sales Act, R.S.O., 1960, c. 61; The Bills of Sale and Chattel Mortgages Act, R.S.O., 1960, c. 34; The Assignment of Book Debts Act, R.S.O., 1960, c. 24; The Corporation Securities Registration Act, R.S.O., 1960, c. 70; and a host of provisions in other Acts, such as the Factors Act, R.S.O., 1960, c. 129; The Mercantile Law Amendment Act, R.S.O., 1960, c. 238; and The Warehouse Receipts Act, R.S.O., 1960, c. 424.
is still displayed in much of the legislation. This is reflected in the complicated and highly technical apparatus of affidavits which has provided many a Waterloo for a hapless creditor, in the statutory requirements that the security agreement must be filed within a given period on pain of total invalidity against third parties if it is not, and in description requirements which are often difficult if not impossible to comply with. In the third place, many of the provincial statutes still suffer from an antiquated county or city based registration system which in our highly mobile society has long ceased to serve the purpose it was intended to fulfill. Finally, our legislation has failed to keep abreast of important developments in modern financing procedures and to provide clear guidelines where the judicially evolved rules are still unsettled or in a state of conflict. I have in mind the pervasive field of inventory financing, the rapidly expanding areas of equipment leasing and accounts receivable financing, and the recurring sources of conflict with respect to accessions, non-consensual liens, and goods moved from one province into another. All these deficiencies in our law of security in personal property are also found in Ontario. Indeed, they are more striking here than elsewhere, for while the Western (and, paradoxically, commercially less important) provinces have at least made intermittent efforts to bring parts of

11 See e.g., The Bills of Sale Act, ibid., ss. 4, 5, 15.
12 Ibid., ss. 7, 8, 21, 25; but see In re Shelley Films Ltd., [1963] 1 O.R. 431 (C.A.).
13 Ibid., s. 13 requires every mortgage to contain "such sufficient and full description of the goods and chattels that they may be thereby readily and easily known and distinguished". This requirement gives rise to particular difficulties where the collateral consists of future goods or goods of a common variety which are not identified by means of a serial number or other distinguishing mark. See e.g., Royal Bank of Canada v. MacKenzie, [1932] S.C.R. 524 (herd of cattle); Crown Coal Co. v. Swanson Lumber Co., [1935] 4 D.L.R. 707 (Alta.) (machinery); and cf. McCall v. Wolfe (1885). 13 S.C.R. 130.
14 See e.g., Ontario Bills of Sale Act, ibid., s. 21; Ontario Conditional Sales Act, ibid., s. 2(1)(6). All the provinces, with the partial or complete exception of Alberta, British Columbia and Saskatchewan, still use a locally based registration system. In 1955 the Ontario Select Committee on Certificates of Title for Motor Vehicles recommended the adoption of a certificate of title system for motor vehicles, but for obscure reasons this proposal was never implemented. The recent Report of the Select Committee on Consumer Credit (Toronto, (1965), para. 174) strongly recommended the adoption of a central filing system for motor vehicles, but presumably no action will be taken on this recommendation until the fate of the draft Personal Property Security Act has been decided.
16 For further details and other examples, see (1965), 30 Sask. Bar Rev. 203, at pp. 210-212.
the law up to date Ontario's legislation is still firmly rooted in the Victorian notions of the nineteenth century.\(^{17}\)

Such, then, was the position which confronted the committee on security in personal property chaired by Mr. Fred M. Catzman, Q.C., of Toronto, when it began its work as long ago as 1960. The committee was originally formed under the auspices of the Ontario Commercial Law Section of the Canadian Bar Association, but as the scope and importance of the task it had assumed became clearer, the committee sought and obtained the endorsement of the then Attorney General and it has operated under his aegis ever since. The original terms of reference of the committee were to make recommendations with respect to the revision of the principal security acts. The committee had two alternatives. The first, the traditional one, was to amend the statutes yet again and to try to remove some of their more serious blemishes on an *ad hoc*, piecemeal basis. The committee tried this approach but saw that it merely led into a new wilderness. They then turned to article 9 of the American Uniform Commercial Code and found that it contained the key to the only workable solution. They therefore adopted it as the basis of their draft Bill.\(^{18}\)

Perhaps this is an opportune moment for me to say a few words about the Code.\(^{19}\) It was produced under the joint sponsorship of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and represents the fruit of many years of intensive labour of numerous scholars and committees of experts. The Code has rightly been hailed as the most important development in the field of commercial law to take place in the common law world in this century. The idea of the Code was first mooted in 1942, but serious work on it did not commence until after the war. The first version of it was completed in 1948, and it

\(^{17}\) The principal security acts at present in force in Ontario were first adopted in the following years: Bills of Sales and Chattel Mortgages Act, 1849; Conditional Sales Act, 1889; Assignment of Book Debts Act, 1931; Corporation Securities Registration Act, 1932. The last two Acts are based on the model statutes drafted by the Uniformity Commissioners, but are now as antiquated as the first two. For a comparison of the legislative history of the provinces in the field of conditional sales and an evaluation of the efforts towards uniform legislation, see Ziegel, Uniformity of Legislation—The Conditional Sales Experience (1961), 39 Can. Bar Rev. 165.

\(^{18}\) For further particulars, see D. E. MacKenzie, (1961), 39 Can. Bar Rev. 663 and the introduction by Mr. Fred M. Catzman, Q.C., to the original Draft Bill of "An Act to reform and make uniform the Law regarding Security Interests in Personal Property and Fixtures" (Toronto, Queen's Printer, 1963), hereafter referred to as "the Catzman Bill" or "the original Bill".

\(^{19}\) For a more detailed history, see Braucher, Legislative History of the Uniform Commercial Code (1958), 58 Col. L. Rev. 798.
has since been revised on a number of occasions. The current version is known as the “1962 Official Text”, and an Editorial Committee has been entrusted with the task of proposing further changes and, not least important, of discouraging unilateral changes by the adopting states. Pennsylvania and Massachusetts were the first two states to adopt the Code; thirty-eight have followed since, including all the commercially important states. It will therefore be seen that the Ontario committee was on very sound ground in adopting article 9 as a model. The Code is divided into ten parts or articles, as they are called. Article 1 deals with definitions and article 10 with transitory provisions. Each of the other articles deals with a major branch of commercial law. Article 9 is devoted to secured transactions. Pre-Code American security law differed from Canadian law both doctrinally and in points of detail, but it shared with it one feature of overwhelming importance—it was equally in need of modernization and rationalization. How article 9 accomplishes these twin objectives I shall explain presently, but let me note for the moment that, with very few exceptions, article 9, along with the other articles of the Code, appears to be working very well and has so far produced surprisingly little important litigation.

And now let me return to the Ontario committee. The committee completed the first version of its Bill early in 1964, and it was then printed and distributed for further study and consideration by the legal profession and other interested parties. On May 1st and 2nd, 1964, the Bill was the central theme of a well attended conference of American and Canadian lawyers at Osgoode Hall, and its structure and basic philosophy won the warm support of those present. Although the conference was much too brief to permit a clause by clause examination of the Bill, a number of detailed recommendations did emerge from it. These engaged the attention of the Catzman Committee in the fall of last year, and

20 For a complete list of the states, see CCH Instalment Credit Guide, Vol. I, p. 4451.
22 The literature on article 9 is enormous. Among the leading texts are: Coogan, Hogan and Vagts, Secured Transactions under the Uniform Commercial Code (2 Vols, 1963); Grant Gilmore, Security Interests in Personal Property (2 Vols, 1965); and Uniform Laws Annotated, The Uniform Commercial Code (2 Vols, 1952).
23 See supra, footnote 18.
24 Copies of a transcript of the proceedings have been privately circulated and arrangements are being made to publish an edited version for public distribution.
many of them were incorporated in the Bill. The basic scheme of the Bill, however, was left intact. In the meantime, the Ontario Law Reform Commission had been established by act of the Ontario Legislature, and in December, 1964, the Commission was invited to review the report on the draft Bill in its then amended state. This the Commission did on May 28th, 1965, in a disappointingly short ten-page report. The Commission reported that it was convinced that the draft Bill "is useful and constructive legislation" and that it believed "that it will serve to modernize the branch of commercial law covered by it". It therefore recommended that the Bill be introduced and given first reading at the then session of the Ontario Legislature so that it might be critically examined by the legal profession and others interested in the field of commercial law. The Commission made numerous verbal changes in the Bill and also introduced a small number of substantive amendments of major significance, to some of which reference will be made later on.

This, then, is the present status of the Bill. Understandably the Bill has aroused widespread interest across the country. Those who are closer to the political scene in Ontario than the writer believe that the Bill will receive its first reading during the 1965-1966 sittings of the Ontario Legislature. Certainly one must hope that this will be the case since without such an initiative the movement in Canada for reforming this branch of the law will lose much of its impetus.

II. The Structure of the Ontario Bill.

The basic concepts of the Ontario Bill, like those of article 9 of the Uniform Commercial Code, are as simple as they are effective. The first concept is that every security agreement serves an identical object—to secure performance of a debt or obligation by a debtor. There is no need for a proliferation of acts all dealing with

25. The revisions were never published.
28. Ibid., p. 10.
29. The Attorney General did not immediately act on this recommendation, presumably because of the heavy pressure of work which then confronted the Ontario Legislature, and this no doubt also explains the delay in the publication of the Report.
30. See infra, Part IV.
31. Unless otherwise indicated, the references hereafter are to the Law Reform Commission's version of the draft Bill. To avoid tedious repetition it will simply be referred to as "the Bill".
the same phenomenon. One act will suffice and it can cover all security agreements, regardless of the nature of the collateral involved (so long as it is still personal property or fixtures), the form of security device used, or the identity of the debtor. Section 2 of the Bill accordingly provides that,

... this Act applies to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,

(a) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust deed or trust receipt; and
(b) an assignment, lease or consignment intended as security.

"Security interest" is defined in section 1(w) as,

an interest in goods, other than building materials that have been affixed to the [sic] realty, fixtures, documents of title, instruments, securities, chattel papers or intangibles that secure payment or performance of an obligation . . . .

The Bill applies to consensual transactions and therefore security interests arising by operation of law are not regulated by it, save with respect to the question of priorities in the case of artisans' liens. Excluded also is the transfer of an interest or claim in or under any policy of insurance or contract of annuity and transactions regulated by the Pawnbrokers Act. Security interests regulated by federal law are of course automatically excluded. Generally speaking, the Bill does not regulate the absolute transfer of an interest in personal property, even though the transferor remains in possession of the goods. Such transactions will continue to be governed by such legislation as the Bills of Sale Act and section 25(1) of the Sale of Goods Act. There is one exception to this rule in the case of book debts or "accounts receivable" as they are generally called in the United States. All assignments of book debts, whether absolute or only by way of security, are regulated by the Bill, the reason being that an absolute assignment

32 Such as an artisan's lien, a landlord's lien (or right of distress) for rent, and liens for taxes and other imposts. Cf. Uniform Commercial Code. hereafter referred to as UCC, article 9-104 (b), (c).
33 See ss. 3(1)(a) and 33 and Part II (2)(c) infra.
34 See s. 3(1)(b), (c).
35 R.S.O., 1960, c. 290. For the existing provisions dealing with the assignment of life insurance policies, see R.S.O., 1960, c. 190, ss. 165, 167.
36 No official reason has been given for the exclusion of these types of collateral, but presumably it is based on the thought that they are of a special character and are satisfactorily regulated by the existing statutory provisions. The exclusions under the Code are somewhat wider. See UCC 9-104.
37 See infra, Part V.
38 S. 1 (w), last two lines ("and includes an interest arising from an
especially when accompanied by a "recourse" or similar agreement, is indistinguishable in its practical effect from a security agreement.\(^{39}\)

The practical result of the comprehensive scope of the Bill will be twofold. Firstly, it will eliminate the four principal security acts and a host of provisions in other statutes\(^ {40}\) which occupy the field at the moment. Gone, too, will be the pigeon-holing and labelling of security agreements which currently occupies so much of the practising lawyer's time. If the parties wish to include different types of collateral in the same agreement they will be free to do so. The second practical result stems from the flexibility of the concept of a "security interest". The definition is wide enough to catch not only all the existing security interests, but also any new devices which ingenious counsel may conjure up in the future. Form will no longer count; it will be the substance and object of the agreement in each case that will matter. Our courts will therefore no longer have to struggle with the proper classification of the conditional sales agreement,\(^ {41}\) and such anachronisms in the common law as the English form of hire-purchase agreement\(^ {42}\) will cease to exist.

Although the Bill integrates all security agreements, it does not pretend that they can all be treated alike. There are some justifiable differences between them, but the differences are functional ones and do not turn on the legal nature of the agreement. The Bill therefore distinguishes between different types of collateral and, when necessary, provides separate rules for them. The

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\(^{39}\) Cf. UCC 9-102 (1)(b), whose language is less ambiguous and which also includes the sale of "contract rights" and "chattel paper". The Assignment of Book Debts Act, supra, footnote 10, ss. 1(d), 3 also covers both types of assignments, but excludes assignments of specific debts (s. 2(b), (c)). Specific debts are inferentially included in the Bill. Cf. UCC 9-104(f) and -302(1)(e). "Book debts" is not defined in the Bill. Quaere, whether it is intended to have the same meaning as the term in the Assignment of Book Debts Act, s. 1(d). If so, it will vary slightly from the definition of "account" in UCC 9-106, and it will also exclude the transfer of a claim for wages, salary or other compensation by an employee since such claims are not usually entered in a book by the assignor. Cf. UCC 9-104(d). Quaere, however, whether such a transfer, if it is given by way of security, may not be caught under the heading of "intangibles"? This term is more broadly defined in s.1(m) of the Bill than is "general intangibles" in UCC 9-106. See also infra, footnote 202.


\(^{42}\) See Ziegel, Hire-Purchase Agreements: A Plea for Greater Realism (1960), 104 Sol. J. 996.
principal divisions are into tangible collateral ("goods", 43 "accessions", 44 and "fixtures" 45), intangible collateral (contract rights, 46 accounts receivable, 47 and other "intangibles" 48) and rights to intangibles embodied in documents which are generally transferred by delivery ("documents of title", 49 "instruments", 50 "securities", 51 and "chattel paper" 52). "Goods" in turn are sub-divided into "consumer goods", 54 "equipment" 55 and "inventory". 56 This list looks a little frightening at first but the definitions are quickly grasped and, generally speaking, are easy to apply.

The second basic concept of the bill arises from the fact that every security agreement raises the same four basic questions. First, how do you create the security interest and what restrictions are imposed upon its effectiveness between the parties to the agreement? Secondly, what steps must the secured party take to perfect

43 Defined in s. 1(k).
44 Defined in s. 1(a) as "goods that are installed in or affixed to other goods". Accessions are dealt with in s. 39.
45 This key term is not defined either in the Bill or in the Code, save that s.1(w), in enumerating the types of collateral in which a security interest may be created, excludes "building materials that have been affixed to the (sic) realty". C.f. UCC 9-313(1). For further discussion of the problem of fixtures, see infra, Part II (2)(d).
46 This term is not defined in the Bill, though it is used in s. 5(1). It is defined in UCC 9-106 (second sentence) as meaning "any right to payment not yet earned by performance and not evidenced by an instrument or chattel paper".
47 This term is also not defined in the Bill, though again it is used in s. 5(1). "Account" is defined in UCC 9-106 (first sentence) as meaning "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper". (Article 9 does not use the term "accounts receivable" and its use in s. 5(1) of the Bill appears to be due to an oversight.) The distinction between contract rights and accounts is of importance only for the purposes of s. 30(1)(b) of the Bill, although the Code also distinguishes between them for at least one other purpose. See UCC 9-318(2), and cf. UCC 9-102, Comment 5. The Bill adds an unnecessary element of confusion by speaking in section 1(w) of "book debts". Presumably this should read "accounts" or "accounts receivable".
48 Defined in s. 1(1) as meaning "a chose in action, but does not include chattel paper, a document of title, an instrument or securities". Cf. the more comprehensive definition of "general intangibles" in UCC 9-106 (third sentence).
49 Defined in s. 1(i). Cf. UCC 9-105(e).
50 Ibi d., s. 1(1). Cf. UCC 9-105(g).
51 Ibid., s. 1(u). Cf. UCC 8-102.
52 Ibid., s. 1(c). Cf. UCC 9-105(b).
53 Ibid., s. 1(k). Cf. UCC 9-105(f).
54 Defined in s. 1(e) as meaning goods "that are used or acquired primarily for personal, family or household purposes". Cf. UCC 9-109(1).
55 Defined in s. 1(f) as meaning goods "that are not inventory or consumer goods". Cf. UCC 9-109(2).
56 Defined in s. 1(n) as meaning goods "that are held by a person for sale or lease, or that are to be furnished or have been furnished under a contract of service, or that are raw materials, work in process or materials used or consumed in a business or profession". Cf. UCC 9-109(4).
his security interest so as to protect it against attack by creditors and purchasers (other than purchasers in ordinary course of business), and what is the order of priorities where other persons claim a conflicting interest in the same collateral? Thirdly, if the security interest is perfected by registration, when, where, and what document must be filed and what information must it contain? Finally, what are the secured party's rights and remedies if the debtor defaults in his obligations? Under each of these headings the Bill elaborates an appropriate set of rules which apply to all security interests regardless of the nature of the instrument by which they were created, save where the nature of the collateral or the value given by the secured party requires or justifies special rules.

The cumulative effect of these two basic concepts is to sweep aside the bewildering variety of statutory, common law, and equitable rules which have developed around the existing security devices. Although the parties are free to continue to use the old nomenclature if they wish, there is in substance now only one security device—the "security agreement"—and every security agreement is governed by the same basic set of rules. When one considers that, with very few exceptions, the Bill regulates security agreements covering every possible form of collateral in almost every conceivable situation this is truly a remarkable achievement.

A simple example will illustrate the operation of the Bill. Dealer A sells vehicles on a conditional sale basis. Bank B extends "purchase money" loans to borrowers and takes a chattel mortgage as security. Under the Bill the dealer and the bank will both become "secured parties" and they will both have a "purchase money security interest" in the vehicles which they have helped to finance. Both will have to comply with identical filing requirements in order to perfect their security interests, and the documents filed by them will be registered in the same office and indexed in the same book. Both will occupy the same positions towards third parties and both will enjoy the same rights and remedies, and be subject to the same duties, if they seek to enforce their security interests.

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57 See UCC 9-102, Comment 2.
58 Defined in s. 1(f).
59 Defined in s. 1(r) as meaning a security interest "that is (i) taken or reserved by the seller of the collateral to secure payment of all or part of its price, or (ii) taken by a person who gives value that enables the debtor to acquire rights in or the use of the collateral, if such value is applied to acquire such rights". The concept of a purchase money security interest is important in determining the order of priorities between conflicting security interests. See infra, Part II, 2-(f).
60 See infra, Part II, 3.
61 See infra, Part II, 2.
62 See infra, Part II, 4.
I should now like to retrace my steps and consider briefly the principal provisions of the Bill with respect to each of the four stages in the life of a security agreement which have been mentioned.

1. The creation of the security interest. Present Anglo-Canadian common law is very permissive and, as distinguished from pre-Code American law and a variety of provincial statutory prescriptions, imposes few restrictions on the creation of security interests in personal property. The Bill adheres to the same policy. All that is necessary in order to create an effective security interest between the parties is that (a) the parties intend it to attach; (b) value is given; and (c) the debtor has rights in the collateral. In addition, if the secured party wishes to be in a position to enforce a security interest against a third party the agreement must be in writing and signed by the debtor, unless the collateral is already in his possession. Subject to these simple requirements, the security agreement is effective according to its terms between the parties to it and against third parties. In particular it may cover after-acquired property and it may secure future advances or other value, whether or not the advances or other value are given pursuant to commitment. Such clauses are common in inventory financing and other agreements involving the extension of a line of credit, and their express recognition is much to be welcomed. The Bill does, however, impose some important restrictions for the protection of farmers and consumers on the use of after-acquired property clauses in crop agreements and those involving consumer goods.

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63 As to which, see Ziegel, loc. cit., footnote 15, at pp. 62, 70-73.
64 Ibid., at pp. 60-69.
65 The most serious restriction is the common law's refusal to recognize mortgages on after-acquired property, but this hurdle has long ago been overcome by equity. See Holroyd v. Marshall (1862), 10 H.L.C. 191. Equitable securities are, however, highly vulnerable by reason of the doctrine of purchaser for value and, in the case of choses in action, the rule in Dearle v. Hall (1823), 3 Russ. 1. See further, Ziegel, loc. cit., ibid., at pp. 60-69.
66 S. 12.
67 S. 10. UCC 9-203(1), on the other hand, makes a security agreement not signed by the debtor unenforceable against him as well as against third parties, unless the collateral is in the possession of the secured party. Whether this is a better rule is debatable. The present Canadian security acts do not generally require a written agreement so far as the debtor is concerned. The point is apparently of small practical importance since it is a rare case where the security agreement is not reduced to writing.
68 Section 9. The prescriptions in other acts not repealed by the Bill, such as consumer credit legislation, will of course continue to apply. Cf. UCC 9-201 (second sentence).
69 S. 13.
70 S. 16.
71 See s. 13.
2. Perfection of security interest and priorities between competing interests. For more than a century now the provincial legislatures have evinced concern over the deception which secret liens may play on unsuspecting third parties and have prescribed measures to deal with it. The draft Bill continues and indeed strengthens this philosophy, while pruning it of its more irrational elements. The steps which a secured party must take in order to obtain maximum protection for his security interest are referred to in the Bill as the "perfection" of the security interest; an unperfected security interest is subordinated to:

[Section 23.]

(a) the interest of a person,
   (i) who is entitled to a priority under this or any other Act, or
   (ii) who, without knowledge of the security interest and before it is perfected, assumes control of the collateral through legal process, or
   (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver; and

(b) the interest of a transferee who is not a secured party to the extent that he gives value without knowledge of the security interest and before it is perfected,
   (i) of chattel paper, documents of title, securities, instruments or goods in bulk or otherwise not in the ordinary course of the business of the transferor and where the transferee receives delivery of the collateral, or
   (ii) of intangibles.

It will be observed that the classes of persons who are protected against an unperfected security interest are almost identical with those enumerated in a typical registration statute. Two minor differences are that, under the Bill, an execution creditor must not have actual knowledge of the security interest before he seizes the collateral and that a transferee for value must actually obtain possession of the collateral before the security interest in it has been perfected.

72 "Maximum", not complete protection, since, as will be seen later, even a perfected security interest can be overridden in a variety of circumstances.
73 See, e.g., the Ontario Bills of Sale Act, supra, footnote 10, s. 8, and cf. the Ontario Sale of Goods Act, supra, footnote 37, s. 25.
74 The wisdom of these changes is not beyond question. It is arguable, for instance, that an unregistered security interest prejudices an execution creditor not only because he might not have seized the collateral if he had known the true position but also because he might not have extended the credit to the judgment debtor (if such was the case) out of which his claim arose. Likewise it may be argued that a transferee would not have purchased the collateral, and even less have paid the purchase price, had he known the full facts.
Under existing law a security interest can generally be perfected either by filing a prescribed document in a public office or by taking possession of the collateral.\textsuperscript{75} This is also true under the Bill.\textsuperscript{76} But the Bill does not countenance perfection by marking the goods with the seller's name and address, a method which incredibly still survives in the Ontario Conditional Sales Act\textsuperscript{77} and the acts of several other provinces.\textsuperscript{78} Not all security interests of course can be perfected either by filing or taking possession. "Intangibles", for example, cannot be physically possessed and a security interest in such collateral must always be perfected by filing.\textsuperscript{79} On the other hand, a security interest in bills of exchange and similar instruments evidencing a monetary obligation which are normally transferred by delivery, and securities issued by a corporation or other person, can only be perfected by possession.\textsuperscript{80} The reason for this rule is that possession is the invariable method of perfection adopted in practice with respect to such collateral in all but very short term loans, and registration would therefore serve no useful purpose.\textsuperscript{81} As under existing law, the Bill also recognizes\textsuperscript{82} a number of situations in which the secured party can have a perfected security interest in collateral for a strictly limited period\textsuperscript{83} without filing or taking possession. Of these the most familiar example\textsuperscript{84} is the ten days' "grace" period afforded the secured party who holds a purchase money security interest in collateral that has come into the debtor's possession, for example, an automobile under a conditional sale agreement.\textsuperscript{85} Subject to these exceptions, all security interests in goods must be perfected by filing.\textsuperscript{86} The construction of the "grace" clauses in the existing conditional sales

\textsuperscript{75} See, e.g., the Ontario Bills of Sale Act, supra, footnote 10, s. 8.
\textsuperscript{76} Ss. 25 and 26.
\textsuperscript{77} Supra, footnote 10, s. 2(5).
\textsuperscript{78} See Ziegel, loc. cit., footnote 17, at pp. 185-187.
\textsuperscript{79} Ibid. Cf. UCC 9-304(1) (second sentence). Note that the definition of "instruments" in UCC 9-105(1)(g) includes securities.
\textsuperscript{80} See UCC 9-304, Comment 1.
\textsuperscript{81} Ss. 23(3), 27(2). Cf. UCC 9-301(2), -304(4), (5); and note that s. 27(2)(a) requires the security interest in the instrument to be initially perfected whereas UCC 9-304(4) does not. Quaere, whether this difference is due to an oversight?
\textsuperscript{82} The Bill implicitly rejects, and rightly so, the doctrine of constructive pledge applied in such cases as North Western Bank, Ltd. v. Poynter, [1895] A.C. 56 and Re David Allester, Ltd., [1922] 2 Ch. 211.
\textsuperscript{83} In addition to the exception stated in the text, s. 27(2) permits two others: viz.
(a) where an instrument is delivered to the debtor for the purpose of ultimate sale or exchange, presentation, collection or renewal, or registration of transfer; and
(b) where a negotiable document of title or goods held by a bailee are made available to the debtor for sale or exchange, loading, unloading, etc., or manufacturing, processing, packaging or otherwise dealing with goods preliminary to their sale or exchange.
\textsuperscript{84} Cf. Ontario Conditional Sales Act, supra, footnote 10, s. 2(1)(b).
interests must be perfected by filing or possession.

The problem of determining priorities between competing claims to the same collateral is related to, but by no means identical with, the question of the perfection of the security interest. The secured party may have a perfected security interest and yet there may be sound policy reasons why his interest should be deferred to a competing claim, just as there may be valid reasons why his interest should be preferred whether or not his security interest has been perfected at the time when the competing claim arose. Such conflicts cannot be resolved on an a priori basis but only by an examination of the individual merits of the competing claims in each case. A notable accomplishment of the Bill is that for the first time in a Canadian statute we have an explicit statement of the applicable rules instead of the hotchpot of common law, equitable, statutory—and frequently conflicting—rules which do service at the present time.

With this brief introduction, let me enumerate the principal priority rules adopted in the Bill:

(a) *Purchasers in ordinary course of business*. In the case of goods the Ontario Conditional Sales Act has long provided that where goods are conditionally sold to a person for purposes of resale by him in the course of business and he resells the goods in the course of business, the purchaser takes the goods free of the financier's lien. Ontario case law, however, has refused to accord the same protection where the inventory in the dealer's hands was subject to a wholesale chattel mortgage. Section 31(1) of the Bill removes the anomaly and protects all purchasers in ordinary course of business regardless of the nature of the security interest held acts has provoked much difference of opinion, especially where the conditional sale agreement was not registered until after the grace period had expired. Cf., for example, *Hulbert and Worth v. Peterson* (1905), 36 S.C.R. 324 with *Östler v. I.A.C.* (1963-4), 45 W.W.R. 673 (B.C.). S. 23(3) of the Bill clearly follows the line of cases represented by the latter decision, that is, the secured party can only rely on the grace period if he in fact perfected his security interest within the ten days.

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86 See now s. 2(3) - (4).
88 UCC 9-307(1) uses the expression "buyer in ordinary course of business" rather than "purchaser" etc., because the definition of "purchaser" in UCC 9-201(32) - (33) includes the acquisition of any interest in property, limited or absolute, and whether for value or not, whereas UCC 9-307(1) is intended to be confined to absolute transfers for new value. See the comments to UCC 9-307 and the definition in UCC 9-201(9). The Bill, on the other hand, uses only the single expression "purchaser" and does not define it, thus creating doubts as to its meaning and as to whether the same meaning is to be attached to the term in s. 31(1), (2), and (3).
by the inventory financier and whether or not the purchaser knows of its existence. It should be carefully noted however that purchasers in ordinary course of business do not take free of the security interest in every case; the Bill only protects them where the security interest was created by the person who sold the goods to them. If, to take a familiar example, A sells an automobile subject to a security interest to B for use and not for resale, and B wrongly resells the vehicle to C, a used car dealer, then D, who purchases the vehicle from C, will not be protected by section 31. In other words, the section is based on the principle of estoppel and not simply on the necessity of protecting members of the public. The Bill does not proceed on the principle of possession vaut titre of French law or the modified version of the principle in the Quebec Civil Code. Whether it should have done so in the case of purchasers in ordinary course of business is a point well worthy of discussion.

The Bill creates a further, and welcome, innovation by extending to purchasers in ordinary course of business of chattel paper and instruments a protection similar to that which it extends to purchasers of goods. “Chattel paper” is defined as “one or more than one writing that expresses both a monetary obligation and a security interest” and “instrument” as a “bill, note, or cheque within the meaning of the Bills of Exchange Act or any other right that evidences a right to the payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment”. These terms are therefore not confined to paper which is negotiable under the law merchant. Nevertheless, the theory of the Bill is that they are sufficiently analogous to negotiable instruments to warrant protection for the party who purchases them in the ordinary course of business. He will be protected whether or not the security interest in the chattel paper or instrument was created by his transferor, provided he did not know of its existence. Here then the Code does give effect, and justly so, to the possession vaut titre principle. However, the secured party who leaves, say, a conditional sale agreement in the debtor’s hands can always protect himself by stamping the document with his name and thus putting third parties on notice. Holders in due course of negotiable instruments and nego-

90 Arts. 1489, 2268.
91 S. 1(c); cf. UCC 9-105(b).
92 A conditional sale agreement or chattel mortgage are typical examples of such chattel paper.
93 S. 1(f); cf. UCC 9-105(g).
94 S. 31(2)(a), 31(3). Cf. UCC 9-308.
95 See UCC 9-308, Comment 2, (final sentence).
tangible documents of title continue of course to be protected by the rules of the law merchant. Apparently the same priority is also to be accorded to the purchaser of securities, but this point requires clarification.

(b) "Proceeds". A secured party who finances a manufacturer or dealer's inventory normally expects to be repaid out of the proceeds of the sale of the inventory in its original or processed form. Understandably therefore the wholesale financer invariably stipulates that the proceeds of such disposition shall be held "on trust" for him. Under the existing law his ability to establish his title to such proceeds depends on a bewildering variety of elusive rules. The Bill neatly cuts through the labyrinth by stating simply that the secured party shall have a perfected security interest in the proceeds if it was included in the security agreement relating to the original collateral, provided the security agreement in the collateral was perfected by registration and providing the proceeds are identifiable or traceable. If the original security agreement does not contain a proceeds clause, the secured party has a temporarily perfected interest for a ten day period following the disposition of the original collateral and can thereafter protect himself by filing a "caution".

(c) Liens for materials and services. Present Anglo-Canadian case law generally accords priority to the artisan who has furnished materials or bestowed labour on the collateral if he can show that the secured party expressly or impliedly consented to his action.

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96 S. 32; cf. UCC 9-309.
97 This term is defined in s. 1(m) as meaning "shares, stock, warrants, bonds, debentures, debenture stock or the like issued by a corporation or other person, or a partnership, association or government". It will be noted that the definition is not confined to negotiable securities.
98 S. 32(1)(c) provides that the rights of a bona fide purchaser of securities are to be determined "without regard to this Act and are superior to any security interest whether perfected or not". Cf. UCC 9-309. If the rights of the purchaser are to be determined "without regard to this Act" then the second part of the quoted words becomes contradictory, for it is conceivable that in a given situation existing Ontario law may not give the purchaser any better rights than his transferor had. The draftsmen of the Ontario Bill overlooked the fact that UCC 9-309, on which s.32(1)(c) is based, is merely supplemental (so far as investment securities are concerned) to UCC 8-301, -2, which define the rights of a bona fide purchaser of securities and equate his position with that of a holder in due course of a negotiable instrument. Ontario does not have any legislation comparable to article 8 of the Code (which in turn replaces the Uniform Stock Transfer Act).
99 See Ziegel, loc. cit., footnote 15, at p. 96 et seq.
100 Ss. 28(2)(b) and 48(2).
Much litigation has been provoked by this all important proviso. The Bill elegantly resolves the controversy by providing\textsuperscript{103} that the artisan shall have priority unless the lien is given by an act that provides that the lien does not have such priority.

(d) \textit{Fixtures}. If the goods subject to a conditional sale agreement have become affixed to realty, ever since 1897\textsuperscript{104} Ontario law has provided that the seller shall not lose his interest in the converted goods. An amending statute provided in 1933\textsuperscript{105} that such conditional sale agreements have to be filed in the appropriate Land Titles or Land Registry Office where the land to which the goods were to be affixed was registered, and in this form the provisions appear to have worked reasonably satisfactorily up to the present time. The difficulty arises because provisions of a similar nature were never inserted in the Bills of Sale Act, so that a chattel mortgage on fixtures is at present binding neither on existing realty interests nor on realty interests which may be created after the date of the chattel mortgage,\textsuperscript{106} unless the subsequent realty claimant has actual notice of the prior security interest in the fixture or the security interest was filed as an encumbrance or charge against the land.\textsuperscript{107} The logical step therefore would have been to assimilate the law affecting fixtures subject to a chattel mortgage with that relating to conditional sales, save where the security interest is created only after the goods have become fixtures, and this is what article 9-313 of the Uniform Commercial Code does.\textsuperscript{108}

Unfortunately, section 37 of the Ontario Bill follows exactly neither the Code provisions nor the provisions in the Ontario Conditional Sales Act, with the result that the section falls unhappily between two stools. Briefly, section 37 provides that if the security interest in the goods attached before they were affixed to the realty, the

\textsuperscript{103} S. 33.

\textsuperscript{104} S. O., 1897, 60 Vic., c. 14, s. 80. Most of the other provinces adopted similar legislation over the next twenty years, and it was these provisions which provided the precedent for the Uniform Conditional Sales Act (1922), s. 12.

\textsuperscript{105} S. O., 1933, c. 8, s. 3. Now see supra, footnote 10, s. 13. The amendment was adopted because of the decision in \textit{Hoppe v. Manners} (1931), 66 O.L.R. 587, [1931] 2 D.L.R. 253 (C.A.). A similar amendment to the Uniform Conditional Sales Act was adopted by the Uniformity Commissioners in 1934. See now the Revised Uniform Act (1955), s. 14.


\textsuperscript{108} For a discussion of the Code provisions and some of the difficulties which have been encountered, see Krinke (1964), 64 Col. L. Rev. 44; Coogan in (1962), 75 Harv. L. Rev. 1319 and (1965), 113 U. Pa. L. Rev. 1186.
secured party shall have priority over all prior interests in the realty. If the security interest in the goods attached after they became fixtures, the secured party takes subject to any prior realty interests—which is fair enough. In both instances, the secured party’s interest is subordinate to any subsequently created realty interest unless the secured party can show that the realty claimant had “actual knowledge” of the security interest at the time of the creation of his interest. The requirement that he must have “actual knowledge” as distinct from “constructive notice” appears to mark an important and, so far as I can see, unjustifiable departure from the Code provisions and the existing conditional sales law.108

(e) Accessions. The problem which arises when goods (the “accessory” or “part”) subject to a security interest are attached to goods (the “principal goods”) owned by or subject to a security interest in the hands of another person is basically the same as in the case of fixtures. There is however this difference, in that there is no Canadian legislation to act as a precedent and the jurisprudence is divided. The Ontario decisions110 follow American doctrine111 whereas the leading Prairie case112 appears to adopt the common law fixture test by analogy, The Bill113 applies the same rules to accessions as it does to fixtures, but with one significant change. In the case of fixtures, as we have seen, subsequent realty claimants take priority unless they had actual knowledge of security interest in the fixture. With respect to accessions, the test is whether or not the subsequent claimant to the principal goods acquired their interests “without notice” of the security interest in the part.114 Since the Bill provides115 that registration of a document constitutes notice of its existence, this means that a perfected security interest takes priority over subsequently created interests in the principal goods. Why the Bill should have drawn this distinction between fixtures and accessions is not clear.

(f) Priorities between conflicting security interests in the same collateral.

A multitude of rules govern such conflicts at the present time

108 These observations have been developed more fully in a memorandum on the draft Bill submitted by the writer to the Attorney General of Ontario.


113 S. 39; cf. UCC 9-314.

114 S. 39(2), last two lines.
and the order of priorities in a given case may depend on the answer to one or more of the following questions:

(i) What was the first security interest equitable or legal in character?
(ii) Was it registered?
(iii) Did the second secured party have actual knowledge of it?
(iv) Did he perfect his own security interest?
(v) In the case of choses in action, which of the two parties gave first notice to the debtor?

The Bill sweeps aside this confusion and replaces it with a few simple and intelligible rules. These are set forth in section 36, which reads as follows:

(1) If no other provision of this Act is applicable, priority between security interests in the same collateral shall be determined,

(a) by the order of registration, if the security interests have been perfected by registration;
(b) by the order of perfection, unless all security interests have been perfected by registration; or
(c) by the order of attachment under subsection 1 of section 12, if no security interest has been perfected.

(2) For the purposes of subsection 1, a continuously perfected security interest shall be treated at all times as if perfected by registration, if it was originally so perfected, and it shall be treated at all times as if perfected otherwise than by registration if it was originally perfected otherwise than by registration.

These rules are copied almost verbatim from article 9-312(5)-(6) of the Uniform Commercial Code and their adoption will lead to some departures of a perhaps less desirable character from established Anglo-Canadian principles of priority. Under existing statutory and judicially evolved rules, if A makes an advance against collateral on January 1st but does not file until March 1st and B makes an advance against the same collateral on February 1st and files on February 1st, B will only obtain priority over A's then unperfected security interest if he had no prior knowledge of its existence. Under section 36, on the other hand, B will obtain priority whether or not he had prior knowledge of A's security interest because he registered his security interest first. The Code explains this result because of the idea, "deeply rooted at common law," of a race of diligence among creditors. I cannot speak for American law but I should have thought the Canadian common law emphasizes good faith at least as much as diligence.118


117 Comment to UCC 9-312, Example 2 (second para., first sentence).

118 Quaere the position under s. 36 where the second security agreement
If the rules in section 36 were applicable in every case they would upset the priority which a conditional seller of goods enjoys over other security interests under existing law. This would plainly be unacceptable. Section 35 therefore states three situations in which a purchase money security interest in collateral will have priority over other security interests. The first situation arises when a security interest in crops is given for a consideration to enable the debtor to produce the crops during the production season and the security interest is given not more than three months before the crops become growing crops. The second situation concerns a purchase money security interest in inventory, but here in order to obtain priority the holder of the purchase money security interest must, inter alia, give notice of his proposed dealings to any prior secured party of whose existence he knows or is deemed to know. The third situation covers all purchase money security interests in collateral other than inventory. In all three cases the priority extends to any proceeds arising from the collateral as well as to the security interest in the original collateral, and underlying them all is the very reasonable concept that the financer who made possible the acquisition by the debtor of new collateral should not be subordinated to the security interest of an earlier financer.

3. Registration procedures. As has already been mentioned, the filing provisions of the existing Ontario security acts suffer from at least two serious defects. The first arises from the absence of a central registry office; the second lies in the onerous affidavit requirements. The draft Bill effectively deals with both these shortcomings. So far as the place of registration is concerned, the Bill establishes a central registration office which is to be located at or near Toronto in which all documents tendered for registration will be recorded. To accommodate persons living in other areas, the Bill provides for the establishment of branch offices across the

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119 Cf. UCC 9-312(4) - (5).  
120 See supra, footnote 59.  
121 Cf. the rule in Hopkinson v. Rolt (1861), 9 H.L.C. 514 and the Land Registry Act, R.S.O., 1960, c. 82, s. 79. Difficult problems of priority will arise where two or more inventory financers claim a purchase money security interest in the same collateral.  
122 "Proceeds" are not included in UCC 312(3) - (4). They were added by the Catzman Committee because American authors had pointed out the conflict of priorities which would arise between an accounts receivable financer and an inventory financer who claimed the same accounts as proceeds. See, for example, the discussion by Peter Coogan and Nahum L. Gordon in (1963), 76 Harv. L. Rev. 1529.  
123 S. 43(1).
province at which documents may be tendered for registration.\textsuperscript{124} The registration only becomes effective, however, from the time the document is recorded in the central office.\textsuperscript{125} These provisions, therefore, combine the effectiveness of central registration with the convenience of local filing.\textsuperscript{126} If the Registrar or his officials make a mistake, there is an assurance fund out of which the injured parties may be compensated.\textsuperscript{127}

What, then, is the document which must be filed in order to perfect a security interest? Section 48 of the Bill says it must be the security agreement or a copy thereof signed by the debtor. The Code requirements are much simpler. Article 9-401 only requires the filing of a "financing statement", that is, a short one-page document signed by the debtor and the secured party in which the debtor announces his intention of giving the secured party a security interest in the collateral which has to be described in general terms.\textsuperscript{128} This is known as a "notice filing" procedure and is by no means unknown in Canada, for we have had it in the federal Bank Act since 1923.\textsuperscript{129} "Notice" filing possesses several important advantages over "agreement" filing.\textsuperscript{130} In the first place, it enables the parties to change the security agreement as circumstances may dictate without each time having to file a copy of the amended agreement. This is of particular importance in inventory financing situations in which the parties are engaged in a continuous series of dealings. Secondly, it keeps confidential information which might prove useful to a competitor. Thirdly, it saves the registry office from being inundated with large numbers of bulky documents. Nevertheless, the Catzman Committee was unwilling to adopt the notice filing procedure. The fear of fraud appears to have been the dominant reason for their reluctance, though one would have thought that a fictitious security agreement can be concocted as easily as a financing statement.\textsuperscript{131}

\textsuperscript{124} S. 43(2).
\textsuperscript{125} S. 47.
\textsuperscript{126} A similar system, it might be noted, has operated successfully in Saskatchewan since 1957. See, e.g., The Conditional Sales Act, S. S., 1957, c. 97, s. 5(2)-(5). Dissatisfaction has been expressed by Saskatchewan practitioners about the way in which the records are kept at the central office, but that is another matter.
\textsuperscript{127} S. 46.
\textsuperscript{128} If the secured party prefers, he is still free to file a copy of the security agreement. See UCC 9-402(1) (last sentence).
\textsuperscript{129} See now the Bank Act, S. C., 1953-4, c. 48, s. 88(4) and App. K.
\textsuperscript{130} For a brief discussion of this and other aspects of notice filing, see Ziegel, \textit{loc. cit.}, footnote 15, at pp. 73-5.
\textsuperscript{131} At the Osgoode Hall conference in May 1963 there appears to have been a fairly widespread sentiment that notice filing should be adopted, at least for inventory financing purposes.
Fortunately the Catzman Committee did not show the same hesitance with respect to affidavits. They dispensed with them entirely, at all times, and for any purpose. The Law Reform Commission unfortunately has restored the need for affidavits in one situation, namely, where a purchase money security interest in collateral other than consumer goods also covers other collateral. The introduction of affidavit requirements for this purpose is a retrograde step, as well as being illogical, and may well open the door to the re-introduction of affidavits for other purposes.

Next, we must look to see what mandatory information the filed security agreement must contain. The requirements are set forth in section 48(1) and are:

(a) the full name and address of the debtor;
(b) the full name and address of the secured party;
(c) the date of execution of the security agreement;
(d) a description of the collateral sufficient to identify it;
(e) the terms and conditions of the security agreement; and
(f) where appropriate, the affidavit provided for in section 16.

The first three requirements are self-evident and require no comment; the requirement in subsection (e) follows logically from the requirement that the security agreement must be filed and is really superfluous; and the affidavit requirement in subsection (f) I have already dealt with. I should like only to add a few words about the description requirement in subsection (d). The existing statutes frequently provide that the security agreement must contain "such sufficient and full description" of the collateral "that the same may be readily and easily known and distinguished". Section 48, on the other hand, requires a description of the collateral "sufficient to identify it". Is there any substantial distinction between these requirements? It seems unlikely. If this conclusion is correct, the old case law will continue to apply with all its attendant difficulties. Inventory financing in particular may be seriously affected, for it is often impossible in advance to describe future collateral with that degree of particularity which the subsection requires.

The original Bill did not require the security agreement to be filed within any particular time following its execution. It could be filed at any time. This is also what the Code impliedly provides.

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125 S. 15, Form 2.
126 Another shortcoming of the section is that it fails to state what is the sanction for non-compliance with its provisions.
127 This appears to be a misprint and should read "section 15".
128 See supra, footnote 13.
129 See UCC 9-301, -302, -312(5), -401.
Of course, if filing is delayed the secured party risks losing his security interest altogether (as where the collateral is sold to a *bona fide* purchaser) or having it subordinated to another security interest. The Law Reform Commission thought this provision was too permissive and amended the Bill, so that, with some exceptions, the security agreement must now be registered within fifteen days of its execution. This amendment appears to be ill-conceived and badly drafted, especially since no provisions are made to permit late filing under any circumstances. In view of what has been said, it will be seen that the only persons who are prejudiced by a delayed filing are general creditors. There is nothing in the Bill, however, to prevent a secured party from perfecting a security interest by taking possession of the collateral, and in this way the filing requirements can easily be circumvented. There is also no prohibition in the Bill against the parties cancelling one security agreement and replacing it with a new one, which is then promptly filed—again to the detriment of prior general creditors. I am not of course suggesting that general creditors should be left unprotected; I am merely saying that there are better ways of doing it than by the imposition of a rigid time filing requirement. A provision such as appears in section 60(a) of the American Bankruptcy Act would probably furnish a better solution, although other solutions also commend themselves.

4. **Enforcement of the security interest.** The same multiplicity of divergent rules which characterizes other aspects of the law of secured transactions also characterizes the secured party's rights and remedies under a security agreement at common law. If the

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137 See UCC 9-301, -312(5).
138 S. 48(4).
139 See *In re Shelley*, [1963] 1 O.R. 431 (C.A.). This case shows that the Bills of Sale Act, *supra*, footnote 10, s. 27, as presently drafted, is not effective to curb this kind of evil.
140 See now 11 U.S.C.A. para. 96(a) (1964 Suppl.). Briefly this complex section extends the doctrine of fraudulent preferences by avoiding, *inter alia*, any security interests perfected within four months prior to the filing of a bankruptcy petition by or against the debtor, other than in respect of new value given by the secured party at the time of perfection. For an admirable account of the history of section 60, see Countryman (1951), *16 Law & Contemporary Problems* 76.
141 Here again reference may be made to some interesting Saskatchewan legislation. Section 5 of the Conditional Sales Act, *supra*, footnote 126, requires a copy of the agreement to be filed within thirty days, but then proceeds to provide (see s. 23) that the document may be registered at a later date—without anyone's consent—subject only to prior accrued rights. These rights presumably include those of general creditors since they are included within the classes of protected persons enumerated in s. 3. In effect, therefore, Saskatchewan has now adopted an "open date" filing system and the only advantage of filing within thirty days is to provide the secured party with a retroactive grace period. The Bills of Sale Act, S.S., 1957, c. 96, ss. 6,25 contains similar provisions.
security takes the form of a pledge, the pledgee may only sell the collateral; he has no rights of foreclosure.\textsuperscript{142} If the security is in the form of a chattel mortgage, the secured party's remedies are cumulative and concurrent and he may sue for the price, appoint a receiver, and either sell or seek a foreclosure order.\textsuperscript{143} In the case of an equitable charge, the remedies again are limited to a right to sell and to the appointment of a receiver.\textsuperscript{144} In the case of a conditional sale, the governing rules are drawn from the law of sale of goods, for the agreement is not regarded as a true security agreement at all.\textsuperscript{145} Thus the seller's remedies are not cumulative and he must elect between suing for the price or repossessing the goods. If he repossesses and sells, he cannot sue for any deficiency unless the agreement so provides.\textsuperscript{146} And, conversely, if there is a surplus, it is doubtful to what extent the seller is accountable for it\textsuperscript{147}; nor is he obliged after repossessing the collateral to allow the buyer a period of redemption.\textsuperscript{148} As early as 1896 the Ontario Conditional Sales Act made some attempts to assimilate the buyer's position to that of a mortgagor, but the assimilation is far from complete, and in the case of the other security devices the common law rules have been left substantially intact.

The first task, therefore, which the Bill sets itself is to integrate the divergent rights and remedies so that they are the same regardless of the nature of the security device used. The model which the Code used, and which the Bill also uses, is the enforcement rights of a mortgagee. The Bill accordingly provides that the secured party's rights are cumulative and not alternative;\textsuperscript{149} that the security

\textsuperscript{142} Carter v. Wake (1887), 4 Ch. D. 605.
\textsuperscript{143} See e.g., Ace v. Higgins (1962), 33 D.L.R. (2d) 63 (B.C.C.A.).
\textsuperscript{144} Tennant v. Trenchard (1869), L.R. 4 Ch. 537.
\textsuperscript{147} See the conflicting theories expounded by the British Columbia Court of Appeal in C. C. Motor Sales v. Chan, [1926] 1 W. W.R. 508. If, in repossessing the goods, the seller intends to rescind the agreement then he should be entitled to retain any surplus, and the dissenting judgments of Martin and MacDonald J.J.A. are right. Whether the buyer should be entitled to recover any part of his payments is another question. The contrary decision of the Supreme Court of Canada appears to have been based on the grounds that since the agreement contained a deficiency clause and the word "security" was used in several places the parties must have intended their relationship to be governed by mortgage principles.
\textsuperscript{149} S. 56(1).
interest does not merge in a judgment for the debt;\textsuperscript{150} that the debtor has a right to redemption till the collateral is sold;\textsuperscript{151} and that he is entitled to any surplus.\textsuperscript{152} So far as these provisions confer rights on the debtor they cannot be restricted by the terms of the security agreement and the debtor cannot waive them.\textsuperscript{153} The original version of the Bill\textsuperscript{154} also provided that after a disposition of the collateral the secured party was entitled to claim any deficiency, but this provision was deleted by the Law Reform Commission —why, it is not clear.\textsuperscript{155}

A second task which Part V in the bill sets itself is to provide the debtor, and especially the consumer debtor, with some minimum safeguards over and above the common law protection accorded the chattel mortgagor. The model used here is the American Uniform Conditional Sales Act of 1918,\textsuperscript{156} but it should be emphasized that these provisions are not intended to serve as a substitute for retail instalments sales legislation.\textsuperscript{157} The safeguards are twofold. First, the secured party must give the debtor at least five days’ notice of any intended sale of the collateral.\textsuperscript{158} Secondly, in the case of consumer goods, where more than sixty per cent of the indebtedness secured has been paid the collateral must be sold within ninety days of its repossession unless the debtor, after default, has renounced his rights.\textsuperscript{159} It will be seen that these safeguards are very modest in character and substantially less than the

\textsuperscript{150} S. 56(7). This provision will therefore give the quietus to the long standing doubt created by this question with respect to conditional sales.

\textsuperscript{151} S. 62.

\textsuperscript{152} S. 60.

\textsuperscript{153} S. 56(5).

\textsuperscript{154} See s. 55.

\textsuperscript{155} Presumably, however, there would be nothing to prevent the security agreement conferring such a right on the secured party. The position would then be the same as it is now in the case of conditional sale agreements.

\textsuperscript{156} See Uniform Laws Ann., Vol. 2.

\textsuperscript{157} Cf. UCC 9-203(2). See further infra, Part III.

\textsuperscript{158} S. 59(5). If he fails to do so, the debtor has a right to sue him for any loss or damage suffered by him in consequence; and in any event he has a right to recover an amount which is not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price. See s. 63(2). “Credit service charge” and “time price differential” are not defined; perhaps they should be.

\textsuperscript{159} S. 61(1). The sanctions here for non-compliance are somewhat different. The debtor (or any other interested party) may either apply to the Supreme Court or to a county or district court having jurisdiction in the matter for an order directing the secured party to comply (s. 63(1)) or sue for damages or loss sustained by him. Quaere, can he also sue under s.63(2)(b)? The last two lines of s. 61(1) provide that the debtor “may proceed under s. 63 [sic], or in an action for damages or loss sustained”. If the debtor can invoke the whole of s. 63 the reference to his right to sue for damages or loss becomes superfluous since it is already conferred on him under s. 63(2)(a). Presumably s. 63 should read s. 63(1).
protection accorded the debtor in several Canadian jurisdictions at the present time.\textsuperscript{160}

The Bill also sets itself a third goal — to modernize some of the common law rules and familiar statutory provisions. It abolishes the need for the collateral to be disposed of in any particular manner, but approves of any method which is "commercially reasonable".\textsuperscript{161} Public auctions are therefore no longer mandatory and the secured party is free to dispose of the collateral in part or in whole and by lease as well as by sale. These are eminently sensible reforms. Upon default the secured party is also authorized to take possession of collateral which assumes the form of equipment simply by rendering it unusable on the debtor's premises.\textsuperscript{162} Finally, the Bill sanctions a simple non-judicial method of foreclosure. The secured party may notify the debtor of his intention to retain the collateral in satisfaction of the indebtedness, and the foreclosure thereupon becomes effective unless the debtor objects within fifteen days of receiving the notice.\textsuperscript{163}

III. A Critical Appraisal of the Bill.

From what I have said so far, it will be obvious that I warmly support the basic philosophy and structure of the Bill. It represents an enormous improvement over the chaotic state of our present law and lawyers everywhere in Canada are deeply indebted to Mr. Catzman and his Committee for the countless hours they have devoted in giving us a Canadian version of article 9 of the Uniform Commercial Code. It is greatly to be hoped that their labours will be crowned with the success they so richly deserve.

It will be equally obvious from my preceding remarks that I am critical of the Bill on points of detail and sometimes on questions of policy and that I have particular reservations about some of the major changes in the Bill made by the Law Reform Commission. What I should like to do now, therefore, is to summarize my main criticisms of the Bill in terms of the responsibility which the Catzman Committee and the Law Reform Commission each bear for its present state. Before I turn to this task, let me refer briefly to criticisms which have been directed from other quarters.\textsuperscript{164}
The first such criticism is that the Bill is too favourable to secur-
ed creditors. It makes it too easy for them, it is said, to tie up all
of the debtor's assets, leaving him with few or no assets with which
to satisfy the claims of unsecured creditors. Secured creditors,
the argument runs, usually consist of large and powerful cor-
porations who should be able to protect their interests without
claiming priority over other creditors. A similar criticism was
voiced when article 9 of the Code was presented for adoption in
the various states of the Union, but it appears to be even more
groundless in Canada than it was in the United States. Under ex-
isting Canadian law, federal as well as provincial, it is already
possible for one or more secured creditors to tie up all of the
debtor's present and future assets. Our law has never prescribed
the use of the "floating lien", as did pre-Code American law. The
Ontario Bill therefore breaks no new ground; it merely removes a
large number of artificial barriers which have grown up hap-
lessly over the years and not in pursuance of some clearly de-
ined policy to restrict the use of secured credit. Moreover, it is not	rue to say that because a secured party now has, and under the
Bill will have, the legal right to monopolize all of the debtor's assets
that he will necessarily exercise it. If he is too greedy he will find
his debtor's sources of unsecured credit drying up very quickly,
thus leaving him with the main burden of financing his debtor's
business—a prospect which is not likely to appeal to him. To sug-
gest that a person who lends substantial sums of money should not
be entitled to seek priority over other creditors ignores the vital
difference between a financer and a general trade creditor. The
margin of profit on commercial loans is usually very small and
only a fraction of the profit that a trade creditor will normally
expect to make on a sale; the sums involved are usually much
larger; and the period of credit as a rule very much longer. What all
this adds up to is that a prudent lender will not lend unless he has
satisfactory assurance of repayment. Will anyone blame him? And

which follows is based on views expressed at symposia held in Vancouver
and Saskatoon on June 9th, 1965, and June 24th, 1965, respectively. A
record of the Saskatoon proceedings appears in (1965), 30 Sask. Bar
Rev. 203.


166 See, for example, State of New York, Law Revision Commission,
Study of Uniform Commercial Code, Statement of the National Com-
mercial Finance Conference Inc. and the Assoc. of Commercial Discount
Companies, Inc., Leg. Doc. (1954), No. 65 (H), at p. 22 et seq.; and,
passim, Coogan, (1959), 72 Harv. L. Rev. 838.

et seq.
would it be in the economic interests of the community if the sources of commercial credit were restricted?

A second criticism of the Bill is that it does not sufficiently protect the debtor, and particularly not the consumer debtor, against unconscionable agreements. I have already mentioned some of the safeguards which the Bill accords the consumer in the enforcement of a security interest, and the Bill contains three other safeguards. Of the latter, the first two restrict the use of after-acquired property and "add-on" clauses and the third invalidates the use of cut-off clauses in consumer goods security agreements. These are welcome safeguards but no one would pretend that they begin to cover all the consumer credit problems which require legislative action. The real issue is therefore whether the Bill should be expanded so as to incorporate the additional safeguards which are needed or whether they should be made the subject of a separate consumer credit or retail instalment sales act. The same question arose in the United States and the sponsors of the Code eventually decided that if the Code was to be uniformly acceptable to all the states it had to eschew controversial social legislation. This would have to be left for action by the individual states. I think this conclusion is also apposite with respect to the Ontario Bill. It is of course no excuse for inaction on the pressing social problems.

A third criticism of the Bill, and one which has been expressed in the Western provinces on two occasions, is that its registration provisions do not sufficiently protect innocent third parties who deal with the collateral. Suppose A sells goods to B on conditional sale terms. A registers the security agreement. B then sells the goods to C, and C sells them to D. D searched the goods under C's name before completing his purchase and found no encumbrances. Nevertheless, D is now confronted with a claim by A that C was not the owner of the goods. D would feel even more aggrieved if C was a merchant dealing in this line of goods. The

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169 Supra, pp. 126-129. 170 See ss. 13(2)(b) and 14.
171 See s. 17.
172 For two recent Canadian reports on consumer credit problems and legislative recommendations with respect to them, see Ontario, Final Report of the Select Committee on Consumer Credit (Toronto, 1965), and Nova Scotia, Final Report of the Royal Commission on the Cost of Borrowing Money, the Cost of Credit and related Matters in the Province of Nova Scotia (Halifax, February, 1965).
174 Viz. at the symposium in Vancouver and the one held in Saskatoon. See further (1965), 30 Sask. Bar Rev. 203, at pp. 230-231.
questions raised by this hypothetical example strike at the very root of the nemo dat doctrine and the nature of our registration statutes and call for a much more extended treatment than I have time for here. I shall therefore limit myself to some random thoughts.

To begin with, none of our existing registration statutes purport to offer a record of title with respect to collateral. All they undertake to do is to show whether the immediate possessor of the goods has given a security interest in them. In this respect the Ontario Bill is merely following the established precedent. It would not be possible to establish a certificate of title system for all collateral, nor is it necessary since the most common source of frauds is confined to one class of chattels—the motor vehicle. Here a certificate of title system is both possible and desirable, but the place for its adoption is not in a general bill on security in personal property. Several of the provinces have adopted a limited form of title system by requiring motor vehicles and, in some cases, other types of goods to be registered under engine and serial numbers as well as under the name of the current owner. Assuming that in such cases the Motor Vehicles Registry keeps a separate index of serial numbers, it should be possible to obtain a complete history of all dealings in a given chattel during its presence in the province. Complications, of course, arise where the goods were originally sold in another province. The draft Bill in its present form does not contain any express requirements for description by serial numbers, but it would be a simple matter to add them.

The last outside criticism which I should like to consider is one made by Mr. J. M. Goldenberg, Q.C., a respected member of the Saskatchewan Bar. It is that the Bill is difficult to understand and that it contains too many provisos, exceptions and cross-references. I think the criticism is ill-founded, and it has not been echoed by the many hundreds of lawyers across Canada who have now seen one of the several versions of the Bill. To be sure, the Bill does read like a novel. It deals with a highly technical subject and, having regard to the variety of agreements, parties, and collateral with which it must cope, it must allow for exceptions from general rules. Given these inescapable conditions, it is remarkable how easily the Bill does read. There is a directness and simplicity of

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176 See ibid., at pp. 231, 235.
language about it that is conspicuously absent from most of our existing security acts.

I should now like to offer some of my own criticisms of the Bill. Article 9 of the Code reflects American conditions and it contains many references to other articles of the Code and other extant American legislation. These provisions of course had to be adapted to Canadian conditions. The Catzman Committee, however, took a more questionable step when they decided to substitute "good Canadian prose" for the more relaxed, almost narrative type, style of the Code. That the result is a more succinct Bill cannot be denied, but whether the linguistic advantages outweigh the disadvantages is another matter. The disadvantages are twofold in character. First, assuming the Bill is enacted in substantially its present form, where there is a difference in terminology between the Code and the Bill an Ontario lawyer or judge will always have to ask himself whether the difference is merely verbal or whether the draftsman also intended a difference in meaning. For the same reason, care will have to be exercised in the use of American case law on the Code. Secondly, in their perhaps too ready assumption that the Code is unduly prolix, the Catzman Committee sometimes overlooked subtle nuances in the original document and omitted definitions which were essential to fix the meaning of important terms.177

An even more difficult question confronted the committee when they had to decide whether or not to adopt the policy decisions in article 9 in toto or whether to review them systematically and to reject those with which they disagreed. From what I have said earlier it is obvious that the committee did not agree with all of the Code's policies, but it is far from clear on what basis the committee frequently made their selection. It is not easy to see, for example, why the committee accepted for Canada the radical priority provisions in article 9-312(4)-(5)178 of the Code but rejected the by no means new "notice filing" provisions in article 9-402;179 or why the committee accepted the accessions provisions in article 9-313180 but made substantial changes to the fixtures provisions in article 9-312.181 These examples could be multiplied several times. I believe myself that the overall gain in accepting all of the Code provisions which were not incompatible with Canadian conditions would have more than offset the departures from traditional moulds

177 The writer has compiled a list of such instances in a privately circulated memorandum.
178 See Bill, s. 36.
179 Ibid., s. 48.
180 Ibid., s. 39.
181 Ibid., s. 37.
of thought which this process would have involved. Having made these observations, I do want to re-emphasize my whole-hearted support of the basic philosophy and structure of the Bill. The Bill in the form in which the Catzman Committee left it is, with one exception, a sound and workable instrument and the changes in detail which are desirable in order to resolve a number of ambiguities, or to redress some omissions, can easily be made in a matter of days.

My support is less than whole-hearted for the philosophy implicit in the major changes made to the Bill by the Law Reform Commission. In almost every case they appear to be retrograde in character and to do violence to the progressive spirit of the Bill. Time does not permit me to examine all the changes, but I should like to single out one of them for special mention. The problems arising out of the surreptitious removal of goods from one province into another has long been a source of anxiety. The common law rule which has been consistently adopted in our courts is that if the security interest has been validly created in the first province it is entitled to be recognized in every other province, even though the security interest has not been perfected in the province to which the goods were removed. This position was regarded as too favourable to extra-provincial secured parties and from about the turn of the century onwards most of the provinces adopted provisions requiring the security interest to be perfected in the province to which the goods have been removed within a given number of days following the secured party’s knowledge of the removal. Similar provisions were subsequently introduced in the Uniform Conditional

182 Cf. the comments by David H. Wright in (1965), 30 Sask. Bar Rev. 203, at p. 228.
183 That is, the provisions concerning the type of document which must be filed and the requirement that the security agreement must contain a description of the collateral “sufficient to identify it”. See the discussion, supra, Part II-3. The impact of the Bill on long-term debentures and on the English floating charge also merits further consideration.
184 Apart from the change discussed in the text, the other major changes or additions of an objectionable character are the following: the affidavit requirement in s. 15—see supra, p. 125; s. 48(4), which provides that the security agreement must be filed within fifteen days of its execution—see supra, p. 126; the deletion in s. 60 of the provision in the original Bill that the debtor was to be liable for any deficiency—see supra, p. 128.
186 See, e.g., Gosline v. Dunbar (1894), 32 N.B.R. 325 (full court); McGregor v. Kerr (1896), 29 N.S.R. 45 (en banc); Cline v. Russell (1909), 10 W.L.R. 666 (Alta.).
187 Nova Scotia was the first province to do so. See S.N.S., 1907, c. 42, s. 2. The provisions in the present Ontario Conditional Sales Act were first adopted in 1927. See S. O., 1927, c. 42, s. 5.
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Sales Act and the Uniform Bills of Sale Act. The Catzman Committee repeated these provisions in the Bill and added a further provision, borrowed from the Code, which stated that a security interest perfected under the law of the jurisdiction in which the collateral was when the security interest attached shall become unperfected in Ontario at the end of four months whether or not the secured party was aware of the removal of the collateral before the expiration of this period.

The Law Reform Commission has radically changed the structure of these conflict of laws provisions. In effect the Bill now provides that the foregoing provisions shall not apply and the security interest shall be deemed to be unperfected from the moment the goods are brought into Ontario, unless the Attorney General of Ontario certifies that the province from which the goods were brought has adopted legislation substantially similar to the provisions in the Bill. This is a most undesirable innovation. The common law courts have never applied conflict of laws rules on a basis of reciprocity and to engraft such a rule now on the recognition of extra-provincial security interests can only impede the flow of commerce between the provinces and invite retaliation. If the protection of innocent purchasers in Ontario requires that extra-provincial security interests should be perfected anew in Ontario, this requirement should be imposed on a uniform basis without regard to the accidents of legislation in other provinces.

There is a final observation I would permit myself about the

S. 3(5). See now the Revised Uniform Conditional Sales Act (1955), s. 6.
See ss. 6 - 7.
S. 7(2).
See UCC 9-103(3).
It is arguable that this period is too long. The Saskatchewan Conditional Sales Act, supra, footnote 126, s. 8, has a cut-off period of thirty days.
As a result of the combined effect of ss. 7 - 8.
Equally undesirable is s. 7, which only allows the secured party a period of fifteen days from the time the collateral is brought into Ontario in which to perfect his security interest in the province. Read literally this means that, unless he can bring himself within the exception in s. 8, the secured party cannot perfect his security interest after this date, even though he may not have known of the removal of the goods. This is simply confiscatory. Cf. the time provisions in s. 48(4) discussed supra, Part II - 3. The original Bill, s. 8, permitted perfection in Ontario at any time, though of course the perfection was not retroactive.
The American experience proves this. For a long time Texas and a number of other American states refused to recognize validly created liens on goods surreptitiously brought into their jurisdictions. The contiguous states retaliated by refusing to recognize Texas created liens. Later a more sensible attitude prevailed on both sides. See further, Lalive, The Transfer of Chattels in the Conflict of Laws (1955), pp. 161-162.
Bill. Each of the sections of the Code is followed by an official comment in which the general purposes of the section are explained, examples of its practical application are given, and the draftsman makes clear to what extent the section departs from prior law. From all these points of view the comments are most helpful. The draft Bill contains no such comments because the Catzman Committee apparently felt that the government could not be expected to agree to such a legislative innovation. It is a pity that they did not try to convert the government. Consider the plight of the lawyer who is confronted with a problem under the Bill or who is trying to resolve an exegetical point. Where will he look for guidance? Prior law will not help him much because the very question he may want to determine is to what extent the Bill intended to change it. So, in the nature of things, he will turn to unofficial sources—to Canadian literature, to the vast amount of American literature and, we may be sure, above all to the official comments to article 9! If we know this is going to happen, and if we admit that his need is a legitimate one, why should we not provide him with assistance from an official Canadian source?

IV. The Prospects for a Uniform Act.

At the 1963 annual convention of the Canadian Bar Association a Special Committee, chaired by the Honourable R. L. Kellock, Q.C., was established to follow the Ontario development and to examine the feasibility of a uniform personal property security law which would do for the other common law provinces what the Ontario Act was designed to do for Ontario. The committee, which comprises representatives from most of the provincial commercial law sections of the Canadian Bar Association, including a particularly strong contingent from Quebec, and representatives from the federal government and the Conference of Commissioners on Uniformity of Legislation in Canada, had little difficulty in reaching the conclusion that the law of security in personal property in the non-Ontario provinces was equally in need of modernization and rationalization and that the Ontario bill could usefully provide the basis for a uniform act.

The resolution establishing the Special Committee envisaged the committee undertaking or commissioning a detailed study of the existing provincial and federal laws and of the provisions of the Ontario Bill, and a grant to assist in the implementation of this scheme was in fact obtained from the Foundation for Legal Research.

197 See Ziegel, loc. cit., footnote 8, at pp. 548-549.
of the Canadian Bar Association. The Ontario representatives on the committee have, however, strongly objected to an independent study of the Ontario Bill being undertaken at this time, and their position won the support of a majority of the members attending a meeting of the committee in August, 1965. The reasoning of the Ontario members was that another study of the Bill would merely lead to a further postponement of its enactment in Ontario, and they have urged that the revised version of the Catzman Bill be adopted as the prototype for a uniform act for the other common law provinces. The committee has reached no decision with respect to this suggestion but is awaiting developments in Ontario. The Ontario members do not claim perfection or infallibility for their Bill, but they contend that once a uniform act has been enacted in a majority of the provinces it could be revised by mutual agreement in the light of the experience gained in the course of its practical operation and that it is more important to have a uniform act now than to strive for some doubtfully superior bill in the distant future.

These arguments seem so reasonable that it seems almost churlish to voice a dissent, but dissent I must. There are many grounds on which I do so, but I will limit myself to two or three. To begin with, even if the Special Committee were willing to adopt the Ontario Bill as a uniform act without further ado nothing in the past legislative history of the provinces—or the comparable history of the Code in the United States—suggests that they would be prepared to act on the Special Committee's recommendation without first taking a hard look at the Bill themselves. Secondly, for a national committee to rubber stamp a provincial act, however carefully drafted, but in the formulation of which no other province has been invited to participate, appears to me to be an abdication of its responsibilities. How, it may be asked, can it conscientiously recommend for adoption by the other provinces an act which it has not itself studied in depth? Finally, it is difficult to believe that an independent study of the Bill would seriously delay its enactment in Ontario. If the Attorney General of Ontario wants to find excuses for delaying tactics, he will do so regardless of what other committees are doing. What makes such a study particularly urgent is the fact that none has been published so far, in Ontario or elsewhere. It is true that several provincial subsections of the

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196 The proceedings of the Special Committee are not available in published form, and the writer is relying on his knowledge of them as a member of the committee.
Canadian Bar Association have held symposia on the Ontario Bill and that others are initiating local studies, but however helpful and educational these are, they are no substitute for the detailed and methodical study which only an inter-provincial committee can effectively organize. They may in fact give rise to the very real danger that there may develop as many versions of the Ontario Bill as there are provinces—a danger which the establishment of a Special Committee was precisely designed to avoid.

At the moment it is difficult to predict the prospects for a uniform act. One fact, however, is abundantly clear. Unless Ontario speedily proceeds with the enactment of its Bill, in its present or in an amended form, the movement for modernizing the Canadian law of security in personal property will be stopped dead in its tracks. If Ontario provides the essential lead, then the movement will be given a new impetus and, given sound leadership, could well lead to a widely adopted uniform act in due course. Whether the Special Committee can provide this kind of leadership remains to be seen, though it must be confessed that the omens are not too auspicious. However, there is another alternative which deserves serious consideration. In Australia ad hoc conferences of the state and federal Attorneys General and other ministers, preceded by careful planning on the part of their assistants, has been very successful in obtaining agreement on such important measures as a Uniform Hire-Purchase Act and a Uniform Companies Act. The difference between these conferences and the proceedings of the Canadian Uniformity Commissioners is that the former are much more intensive, limited to a single topic, and are accompanied by an implied understanding between the participants that, once agreement has been reached, the states will enact the uniform bill in its agreed form. The Attorney General of Ontario, prompted perhaps by the Special Committee, could most appropriately take the initiative in calling a similar conference in Canada for the purpose of reaching agreement on a uniform act. This would be better than allowing the subject to meander about committee rooms across the country for an interminable number of years.

The position of Quebec deserves a special word. The civil law on security in personal property differs in many important respects from the common law, doctrinally as well as in its detailed rules, but it seems fair to say that basically it is confronted by the same

\footnote{See LeDain, loc. cit., footnote 8. The Quebec members of the Special Committee have also prepared an excellent memorandum on the subject which it is hoped will be published in an early number of the Canadian Bar Journal.}
problems as are the common law provinces. This is hardly surprising. It would be too much to expect, however, that a Bill conceived in a common law milieu will be adopted lock, stock and barrel in Quebec and the Quebec members of the Special Committee have held out no such hopes. What they have indicated is that the logical structure of the Bill and its neutral terminology may well make it an attractive source book for the Quebec draftsman, just as other common law legislation dealing with contemporary problems has served as precedent on previous occasions. One hopes indeed that there may be a two-way traffic, for the common law provinces have much to learn from the civil law in adjusting the static nemo dat quod non habet principle to the exigencies of modern commerce.

V. Federal Law and a Uniform Act.

The regulation of security interests in personal property falls primarily within the provincial sphere, as being an aspect of the regulation of property and civil rights within the provinces. However, the federal government also enjoys a concurrent and, indeed, to some extent overriding jurisdiction of a very extensive character by reason of its ancillary powers with respect to the enumerated heads of powers in section 91 of the British North America Act. The federal government has used its powers fairly generously and today there are at least a dozen statutes, ranging in subject matter from patents and copyrights to companies and merchant shipping, which contain provisions regulating some aspect of the law of security. Of these the best known and easily the most important are the provisions in the Bank Act. The result is that confusion becomes worse confounded, since the federal rules often differ markedly from the corresponding provincial ones and the incidents of a secured transaction may depend on the fortuitous circumstance whether or not one or other of the parties, or the collateral, is subject to federal jurisdiction. It may well be asked, do we need a federal as well as a provincial network of rules? With few exceptions, it may be confidently stated, the answer is no. Most of the federal rules grew up for historical reasons, and not least because of the unsatisfactory state of the provincial laws. This is true, for example, of the security provisions in the Bank Act. If the provinces can be persuaded to modernize their laws the justification for the separate

federal provisions will largely disappear and the federal government can reasonably be approached to eliminate the redundant federal rules or at least to integrate them with the provincial laws. The imminent decennial revision of the Bank Act would provide an ideal opportunity for making a beginning on the task. It can hardly be expected, however, that the parties most likely to be affected by the change, the chartered banks, will support the dismantlement of the federal rules unless they can be assured that the new provincial laws will be as fair to them and as workable as are the federal ones and, above all, that they will be uniform across Canada and remain uniform. Here, then, is a fertile field for the concept of co-operative federalism and the exercise of those diplomatic skills with which the Canadian Bar Association is so well endowed.

201 Bill C-102, 2nd Sess., 26th Parl., 14 Eliz. II, 1965, which was given First reading on May 6th, 1965, appears to eliminate the existing restrictions with respect to the taking of security in personal property by the chartered banks. See Bill, s. 75(1)(c). Ss. 82, 84, 86 - 87, and, in particular, sections 88 - 90 of the existing Act are, however, retained in the Bill. See ss. 84 - 90. It would seem that if these proposals are enacted the banks will have an option whether to take security under provincial law or under federal law—which would merely compound the present confusion. Quaere, however, whether section 75(1)(c) of the Bill is to be read subject to ss. 84 - 90? S. 75(1)(c) does not so state.

202 Since this article was written the Attorney General of Ontario has announced his intention of tabling the report of the Law Reform Commission during the current sittings of the Legislative Assembly and then referring the Bill to a standing committee for detailed consideration. The Catzman Committee has also submitted a memorandum stating its reactions to the changes in the original Bill made by the Commission. The committee apparently interprets the changes made in s. (w) as involving the exclusion of absolute assignments of debts. Cf. footnote 38, supra. If the committee is right in this conclusion, I entirely agree that the deletion was an unwise step.