PERFECTION BY REGISTRATION

DELLAS W. LEE*

Edmonton

Introduction

The forces that led to the chattel security revolution in the United States chronicled in the common law development and statutory regulation of trust receipts, factor’s liens, assignments of accounts receivable, and so on, and culminating in the advent of Article 9 of the Uniform Commercial Code,¹ may also be seen at work in other countries² as inadequate chattel security laws fail to accommodate the stresses imposed by accelerating inventory and retail secured financing practices.³ Fortunate indeed are such countries to have access to Article 9 of the Uniform Commercial Code as the model for the development of their own integrated, flexible, chattel security law. Article 9 was the inspiration and model for the de-

*Deallas W. Lee, of the Faculty of Law, University of Alberta, Edmonton. Grateful acknowledgement is due to Dr. Frank R. Kennedy of the University of Michigan Law School for reading the manuscript and for making numerous valuable suggestions with respect to form and substance.

¹ Hereinafter cited as U.C.C. For an historical account of the common law and statutory development of these devices in the United States, see G. Gilmore, Security Interests in Personal Property (1965), pp. 86, 128, 250, 288. These developments have also been described as merely chapters in the long struggle waged between secured creditors and unsecured creditors who may be misled by the apparent ownership of the debtor by virtue of the absence of public disclosure requirements. See Coogan, Hogan, and Vagts, Secured Transactions Under U.C.C. (1968), pp. 214, 215.


³ In contrast with the apparent ownership conflict in the United States, the struggle in some jurisdictions is focused more on the functional limitations of their chattel security devices. Consider the law in Quebec, for example. Lee, International Secured Transactions: United States and Canada (1967), 17 Buffalo L. Rev. 85, at pp. 119-121. For a common-law illustration we might consider New Zealand, where the after-acquired property clause has not yet received unrestricted validation outside the corporate floating charge. In this jurisdiction a comparatively small loan—let us
development of the Ontario Personal Property Security Act, 1967, and the latter statute is the basis for the proposed Uniform Personal Property Security Act developed by a special committee of the Commercial Law Section of the Canadian Bar Association.

The purpose of this study is to examine one aspect of the Ontario Act for its internal consistency and meaning, to suggest improvements, to indicate the scope and nature of its impact on the pre-Act (pre-Ontario Personal Property Security Act) law of Ontario, and indirectly its potential impact on the law of other common law jurisdictions of Canada. An underlying issue is whether the decision of the sponsors of the Act to reject uniformity with Article 9 as a drafting policy was well conceived. The discussion begins with a consideration of the concept of perfection generally, followed by an examination of the provisions of the Act relating to the mode of perfection by registration, time, place, duration of, and exemptions from registration. As a frame of reference each section is preceded by a brief description of relevant pre-Act law. The Uniform Act recommends amendments in only a few of the provisions dealt with in this study and these are commented upon briefly.

say, for the financing of the inventory of a hardware store—may not be successfully secured unless the business is incorporated. Following incorporation a trust deed must be drawn and registered under the Companies Act of 1955, and debentures issued and registered, all of which results in a substantial legal fee, as well as additional work for the debtor in the form of corporate housekeeping. The illustration is adapted from a letter from Dr. A. R. Thompson, professor of law at the University of British Columbia (visiting professor at the University of Auckland Faculty of Law, 1966-67), to Professor D. W. Lee, April 15th, 1968. In view of the long struggle that preceded general validation of the after-acquired property clause in the United States it is admirable that the clause has achieved validation in New Zealand in any form, but the needlessly awkward and expensive nature of this routine is obvious. It is not surprising therefore that Article 9 and the Ontario Personal Property Security Act, 1967, are currently being studied by the Legal Research Foundation of New Zealand, an adjunct to the University of Auckland Faculty of Law: Letter from Professor E. H. Flitton, visiting lecturer in law, at the University of Auckland, to Professor D. W. Lee, May 3rd, 1968. Australia is also reassessing certain aspects of its chattel security law. Although Article 9 has been discussed by the Law Council of Australia, conflicting opinions have been expressed on whether Article 9 will prove to be a direct inspiration for future developments in that country: Letter from Dean H. A. J. Ford, University of Melbourne Faculty of Law, May 14th, 1968, containing a memorandum from Professor E. I. Sykes, to Professor D. W. Lee. For the suggestion of a contrary view see Allan, Stock-in-Trade Financing, op. cit., footnote 2, at p. 417.


The following discussion, so far as it includes an examination of pre-Act law, is limited to provincial chattel security law, and therefore the section 88 security interest and the operation of the Bank Act generally are not considered, even though they may be more significant in practice than the provincial law in certain instances.\(^6\) Basically there are seven chattel security devices that might arise under provincial law which will be superseded, although not abolished, by the Act: the pledge, chattel mortgage, conditional sale,\(^7\) floating charge not regulated by the Corporation Securities Registration Act,\(^8\) trust receipt,\(^8\) equipment trust, and the assignment of book debts (accounts receivable).\(^9\) Since very little case law has developed on the trust receipt, the equipment trust, and the noncorporate floating charge, practically no attention will be devoted to these devices in the following pages. And since the Ontario Act does not purport to regulate a floating charge subject to the Corporation Securities Registration Act, no comment will be made on this device either.\(^10\) It is believed, however, that an integration of the corporate floating charge into the Ontario Act is not an over-fanciful idea and that it would not be too difficult to implement.

With these preliminary observations we may now turn our attention to the subject of perfection. The term “perfect” or “perfected” as used in the Act does not have an exact counterpart in pre-Act law, and it has not been used in pre-Act legislation, but the term is by no means foreign to Anglo-Canadian judicial parlance.\(^11\) In the cases, “perfection” has usually been


\(^7\) On the alternative use of conditional sales and chattel mortgages, see Bowker, Panel on Bills of Sale, Chattel Mortgages and Conditional Sales Agreements, 1958 (1958), 1 Alta L. Rev. 273.

\(^8\) R.S.O., 1960, c. 70.


\(^11\) See Dearle v. Hall (1828), 3 Russ. 1, at p. 9, 38 E.R. 475, at p. 478 (“imperfect title” used to refer to state of plaintiff’s claim in absence of
used to refer to the steps necessary to validate the security interest as against third parties as well as to give the secured party priority over a competing claimant. Under pre-Act law if a security interest is "valid", it is generally thought of as being perfected and hence nearly always assured of priority.

Under the Act "perfection" is a term of art which, though undefined, refers to the rights of the secured party vis-à-vis other claimants of the collateral, and indicates that the secured party has done all that he is required to do to obtain the maximum protection available to his claim under the circumstances. "Perfection" is distinguishable from "validity" as indicated by the fact that an unperfected security interest may be quite valid and even take priority over certain other claims. However, the fact that a security interest is perfected is no assurance that it will take priority over all competing interests, but only that it will prevail over competing interests in accordance with the dictates of equity and expediency, as these precepts have been given expression in the Act by the draftsmen. Therefore, to determine the degree of protection given a perfected security interest in particular circumstances it is always necessary to resort to the Act's scheme of priorities which, in

notice pursuant to the rule of the case); Holroyd v. Marshall (1862), 10 H.L. Cas. 191, at p. 198; 11 E.R. 999, at p. 1002 ("perfect"); Tailby v. Official Receiver (1888), 13 A.C. 523, at p. 534 (assignee's assignment of future accounts receivable was "perfected by his notice" to account debtor); Young v. Magee (1924), 20 Alta L.R. 431, at p. 437; [1924] 3 D.L.R. 426, at p. 429 (C.A.): "... subsequent registration would have been senseless and useless and cannot have been intended to be required by the Statute in order to maintain a perfected legal transaction"; Sloan v. Ottawa Car Mfg. Co. (1921), 50 O.L.R. 235, at p. 237, 64 D.L.R. 333, at p. 336 (C.A.) (The plaintiff argued that "taking possession did not perfect the third party's title as against the plaintiffs").

13 Young v. Magee, ibid., Sloan v. Ottawa Car Mfg. Co., ibid. 13 Bona fide purchasers from traders are of course obvious exceptions. Another exception arose in the field of assignments of accounts receivable with the enactment of assignment of book debts Acts. Compliance with the requirements of the Acts is necessary to validate the assignment, but the assignee may not be assured of priority unless he gives notice pursuant to Dearle v. Hall, ibid.

14 Since Canada's Bankruptcy Act, R.S.C., 1952, c. 14, as am. by S.C., 1966-67, cc. 25, 32 has no counterpart to section 60a(2) of the American Bankruptcy Act, 11 U.S.C., from which the term "perfected" was drawn for Article 9, it is not particularly meaningful, and perhaps it would be misleading to define "perfection"; as well as certain other terms of the Act, as they are defined in the American framework from which they were derived. It may be worth noting, however, that under the American Bankruptcy Act, and also under Article 9, a perfected security interest is one which may not be defeated by a lien creditor and therefore not by any lower class of creditor. Under the O.P.P.S.A., 1967, a perfected security interest is one that will not be subordinated to any of the parties mentioned in section 22(1)(a)(ii)(iii) and (b) (lien creditors or transferees in bulk) or, a fori ori, to general creditors.
contrast to most prior chattel security statutes, is self-contained and comprehensive. The only parties against whom it may be said with certainty that a perfected security interest will prevail are those catalogued in section 22(1)(a)(ii) and (iii) and (b), or "lien creditors", to borrow a phrase from Article 9,\textsuperscript{15} transferees in bulk, and of course, general creditors. Beyond this the priority rules, which in turn depend on such matters as the nature of the collateral, the status of the claimants, and the type of security interest, as well as on the chronology or fact of perfection, determine the relative status of one claim as against another. For example, under section 30 a bona fide purchaser of goods in the ordinary course of business, whether wholesale or retail, will take free of a perfected security interest, even though the purchaser has actual knowledge of the security interest. Thus a perfected security interest is only relatively superior to competing interests.

Another term that is highly relevant to a discussion of perfection under the Act is "attach". Like "perfect", the term "attach" has no specific pre-Act equivalent, although it might bear rough comparison to what is conveyed under pre-Act law by the words "execution" or "creation" of a chattel security agreement or to the event that occurs when a debtor's incoming goods become subject to a security interest under a chattel mortgage containing an after-acquired property clause. The Act makes a very useful, albeit an easily overrated, distinction between "attachment" and "perfection". Under section 12 "attachment" occurs when the parties "intend" it to attach, value is given, and the debtor has rights in the collateral. Thus "attachment" relates to the secured party's rights in collateral acquired upon creation of the security interest or thereafter. In most instances attachment occurs simultaneously with and is synonymous with

\textsuperscript{15} Article 9, section 9-301(3) of the U.C.C., defines a "lien creditor" as "a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest".

It is regrettable that this term or a comparable descriptive phrase such as "process creditor" was not adopted by the draftsmen of the Act since it is adequately descriptive of the class of parties included in section 22(1)(a)(ii) and (iii) and is a particularly convenient method of referring to them. For these reasons the term will sometimes be used in this study to refer to the parties now mentioned in section 22(1)(a)(ii) and (iii): one who "assumes control of the collateral through legal process", or one who "represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver . . .".
creation of the security interest. This is not always the case, however, since a security interest does not attach, *inter alia*, until the parties “intend” it to attach, so that in theory and fact a security interest may be created before attachment occurs. In all but a few instances further steps are necessary to perfect the security interest, although in some cases it is possible to take these steps before attachment occurs so that upon attachment the security interest is immediately perfected. The additional steps will entail either the taking of possession of the collateral by the secured party or someone on his behalf, or a registration of a security agreement, notice of intention, or caution. Perfection upon attachment, or “automatic perfection”, as it exists in Article 9, is rejected as a mode of perfection under the Act. Thus although attachment is an event which is always part of the perfecting process, its significance is only incidental until the priority rules arise for consideration, and even in this area the element of attachment assumes lesser importance than it has under Article 9.

The anachronistic method of perfecting a security interest by marking the goods with the seller’s name and address as is permitted in Ontario and some of the other provinces is eliminated by the Act.

I. Perfection by Registration.

A. Pre-Act Law.

Three major chattel security statutes are found in most common law jurisdictions in Canada, each of which establishes registration or filing as a method of perfection or, in the case of an assignment of book debts, validation. Chronologically, the Acts

16 The right of the parties to create a security interest and yet suspend its attachment is implicit in the word “intend” (s. 12) and in the freedom of a secured party to execute a subordination agreement (s. 39). It is this facet which would be the key to the creation of a corporate floating charge if the Act were amended to permit such. This point would be more evident if “intend” had not been substituted for “agreement” (Article 9, s. 9-204) in stating the requisites for attachment in section 12. For this and other reasons which are not particularly relevant to the discussion at hand the term “intend” is an inferior substitute. For further comment on the availability of the floating charge under the present structure of the Act, see infra footnote 55.

17 Although a distinction was once made to the effect that “filing” referred to the depositing of a chattel mortgage at the public registry and “registration” to the registrar’s act of recording and indexing the document for the convenience of subsequent searchers, the terms will be used interchangeably since this distinction appears to have been lost. J. Barron and A. O’Brien, Chattel Mortgages and Bills of Sale (3rd ed., 1927), pp. 33-34. Cf. The Lien Notes Act, R.S.M., 1954, c. 120, a rough counterpart to the conditional sales Acts of other provinces, which makes no provision for registration. Since marking of the manufacturer’s name on the goods is the only mode of perfection available under the last cited statute, utility
were usually adopted in this order: Bills of Sale and Chattel Mortgages Acts, Conditional Sales Acts, and Assignment of Book Debts Acts. Before statutory regulation was instituted, the devices were recognized at common law.

Pre-Act statutes are unanimous on the point that unless the agreement is registered within the stipulated time and pursuant to the other requirements of the Acts, the device is void against certain third parties. But registration does not necessarily assure the secured party of priority over all third parties. For example, a subsequent purchaser from a dealer or factor out of the ordinary course of business as well as a purchaser in the ordinary course of business may prevail over the secured party who has registered a conditional sales contract or a purchase-money chattel mortgage (sale followed by a mortgage back). This is because under the prevailing view, registration does not constitute notice under the relevant provisions of the Factors or Sale of Goods Acts. Where these statutes are applicable, and sometimes when they are not, nothing short of actual notice to the purchaser will perfect the security device, even as against purchasers out of the ordinary course of business. A similar phenomenon with regard to assignments of book debts will be observed. Nevertheless, with this qualification, the term "registration" or "filing" is used throughout to indicate a method of perfection because under the conditional sales and chattel mortgage legislation registration does perfect and assure priority to the interest as against creditors and subsequent mortgagees, and in some instances, as against purchasers. As to these parties registration, as a method of perfection, is virtually of the Act appears to be limited primarily to the field of manufacturer or wholesaler financing.

See Joanes, Third Party Rights in Goods Subject to Conditional Sale Agreements and Chattel Mortgages (1959), 1 U.B.C.L. Rev. 23, at pp. 28-32; and LaForest, Filing Under the Conditional Sales Act: Is It Notice to Subsequent Purchasers? (1958), 36 Can. Bar Rev. 387; Commercial Credit Co. of Can. v. Fulton Bros. (1922), 55 N.S. 208, 65 D.L.R. 699, aff'd on other grounds [1923] A.C. 798, [1923] 3 D.L.R. 611. The sale in this case was in fact in the ordinary course of business. See note re notice in Chalmers, Sale of Goods (14th ed., 1963), p. 200. Purchasers of inventory from a dealer who is not a factor (a distinction that is not always honored) will also take free of a security interest. But technically this results from the principle of estoppel rather than the courts' refusal to apply the doctrine of constructive notice, (See Dedrick v. Ashdown (1888), 15 S.C.R. 227) since a chattel mortgagee's or conditional vendor's rights merely depend upon compliance with the relevant statute and not upon the principle of constructive notice. However it is fair to assume that the reason legislatures were willing to preserve a chattel mortgagee's or conditional vendor's common law rights at all is because they felt that registration would constitute a means of protection to third parties, and this is the premise underlying the doctrine of constructive notice. And see footnote 20, infra.
indistinguishable from other formalities required for the validation of the various devices.

Although an extensive discussion of the doctrine of construction notice would lead to a general consideration of the subject of priorities and thus take us outside the ambit of this study, a few comments on constructive notice will be useful before turning directly to the subject of perfection. The view that registration does not constitute constructive notice or notice to the world was virtually canonized by Lindley L.J. by his oft-quoted statement:

As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar, but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land, title is everything and it can be leisurely investigated, in commercial transactions, possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.19

Obviously an indiscriminate application of this view would reduce considerably the strength of registration as a mode of perfection. It has not gone unchallenged, however, and there is some contrary judicial opinion.20 Moreover, the historical context out of which registration statutes arose and the prime object for enacting them, to be discussed shortly, tends to suggest that the draftsmen and the legislatures which first enacted these statutes might have viewed compliance with the registration requirements as something akin to notice to the world of the grantee’s interest, at least with respect to sales out of the ordinary course.

In any event, regardless of the degree to which Lindley L.J.’s position may have been founded on “good sense” in the nineteenth and early part of the twentieth centuries when “possession was everything”, changes in business practices and technological developments make it highly desirable to accept the premises on

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20 Consider the dictum of Sloan J.A.: “Filing of a conditional sale agreement may be [by reason of section 2 of the Conditional Sales Act] constructive notice to subsequent purchasers or mortgagees claiming from the buyer. . . .” Vowles v. Island Finance, Ltd. (1940), 55 B.C. 362, at p. 367, [1940] 4 D.L.R. 357, at p. 360. In this case a subsequent purchaser would have been out of the ordinary course since the conditional vendee was not a dealer. A more recent case holds that registration under the Bills of Sale Act is not only “constructive notice” but is “statutory notice” or “actual notice”. Green Belt Holdings Ltd. v. Holowaychuck (1967), 60 W.W.R. 332, at p. 337 (Alta). It is noteworthy, however, that
which the constructive notice doctrine rests and to use them as basic policy in the development of an integrated chattel security law. Today some of the most valuable collateral is neither capable of possession nor is it commonly represented by documents, the endorsement and delivery of which are capable of transferring an interest in the collateral. To reject the constructive notice doctrine would, in effect, prevent such property from being used as security altogether. Moreover a financer's security interest in inventory and consumer goods must of necessity be nonpossessory, if he is to have a security interest at all, and yet there are certainly some classes of third parties, such as creditors of the debtor and purchasers out of the ordinary course of business, whose equities are no greater, if as great, as those of a secured party out of possession who has taken reasonable steps to apprise third parties of his interest. Why should not registration constitute constructive notice with respect to such parties? The advent of computer technology and the shift to centralized and improved filing systems do much to elevate the constructive notice doctrine above the status of a mere fiction. And in a day when credit transactions are the rule rather than the exception, to this can be added the diminished significance of the apparent ownership argument because of the increasing inclination of lenders to rely upon financial statements and frequent credit checks.

in the latter case the chattel mortgagee was not an inventory financer under wholesale paper. If he had been the court would have denied him recovery, but this on the ground that the dealer would have "implied authority" to sell in the ordinary course. Ontario has achieved substantially the same position by statutory decree: registration pursuant to the Conditional Sales Act is deemed actual notice to creditors, subsequent purchasers and mortgagees. R.S.O., 1960, c. 61, s. 10(3). Thus purchasers out of the ordinary course of business are denied the cut-off protection of the Factors and Sale of Goods legislation. Century Credit Corp. v. Richard, [1962] O.R. 815, 34 D.L.R. (2d) 291 (C.A.) (buyer out of ordinary course received cut-off protection of section 25(2) of Sale of Goods Act because conditional vendor in Quebec failed to register in Ontario, the law of Ontario (the ultimate situs) being applicable). However, goods sold to a purchaser in the ordinary course of business pass to the purchaser free of the conditional vendor's interest by virtue of a trader's section. R.S.O., 1960, c. 61, s. 2(4).

21 This is not to say that under pre-Act law creditors and purchasers out of the ordinary course are able to prevail over a secured party under a properly registered chattel security device; they usually may not. But this is for reasons other than the application of the equitable principle of constructive notice—a doing indirectly what could be done directly, and more neatly. See supra, footnotes 18 and 20.

22 "Because of high registration costs and the volume of contracts, it is the practice of many sales finance companies in Canada not to register wholesale contracts unless the dealer is financially unsound or appears to be heading in that direction. About the only real protection one receives is against a trustee in bankruptcy, and we prefer to rely on frequent
Of course, constructive notice via registration, if accepted, ought not to effect the rights of all third parties in the same manner in all cases. Obviously constructive notice ought not to prevent a purchaser in the ordinary course of business from taking free of an inventory financer’s lien on the stock-in-trade, as witnessed by the inclusion of traders sections in conditional sales Acts which effectuate this policy. Moreover nothing short of actual notice should bar certain third parties from priority, and in other instances it is doubtful whether even actual notice should defeat a third party. But these are merely exceptions to the consequences that ordinarily flow from constructive notice, that is, subordination, and not a repudiation of the theory that registration constitutes anything less than constructive notice. This is the implicit premise on which Article 9 stands. The Ontario Personal Property Security Act, 1967, also follows this premise but goes further by stating the premise expressly with respect to a registered security interest in certain types of collateral. The relevant provisions are discussed later.

The chattel mortgage

Although a chattel mortgage may be perfected by the mortgagee taking possession of the goods, registration of the agreement is of course the common mode of perfection. At common law property rights of an owner or chattel mortgagee were so highly respected that in any dispute between an owner or mortgagee and another conflicting claimant of goods (such as a subsequent purchaser or mortgagee without knowledge of the prior interest), with the exception of a narrow area of protection afforded a bona fide stock checks and up-to-date financial information to guide us on whether or not we should register this type of contract. Most dealers on bankruptcy have absolutely nothing to distribute among the creditors and anything available is usually snapped up by the Crown and the Trustee for his fees.” Letter to Professor D. W. Lee from G. E. Whitley, Secretary and Legal Counsel of Traders Group Ltd., Toronto, Ontario, November 14th, 1968.

23 E.g., O.P.P.S.A., s. 36(3).

24 E.g., s. 30(2)(b) re transferees of chattel paper, s. 35(1) re conflicting security interests in certain other collateral, and s. 32 re holders of a particular lien for materials or services.

25 S. 53.

26 See infra.

27 Model Bills of Sale Act, ss 7, 8(3); Bills of Sale Act, B.C., 1961, c. 6, s. 8; The Bills of Sale and Chattel Mortgages Act, R.S.O., 1960, c. 34, ss 4, 8. British Columbia requires corporate chattel mortgages to be filed with the Registrar of Companies (Ibid., s. 9(2)(a)), the same place for registering floating and specific corporate charges created under the Companies Act, R.S.B.C., 1960, c. 67, as am. Most jurisdictions do not distinguish between corporate and non-corporate bills of sale for the purpose of registration.
purchaser in the ordinary course of business,\textsuperscript{29} the owner or mortgagee always prevailed, usually at the expense of a third party who had no reasonable means of discovering the mortgagee's interest. It is true that Twyne's case viewed a conveyance of goods followed by the grantor's retention of possession as a "badge of fraud";\textsuperscript{30} but under Anglo-Canadian law these circumstances raised only a presumption of fraud—only evidence of fraud to go to the jury. It was therefore theoretically possible for a vendee or mortgagee to step forward, establish the \textit{bona fides} of the transaction, and prevail over third parties who had been misled by the transferor's apparent ownership of the goods.\textsuperscript{30} The bills of sale legislation was designed to correct these inequities by instituting registration requirements.\textsuperscript{31} Under these statutes a

\textsuperscript{29} Pickering v. Busk (1812), 15 East 38, 104, 758 (K.B.).

\textsuperscript{29} The early common-law position with respect to fraudulent conveyances was codified in the fourteenth century by the Statute of 13 Eliz. c. 5 (1571). This statute declared all conveyances of real or personal property void if made to hinder, delay, or defraud creditors of the transferor, \textit{i.e.}, transfers which were not made for good consideration and \textit{bona fide}. However, the statute did not expressly invalidate a sale, pledge, or conveyance as security unaccompanied by a delivery of possession of the goods, even though such misleading circumstances might be considered a species of fraud. Thirty years later the uncertainty respecting this type of transaction was reduced considerably by Twyne's case, wherein Lord Coke, elaborating somewhat on 13 Eliz., identified several "badges of fraud" in the facts of that case, one of which was that "the donor continued in possession and used them [the goods] as his own, and by reason thereof he traded and trafficked with others, and defrauded and deceived them". (1601), 3 Co. Rep. 80b, 76 E.R. 809. But because of the law's great respect for property rights of an original owner or mortgagee, Anglo-Canadian common law continued to look upon retention of possession as raising, at most, a presumption that the conveyance was made with an intent to defraud creditors and \textit{bona fide} purchasers: Belanger v. Menard (1896), 27 O.R. 209, particularly at pp. 211-212; Cookson v. Swire (1884), 9 A.C. 653, particularly Lord Blackburn's opinion at pp. 664-665; Barron and O'Brien, op. cit., footnote 17; whereas in many of the American states the presumption was held to be conclusive: Countryman, Debtor & Creditor (1963), pp. 167-168; 1 Glenn, Fraudulent Conveyances and Preferences (rev. ed., 1940), ss 58, 61d, 67, 61; Cohen & Gerber, Mortgages of Merchandise (1939), 39 Col. L. Rev. 1338, at p. 1340. Not until the enactment of the Act Requiring Mortgages of Personal Property in Upper Canada to be Filed, S.U.C., 1849, c. 74, no doubt inspired by the statute of 13 Eliz. and Twyne's case, see Jackson v. Bank of Nova Scotia (1893), 9 Man. R. 75, at pp. 86-87 (C.A.), would a retention of possession by the grantor be deemed conclusively invalid as to certain third parties in the absence of filing, and then only if the transaction fell within the Act. Gault Bros. Co. v. Morrell (1907), 3 N.B. Eq. 453 (C.A.) (book debts are not within the Bills of Sale Act); accord: Thibaudeau v. Paul (1895), 26 O.R. 385 (C.A.); Mowat v. Clement (1886), 3 Man. R. 585 (C.A.) (the affidavit of \textit{bona fides} could not be made within the terms of the Chattel Mortgage Act, and thus the transaction was not subject there-to); accord: Walker v. Niles (1871), 18 Gr. 210.

\textsuperscript{30} Belanger v. Menard, \textit{ibid.}, particularly at pp. 211-212; Cookson v. Swire, \textit{ibid.}, particularly Lord Blackburn's opinion at pp. 664-665.

grantor's retention of possession of the goods following a sale or mortgage not registered pursuant to the Acts raises, in effect, a conclusive presumption of fraud. Under today's statutes if a mortgage of goods "is not accompanied by an immediate delivery and an actual and continued change of possession . . ." the mortgage must be registered as provided by the Acts, otherwise "the mortgage is absolutely null and void as against creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith, for valuable consideration." By virtue of the registration requirement liens that prior to the bills of sale legislation would have been secret become public and open to the scrutiny of all potential creditors, subsequent purchasers, and mortgagees. Of course, if the real essence of the transaction is a sale rather than security, and the buyer takes possession of the goods at the time of the sale, nothing further need be done to protect the purchaser since the sale is absolute in nature and therefore falls outside the act. The same is true if the transferee is a pledgee.

The conditional sale

Registration or filing is also the most widely used system for perfecting a conditional sale, although some jurisdictions permit the secured party to perfect his conditional sale by marking his name on the goods. Typically, the Acts provide that where a sale has been made reserving title to the goods in the seller with delivery of possession to the buyer, the agreement or a true copy must be filed or registered in a particular place, within a specified time.

Statutory regulation of conditional sales, as in the case of chattel mortgages, was instituted to correct the inequities which arose from application of the common law principle of nemo dat non quad habet—one cannot confer on another a better title than he himself has. Since a conditional sale contemplates reservation of title to the goods in the vendor with delivery of possession to the vendee, third parties might be misled by the apparent ownership of the buyer in the absence of a registration requirement in the same manner as if a secret mortgage had been given. Thus

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32 Ibid., at p. 87.
33 R.S.O., 1960, c. 34, ss. 4, 7.
34 Discussed infra text following footnote 157.
35 The most frequently specified place is an office in the registration district where the buyer resides at the time of the sale. Model Conditional Sales Act, s. 2(2); R.S.O., 1960, c. 61, s. 2(1)(b). Four provinces have central filing systems: R.S.A., 1955, c. 12, s. 3; R.S.B.C., 1960, c. 70, ss 4, 6; R.S.N., 1952, bill 62, s. 4(2); R.S.S., 1965, c. 393, s. 5(2).
Ontario's statute, typical of those in other provinces, provides that failure to register pursuant to the Act renders an agreement reserving ownership in the seller until payment "invalid . . . as against a subsequent purchaser or mortgagee claiming from or under the purchaser, without notice, in good faith and for valuable consideration . . . and the purchaser shall be deemed to be the owner of the goods".36

An assignment of accounts receivable

Like the Bills of Sale and Conditional Sales Acts, the Assignment of Book Debts Act states that unless the assignment is registered in accordance with the Act, it will be "void as against the creditors of the assignor and as against . . . subsequent purchasers . . . ",37 but except for the British Columbia Act, nothing indicates the advantages to be gained from registration, except for what might be derived by implication. However, the most obvious implication to arise from the section just quoted, that registration perfects the interest against the named parties, is not correct.38 Thus registration is really no more than another formal requisite, necessary for validation of the assignment as against the named third parties, but it does not necessarily perfect the assignment against them.39 For example, as between consecutive assignees, the first to give notice of the assignment to the account debtor will take priority, irrespective of the order of registration, assum-

36 R.S.O., c. 61, s. 2. Contemporary statutes render a conditional seller's interest void "as against a creditor, and as against a subsequent purchaser or mortgagee claiming from or under the buyer in good faith, for valuable consideration, without notice . . . " . Model Conditional Sales Act, s. 3; R.S.N., 1952, bill 62, s. 3; R.S.S., 1965, c. 393, s. 3(1).
37 R.S.O., 1960, c. 24, s. 3; and see the Model Assignment of Book Debts Act, s. 4; cf. R.S.B.C., 1960, c. 4, s. 12.
39 This does not appear to be the case in British Columbia, so far as perfection against subsequent assignees is concerned, since the Act specifically states that a registered assignment takes priority over an unregistered one, and as between two registered assignments, priority of the parties is ranked in the order of registration. R.S.B.C., 1960, c. 4, ss 14, 15. In these instances notification to the account debtor is not a condition precedent to the application of these sections, and thus the rule of Dearle v. Hall, supra, footnote 11, is not applicable in this area.
ing the first to give notice was without knowledge of the competing assignment.\(^{40}\)

In view of the circumstances which led to statutory regulation of assignments of accounts receivable falling within the Act, namely, secret transfers, and in view of the wording of the Act itself, it is not unlikely that registration was originally intended to constitute perfection, but since it has been held that compliance with the Act gives the assignee no greater right than he would have had if the Act had never been passed,\(^{41}\) it is necessary to resort to the common law to determine the final step of perfection. At common law, while notice to the account debtor is not necessary to perfect the assignment as between the parties, notice to the account debtor is necessary to perfect the assignee’s interest against subsequent assignments, rights of set-off and certain other rights or claims that may arise.\(^{42}\)

What must be registered (transaction filing v. notice filing)

From the point of view of what must be registered, registration systems may be classified under two headings for convenience of discussion: “transaction filing”, which requires the deposit of the original or a copy of the agreement at the registry each time a secured transaction is consummated, and “notice filing”, under which a short, usually a one-page document is deposited as notice to the world of a present or an intended secured transaction between the parties.

Notice filing grew up in the United States to accommodate inventory financing\(^{43}\) and has been known in Canada since 1923, when the Bank Act made provision for the filing of a notice of intention to perfect a section 88 security interest.\(^{44}\) Under this system the document to be filed requires little more than the names and addresses of the parties, a description of the type of collateral, and perhaps the signature of the intended debtor. The agreement itself is not filed. The theory is that third parties desiring further information regarding the intended transaction may contact the parties themselves.

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\(^{40}\) Dearle v. Hall, ibid.


\(^{43}\) G. Gilmore, op. cit., footnote 1, p. 468.

\(^{44}\) S.C., 1966-67, c. 87.
Provincial statutory registration requirements would fall into the category of transaction filing. Typically the document to be registered under the chattel mortgage Acts are the original agreement accompanied by appropriate acknowledgements and affidavits. Generally the requirements for conditional sales contracts are more relaxed, for example, a "true copy" may be filed under the Ontario Act with no affidavits required, except in conjunction with renewal statements and goods affixed to land in some provinces.

At first glance the Assignment of Book Debts Acts appear to establish something akin to a notice registration system. After an agreement and requisite affidavits have been filed, subsequent filings are not required to bring future accounts under the agreement, providing they fall within the description, which of course, must be very general since future accounts are contemplated. This was an auspicious beginning for what might have been an adequate accounts receivable financing statute, but cases have held that registration thereunder is not notice to the world. To perfect an assignment as against subsequent assignees actual notice to the account debtor is required.

In relation to inventory financing, to the extent that an adequate description can be drafted to permit the mortgage to attach to after-acquired property, chattel mortgage registration requirements also bear some similarity to a notice filing system. Somewhat surprisingly, however, the chattel mortgage has generally not been used to secure loans against inventory, except in the case of used goods, particularly automobiles, house trailers, and so on. The conditional sales contract is the device commonly used in the case of new inventory. Conditional sales Acts typically contain a trader's section which permits the debtor to sell the collateral in the ordinary course of business free of the security interest, thereby suggesting that this is the proper document to be used in such transactions. But since the after-acquired property

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46 Model Bills of Sale Act, ss 8(3), 7; Bills of Sale Act, S.B.C., 1961, c. 6, ss 4, 6; The Bills of Sale and Chattel Mortgages Act, R.S.O., 1960, c. 34, ss 4, 5, 6.
47 Model Conditional Sales Act, s. 12(2)(b); R.S.A., 1955, c. 54, s. 7(2); R.S.B.C., 1960, c. 70, s. 7(b); and see R.S.O., 1960, c. 61, s. 5(2); R.S.S., 1965, c. 393, s. 13(2)(b).
48 R.S.B.C., 1960, c. 70, s. 12(5); R.S.O., 1960, c. 61, s. 14(2); R.S.S., 1965, c. 393, s. 19(6).
49 See Snyder Ltd. v. Furniture Finance Corp., supra, footnote 41.
50 Dearle v. Hall, supra, footnote 11.
51 See Ziegel, op. cit., footnote 2, at pp. 59-60.
52 The Model Conditional Sales Act, s. 9.
clause has been considered incongruous to the conditional sale contract, the secured party is required to make a separate registration of the agreement each time a new piece of collateral is added to the buyer’s stock. The burdensome and expensive nature of this requirement to the inventory financer is obvious.

The nearest Canadian equivalent to a notice filing system is that found in the Bank Act under which the section 88 security interest is permitted. The security agreement creating the interest is usually not filed; rather a “notice of intention”, signed by the intended debtor, is filed in the relevant provincial office of the Bank of Canada. The filing is good for three years, after which it may be renewed.52

There are advantages and disadvantages to each system. The major advantages of notice filing flow from its flexible and inexpensive nature in the inventory financing context. The necessity of repeated registrations with the addition of each new piece of stock is eliminated. Moreover, the notice may be filed in advance of the actual taking of the security interest with the incidental advantage that third parties may not intervene between execution and registration as under transaction filing. Thus a grace period becomes unnecessary except in the case of consumer sales and loans, and the race to record is eliminated. On the other hand, the major weakness of notice registration is the obvious one that the notice contains very little information. Searchers must check further to determine the true circumstances in each case since the existence of a notice indicates only that the parties intended to enter a secured transaction. In fact no loan may have been made at all; or the loan, if made, may have been repaid; or the debtor’s entire assets may presently be subject to the security interest.

B. Registration Under the Act.

A few preliminary comments regarding the filing system of Article 9 will serve as a convenient introduction to the approach taken by the Act. Notice filing is the heart of the registration system contemplated by Article 9, and is accomplished by the filing of a financing statement, as it is called, at the appropriate registry. Notice filing is available for all types of secured transactions under Article 9, although a deposit of the security agreement itself is an available alternative if the type of transaction lends itself to this method of satisfying the filing requirements, as

52 Bank Act, R.S.C., 1952, c. 87, as am. S.C., 1966-67, c. 88, ss 88(4)(a) & (k). See also Schedule K.
it usually will if inventory financing or a continuing line of credit is not involved. Indeed, where a single transaction is contemplated under which a specific piece of property will be taken as collateral, for example, a piece of equipment sold to a business enterprise, it may be advisable for the parties to file the security agreement rather than a financing statement because of the greater amount of information this will place on public record. The secured party is thereby relieved of the obligation otherwise imposed on him to supply information of the type normally found in the agreement to qualifying, interested third parties under circumstances to be discussed later.

The Act also provides for notice filing and registration of the agreement itself, but beyond this the similarities between the registration systems of the Act and Article 9 begin to diminish rapidly. Whereas notice filing is the dominant theme under Article 9, registration of the agreement is the modus operandi under the Act, with notice filing as a permissible alternative in some types of transactions. Thus the emphasis is completely reversed.

The documents to be registered under the Act are the security agreement, or a notice of intention, or a caution. Section 47 provides:

(4) Registration of a copy of the security agreement signed by the debtor, a notice of intention signed by the debtor or a caution under this section constitutes registration for the purposes of this Act.

A “security agreement” as defined in section 1(x) is “an agreement that creates or provides for a security interest”. The notice of intention and caution, taken together, are the counterpart to the financing statement under Article 9, but they differ from each other under the Act. A notice of intention is a simple document containing minimal information which will enable third parties to determine the true state of the debtor’s collateral, but only after checking beyond the notice of intention itself. The document itself indicates only the possibility of an outstanding security interest in the debtor’s collateral. The intended secured party, whose name and address appear in the notice, must be contacted to determine the extent this possibility has become a reality. The caution is used for essentially the same purpose as the notice of intention, but its use is restricted to perfecting a security interest (in Ontario) in collateral which was subject to a security interest in another jurisdiction and subsequently brought into Ontario, and to perfecting an interest in the proceeds derived from the debtor’s

53 U.C.C., s. 9-402.
disposition of collateral in which the secured party already held a perfected security interest.  

**Effect of registration and constructive notice**

Registration under the Act is quite different in consequence from what it was under the statutes regulating the independent devices. Under the Act, for example, the security interest may be completely valid without the secured party either taking possession of the collateral or complying with the registration requirements. Such a security interest may not take priority over certain third parties unless the registration requirements have been met, but it may be "valid". Thus, conceptually, validation and perfection of the security interest are noticeably different events under the Act.

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54 The O.P.P.S.A., s. 47(3).
55 The O.P.P.S.A., ss 10, 12, 21. With respect to pre-Act differentiations see footnotes 12 and 13 supra. Under the Act the nearest equivalent to what is generally conveyed by "validate" is the term "attach". The only reason one might wish to speak in terms of "validation" rather than "attachment" is to recognize the possibility that a security interest may be validly created even though it has not yet attached, a distinction which makes the equivalent to a floating charge theoretically possible under the Act. Supra, footnote 16. The Minutes of a Meeting of the Committee on a Uniform Personal Property Security Act, Commercial Law Section, Canadian Bar Association, June 13th-14th, came to hand too late to permit comment on all relevant action taken thereat. However, it should be observed that the proposed sections 12(2) and 9(2) are largely only didactic in nature, but their very existence would be cumbersome. Section 12(2) says expressly what is now implicit in the Act with respect to all security interests including those that would be created under a floating charge if such were authorized by the Act, i.e., unless the parties otherwise agree, under section 12(1) it would normally be assumed that the parties "intend" the security interest to attach when the debtor obtains rights in the collateral. Likewise the liberty given to the debtor by the introductory portion of section 9(2) to deal with the collateral is quite available without an express statement to that effect. The parties are competent to agree on both of these matters under the present framework of the Act, and thus the express provisions are of questionable desirability. The desired objective could be achieved more simply and neatly by adopting the essence of only the priority aspect of proposed section 9(2), section 12(2) being excluded. If this approach were taken the word "perfected" in section 9(2)(ii) would have to be replaced with "registered". Registration requirements would assure the benefits of notice to third parties. To require further that the agreement be "perfected" could lead to problems in some instances since "attachment" is an essential step to perfection under section 21. That is, the parties may on occasion desire to create merely a "valid" security interest while suspending its "attachment" until some future contingency, such as any of those events that cause a floating charge to crystallize at common law, in which case the security interest technically would not be perfected, but perfection would not be important to its priority. An even simpler and more desirable alternative, would be to exclude proposed sections 9(2) and 12(2) altogether. The relevant general and special priority rules of the Act would then control. As under the first alternative the parties would be free to designate the conditions of attachment which, again, would be any or all of those events which cause a
Another very significant difference lies in the fact that registration constitutes notice (constructive notice). Section 53 provides:

(1) Where the collateral covered by a security agreement is other than instruments, securities, letters of credit, advices of creditor negotiable documents of title, registration under this Act,

(a) of a security agreement, notice of intention or caution constitutes notice thereof to all persons claiming any interest in such collateral during the period of three years following such registration. . . .

To state the proposition affirmatively, collateral with respect to which registration will constitute notice includes goods, intangibles, and chattel paper. Subsections (b) and (c) go on to give similar effect to a renewal statement or any other registered document, such as an amendment to the security agreement following its registration.\(^5\) The old dispute over whether registration constitutes constructive notice is therefore laid to rest so far as matters affected by the operation of this section are concerned, but in taking this approach the draftsmen have sown the seeds for other problems since the extent to which other provisions of the Act are to be affected by section 53(1) is not made clear.

Notice, or the lack of it, becomes important, if at all, in the re-

floating charge to crystalize at common law, or as otherwise agreed. This would allow the parties maximum flexibility in determining the intensity of their security interest. If, for example, the secured party wanted to have the advantages of a perfected security interest in the event the debtor should attempt to encumber the collateral further, or in the event a process creditor should attempt to levy, these events need only be stated in the agreement as conditions to instantaneous attachment. If the floating charge has previously been registered, as it normally would be, perfection would occur simultaneously with attachment. With a charge-holder's security interest perfected prior to the intervention of the rights of such third parties, he would have virtually every priority advantage that would be available under proposed section 9(2). Surely he would not expect to take priority over a purchase-money security interest in inventory, and it is highly questionable whether this should be permitted even if he does. But it is not clear that this possibility does not exist under section 9(2) in the absence of express language in the floating charge to the contrary. If this is so, inherent in section 9(2) is also the spectre of a secured party dressing up a floating lien to look like a floating charge in order to gain the superior priority advantage. In short, sections 9(2) and 12(2) do not really add anything that is not now available to the parties under the greater freedom they would enjoy under the Act as it now stands; by the same token third parties would gain nothing under the proposed section that they do not already have under the Act.

\(^5\) "Notice" is not defined by the Act, but section 1(p) states: "'notify' means to take such steps as are reasonably required to give information to the person to be notified so that,

(i) it comes to his attention, or

(ii) it is directed to such person at his customary address or at his place of residence, or at such other places as is designed by him over his signature,

and 'notification' has a corresponding meaning."

Regarding amendments after registration see the O.P.P.S.A., s. 50.
solution of priority disputes. It should be noted, however, that the successful operation of the priority rules does not require an express statement that registration constitutes constructive notice, any more than a statement is required that a security interest taken in after-acquired property creates a "legal" interest. Accordingly Article 9 does not contain such provisions. An express statement indicating the effect of registration is required for some purposes, such as with respect to the application of section 25 of the Sale of Goods Act, but this may be, and has been, satisfied by an amendment to the Sale of Goods Act itself; a further general statement in the Act is superfluous. Consider, for example, section 30 under which buyers out of the ordinary course of business of certain types of collateral and certain subsequent secured parties are relegated to a position subordinate to an earlier registered security interest. This result and many others like it would follow even in the absence of section 53(1). It is true that the priority structure of the Act is based largely on the assumption that it is reasonable to expect such third parties to search at the registry or to suffer subordination, a sort of implied acceptance of the constructive notice doctrine, but an acceptance nevertheless, and thus an express statement to that effect is not necessary. In fact, the very existence of such a statement might create problems since the Act does not define "knowledge", a term which is used a number of times in the Act and which could easily be construed as the equivalent of "notice" (constructive notice)—to the damage of the priority scheme of the Act. The confusion is enhanced by the use of "actual notice" elsewhere in the Act, as for instance in section 36.

It appears that section 53(1) was inserted in the Act because the sponsors were "not certain that it [the American doctrine of constructive notice] operates in the same manner and to the same extent as our statutory notice". Further consideration of the concept of constructive notice as it finds expression in the various priority rules of Article 9, and now the Act, would have led to the conclusion that the fear which prompted the insertion of section

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27 An Act to amend The Sale of Goods Act, 1967, (known as Bill 89 in the legislature), provides: "Section 25 is amended by adding the following: (2a) Subsection 2 does not apply to goods the possession of which has been obtained by a buyer under a security agreement whereby the seller retains a security interest within the meaning of the Personal Property Security Act, 1967, and the rights of the parties shall be determined by that Act."

53(1) was not justified. With respect to Article 9, “a person ‘knows’ or has ‘knowledge’ of a fact when he has actual knowledge of it”. Under the Code, therefore, constructive notice does not constitute “knowledge” since “knowledge” is had only when a person has “actual knowledge”. The priority rules containing the word “knowledge” obviously contemplate something more than a mere showing that a security agreement or financing statement was filed. It is submitted that a deletion of section 53(1), followed by a correlation of the rest of the Act where necessary after the manner of Article 9, would simplify the Act and eliminate much potential confusion. This approach calls for a clarification of the difference between knowledge and constructive notice but this is preferable to an attempt to redefine terms of Article 9 which contain distinctions deeply embedded in the framework of the perfection and priority rules.

Where fixtures and certain interests in land are involved in a secured transaction, section 53 provides that the appropriate document may be registered under The Land Titles Act or The Registry Act.

(2) Where the collateral is or includes fixtures or goods that may become fixtures, or crops, or oil, gas or other minerals to be extracted, or timber to be cut, the security agreement or any other document that may be registered under this Act containing a description of the land affected sufficient for registration under The Land Titles Act or The Registry Act, as the case may be, may whether or not it is registered under this Act, be registered under The Land Titles Act or The Registry Act.

59 U.C.C., s. 1-201(25).
60 This would not require a rejection of the pre-Act usage of “notice” and “actual knowledge”. Cf. Chalmers, op. cit., footnote 18, with U.C.C., s. 1-201(25).
61 As an example of the type of confusion likely to arise from the innovation of section 53(1) we may consider the proposal adopted by the Committee on the Uniform Act that the phrase “without knowledge of the security interest and before it is perfected” be deleted from section 22(1)(a)(ii) on the ground that “it permits last minute perfection by an unsecured party, and it introduces the issue of notice on the part of the unsecured creditor at a time when notice is irrelevant”. Minutes of a Meeting of The Committee on a Uniform Personal Property Security Act, Commercial Law Section, Canadian Bar Association, February 21st-22nd, 1969. This development appears to overlook the distinction between knowledge and constructive notice implicit in Article 9 and which now exists in the Act notwithstanding section 53(1)—a distinction which, if applied, introduces no more of a notice problem into section 22(1)(a)(ii) than is common to any other section of the Act where “knowledge” is relevant. Are we to infer that “knowledge” should be deleted from all other sections containing the term? Prior to the deletion in section 22(1)(a)(ii), or as the subsection now stands under the Ontario Act, if a security interest is unperfected a process creditor may be defeated if he has “knowledge . . .”—a question of fact. If the security interest is perfected prior
Both of these Acts indicate that a registered instrument is deemed to constitute notice, but it is not clear whether such registration constitutes “actual notice”. This is material at least with respect to fixtures under section 36(3). The Conditional Sales Act deals with the point specifically, and it would seem that the Act should be amended accordingly to eliminate any uncertainty on this point by providing in section 53(2) that registration in the land titles office constitutes “knowledge” and then by incorporating into the Act a definition of knowledge consistent with that of the Code. In any event, it will be observed that registration under section 53(2) is permissive so that a failure to register in the land titles office in an appropriate case will not invalidate a proper registration in the personal property registry.

Registration of the agreement

As noted earlier, although notice filing is recognized to a limited degree, transaction filing is the dominant method of registration contemplated by the Act. Indeed, the first several drafts contained no provision for notice filing whatsoever. Not until Bill 88 (the present version of the Act) was introduced into the to seize the secured party takes priority irrespective of the lien creditor’s knowledge. Where is the notice problem? Moreover the deletion is inconsistent with the very next subsection (b) which does make knowledge relevant in a not-too-different circumstance. With respect to “last minute perfection”, it should be noted that as a result of the deletion a process creditor may now prevail over an unperfected security interest even though he is subsequent in time and has knowledge of the pre-existing security interest. Is an unsecured creditor who resorts to judicial process, knowing that he did not bargain for a secured claim and that the goods are subject to a security interest, more deserving than a secured creditor who has bargained for security but whose security interest, perhaps through inadvertence, has not yet been perfected? The lien creditor gets a windfall. If the justification for requiring perfection is to put third parties on notice, (the obvious rationale of section 53(1)) then a requirement of perfection as a condition to priority in this instance is useless. Furthermore, the incorporation of a grace period for the benefit of the secured party would be objectionable because it permits the thing the deletion is intended to preclude—a delay in registration; on the other hand a limitation period is undesirable for the same reasons the limitation period in section 47(5) is objectionable—threat of subordination is adequate motivation for prompt perfection. Discussed infra.

62 The Land Titles Act, R.S.O., 1960, c. 204, s. 77; The Registry Act, R.S.O., 1960, c. 348, s. 80.
63 R.S.O., 1960, c. 61, ss 10(3), 14(3).
64 See U.C.C., s. 1-201(25). This would be part of the larger undertaking discussed supra, footnote 61.
Ontario legislature was any provision made for notice filing, and then only on a limited basis. Until that time the only registration provision of the earlier drafts was essentially that now contained in section 47(1) of the Act which provides:

In order to register under this Act for the purpose of perfecting a security interest, the security agreement or a copy thereof signed by the debtor shall, subject to subsection 3, be registered, and it shall contain and legibly set forth at least,
(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; and
(e) the terms and conditions of the security agreement.

The most drastic difference in the formal requisites for registration under this subsection, as compared to the pre-Act statutory requirements, is the elimination of affidavit and acknowledgement requirements. Note, however, that full given names, not just the initials are required, where the name consists of more than an initial.

A section 47(1) registration is essentially transaction filing and, in contrast with the mode provided in section 47(2), the security agreement may be used to perfect a security interest in all types of collateral in any transaction in which a nonpossessory security interest may be perfected, such as chattel paper, goods, intangibles, documents of title, proceeds, and returned goods.

But where nonpossessory, nonpurchase-money security interests are taken (that is, in those transactions which formerly contemplated the use of a chattel mortgage to secure a loan), a section 47(1) registration is the only option open to the secured party. In the case of purchase-money security interests involving single transactions the security agreement will normally be registered even though a section 47(2) registration would be available, primarily because it would only require double documentation to draw up a notice of intention in addition to the security agreement when registration of the security agreement will suffice, and because as a practical matter the secured party would not be aware of the intended transaction in time to make an advance registra-

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66 O.P.P.S.A., s. 47.

67 See, e.g., O.P.P.S.A., ss 25, 26, 27, 28, 29. Section 47(2) appears infra.

A "purchase-money security interest" is defined in section 1(s) as a security interest "(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".
tion even if he wanted to. Even where a continuing line of secured credit is contemplated for inventory or wholesale financing, perfection by advance registration of the agreement is, *semblle*, available, but if the collateral consists of "goods to be held for sale or lease" a permissible alternative, and a most likely one, is the registration of a notice of intention pursuant to section 47(2).

One might wonder why the two previous drafts having accepted virtually every other aspect of Article 9, excepted the notice filing provisions.\(^{68}\) Considering the importance of notice filing to the creation of a functional floating lien, the question immediately arises whether this departure, followed by the later inclusion of notice filing, indicated an earlier intention to eliminate or at least to greatly diminish the availability of the floating lien in inventory and accounts receivable financing via advance registration.\(^{69}\) Certainly the stipulation in section 47(1)(e) that the document registered must contain "the terms and conditions of the security agreement" tends to suggest the necessity of registering a new agreement with the addition of each new piece of collateral to the debtor's inventory or with each advance made, and the reasons given by the Catzman Committee for rejecting notice filing would seem to confirm this view. But an examination of the Act as a whole reveals that the draftsman, perhaps inadvertently, left in the essence of notice filing via registration of a security agreement. With respect to other aspects of a floating lien it should be observed that the after-acquired property clause in section 13 and future advance clause in section 15 are validated, and these in turn would at least permit a valid "cross-over" clause under which *all* present and future collateral is taken as security for *all* present and future advances.\(^{70}\) Under a clause of this nature it is

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\(^{68}\) The Catzman Committee rejected notice filing with the following observation: "(1) that in our view the security agreement should be on record so that all of its terms, including interest rate, terms or repayment, etc., should not be open to ex post facto re-arrangement; (2) that your [the American] section 9-208 (our section 21) [now section 20] limits the information required to be furnished or confirmed by the secured party to two items: (a) the amount of unpaid indebtedness; (b) the list or type of collateral."

Catzman, *op. cit.*, footnote 58, at p. 219. Surely these were not the reasons for the departure. The legislature was apparently not impressed with these reasons in view of the later inclusion of notice filing in section 47(2).

\(^{69}\) It would appear that the only financing entities which could benefit from such a restriction are the chartered banks, which might directly or ultimately fill the vacuum existing by virtue of the inadequate provincial chattel-security financing law.

\(^{70}\) The description requirement is discussed *infra*, text commencing at footnote 78.
possible to articulate the terms and conditions and to describe the collateral in sufficiently broad language to enable the consummation of a series of transactions of the type common to inventory financing, or that are found under the "blanket mortgage", without the necessity of repeated registrations. To this extent a floating lien is available under a section 47(1) registration, but two vital questions remain: (1) whether a security agreement attempting to create a floating lien under an advance registration may satisfy the requirements that the agreement must contain a description of the collateral "sufficient to identify it" and "the terms and conditions of the security agreement" where less than all of a debtor's present and future collateral is claimed; and (2) whether the security agreement may be registered before the first of a series of intended transactions had occurred, that is, advance registration. The second question will be discussed later in connexion with the time of registration. With respect to the first, it appears fairly clear that a financier could claim all of a certain type of a debtor's present and future collateral, such as all accounts receivable or all inventory, but to be more selective than this would subject the secured party to the risk that a court might determine that certain events which transpire at some point during the life of the agreement (advances made or collateral received) are not adequately covered by the terms, conditions, and description spelled out in the agreement, thereby rendering the security interest vulnerable to subordination for lack of perfection. Thus, although a section 47(1) registration would in theory appear to permit the creation of a floating lien through advance registration, the difficulties or risks encountered in attempting to use a security agreement as a notice of intention as well as the agreement creating the underlying obligation will no doubt discourage its use in practice for inventory and receivables financing, or any other transaction in which advance registration is desired unless the terms and conditions can be clearly stated.

Notice registration

The notice filing provision of the Act, section 47(2) gives the floating lien via advance registration a transfusion, but unfortunately it might still perish from loss of blood because of poor draftsmanship. Section 47(2) states that:

Where the collateral is goods to be held for sale or lease, a notice of intention to give security signed by the debtor, which contains and

Intra.
legibly sets forth at least,
(a) the full name and address of the debtor;
(b) the full name and address of the secured party; and
(c) a description of the collateral sufficient to identify it,
may in lieu of the security agreement under subsection 1, be regis-
tered before a security agreement is signed or a security interest other-
wise attaches, in order to perfect a security interest in such goods.\textsuperscript{72}

Elimination of the requirement of the secured party’s signature of
the notice of intention and caution is a departure from Article
9, but a reasonable one since only the debtor’s signature is re-
quired on the security agreement. There appears to be no good
reason why the signature requirement of the two documents should
not be uniform.\textsuperscript{72A}

It will be observed that the two elements required by section
47(1) but not by section 47(2) are the date of execution and the
terms and conditions of the security agreement. These elements
are excused under a notice filing provision for the obvious reason
that at the time it is usually most advantageous for the parties
to establish public notice of their intent to engage in inventory
or accounts receivable financing—before any transactions are
consummated—it is not always possible to determine all the terms
and conditions which will ultimately become a part of the security
agreement. Herein lies the potential strength of a section 47(2)
registration, so far as the floating lien is concerned, as compared
to the somewhat shaky ground on which a section 47(1) regis-
tration will stand.

Section 47(2), though undoubtedly intended to facilitate the
safe and smooth operation of inventory financing, unfortunately
contains several ambiguities of considerable magnitude. The inept
choice of language and style of the subsection is compounded by
the fact that notice filing is an innovation in provincial chattel
security legislation against a background to transaction filing, and
a last minute one at that, so that the courts might be tempted to
construe the provision strictly and to limit the scope of notice filing
as narrowly as possible. This would be a sad mistake but the
opportunity is clearly there. The major ambiguity arises from the
use of the phrase “collateral is goods to be held for sale or lease”.
The question immediately arises as to why these words were
chosen rather than “inventory”, which is the term one would

\textsuperscript{72} The Uniform Act Recommends that “goods to be held for sale or
lease” be substituted by “inventory or accounts receivable”.
\textsuperscript{72A} With respect to Article 9 see G. Gilmore, \textit{op. cit.}, footnote 1, p. 347.
expect to be used to convey the face-value impression gained by a reading of "goods to be held for sale or lease" in the over-all context of the Act. If this is what was intended, certainly "inventory", rather than "goods to be held for sale or lease", ought to be used since it is defined by the Act in section 1(n) and is therefore a term of art. It is not an unlikely construction of the subsection as it now stands that something less than "inventory" is intended by the words now used. For example, compare "goods to be held for sale or lease", in section 47(2) with "goods that are held...for sale or lease", which latter phrase describes only part of the collateral included in the definition of inventory. From this comparison the inference may be drawn that notice filing is not available if the collateral is "raw materials, work in process or materials used or consumed in a business or profession", which is the remaining collateral included in the definition of "inventory". Such a construction is quite untenable, however, since "goods" in section 1(k) includes "inventory" and thus, by a rather circuitous route, we must arrive at the same point in construing section 47(2) as if "inventory" had in fact been used in the subsection in the first place.

But even if a court concedes that notice filing is available under section 47(2) for all forms of inventory, there is yet another problem. The concluding words of the subsection provide that the notice of intention may be registered in lieu of a security agreement "before a security agreement is signed or a security interest otherwise attaches". Undoubtedly this was part of the over-all attempt to infuse flexibility into the registration system and, as under Article 9, to permit registration by filing a notice in advance of attachment of the security interest or before the execution of the security agreement. But the manner in which the subsection is phrased might lead to the erroneous conclusion that the notice of intention is available only if it is used "before" a security agreement is signed, but that once the agreement is signed, it is not, in which case the agreement itself must be registered. This construction would reintroduce the very problem notice filing is designed to eliminate. However, such a view, though erroneous, could find some reinforcement by virtue of the fact that section 47(1) is made subject to subsection (3), which provides for registration of a caution, but not expressly subject to subsection (2).

75 It is true that Article 9, s. 402(1) contains a similar sentence, but the context in which it stands, one in which the notice filing system predominates, leads to no uncertainty as to what is meant.
The drafting aberrations of section 47(2) can no doubt be explained on the basis that the subsection was a last-minute insertion and as so frequently happens in this situation language is not conformed to that used in the rest of the statute and consequently potentially troublesome sentence structure is developed. However, when the draftsmen once became convinced of the necessity of notice filing, it is unfortunate they did not go further and rewrite the entire section to conform with the philosophy of notice-filing espoused by Article 9, as the draftsmen have done in virtually every other important aspect of the Act. It is arguably true that the same benefits are now available under section 47 that are available under Article 9's notice filing system, assuming the validity of advance registration of a security agreement and notwithstanding the problems of construction just mentioned, but in any event it appears that there are some functional limitations on the types of financing which may be accomplished under the Act. For example, certain forms of selective financing, such as financing of accounts receivable, may be hampered by section 47 even with the addition of subsection (2).

How selective may a financer be under section 47? If he desires to finance accounts receivable only, he must register the agreement under section 47(1) since accounts are obviously not "goods to be held for sale or lease". If this is done, however, as indicated above, the financer must finance all the accounts receivable or run the risk of being unable to describe adequately the collateral or to include all terms and conditions relative to the transactions in the agreement. Why should a lender be forced to an all-or-nothing choice in this situation, even though he may find it quite desirable to finance all the debtor's accounts receivable in some or most circumstances? By the same token, why should the debtor be limited in the type or quantity of collateral he may use to secure a loan? The provision in effect dictates business decisions. By contrast, if a lender is willing and able to finance the inventory, he may be selective as to which classes of inventory he will finance. Since it would appear that there are no sound policy reasons underlying the peculiar dichotomy of section 47(1) and (2) on this point, the approach is of questionable desirability. It is submitted that the entire section should be rewritten to conform to the substance of Article 9.

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74 See Haydock, American Reactions to the Canadian Proposals (1966), 22 Bus. L. Rev. 221, at p. 226.
75 Coogan, Hogan and Vagts, op. cit., footnote 1, pp. 187-188.
Normally, a financer who takes a security interest in inventory will insert a clause claiming a security interest in the proceeds derived from the disposition of the inventory as well, and in this way the proceeds, including accounts receivable become the real security. The question arises whether some step other than the registration of a notice of intention is required to perfect a security interest in such proceeds. An application of section 27(2)(b), which carries over a perfected interest in the original collateral to proceeds that are identifiable or traceable, would lead to the conclusion that no further steps are necessary if the security interest in the original collateral is perfected.

The caution

The Act does not define "caution" but under his authority to prescribe and provide forms, the Lieutenant Governor in Council undoubtedly will indicate the formal requisites in due course. The earlier drafts of the Act contain a prototype form which requires the full name and address of the original debtor, the full name and address of the secured party, a description of the collateral sufficient to identify it, and particulars regarding the prior registration whether in Ontario or another jurisdiction.

The function of the caution is indicated by section 47:

(3) Where the collateral was subject to a security interest in another jurisdiction at the same time the collateral was brought into Ontario or where it is desired to perfect a security interest in the proceeds of collateral included in an already perfected security interest, the secured party may register a copy of the security agreement signed by the debtor or a caution in the prescribed form.

It will be observed that use of the caution is not limited to transactions where collateral is brought into Ontario as the marginal note suggests, but is also available to perfect a security interest in proceeds arising on the disposition of the original collateral by the debtor, such as where the disposition is unauthorized. However, if a debtor disposes of the collateral without authority, the security interest in the original collateral may continue.

As indicated above, the caution occupies part of the role taken by the "financing statement" in Article 9. If the approach of Article 9 had been followed faithfully by the Act, a "caution" would not be needed. It is true that there is federal and provincial precedent for the terms "notice of intention" and "caution" but following

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77 O.P.P.S.A., 1967, s. 27.
it may prove to be a liability in the long run. The Act contains other terms of art at which the draftsmen did not wince, and it is unfortunate the "financing statement" was not also adopted. The innovation of "caution" is a step backward because it results in an unnecessary proliferation of documents, with no gain.

The description requirement, amendments, and errors

For registration purposes the security agreement, the notice of intention, and caution require a "description of the collateral sufficient to identify it". The degree of specificity necessary to meet this requirement is a question of fact. Since a notice of intention is designed to permit advance registration even before the collateral comes into existence, a serial-number type of description is not implied. On the other hand, a statement like "all my present and future property" is probably too broad. The description should go on to particularize in terms of kinds, classes, and types, to the extent it is possible, and even serial numbers should be included where they are available and reasonably necessary for identification. The description ought not to cover more area or more types of collateral than presently needed or reasonably expected to be needed as security in the near future. Too broad a description might inadvertently cover a class or line of collateral which the debtor at a later time might want to use as security for other financing. If this should happen, the debtor may be put to the necessity of demanding a release, partial discharge, or an amendment of the documents, all of which are possible under the Act, but which are inconvenient and perhaps expensive to obtain.

Amendments to the registration documents may be desirable for the purpose of adding a new type or piece of collateral to the security agreement or for other purposes, such as the correction of errors. Accordingly, section 50 provides:

An amendment, or a copy thereof, of a security agreement registered under this Act that refers to the registration number of the security agreement, notice of intention or caution that it amends and that is signed by the secured party of record and by the debtor may be registered at any time during the period that the registration of the security agreement, notice of intention or caution is effective.

The form developed for the caution in earlier drafts of the Act also required a "description of collateral sufficient to identify it". See e.g., Form 1, O.P.P.S.A., 1966, Report No. 3A, Ontario Law Reform Commission. A similar form and requirement will undoubtedly be developed for the Act pursuant to section 70(i).

For a comparison of the description required for the security agreement prior to registration see s. 10.
It will be noted that not only is the debtor’s signature required, but also the secured party’s. The secured party’s signature is not required on the security agreement or notice of intention, but it is a reasonable requirement here because of the assurance it gives that the amendment has not been initiated by the debtor alone. Since amendments are sanctioned by the Act, thereby permitting the addition and subtraction of the type of collateral covered by the security agreement as conditions change, secured parties ought to restrain the temptation to claim more collateral than is actually needed for their own protection merely because they expect that “sometime” they will extend their financing to include that type. An over-extension of the security agreement may impair the debtor’s credit rating.

To foster the basic policy of the Act, which is to simplify secured financing, certain errors in the registered document are not to invalidate the registration. Section 47 provides:

(6) An error of a clerical nature or in an immaterial or non-essential part of a security agreement, caution or notice of intention that does not mislead does not invalidate the registration or destroy the effect of the registration.

This provision says negatively what its counterpart in Article 9 says positively, namely, that a registered document which substantially complies with the requirements of section 47 is effective even though it contains minor errors which are not seriously misleading. The Act’s approach is similar to that taken in pre-Act statutes and therefore might tend to invite the old strict-construction interpretation. A break with the past with respect to phraseology would have been preferable.

Requests for information: Obligation to account

The major advantage derived from a registration system which requires the security agreement to be filed is that much more information regarding the transaction is open to scrutiny by interested parties. By the same token, any disadvantage that might flow from the availability of information to curiosity seekers, competitors, and so on, is also inherent in the system. Nevertheless, the security agreement frequently will not contain all the information third parties may desire to know, and if a notice of intention has been filed in lieu of the agreement the chance of finding required information by searching at the registry is almost nil. The security agreement and the notice of intention do contain the names and addresses of the parties, but this alone is no assurance that even the parties having a legitimate interest, such as
creditors and subsequent purchasers, will be able to obtain the information they want. Of course the debtor, who is usually the person to precipitate the desire for more information, would normally reveal all he knows by exhibiting a copy of the agreement, and so on, but prudent parties will want to verify the information by checking with the secured party. Accordingly, the Act permits certain parties to demand relevant information from the secured party.

Section 20 provides:

(1) A debtor or a person having an interest in the collateral or an execution creditor may, by a notice in writing, require the secured party to furnish him with a statement in writing,
(a) of the amount of the indebtedness and of the terms of payment thereof as of the date specified in the notice;
(b) approving or correcting as of the date specified in the notice a statement of the collateral attached to the notice; and
(c) approving or correcting as of the date specified in the notice a statement of the amount of indebtedness and of the terms of payment thereof; or any one or two of them.

Not all persons are entitled to the information as of right, but the debtor may require the secured party to make it available for any purpose he may choose. The extension of the list to include persons having an interest in the collateral and execution creditors represents a departure from Article 9, but it is a step forward since such parties usually have a legitimate interest in knowing the true state of the debtor's affairs with respect to particular collateral, and the door is not thereby opened to curiosity seekers.

Section 20 also particularizes the information the secured party may be required to provide and the procedure under which the disclosures are to be made. Basically the information is limited to the amount of indebtedness and a list of the collateral. The secured party's reply to the demand may be simplified if the secured party claims a security interest in all of a particular type of collateral:

(2) In the case of clause b of subsection 1, if the secured party claims a security interest in all of a particular type of collateral owned by the debtor, he may so indicate in lieu of approving or correcting the itemized list of such collateral contained in the statement of the collateral and attached to the notice.

The section goes on to state the time within which the secured party must comply with the request and his potential liability for failure to do so:

(3) The secured party shall answer a notice given under subsection 1 within fifteen days after he receives it, and, if without reasonable excuse he fails so to do or his answer is incomplete or incorrect, he is liable for any loss or damage caused thereby to the debtor or any other person.

The subsection eliminates the provision in Article 9 requiring forfeiture of the secured party's security interest for noncompliance with a debtor's request in the event the debtor has included in his request "a good faith statement of the obligation or a list of the collateral" upon which a third party may later rely to his detriment. This is realistic since third parties are likely to be unwilling to rely on such a statement in any case, knowing they will only be protected against its falsity if the debtor's statement was made in good faith, something that is hardly open to their scrutiny. The extension of the secured party's potential liability directly to the third party would seem to be a more reasonable assurance of prompt co-operation.

Discharge and release

In the course of time the debtor may satisfy all obligations under the security agreement; or where a notice of intention has been filed, it may be that no security agreement was ever executed or, if one was, that obligations thereunder may also have been satisfied. To improve his credit rating the debtor may desire the records to show the true circumstances, and thus the Act provides for the discharge or termination of a security agreement and notice of intention of record. Section 54 states:

(1) Upon performance of all obligations under a security agreement, it shall be discharged, and upon written demand delivered either personally or by registered mail during the period that the registration of the security agreement or caution is effective by any person having an interest in the collateral to the secured party, the secured party shall sign and deliver personally or by registered mail to the person demanding it, at the place set out in the demand, a certificate of discharge in the prescribed form together with unregistered assignments, if any, of the security agreement.

(2) Where there are no outstanding obligations under any security agreement covered by a registered notice of intention, the secured party, upon written demand delivered either personally or by registered mail by a person having an interest in the collateral, shall sign and deliver personally or by registered mail to the person demanding it, at the place set out in the demand, a certificate of discharge of the notice of intention in the prescribed form.

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81 See U.C.C., s. 9-208.
82 See G. Gilmore, op. cit., footnote 1, p. 475.
The theory and procedures related to a discharge are quite similar to those found under prior law, except that the Act takes into account the possibility of registration under a notice of intention or under security agreement.

In some instances before a debtor is permitted to sell the collateral, use it, or trade it in on new collateral, and so on, it may be necessary to obtain a release during the life of the security interest. If the agreement provides for a release and the debtor meets the conditions therein he may demand a release pursuant to section 54, which goes on to provide:

(3) Where it is agreed to release part of the collateral upon payment or performance of certain of the obligations under a security agreement, then, upon payment or performance of such obligations and upon written demand delivered either personally or by registered mail during the period that the registration of the security agreement or caution is effective by any person having an interest in the collateral to the secured party, the secured party shall sign and deliver personally or by registered mail to the person demanding it, at the place set out in the demand, a release in the prescribed form of the collateral as agreed.

This provision varies from Article 9 in that the counterpart section does not authorize the debtor to demand a release as of right. However, there would seem to be no good reason why this variation should not be permitted.

If the secured party fails "without reasonable excuse" to provide a discharge or release as required, subsection (4) states that he must pay $100.00 to the person making the demand and be liable for any loss that may arise by virtue of the failure. This does not mean an interested party must accept a secured party's failure or refusal to give a discharge or release, since subsection (5) provides that upon payment into court of the amount claimed by the secured party plus costs, an order for discharge or registration of release may be granted. Finally, subsection (6) permits registration of any discharge or release obtained, but registration is not mandatory.

Assignments

Assignment of a security interest during the life of the security agreement, such as the discount of a conditional sales agreement with a finance company following the sale of an item of inventory, is a common practice in commercial circles. Assignments are

83 See, e.g., R.S.O., 1960, c. 34, s. 32; R.S.O., 1960, c. 61, s. 13.
84 U.C.C., s. 9-406.
85 This is an innovation: See Catzman, op. cit., footnote 58, at p. 216.
validated under section 48 and a procedure for making assignments a matter of record is provided:

(1) An assignment, or a copy thereof signed by the secured party of record, of a security agreement, notice of intention or caution may also be registered, if the security agreement, notice of intention or caution has been registered under this Act previous to the registration of the assignment, if the assignment contains and legibly sets forth at least,

(a) the full name and address of the debtor;
(b) the full name and address of the secured party of record;
(c) the full name and address of the assignee; and
(d) the registration number given at the time of registration of the security agreement, notice of intention or caution or, if the assignment is presented for registration at the same time as the security agreement or caution, the registration number of the security agreement or caution that is then endorsed thereon.

Under section 23(2) registration of an assignment is not a prerequisite to the continued perfection of the assignee's security interest, nor is registration mandatory, but in order for the assignee to become a secured party of record, under section 48(2) registration is required. It is advantageous both to the assignor and assignee to make the assignment a matter of record so that subsequent requests for information under section 20 or for discharge or release under section 54, will be directed to the assignee rather than to one who no longer has any interest in the collateral. If an assignment is not registered, under section 20 the obligation to disclose the identity of the assignee and potential liability for failure to do so remains on the party of record:

54(4) Where the person receiving a notice under subsection 1 no longer has an interest in the obligation or collateral, he shall, within fifteen days after he receives the notice disclose the name and address of the latest successor in interest known to him, and, if without reasonable excuse he fails so to do or his answer is incomplete or incorrect, he is liable for any loss or damage caused thereby to the debtor or any other person.

But if notice of the request for information has reached the assignee, under subsection (5) he is "deemed to be the secured party" for the purpose of making a reply. With respect to requests for a discharge or release, section 54 does not expressly require the assignor to disclose the name and address of an assignee on pain of liability as does section 20, but it would seem likely that a failure to provide a discharge or release by a secured party of record without disclosing, the name and address of the assignee so that the assignment may be verified, may not constitute a "reasonable excuse". Prompt registration of an assignment, thereby
making the assignee the secured party of record, will relieve the original secured party of potential liability under sections 20 and 54. The secured party would be well advised to follow this course as a cautionary measure. As section 48 indicates, this may be done over the secured party's signature alone, providing the assignment contains the requisite data.

II. Time of Registration.

A. Pre-Act Law.

Aside from the perfection of transactions under which it is contemplated that present or future advances will be secured by after-acquired property, validated by Holroyd v. Marshall, there is no provincial counterpart to notice filing or advance registration of the type available under section 88 of the Bank Act and common to American jurisdictions under the Code and pre-Code law. It has generally been thought that registration of the agreement must be concurrent with or subsequent to the creation of a security interest in the property sold or mortgaged. In the case of a chattel mortgage, for example, it appears to have always been assumed that the mortgagor must have rights in at least some of the property which will become subject to the security interest at the time of creation (execution), or at latest, by registration, even though it might be contemplated that other property ultimately will be substituted or added in the future. As under the chattel mortgage statutes of the United States, no one seems to have thought that registration prior to the security transaction is possible. This is somewhat surprising so far as Canada is concerned, since the after-acquired property and future advance clauses in chattel mortgages are commonly validated, and the Acts contain no express provision requiring the debtor to have rights in any collateral at the time of execution or registration. The notion that there must in fact be a mortgage transaction before the mortgage (document) is registered is explained primarily by the fact that the Acts were drafted prior to the development of inventory financing and perhaps partly because some of the need for a notice filing system was satisfied independently for banks under the Bank Act.

86 Supra, footnote 11.
87 Supra, footnote 6.
88 Coogan, Hagan and Vagts, op. cit., footnote 1, pp. 187-188.
89 G. Gilmore, op. cit., footnote 1, pp. 481-482.
90 R.S.O., 1960, c. 34, ss 14, 5.
Outside of the field of inventory financing notice filing is not vital or particularly meaningful since it is normally impractical to file in advance of a retail sale or consumer loan, for example, even if the law were to permit advance registration. Nevertheless, an examination of the Acts reveals no substantial reason why notice registration, that is, advance registration, may not be practiced under the various Acts in those transactions where it would be desirable except in those instances where a serial number or other minute description is required but for some reason is not available. Even the affidavit requirements suggest the possibility of advance execution and registration in view of the statement that the mortgagee must affirm that the mortgage was executed for the purpose of "securing the payment of money justly due or accruing due . . .".91

If notice filing is not permitted, or even if it is in the case of consumer or retail financing, a gap between the time of execution of the agreement and registration is practically inevitable, and there is always the possibility that interests of creditors, purchasers, and mortgagees as well as other third parties might arise during this period. In view of this possibility and the fact that invariably the chattel mortgage, conditional sales, and assignment of book debts Acts contain provisions which require registration within a specified period after execution, interesting questions arise. Is the time stipulated for registration a "grace period" with a relation back of registration occurring during the period—that is, a period within which timely registration will be deemed to have taken place simultaneously with execution? Or is the time stipulation merely an expression of policy that in no event will the security interest be valid as against specified third parties unless the agreement is filed within the required time (that is, altogether void against such parties), leaving open the question whether intervening specified third parties may prevail notwithstanding timely registration? Further, if a registration is late, but effected before any third parties intervene, is the security interest valid as against such parties? Specific answers to these questions are not provided by the Acts, and an examination of the relevant provisions as well as the cases indicates that the results will not be uniform among the various jurisdictions. Moreover, with regard to the rights of intervening purchasers, and discussion of these questions must be qualified by the effect of the Factors Acts, the Sale of Goods Acts, the rules of estoppel and agency, and so on. However, as a general

91 Ibid., s. 4.
proposition it may be said that under the latter statutes and rules a *bona fide* purchaser for value and without notice, will prevail, notwithstanding timely registration, especially if the purchase was in the ordinary course of business.

**The chattel mortgage**

Registration of a chattel mortgage must be effected within thirty days of execution in those jurisdictions having the Uniform Act, within twenty-one days in British Columbia, and either five or ten days, depending on the county, in Ontario. The rights of third parties intervening after execution but prior to timely registration appear to be clearly ascertainable by the fact that in most jurisdictions the mortgage "takes effect" only from the time of registration. What little case law there is indicates that intervening parties are likely to prevail over the chattel mortgagee. Although Ontario's statute provides that a chattel mortgage "takes effect upon execution" the cases have stood rather firmly against relation back. British Columbia's Act contains no similar provision so that it is uncertain whether the time allotted for registration is a grace period under the Act, but a reading of the Act permits the inference that it is, since it simply provides that if registration is not accomplished within the prescribed time the mortgage will be void. A recent case regarding interprovincial removal of property nevertheless suggests otherwise.

In all jurisdictions the penalty for failing to register within the prescribed period is that the chattel mortgage is null and void as against certain third parties. Thus it is clear that such third

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93 Model Bills of Sale Act, s. 8(1).
94 Bills of Sale Act, S.B.C., 1961, c. 6, s. 10(a).
95 The Bills of Sale and Chattel Mortgages Act, R.S.O., 1960, c. 34, ss 21(3), (4).
96 Model Bills of Sale Act, s. 4(2).
97 Consolidated Finance Co. v. Alfke (1960), 31 W.W.R. (n.s.) 497 (Alta). This is an important case because it appears to be the only one construing the phrase "takes effect" as found in the Uniform Act. Model Bills of Sale Act, s. 4(2). Cf. Matter of Union Accept. Corp. (1955), 16 W.W.R. (n.s.) 283, [1955] 4 D.L.R. 822 (Alta) (Quaere whether the result would have been the same if the sale had been in the ordinary course of business).
98 R.S.O., 1960, c. 34, s. 12.
100 The protected third parties include either all or certain creditors, subsequent purchasers, and mortgagees: Model Bills of Sale Act, ss 4(1), (2); Bills of Sale Act, S.B.C., 1961, c. 6, s. 16(1); The Bills of Sale and Chattel Mortgages Act, R.S.O., 1960, c. 34, s. 8.
parties whose rights intervene after the expiration of the allotted time but before registration will prevail over the mortgagee. Typically the Acts permit an extension of the time for registration by court order where the failure was inadvertent, and so on, but if granted at all, the extension is subject to accrued rights.101

**Conditional sales contracts**

Thirty days from execution is the most common period permitted for registration of a conditional sale.102 British Columbia allows twenty-one days103 and Ontario ten days after execution.104 Moreover, most of the provinces permit execution to take place up to ten days after delivery, thereby implying that the vendor will be protected against intervening third parties during this period. If this is true and if the original time allowed for registration is a grace period, we have the unusually long period of thirty-one to forty days during which a valid secret lien may be in existence in these jurisdictions.

Unlike the chattel mortgages Acts, however, the conditional sales Acts do not generally provide that the agreement shall “take effect” as of the time of registration. The implication thereby arises that timely registration will perfect the conditional sale even against intervening third parties. However, a comparatively recent Ontario case casts considerable doubt on this view.105 This is somewhat surprising in view of the fact that before the conditional sales Acts were adopted, the common law passionately protected the owner’s rights under the nemo dat rule. If we superimpose on this a conditional sales statute that purports only to protect the rights of certain third parties unless a conditional sales agreement is registered within a specified time, the logical conclusion is that registration should preserve to the conditional vendor his common law rights against these parties.106 Consistently with this view a recent

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101 Model Bills of Sale Act, s. 21(1); cf. The Bills of Sale Act, R.S.S., 1965, c. 392, s. 25 (no court order required).
102 Model Act, s. 2(2); R.S.N., 1952, bill 62, s. 4(2); R.S.S., 1965, c. 393, s. 5(4).
103 R.S.B.C., 1960, c. 70, ss 4, 6.
104 R.S.O., 1960, c. 61, s. 2(1)(b).
105 Industrial Acceptance Corp. v. Munro, [1950] W.N. 220, [1950] 3 D.L.R. 80, [1950] O.R. 130. “Subsequent purchaser” was construed to include any purchaser, not just one purchasing after the expiration of the period prescribed for timely filing. Although filing was not within the ten-day period as required, the reasons given for the decision indicate timely filing would have made no difference.
106 Commercial Fin. Corp. v. Stratford (1920), 47 O.L.R. 392. The court indicates that filing puts the conditional vendor in the same position he would have been in if the Act had not been passed. See also Commercial
Alberta case has held that timely registration will protect the conditional vendor against an intervening purchaser.\textsuperscript{107}

The penalty for failing to register within the specified time is that the conditional sales agreement is "invalid as against a subsequent purchaser or mortgagee claiming from or under the purchaser, without notice, in good faith and for valuable consideration", and also as against creditors where the goods have been delivered to a person for resale in the ordinary course of business.\textsuperscript{108}

Under statutes of this type it would follow that protected third parties whose rights intervene after the prescribed period but before registration would prevail over the conditional vendor. However, late registration is generally not permitted unless a judicial extension of time is obtained, in which case registration is "subject to the rights of other persons accrued by reason of the omission".\textsuperscript{109} Ontario expressly provides that the vendor's interest will be valid as against third parties "only from the actual date of registration".\textsuperscript{110}


\textit{Kilmove v. General Motors Acceptance Corporation} (1955), 14 W.W.R. 463, [1955] 2 D.L.R. 215 (Alta). This case was distinguished in a later case involving a chattel mortgage on the ground that under the Act the mortgage did not "take effect" until registration, and that no similar phrase was in the Conditional Sales Act. \textit{Consolidated Finance Co. v. Alfke} (1960), 31 W.W.R. (n.s.) 497 (Alta). The \textit{Kilmove} case does not specifically indicate whether the vendee was a dealer or trader, but the fact that the second buyer searched the registry of liens and encumbrances before buying indicates that he probably was not and that the sale was therefore not in the ordinary course of business. \textit{Quaere} whether the result would have been the same if the sale had been in the ordinary course of business. It is not clear whether the "sale" in \textit{Industrial Acceptance Corp. v. Munro}, supra, footnote 105, was in the ordinary course of the seller's business, but it was said that the "purchase" was in the ordinary course of business, if such a distinction is possible. \textit{Ibid.}, at pp. 131 (O.R.), 818 (D.L.R.), 79 (O.W.N.). That \textit{Munro} did involve a "sale" in the ordinary course of business would appear to be the only rational basis for reconciling the decision with the rest of the law.

\textit{R.S.O.}, 1960, c. 61, s. 2(1), (3). The third parties generally described are subsequent purchasers or mortgagees in good faith and for valuable consideration, and creditors of the buyer. \textit{Model Conditional Sales Act}, s. 3, Alberta, R.S.A., 1955, c. 54, s. 3 and British Columbia, R.S.B.C., 1960, c. 70, s. 15 require the creditors to have risen to the level of judgment of execution creditors or, in the case of British Columbia, to be represented by a trustee in bankruptcy.

\textit{Model Conditional Sales Act}, s. 19(1); \textit{accord}, R.S.A., 1955, c. 54, s. 13(1)(b); R.S.N., 1952, bill 62, s. 18(1). Note that application to the court is not necessary for a late registration in Saskatchewan, R.S.S., 1965, c. 393, s. 30. Also R.S.B.C., 1960, c. 70, s. 10(2).

\textit{R.S.O.}, 1960, c. 61, s. 2(7); \textit{Industrial Acceptance Corp. v. Munro}, supra, footnote 105.
Assignment of book debts

Registration of the assignment of book debts must be within thirty days of execution in most jurisdictions and within twenty-one days in British Columbia.\textsuperscript{111} In those jurisdictions following the Uniform Act (the majority), the assignment “takes effect” only from the time of registration.\textsuperscript{112} A similar provision in the Bills of Sale Acts led to the holding that registration within the prescribed time did not protect the mortgagee against intervening third parties.\textsuperscript{113} Whether the time for registration of assignments is a grace period is a rather meaningless question since registration only validates an assignment but does not perfect it.\textsuperscript{114}

Notwithstanding the ineffectiveness of registration as a means of perfecting an assignment against intervening parties, failure to register renders the assignment “void as against a creditor and as against a subsequent purchaser who claims from or under the assignor in good faith, for valuable consideration and without notice, and whose assignment has been registered or is valid without registration”\textsuperscript{115}.

B. Time of Registration Under the Act.

The Act establishes a double standard with respect to the time of registration: thirty days in the case of some transactions, and no limitation whatsoever in the case of others.

Security agreements covering collateral not excluded by section 47(5) are required to be registered within thirty days of execution:

\begin{quote}
(5) Where the collateral is other than instruments, securities, letters of credit, advices of credit, negotiable documents of title or goods to be held for sale or lease with respect to which a notice of intention has been registered, the security agreement shall not be registered after thirty days from the date of its execution.\textsuperscript{116}
\end{quote}

To state the proposition affirmatively, the transactions affected by the time limitation will involve security interests taken in chattel paper, intangibles, equipment, and consumer goods.\textsuperscript{117} In the nature

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{111}] Model Assignment of Book Debts Act, ss 4, 5; R.S.B.C., 1960, c. 19, as am. s. 9; R.S.O., 1960, c. 24, ss 3, 4.
\item[\textsuperscript{112}] Model Assignment of Book Debts Act, s. 4.
\item[\textsuperscript{113}] Supra, footnote 10.
\item[\textsuperscript{114}] Supra, footnote 39.
\item[\textsuperscript{115}] Model Assignment of Book Debts Act, s. 4.
\item[\textsuperscript{116}] "This section is deleted in the Uniform Act.
\item[\textsuperscript{117}] All collateral is defined in section 1. Surely the reference to “goods to be held for sale or lease” is not intended to subject some types of inventory financing to the limitation. For discussion of the phrase see text after footnote 72, supra.
\end{itemize}
\end{footnotesize}
of things the application of this provision will tend to be of greatest
significance where non-purchase-money security interests are taken
in the excluded collateral, although it is not limited to non-
purchase-money security interests. Article 9 does not contain this
limitation.

In view of the judicial approach to the question of time for
registration under prior chattel security Acts of Ontario and the
priority structure embodied in the Personal Property Security Act,
the thirty-day registration requirement is certain to be given no
relation back effect. The time limitation does not establish a grace
period during which an unregistered security agreement is deemed
to be registered simultaneously with execution if registration is
effected within thirty days. Until the thirty-day period has expired,
the relative priority of conflicting claimants will be determined
by the same rules governing all other unperfected security interests
as provided by section 22(1)(a), under which an unperfected
security interest is subordinate to the rights of "lien creditors"
arising without knowledge of the security interest and before it is
perfected. This includes process creditors, assignees for the
benefit of creditors, trustees in bankruptcy, and receivers. At the
end of thirty days the status of an unperfected security interest
and the rights accorded to the secured party will depend on the
course of action taken by the secured party, although this was
probably not intended by the draftsmen. This is because the Act
stipulates no penalty for nonregistration within thirty days, but
merely permits the secured party to seek judicial approval of a
time extension under section 63:

(1) Where in this Act any time is prescribed within which or before
which any act or thing must be done, a judge on application may, upon
such terms and conditions and with such notice, if any, as he may order,
extend such time for compliance upon being satisfied that no interest
of any other person will be prejudiced by such extension, but, in the
event that it later appears that any such act or thing done within the
period so extended has prejudiced the rights that any person acquired
before the doing of such act or thing, such act or thing shall be pres-
sumed not to have been done in conformity with this Act for the
purpose of obtaining the right that such person acquired before the
doing of such act or thing.

Since the applicant is not required to show that his failure to regis-
ter was due to inadvertence or other excusable reason as under

118 Supra, footnote 19.
119 Cf. U.C.C., s. 9-301.
120 The term "lien creditors" as used in Article 9 unfortunately is not
used in the Act. See footnote 15 supra.
prior Acts, it does not appear that the court has discretion to refuse a time extension\textsuperscript{121} except for protecting the rights of third parties. Under this subsection intervening third parties, even though they may not qualify for protection under section 22 (because, for example, they are ordinary creditors) may, in the discretion of the court, be given priority over an unperfected security interest. It was out of concern for simple creditors that the thirty-day registration limitation was introduced into an earlier draft of the Act by the Ontario Law Reform Commission.\textsuperscript{122} Whether ordinary creditors ought to be given this type of protection is a policy question on which the provinces are divided.\textsuperscript{123} The combined effect of sections 47(5) and 63(1) was no doubt intended to protect ordinary creditors in Ontario and to the extent that it does, is more or less consistent with prior law.

The thirty-day innovation is implemented in a manner, however, that raises much doubt whether its intended purpose will be achieved. Because the Act specifies no penalty for failure to register within the required period, the inference to be drawn is that the rights of an unperfected security interest after that period are to be determined by section 22(1) alone, under which ordinary creditors may not prevail over an unperfected security interest. It is true that section 63(1) gives a judge discretion to protect all intervening third parties who have been prejudiced by nonregistration, but this protection is available only if the secured party applies for a time extension under section 63(1). He need not seek such an extension, so long as he is willing to have his security interest subordinated to the rights of lien creditors, subsequent purchasers, and so on. Moreover, the scope of protection afforded by the time limitation is extremely narrow since trade creditors, by far the largest class of ordinary creditors, are not among those who may expect protection under the application

\textsuperscript{121} Surprising as it may seem the subsection is fairly clear when read in its context with other sections, but it is difficult to imagine a more obscure and awkwardly worded provision on its face.

\textsuperscript{122} Speaking of the counterpart to section 22(1), the Commission explained: "Your Commission is strongly of the opinion that a holder of a security interest should not be permitted to withhold registration indefinitely. The view of your Commission is that such a provision would be unfair to ordinary creditors who would, while extending credit, have no way of knowing that the security interest was outstanding, subject to perfection at the will of the security holder. In addition, such a provision could be used as an instrument of fraud."


\textsuperscript{123} In Alberta and British Columbia, for example, only parties of the type protected by section 22(1)(a), i.e., "lien creditors", are protected in the event of non-registration under various chattel security Acts.
of section 63(1) because "goods to be held for sale or lease with respect to which a notice of intention has been registered" are excluded by section 47(5).\textsuperscript{124} For these reasons and because fear of subordination of an unperfected security interest to the claims of lien creditors, perfected security interests, and \textit{bona fide} purchasers is adequate pressure to compel prompt registration, the thirty-day requirement is practically useless as a means of accomplishing its avowed purpose and therefore ought to be deleted from the Act. But if a time limitation is to be retained, much less uncertainty would prevail and the necessity of a court application would be eliminated simply by amending section 22 along the following lines:

(1)(a)(iv): who becomes a creditor after thirty days from execution of the security agreement covering collateral other than instruments, securities, letters of credit, advices of credit, negotiable documents of title or goods to be held for sale or lease with respect to which a notice of intention has been registered.\textsuperscript{125}

With respect to all other transactions, with one special exception to be mentioned later, the Act establishes no time limitation for registration. Transactions free of the limitation are, of course, those involving collateral excluded by section 47(5), namely, "instruments, securities, letters of credit, advices of credit, negotiable documents of title or goods to be held for sale or lease with respect to which a notice of intention has been registered". Inventory financing is therefore not subject to the thirty-day limitation, but it is highly unlikely that an inventory lender would forgo advance registration of the notice of intention just because he has forever to register it under the Act, so that the exclusion is rather meaningless here. Most of the remaining exclusions are of collateral in which a security interest may be perfected only by taking possession, except for short-term periods during which perfection is accorded without possession, so that again the exclusion is rather meaningless. This is not to imply that limitations on the operation of section 47(5) ought not to be made, but rather the thirty-day rule itself ought to be eliminated since, as mentioned earlier, fear of subordination by virtue of the provisions of section 22 provides adequate incentive for prompt compliance with the registration requirements in all cases.

In balancing the equities to determine whether unregistered security interests or intervening third parties ought to suffer by

\textsuperscript{124} This exclusion was added as an amendment to the original subsection by the Ontario Law Reform Commission.

\textsuperscript{125} In connexion with this suggestion see comment \textit{supra}, footnote 61.
virtue of the secrecy of a lien during the inevitable gap between execution and registration, Ontario has quite consistently come down in favor of intervening third parties.\textsuperscript{126} Section 22 introduces an exception to this position by providing a grace period during which a purchase-money security interest may be registered:

(3) A purchase-money security interest that is registered before or within ten days after the debtor's possession of the collateral commences has priority over, (a) an interest set out in subclause ii or iii of clause a of subsection 1; and (b) transfers in bulk or otherwise, not in the ordinary course of business, occurring between the security interest's attaching and its being registered.

Notwithstanding the exceptions it will be noted that purchasers in the ordinary course of business during the ten-day period will take free of a purchase-money security interest. Purchase-money security interests are singled out for special treatment because in many transactions it is impossible, as a practical matter, to take advantage of advance registration, such as in the case of retail sales of consumer goods or commercial equipment. This is also true of consumer loans, although a special exception has not been made for them. In transactions of this nature there usually is not time for the financer to register before the transaction is consummated. Nevertheless outside of the purchase-money exception, the rights of lien creditors or purchasers arising during the gap between execution and registration will prevail over the unregistered security interest under section 22. This distinction is drawn because in most other cases it is reasonable to expect that a notice of intention will be registered in advance of the security transaction, such as where the security interest is taken in "goods to be held for sale or lease", or that the advance of money under a loan will be withheld until registration and subsequent search, thereby removing the need for a grace period for such transactions.

Section 47(2) expressly states that a notice of intention may be registered prior to the signing of a security agreement. There is no equivalent provision that a security agreement may be registered in advance of the security transaction, but the combined effect of several sections leads to the conclusion that it may. The evidence begins with the definitions of a security agreement in section 1(\text{x}): a security agreement is "an agreement that creates or provides for a security interest". Under section 10, to be enforceable against third parties, the security agreement requires a "description of the collateral", and for registration under section

\textsuperscript{126} See exception as to creditors where goods sold under a conditional sales agreement are not purchased for resale. R.S.O., 1960, c. 61, s. 2(3).
47 all that is required is a "description of the collateral sufficient to identify it". A minute or serial number description is not required since section 13 provides that "a security agreement may cover after-acquired property" and section 15 states that "a security agreement may secure future advances". Hence, future transactions are contemplated. Moreover, section 12 provides that a security interest will attach "when (a) the parties intend it to attach; (b) value is given; and (c) the debtor has rights in the collateral", and no restriction is placed on the order in which those events may occur. Thus, if a security agreement may provide for a security interest as well as create one, and if after-acquired property and future advances may also be covered, and if the events for attachment may occur in any order, it would appear that under the Act, as under Article 9, a security agreement, as well as a notice of intention, may be executed and registered in advance of a security transaction.

Temporary perfection

Section 26 provides a ten-day period of perfection of a non-possessory security interest in instruments and negotiable documents provided the security interest is "perfected". This in effect requires that the secured party either have possession of the document prior to the debtor's acquisition, or that he register at some point, presumably before the debtor obtains possession. It is unlikely that the "perfected" requirement is intended to be met by registration; however, since if it were, there would hardly be any need for a ten-day perfection period. Temporary perfection differs from a grace period in that no act of perfection is required during the ten-day period or thereafter to ensure a perfected status. Accordingly, lien creditors arising during the period may not prevail over the secured party. Perfection for a longer period can be obtained only by possession or registration, depending on the nature of the collateral and the type of protection desired. If the necessary act of perfection is achieved before the expiration of the ten days, under section 23 the security interest is deemed to have been continuously perfected from the commencement of the ten-day period.

Voluntary and involuntary transfers by debtor

Although a debtor's collateral is encumbered the debtor may

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127 Compare G. Gilmore, op. cit., footnote 1, pp. 496-497.
128 See definition, supra, footnote 15.
have some rights or equity of value to himself, his creditors, or subsequent assignees. Accordingly, section 33 provides that notwithstanding a covenant to the contrary a debtor may transfer his rights either voluntarily or involuntarily, albeit in default of the agreement, but such a transfer does not, of course, impair the secured party's interest under the security agreement. In the event of such a transfer third parties taking from the transferee may have difficulty determining the extent of any conflicting interest in the collateral because searches must be against the name of the debtor or owner not against the collateral, and chances are the transferee's name will not appear on the records of the registry. Under these circumstances third parties might give value in ignorance of outstanding perfected security interests and thereby become subordinate to a prior secured party. To minimize this inequity to the extent possible section 49 requires secured parties to notify the registry of changes in ownership to which they consent or of which they learn within a specified time:

(1) Where a security interest has been perfected by registration and the debtor with the consent of the secured party assigns his interest in the collateral, the assignee becomes a debtor and the security interest becomes unperfected unless the secured party registers a notice in the prescribed form within fifteen days of the time he consents to the assignment.

(2) Where a security interest has been perfected by registration and the secured party learns that the debtor has assigned his interest in the collateral, the security interest becomes unperfected fifteen days after the secured party learns of the assignment and the name and address of the assignee, unless he registers a notice in the prescribed form within such fifteen days.

Although the subsections are not uniform in their manner of expression, the security interest remains perfected until the fifteen days have elapsed in each case. Thus even though the secured party never notifies the registry of the transfer following consent or learning of the requisite facts, he will take priority over parties intervening prior to the expiration of the fifteen days. That is, the stated time is not a grace period with a relation back effect upon compliance, but rather a period during which the security interest is fully perfected irrespective of a subsequent notification. A failure to notify renders the security interest unperfected, in which case section 22 will regulate the rights of intervening parties.

In the event the fifteen-day period expires before the secured party informs the central registry of the transfer it would appear that he may file a late notice without making an application to the court for a time extension, but of course his rights will be subject
to those which have intervened as determined by the priority rules of the Act. This view is derived from the fact that section 49 does not prohibit registration of a notice after the fifteen-day period in the way that section 47(5) prohibits a late registration after the thirty-day period. Whether this distinction was intended is uncertain, but a court application would surely be a waste of time. Section 49 is an innovation so far as Article 9 is concerned, but it would seem to be useful.

**Time registration becomes effective**

The remaining relevant provision establishes the time when registration becomes effective. Under the “local-central” filing system provided by the Act documents are registered at branch offices from which essential data is transmitted by teletype to the central registry. Section 46 provides:

Documents to be registered under this Act shall be tendered for registration at any branch office established under subsection 3 of section 41, but registration is effective only from the time of the recording of the prescribed particulars thereof in the central office and the assignment thereto of a registration number.

Recordation in the central registry takes place simultaneously with transmission from the branch offices so that a gap between registration and recordation is not contemplated. The time of registration as well as a central number is assigned automatically by the computer located at the central registry.\(^{139}\)

III. *Place of Registration.*

A. *Pre-Act Law.*

Obviously a place for registering the requisite documents must be prescribed by statute. Either local or central registration, or some variation of the two systems, is in force in each jurisdiction.

Under the local filing systems, in the case of tangibles, the criterion which determines the appropriate registration district is either the location of the property at the time of execution or delivery, or the residence of the buyer at the time of execution. Typically, chattel mortgages are registered in the district where the property is located, and conditional sales agreements in the district where the buyer resides, although location at point of delivery frequently controls. Diverse criteria of this nature can easily lead to

\(^{139}\) Priddle, Memo to All County and District Court Clerks Province of Ontario, from Department of the Attorney General (July 17th, 1967), p. 4.
problems. For example, since either a conditional sale contract or a chattel mortgage may be used to secure the balance of the price following a sale, the appropriate registration district may depend on nothing more than which document is selected, which may in turn be dictated by mere chance. The risk of registration in the wrong district is therefore increased. Even if this mistake is not made, the fact that a particular registration district is convenient for the vendor, for instance, the location of the goods at the time of execution, is no assurance that it will also be convenient for creditors and prospective purchasers of the buyer, particularly if the location of the goods and the debtor's residence happen to be different, since third parties will naturally be inclined to search the registry in the district where a debtor resides. On the other hand, the residence criterion will not eliminate uncertainties. For example, if the debtor has more than one residence within the province, which of the possibilities is to control the selection of the registration district? Moreover, even if the proper residence can be determined, the debtor may move to another district and thereby aggravate the hazard that creditors or prospective purchasers may overlook an outstanding mortgage or conditional sale interest.

Where local filing is required for intangibles, such as book debts, the filing criterion for corporations is based on the district in which the head office is located; in the case of unincorporated entities the location of the business controls. As in the case of a residence test for conditional sales and chattel mortgages, there is always the problem of determining which is the head office of an incorporated business operating in more than one district. If the business is unincorporated, there is the possibility that business is being carried on in more than one district, thereby necessitating registration in each district. From the point of view of third parties this leads to the necessity of searching in each district to eliminate the possibility of overlooking pertinent districts.

Two provinces have a central registration system under which all registrations and searches are required to be done at one place. The great advantage of central filing over local filing for both tangible and intangible property is that it eliminates the problems mentioned in connexion with local filing: nothing turns on the choice of document; the residence is no longer significant except as a potential source of information; nor is the location of the goods, so long as they are in the province; in the case of assignments of accounts receivable the location of the head office and the district in
which the business is carried on becomes irrelevant so long as they are somewhere in the province; and multiple filings are unnecessary. Thus the chances of secured parties registering in the wrong district and third parties searching in the wrong district are eliminated. However, a consequent disadvantage arising from central filing is that secured parties and third parties no longer have the convenience of easy access to the registry for registrations and searches. So far as searches are concerned the inconvenience is offset considerably by the availability of telephonic communication, but in the case of registrations a time gap is inevitable.

Two provinces provide for what might be described as a "local-central" registration system under which the central registry is co-ordinated with branch offices located throughout the province to funnel information to the central registry and back again to the branches. Registrations and searches may be done either locally or centrally, so that in theory the system has virtually all the advantages of a local and central registration system while having the disadvantages of neither. And when the system is technologically implemented to provide instantaneous transmission of information, as it is under the Personal Property Security Act, it becomes the ultimate in registration systems.130

The chattel mortgage

Except in the case of motor vehicles, jurisdictions following the Uniform Act require registration of a chattel mortgage in the district where the property is located at the time of execution. If the property is located in more than one district, either an original or certified copy of the agreement must be filed in each district where property is located.131 Central registration is provided for motor vehicles.132 In Ontario registration is also consummated in the county or district where the property is located at the time of execution.133

British Columbia and Newfoundland have central registration. In British Columbia if the grantor is a corporation, registration is effected with the Registrar of Companies unless a motor vehicle is involved, in which case the corporate mortgage, like non-corporate mortgages, must be registered with the Registrar-Gen-

131 The Model Bills of Sale Act, s. 8.
132 Ibid., s. 9.
133 Ibid., s. 21.
Newfoundland makes no exception for motor vehicles.\textsuperscript{135} Local-central registration prevails in Alberta and Saskatchewan. In Alberta motor vehicle registrations are effected only centrally with the Motor Vehicle Registry; all other registrations are made directly at the central registry or through one of the branch offices. Alberta's registration system is very comprehensive and quite similar to the system adopted by the Personal Property Security Act. A unique feature of the Alberta system requires the registrar, upon receipt of the prescribed fee, to provide a certificate indicating whether a registration has been made in the name of a particular person and, if so, a copy of any document registered under such name for inspection either at the local or central office.\textsuperscript{136} An "assurance fund" is also provided, financed by part of the registration fee, to compensate anyone damaged by an "omission, mistake or misfeasance of the registrar, and official of the Registry, or the registration clerk in the Motor Vehicles Branch" in connexion with registrations, searches, and so on.\textsuperscript{137} In Saskatchewan registration is effected either at the central registry in Regina or alternatively by depositing the requisite documents with an "appointed person", who is required to endorse the time of filing on the documents and to forward them to the registration clerk at Regina. Searches may also be made either at the central office or through an "appointed person", presumably at a local office.\textsuperscript{138} But the Act relieves the "appointed person" of liability for delay or failure to forward the documents for registration, and there is no provision for an assurance fund to cover losses in such cases, so use of the alternative or branch facilities appears to be rather risky.\textsuperscript{139}

\textit{The conditional sale}

Jurisdictions following the Uniform Act require registration of a conditional sale in the district where the buyer resides at the time of execution, but if the goods are to be delivered to a district in which the buyer does not have his residence or if the buyer resides outside the province, registration is to be made in the district of delivery.\textsuperscript{140} Under these statutes location of the goods at the

\textsuperscript{134} S.B.C., 1961, c. 6, s. 9. Note that if non-corporate property is also involved the bill of sale must be registered, as to that property, with the Registrar of Companies.
\textsuperscript{135} R.S.N., 1955, No. 22, ss 2(1), 7.
\textsuperscript{136} S.A., 1966, c. 12, ss 7, 9, and Schedule 2.
\textsuperscript{137} S.A., 1955, c. 13, s. 14.
\textsuperscript{138} Ibid., ss 6, 7. \textsuperscript{139} Ibid., c. 12, s. 6.
\textsuperscript{140} The Model Conditional Sales Act, ss 2(2), 4.
point of delivery is the controlling factor. Ontario requires registration in the district or county in which the purchaser resides at the time of sale; nothing turns on point of delivery.¹⁴¹

As in the case of bills of sale, central registration prevails in British Columbia and Newfoundland,¹⁴² and local-central registration is provided in Alberta and Saskatchewan.¹⁴³ The registration policies and practices applicable to location of filing conditional sales with respect to motor vehicles, corporate buyers, assurance funds, and "appointed persons", and so on, are the same as those governing registration of bills of sale and chattel mortgages.

If goods sold by conditional sale are to become affixed to the land most, if not all, jurisdictions require a notice of the transaction to be filed in the Land Titles Office, Land Registry Office, Registry of Deeds, or the like. The notice is deemed to be actual notice.¹⁴⁴

Assignment of book debts

Ontario, following the Uniform Act, provides that if the assignor is a corporation, assignments are to be registered in the district where the head or registered office is located and, in the case of an extra-provincial corporation without a head office within the province, with the county clerk of York. Unincorporated assignors are to register in each district where the business is carried on.¹⁴⁵

British Columbia, Newfoundland, and Saskatchewan each provide for central filing.¹⁴⁶ In Alberta a local-central filing system prevails.¹⁴⁷

B. Place of Registration Under the Act.

Local registration of security interests in personal property has prevailed in Ontario since 1849.¹⁴⁸ It was quite natural, and at the time perhaps quite reasonable, for the early systems to have

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¹⁴¹ R.S.O., 1960, c. 61, s. 2.
¹⁴² S.B.C., 1961, c. 9, s. 5; R.S.N., 1955, No. 22, s. 4.
¹⁴³ S.A., 1966, c. 12, s. 7, Schedule 3; R.S.S., 1965, c. 393, s. 5.
¹⁴⁴ The Model Conditional Sales Act, s. 15; S.B.C., 1961, c. 9, s. 12; R.S.N., 1955, No. 22, s. 14; R.S.O., 1960, c. 61, s. 14 and cf. s. 10; R.S.S., 1965, c. 393, s. 19.
¹⁴⁵ The Model Assignment of Book Debts Act, s. 5; R.S.O., 1960, c. 24, s. 4.
¹⁴⁶ S.B.C., 1961, c. 4, s. 8 (corporate assignors register with the Registrar of Companies; unincorporated assignors with the Registrar General); R.S.S., 1965, c. 391, s. 5.
¹⁴⁷ S.A., 1966, c. 12, ss 1, 7.
¹⁴⁸ Act Requiring Mortgages of Personal Property in Upper Canada to be Filed, S.U.C., 1849, c. 74.
been patterned after those established for recording interests in real estate, including their narrowly defined geographical limits. But in view of today's mobility of personal property and the complexity of commercial transactions, local filing systems are an unsatisfactory means of providing creditors and prospective purchasers with the desired access to requisite information.

Accordingly, the Act provides for what was described above as a "local-central" registration system under which a central registry is to be located in or near Toronto and linked electronically with branch offices located throughout the province, probably at the site of existing county and district court clerk offices.\(^{149}\) The central registry will house a computer in which important data respecting registrations can be stored and retrieved by telecommunication from the local offices. Section 36 provides:

Documents to be registered under this Act shall be tendered for registration at any branch office established under subsection 3 of section 41, but registration is effective only from the time of the recording of the prescribed particulars thereof in the central office and the assignment thereto of a registration number.

Thus, a registration is effected by depositing either a security agreement, notice of intention, caution or other document at a branch office, and it becomes effective from the time particulars are recorded in the central registry and a number is assigned to the transaction. The time of registration and central number will be assigned automatically by the computer.\(^ {150}\)

Searches are also made at the local offices where requests for particular data are received and transmitted to the central registry. Relevant information is then returned by teletype to the branch offices. Section 44 provides:

(1) Upon the request of any person and upon payment of the prescribed fee,

\begin{enumerate}
\item the registrar shall issue a certificate stating whether there is registered at the time mentioned in the certificate a security agreement or other document in which the person named in the certificate is shown as a debtor and, if there is, the registration number of it, and any other information recorded in the central office of the registration system;\(^ {151}\)
\item any registered security agreement or other document shall be provided for inspection at the branch office where it was registered; and
\end{enumerate}

\(^{149}\) Location of the branches will be determined by the Lieutenant Governor in Council under his regulation making power. O.P.P.S.A., ss 41(3), 70.

\(^{150}\) Priddle, op. cit., footnote 129.

\(^{151}\) The Uniform Act adds "or the office of the Provincial Secretary (or
(c) a certified copy of any security agreement or other document shall be furnished at the branch office where it was registered. Although only documents registered at the branch office will be retained there for inspection, certified copies of documents located in more remote branches will be available, presumably all by mail, if desired. Thus the registration system provided by the Act contains all the advantages of local and central registration while eliminating the disadvantages of both. No longer can the secured party register in the wrong place, and subject to what is said later, creditors and prospective purchasers do not run the risk of searching in the wrong place.\(^{152}\)

If a registrar’s search certificate shows there is nothing on file on a given person, such finding may be relied upon by third parties as conclusive, unless of course they have knowledge to the contrary. Moreover, if the certificate proves to be erroneous and someone is injured in reliance upon it, section 45 provides for indemnification of the injured party from the Personal Property Security Assurance Fund financed by a portion of registration fees:

(3) Any person who suffers loss or damage as a result of his reliance upon a certificate of the registrar issued under section 45 that is incorrect because of an error or omission in the operation of the system or registration, recording, and production of information under this Part, is entitled to have compensation paid to him out of the Fund so far as the Fund is sufficient for that purpose, having regard to any other charges thereon, if he makes a claim therefor under subsection 4 within one year from the time of his having suffered the loss or damage.

This section goes on to outline the procedure under which an injured party may make his claim, including provisions for a hearing by the Master of the Supreme Court, the Master’s certificate of findings, a thirty-day period for appeal to the Court of Appeal, and the mode of paying compensation to successful claimants. Article 9 does not provide for an assurance fund but in concept it would appear to be a desirable innovation, providing the cost of implementation and maintenance does not offset the benefits to be derived therefrom. Canadian experience with similar funds for real property registries and Alberta’s more recent experience in the personal property field suggest that an assurance fund for personal property may be quite practical.

registrar of Companies).\(^{152}\)”. This amendment is made necessary by the extension of the Uniform Act to cover security interest normally regulated by the Corporate Securities Registration Act.\(^{152}\) This of course does not consider the risks arising from inter-provincial removals.
The Act designates the central registry as the place of registration for all types of collateral in which a nonpossessory security interest may be taken except in the case of fixtures. This exception arises rather abstrusely by virtue of the deletion of "fixtures" from the definition of "goods" in section 1(k), as the term is defined in Article 9, section 105(f). Thus registration in the central registry perfects a security interests in all types of collateral except fixtures. With regard to fixtures and certain other interests in real estate section 53(2) provides:

Where the collateral is or includes fixtures or goods that may become fixtures, or crops, or oil, gas or other minerals to be extracted, or timber to be cut, the security agreement or any other document that may be registered under this Act containing a description of the land affected sufficient for registration under The Land Titles Act or The Registry Act, as the case may be, may, whether or not it is registered under this Act, be registered under The Land Titles Act or The Registry Act.

This section deals with what might be described as highly potential personal property, that is, fixtures, oil to be extracted, timber to be cut, and so on, but real property nevertheless under the law. The most logical means of giving public notice of outstanding interests in property of this type, at least to persons who might want to acquire an interest in the realty to which the types of property mentioned in the section are related or attached, is by registration in the real property registry, as the section provides. However, once a registration in the real property registry has been affected, there is still some doubt as to its status technically, since there is nothing in the Act which says that such registration "perfects" the security interest. This ambiguity should be clarified by providing in section 53(2) that registration in the land titles office perfects a security interest as against real property claimants. As the Act now stands the absence of such a clarification is of no particular consequence so far as fixtures interests are concerned since priority over certain subsequent real property interests under section 36 is determined by the existence of "actual notice" and not by the state of perfection. Registration in the land registry office, *semble*, provides such notice. But a return to the language of Article 9 in the Act's fixtures priority rule in section 36, as done in the Uniform Act, does make the perfected status of a fixtures security interest important.

Registration under section 53(2) is not mandatory, however, and therefore failure to register in the appropriate real property registry with respect to the types of property mentioned in the
section will not destroy the validity and effect of a registration under the local-central system. Nor will failure to register in the central registry detract from the protection afforded the secured party through registration in the land titles office, whatever that protection might be as determined by relevant real property law and section 36 of the Act.

The draftsmen of Article 9 found almost unanimous support for the view that security interests in fixtures and property which is to become fixtures should be filed only at the registry in which interests in real property are recorded, and consequently filing in the real estate registry is the exclusive mode of perfecting a security interest in goods which are or are to become fixtures under Article 9, section 401. This does not prevent the secured party from filing in both the personal property and real estate registries in doubtful cases, but only one of the filings will be effective, depending upon whether the goods ultimately turn out to be fixtures or non-fixtures. On balance it appears that the approach taken by the Act with respect to property which may become fixtures is superior to Article 9, primarily because of its simplicity and to some extent because of the less drastic consequences arising in the event of an error of judgment as to whether a given piece of collateral is or will become fixtures. If all security interests in all types of personal property, including property which is to become fixtures, must be recorded in the central registry it will not take long for everyone concerned to learn that this is the place to register all security interests or to search for all encumbrances regulated by the Act, particularly since a number of the pre-Act statutes follow this principle. If registration is made only in the central registry and it should happen that the collateral is to become fixtures, the security interest is perfected nevertheless and will entitle the secured party to whatever protection that type of registration merits. By contrast, under Article 9 a filing in the personal property registry would avail the secured party nothing since his security interest would remain unperfected. Under both Acts, however, a security interest in fixtures must be registered in the real property registry for protection against third parties of the type mentioned in section 36(3).

153 G. Gilmore, op. cit., footnote 1, pp. 517, 518; Coogan, Hogan and Vagts, op. cit., footnote 1, p. 1809. There is of course a considerable amount of law review literature on this subject.

A recent revision of part of Article 9 by the Permanent Editorial Board is directed toward the inadequacies of the 1962 Official Text of the Uniform Commercial Code with respect to perfection and priorities of security interests in goods which are or are to become fixtures. It is interesting to note that the perfection aspects of the revision are similar to the approach taken in the Act to the extent that a security interest in goods which are to become fixtures may be perfected by filing in the personal property registry. But the revision goes further by permitting perfection of a security interest in the fixtures themselves by registration in the personal property registry. It is submitted that this further step should also be taken in the Act to make it clear that once goods do in fact become fixtures, an earlier perfected security interest in the goods carries over to the fixtures' stage. This is important with respect to conflicting non-realty claimants, including a trustee in bankruptcy. The change could be made by adopting "fixtures" back into the definition of "goods". Fixtures would thus become "goods" for the purpose of perfection and priorities in a non-real-property context, but would continue to be governed by sections 53(2) and 36 with respect to real property claimants.

The registration system contemplated by the Act achieves the ultimate in effectiveness. It is unquestionably a vast improvement over any of the combinations offered by section 9-401 of the Code. Nevertheless, it must be remembered that a search pursuant to the Act will not insure the searcher that there are no outstanding encumbrances against the debtor's property, but only that there are none regulated by the Act. The searcher must also determine that there are no floating charges, section 88 security interests, outstanding bills of sale (unless central registration is ultimately provided for these), or other liens arising by operation of some other law, none of which will be registered in the registry provided by the Act. In addition there is the possibility that property removed into Ontario from another jurisdiction is subject to a security interest which is not registered pursuant to the Ontario Act. Thus, notwithstanding the great stride forward taken in the Act's system, the need yet besetting careful creditors and

158 Professor Gilmore's chapter on "Place of Filing Under Article 9" adequately attests to the weakness of the alternative proposals expounded therein. G. Gilmore, op. cit., footnote 1, p. 517. For formal acknowledgement of the inadequacies of the 1962 fixture filing requirements of Article 9, see Permanent Editorial Board for the Uniform Commercial Code, ibid.
purchasers to search numerous other places indicates that there remains considerable room for improvement in the place-of-registration aspect of Canada's chattel security law.

IV. Exemptions from Registration—Automatic Perfection.

A. Pre-Act Law.

Several provinces exempt certain sellers of manufactured goods from registering a conditional sale agreement where the name of the seller is plainly affixed to the goods and the seller maintains an office in the province at which further information regarding ownership of the goods may be obtained.\(^{157}\) Alberta and Ontario allow this method of perfection in the case of any seller of manufactured goods.\(^{158}\) Manitoba and Newfoundland appear to limit marking to manufacturers only.\(^{159}\) Manufacturers and wholesalers may mark the goods under Saskatchewan law, but the transactions in which marking is authorized are restricted to manufactured goods sold "to a buyer for resale in the ordinary course of business".\(^{160}\) Most of the provinces make this system of perfection an optional alternative to registration. Manitoba, however, not only has no optional registration, but has no system of registration whatever.

In Ontario a conditional sale of "household furniture other than pianos, organs and other musical instruments" is also exempt from the registration, and not even marking is required.\(^{161}\) This exemption extends to retail as well as wholesale and manufacturer sales.

B. Exemptions Under the Act.

Article 9 exempts from the filing requirement any possessory security interest, a nonpossessory purchase-money security interest in consumer goods and farm equipment, a security interest in accounts receivable and contract rights representing less than "a significant part of the outstanding accounts or contract rights of the assignor", and a temporarily perfected security interest in instruments or documents.\(^{162}\) Security interests taken in these kinds of collateral are automatically perfected the moment they attach.

\(^{157}\) R.S.A., 1955, c. 54, ss 11, 12; R.S.M., 1954, c. 144, s. 2; R.S.N., 1952, bill 62, s. 5(1)(2); R.S.O., 1960, c. 61, s. 2(5) (household furniture other than pianos excluded).

\(^{158}\) R.S.A., 1955, c. 54, s. 11; R.S.O., 1960, c. 61, s. 2(5).

\(^{159}\) R.S.M., 1954, c. 144, s. 2; R.S.N., 1952, bill 62, s. 5.

\(^{160}\) R.S.S., 1965, c. 393, s. 5(7).

\(^{161}\) R.S.O., 1960, c. 61, s. 2(5).

\(^{162}\) U.C.C., s. 9-302.
The Act in section 24, like Article 9, exempts possessory security interests from the necessity of registration, but the concept of automatic perfection, or "perfection by attachment" is rejected. Even in the case of temporary perfection of a nonpossessory security interest in instruments and documents, the security interest must first have been "perfected", that is, possession taken or a registration made prior to the relinquishment of the collateral to the debtor for any of the various purposes mentioned in section 26, as a condition to the temporary perfection. In only one instance may perfection of a nonpossessory security interest be had indefinitely without registration and this is where a secured party succeeds to a previously perfected security interest by assignment under section 23; this is not really an example of perfection by attachment, however, since the assignor's registration has already put something on record for the benefit of third parties. Security interests regulated by other provincial or federal legislation are of course also exempt from the Act's registration requirements, the most notable of which are the floating lien regulated by the Corporation Securities Registration Act and section 88 security interests arising under the Bank Act.

The Act is consistent with Article 9 in requiring manufacturers and wholesalers to comply with the registration requirements in perfecting a nonpossessory security interest, whether purchase-money or otherwise. It is hardly surprising that the anachronistic principle of perfection by marking has not been perpetuated by the Act. None of the statutes authorizing this mode of perfection requires anything more than that the name and address of the party claiming an interest be inscribed plainly on the goods. The inscription need not even state that the named party is the owner or claimant of some interest in the goods. Where only the minimal requirement is met, the information given is at best equivocal, if it can be found at all, so that this method of perfection is almost tantamount to validating a secret lien. Moreover the prospective creditors of and purchasers from an owner in possession of collateral marked in this fashion would normally be the very class of parties who would benefit most from public notice via registration if such were required. Under these circumstances it is obviously inequitable to deny such parties the reasonable opportunity to discover outstanding security interests which is afforded by requiring registration.

163 With respect to current registration practices of wholesale financers, see supra, footnote 22.
Consumer goods

It does not follow, however, that all classes of third parties will consult and rely upon information contained in registration records to the same degree, and the question therefore arises whether it is realistic to require registration to perfect a security interest in all kinds of collateral and credit transactions, especially if the registrations would be very large in volume and expensive and the likelihood of their being consulted by third parties very small. Article 9, as indicated earlier, has answered this question in the negative with respect to certain kinds of secured financing, including notably purchase-money security interests in consumer goods. The basic philosophy of Article 9 on this point seems preferable to the position taken by the Act since it is more in line with Canadian commercial practices and needs, although the particular manner in which the policy has been implemented by Article 9 could be improved upon. The basis for exempting consumer credit transactions is that in practice no one looks at the records of security interests created thereby even where registrations are required. It is well known that those who extend consumer credit (except where motor vehicles and mobile homes are involved), such as department stores, finance companies, and banks, are not nearly so much interested in consumer goods as security as in the earning capacity and prospects of the consumer debtor, including in particular his ability to liquidate the debt incurred. Normally a credit check will reveal everything a credit seller or lender wants to know about the prospective borrower or purchaser. Thus, except to the extent that registration records may be used by credit bureaus in compiling their data (quaere, whether this is an indispensable source of required information), they are of no interest to consumer financers. On the other hand, prospective purchasers of secondhand consumer goods (again with the exception of automobiles and house trailers) normally do not consult the registration records when buying from a neighbor or through the classified "ads", or even when taking a trade-in on a new unit, and no one would expect them to. Since the only possible justification that can be made for requiring registration is that it makes information accessible to those parties who are likely to use it, there is clearly no reason to require it in those phases of consumer financing where the information will not be used. On the other hand, we may not want to protect all habitually "careless" people and thereby institutionalize and perpetuate bad practices. Accordingly an appropriate registration requirement
with respect to consumer goods is not easily articulated.

Thus, if it is once concluded that registration is a useless requirement with respect to security interests taken in consumer goods, there remains the problem of defining the precise areas in which registration should not be required and the question of who should bear the risk of loss where a third party buys the collateral or makes a loan against it without knowledge of an outstanding security interest—that is, the secured party who ought not to be compelled to do a useless act, or the third party who would not look at the information even if it were there. Since there are no certificate of title statutes to govern the transfer of interests in motor vehicles in Canada, and since motor vehicles have the rare characteristic of retaining a substantial trade-in value after use, special consideration should be given to these consumer goods. This would also apply to mobile homes and perhaps other items. The answer ultimately must be an arbitrary one, but a balancing of the equities permits a more reasonable registration rule and division of the risks than now exist in the Act, as is substantially illustrated by the provisions of Article 9. An equitable and realistic approach in terms of commercial practices and needs would be to permit perfection of a security interest in consumer goods by attachment and to give it priority over lien creditors and subsequent secured parties, but to allow certain buyers without knowledge to take free of the security interest. Dealer-buyers taking secondhand goods as trade-ins on new merchandise normally do not search the registration record, but there appears to be no equity in favor of giving dealers greater protection than the secured party in these circumstances, and on balance it would seem preferable to subordinate them to a secured party's claim. There would appear to be even less reason to give priority to one who makes non-purchase-money loans against such goods. A more difficult question is whether a secured party ought to prevail over a consumer-buyer where a registration is

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165 Consider a somewhat similar policy expressed in the Uniform Conditional Sales Act, s. 12, and the Ontario Conditional Sales Act, R.S.O., 1960, c. 61, s. 5(1), wherein subsequent mortgagees are not protected if there is a failure to file a renewal statement, whereas subsequent purchasers are. See also the application of the Sale of Goods Act (1893), 56 & 57 Vict., c. 71, s. 25(2), to priority problems of this kind.

166 This view is consistent with pre-Act law and that of the Law Reform
made prior to the secondhand sale. It is submitted, however, that the secured party should prevail in this instance. To protect a buyer from all forms and extremes of his own improvidence is not only to encourage greater irresponsibility but to insult his intelligence. Moreover there is nothing further the secured party may reasonably do to give third parties notice of his interest but there is something the buyer can do to protect himself, even though he may be disinclined to do it. These policies may be implemented by adding to section 25(2):

(c) a purchase-money security interest in consumer goods other than motor vehicles and mobile homes [optional: in consumer goods under the value of $500.00];

and by inserting the following provision after section 30(1):

(2) In the case of consumer goods other than motor vehicles and mobile homes [optional: or consumer goods under the value of $500.00] a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has registered a security agreement, notice of intention, or caution.

It will be noted that under the section 25(2)(c) proposal a distinction is drawn between purchase-money and non-purchase-money security interests, as there is under Article 9. There seems to be little reason to give encouragement to non-purchase-money lenders on consumer goods; accordingly a registration requirement would remain with respect to such parties. Under pre-Act law where registration requirements have been in force neither sellers nor purchase-money consumer lenders have complied with the requirements in practice since it is more expensive to do than to suffer the occasional loss. Perfection by attachment is therefore accorded to these parties although, as will be seen, it is of a low order—again, motor vehicles and mobile homes excepted. The section 25(2)(c) proposal should be considered in the light of section 22(3) under which even purchase-money security interests in motor vehicles and mobile homes are protected by a ten-day grace period. Fraudulent conveyances become easier under a principle that exempts from registration, but this has not presented a problem under the corresponding provisions of Article 9, (perhaps because it is fairly difficult to dress up fraudulent transfers


167 *Cf. U.C.C.*, s. 9-307(2).

168 *U.C.C.*, s. 9-302,
to look like purchase-money transfers),¹⁶⁹ and there is no reason to believe it would in Canada.

Under the section 30(2) proposal a consumer-buyer without knowledge of the security interest, except in the case of motor vehicles and mobile homes (or consumer goods over the value of $500.00), would prevail over the holder of a perfected security interest in consumer goods perfected only by attachment. However, a secured party who is willing to bear the cost of registration would prevail over a consumer-buyer if he complies with the registration requirements before the secondhand sale. A creditor, subsequent secured lender, lien creditor (including a trustee in bankruptcy)¹⁷⁰ and non-consumer-buyer would not prevail over a security interest in consumer goods perfected only by attachment. Since a security interest in motor vehicles and mobile homes may not be perfected by attachment, the latter parties would prevail over the secured party holding an unregistered security interest in these goods. Thus under the proposal the priorities as between the secured party and a consumer-buyer would remain substantially the same as under the current version of the Act, while a more economic, rational, and equitable registration and priority policy would be provided, it is submitted, with respect to third parties not deserving the same consideration as a bona fide purchaser or purchase-money lender in the case of consumer goods other than motor vehicles and mobile homes.

V. Duration of Registration and Renewal.

Most statutes provide that after the expiration or lapse of a specific time registration ceases to be valid as against various third parties. If the period of validity is not specifically limited, by implication the original registration is valid indefinitely. If the period of validity is limited, the statute will provide for a renewal of the registration before the expiration of the prescribed period. Periods range from one to four years, with three years being the most common. The usual justification for limiting the duration of effectiveness is to establish a cut-off point beyond which searchers will not be required to go.

¹⁶⁹ U.C.C., s. 9-307(2).
¹⁷⁰ "Lien creditor" is defined in footnote 15 supra. Federal law removes from a bankrupt's estate for distribution to creditors "any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situate and within which the bankrupt resides". Bankruptcy Act, supra, footnote 14, s. 39(b). Exemption laws thus modify the impact of requirements that security interests be perfected as against lien creditors.
Under the chattel mortgage, conditional sales and assignment of book debts statutes, the renewal is effected, where it is required, by registering a "renewal statement" containing data regarding the original contract such as the names of the parties, the prior registration number, the date of registration, the district of registration if central filing is not in force, the amount due, whether the original agreement has been assigned, and finally the signature of the secured party is also required.

The chattel mortgage

Jurisdictions having the Uniform Act and British Columbia require any renewal to be effected before the expiration of three years from the date of the last registration.\(^\text{171}\) In Ontario a registration is valid for one year, and renewal is required within thirty days before the expiration of the year.\(^\text{172}\) In most jurisdictions a failure to renew within the prescribed time renders the bill of sale invalid or void as against creditors, subsequent purchasers and mortgagees;\(^\text{173}\) in British Columbia only creditors whose rights have crystallized and subsequent purchasers and mortgagees are protected.\(^\text{174}\) After a valid registration has lapsed, the Uniform Act permits a late renewal on reasonable excuse but it is "subject to rights of other persons accrued".\(^\text{175}\) Ontario also permits a late renewal, but it is subject only to the rights of intervening creditors of the mortgagor and subsequent purchasers and mortgagees.\(^\text{176}\) British Columbia protects only subsequent purchasers and mortgagees.\(^\text{177}\)

The conditional sale

A conditional sale is generally valid for three years following registration in subsequent renewals,\(^\text{178}\) and renewals may be made

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\(^{171}\) The Model Bills of Sale Act, s. 11(1)(7); S.B.C., 1961, c. 6, s. 12.


\(^{173}\) The Model Bills of Sale Act, s. 11(1)(7); R.S.O., 1960, c. 34, s. 24(1)(7).

\(^{174}\) S.B.C., 1961, c. 6, ss 12, 16.

\(^{175}\) The Model Bills of Sale Act, s. 21. It should also be noted that if the mortgagee takes possession of the property, assuming he has this right under the agreement and the particular circumstances, his rights are superior to those of third parties arising thereafter. By implication, The Model Bills of Sale Act, s. 14, and see Re Blackburn: Ex Parte Moffatt (1925), 5 C.B.R. 698, 28 O.W.N. 227; [1925] 2 D.L.R. 1206; McCabe v. Coste, [1922] 3 W.W.R. 465, 18 Alta L.R. 422, 70 D.L.R. 25 (C.A.).

\(^{176}\) R.S.O., 1960, c. 34, s. 24(11).

\(^{177}\) S.B.C., 1961, c. 6, s. 14.

\(^{178}\) The Model Conditional Sales Act, s. 12(1)(7); S.B.C., 1961, c.
any time before the expiration of this time. Ontario also validates
the conditional sale for three years following a registration or
renewal, but original and subsequent renewals are required within
thirty days before the expiration of the three-year period. If a
renewal statement is not filed, the conditional sale becomes invalid
as against creditors and subsequent purchasers in most jurisdic-
tions. British Columbia follows its usual format: where a regis-
tration or renewal has lapsed, the conditional sale is invalid as
against creditors whose rights have crystalized and as against
subsequent purchasers and mortgagees. Under the Uniform Act
a later renewal is subject to “the rights of other persons accrued”. In
Ontario a lapse renders the conditional vendor’s interest invalid
as against intervening “creditors of the purchasers and as against
subsequent purchasers”, while in British Columbia only subsequent
purchasers and mortgagees are protected.

Assignment of book debts

In jurisdictions having the Uniform Act a registration is valid
for three years and renewals are required within three years of the
last registration. A late renewal is permitted on proper grounds
but “subject to the rights of other persons accrued”. In British
Columbia and Ontario the problem of lapse does not arise be-
cause registrations are good for all time.

Expiration and renewal under the Act

The provisions pertaining to lapse and renewal are consider-
ably more simple and terse than their pre-Act counterparts. The
relevant sections are as follows:

52. A renewal statement in the prescribed form that is signed by the
secured party of record may be registered at any time.
53. (1) Where the collateral covered by a security agreement is other
than instruments, securities, letters of credit, advices of credit or
negotiable documents of title, registration under this Act,
(a) of a security agreement, notice of intention or caution constitutes
notice thereof to all persons claiming any interest in such collateral
during the period of three years following such registration;

9, s. 8. The original registration in Saskatchewan is valid for four years.
R.S.S., 1965, c. 393, s. 13(1).
179 R.S.O., 1960, c. 61, s. 5(1) & (3).
180 The Model Conditional Sales Act, s. 12; R.S.O., 1960, c. 61, s. 5.
181 S.B.C., 1965, c. 9, s. 15.
182 The Model Conditional Sales Act, s. 19.
183 S.B.C., 1965, c. 9, s. 10; R.S.O., 1965, c. 61, s. 5(5).
184 The Model Assignment of Book Debts Act, s. 7.
185 Ibid., s. 15.
(b) of a renewal statement constitutes notice of the security agreement, notice of intention or caution to which it relates to all persons claiming any interest in such collateral during the period of three years following such registration; and

c) of any other document constitutes notice thereof to all persons claiming any interest in such collateral during the remainder of the period for which the registration of the security agreement, notice of intention or caution is effective.186

Section 53 appears to say and has been construed to mean that a registration is valid for only three years.187 If this is accurate, section 52 would appear to permit a renewal either before or after the expiration of the three years. The form of the renewal will be prescribed pursuant to section 70.

Unfortunately the provisions fail to cover several important points relative to lapse and thereby engender confusion when the rights of various parties are considered. To begin with, section 53 says that a registration is effective for the purpose of giving notice for a period of three years. A fair inference is that on the expiration of three years a registration no longer constitutes notice, but nothing indicates that the registration itself becomes ineffective. This is important because a valid distinction can be made between registration and registration for the purpose of giving notice. The approach taken may have been sufficient under pre-Act statutes but it is not under the Act since in only one instance is notice via registration significant in determining the relative priorities of parties under the Act.188 In all other cases the rights of parties are determined without regard to notice since, as indicated earlier, the Act provides a self-contained structure of priorities which are not dependent on notice for their application, but rather upon whether a security interest has been perfected, the time and manner of perfection, whether by registration or by possession, the nature of the debtor, the secured party, the type of interest, the nature of the third party, and so on.189 It is true that the scheme of priorities has been founded on the proposition that registration constitutes constructive notice in some instances, but the structure itself, once established, is in no way dependent for its application upon an express statement in the Act that registration constitutes

186 The Uniform Act creates an exception to the limitation period of section 53(1) with respect to security interests normally regulated by the Corporate Securities Registration Act, as follows: "(2) The time limits in subsections a, b, and c of subsection 1 shall not apply to corporate securities."

187 Priddle, op. cit., footnote 129.

188 The Personal Property Security Act, s. 37(2); cf. s. 40.

189 See, e.g., The Personal Property Security Act, ss 30, 35, 36.
notice, and this is why a similar statement does not appear in Article 9. But even if we were to assume that after three years the status of the security interest is affected in some way by the operation of section 53, just how it is to be affected is not made clear. The usual rule is that unless a statutory registration requirement is followed by an express statement that registration ceases to be valid after the expiration of a stated period of time, the registration is presumed to remain valid for all time. Thus, except in the case where the rights of the parties are said to turn on notice, the expiration of three years will not affect the perfected status of a security interest. Certainly this is not what was intended by the draftsmen.

To correct the ambiguities arising under the Act a provision of the following nature is required (it could be amalgamated with section 52):

(1) A registration ceases to be effective after the expiration of three years from the date of registration unless a renewal statement in the prescribed form is registered prior to the expiration;
(2) Upon expiration of the registration the security interest becomes unperfected with regard to rights which accrue thereafter;
(3) A renewal statement that is signed by the secured party of record may be registered at any time, and such registration will continue the effectiveness of a prior registration for another three years from the date of renewal.

The first two sentences prescribe the effective period of a registration, the conditions under which it will terminate, and the status of the security interest following expiration. None of these points are made clear by the Act. The italicized portion of the second sentence is based on the format of the 1952 Official Text of the Uniform Commercial Code which was omitted from the 1956 Text, probably by error. The 1956 Text (also the current version of section 9-403(2)) states, "Upon such lapse the security interest becomes unperfected". The 1952 version is preferable for several reasons: (1) it ensures a reasonable solution to the problem of circularity created by section 9-403(2); (2) it resolves with certainty and equity a number of priority problems which are left to speculation under section 9-403(2); and (3) it is substantially in accord with the approach taken by pre-Act law.

Consider, for example, the practice in British Columbia and Ontario with respect to the assignment of book debts.

If the Act were designed to include security interests now covered by the Corporation Securities Registration Act, as it should be, a longer period of effectiveness of the registration should be provided for long-term corporate obligations. For the approach of the Uniform Act, see footnote 186 supra.

The circular problem created by an application of the principle in section 9-403(2) and its resolution under the above proposal may be illustrated as follows. Suppose that A and B each claim a non-purchase-money security interest in debtor’s collateral and both have perfected by registration, with A having registered first. Under section 35 of the Act, A’s security interest, being registered first, has priority. Suppose further that A fails to renew his registration after three years and that the debtor goes into bankruptcy shortly thereafter with the obligations to A and B still unpaid. There is not enough money in the debtor’s estate to pay off B, the junior secured party. Is the trustee in bankruptcy entitled to receive anything? This depends on whether the junior party, B, is to be promoted to the position of a first encumbrancer in A’s stead. Under section 9-403(2) (“upon . . . lapse the security interest becomes unperfected”) there is considerable justification for drawing the inference that B should be advanced to the position formerly held by the first encumbrancer, A. Not only would this be inequitable, because of the constructive notice B was deemed to have during the effective period, but it creates a circular problem: the trustee prevails over the senior security interest under section 22; the junior interest appears to prevail over the senior interest under section 9-403(2); and in turn the junior interests prevail over the trustee in bankruptcy. Thus it is clearly debatable whether the trustee in bankruptcy or the junior secured party should get the money. Under the above proposal the trustee in bankruptcy not only prevails over the senior secured party since his rights “accrue[d] thereafter”, but also over the junior party whose rights remain subordinate to the senior party because they did not “accrue thereafter”. The solution under the proposal is equitable because B never had any reasonable expectation that he would have the advantage of a senior encumbrancer so long as the senior party’s debt remained unpaid.

With regard to the priority problems arising under the section 9-403(2) version there is also considerable uncertainty about the rights a secured party has against: (a) a pre-lapse creditor who knows the registration has expired, but does not have actual knowledge the security interest remains unpaid, and (b) the rights of a pre-lapse creditor who does not know of an expired registration, but who is deemed to have constructive notice of the security interest. Under the proposal these questions are clearly and

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1969] Perfection by Registration 487

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193 *Cf.* U.C.C., s. 9-301.

equitably resolved: neither creditor would prevail since only parties arising after the expiration have any hope of defeating a secured party whose registration has expired. It will be noted that the special priority rule contained in the proposal displaces the general rules of section 22 with respect to rights accruing prior to the expiration.

The last sentence of the proposal is a repeat of section 52 with a slight addition for clarification. The erroneous implication arising under section 9-403(3) that only a timely renewal will preserve the original filing is eliminated. Under the proposal the registration of a renewal statement continues the perfected status of a security interest if the prior registration has not expired, or reperfects the security interest from the moment of registration if it has. The rights of parties arising between expiration of the registration and the time of renewal will be governed by the rules of section 22 which sets out the interests that prevail over an unperfected security interest.

An application to the court for permission to register a renewal statement after a previous registration has lapsed, as under prior statutes, would not be required.

**Conclusion**

This study has not been concerned with the issue of whether the Act is more desirable than the uncohesive conglomerate of chattel security law it supersedes. There is little question that the integrated and logical framework of the Act represents a vast improvement over pre-Act law. Rather, the inquiry has been whether a law superior to the Act might be produced. In the thirteen sections of the Act that have been examined, we have noted eleven material ambiguities, three material omissions, and seven recommendations for improvement, and of course these observations pertain only to the provisions related to perfection. One point is clear: if the entire Ontario Act is allowed to become effective in its present form the venerable canon of construction for ambiguous statutes will be in great demand. At the other end of the scale, the preceding pages acknowledge six improvements on Article 9. This

185 Speaking of the task of a judge in construing a statute containing ambiguities or omissions, Denning L.J. has said: "He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. . . . Put into a homely metaphor it is this: A judge should ask himself the question how, if the makers of the Act had themselves come across this
is not a tally on the proposed Uniform Personal Property Security Act which makes a number of improvements on the Ontario Act, but which also introduces some questionable elements of its own.

A comment on the drafting policies and style of the Act would seem to be in order since virtually nothing has been said on the subject to this point, and yet these considerations are inseparable from the substantive provisions themselves. A rejection of uniformity with Article 9 was an obvious drafting policy, as was the intent to improve on Article 9 where possible. Beyond these general observations it is difficult to determine what guidelines the draftsmen followed in departing from the format of Article 9. Being different can of course be a mark of originality and creativity, but the decision to rewrite Article 9 even where no substantive changes were intended has resulted in many awkwardly written provisions, numerous ambiguities of the type pointed out in this study, and an occasional nonsensical provision. A brief illustration of the drafting approach may be of interest. To start with a rather innocuous example, it may be pointed out that Article 9 is written substantially in the present tense. The draftsmen of the Act prefer the past tense, but then for no apparent reason other than perhaps inadvertence, they inconsistently return to the present tense. Certain phraseology of Article 9 was apparently objectionable, for instance, the particularization of "sale, exchange or other disposition thereof" of section 9-306(2) and section 9-504(1) is replaced with "is dealt with" in section 27(1) of the Act and "dispose of" in section 58. Then, as if the draftsmen had forgotten they did not like to particularize, the phraseology "disposed of the collateral by sale or exchange or contracted for such disposition" turns up in section 61. The corresponding section of Article 9 in this instance is less particularized. On the whole the draftsmen prefer to divide a section of Article 9 into further subdivisions, but again there is no consistency.

196 See the priority rules in particular, e.g., s. 34(1).
197 E.g., s. 36(4).
198 S. 9-506: "disposed of the collateral or entered into a contract for its disposition". See also the particularity of section 26 of the Act.
199 E.g., cf. s. 12 of the Act with s. 9-204; and s. 26 with s. 9-304.
200 E.g., s. 37 on accessions where the counterpart to section 9-314 (1) & (2) are consolidated into subsection (1) of s. 37, which in turn is inconsistent with the approach taken in the parallel provision on fixtures, s. 36, with the unfortunate result that the statement in s. 37(2) which refers back to s. 37(1) is too broad, and the reader is sent on a hunting ex-
uses “consideration”, and section 1(s)(ii) “value”, to replace “new value” in Article 9. The question arises whether something different was intended. Then there are sections 29 and 32, which deal with priorities and thus are outside the immediate scope of this article but which are nevertheless relevant to the subject of drafting style. The Article 9 section 306(5) version of section 29 is not as clear as it could be, but section 29 manages to increase its obscurity, and section 32 almost defies explanation, suggesting, perhaps, that the draftsmen were unduly impressed with the aphorism that the beauty of a mystery lies in its inability to be understood.

The foregoing pages reveal that most, if not all, of the ambiguities and omissions in the provisions on perfection (and the same is true of many other sections of the Act) result from the basic decision of its sponsors to abandon the policy of uniformity with Article 9. This decision, coupled with the apparent policy of the committee on the Uniform Personal Property Security Act to follow the new wine in old bottles approach, will no doubt haunt the field of chattel security financing in Canada for years to come. It is submitted that a superior product would result from a clean break with the Ontario Act and a return to the format of Article 9, implementing of course the improvements on Article 9 uncovered by the Ontario experience and by the committee on the Uniform Act, eliminating other imperfections of Article 9, making the changes necessary to adapt to Canadian law, but on the whole adhering to the policy of uniformity with Article 9. It may be true that Ontario would never buy such a change, but the alternative is to come up with something Ontario will accept which, it would appear, must not be too different from what it already has. This predicament would seem to place too many constraints on the committee to permit the development of an ideal Uniform Act. On the other hand, if it should be that Ontario is disposed to go

petition to determine whether s. 37(2) is intended to refer to s. 37(1)(a) as well as s. 37(1)(b). It is not, but this is not clear from the structure of the subsection.

S. 9-312(2) and cf. s. 1-201.

In explaining to an American audience on one occasion why the Catzman Committee departed from the Article 9 format in drafting the Act, Mr. Catzman said: “Our statutes in Ontario are traditionally drafted in terse, concise and precise terms. Your Code [speaking of the U.C.C.] is endowed with readable prose and explanatory comments. . . . We recognize the risk of translating American English into Canadian English—you always lose something in translation.” Catzman, supra, op. cit., footnote 58, at p. 210. Perhaps Mr. Catzman prophesied better than he knew; one wonders if the above illustrations are exemplary of the “Canadian English” Mr. Catzman had in mind.
along with a drastically improved version of its own statute, the question still remains, then why not uniformity with Article 9?