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Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code

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**CHOICE OF LAW IN SECURED PERSONAL
PROPERTY TRANSACTIONS: THE
IMPACT OF ARTICLE 9 OF THE
UNIFORM COMMERCIAL CODE**

Russell J. Weintraub

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CHOICE OF LAW IN SECURED PERSONAL PROPERTY TRANSACTIONS: THE IMPACT OF ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

*Russell J. Weintraub**

IT is likely that, in view of the adoption in forty-nine states of the Uniform Commercial Code (Code), particularly of article 9 dealing with secured transactions,¹ the incidence of interstate conflict-of-laws problems concerning commercial transactions in personal property will be greatly reduced. The reason for this anticipated reduction is that the Code creates uniformity in the applicable law governing the rights and duties both between the secured creditor and the debtor² and between the secured creditor and third parties who challenge the secured creditor's right to enjoy his security interest.³

But even though the Code, by unifying substantive law, will probably decrease the frequency of conflicts problems in commercial transactions dealing with property, there are still likely to remain a substantial number of commercial property cases in which the need to choose the governing law will arise. The first reason for this situation is that the various state versions of the Code are not uniform. The state variations from the "official" text are most numerous in article 9. An extreme example can be found in California which departs from the official text in thirty-four of the fifty-three sections of article 9.⁴ Second, as will become apparent in this

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1. Louisiana is the only state that has not adopted the Code. The Code has also been adopted in the District of Columbia and in the Virgin Islands.

2. See, e.g., UNIFORM COMMERCIAL CODE [hereinafter UCC] §§ 9-503 (secured party's right to take possession after default); 9-504 (secured party's right to dispose of collateral after default, and effect of disposition); 9-505 (limitation on creditor's right to retain the collateral without reselling it and accounting for the proceeds). All references to the Uniform Commercial Code in this discussion are to the Uniform Laws Annotated, Master Edition (1968), unless otherwise indicated.

3. See, e.g., UCC § 9-103 (choice of law to determine validity and perfection of security interests); UCC §§ 9-301 to -318 (rights of third parties).

4. See UCC REP. SERV. Cal. correlation tables, at 16-31; CAL. COMM. CODE §§ 9101-507 (West 1964, Supp. 1970). See also, e.g., UCC § 9-302; "(1) A financing statement must be filed to perfect all security interests except the following: . . . (d) a purchase money security interest in consumer goods; but filing is required for a fixture under Section 9-313 or for a motor vehicle required to be licensed . . ." The words "or for a motor vehicle required to be licensed" are omitted in Hawaii [Act of June 29, 1965, § 9-302 (1)(d), [1965] Hawaii Laws, 2d Vol. 136]; Massachusetts [MASS. GEN. LAWS ANN. § 9-302 (1)(d) (1963)]; Ohio [OHIO REV. CODE § 1309.21(A)(4) (Page Supp. 1969)]; Oregon [ORE.

discussion, the meanings of Code provisions and an understanding of the manner in which the various articles relate to one another do not leap ineluctably from the page. Much construction and interpretation of the Code is needed. There is great likelihood that, despite the salutary injunction of section 1-102 to construe the Code with uniformity as a goal, and despite the existence of a permanent editorial board to oversee the operation of the Code, states will differ in their construction of various Code provisions. A third reason why conflict-of-laws problems will probably continue in this area is that the Code leaves in force various nonuniform state enactments concerning usury, small loans, and retail installment sales,⁵ thus excluding from the Code's unifying influence some aspects of vast numbers of commercial transactions.⁶ Finally, transactions with foreign countries will continue to raise conflicts problems.

It is therefore desirable, before discussing the choice-of-law provisions in article 9, to discuss the pre-Code conflict-of-laws rules, both in terms of the non-Code transactions to which they will continue to apply and as background for understanding the conflicts rules in article 9. The Code's choice-of-law rules in turn will influence the future development of non-Code conflicts rules. A useful division

REV. STAT. § 79.3020(1)(d) (1967)]; Virginia [VA. CODE ANN. § 8.9-302(1)(d) (Additional Supp. 1965)]; Wisconsin [Wis. STAT. ANN. § 409.302(1)(d) (Supp. 1969)]. The Wisconsin statute adds, after "goods," "having a purchase price not in excess of \$250." Section 9-307(2) mitigates the effect of § 9-302(1)(d) by providing:

In the case of consumer goods . . . (other than fixtures, see Section 9-313), 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 filed a financing statement covering such goods.

This provision is omitted in California [CAL. COMM. CODE § 9307 (West 1964)]; Kansas [KAN. STAT. ANN. § 84-9-307 (1965)]; Maine [ME. REV. STAT. ANN. tit. 11, § 9-307(2) (1964)]; Oklahoma [OKLA. STAT. ANN. tit. 12A, § 9-307 (1963)]; Tennessee [TENN. CODE ANN. § 47-9-307 (Supp. 1969)].

5. See UCC § 9-201, which provides:

Nothing in this Article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

See also the official note to § 9-102, quoted in note 28 *infra*.

6. See UCC § 9-203(2), which provides:

A transaction, although subject to this Article, is also subject to*, and in the case of conflict between the provisions of this Article and any such statute, the provisions of such statute control

Note: At * in subsection (2) insert reference to any local statute regulating small loans, retail installment sales and the like.

.
 . . . Such acts may provide for licensing and rate regulation and may prescribe particular forms of contract. Such provisions should remain in force despite the enactment of this Article. On the other hand if a Retail Installment Selling Act contains provisions on filing, rights on default, etc., such provisions should be repealed as inconsistent with this Article.

of this discussion is to examine first the choice of law to determine the rights and duties as between a secured creditor and his debtor, and then, what law determines whether the rights of a secured creditor prevail over those of third parties who claim an interest in the goods.

I. THE DEBTOR AND THE SECURED CREDITOR

A. *Pre-Code Conflicts Rules*

It is often said that the standard choice-of-law rule for determining rights and duties between a secured creditor and a debtor refers to the situs of the chattel at the time that the security interest attached.⁷ This situs rule does find some support in a few of the older cases,⁸ but it is doubtful that the rule ever represented the position of a majority of jurisdictions in the United States.⁹ The trend of modern choice-of-law analysis has been markedly away from any such rigid situs approach.¹⁰ That trend is illustrated by three cases which span thirty years of developments in choice-of-law doctrines for determining rights between debtors and secured creditors: *Thomas G. Jewett, Jr., Incorporated v. Keystone Driller Company*,¹¹ *Shanahan v. George B. Landers Construction Company*,¹² and *Universal C.I.T. Credit Corporation v. Hulett*.¹³

In *Jewett*, the debtor was incorporated in, and had its headquarters in, Massachusetts. The creditor was a Pennsylvania corporation with headquarters in Pennsylvania. The debtor and the creditor's local agent executed in Massachusetts a conditional sales contract for a power shovel. As agreed, the shovel was delivered to the debtor in New Hampshire where the debtor was working on a

7. See RESTATEMENT OF CONFLICT OF LAWS § 272 (1934) (conditional sale); R. LEFLAR, AMERICAN CONFLICTS LAW 431 (1968); cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 251 (P.O.D. III, 1969) ("the state which . . . has the most significant relationship"; "[i]n the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact . . .").

8. See, e.g., *United States v. Rogers & Rogers*, 36 F. Supp. 79 (D. Minn.), *appeal dismissed*, 121 F.2d 1019 (8th Cir. 1941) (whether mortgagor may sell property; situs also debtor's residence); *Youssouppoff v. Widener*, 246 N.Y. 174, 190-91, 158 N.E. 64, 69 (1927) (whether contract of sale will be construed as a mortgage; "the construction and legal effect of a contract for the transfer of, or the creation of a lien upon, property situated in the jurisdiction where the contract is made is governed by the law of that jurisdiction").

9. See note 21 *infra*.

10. See R. LEFLAR, *supra* note 7, at 435 (situs dogma "rapidly disappearing").

11. 282 Mass. 469, 185 N.E. 369 (1933).

12. 266 F.2d 400 (1st Cir. 1959).

13. 151 S.2d 705 (La. Ct. App. 1963).

construction project. After the project was finished, the debtor stored the shovel in New Hampshire where it was repossessed by the creditor nine months after it had been delivered to the debtor. The creditor shipped the shovel to Connecticut and there resold it without notice to the debtor. The debtor then sued the creditor for conversion of the shovel, claiming that under New Hampshire law the debtor's right to redeem the collateral after default could not be cut off unless the debtor was given fourteen-days notice before resale. In this case, no such notice was given. The Massachusetts Supreme Judicial Court affirmed a judgment for the defendant, holding that Massachusetts law, not New Hampshire law, determined the debtor's right to redeem the collateral. Under Massachusetts law, the debtor lost its right to redeem when it failed to tender to the creditor, within fifteen days after repossession, the full amount due. The court characterized the problem as one of "contract" and held that the law of the place of making the contract applied, since it did not appear that the contract was entered into with reference to the law of any other state. Justice Lummus dissented, contending that the law of New Hampshire, the situs of the chattel from delivery until repossession, should have been applied.

The *Shanahan* case arose when a Massachusetts company repossessed in New Hampshire a power trench hoe that it had sold, by conditional sales contract, to a New Hampshire company. The contract technically had been "made" in Massachusetts, because it was there that the seller signed and thereby accepted the contract that had previously been executed in New Hampshire by the buyer. As agreed, delivery of the hoe was made to the buyer in Vermont, although the conditional sales contract had not included that condition in its terms. Thereafter, the buyer moved the hoe to New Hampshire, where it was repossessed because of the buyer's default in payment. Within ten days after he had repossessed the hoe, the seller removed it to Massachusetts and resold it. Although such resale was proper under Massachusetts law, it violated a New Hampshire requirement that collateral remain in the state for ten days following repossession, during which period the vendee could redeem by tendering to the creditor the amount owed. The buyer brought suit for conversion in the federal district court in Massachusetts against the seller and others.¹⁴

The district court applied New Hampshire law and gave judg-

14. The other defendants were the finance company to whom the contract and note had been assigned with recourse and a Mr. Shanahan who repossessed the hoe, bought it from Shanahan, Inc., and then resold it.

ment for the plaintiff.¹⁵ On appeal, the United States Court of Appeals for the First Circuit approved the application of New Hampshire law, but vacated the judgment and remanded for recomputation of damages under that law. Because the trial had been held in Massachusetts, the court of appeals was compelled, under the rules of *Erie*¹⁶ and *Klaxon*,¹⁷ to apply Massachusetts law. That court was thus called upon to construe *Jewett* and to apply it to these facts. The court first decided that *Jewett* required it to disregard whatever had been the fortuitous location of the collateral—somewhere in the midwest—at the time at which the conditional sales contract had been made. The basis for this conclusion was the fact that the *Jewett* majority had made no mention of what had been the location of the shovel at the time of contracting. Further following *Jewett*, the *Shanahan* court decided to disregard the place of the chattel's delivery—Vermont, just as the *Jewett* court was not controlled by the delivery of the shovel to a job site in New Hampshire. A more difficult problem for the court was whether to read *Jewett* as articulating a place-of-contracting rule and thus to apply the law of Massachusetts, where the conditional sales contract had been "made." In reaching its decision not to apply Massachusetts law, the court referred to a Massachusetts decision more recent than *Jewett*—*Budget Plan, Incorporated v. Sterling A. Orr, Incorporated*,¹⁸ in which the Massachusetts Supreme Judicial Court had referred to *Jewett* as "contrary to the prevailing view."¹⁹

For reasons indicated later, the *Shanahan* court's application of New Hampshire law should be applauded,²⁰ but its use of the *Budget Plan* case as a device to avoid the place-of-contracting rule of *Jewett* is rather puzzling. When the Massachusetts court said in *Budget Plan* that *Jewett* seemed "contrary to the prevailing view," it was referring, as the "prevailing view," to the position that the applicable law was the law of the situs of the collateral at the time

15. 266 F.2d at 402, 405.

16. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

17. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

18. 334 Mass. 599, 137 N.E.2d 918 (1956).

19. 334 Mass. at 601 n.1., 137 N.E.2d at 920 n.1. The *Shanahan* opinion stated: But it does seem to us that the remarks in the later case [*Budget Plan*] indicate that the Supreme Judicial Court of Massachusetts now would not be disposed to extend the rule of the *Jewett* case to facts like those in the case at bar, where the purchaser of the chattel was not a Massachusetts corporation but a New Hampshire corporation with its headquarters in that state and where in addition the shovel was not only located in New Hampshire when it was repossessed, but also where the shovel would presumably be kept when not in use on out-of-state jobs.

266 F.2d at 405.

20. See text accompanying notes 23-26 *infra*.

of delivery to the buyer.²¹ In *Shanahan*, that view would have meant application of Vermont law—a possibility that the United States court of appeals rejected in reliance on *Jewett*. Thus, the *Shanahan* court used *Budget Plan* to avoid the place-of-contracting rule of *Jewett*, and it used *Jewett* to avoid the situs rule hinted at in *Budget Plan*.

In *Universal C.I.T. Credit Corporation v. Hulett*,²² the defendants, Louisiana spouses, had purchased an automobile in Indiana from an Indiana firm. The purchase was under a conditional sales contract executed in Indiana and immediately assigned to the Indiana office of a finance company. The contract indicated that the buyers were Louisiana residents and that the automobile would be brought to Louisiana and kept there. Five months later the automobile was repossessed in Louisiana with the wife's written consent and was then returned to Indiana where it was sold at a public sale. The finance company brought suit in Louisiana against the buyers for a deficiency judgment. The company had done everything required under Indiana law to preserve its right to such a judgment: prior written notice of the repossession sale had been given to the debtors, and notice of the sale had been posted. Under Louisiana law, however, an appraisal of the automobile, fixing the minimum

21. The court in *Budget Plan* reserved opinion on whether in a case in which the choice of rules would make a difference, as it did not in *Budget Plan*, it would apply the place-of-making rule of *Jewett* or the "prevailing view" rule. The *Budget Plan* opinion cited the following sources for the "prevailing view," all advocating the situs rule: "See Restatement: Conflict of Laws, § 272 [1934]; Goodrich, Conflict of Laws, § 157 [3d ed. 1949]; and cases cited in the dissenting opinion of Lummis, J., in the *Jewett* case at page 479." 334 Mass. at 601 n.1, 137 N.E.2d at 920 n.1.

The citation to Justice Lummus' dissenting opinion is to the following statement and string citation. It is ironic that not a single case in this string citation supports the situs rule in determining rights as between the secured creditor and the debtor. Every case cited deals with the rights of the secured creditor, not against the debtor, but against various third parties. A description of the third party in each case is inserted in brackets:

Ordinarily the law of the place of delivery, at least where it does not appear that no further presence or use of the chattel there is contemplated, governs the rights of the parties under a conditional sale. *Cleveland Machine Works v. Lang*, 67 N.H. 348 [31 A. 20 (1893)] [attaching creditor]. *Knowles Loom Works v. Vacher*, 28 Vroom 490, 30 Vroom 586, [57 N.J.L. 490, 31 A. 306 (1895), *aff. mem.*, 59 N.J.L. 586, 39 A. 1114 (1896)] [subsequent mortgagee]. *Cooper v. Philadelphia Worsted Co.*, 2 Robb. (N.J.) 622 [68 N.J. Eq. 622, 60 A. 352 (1905)] [judgment creditors]. *Eli Bridge Co. v. Lachman*, 124 Ore. 592 [265 P. 435 (1968)] [bona fide purchaser]. *Mergenthaler Linotype Co. v. Hull*, 239 Fed. 26 [(1st Cir. 1916)] [trustee in bankruptcy]. *Smith's Transfer & Storage Co. v. Reliable Stores Corp.*, 58 F.2d 511 [(D.C. Cir. 1932)] [warehouseman]. *United States Fidelity & Guaranty Co. v. Northwest Engineering Co.*, 146 Miss. 476 [112 S. 580 (1927)] [execution creditor]. *James Beggs & Co. v. Bartels*, 73 Conn. 132 [46 A. 874 (1900)] [buyers at execution sale]. *H.G. Craig & Co. v. Uncas Paperboard Co.*, 104 Conn. 559 [133 A. 673 (1926)] [receiver for benefit of creditors].

282 Mass. at 479, 185 N.E. at 373 (Justice Lummus, dissenting).

22. 151 S.2d 705 (La. Ct. App. 1963).

resale price, was necessary before the creditor could be entitled to a deficiency judgment; and no such appraisal had been made in this case.

The Louisiana court of appeals held that Louisiana law was applicable, and it affirmed the trial court's granting of the defendants' motion for summary judgment. The court reviewed various choice-of-law rules that had been applied in determining rights between a secured creditor and debtor—the law of the place of contracting, the law of the place where the contract was intended to have effect, the law of the place where the collateral was intended to be kept, and the law of the place where the collateral was repossessed—and found all these rules too rigid. The court noted that Louisiana had a significant interest in protecting the Louisiana residents from a deficiency judgment when an appraisal had not preceded resale; and it held that the contacts with Louisiana—which was the residence of the defendants and was the place where the automobile was intended to be kept and where it was repossessed—were sufficient to make it reasonable for that state to give effect to its own policy.

Thus, each of these three leading cases determined the manner in which the secured creditor should repossess and resell the goods if he is to preserve his right to a deficiency judgment and avoid liability to the debtor. Despite their disparate reasoning, all three courts applied the law of the place of the debtor's residence or principal place of business when, as is usually the case, that place was where the creditor had reason to expect that the goods would be kept when not in use elsewhere. This same pattern—applying the law of the debtor's home state if the goods have a nexus with that state that the creditor should have foreseen—emerges from a great many of the modern cases dealing with rights between secured creditors and their debtors.²³ That choice of law makes eminent

23. See *Susi v. Belle Acton Stables, Inc.*, 360 F.2d 704 (2d Cir. 1966) (method of foreclosure as between Maine creditor and Maine debtor held to be governed by Maine law, although the horses mortgaged were not in Maine either at time security interest attached or at the time foreclosure was made); *United Sec. Corp. v. Tomlin*, 198 A.2d 179 (Del. Super. Ct. 1964) (whether creditor was entitled to deficiency judgment after private sale of automobile; court applied law of state of debtor's residence, rather than law of state of seller's place of business); *Phillips v. Englehart*, 437 S.W.2d 158 (Mo., K.C. Ct. App. 1968) (whether buyer of repair equipment was entitled to refund after default; court applied law of buyer's state, to which equipment was moved with consent of seller); *Industrial Credit Co. v. J.A.D. Constr. Corp.*, 29 App. Div. 2d 952, 289 N.Y.S.2d 243 (1968) (whether rights of buyer were violated by private sale after default; court applied law of buyer's state, where goods were to be shipped, although their situs at all relevant times was elsewhere); *General Acceptance Corp. v. Lyons*, 125 Vt. 332, 215 A.2d 513 (1965) (court held that, in absence of choice-of-law clause in conditional sales contract, applicable law to determine whether vendor was en-

functional sense.²⁴ The debtor's state has a legitimate concern in extending to the debtor the protection of its repossession and resale requirements when that protection will not unfairly surprise the creditor and when the law sought by the creditor would provide significantly less protection to the debtor.²⁵ The debtor is likely to rely on the law of his home state with respect to redeeming the collateral; and if the creditor acts properly under the law of the debtor's state, it is not likely that any other state would have a significant reason for affording the debtor any greater protection.²⁶

B. *The Code Conflicts Rules*

1. *Should Section 1-105(1) or Sections 9-102 and 9-103 Be Applied?*

If one seeks to utilize the choice-of-law provisions of the Uniform Commercial Code in order to determine what law should govern the rights and duties between a debtor and a secured creditor, he confronts many puzzles for which the solutions are not clear. The first, and perhaps most fundamental, of these Code conundrums is whether to apply the basic Code choice-of-law section, 1-105,²⁷ or the

titled to deficiency judgment was law of "center of gravity" of contract—in this case, the law of the place where both vendor and vendee had business headquarters, not the law of the place where the property was repossessed and resold); *Pioneer Credit Corp. v. Morency*, 122 Vt. 463, 177 A.2d 368 (1962) (method of resale to preserve creditor's right to deficiency judgment held to be determined by law of state to which conditional buyer, with permission of creditor, had moved property about a year after sale).

24. See *Cavers, The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 N.Y.U. L. REV. 1126, 1140-42 (1960).

25. For a thoughtful criticism of *Hulett* on the ground that Indiana law, although different from Louisiana law, shared with Louisiana law the basic policy of protecting the vendee against inflated deficiency judgments, see *Dainow, Variations on a Theme in Conflict of Laws*, 24 LA. L. REV. 157, 163 (1964).

26. One situation in which another state might have a significant reason for affording to the debtor greater protection than that available in his home state might occur when the creditor has acted in that other state in such a manner as to make it likely that a breach of the peace of that state would take place. Cf. *Associates Discount Corp. v. Cary*, 47 Misc. 2d 369, 372, 262 N.Y.S.2d 646, 650 (N.Y. Civ. Ct. 1965) (dictum). This situation may occur if self-help repossession is permitted in the debtor's home state, but forbidden in the state where the goods are located at the time of retaking.

27. UCC § 1-105 provides:

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

Bulk transfers subject to the Article on Bulk Transfers. Section 6-102.

article 9 choice-of-law sections, 9-102²⁸ and 9-103.²⁹

Section 1-105(1) provides the basic choice-of-law rules for the Code and thus for article 2, which covers sales. Section 1-105(2), however, indicates that the conflicts provision of 1-105(1) is superseded

Applicability of the Article on Investment Securities. Section 8-106.
Policy and scope of the Article on Secured Transactions. Sections 9-102 and 9-103.

28. UCC § 9-102 provides in pertinent part:

(1) Except as otherwise provided in Section 9-103 on multiple state transactions and in Section 9-104 on excluded transactions, this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9-310.

(3) The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

Note:

Where the state has a retail installment selling act or small loan act, that legislation should be carefully examined to determine what changes in those acts are needed to conform them to this Article. This Article primarily sets out rules defining rights of a secured party against persons dealing with the debtor; it does not prescribe regulations and controls which may be necessary to curb abuses arising in the small loan business or in the financing of consumer purchases on credit. Accordingly there is no intention to repeal existing regulatory acts in those fields. See Section 9-203(2) and the Note thereto.

29. UCC § 9-103 provides in pertinent part:

(1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this Article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.

(2) If the chief place of business of a debtor is in this state, this Article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern. If the chief place of business is located in a jurisdiction which does not provide for perfection of the security interest by filing or recording in that jurisdiction, then the security interest may be perfected by filing in this state. . . .

(3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state. If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached

to the extent that the conflicts provisions of sections 9-102 and 9-103 apply to secured transactions. The question thus arises: if a sale of goods also involves the creation of a security interest, which choice-of-law provisions are to be utilized? At one pole is the suggestion, advanced by Professor Gilmore, that 1-105(1) is "irrelevant in any choice of law problem which involves an Article 9 security interest."³⁰ The other extreme, suggested in at least one opinion,³¹ is that 1-105 is to be used to select the law to apply between debtor and secured creditor even though the controversy centers on issues specifically covered by sections of article 9. It is submitted that both of these extreme approaches are wrong and that there is a middle way that is more responsive both to the scheme of the Code and to the need for sensible solutions to conflicts problems.

*Skinner v. Tober Foreign Motors, Incorporated*³² indicates the outlines of the problem. In that case, Connecticut residents had purchased an airplane by installment contract from a Massachusetts corporation. Negotiations for the purchase were conducted at seller's principal place of business in Massachusetts and all instruments in connection with the installment sale were executed there. The airplane was delivered to the buyers in Massachusetts, and they then removed it to Connecticut. The original contract called for payments of 200 dollars per month; but subsequent to that agreement, the parties orally agreed to reduce the payments for the first year to 100 dollars per month. Five months later, the seller demanded payment as originally agreed; and when the buyers failed to meet his demand, he repossessed the airplane in Connecticut, removed it to Massachusetts, and resold it. The buyers sued the seller in Mas-

and before being brought into this state, the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state. The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, it may be perfected in this state; in such case perfection dates from the time of perfection in this state.

(4) Notwithstanding subsections (2) and (3), if personal property is covered by a certificate of title issued under a statute of this state or any other jurisdiction which requires indication on a certificate of title of any security interest in the property as a condition of perfection, then the perfection is governed by the law of the jurisdiction which issued the certificate.

30. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.11, at 1278 (1965) [hereinafter GILMORE].

31. *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960), *allocatur refused*. Pennsylvania law was applied under UCC § 1-105(1) to determine whether notice to the buyer of the resale of repossessed goods was necessary. As Professor Gilmore has pointed out, there was no conflict of laws on this issue. 2 GILMORE § 44.11, at 1279.

32. 345 Mass. 429, 187 N.E.2d 669 (1963).

sachusetts for equitable replevin or damages, contending that, under the modified payment agreement, they were not in default and that the retaking and resale were wrongful. Under Massachusetts law—section 2-209(1) of the Code—an “agreement modifying a contract needs no consideration to be binding.”³³ The seller, however, argued that Connecticut law was applicable and that under that law the modification was not binding because of lack of consideration. The seller relied for support on the choice-of-law provision of section 9-103(2), which provides that the “validity and perfection” of a security interest in equipment of a kind “normally used in more than one jurisdiction” is governed by the law of the jurisdiction where the debtor’s chief place of business is located—in this case Connecticut. The Massachusetts court rejected this contention, applied Massachusetts law, and affirmed a judgment awarding damages to the buyers. The court held that section 1-105 was the applicable choice-of-law provision in the Code and that under that provision Massachusetts law applied because the transaction bore “an appropriate relation to this state.” It stated that the choice-of-law provision for the sales article applied, rather than that from the secured-transactions article, because “[t]he issue in the case at bar involves the duties of the parties under the primary obligation; neither party contests the validity or perfection of the security interest.”³⁴

Professor Gilmore agrees with the court’s reasoning to the extent of recognizing that the relevant Code sections do “suggest the possibility of splitting a purchase money transaction into two components: a sale and a security transaction, with the result that the ‘sales’ aspects would be governed by the broad rule of § 1-105 (an “appropriate relation”) while the ‘security’ aspects would be governed by the narrower rules of §§ 9-102 and 9-103.”³⁵ Nonetheless, he concludes that the *Skinner* court’s choice of section 1-105 rather than sections 9-102 and 9-103 is “bad law.”³⁶ Despite Gilmore’s position, however, it is submitted that the *Skinner* result not only is more in accord with the scheme of the Code than a selection of the article 9 sections would have been, but also that it is desirable in selecting the better of two unsatisfactory Code approaches to choice of law.

The fundamental problem to be solved, before deciding what choice-of-law provision in the Code to apply, is to determine the

33. MASS. GEN. LAWS ANN. § 2-209(1) (1963).

34. 345 Mass. at 432-33, 187 N.E.2d at 671.

35. 1 GILMORE § 10.8, at §19 n.5.

36. 2 GILMORE § 44.11, at 1280 n.9.

extent to which the provisions of article 2, the sales article, continue to apply to a sales contract that is also a "secured transaction" governed by article 9. Some guidance is provided by the official comment to section 2-102 which indicates that article 2 "leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though it regulates the general sales aspects of such transactions." Thus the fact that article 9 applies to some issues that might arise between a buyer and a secured seller—issues such as the seller's right to repossess or resell goods from a defaulting buyer,³⁷ the buyer's right to redeem the goods,³⁸ or the buyer's liability for a deficiency judgment³⁹—does not preclude the application of article 2 to other issues that might arise between buyer and seller, so long as those issues are covered by a provision of article 2 and are not covered by a provision in article 9. That view of the scope of article 2 is consistent with the Code's central purpose of unifying the law governing commercial transactions. Indeed, it would be unwise to remove a transaction from the coverage of article 2 merely because there happened to be a security interest in the goods; if, in that situation, it should be discovered that no provision in article 9 covered the issue, the resolution of the problem would depend upon reference to the nonuniform law outside the Code.

*Associates Discount Corporation v. Palmer*⁴⁰ illustrates the correct approach. In that case, the buyer had purchased an automobile under a contract that gave the seller a security interest in the vehicle. Following the buyer's default, the car was repossessed and resold. More than four years later, the seller's assignee brought suit against the buyer for a deficiency judgment. The court had to decide whether to apply the four-year limitation period of section 2-725 for bringing "[a]n action for breach of any contract for sale," or whether to hold that section inapplicable because the sale had been a secured transaction and to look instead to non-Code statutes of limitation because there was no applicable limitation in article 9. The court applied section 2-725 and reversed a judgment for the plaintiff, stating that a suit for a deficiency judgment

37. With respect to repossession, see UCC § 9-503; with respect to resale, see UCC §§ 9-504 and 9-505. To complicate matters further, the secured party's rights after default are governed by article 2 if the debtor has not lawfully obtained possession of the goods and if the security interest arises under article 2. See UCC § 9-113.

38. UCC § 9-506.

39. See, e.g., UCC §§ 9-502(2), 9-504(2).

40. 47 N.J. 183, 219 A.2d 858 (1966).

is nothing but a simple *in personam* action for that part of the sales price which remains unpaid after the seller has exhausted his rights under Article 9 by selling the collateral; it is an action to enforce the obligation of the buyer to pay the full sale price to the seller, an obligation which is an essential element of all sales and which exists whether or not the sale is accompanied by a security arrangement.⁴¹

The reasoning in *Palmer* is right, and the dictum in *In re Advance Printing v. Litho Company*⁴²—that “it is clear that Section 2-102⁴³ takes a security transaction without the scope of that article [article 2] in the code”⁴⁴—is wrong. As the court in *Palmer* pointed out with respect to section 2-102, “[t]his section excludes from Article 2 those dealings designed to operate *only* as security transactions”⁴⁵

Once it is recognized that article 2 may continue to apply to a transaction that is also covered by article 9, the decision whether to apply the choice-of-law rules of section 1-105(1) or those of sections 9-102 and 9-103 is simplified. If the conflict-of-laws problem concerns an issue covered by a provision in article 2, then the conflicts provisions of 1-105(1) are applicable. If the conflict-of-laws problem concerns an issue covered by a provision in article 9, the conflicts provisions of 9-102 and 9-103 are applicable. This conclusion is consistent with the primary approach of the choice-of-law provisions in sections 9-102 and 9-103—to indicate when “this Article,” meaning the forum’s version of article 9, “applies” or “governs.” It would seem logically difficult for “this Article” to “govern” if the issue affecting the debtor and the secured creditor is covered by no provision in article 9 but by a provision in article 2.

The conclusion that the conflicts provisions of section 1-105(1)

41. 47 N.J. at 187, 219 A.2d at 861.

42. 277 F. Supp. 101 (W.D. Pa.), *affd. mem.*, 387 F.2d 952 (3d Cir. 1967).

43. UCC § 2-102 provides:

Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

44. 277 F. Supp. at 105. The court was referring to UCC § 2-302 which gives a court the power to modify or to refuse to enforce unconscionable contracts or clauses. For cases involving retail installment sales in which § 2-302 was applied, see, *e.g.*, *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct., App. Term 1967); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Spec. Term 1969); *cf.* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (although an installment sale in which the seller retained title occurred before the Code was in effect, the court adopted a common-law rule patterned after UCC § 2-302).

45. 47 N.J. at 188, 219 A.2d at 861.

should be applied to a secured transaction when the issue concerning the debtor and the secured creditor is covered by a provision in article 2 not only is consistent with the structure of the Code, but also is desirable in light of the comparative quality of section 1-105(1) and sections 9-102 and 9-103. The choice-of-law provisions in section 1-105(1) are unsatisfactory, because they permit the parties to include in their contract a choice-of-law provision that can, in effect, validate a contractual term that, on a proper evaluation of relevant state policies, should be invalid. Moreover, section 1-105(1) invites parochial application of forum law in situations in which the parties have not agreed on what law should govern.⁴⁶ Nevertheless, that section does require that choice of law be "reasonable" and "appropriate," thus leaving hope that, even under the Code, courts may continue to seek better conflicts results by analysis of policies underlying putatively conflicting domestic rules.⁴⁷ In any event, whatever the shortcomings of the section 1-105(1) conflicts provisions, they are minimal in comparison to those of sections 9-102 and 9-103, in which, as will be seen, the Code reaches its nadir with regard to both Delphic draftsmanship and regressive policy.

2. Should Section 9-102 or Section 9-103 Be Applied?

Once it is determined that an issue involved in a conflicts problem is covered by a provision in article 9 so that the choice of law is controlled by sections 9-102 and 9-103, it becomes necessary to decide which of those two sections applies to determine the rights and duties between a debtor and secured creditor. Section 9-103 contains choice-of-law provisions for the determination of the "validity" and "perfection" of security interests; but the extent to which those provisions apply in determining the rights and duties between debtors and secured creditors depends upon the scope of the meaning given to "validity" and "perfection."⁴⁸

Under subsection (1) of 9-103, the "validity and perfection" of a

46. For elaboration of these criticisms of UCC § 1-105(1), see Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399, 406-12, 418-21 (1968).

47. See Nordstrom & Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623, 641; cf. *General Elec. Credit Corp. v. R.A. Heintz Constr. Co.* 302 F. Supp. 958, 962 (D. Ore. 1969) ("appropriate relation" same as "significant contacts").

48. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, tit. B, introductory note at 119-20 (P.O.D. III, 1969):

[I]t has not been determined what issues are covered by the term "validity" as used in § 9-103. Undoubtedly, the term does include certain requirements as to formalities (see § 9-203), but it is not clear that the term covers such issues as capacity, illegality and fraud. Also it is not clear that the term covers issues of redemption.

security interest in assigned accounts or contract rights is determined by the whole law—thus including the conflicts rules—of the state in which is located the office where the assignor keeps his records concerning the accounts or contract rights. Under subsection (2), the “validity and perfection” of a security interest in “general intangibles,” mobile equipment, and mobile leased inventory is determined by the whole law of the state in which the “chief place of business” of the debtor is located. Subsection (3) applies to personal property not covered by subsections (1) and (2). If such property is already subject to a security interest when brought into the forum state, the “validity” of the security interest may continue for four months, but is to be determined by the whole law of the state in which the property was located when the security interest attached. If the security interest is not perfected in the forum and under forum law within that four-month period, the secured creditor’s interest is to be regarded by the forum as perfected only from the date on which it is perfected in the forum. Subsection (4) does not mention “validity.” Under that subsection, “perfection” is governed by the law of the state that issues a certificate of title to property if, as a condition of perfection, that certificate is required to indicate any security interest in the property.

“Perfection” is the less troublesome of the two terms, and it is clear from the official comments that “perfection” does not relate to such matters as rights between a secured creditor and a debtor after default.⁴⁹ Whether “validity” refers to such default rights, however, is less clear. The closest that the Code comes to defining “validity” is in official comment 7, paragraph three, following section 9-103:

Note that even after the four-month period, it is the law of the jurisdiction where the security interest attached which determines its validity. That is to say, such matters as formal requisites continue to be tested by the law with reference to which the parties originally contracted; other matters (rights of third parties, *rights on default* and so on) are governed by this Article. [Emphasis added.]

Professor Gilmore interprets this statement as follows:

The Comment is not a gem either of legal analysis or of English prose. Nevertheless, as through a glass darkly, it makes two quite relevant statements. (1) The term “validity” as used in subsection (3), and presumably in the other subsections, means “formal requi-

49. See UCC § 9-301, comment 1, which reads: “As in section 60 of the Federal Bankruptcy Act, the term ‘perfected’ is used to describe a security interest in personal property which cannot be defeated in insolvency proceedings or in general by creditors.”

sites." (2) The law which determines perfection and reperfectio also governs default rights. That is, if litigation arises in State A (a Code state), the court should (according to the Comment) apply State A law to default rights if, under § 9-103(3), reperfectio of an out-of-state security interest in State A is required. By implication, if State A is not the state of initial perfection or of reperfectio the State A court should apply the law of the perfection jurisdiction to default cases between the parties as well as to cases involving the rights of third parties.⁵⁰

That interpretation is wrong; the official comment and section 9-103 do not mean any such thing. If the official comment conveys any meaning, it is that "validity" does not include default rights.⁵¹ No word or phrase in section 9-103 can reasonably be read to include default rights. Instead, choice of law for default rights between a debtor and a creditor is controlled by the situs rule of section 9-102.⁵² It is to that provision that the comment refers when it states that default rights are "governed by this Article." They are "governed by this Article," because section 9-103(3) refers to property that has been brought into the state that has enacted "this Article," and because section 9-102 says "this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state." The introductory phrase of section 9-102, "[e]xcept as otherwise provided in Section 9-103 on multiple state transactions," excludes from the coverage of 9-102 only the issues of "validity," "perfection," and "the possibility and effect of proper filing," none of which encompasses default rights.

It would be better for choice-of-law purposes if Professor Gilmore were correct and default rights were tied to the section 9-103 perfection provisions. At least with regard to mobile equipment under section 9-103(2), the Code, by referring to the chief place of business of the debtor in order to determine default rights, would approximate the results that thoughtful pre-Code cases had been reaching under rudimentary forms of state-interest conflicts analysis.⁵³ But, alas, that result is not what the Code has wrought. As between debtor and creditor, only matters of "validity"—that is, "such matters as formal requisites"—escape control by section 9-102. With regard to such

50. 2 GILMORE § 44.11, at 1276-77.

51. See also *Cavers*, *supra* note 24, at 1144; Holt, *Some Conflict of Laws Problems Under the Uniform Commercial Code*, 1962 U. ILL. L.F. 390, 394.

52. See *Associates Discount Corp. v. Cary*, 47 Misc. 2d 369, 262 N.Y.S.2d 646 (N.Y. Civ. Ct. 1965) (whether resale without notice is proper).

53. Professor Gilmore feels that the *Jewett*, *Shanahan*, and *Hulett* cases would be decided under the Code in the same way that they were in fact decided, so long as § 9-103(2) controlled default rights. See 2 GILMORE § 44.10, at 1267, 1273.

formalities, one would have expected that a Code which is intended to serve the reasonable needs of the business community would have contained a flexible rule of validation, and would have thus upheld a transaction between a debtor and a creditor so long as it met the formal requirements of any state having a relationship with the parties or with the transaction sufficient to make the validation policy of that state relevant.⁵⁴ Differences in formal requirements among the states are almost certain to be matters of detail rather than of basic policy. Instead, however, section 9-103 foolishly ties validity on matters of formalities to the law of the state where records of assigned contract rights or accounts are kept, to the law of the state of the chief place of business of the debtor, or to the law of the state where the property was located when the security interest attached. Fortunately the references in section 9-103 are to the whole law of these states, including their conflicts rules; and these conflicts rules may provide the desirable alternative references for validation. But there is no similar liberating reference to whole law under subsection (1) if the records of assigned accounts or contracts rights are kept in "this state," or under subsection (2) if "this state" is the chief place of business of a debtor and the security interest is in mobile equipment. In such cases "this Article" governs validity. Section 9-103 does refer to "the law of this state" rather than to "this Article" for determining the validity of a security interest in goods that the parties understood would be kept in the forum state, but that reference applies only if the goods were brought into the forum state within thirty days after the security interest attached and were intended to be used "for purposes other than transportation through" the forum. Still, the language of this section might be construed as a reference to "the [whole] law of this state," including conflicts rules that would provide alternative references for validation on matters so minor as formalities.

It is fortunate that, when under sections 9-103(1) and 9-103(2) "this Article" must determine matters of formal validity, the provisions covering formalities, such as section 9-110⁵⁵ and section 9-203

54. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 244, comment i (P.O.D. III, 1969). Concerning the analogous problem of formalities in the execution of a will, many states have statutes that make alternative references to various laws in order to uphold validity. See MODEL EXECUTION OF WILLS ACT, superseding UNIFORM WILLS ACT, FOREIGN EXECUTED § 7 (act withdrawn 1943); Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 905-06 (1960) (listing thirty-two states with statutes making some alternative reference for formal validity).

55. UCC § 9-110 provides in pertinent part: "For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

(1),⁵⁶ are liberal ones that are unlikely to strike down a security interest. But Colorado,⁵⁷ Florida,⁵⁸ Idaho,⁵⁹ Kansas,⁶⁰ and Mississippi⁶¹ have stricter provisions in section 9-110. Moreover, with respect to section 9-203, Colorado requires both spouses to sign an agreement creating a security interest—other than a purchase-money security interest—in consumer goods used by a family;⁶² and Wisconsin requires the debtor's wife to sign if a non-purchase-money security agreement covers goods exempt from execution.⁶³ These provisions in Colorado and Wisconsin can be applied rationally only when the state is the marital domicile. But marital domicile is not the nexus required under section 9-103.

In summary, the choice-of-law provisions of section 9-103 do not

56. UCC. § 9-203 provides in pertinent part:

(1) Subject to the provisions of Section 4-208 on the security interest of a collecting bank and Section 9-113 on a security interest arising under the Article on Sales, a security interest is not enforceable against the debtor or third parties unless

- (a) the collateral is in the possession of the secured party; or
- (b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops or oil, gas or minerals to be extracted or timber to be cut, a description of the land concerned. In describing collateral, the word "proceeds" is sufficient without further description to cover proceeds of any character.

57. COLO. REV. STAT. ANN. § 155-9-110 (1963) provides in pertinent part:

For the purposes of this article, any description of personal property is sufficient if it specifically identifies and itemizes in the security agreement what is described as to consumer goods, and whether or not it is specific if it reasonably identifies what is described as to all other personal property.

58. FLA. STAT. ANN. § 679.9-110 (1967) adds the following language at the end of the section:

except that a description of real estate in an instrument filed to perfect a security interest in crops growing or to be grown or goods which are or are to become fixtures shall be sufficient only if the filing or recording of the same constitutes constructive notice under the laws of this state, other than this chapter, which are applicable to the filing or recording of real estate mortgages, and a mailing or street address alone shall not be sufficient.

59. In IDAHO CODE ANN. § 28-9-110 (1967), the words "or real estate" are deleted from the section, and the following is added at the end of the uniform version:

provided, however, that any description of real property be a legal description, that is, a description setting forth a United States government subdivision . . . or metes and bounds of the premises affected by the security interest and tied to primary control points which include either a section corner, quarter-section corner, or meander corner according to United States government survey.

60. In KAN. STAT. ANN. § 84-9-110 (Supp. 1967) the uniform version is preceded by the words, "[e]xcept in the case of a description of real estate concerned with goods which are or are to become fixtures (section 84-9-402)."

61. In MISS. CODE ANN. § 41A:9-110 (Supp. 1967), the following words are added at the end of the uniform version:

except that description of real estate in an instrument filed to perfect a security interest in fixtures is sufficient only if the filing or recording of the same constitutes constructive notice under the laws of this State, other than this Article, which are applicable to the filing or recording of real estate mortgages and deeds of trust.

62. COLO. REV. STAT. ANN. § 155-9-203(1)(b) (1963).

63. WIS. STAT. ANN. § 409.203(2) (1967).

apply to default rights between a creditor and a debtor. Thus, to determine default rights between those parties, one is compelled to decipher and apply section 9-102.

3. Section 9-102: *Situs When?*

If taken literally, the language of section 9-102(1)—“this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state”—would produce irrational results. Under a strict interpretation of that section, the forum’s version of article 9 would apply if the property was in the forum at the moment that the choice-of-law decision was made, even if the property had not previously been in the forum, and even if the events being scrutinized, such as repossession and resale, occurred elsewhere. That literal interpretation of section 9-102 might produce some interesting examples of forum shopping and law shopping through chattel-napping, but the results would be outrageous. Under such circumstances, the application of the forum’s law could result in applying the law of a state that had no legitimate interest in having its law applied; and if such application unfairly surprised one of the parties, there would probably be a violation of the due process clause.⁶⁴ Hence, the *situs* language of section 9-102 should not, and under some circumstances cannot, be taken literally.

But if the presence of the property in a state at the moment of decision does not require the application of the state’s law, at what time must the property be within the forum for the forum’s version of article 9 to apply? One suggestion has been to apply the forum’s law if the property was there at the time that the security interest attached.⁶⁵ Under section 9-204, in the absence of an explicit agreement to the contrary, a security interest attaches when there is an agreement that it do so, value is given, and the debtor has rights in the collateral.⁶⁶ That approach, however, seems little better than the strictly literal reading, for the collateral’s location at this particular moment might be completely fortuitous, especially in the case of a purchase-money security interest. Indeed, the *situs* of property when a security interest attaches bears no relationship to the interest of the *situs* state in controlling the conduct of the parties, particularly

64. See *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); cf. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964).

65. See 1 GILMORE § 10.8, at 318 n.5.

66. UCC § 9-204 provides in pertinent part:

(1) A security interest cannot attach until there is agreement (subsection 3 of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

conduct that will occur after default, which may be months or years later at a time when the property is located elsewhere.

Another approach is to allow the forum's article 9 to apply to an issue of repossession, resale, or redemption if the property was in the forum when the conduct in question occurred. For example, the forum's rules on retaking the collateral would apply if the property had been in the forum at the time that the secured creditor repossessed; forum law on manner of resale would apply if the collateral had been in the forum when it was resold; and forum law of the debtor's right of redemption would control if the property had been in the forum when the debtor attempted to exercise his right of redemption. This construction of section 9-102, however, is also unsatisfactory, because it would enable the creditor to select the state whose law would govern his actions in reselling the goods. So long as the creditor followed the law of the state in which he disposed of repossessed property, he would be protected, regardless of whether he had acted wrongfully under the law of some other state that had an interest in protecting the debtor. Moreover, if the creditor moved the property across state lines after retaking it, the debtor's right of redemption might change depending on where the property was located at the moment that the redemption tender was made.

If repossession, resale, and redemption must be governed by reference to some situs law, it seems preferable to apply the law of the place in which the collateral was located at the time of repossession.⁶⁷ That approach would deprive the creditor of the ability to select the applicable law simply by changing the situs, and it would have the merit of certainty in fixing the law by which the propriety of the creditor's conduct after default is to be judged. In addition, it is likely to make some rough functional sense in that the applicable law under this approach will probably be that of a state in which the debtor is doing business and has been using the property, thus giving that state a legitimate concern in determining the default rights of the parties. But even though this approach is the best of the "situs" solutions, it is still far from satisfactory. Its gain in certainty of applicable law may be far outweighed by the fact that some state other than the situs of the property at the time of repossession may have the predominant interest in controlling the protection to be afforded the debtor and the rights to be given the

67. *Cf. Associates Discount Corp. v. Cary*, 47 Misc. 2d 369, 262 N.Y.S.2d 646 (N.Y. Civ. Ct. 1965) (held that whether notice of resale must be given is determined by the law of the state where the property was repossessed and resold).

creditor. In *General Acceptance Corporation v. Lyons*,⁶⁸ for example, a Vermont debtor purchased a boat by conditional sales contract from a Vermont creditor. While the debtor was sailing the boat from Maine to Florida, it proved unseaworthy off the Georgia coast and was taken to a Georgia port for repairs. The conditional vendor's assignee repossessed the boat and resold it in Georgia. The Vermont court was correct in holding that, insofar as it made any difference,⁶⁹ Vermont law rather than Georgia law determined whether the creditor, in order to preserve his right to a deficiency judgment, had to give the debtor notice of the time and place for the resale.

The foregoing discussion of section 9-102 has been in terms of when the forum is the situs referred to by that section so that the forum's version of article 9 applies. The reason for this approach is that section 9-102 speaks of when "this Article applies," meaning "this state's Article 9." It seems reasonable, however, to read section 9-102 not as just a delimitation of the applicability of forum law, but as a choice-of-law rule. If—and it is a big "if"—the forum's law is properly applicable because the forum was the situs of the property at whatever moment is intended by section 9-102, then it appears that the law of the situs at that magical moment is properly applicable whether or not that situs is the forum. Assuming that a non-forum situs state has enacted article 9, that state would apply its own law if it were the forum and if it construed section 9-102 in the same manner as the forum has construed it. If the forum is not the situs referred to in section 9-102, and if the choice-of-law rule of that other situs differs from the forum's construction of section 9-102, some needed rationality and flexibility could be introduced into the unduly rigid situs rule of section 9-102 by referring to the whole law of the situs state, including that state's choice-of-law rules.⁷⁰

That section 9-102 is intended as a general situs choice-of-law rule, not as just an indication of when forum law applies, is suggested by the first sentence of official comment 3 to that section: "In general this Article adopts the position, implicit in prior law, that the law of the state where the collateral is located should be the governing law, without regard to possible contacts in other jurisdictions." As indicated in the previous discussion of pre-Code conflicts rules,⁷¹ this situs rule, at least insofar as it concerns default rights,

68. 125 Vt. 332, 215 A.2d 513 (1965).

69. The creditor in this case did not prove Georgia law and the court assumed that it was the same as Vermont law.

70. Cf. 1 GILMORE § 10.8, at 319 (whole law of situs when security interest attaches).

71. See text accompanying notes 7-26 *supra*.

does not reflect "prior law" if one has any regard for the results, the reasoning, or the trend of modern cases. Moreover, regardless of which of the several reasonable constructions is given to section 9-102, the selection of which law under that provision governs default rights is made without proper regard either for the policies underlying putatively conflicting domestic rules or for the reasonable concerns that situs and nonsitus states may have with protecting the debtor from oppression and the creditor from unfair surprise.

II. THE SECURED CREDITOR AND THIRD PARTIES

A. Pre-Code Conflicts Rules

The classic triangle, involving a secured creditor, a debtor, and a third party, can be sketched as follows. The creditor acquires a security interest in goods situated in state X. He records his interest as required by the law of X so that, in X, his security interest would have preference over the claims of third parties who thereafter might deal with the goods in X. The debtor, however, transports the goods to state Y in which a third person, perhaps a bona fide purchaser or another creditor of the debtor, enters into a transaction involving the goods. On the basis of this transaction, the third person claims to have an interest in the goods that is superior to the security interest of the first creditor. The first creditor has not recorded his security interest in Y or has not done whatever else might be required by the law of Y for secured creditors to protect themselves against having their security interests superseded by the claims of persons dealing with the goods in Y. The question then arises: as between the secured creditor and the third person, who prevails?

The almost universally recognized common-law rule was that the interest that a person acquires in personal property is determined by the law of the situs of the property at the time of the transaction on which that person bases his claim.⁷² This rule, however, did not

72. See *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664 (1877); *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307 (1866), 74 U.S. (7 Wall.) 139 (1868) (held that New York is compelled to give full faith and credit to the law of the Illinois situs, which prefers the New York attaching creditor over a secured creditor who was not a party to the Illinois attachment suit); *In re Herold Radio & Electronics*, 327 F.2d 564 (2d Cir. 1964); *Fred E. Cooper, Inc. v. Farr*, 165 S.2d 605 (La. Ct. App.), writ refused, result correct, 246 La. 838, 167 S.2d 667 (1964); *Craig v. Columbus Compress & Warehouse Co.*, 210 S.2d 645 (Miss. 1968) (held that whether warehouse receipts are negotiable is determined by the law of the situs of the goods, not by the law of the place of negotiation; court also noted that this result was consistent with "center of gravity" rule); *Marvin Safe Co. v. Norton*, 48 N.J.L. 410, 7 A. 418 (1886) (situs rule carried to the extreme of giving the secured creditor more protection under the situs law against a bona fide purchaser than he had under the law of the creditor's state); *Zendman v. Harry Winston, Inc.*, 305 N.Y. 180, 111 N.E.2d 871 (1953) (situs rule stated for determining whether factor could convey title to bona fide purchaser,

mean that in a situation like the preceding hypothetical case, the secured creditor would lose. Almost as universally recognized as the situs rule was the rule that the situs would recognize rights that a secured creditor had perfected in another state in which the property had been formerly situated,⁷³ provided that the property had been

but there was probably no conflict in laws); *Torrance v. Third Natl. Bank*, 70 Hun 44, 23 N.Y.S. 1073 (Sup. Ct., Gen. Term, 1893) (held that under situs law conditional vendor loses to attaching creditor); *W.H. Applewhite Co. v. Etheridge*, 210 N.C. 433, 187 S.E. 588 (1936) (situs law applied although it defeated a forum creditor's interest recorded at the forum); *Cammell v. Sewell*, 5 Hurl. & N. 728 (Exch. Chamber 1860) (held that whether bona fide purchaser gets good title through sale by unauthorized ship's master is determined by situs law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 245 (P.O.D. III, 1969); *Vernon, Recorded Chattel Security Interests in the Conflict of Laws*, 47 IOWA L. REV. 346, 355 (1962); *cf. Ford Motor Co. v. National Bond & Inv. Co.*, 294 Ill. App. 585, 14 N.E.2d 306 (1938) (secured creditor won under situs law, but he could have lost only through a combination of elements from both the law of the situs and the law of the place of contracting); *Clark Equip. Co. v. Poultry Packers, Inc.*, 254 Miss. 589, 181 S.2d 908 (1966) (whether conditional sale must be recorded to protect vendor against attaching creditor was determined in vendor's favor by the law of the place of contracting, which was the same as the law of the place where the truck trailers in question were temporarily located when attached, but was contrary to the law of the debtor's principal place of business where trailers were based); *Hornthall v. Burwell*, 109 N.C. 10, 13 S.E. 721 (1891) (court permitted chattel mortgagee to recover against attaching creditor who had sold the goods, but it assumed that a court in the situs would reach the same decision); *Delaney Furniture Co. v. Magnavox Co.*, 435 S.W.2d 828 (Tenn. 1968) (whether receiver could recover preferential transfer was determined by law of situs). *But cf. Charles T. Dougherty Co. v. Krimke*, 105 N.J.L. 470, 144 A. 617 (1929) (court refused to give owner more protection under situs law against person to whom factor pledged the goods than owner would receive under law of owner's state); R. LELAR, AMERICAN CONFLICTS LAW 440 n.9 (1968) (result in *Krimke* partially explained by "misinterpretation of the facts of *Marvin Safe*"). Cases which did not apply the law of the situs include: *Forgan v. Bainbridge*, 34 Ariz. 408, 274 P. 155 (1928) (court refused to apply law of situs in which bona fide purchaser acquired automobile, when that law would have preferred purchaser over mortgagee); *Edgerly v. Bush*, 81 N.Y. 199 (1880) (court refused to apply situs law under which purchaser would have prevailed over mortgagee, since all parties were forum citizens).

73. *Forgan v. Bainbridge*, 34 Ariz. 408, 274 P. 155 (1928); *Merchants & Farmers State Bank v. Rosdail*, 257 Iowa 1238, 131 N.W.2d 786 (1964), *modified*, 257 Iowa 1238, 136 N.W.2d 286 (1965); *Brawner v. Elkhorn Prod. Credit Assn.*, 78 Nev. 483, 376 P.2d 426 (1962); *Churchill Motors, Inc. v. A.C. Lohman, Inc.*, 16 App. Div. 2d 560, 229 N.Y.S.2d 570 (1962); *J.A. Tobin Constr. Co. v. Grandview Bank*, 424 P.2d 81 (Okla. 1967); *Bank of Atlanta v. Fretz*, 148 Tex. 551, 226 S.W.2d 843 (1950) (Texas adopted "majority rule"); *In re Union Acceptance Corp.*, [1955] 16 W.W.R. (n.s.) 283 (Alta. Sup. Ct. App. Div. 1955). *See Raphael, Extraterritoriality of a Chattel Security Interest: A Plea for the Bona Fide Purchaser*, 28 FORDHAM L. REV. 419, 420 (1959); *Vernon, supra note 72*, at 350; *cf. Wells v. City Natl. Bank*, 233 Ark. 868, 349 S.W.2d 688 (1961), (court refused to recognize mortgage recorded in another state, since mortgage was not refiled in forum within the period which the other state would require for refiled of out-of-state mortgages); *Hornthall v. Burwell*, 109 N.C. 10, 13 S.E. 721 (1891) (court assumed that situs of attachment proceedings would recognize prior mortgage recorded at forum); *Hannah v. Pearlman & Selchen*, [1954] 1 D.L.R. 282 (B.C. Sup. Ct. 1953) (bona fide purchaser at forum prevailed over conditional vendor who did not comply with conditional sales statute of jurisdiction where conditional sale was made). *But cf. Fincher Motors, Inc. v. Northwestern Bank & Trust Co.*, 166 S.2d 717 (Fla. Dist. Ct. App. 1964) (held that, although interest of foreign mortgagee was protected, forum "procedure" denied him the remedy of replevin); *Fred E. Cooper, Inc. v. Farr*, 165 S.2d

removed to the new situs without the knowledge or consent of the creditor, and provided that the creditor, after learning of the new location of the property, acted with reasonable dispatch to perfect his interest under the law of the new situs, typically by recording it there.⁷⁴

These rules gave the secured creditor a substantial amount of protection. They shifted from the creditor the risk that the debtor would abscond with the goods to another state and there trick someone into parting with value for what that person believed was an interest in unencumbered goods. The argument most frequently advanced in favor of these creditor-protecting rules was that a state that did not recognize rights perfected elsewhere would quickly become a dumping ground for stolen property. According to that argument, buyers of mobile goods, such as automobiles, would have no incentive to exercise care in determining whether there was an outstanding security interest in the goods.⁷⁵ This reasoning does have

605 (La. Ct. App.), writ refused, result correct, 246 La. 838, 167 S.2d 667 (1964) (conditional seller lost to forum's materialmen); *Universal Credit Co. v. Marks*, 164 Md. 130, 163 A. 810 (1933) (garageman's lien prevailed over conditional sales contract recorded out of state); *Johnson v. Eastern Precision Resistor Corp.*, 19 Ohio Op. 2d 150, 182 N.E.2d 59 (C.P.), *aff'd.*, 19 Ohio Op. 2d 150 (Ct. App. 1961) (assignee of accounts receivable lost to creditor who garnisheed at forum). See *Leary, Horse and Buggy Lien Law and Migratory Automobiles*, 96 U. PA. L. REV. 455, 457 (1948) (despite lip service to supposed majority rule, courts found ways to protect the bona fide purchaser). A case which did not follow the majority rule was *Commercial Credit Corp. v. Pottmeyer*, 176 Ohio St. 1, 197 N.E.2d 343 (1964); but it was partially overruled, in *Hardware Mut. Cas. Co. v. Gall*, 15 Ohio St. 2d 261, 240 N.E.2d 502 (1968). See also *G.F.C. Corp. v. Antrim*, 2 Pa. D. & C.2d 377 (C.P. Luzerne County, 1954) (bona fide purchaser takes free of lien noted on title certificate that had been issued in another state).

74. See UNIFORM CONDITIONAL SALES ACT § 14 (act withdrawn 1943), superseded by UNIFORM COMMERCIAL CODE (must refile "within ten days after the seller has received notice of the filing district to which the goods have been removed"); *Brown v. C.I.T. Credit Corp.*, 331 F.2d 246 (7th Cir. 1964) (law of situs to which creditor knew truck had been removed determined whether recording had been necessary); *Davis v. P.R. Sales Co.*, 304 F.2d 831 (2d Cir. 1962) (court in situs to which equipment moved with consent of conditional vendor applied its own law to prefer trustee in bankruptcy over creditor, but it gave no indication that different result would be reached under law of vendor's state); *Enterprise Optical Mfg. Co. v. Timmer*, 71 F.2d 295 (6th Cir. 1934) (law of situs to which creditor knew chattels had been removed determined whether recording had been necessary); *J.A. Tobin Constr. Co. v. Grandview Bank*, 424 P.2d 81 (Okla. 1967) (decision in favor of secured creditor who did not record lien at situs was based on a finding that he did not know that machine was to be moved there); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 253, comment b (P.O.D. III, 1969); *Davis, Conditional Sales and Chattel Mortgages in the Conflict of Laws*, 13 INTL. & COMP. L.Q. 53 (1964) (reviewing English and United States cases); *Raphael, supra* note 73, at 420; *Vernon, supra* note 72, at 353-55.

75. See *Forgan v. Bainbridge*, 34 Ariz. 408, 413-14, 274 P. 155, 157 (1928); *Merchants & Farmers State Bank v. Rosdail*, 257 Iowa 1238, 1245-46, 131 N.W.2d 786, 790 (1964), modified, 257 Iowa 1238, 136 N.W.2d 286 (1965); *Commercial Credit Corp. v. Pottmeyer*, 176 Ohio St. 1, 13, 197 N.E.2d 343, 351 (1964) (dissenting opinion); *Bank of Atlanta v. Fretz*, 148 Tex. 551, 560, 226 S.W.2d 843, 849 (1950).

a certain amount of surface appeal. For example, the argument might have justified shifting from the secured creditor to the third person the burden of proof on the issue of the good faith of that third person. Also, when an automobile bearing an out-of-state license plate was offered for sale, application of this argument might have justified charging a person—particularly a used-car dealer—with whatever that person could have learned by a diligent inquiry to recording officials of the relevant sister state.⁷⁶ In addition, one might have preferred the first secured creditor over subsequent creditors, because the latter, like the first creditor, could have been expected to make a thorough credit investigation before parting with value for a security interest in the goods.⁷⁷ Nevertheless, it was nothing short of madness to shift the risk of the debtor's misconduct from the secured creditor to a consumer who in his home state purchased an automobile bearing license plates of that state, when no lien was recorded in that state and there was no way that the consumer could, by reasonable inquiry, learn of the existing lien. Yet that shifting of risk was frequently done.⁷⁸ A comparison of the opportunities to investigate the debtor's background and to distribute losses caused by fraudulent debtors indicates that in the situation just described the bona fide consumer-purchaser should have prevailed.⁷⁹ That he did not prevail was the great weakness of the pre-Code rules. The great strength of those rules was that the creditor had to act with reasonable dispatch to protect third persons in a new state once he knew that the goods had been removed to that state. Article 9 has wrought significant changes in this pattern.

B. *The Code Conflicts Rules*

One of the central choice-of-law issues between a secured creditor and a third person making competing claims to the same goods is what law should be applied to determine whether the creditor's interest is "perfected" so that it "cannot be defeated in insolvency proceedings or in general by creditors."⁸⁰ Furthermore, it is necessary to know what law determines both whether the creditor's interest has been properly filed and the "effect of proper filing" on other

76. See Leary, *supra* note 73, at 472, 483.

77. See Vernon, *supra* note 72, at 364-65.

78. See, e.g., *Merchants & Farmers State Bank v. Rosdail*, 257 Iowa 1238, 131 N.W.2d 786 (1964), *modified*, 257 Iowa 1238, 136 N.W.2d 286 (1965); *Brawner v. Elkhorn Prod. Credit Assn.*, 78 Nev. 483, 376 P.2d 426 (1962).

79. See Leary, *supra* note 73, at 483; Raphael, *supra* note 73, at 426-28; Vernon, *supra* note 72, at 363.

80. UCC § 9-301, comment 1.

creditors and on bona fide purchasers. The Code choice-of-law rules on these matters are set forth in section 9-103.⁸¹ Which of these Code rules applies depends, in part, upon the type of collateral in which a security interest is claimed.

1. Section 9-103(1)

The perfection and filing of security interests in "accounts or contract rights" are covered by section 9-103(1). That section selects as the applicable law the law of the state in which is located "the office where the assignor . . . keeps his records concerning" those accounts or contract rights.⁸² "General intangibles," on the other hand, along with mobile equipment and mobile leased inventory, are covered by section 9-103(2) which selects the law of the state where the debtor's chief place of business is located. It is probably a mistake to draw this distinction. Both for "accounts or contract rights" and for "general intangibles," mobile equipment, and mobile leased inventory, the law chosen should be that of the state of the debtor's chief place of business, insofar as that place might differ from the place where his records are kept. In this computer age, the "records" might be kept in a central computer shared with other debtors and located in a state having no other connection with the debtor. Moreover, there is no good reason to require anyone to engage in the mind-boggling task of distinguishing between "accounts or contract rights" under section 9-103(1) and "general intangibles" under section 9-103(2). The official comment to section 9-106—the section that defines these terms⁸³—is especially unsatisfactory in this regard, for it uses the term "contractual rights" to define "general intangibles": "[t]he term 'general intangibles' brings under this Article miscellaneous types of contractual rights and

81. For the full text of UCC § 9-103, see note 29 *supra*. See also UCC § 2-402(2), which protects creditors of the seller against sales of goods, when the seller's retention of possession is fraudulent under the law of the state where the goods are situated.

82. See *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Intl., Inc.*, 399 Pa. 643, 161 A.2d 19 (1960) (applying law of state where assignor keeps its records and rejecting law indicated by parties in a choice-of-law clause). The law chosen in subsections (1), (2), and (3) of § 9-103, if it is not the forum's version of article 9, is the whole law of the indicated jurisdiction, "including [its] conflict of laws rules."

83. UCC § 9-106 provides:

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. "Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper. "General intangibles" means any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents and instruments. All rights earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are contract rights and neither accounts nor general intangibles.

other personal property which are used or may become customarily used as commercial security." In addition, as Professor Gilmore has pointed out, what starts life as a "general intangible" is likely to mature into an "account," and "contract rights" may change into either "accounts" or "general intangibles."⁸⁴

2. Section 9-103(2)

Section 9-103(2), as indicated above, selects the law of the state of the debtor's chief place of business, not that of its state of incorporation,⁸⁵ to cover the issue of the perfection of security interests in general intangibles and in certain mobile equipment and leased mobile inventory section 9-103(2) also covers the issue of the effect of a proper filing of such security interests. To determine if the goods in a particular case constitute mobile equipment or inventory, the test is whether they are "goods of a type which are normally used in more than one jurisdiction"; it is irrelevant for purposes of this determination whether the goods are actually so used.⁸⁶ Thus, subsection 2 applies to goods of this type even if they are in fact used in only one jurisdiction; and it does not apply to goods which are not of this type, even if those goods are transported across jurisdictional boundaries.⁸⁷ In addition to being mobile,⁸⁸ the goods must be either "equipment," as opposed to consumer goods,⁸⁹ or inven-

84. 1 GILMORE § 12.5, at 382.

85. UCC § 9-103, comment 3 provides:

"Chief place of business" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. That is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief place of business" is not defined in this section or elsewhere in this Act. Doubt may arise as to which is the "chief place of business" of a multistate enterprise with decentralized, autonomous regional offices. A secured party in such a case may easily protect himself at no great additional burden by filing in each of several places.

86. See UCC § 9-103, comment 4.

87. See *In re Dennis Mitchell Indus., Inc.*, No. 17,240, CCH BANKR. L. REP. ¶ 63,328 (3d Cir. Dec. 18, 1969), reversing 280 F. Supp. 433 (E.D. Pa. 1968). For a discussion of the implications of this case, see Note, *UCC—Secured Transactions—Judicial Sales—Purchaser at Judicial Sale Takes Property Subject to Unperfected Security Interest of Which He Has Knowledge*, 67 MICH. L. REV. 1421 (1969).

88. UCC § 9-103(2) includes "airplanes" in its listing of examples of mobile goods. It should be noted that 49 U.S.C. § 1403 (1964) directs the administrator of the Federal Aviation Agency to establish a system for recording "[a]ny conveyance which affects the title to, or any interest in, any civil aircraft of the United States . . ." Any conveyance not recorded under this system is not effective against third persons who take without notice of the unrecorded interest. See *International Atlas Serv., Inc. v. Twentieth Century Aircraft Co.*, 251 Cal. App. 2d 434, 59 Cal. Rptr. 495 (1967), cert. denied, 389 U.S. 1038 (1968), holding that the Federal Aviation Act provides a complete and comprehensive recording system that supersedes inconsistent state laws.

89. UCC § 9-109(2) classifies goods as "equipment"

if they are used or bought for use primarily in business (including farming or a

tory⁹⁰ that the debtor leases to others. For example, a company automobile used by salesmen in the company's business is mobile equipment covered by section 9-103(2) even if in fact the automobile is used by the salesmen in only one jurisdiction. On the other hand, a family car used "primarily for personal, family or household purposes" is "consumer goods," rather than equipment;⁹¹ and, assuming that it is not covered by a certificate of title under subsection (4), it is covered by subsection (3) but not by subsection (2), even if the family car is used in more than one jurisdiction. An automobile in the inventory of an automobile leasing company is the type of mobile inventory covered by section 9-103(2), but an automobile in the inventory of a new- or used-car dealer is not. It is possible, however, for an automobile to be used both as leased inventory and as inventory for sale. That situation could occur if the debtor is a used-car dealer who also rents automobiles and who offers some of the same automobiles either for sale as used cars or for rental until sold. In such a case it seems reasonable to require the creditor to perfect both under the law of the state of the debtor's chief place of business, as required by subsection (2), and under the law of the state where the automobile has been located for more than four months, as required by subsection (3).

Section 9-103(2) does not indicate what law applies if the debtor's main office is shifted to another jurisdiction after the security interest attaches. The court in *General Electric Credit Corporation v. Western Crane and Rigging Company*⁹² applied the law of the state in which the debtor's chief place of business had been located when the security interest attached, rather than the law of the state to which his main office had been moved before the sale to a bona fide purchaser. That approach seems incorrect both in terms of official comment 5 to section 9-103⁹³ and because it apparently fails to give

profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods. . . .

See also 1 GILMORE § 10.10, at 329; Ruud, *Secured Transactions: Article IX*, 16 ARK. L. REV. 108, 120 (1961).

90. UCC § 9-109(4) classifies goods as "inventory"

if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment.

91. UCC § 9-109(1).

92. 184 Neb. 212, 166 N.W.2d 409 (1969).

93. UCC § 9-103, comment 5 states:

If the debtor's chief place of business is moved into "this state" after a security interest has been perfected in another jurisdiction, the secured party should file

reasonable protection to a subsequent purchaser or creditor who is likely to look for a recorded interest in mobile equipment at the new headquarters of the debtor. Under the circumstances present in *Western Crane*, however, the bona fide purchaser was not misled by the changed location of the debtor's main office, because in that case the buyer had purchased the crane in the state where the security interest had been filed and where the debtor's main office had formerly been located. Ironically, the subsequent buyer purchased from the conditional vendor to whom the debtor had returned the crane for repairs. That buyer lost to the assignee of the conditional vendor.

So long as the collateral is the kind of mobile equipment or mobile leased inventory covered by section 9-103(2), the only perfection required is in the state of the debtor's chief place of business. There is no need to re-perfect in another state to which the equipment is moved with the knowledge of the creditor, even if the equipment is used in that new state for longer than the four-month period specified in section 9-103(3). To perpetuate this situation seems unwise; refiling should be required to be made in the state where the mobile equipment is located if the equipment is used in that state for more than four months. Such refiling was required under earlier Code drafts⁹⁴ and would not be an onerous requirement to impose on secured creditors. Moreover, this requirement would afford additional protection to subsequent purchasers and creditors who deal with collateral that may, depending on its use, be either mobile "equipment" or "consumer goods," who cannot tell which it is by looking at it, and who cannot know where to look for a recorded security interest.

3. Section 9-103(3)

Section 9-103(3) covers property not covered in subsections (1) and (2), and thus it applies most frequently to consumer goods or to equipment of a kind not "normally used in more than one jurisdiction." Suppose that property covered by subsection (3) is situated in state X when the security interest in issue attaches to the prop-

in this state, since Section 9-401(3) is inapplicable. UCC § 9-401(3) provides:

A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed. UCC § 9-401, comment 6 states that subsection (3) of that section "is important only when local filing is required, and covers only changes between local filing units in the State."

94. See UCC § 9-103 (1952 version).

erty, and that this security interest is perfected in *X* by filing there. The debtor then removes the property to *Y* where he sells it to a bona fide purchaser or where another creditor, without knowledge of the prior lien, parts with value for a security interest in the property. Under section 9-103(3), the creditor who perfected his security interest in *X* by filing there retains the protection of the law of *X* for four months after the property is taken to *Y*. Unlike the situation under prior law, the four-month time limit for perfecting in *Y* begins to run when the property is taken to *Y*, even if the creditor does not know that it is there.⁹⁵ Purchasers and creditors who attempt to acquire an interest in the goods in *Y* during this four-month period take subject to the prior perfected interest. That situation remains true even if the creditor fails to perfect his interest in *Y* within the four months.⁹⁶ Thus, only those purchasers and creditors who take an interest in the property in *Y* after the four-month period can prevail over a secured creditor who has perfected in *X* but who has not yet perfected in *Y*.⁹⁷

95. See *In re Dennis Mitchell Indus. Inc.*, No. 17,240, CCH BANKR. L. REP. ¶ 63,328 (3d Cir. Dec. 18, 1969), reversing 280 F. Supp. 433 (E.D. Pa. 1968); *In re Atchison*, 6 UCC REP. SERV. 258 (E.D. Wis. Feb. 26, 1969, Bankruptcy No. 68-B-1761). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 253, comment *b* (P.O.D. III, 1969).

96. This result is unlike the result under the ten-day filing period of UNIFORM CONDITIONAL SALES ACT § 5 (act withdrawn 1943), which states:

Every provision in conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

An interesting interplay between § 5 of the UNIFORM CONDITIONAL SALES ACT and UCC § 9-103(3) occurs if state *X* has the Conditional Sales Act in force while *Y* has the Commercial Code. Suppose that the property is brought into *Y* within the ten days provided in the Conditional Sales Act, but the interest is not yet filed in *X*. Then, still within the ten days, the interest is filed in *X*. The question thus arises whether the security interest should be held to meet the requirement of UCC § 9-103(3) that it be "already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state." Some cases have held that the interest does meet this requirement. See *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965), *allocatur refused*; *Casterline v. General Motors Acceptance Corp.* 195 Pa. Super. 344, 171 A.2d 813 (1961). But see *General Motors Acceptance Corp. v. Manheim Auto Auction*, 25 Pa. D. & C.2d 179 (C.P., Lancaster County, 1962).

97. *First Natl. Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (L. Div. 1966); *Churchill Motors, Inc. v. A.C. Lohman, Inc.*, 16 App. Div. 2d 560, 229 N.Y.S.2d 570 (1962). See *In re Dumont-Airplane & Marine Instruments, Inc.*, 203 F. Supp. 511 (S.D.N.Y. 1962) (held that a trustee in bankruptcy prevails over a secured creditor in proceedings begun after the four months and before the security interest was properly filed); 1 GILMORE § 22.8, at 627. But cf. UCC § 9-103, comment 7:

The four month period is long enough for a secured party to discover in most cases that the collateral has been removed and to file in this state; thereafter, if he has not done so, his interest, although originally perfected in the state where it attached, is subject to defeat here by those persons who take priority over an

Moreover, except in the situation in which the parties understood at the time that the security interest attached that the property would be kept in *Y* and that property is then brought into *Y* within thirty days, the secured creditor gets the protection of the four-month period even if he knows that the property has been removed to *Y*.⁹⁸ The creditor is not required to re-perfect in *Y* within a reasonably short time after learning of the removal of the goods to *Y*.⁹⁹ That failure to impose a reasonable re-perfection requirement is an outrageous regression in the protection afforded to those who deal with a debtor in *Y*. The apparent countervailing benefit that section 9-103(3) purports to confer on purchasers and creditors in *Y* is that the four-month period begins to run even if the creditor does not know that the goods are in *Y*. But that apparent benefit is actually illusory, except when it is used by a trustee in bankruptcy to defeat the creditor's claim; an absconding debtor is not likely to wait four months before selling the goods in *Y*. Thus, if protection

unperfected security interest (see Section 9-301). Under Section 9-312(5) the holder of a perfected conflicting security interest is such a person even though during the four month period the conflicting interest was junior.

In addition, cf. UCC § 9-312(5):

[P]riority between conflicting security interests in the same collateral shall be determined as follows:

- (a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and whether it attached before or after filing;
- (b) in the order of perfection unless both are perfected by filing

It is submitted that comment 7 is in error and that the priority rules of § 9-312(5) are not intended to alter the absolute four-month protection that the secured creditor receives under § 9-103(2).

The foregoing discussion of priority vis-à-vis a secured creditor, however, refers only to purchasers and creditors who take a subsequent interest in the property. Improvers and materialmen are likely to prevail over the secured creditor even if they acquire their liens during the four months. That was the rule under pre-Code law [see, e.g., *Fred E. Cooper, Inc. v. Farr*, 165 S.2d 605 (La. Ct. App.), writ refused, result correct, 246 La. 838, 167 S.2d 667 (1964); *Universal Credit Co. v. Marks*, 164 Md. 130, 163 A. 810 (1933)]; and the same result is likely under the Code. See UCC § 9-310, which provides:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

For a case construing an improver's lien statute in favor of the secured creditor under UCC § 9-310, see *National Trailer Convoy Co. v. Mount Vernon Natl. Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

98. See *Utah Farm Prod. Credit Assn. v. Dinner*, 6 UCC REP. SERV. 937 (D. Colo. Aug. 1, 1969); 1 GILMORE § 22.8, at 626; *Vernon*, *supra* note 72, at 377. But cf. UCC § 1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

99. The Code's failure to impose such a requirement contrasts with the situation under UNIFORM CONDITIONAL SALES ACT § 14 (act withdrawn 1943), which requires the creditor to refile "within ten days after the seller has received notice of the filing district to which the goods have been removed."

is to be adequate, the secured creditor should be required to re-perfect in *Y* within a reasonably short time¹⁰⁰ after he learns that the collateral has been removed to *Y* and that its presence in *Y* is intended to be more than transitory.

Not only has section 9-103(3) impaired some the strengths of the preceding law, but it also seems to have preserved the grave weakness of the prior law. The risk of the debtor's dishonesty is apparently shifted from the secured creditor to those who deal with the debtor in *Y*. That shift, however, may be merely apparent. Although section 9-302(1) states that a security interest in consumer goods other than fixtures or motor vehicles required to be licensed may be perfected without filing,¹⁰¹ section 9-307(2) allows a bona fide consumer-purchaser of those goods to take free of the perfected interest unless it has been filed.¹⁰² It could be argued, then, that if the goods are of the kind in which a security interest can be perfected without filing, and if the security interest is filed in *X* but not in *Y*, the interest should, under section 9-103(3), be treated in *Y* as a perfected-but-unfiled interest so that a consumer purchaser will take free of the security interest filed in *X*.¹⁰³ Some support is given to that argument by the fact that 9-103(3), unlike subsections (1) and (2), speaks of "perfection" being governed by the law of *X*, but does not speak of the "effect of proper filing" being controlled by that law. Nevertheless, this argument that the shift in risk is only apparent seems contrary to the first sentence of section 9-103(3), which is seemingly intended to give the secured creditor the same protection in *Y* for four months as he would have in *X*.¹⁰⁴ Consequently, section 9-103(3) should be amended so that those who, in good faith, deal with the goods in *Y* need not bear the risk of the debtor's dishonesty, unless

100. Such a reasonably short time might be the ten-day period of the Uniform Conditional Sales Act. See note 99 *supra*.

101. UCC § 9-302(1)(d) provides:

A financing statement must be filed to perfect all security interests except the following:

.....
a purchase money security interest in consumer goods; but filing is required for a fixture under Section 9-313 or for a motor vehicle required to be licensed;
.....

102. UCC § 9-307(2) provides:

In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of \$2500 (other than fixtures, see Section 9-313), a buyer takes free to 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 or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods.

103. See Vernon, *supra* note 72, at 378.

104. Cf. General Elec. Credit Corp. v. Western Crane & Rigging Co., 184 Neb. 212, 166 N.W.2d 409 (1969).

their dealings are of a kind that would make it reasonable to expect them to make the same character and credit investigation of the debtor as one would expect the secured creditor to have made.

4. Section 9-103(4)

Section 9-103(4) governs the issue of perfection of a security interest, and supersedes subsections (2) and (3), if the personal property involved is covered by a certificate of title issued under a state law that requires as a condition of perfection that any security interest in the property be indicated on the certificate. Section 9-103(4) states that in such a case the perfection is to be governed by the law of the state that issued the certificate. Suppose that a title certificate is issued on an automobile in state *X*, that the secured creditor's interest is indicated on the certificate, and that the debtor then moves with the automobile to *Y* which has no title certificate system. Under subsection (4) the creditor need not re-perfect his interest in *Y* even if he knows that the automobile is now garaged in *Y*.¹⁰⁵ Moreover, because subsection (4) supersedes subsection (3), there is not even a four-month time limit within which the creditor must re-perfect in *Y*.¹⁰⁶ For the reasonable protection of third parties in *Y*, however, the creditor should be required to re-perfect in *Y* within a reasonably short time after he learns that the automobile is in *Y* for more than transitory purposes; and the four-month time limit of subsection (3) should apply in cases in which the creditor does not know that the automobile is in *Y*.¹⁰⁷

Suppose that *X* is a state that does not have a title certificate system and that the creditor's interest in the automobile is perfected by filing in *X*. Suppose, further, that the debtor brings the automobile to *Y*, which has a title certificate system, and fraudulently acquires a *Y* title certificate that does not indicate the creditor's interest. Then, within the four-month period of section 9-103(3), and before the creditor re-perfects in *Y*, the debtor sells the automobile to a bona fide purchaser in *Y*. Is the creditor protected by the four-month period of section 9-103(3), or is "perfection governed by the law of the jurisdiction which issued the certificate"—that is, *Y*? There is no clear answer in subsection (4), and courts have reached

105. See *General Motors Acceptance Corp. v. Whisant*, 387 F.2d 774 (5th Cir. 1968).

106. *In re White*, 266 F. Supp. 863 (N.D.N.Y. 1967).

107. See *Vernon*, *supra* note 72, at 380, 348: "[T]he system of [automobile title] certificates seems to have done little more than challenge the imagination of those intent on fraud."

conflicting conclusions on the matter.¹⁰⁸ Nor does section 9-103(4) provide a solution for the situation in which both X and Y issue title certificates, but the security interests of different creditors appear on those certificates.¹⁰⁹ With respect to these points, then, section 9-103(4) should be clarified. Whenever Y has issued a title certificate and the rights of third parties in Y are involved, it is the law of Y and the Y title certificate that should control, because the third parties are likely to have relied on that certificate.¹¹⁰

III. CONCLUSION

Section 9-102(1), the general choice-of-law section for article 9, should be repealed and not replaced. It is both too late in the day and too early in the continuing reform of conflicts law to attempt by any rigid, territorially oriented statutory fiat to provide a wise solution of all the choice-of-law problems that may arise under article 9. The courts should be free to continue their search for intelligent accommodations of truly conflicting state policies.

So far as the perfection of security interests and the possibility and effect of proper filing are concerned, it is desirable to have clear rules that tell the creditor where to file, show third parties where to look for a recorded security interest, and indicate when and where the creditor must refile in order to be entitled to continued protection. Section 9-103 should be limited to these questions of perfection and filing, and it should be amended to provide clear answers and to give better protection to the interests of third parties who deal with the collateral. The following is a summary of the main suggestions that have been offered along these lines.

Section 9-103(1) should be changed to refer to the chief place of business of the debtor.

In both 9-103(1), as so amended, and 9-103(2), it should be made clear that refiling is necessary when the main office of the debtor is moved to another jurisdiction after the security interest has attached.

Mobile equipment and mobile leased inventory under section

108. For cases holding that the creditor is protected by the four-month period of UCC § 9-103(3), see *First Natl. Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (L. Div. 1966); Note, *Security Interests in Motor Vehicles Under the UCC: A New Chassis for Certificate of Title Legislation*, 70 YALE L.J. 995, 1021 (1961). For a case adopting the opposite position, see *General Motors Acceptance Corp. v. Manheim Auto Auction*, 25 Pa. D. & C.2d 179 (C.P. Lancaster County, 1962).

109. See 1 GILMORE § 22.8, at 623.

110. See *In re Edwards*, 6 UCC REP. SERV. 1124 (E.D. Mich. July 15, 1969, Bankruptcy No. 69-460-B) (held that, when title certificate is issued in X and then a new certificate is issued in Y, creditor who does not comply with Y's filing requirement loses perfection).

9-103(2) should be subject to the four-month refiling limit of section 9-103(3), if the equipment or inventory is continuously located for that period in a jurisdiction other than that of the debtor's chief place of business.

Under sections 9-103(3) and 9-103(4), the creditor should be required to refile in the new situs jurisdiction within a reasonably short time after he learns that the property has been relocated there for more than transitory purposes. The four-month limit should be retained in subsection (3) and extended to subsection (4) for situations in which the creditor does not know that the collateral has been removed to a state that does not have a title certificate system.

In section 9-103(4), it should be made clear that a title certificate issued at the new situs controls the continued viability of a security interest that was previously perfected, whether that previous perfection was in a state with a title certificate system or in a state without one.

Under all the subsections of 9-103, the secured creditor, not third parties who bought in good faith, should bear the risk of the debtor's dishonesty, unless the third parties dealt with the debtor in such a manner that they should have reasonably made as extensive an investigation of the debtor's credit and character as one would have expected the secured creditor to have made.

Whatever the theoretical desirability of all these changes, one important final question remains: is it politically realistic to expect state legislatures to effect such changes? I do not know. I do believe, however, that if the now unconscionable distance between what is the law and what ought to be the law is to be traveled, the legal profession had better have as its lodestar, not "political reality," but the best and fairest accommodation of conflicting interests.