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Remedies on Default Under the Proposed Uniform Commercial Code as Compared to Remedies Under Conditional Sales

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COMMENTS

REMEDIES ON DEFAULT UNDER THE PROPOSED UNIFORM COMMERCIAL CODE AS COMPARED TO REMEDIES UNDER CONDITIONAL SALES

Since the official draft of the Uniform Commercial Code was completed and published in 1952, there has been considerable discussion and criticism of the various Articles in the Code. The first state to adopt it has been Pennsylvania; it became effective there in July, 1954. California, Connecticut, Massachusetts, New Hampshire, Texas, and New York have been considering its adoption.¹

Because of the increased interest in the Code, and the fact that many of the proposed changes would present an entirely new law for attorneys to consider, this comment will analyze one of the provisions of the Code that will be of considerable importance to the practitioner. Article 9, Section Five, pertaining to defaults on secured transactions will be taken section by section to determine what changes in existing conditional sales law they will make if adopted.

However, before delving into this subject, it might be well to first consider some of the broad principles and basic ideas underlying Article 9, in which these Sections are contained.

Article 9 proposes to integrate, under a single system of legal propositions and a single system of terminology, the entire range of transactions in which money debts are secured by personal property. The Code recognizes the essential uniformity of credit transactions. The various devices in present use, such as the conditional sale contract, chattel mortgage, trust receipt, bailment-lease, and pledge, are all different in form, but have essentially the same broad purpose, to secure a money debt. The authors of the Code felt that there was no logic in having transactions, basically similar in substance, although different in form, result in different legal conclusions. Under Article 9 all differences in form and technical distinctions are immaterial. However, this is not to say that there are no distinctions; only those that had no basis in reason or substance are to be done away with. The Code still recognizes that there are valid differences between types of collateral and persons involved in security transactions, and has provided for them. Security transactions are differentiated with reference to the status of the person whose property secures the debt, that is, whether consumer or seller of goods, and with reference to the kind of property put up as collateral. The type of property used as collateral is further subdivided into consumer goods;² farm products;³

² Article 9, Section 9-109(1), Uniform Commercial Code.
³ Supra, note 2, Section 9-109(4).
or property used in business, which is subclassified, depending on whether held for use in business (equipment), or for sale (inventory), or represents the proceeds of the sale of inventory.

Because it is felt that security transactions are fundamentally the same, and that there should be the same requirements and consequences between immediate parties and third parties regardless of the form of the transaction, does not mean that old documents are to be disregarded and discarded. The old forms may still be used, but the substance of the transaction would be the controlling factor. Thus, the old form of conditional sales contract will not disappear, primarily because of the inertia inherent in the discarding of the old, familiar forms, but the transaction will have applied to it the rules of Article 9, rather than the present rules of law governing conditional sales.

Another policy behind Article 9 is aptly stated by one of the members of the committee engaged in the writing of the Article.

"...the policy ... is to encourage the maximum realization on the collateral by the secured party in the interest of both himself and the debtor." p.353

Before proceeding into the law of default under the Code, it should be noted that all Sections cited or quoted are from the 1952 Official Draft of Text and Comments of the Uniform Commercial Code, as amended in 1954 and published in Supplement No. 1 to the 1952 Official Draft. All Comments to the Sections cited or quoted are from the 1952 Draft, unless stated to be from the 1954 Supplement.

**SECTION 9-501**

Section 9-501 is entitled as an index of rights on default. The interesting thing to take note of is that the remedies are cumulative. Subsection (1) states,

"When a debtor is in default under the security agreement a secured party may reduce his claim to judgment. If the collateral is accounts, general intangibles, chattel paper, contract.

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4 Supra, note 2, Section 9-109(3).
5 Supra, note 2, Section 9-109(5).
6 Supra, note 2, Section 9-106, 9-105(1)(c).
8 Account means a right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. §9-105.
9 General intangibles is defined as intangibles which are or evidence rights in personalty and which are neither accounts or contract rights, nor chattel paper, documents or instruments. §9-106.
10 Chattel paper is defined as a writing which evidences either a security interest in or a lease of specific consumer goods or specific equipment. When a transaction is evidenced both by chattel paper and by an instrument or series of instruments, the group of writings taken together constitutes chattel paper. §9-105(1)(b).
rights, or instruments, he may in addition proceed under either Section 9-504 (pertaining to secured party's right to dispose of collateral after default) or Section 9-502 (rights of assignee when assignor defaults) or both. If the collateral is documents, he may in addition proceed under Section 9-504 either as to the documents or as to the goods covered thereby. If the collateral is goods, he may in addition do one or more of the following (except that he cannot accept the collateral in discharge of the obligation under Section 9-505 and also recover a deficiency under Section 9-504): (italics added)

(a) foreclose the security interest by any available judicial procedure;
(b) take possession of the collateral under Section 9-503;
(c) prepare or process the collateral for disposition as provided in Section 9-504;
(d) sell and recover a deficiency as provided in Section 9-504;
(e) accept the collateral in discharge of the obligation as provided in Section 9-505.

Apparently, then, under the Code the problem of election of remedies is not as acute as under existing law. The secured party, presumably, could not recover more than once, as this would be contrary to the inherent nature of justice, and would hardly seem to be within either the spirit or the letter of any law that was sincerely and conscientiously devised. However, the secured party is not under the constant threat of tying his hands by proceeding in one manner, discovering it will be unsuccessful, and then learning that he has elected one path to recovery and is barred from others, without, at the time he made the "election", realizing he was making one, or that he was barring himself from other means of recovery.

In those states which have not adopted the Uniform Conditional Sales Act it has been held, in the absence of statute, that the seller's remedies of retaking the property and bringing an action for the purchase price are inconsistent. Thus, the pursuit of one remedy is a bar to the other. A secured party in such a state would have his

11 Contract right means any right to payment under a contract not yet earned by performance and not evidenced by any instrument or chattel paper. §9-106.
12 An instrument is defined as a negotiable instrument (defined in §3-104) or a security (defined in §8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment. §9-105(1)(g).
13 To constitute an election of remedies, the remedies available to the seller must be inconsistent and proceed upon irreconcilable claims of right. To determine whether coexistent remedies are inconsistent, the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings should be considered, and if the allegations of fact necessary to support one remedy are substantially inconsistent with those necessary to support the other, then the adoption of one remedy waives the other. 47 AM. JUR., Sales §§996.
14 "It is an election between inconsistent substantive legal relations, that is, between a contract and no contract." Washington Cooperative Chick Association
position considerably improved by the adoption of the Code when a judgment he has obtained proves to be uncollectible, or he, for one reason or another decides not to prosecute the action to final judgment.

However, there are a number of states that have held that the two remedies are not inconsistent, and it might be added that the trend of recent decisions is toward this view. Also, the position of the Conditional Sales Act is that the remedies are not inconsistent, until the entire purchase price has been recovered. Hence, in these states the adoption of the Code would not result in a change of the law in relation to actions for the purchase price and repossession, either before bringing the action, or subsequent thereto.

The next problem to consider is what is the effect of an attachment of the goods, or a levy upon them, by the seller-creditor. The Uniform Conditional Sales Act provides that the seller loses his right to retake possession of the goods when he attaches them or levies on them. Those states that have not adopted the Uniform Conditional Sales Act arrive at the same result.

There is nothing in Section 9-501 which directly covers this question. However, the reasoning of the courts presently is that the attachment or levy is an act evincing a passage of title to the buyer, and thus the seller may no longer repossess. As stated in the Code and in the Comments by the reporter,

“Every provision with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor.”

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v. Jacobs, 42 Wash.2d 460, 256 P.2d 294 (1953); 47 A.M. JUR., Sales, §§896 and 945; Generally, the reason given to support the rule is that repossession is an assertion of title in the seller, and an action for the price is treating the sale as absolute and vesting title in the buyer.

15 It would appear from the words, in addition, following the specification of the right to reduce the claim to judgment in §9-501 that the seller does not make an election until he has satisfied the judgment.

16 47 A.M. JUR., supra, note 13; 113 A.L.R. 653.

17 Uniform Conditional Sales Act, Section 24; Wis. Stats. (1953) §122.24; “It is clearly the contemplation of the Conditional Sales Law that the conditional vendor may bring an action for the recovery of the purchase price and later retake possession . . .” Allis-Chalmers Mfg. Co. v. Nein, 64 S.D. 235, 266 N.W. 156 (1936).

18 Uniform Conditional Sales Act, Section 24.

19 In states holding that a bringing of a suit for the price is an election, it would obviously follow that an attachment or levy would have the same result. See note 13. The reason for the rule generally given is that one cannot levy or attach his own property, thus, taking such steps operates as a waiver of seller's reservation of title and acknowledges title in the buyer. “It is held, even in jurisdictions adhering to the rule that an action for the purchase prices does not waive a right of repossession, that an attachment or levy of execution upon the property as that of the vendee is such an election to treat title as having passed as will prevent the subsequent reclamation of the property.” 47 A.M. JUR., Sales, §945; 3 WILLISTON, SALES, §571 (1948).

20 Supra, notes 13 and 18.

The parties are free to contract as they desire in regard to who shall have title, and the form of the agreement will not control. The Code does not try to define whether the secured party is the legal owner, or whether the transaction gives a security interest. Thus, as title is not a determining factor in the remedies available, and the purpose of the Code is to do away with technical distinctions, it would appear that attachment or levy would not constitute an election, as the seller and buyer have prior to this determined who has title to the goods and the attachment or levy would not change this.

The Conditional Sales Act further provides that the seller waives his right of retaking after he has claimed a lien upon the goods. There is a conflict as to whether the mere filing of a claim for a lien, either without attempting to enforce it, or attempting to enforce it unsuccessfully, or attempting to enforce it and either having the suit dismissed or withdrawn is an election. Some courts hold that it is an election and bar the seller from his other remedies. Other courts hold that there is no election until there is a foreclosure of the lien and judgment is recovered.

The same split of authority exists in the states that have not adopted the Uniform Act. According to one line of authorities, the mere attempt to enforce a lien is a waiver, while others hold that only attempting to enforce is not sufficient to constitute a waiver.

Again the Code contains no specific mention of the problem, but as title is not the basis on which the remedies lie, and the purpose is to protect both creditor and debtor, it would appear that at least the mere filing of a lien would not bar the secured party from retaking possession, and it is probable that his other remedies would be barred only after the foreclosure of the lien.

At present some jurisdictions hold that there is an election of remedies when the conditional seller, either before or after default,
transfers purchase-money notes to a third party, even if only as a security. These courts find that such a transaction indicates an intention to hold the buyer personally bound as a debtor owing the purchase price, and to treat the contract as an absolute sale.\(^{33}\)

Under the Commercial Code this would appear to be an immaterial event. As the parties are free to determine the location of title,\(^{34}\) and will do so either expressly or by implication, the transfer of notes has no significance. Whether or not the seller lost his remedies would depend on whether he was using the notes as security on a loan that he made, or whether he was selling his full interest (whatever that might be according to the contract) to another.

It has also been held that if the seller takes a new note for the amount of the price remaining unpaid, he has acted so as to vest title in the buyer, unless it contains an express reservation of title. There is a dissent from this view, however, by a minority of the courts.\(^{35}\) Interpretation of such a transaction under the Code would probably be that the seller was merely extending the time of payment.\(^{36}\)

Because of the emphasis on title, it has been almost universally held that the taking of a chattel mortgage on the same property covered by a conditional sale contract is a waiver of the reserved title under the contract. From this viewpoint there is a necessary inconsistency and it is inherently impossible for the two security devices to stand together.\(^{37}\) By removing the question of title, as the Code does, and looking to the substance of the transaction, it would appear that under the Code there would be no election. This would be interpreted as the taking of additional security for the purchase price.\(^{38}\)

Thus, it would seem that many of the problems now facing the conditional seller when his buyer defaults would be eliminated by the removal of the concept of title as the basis on which the remedies lie, and recognizing the real basis of the remedies, as is stated in the Comment to Section 9-501,

> "The rights of the secured party in the collateral after the debtor's default are of the essence of a security transaction."

Subsection (3) of Section 9-501 provides that the rights enumerated in the previous subsections are not all of those available to the seller; hence, the buyer and the seller may work out any arrange-

\(^{33}\) 47 AM. JUR., Sales, §971; 55 A.L.R. 1161.

\(^{34}\) Supra, notes 20, 21, 22, and 31.

\(^{35}\) 47 AM. JUR., Sales, §972; 55 A.L.R. 1160.

\(^{36}\) This would probably be the interpretation in view of the fact that the policy of the Code is to give the seller more leeway without prejudicing the buyer, and the fact that this is the majority view at present.

\(^{37}\) 47 AM. JUR., Sales, §974; 95 A.L.R. 333.

\(^{38}\) The present law is that the mere taking of additional security, unless a chattel mortgage covering the same goods conditionally sold, is not a waiver of the reserved title. 47 AM. JUR., Sales, §973.
ment agreeable to them, with the proviso that the rights and duties specified in Section 9-501 may only be waived or varied as provided in the other Sections of the Secured Transactions Part. 39

Subsection (4) permits a secured party to proceed either under the law relating to foreclosure of real estate mortgages, or under the law as provided in Section 9-501, if the security agreement covers both real and personal property. As conditional sales contracts do not often cover anything other than personal property, it is sufficient to state for the purpose of this comment, that this provides a simplified and faster remedy where the collateral is both real and personal property. 40

SECTION 9-502

This Section does not come within the scope of this comment as it concerns the rights of an assignee of accounts, chattel paper, contract rights, or instruments held as collateral when the assignor defaults on the obligation secured by these items. The Section contemplates defaults in accounts receivable financing, the use of paper as security for loans, and transactions of a similar nature. The sale of goods with title reserved in the seller is not within its scope, although the assignee of a conditional sale contract when the conditional seller assigns it to secure a loan he makes, and then he defaults, would be covered. It does not include the assignee of the conditional sale contract who takes the contract not as collateral for a loan to the seller, but who buys the contract and steps into the shoes of the seller. The assignee's rights are then the same as those of the seller when the buyer defaults. 41

SECTION 9-503

In this provision 42 the rights of the secured party to take possession after default are detailed.

The first sentence provides the right to take possession of the collateral, unless the parties have otherwise agreed. 43

39 Throughout the other parts of the Code the policy is to allow matters which come up between immediate parties to be varied by agreement, but because of the possibility of a creditor taking advantage of a necessitous debtor, §9-501 adopts a fairly strict attitude on agreements which tend to cut down the rights of the debtor after default, or which frees the creditor of duties. §9-501, Comment 4; infra, notes 43, 64, and 80.
40 U.C.C. §9-501, Comment 5.
41 U.C.C. §3-201 (Article 3, Commercial Paper).
42 (1) Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place reasonably convenient to both parties. Without removal a secured party may render the equipment useless and may dispose of collateral on the debtor's premises under Section 9-504.
(2) If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.
43 This is one instance where the rights of the seller may be varied by agreement of the parties.
Under existing law in those states not having the Conditional Sales Act is it uniformly held that the vendor has the right to retake the property on default of the conditional buyer. This is the rule even though not expressly provided for in the contract, as it is implied by the form of the contract.\footnote{44}

The Uniform Conditional Sales Act has a very similar provision\footnote{46} giving the conditional seller the right to retake possession.

However, under existing law there are particular circumstances which affect the right to repossess. If the seller is a foreign corporation which has not complied with the statutory provisions prescribing the terms upon which it may do business, it may find that it is unable to repossess the property.\footnote{46}

Another circumstance which may affect the right of the seller to repossess possession is that the sale was to a municipal corporation. Under certain conditions there would be no right to repossess.\footnote{47}

A third situation affecting the right to repossession is where the sale is to a buyer who intends to use the property in an illegal manner.\footnote{48}

\footnote{44} 47 Am. Jur., Sales, §942; 174 A.L.R. 1363.
\footnote{45} U.C.S.A. §16; Wis. Stats. (1953) §122.16.
\footnote{46} Some statutes expressly void the contracts as to the foreign corporation, such as Wis. Stats. (1949) §226.02, which was repealed in 1951. Other states have construed their statutes to have such effect, while still others operate only on the remedy, denying a foreign corporation a right to sue on a contract made at the time at which it had not complied with the necessary conditions. Where the contracts are declared unenforceable, the corporation cannot sue on the contract to recover the purchase price. However, the general rule, in the absence of statutory provision to the contrary, is that the foreign corporation may still maintain an action for conversion of the property conditionally sold, or an action to recover possession when it is entitled to possession. A few states have denied all right to recovery when there has been non-compliance with the requirements for doing business. Others have held, as Wisconsin did prior to the repeal of §226.02, that if there has been anything paid in under the contract, that must be tendered back before the action will lie. Generally the reason given for allowing these suits is that the failure to follow the statutory requirements does not place the corporation outside the protection of the law so that they may be deprived of their property by persons having no legal right to it. 47 Am. Jur., Sales, §§56; 130 A.L.R. 999; Duluth Music Co. v. Clancy, 139 Wis. 189, 120 N.W. 854 (1909); Wolf Co. v. Kutch, 147 Wis. 209, 132 N.W. 981 (1911).

\footnote{47} When the sale was not in conformity with statutory requirements for a municipal contract, the seller cannot retake possession. It might also be unenforceable because the municipality, at the time of making the contract, was in debt in excess of the amount permitted by the state Constitution. In spite of this, however, some courts, on principles of equity and justice, have permitted the vendor to recover the property, even though it is machinery in use, and of great importance, in the operation of a municipal utility. 47 Am. Jur., Sales, §§57; 76 A.L.R. 695.

\footnote{48} A conditional vendor may be unable to enforce his right to repossess because of knowledge at the time of the sale, or subsequent thereto, that the buyer intended to use the property in an illegal manner. Generally, if the seller knew of the intended use at the time of the sale, he is not allowed to recover possession on the ground that his retention of title made him a participant in the illegal use. If he later learns of the illegal use, but does not immediately attempt to recover, he is barred from a later recovery on the ground that his failure to repossess immediately made him a participant with the buyer.
These matters are outside of the scope of the Code, as they pertain to areas of law other than sales or secured transactions, although related thereto. Hence, the Code would make no change in them, and although the right to repossession is stated in the absolute in the Code, it would be qualified by the rules of law in these related fields.

Under existing law, both under the Conditional Sales Act and otherwise, the vendor may retake possession of the property even though the vendee has transferred his interest, and generally he may recover from purchasers from, or creditors of the conditional buyer, unless the contract permits a resale or a statute requires the contract to be recorded and the seller fails to do so. The seller may also re-claim the property despite the bankruptcy or corporate reorganization of the buyer, or despite the conversion of the property into more valuable goods through the expenditure of money and labor on them.49

Again, some of these matters are not within the scope of the Code; hence, such matters as the right to reclaim the property from the trustee in bankruptcy or after a corporate reorganization will be governed by existing law.50

The second sentence of Section 9-50351 appears to merely reenact the provision in the Uniform Conditional Sales Act,52 with the change in order of words being of seemingly no importance.53

As the case law in those states without the Conditional Sales Act is generally the same,54 the enactment of the Code would make no innovation in the right of the conditional vendor, upon default of the vendee, to repossess himself of the goods peacably, without resorting to legal process.55

47 AM. JUR., Sales, §§847; Standard Furniture Co. v. Van Alstine, 22 Wash. 670, 62 Pac. 145 (1900); Lewer v. Cornelius, 72 Wash. 104, 129 Pac. 911 (1913); 166 A.L.R. 1380.

40 47 AM. JUR., Sales, §§943, 927, 850, 905; 6 AM. JUR., Bankruptcy, §§227, 229, 566.

51 Supra, note 7, pp. 367-374.

52 U.C.S.A. §16; WIS. STATS. (1953) §122.16.

53 The Comment to §9-503 states, "This article follows the provisions of the earlier uniform legislation in allowing the secured party in most cases to take possession without issuance of judicial process." §122.16 provides that repossession may be had without legal process, except in the case of household furniture. If the legislature desired to carry over this policy into the Code they would have to amend the Code Section in the same manner.

54 47 AM. JUR., Sales, §951; 146 A.L.R. 1331; 3 WILLISTON, SALES 226, §579(a) (1948); LaForte Motor Co. v. Fireman's Ins. Co., 209 Wis. 397, 245 N.W. 105 (1932).

55 Thus, all the restrictions and qualifications on the right to repossess without judicial process, that is the restrictions and qualifications in regard to right to enter the buyer's premises, use of force or deception, requisite of demand, and acceptance of delayed payments, would appear to apply notwithstanding the Code as they are matters outside the scope of the Code.
The sentence permitting the secured party to place in the security agreement a provision requiring the defaulter to assemble the collateral and make it available to the secured party at a place reasonably convenient to both parties is a provision not in the Uniform Conditional Sales Act, nor in any of the statutes covering conditional sales. Actually, it does not provide anything new to the law. Parties may contract as they wish, providing that the contract is not illegal or for an illegal purpose, or the provisions do not come within some other restriction, such as that against penalties. The Code merely states this right expressly rather than leaving it to the drafting of the contract.

The last sentence of subdivision (1)\textsuperscript{56} is something new to the law of conditional sales.\textsuperscript{57} It has been placed in the Code in order to aid, primarily, the party taking heavy equipment as collateral, and recognizes that the physical removal from the defaulter's plant and the storage of it until a resale could be both exceedingly expensive and impractical.\textsuperscript{58} This provision is obviously of great assistance to the secured party when the collateral is heavy equipment. However, as the provision is new, and is not elaborated on in the Code or the Comments thereto, there will be many problems arising under it. An enumeration of a few that might come into existence are: (1) What if the conditional buyer resells to a third party? Probably the perfection of the security interest under Part 3 to Article 9 would protect the secured party. Also, the fact that the equipment has been made unuseable might be sufficient to give notice to the third party buyer. (2) What may the buyer do if he does not desire to have the property remain on his premises? May he remove it and store it at his own expense without committing a trespass, or possibly a conversion? The Comment to the Section seems to indicate that he may be able to have the property removed and stored at his own expense without liability on his part. (3) May he require the seller to remove it after a reasonable time has passed and no sale has been made? There is no indication as to what the answer to this may be. (4) If the debtor desires removal after a reasonable time, but the seller refuses and is upheld in his refusal by a court, is this depriving the defaulter of his property (the area covered by the equipment) without compensation and for a private purpose? (5) What comes within the term "equipment?" Would something requiring little expense to remove fall within its definition? (6) What safeguards are there to prevent the seller from using this device to harass and oppress the defaulter? While the pro-

\textsuperscript{56} Supra, note 42.

\textsuperscript{57} Article 9, Secured Transactions, Sales of Accounts, Contract Rights, and Chattel Papers, Comment, 17 Albany Law Review 145 at 175, (1953).

\textsuperscript{58} Comment to §9-503.
vision, if adequately policed and intelligently used by the parties and the courts, could aid both parties, it could also become a method by which the seller could prevail over the buyer’s legitimate desires to a great extent.

Subsection (2) is optional. It was added because it was doubtful whether in some states a secured party had the right to proceed by replevin in the absence of a special or general property interest in the goods in the absence of a statute conferring such authority. It may be omitted in states where it is unnecessary.

Section 9-504

As a first matter, it might be well to comment on those points which are the same or similar to present law, and then take the changes.

59 Supra, note 42.
60 Comment to §9-503 in 1955 Supplement.
61 (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales. (Article 2) The proceeds of disposition shall be applied in the order following to:
(a) the reasonable expense of retaking, holding, preparing for sale, selling and the like to the extent the recovery thereof is not prohibited by law or agreement;
(b) the satisfaction of the indebtedness secured by the security interest under which the disposition is made;
(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed.
If the security agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . .
(2) Disposition of the collateral may be by public sale or private proceedings and may be made by one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market the secured party must give to the debtor, and to any other secured party who has a security interest in the collateral to be disposed of and who has filed a financing statement in this state or is known to be such by the secured party making the disposition, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made. Notification may be sent to addresses given in a financing statement if the secured party has no knowledge of different addresses. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.
(3) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all rights of the debtor, discharges the security interest under which it is made and any security interest or lien subordinate thereto, and the purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings.
(a) in the case of a judicial sale if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party or other bidder; or
(b) in any other case if the purchaser acts in good faith.
(4) The transfer of collateral by a secured party to a person who is liable to
In the Comment to the Section it is stated,

"Subsection (1) in general follows prior law in its provisions for the application of proceeds . . .".

Section 21 of the Conditional Sales Act62 has the same provision in somewhat different language, which, however, does not appear to be substantially in variance with the Code, except that there is no requirement in the Conditional Sales Act to apply the proceeds to junior lien claimants. The proceeds must be so applied under the Code, if the junior lien claimants make written demand, because of subsection (3) which discharges the junior interest by the disposition of the goods.

In those states which do not have the Uniform Act, and which do not have a statute covering the disposition of the proceeds, there is a conflict as to the way in which the proceeds are to be handled if there is no provision in the contract itself. Where it is held that on repossession of the goods the seller becomes the owner of the property free from any equity of the buyer, the seller is under no duty to account to the buyer as to the disposition of the proceeds. But another line of authority holds that the defaulting buyer may call for an account, and may recover the surplus over the amount necessary to liquidate the balance due and pay the expenses of resale. This result is reached on the ground that the retaking does not extinguish the rights of the parties, and the seller must deal with the property as security, recognizing the equitable rights of the defaulting buyer.63

The Code would reconcile this confusion and provide a standard application of proceeds, and recognizing the fact that primarily this is a security transaction, would protect both parties by requiring any surplus to be paid to the debtor, and making the debtor liable for any deficiency.64

One of the changes of significance is the emphasis on private rather than public sale, where the emphasis is in the Conditional Sales Act.65 The reason for this change is aptly stated in the Comment to Section 9-504.

"Although public sale is recognized, it is hoped that private sale will be encouraged where, as is frequently the case, private sale through commercial channels will result in higher realization on collateral for the benefit of all parties."

62 Wis. Stats. (1953) §122.21.
64 Supra, note 6, subsection (1). Note that in regard to liability for a deficiency the parties may vary the provision by their own agreement.
65 U.C.S.A. §19; Wis. Stats. (1953) §122.19.
Along with the requirement of public sale, the Uniform Conditional Sales Act has elaborate requirements for giving notice of the sale. The Code provides only that reasonable notification of disposition be given to the debtor and to other secured parties who have filed or are known to him. "Reasonable notification" is not defined in the Code, however, in the Comment to Section 9-504 it is stated,

"...at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate steps to protect their interest by taking part in the sale or other disposition if they so desire."

While this may seem on the surface to give to the repossessing seller a considerable advantage, it is submitted that actually it will be of aid to the defaulting buyer in many situations. While granting that "reasonable" is a nebulous and vague term, it is used in many fields of law and has not caused any chaos or considerable disorder. Under Section 19 of the Conditional Sales Act the seller was required to give the buyer ten days' notice. While this may have been sufficient time in many instances, there certainly were others where ten days was too short a time for the buyer to take any effective action to protect himself. More than ten days would be required under the Code in such situations.

Where there are no statutes governing the matter, the rights of the parties in the matter of resale is dependent on the provisions of the contract and the view of the jurisdiction as to the effect of repossession. Where it is held that on repossession the seller becomes the owner free from any equity of the defaulting buyer, obviously, he may resell or not as he wishes, and in the manner he desires. However, where he is required to protect the equities of the buyer, the buyer may force a sale by demanding one. In the demand for resale, or a court order requiring one, the type of sale, public or private, could be stipulated.

Thus, the Code would make a great change in some states, and not much of an alteration of the law in others. However, it would provide the defaulting buyer with greater protection, as the Code makes definite what must be done, and a waiver of its provisions may be had only in the specified instances.

Another change is that the disposition of the collateral is not restricted to a sale. It may also be leased. While the parties could always have made such a provision in the contract, none of the laws governing the subject provided for any disposition other than a sale. The addition of this is an aid where, for some reason, the provision is

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66 Ibid.
68 Supra, note 61, subsection (2); Supra, note 39.
left out of the contract, but both parties would be better protected by some other disposition than a sale.

The third change of significance is the lack of any set period within which the repossessed property must be disposed of, except in the case of consumer goods falling within the provisions of Section 9-505 (1). The idea of not requiring any time in which the repossessing seller has to make a sale was adopted from the Uniform Trust Receipts Act.\(^{69}\)

The Conditional Sales Act required that a sale had to be made not less than ten days nor more than thirty days after the retaking of possession.\(^{70}\) The obvious fault with this provision is that it has no relation to practical selling in order to obtain the maximum price. The Code would allow a delay in selling if there was no reasonable market for the goods at the time, or the secured party could sell almost immediately if he could get his best price then. It also provides for sales in units, which would be particularly advantageous in the cases where no one party would desire to buy the entire collateral, or to attempt to sell it in one piece would force the price down.

Outside of the Conditional Sales Act and the statutes of some of the states which provide a time limit within which the repossessing party has to sell, any provision of this nature has to be contained in the contract, and a buyer is not often in a position where he can get the terms most advantageous to himself in such a matter.\(^{71}\)

The provision that the secured party may buy at public sale is not new to the law.\(^{72}\) Because the provision for private sales is a relatively new statutory concept, there is no present interpretation of any statute on the subject.\(^{73}\) What will be construed to be within collateral of a type customarily sold in a recognized market or of a type which is the subject of widely distributed standard price quotations is difficult to say. The Comment to the Section gives no indication of what the intent of the framers was in the construction of this portion. On its face it would appear that almost all consumer goods customarily sold under conditional sales contracts would be included. The seller could take advantage of the buyer by the use of this provision if it is not carefully policed by both the courts and the defaulting buyer and his attorney.

Of course, the principle limitation on the repossessing seller is that the disposition must be commercially reasonable. Some tests as to what is commercially reasonable are contained in Section 9-507. Because of

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\(^{69}\) U.T.R.A. §6 (3) (b) ; Wis. Stats. (1953) §241.36 (2) (b).

\(^{70}\) Supra, note 65.

\(^{71}\) Am. Jur., Sales §967.

\(^{72}\) Supra, note 65.

\(^{73}\) Even the Uniform Trust Receipts Act, supra, note 69, does not provide for the entruster purchasing at a private sale.
their relevancy in a discussion of 9-504 they will be commented on at this point.

"The fact that a better price could have been obtained by sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. . . . The term 'commercially reasonable' includes, among other things, obtaining approval of the secured party's plan of disposition in a judicial proceeding or by a bona fide creditor's committee or representative of creditors." Section 9-507(1)

The Comment to the Section further elucidates on what the term includes.

"One recognized method of disposing of repossessed collateral is for the secured party to sell the collateral to or through a dealer—a method which in the long run may realize better average returns since the secured party does not usually maintain his own facilities for making such sales. . . . However, none of the specific methods of disposition set forth . . . is to be regarded as either required or exclusive. . . ."

Probably one of the major criticisms of the secured transactions part of the Code has been of the term "commercially reasonable." It has been attacked as being both too liberal in regard to the secured party, and too restrictive in regard to him.74 Although there will be problems in regard to exactly what comes within the term, it is a considerable improvement over the Uniform Conditional Sales Act, which strait-jackets the seller, contains requirements almost entirely unrelated to the practical world of selling, and consequently is of benefit to neither the buyer or the seller, but only to those who find it profitable to make a business of buying at forced sales and then turning around and selling at a large profit to the public. The defaulting buyer, if the Code was law, would have more assurance of his debt being satisfied by the resale, and the seller would not often be in the position of carrying a non-paying debtor for an unreasonable length of time because of the unprofitable process of repossession and resale, which the non-paying debtor is well aware of.

This Section also contains another provision which is not within the scope of this comment, but which will aid in realizing a greater amount on resale.75

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74 Gilmore, supra, note 7.
75 Subsection (3), supra, note 61, provides the protection to be given to the buyer
This Section presents no striking revisions in existing law. The point of importance in it is that it applies only to consumer goods. To the extent that conditional sales are not all of consumer goods there is a change, as the discussion of the previous Section discloses. A seller could always accept the goods as a discharge of the obligation, and in many instances he did discharge the obligation by repossession, although that was not his intention. The Code provides that this is an alternative to be used when the parties are better off without a resale and the resulting expenses and legal consequences.

A change has been made in regard to when there must be a resale. Under the Conditional Sales Act the repossessing seller has to resell if over 50% of the purchase price has been paid at the time of the retaking. Under the Code the amount necessary to have been paid in order for there to be a compulsory sale has been increased to 60%. The time in which the seller has to dispose of the collateral has also been lengthened—from thirty days to ninety days.

Where less than 60% of the cash price has been paid, the seller must notify the defaulting buyer in writing if he intends to retain the collateral in satisfaction of the obligation. This provision was not in the Uniform Act.

In both the Code and the Conditional Sales Act the defaulting buyer can force a resale by the seller on written demand for a resale.

at the resale, which will induce more people to buy at resales of repossessed goods.

76 (1) In the case of a purchase money security interest in consumer goods if the debtor has paid 60% of the cash price and has not signed after default a statement renouncing his rights a secured party who has taken possession of collateral must dispose of it under Section 9-504 and if he fails to do so within ninety days after he takes possession the debtor may at his option recover in conversion or under Section 9-507(1) on secured party's liability.

(2) In any other case a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be given to the debtor and to any other secured party who has a security interest in the collateral and who has filed a financing statement in this state or is known to be such by the secured party in possession. If the debtor or other person entitled to receive notification objects in writing within thirty days from the receipt of the notification and causes such written objection to be delivered to the secured party, the secured party must dispose of the collateral under Section 9-504, but in the absence of receipt of such written objection within said thirty days the secured party may hold the collateral or dispose of it free from the requirements of this Article.

77 See previous discussion on election of remedies and footnotes 13 to 38; 47 Am. Jur., Sales, §960.

78 Comment 1 to Section 9-505.

79 Supra, note 65.

80 Supra, note 76(1); Also, note that this is an instance where the debtor may waive his rights, although he may do so only after default.

81 Supra, notes 65 and 76(1).

82 Supra, note 76(2).

83 Section 9-505(2); U.C.S.A. §20; Wis. Stats. (1953) §122.20.
The resale must be made within thirty days under the Uniform Act, and within ninety days under the Code.\textsuperscript{84}

Whether or not the defaulting buyer has a right to demand a resale in the states that do not have a statute governing the matter, depends on the contract and the attitude of the jurisdiction in regard to the effect of repossession. The contract could, but usually would not, provide that the debtor may demand a resale under certain conditions. In the absence of a contract provision, the attitude of the court would control. If the court is one which has adopted the view that retaking is a rescission and terminates all rights of the buyer, then the buyer would have no standing to demand a resale.\textsuperscript{85} Where the court recognizes that the defaulting party has equitable interests in the collateral, he may, under some circumstances, enforce a resale.\textsuperscript{86}

The adoption of the Code would be a great help to the defaulting buyer in those states which now offer him no right to demand a resale, when the market is such that not only could the obligation be satisfied, but there would also be a surplus remaining.

\textbf{Section 9-506}\textsuperscript{87}

The Conditional Sales Act provides a number of ways in which the defaulting buyer may redeem the collateral after it has been possessed. If the seller fails to give the notice of intention to retake,\textsuperscript{88} the buyer has ten days in which to redeem. If the seller serves the notice of intention to retake, the buyer has no less than twenty days, nor more than forty days, in which to redeem.\textsuperscript{89}

The Code gives the debtor the right of redemption, but places no specific time on its operation, except as to consumer goods. The seller does not have to sell within any specific period, and the buyer has no specific period within which to redeem, except as to consumer goods.\textsuperscript{90} As the seller may make successive sales of parts of the collateral, the buyer may reclaim only what has not been sold at the point at which he desires to redeem. These provisions would appear to work no

\textsuperscript{84} Supra, notes 65 and 76(1).
\textsuperscript{85} Supra, note 67; 78 C.J.S., Sales, §600.
\textsuperscript{86} Watkins v. Carter, 267 Ky. 241, 101 S.W.2d 932 (1937), "At least where a substantial portion of the purchase price has been paid by the buyer prior to default on his part and the repossession by the seller... the seller should afford some measure of protection to the buyer's equity in the property.... We are of the opinion that the proper measure of protection in such state of case is obtained by resale of the property..." In this case one-third of the purchase price had been paid; 78 C.J.S., Sales, §627(c).
\textsuperscript{87} At any time before the secured party has disposed of collateral or entered into a contract for its disposition under §9-504 or before the obligation has been discharged under §9-505(2) the debtor may reclaim the collateral by tendering payment of all sums due under the defaulted agreement as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing for disposition.
\textsuperscript{88} U.C.S.A. §17; Wts. Stats. (1953) §122.17.
\textsuperscript{89} Ibid.
\textsuperscript{90} Sections 9-504 and 9-505.
hardships, except possibly as to the buyer being in some doubt as to how soon he must get his funds together to effect a redemption. As any resale must be commercially reasonable, and as that includes approval of the plan of disposition, the seller could not resell so fast as to prevent a redemption by the debtor.

The provisions regarding what must be tendered in order that the debtor may reclaim the collateral are similar, but there are some significant changes. The Code does not contain the provision for the redemption on the performance, or tendering of performance of any condition precedent to passage of title that has been broken, but speaks only of tendering of payment of all "sums" due. Of what importance this omission is, it is hard to say, although in view of the policy to protect both parties, it might be construed to allow a redemption when the reason for default was the breaching of a condition other than payment, and the default has been cured by performance or tender of performance.

Another change of importance is in regard to the amount necessary to be tendered when there has been a default in payment and the contract contains an acceleration clause. The courts have construed the Uniform Conditional Sales Act as to permit a redemption on the tender of the amounts due at the time of the retaking, even though the contract contained an acceleration clause. Thus, the seller cannot insist on the full purchase price as a condition of redemption. However, under the Code the secured party may demand the full purchase price as a condition of redemption, if there is an acceleration clause. "All sums due under the defaulted agreement" is to be construed as the entire balance.

The remainder of the provisions regarding the inclusion of the reasonable expenses incurred in retaking in the amount to be tendered, is the same in the Code as in the Conditional Sales Act.

The debtor does not have the right under the Code to demand a written statement as to the sum due and the expenses incurred, as he has under the Uniform Act. The lack of this provision may cause some trouble where the secured party attempts to defeat the debtor's right of redemption by keeping him in the dark as to the correct amount necessary to be paid or tendered. While the debtor might be able to remedy this in other ways, it is submitted that the addition of such a provision might possibly save some unnecessary problems.

Where neither the Uniform Conditional Sales Act, nor any other statute governing redemptions on default has been passed, nor is there

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91 Section 9-507(2).
92 47 AM. JUR., Sales, §959; 78 C.J.S., Sales §628(a); 99 A.L.R. 1301.
93 Comment to Section 9-506.
94 U.C.S.A. §18; Wis. Stats. (1953) §122.18.
a provision in the contract, there is a split of authority as to whether the defaulting party has a right to redeem. Some jurisdictions afford no right of redemption at all, whereas in others he may redeem by paying the balance due, unless time is made of the essence of the contract.\textsuperscript{95}

The adoption of the Code in these states would make little or great change, depending on which view they took before the adoption. As to the problem of acceleration clauses, it has been held under statutes other than the Uniform Act, and under case law, that the amount necessary to be tendered is the entire balance; therefore, in this respect, there would be no revision of the law.\textsuperscript{96}

\textbf{SECTION 9-507}\textsuperscript{97}

The principle limitation on the secured party's right to dispose of the collateral is the requirement that he proceed in good faith and in a commercially reasonable manner.\textsuperscript{98} The Code recognizes the fact that the best remedy so far as the defaulting buyer is concerned is one which he has available prior to an illegal disposition. Therefore, the Code provides that the buyer, by court order, may restrain the secured party from proceeding in an unreasonable manner, and such order may also provide that the seller proceed under specified terms and conditions, or that the sale be made by a representative of creditors where solvency proceedings have been instituted.\textsuperscript{99}

The Uniform Conditional Sales Act has no comparable provision, nor does it appear that any of the other statutes governing conditional sales have such remedy either. However, it has been held that injunctive relief will lie in order to enforce statutory rights.\textsuperscript{100} Thus, in those states where there is a statute governing the procedure which a repossessing seller must follow in the disposition of the collateral, it would appear that the Code will make no change, except to state clearly that the remedy is available.

In states that have no statutes in regard to the procedure that must be followed on a resale, whether or not the adoption of the Code would

\textsuperscript{95} 47 Am. Jur., Sales, §958; 78 C.J.S., Sales, §628(a); 99 A.L.R. 1288.
\textsuperscript{96} Supra, note 92.
\textsuperscript{97} (1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods the debtor has a right to recover in any event an amount not less than the credit service charge or time price differential plus 10% of the cash price or principal amount of the debt.
\textsuperscript{98} (2) The substance of subsection (2) is quoted in the discussion of Section 9-504.
\textsuperscript{99} Comment to Section 9-507.
\textsuperscript{100} "An injunction is also held to be an appropriate remedy for a violation of all statute rights." J. Joyce, INJUNCTIONS, §2(a), p. 8 (1909); Livingston v. Van Ingen, 9 Johns. (N.Y.) 507 (1812).
cause a change would be dependent upon the view of the court towards the effect of repossession by the seller, and the terms of the contract. Where the rule is that repossession vests the full ownership of the collateral in the seller, free of all rights and equities of the defaulting buyer, obviously there would be a revision. Under this view the defaulting buyer would have no standing in any court to force the seller to do anything in regard to the property. However, where the jurisdiction recognizes the repossession as a means of security, and holds that the seller must protect the equitable rights of the defaulting buyer, there would be no change, providing the contract contained provisions covering the resale, as equity has jurisdiction to grant injunctions to enforce an equitable interest in chattels, and to restrain the transfer of such property.

It is questionable whether this remedy provided by the Code will be of much value in view of the practical problem of the debtor knowing or learning of the contemplated unreasonable sale. The extreme scarcity of cases on point would appear to indicate that it is not often that the buyer learns of the illegal resale until after it has been made.

In regard to liability after disposition has been made under Section 9-507, the debtor may recover his damages, and if the collateral was consumer goods, his damages are not less than the credit charge, carrying charge, or interest, plus ten percent of the cash price or principal amount of the debt. Also, if the secured party has failed to sell within ninety days after he has retaken possession, in cases where he must dispose of the property, the debtor may recover the amount above, under Section 9-507, or in conversion under Section 9-505, at his option.

Under the Uniform Act there are two provisions which provide remedies for the defaulting party in case the seller fails to follow the statutory provisions. Where a notice of intention to retake has been served, and the buyer has made a written demand on the seller for a statement as to the amount due on the contract, which the seller fails to furnish in a reasonable time, the buyer may recover ten dollars plus all damages suffered because of the failure. Where the seller fails to comply with the provisions of the statute in regard to its other provisions, the buyer may recover his actual damages, but in no event less than twenty-five percent of the sum of all payments made under the contract, with interest.

101 Supra, note 63.
102 Ibid.
103 A Pomeroy's Equity Jurisprudence, §1339, p. 937 (1941).
104 Supra, note 97.
105 Section 9-505.
106 U.C.S.A. §18 and §25; Wis. Stats. (1953) §122.18 and §122.25.
107 U.C.S.A. §18; Wis. Stats. (1953) §122.18.
Whether the change from twenty-five percent of the amount paid to ten percent of the cash price will help the buyer and make the seller more careful in following the procedure for resale would depend entirely on the cash price and the amount paid in. A defaulting buyer could recover more under the Code, or he might be in a better position under the Uniform Act, depending on the two mentioned variables.

Where the seller retakes possession, but fails to comply with the statute, he cannot recover a deficiency judgment. There is no comparable provision in the Code, and from its absence it could be assumed he could still recover any deficiency. As a practical matter, though, there would be no sense to this if the deficiency was not greater than what the buyer could counterclaim for as his damages for failure to make a commercially reasonable resale.

The provision under Section 9-505 allowing the buyer to sue in conversion if the seller fails to sell within the stated period is a new concept, not contained in the Conditional Sales Act. Its effect is to give the buyer an option to recover between two amounts, thus putting him in the advantageous position of being able to pick the remedy which will give him the greatest amount of damages, and consequently, provide the seller with an effective incentive to abide by the terms of the Code.

Where there is no statute governing the liabilities of the seller, the defaulting buyer’s remedies depend upon the contract provisions and the view of the jurisdiction as to the effect of repossession by the seller. By the great weight of authority, he is not entitled to a return of the amount paid in up to the time of repossession. In some states, however, if there is no forfeiture clause, and in some instances even when there is one, the retaking is construed as a rescission of the contract, and the seller is liable to account to the buyer for the amount paid to that point, less damages to the property and reasonable compensation for its use.

Where the seller retakes the property unlawfully and resells it, he is liable in conversion.

Briefly, it can be stated in conclusion, that the Code is an attempt, and one that appears to be successful in most instances, to provide better protection to both parties in a secured transaction, without all of the highly technical requirements of the present law. It has one feature that commends it, and that is that it allows the parties more room to operate in when they are both businessmen, and, recognizing that the consumer is usually not in the position of strength either at

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109 Mack International Truck Corp. v. Thelen Co., 205 Wis. 434, 237 N.W. 75 (1931); Carl v. McDonald, 60 Ariz. 170, 133 P.2d 1013 (1934); 37 A.L.R. 106.
110 37 A.L.R. 100; 83 A.L.R. 965; 99 A.L.R. 1292; 78 C.J.S., Sales, §627(a).
111 Ibid.
112 Ibid.
the time of making the contract, or at the time of default, provides more stringent requirements for the secured party to follow, but not such as tie him down or make selling on a secured basis impracticable.

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