Securing the Antecedent Debt of the Failing Retail Merchant Under the Uniform Commercial Code

When a wholesaler supplies inventory on open credit to a small retail merchant, he relies on the merchant's credit rating, business acumen, and current assets for assurance of payment. So long as the merchant is honest and his business successful, the open credit pattern of inventory financing involves no great dangers for the supplier. The story changes if the merchant's business begins to fail. Then the wholesaler must move quickly to secure the debt or risk having his return reduced to a pro rata share in the proceeds of an insolvency liquidation.

Securing the antecedent debt of a failing retail merchant has not always been feasible, especially when the merchant's only valuable asset was his inventory. Before the advent of the Uniform Commercial Code, the prevailing law of chattel security made it difficult, sometimes impossible, for an insecure creditor to take a security interest in his debtor's inventory. Many jurisdictions prohibited chattel mortgages in

1. P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS § 22.01 (1967) [hereinafter cited as COOGAN]; see Lamey, How to Handle a Bulk Transfer, Symposium on A Practical Approach to the Uniform Commercial Code for the Practicing Lawyer, 19 BUS. LAW. 67 (1963). Unsecured sales are frequent even though the security provisions of the Code might be available. See also Schnader, The Unsecured Creditor—"The Little Businessman"—And the Uniform Commercial Code, 1 B.C. IND. & COM. L. REV. 65, 66 (1959). Schnader reports that in Philadelphia during the period from 1954 to 1959, the ratio of secured to unsecured transactions remained relatively constant. He concludes that the availability of the Code's simplified security system has not induced creditors to alter their financing patterns. "[I]f large, the reasons motivating financial institutions, manufacturers and other businessmen to extend unsecured credit, are the same under the Code as they were previously." Id. 66. Predictably wholesalers will continue to sell on unsecured credit to retail merchants, especially where the individual orders are small. The inconvenience of negotiating and filing individual security agreements to cover each small inventory order counts against a change in the unsecured credit pattern.

2. The Code was first enacted in Pennsylvania in 1953 and has been subsequently enacted in 48 other states and in the District of Columbia. Louisiana is the exception. See Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess., insert, at 296 (1967). The 49th state to enact the Code into law was Idaho, which did so during its 1967 legislative session, effective January 1, 1968. For information on enactment and effectiveness and for alterations of the Official Text of the Code by each state, see UCC REP. SERV. (Current Materials 1968). All citations to the Code in this Note are to the 1962 Official Text of the Uniform Commercial Code [hereinafter cited as UCC].

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inventory and others severely limited the scope of their protection. Field pledges were permissible, but the cost and inconvenience of maintaining possession adequate at law without denying the debtor easy access to the pledged inventory often made that remedy impractical. Alternatively, the creditor could secure himself by taking a bulk sale of the inventory. A bulk sale, however, was a harsh remedy almost certain to drive the debtor out of business. Yet, in all but the most extreme circumstances, the law precluded inventory creditors from tailoring a plan more fitting to their commercial needs.

By relaxing the common law’s resistance to secured inventory financing, Article 9 of the Uniform Commercial Code not only made small-scale secured inventory financing possible, but also opened up new ways to deal with the insecure creditor’s plight. Under the Code the creditor may take either a non-possessory, chattel mortgage-type security interest in the inventory, or a possessory, pledge-type interest, to secure himself. Moreover, Article 9 permits a wholesaler to draw on a retail merchant’s inventory for collateral without policing and without extending new value as a condition of perfecting a security interest. Finally,

6. By definition a bulk transfer involves at least half of a merchant’s inventory. UCC § 9-102; 2 COGAN § 22.06(1)(c). In the antecedent debt context, the merchant receives no cash from the transfer to buy new stock. Few merchants could suffer such a depletion in inventory and survive.
7. The Code extends coverage to security interests in personal property, including goods. UCC § 9-102(1)(a). In turn, §§ 9-109(4) classifies inventory as one type of good that can be used as collateral. (See § 9-105(1)(c) for the definition of collateral.) Sections 9-204(3) and 9-205 indicate the extent to which Article 9 has relaxed the common law restrictions on secured inventory financing. UCC §§ 9-204, Comments 2-3; 9-205, Comments 1, 4.
10. UCC § 9-305 & Comments.
11. Article 9 does require new value in certain situations not here at issue. The pertinent Sections are: UCC §§ 9-107 (purchase money security interests), 9-108 (non-preferential interests in after-acquired collateral), 9-304 (security interests in instruments or negotiable documents), 9-307 (protection of buyers of goods). Cf. §§ 1-201(9), 9-303 (security interests in chattel paper and non-negotiable instruments), 9-312(2) (priority of certain interests in crops).
Article 6 of the Code retains the bulk transfer as a third remedy.\textsuperscript{13}

Although the Code's expansion of remedies makes the law more responsive to the insecure creditor's commercial needs, none of the Code devices is a panacea. Each has strengths the others lack, and each has inherent limitations. A creditor faced with the problem of securing himself against a failing debtor must weight carefully the advantages and disadvantages of each device, at peril of ending in no better position than a general creditor if he chooses incorrectly. Before deciding on a device, then, the creditor should consider three broad problems: How quickly must the interest be perfected in order to avoid subordination to competing claims? How much control over the collateral and its proceeds is necessary? And how much cost and inconvenience is warranted for securing the debt? To answer these questions he must take into account the cause of the business crisis, whether the merchant can survive it, and, if not, how rapidly insolvency is approaching.

The following hypothetical places the problem in context. \textit{A} is a household appliance dealer. When a discount department store with an appliance department opens in a shopping center near \textit{A}'s store, \textit{A}'s business begins to drop off. At the time \textit{A} owes \textit{B}, his major inventory creditor, \$4,000. He owes \textit{C}, the rest of his creditors, a total of \$3,000.\textsuperscript{14} \textit{A}'s inventory is worth approximately \$6,500 wholesale. \textit{B} discovers the situation and decides to secure the \$4,000 debt.

From the information given, \textit{B} knows that \textit{A} has enough inventory in stock to pay off his debts if he can liquidate at a profit, but he also knows that the discount store has lured away \textit{A}'s customers. He cannot tell, however, whether the customers will return after the novelty of the discount store wears off, enabling \textit{A} to survive the crisis. Furthermore, he cannot tell whether \textit{A} is already in default to \textit{C} or whether \textit{A}'s operating costs are rapidly driving him toward insolvency. The more pessimistic \textit{B}'s prognosis of \textit{A}'s predicament, the more he will want speedy perfection.\textsuperscript{16}

given before a security interests can attach. However, the Code's definition of value is extremely broad. UCC § 1-201(44). It includes both consideration sufficient to support a simple contract and acquiring rights as security for a debt or obligation. 1 COGAN § 4.05, at 296; 1 GILMORE § 11.5, at 352.

13. UCC § 6-107(2)(c).
14. \textit{C} may be any of several types of creditor—e.g., another inventory supplier, a lending institution, a local utility, \textit{A}'s landlord, \textit{A}'s employees, the state or federal tax collector, or a tort claimant.
15. The Code's "perfection" concept is derived from Section 60 of the Bankruptcy Act, 11 U.S.C. § 96 (1964). See 1 GILMORE 435-37. An interest is "perfected" when a lien creditor cannot acquire a interest in the collateral superior to that of the secured party. UCC § 9-301, Comment 1; see 3 W. COLLIER, BANKRUPTCY §§ 60.36, 60.39 (14th ed. 1967). Any of the three devices under discussion confers a preference in behalf of the secured party.
I. Speed of Perfection

A bulk transfer commends itself only when A's decline toward insolvency is gradual. Compliance with Article 6 is a time-consuming process. After the parties have negotiated the details of the transfer, they must compile a complete list of A's creditors as well as a detailed schedule of the merchandise to be transferred. Notice must then be sent to the other creditors, who are allowed ten days to investigate the terms before the transfer can occur. During the interval between the beginning of negotiations and the completion of the transfer, B has no legal interest in the merchandise as against third parties other than that of a general creditor. Anyone who has a judgment against A may levy on the inventory without regard to the transaction under negotiation. Furthermore, if A is in default on his obligation to C, C may attach the inventory pending suit or, provided he qualifies, file notice of a statutory lien on the property. Since A's business misfortunes will presumably affect his relations with creditors other than B, it is likely that C will have an immediate right of action against A's assets, and the Article 6 notice will be an invitation for him to press his claim.

Where A's operating expenses have become so out of proportion to his income that he is rapidly approaching insolvency, the sluggish

which is potentially voidable under Section 60 of the Bankruptcy Act. A security interest may be voidable if taken on account of an antecedent debt while the debtor is insolvent and perfected within four months of the debtor's adjudication as a bankrupt. See 3 W. Collier, supra, §§ 60.07, 60.13. The only way that an insecure creditor can be certain of avoiding the consequences of Section 60 is to employ a security device that can be perfected before the debtor becomes insolvent.

16. Article 6 has simplified the procedures prescribed in pre-Code bulk sales acts. 2 Coggan § 22.03. Nonetheless, the procedures retained in Article 6 are still tortuous and time-consuming. Id. § 22.10.

17. UCC §§ 6-104(1)(a), (2). Section 6-104(1)(a) clearly indicates compiling the required list of creditors:

The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed.

18. UCC § 6-104(1)(b). The Section requires that the schedule contain a description of the inventory "sufficient to identify it," but does not set out the standard of sufficiency. However, if the schedule is to serve its purpose—i.e., give creditors enough information to make an intelligent judgment about the commercial soundness of the transaction—the description must be detailed. It should indicate not only the quantity of the transfer—the ratio of the amount of stock transferred to the total inventory—but also the quality of the transfer—the ratio of the value of the stock transferred to the value of the total inventory. Cf. 2 Coggan §§ 22.05-07, 22.10(6).

19. UCC §§ 6-105, 6-107. Section 6-107 sets out both a short and a long form of notice. Since in the antecedent debt context the transferor receives no money to pay his other creditors, the long form of notice must be used.

20. UCC § 6-105.

21. See note 14 supra.
mechanics of a bulk transfer create an additional peril. If \( A \) becomes insolvent before an Article 6 transaction is complete, the transfer could constitute a voidable preference under section 60 of the Bankruptcy Act.\(^\text{22}\) Not only could \( C \) allege the preference as an act of bankruptcy against \( A \),\(^\text{23}\) but \( A \)'s bankruptcy trustee might well be able to set the transfer aside, thereby destroying the benefit of \( B \)'s security.\(^\text{24}\)

Either Article 9 device exposes \( B \) to less risk from \( C \)'s intervening claim. Article 9 does not require that \( B \) put \( C \) on guard by actual notice that he is securing himself—only constructive notice by public filing is necessary.\(^\text{25}\) More important, filing notice usually completes the transfer of a security interest.\(^\text{26}\) Without advance notice \( C \) is not likely to assert his claim, and any intervention by him during the executory period would be fortuitous.

The two methods available to a creditor under Article 9 do not, however, offer the same degree of protection against \( C \)'s intervention. A pledge-type interest, especially when it is structured in such a way that \( A \) has ready access to the merchandise, takes longer to perfect than a chattel mortgage-type interest. \( B \) would probably take the pledge of inventory by setting up a field pledge in \( A \)'s storeroom.\(^\text{27}\) Since \( B \)'s taking possession of the collateral will not only affect the appearance of \( A \)'s store but will also limit the amount of his working inventory, \( A \) will bargain to pledge as little of his inventory as possible. Unless \( B \) is will-

\(^{24}\) See note 15 \textit{supra}.
\(^{25}\) UCC § 9-402 & Comment 2. Comment 2 states:
This Section adopts the system of "notice filing" which has proved successful under the Uniform Trust Receipts Act. What is required to be filed is not, as under chattel mortgage and conditional sales acts, the security agreement itself, but only a simple notice which may be filed before the security interest attaches or thereafter. The notice itself indicates merely that the secured party who has filed may have a security interest in the collateral described.
See generally 1 Gilmore ch. 15.
\(^{26}\) UCC § 9-303 does allow the parties the option of filing the financing statement before the security interest attaches. Pre-attachment filing usually occurs in cases where a financial institution agrees to loan a large sum and wants the giving of value, i.e., turning over the money, to be the final step in the transaction. This is done to avoid the possibility of a preference under Section 60 of the Bankruptcy Act. See note 15 \textit{supra}.
\(^{27}\) See p. 1547 \textit{supra}. A field pledge rather than a field warehouse is suggested because the latter involves formalities and expenses unnecessary to securing a relatively small inventory debt. For example, a field warehouse requires the issuance and transfer of warehouse receipts to control the collateral. These receipts must be issued by a licensed warehouseman. 1 Gilmore § 6.2, at 151-54; Skilton, \textit{Field Warehousing as a Financing Device}, 1961 Wis. L. Rev. 221, 240-57; Comment, \textit{Financing Inventory Through Field Warehousing}, 69 Yale L. J. 663, 677-81 (1960). Since \( B \) can take actual possession of the collateral through an agent (see UCC § 9-303, Comment 2), and can protect his interest by requiring his agent to release inventory on \( A \)'s payment of cash rather than on surrender of warehouse receipts, the less formalistic and expensive field pledge device is adequate.
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...ing to make ready concessions to A by undersecuring himself, the negotiation period may also impede a speedy perfection against C.

Secondly, B will need time to convert the storeroom into a suitable place for a field pledge. The amount of time consumed depends upon the layout of the storeroom and upon the method by which B perfects his interest—possession or filing. Article 9 permits both methods of perfecting a pledge, but perfection by possession takes longer. If B chooses to perfect by taking possession, he must comply with the pre-Code formalities for establishing a valid field pledge, or risk C's attacking the pledge as an unperfected security interest. In addition, B's interest is not perfected until the collateral is actually in the properly structured storeroom: Article 9 rejects the old doctrine that related possession back to the time at which the interest attached.

Perfection by filing, though simpler, still does not avoid all the danger of delay. Before a security interest attaches and is perfected, the collateral must be described in both the security agreement and the financing statement; also, the description must be sufficient to identify the collateral. Were all of the inventory taken in pledge, a general

28. UCC § 9-305 & Comment 1. Section 9-305 provides in pertinent part that:
A security interest in ... goods ... may be perfected by the secured party's taking possession of the collateral. ... The security interest may be otherwise perfected as provided in this Article before or after the period of possession by the secured party.
29. The last sentence of UCC § 9-205 provides: "This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee." Section 9-205, Comment 6 indicates that common law rules regarding requisite degree and extent of possession govern. The common law required that the pledgee's possession be open, notorious, and inconsistent with the pledgor's right of possession. See, e.g., American Pig Iron Storage Warrant Co. v. German, 128 Ala. 194, 28 So. 603 (1900); First Nat'l Bank v. Caperton, 94 Miss. 857, 22 So. 60 (1897); Whiting v. Rubinstein, 7 Wash. 2d 204, 103 P.2d 312 (1940); Ackerson v. Babcock, 132 Wash. 335, 232 P. 335 (1923); Hastings v. Lincoln Trust Co., 115 Wash. 492, 197 P. 627 (1921).
30. See UCC §§ 9-205, Comment 6, 9-305; Comment 8; cf. UCC § 9-301.
31. UCC § 9-305 & Comment 5.
32. See UCC § 9-204(1) which provides:
A security interest cannot attach until there is agreement (subsection (2) 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.
33. The moment of attachment marks the time at which the security agreement becomes binding between the secured party and the debtor. See UCC § 9-204, Comment 1.
34. See note 19 supra.
35. UCC § 9-204(1)(b) provides in pertinent part that:
[A] security interest is not enforceable against the debtor or third parties unless
... (b) the debtor has signed a security agreement which contains a description of the collateral. ... In describing collateral, the word "proceeds" is sufficient without further description to cover proceeds of any character.
36. UCC § 9-110. The Comment to Section 9-110 states: The test of sufficiency of a description laid down by this Section is that the description
description such as “all the merchandise located in A’s store” would qualify.\textsuperscript{37} B could not take a pledge of the whole lot, however, unless his claim against A were large enough to justify it.\textsuperscript{38} Consequently, in most cases, B and A must describe the collateral pledged with reasonable particularity or limit it to “all the merchandise in the storeroom of A’s store.” By the latter method, B’s interest could not attach, and thus could not be perfected, until he had segregated the collateral and moved it into the storeroom.\textsuperscript{39}

When B needs the advantage of speedy perfection either to protect himself against C’s claim or to guarantee perfection before A becomes insolvent, he will usually have to content himself with a non-possessor or chattel mortgage-type interest. The negotiation of a chattel mortgage is the least time-consuming, since it in no way disrupts the appearance of A’s business and requires only minimal participation by A in the formalities of perfection. Nor is there anything fraudulent in B’s interest covering all of the inventory,\textsuperscript{40} eliminating the necessity of a detailed inventory of A’s stock to prepare a sufficient description of the collateral. In addition A would not have to furnish a complete schedule of his creditors as he would if the parties attempted a bulk transfer.\textsuperscript{41}

Compliance with the technical requirements for perfecting a chattel mortgage also demands less of B’s time. One of the attachment requirements is already present: A’s rights in the collateral, his inventory.\textsuperscript{42} A second condition for attachment occurs automatically: B gives value adequate under the Code to support the interest merely by agreeing


\textsuperscript{38} There are two reasons for this. First, if B took all the inventory in pledge, A would lose all the working stock he needs to get money with which he could redeem additional inventory. In other words, taking all the inventory would defeat the purpose of the device. Second, depriving A of all his stock would probably render him insolvent and thereby make the pledge vulnerable as a fraudulent conveyance under Bankruptcy Act § 67d(2)(b), 11 U.S.C. § 107(d)(2)(b) (1964). See 4 W. Collier, BANKRUPTCY § 67.35 (14th ed. 1967).

\textsuperscript{39} See p. 1551 supra.

\textsuperscript{40} A would not lose access to his inventory under the chattel mortgage device, so there would be no problem under Bankruptcy Act § 67d, 11 U.S.C. § 107(d) (1964). Moreover, C would not be prejudiced since B must turn over to him any surplus proceeds from a liquidation of the collateral. UCC § 9-504(1)(c). See id. § 9-504, Comment 2.

\textsuperscript{41} See p. 1549 supra.

\textsuperscript{42} UCC § 9-204(1).
to take security for the antecedent debt. All that remains is the requirement that B reduce his agreement with A to writing and file a financing statement. On completion of these relatively simple steps, C can no longer acquire an interest in A's inventory superior to B's.

II. Degree of Control

The need for speedy perfection, however, is not the sole factor determining the choice of a security device. B must also consider the degree of control he must exercise over the collateral and the proceeds from its liquidation in order to be sure of payment. Despite the perfection of his interest, B may lose control over both the collateral and the proceeds in certain situations, and the type of security interest he takes will affect the amount of risk he assumes. The risk arises not only from C but from A as well. C's threat is that he may disregard B's interest and either enforce his claim against the inventory or pressure A into applying the proceeds toward its reduction. The threat from A is that he will succumb to C's pressure, or otherwise put the collateral beyond B's reach.

None of these risks arise under a bulk transfer. That device transfers direct control over both the inventory and its proceeds to B as soon as the transaction is complete. A can no longer threaten B's interest by wasting the proceeds before B's debt is paid; and since a bulk transfer, unlike an Article 9 security interest, extinguishes A's equity in the merchandise, the merchandise is no longer subject to levy by C. For purposes of control the bulk transfer is the most advantageous device for B.

Under a chattel mortgage-type security interest, on the other hand, A retains ownership and possession of the collateral, and B has no right to take the collateral until A defaults. In addition, A will regularly dispose of the collateral in the ordinary course of his business, and the proceeds will come into his, not B's, hands. Although B can exert a measure of control over A's management of collateral by careful drafting of the security agreement, the situation demands that B rely heavily on A's good faith.

43. UCC § 9-204(1). See note 12 supra.
44. UCC §§ 9-203(1)(b), 9-204(1).
45. UCC §§ 9-302, 9-402.
46. UCC § 9-201. See id. §§ 9-301, 9-312(5) & Comment 4.
47. See UCC § 9-311 & Comment.
48. UCC § 9-503 & Comment. See 2 GILMORE § 43.3, at 1191-94.
For example, A's business crisis may become so acute that C threatens to force an involuntary bankruptcy proceeding. A may then begin diverting proceeds to C to forestall him. Article 9 allows B to negotiate a security interest in the proceeds from A's sale of the collateral; however, in order to enforce this interest, B must be able to trace and specifically identify the proceeds. Unless B has policed A's business carefully, such tracing may be impossible and B's security will have been reduced by the amount of the dissipated proceeds. Of course, B can mitigate the risk by requiring, on penalty of default, that A deposit all proceeds in a joint bank account, from which he can withdraw them only on orders signed by both parties. The possibility remains, however, that A will use the proceeds undetected to pay C without their ever passing through the joint account.

Similarly A may dissipate the collateral itself. While an unauthorized transfer of the inventory to C does not extinguish B's security interest in the collateral and B may sue C either in replevin or for conversion, B must identify the merchandise that C holds as the same collateral covered by his security agreement with A in order to enforce this right. Unless A cooperates in disclosing the whereabouts of C and the transferred merchandise, B will probably be unable to trace the collateral. Consequently, where B cannot trust A to respect the security agreement when pressed by C, a chattel mortgage might prove impractical even though it permits a speedy perfection.

C also poses a more direct threat to a chattel mortgage interest: under Section 9-311 he can levy on the collateral notwithstanding B's security

50. UCC § 9-306(5). In interpreting Section 9-306 courts have rejected common law "first-in-first-out" and "declining balance" rules. Under the Code B must be able to identify the source of the proceeds he claims, i.e., to establish that they arose from sale of collateral, Howarth v. Universal C.I.T. Credit Corp., 203 F. Supp. 279 (W.D. Pa. 1962), and he must be able to identify the specific account into which the proceeds were deposited, In re G.E. Poutz & Son, Inc., 2 UCC Rep. Serv. 1131 (E.D. Pa. 1965), aff'd mem., 359 F.2d 436 (3d Cir. 1966).
51. The Code's concept of default is not limited to the debtor's failure to make payments on the secured obligation. According to Gilmore, "Default is, within reason, a matter of contract and can best be defined as being whatever the security agreement says it is." 2 Gilmore § 43.3, at 1193. See Borochoff Properties, Inc. v. Howard Lumber Co., 115 Ga. App. 691, 696, 155 S.E.2d 651, 654 (1967).
52. UCC § 9-306(2).
54. Although UCC § 9-306's identification requirement applies only to proceeds, identification of the collateral would still be necessary in order for B to succeed in his replevin action. See 46 A.B.A. Jour. Replevin § 80 (1949). Identification may be a particularly difficult problem where A's inventory consists of small common-brand items which carry no serial numbers or other identifying marks and which are easily commingled with similar stock.
interest in it. How much trouble C can cause B by levying is unclear. Section 9-311 suggests that C can reach only A's equity, but it fails to define the procedure by which the competing parties can reconcile their interests. Of central importance is whether B or C controls the liquidation of the collateral and, if C, whether the default provisions of the Code govern. Unless B can prevent C from forcing a sheriff's sale, he will either have to pay off C's claim to preserve the collateral or rest content with his priority in the sale proceeds. C's levy indicates that A is in trouble, and B may only throw good money after bad by paying C off. On the other hand, a priority in the proceeds of the sale may be worth little to B since Article 9—and its requirement that the seller make a reasonable effort to obtain a fair price for the goods—ostensibly does not govern foreclosure of non-consensual liens. The pre-Code law authorizing sheriff's sales will often allow C to purchase the merchandise for a nominal bid. Moreover, the sale may extinguish B's interest, leaving him with only the meager proceeds of the sale and the unattractive prospect of collecting a deficiency judgment against A.

 Authorities have divided over the proper interpretation of Section 9-311, but fortunately none has left B in this totally untenable position. So far three interpretations have appeared. The interpretation least favorable to B stems from an Oklahoma amendment to Section 9-311 which clearly indicates that C can compel a sheriff's sale. B has some protection insomuch as the sale does not extinguish his security interest. According to an opinion issued by the Attorney General of Oklahoma, the sheriff must conduct the sale without turning the proceeds over to the secured party. Apparently the sheriff should also inform the purchaser that he is taking the goods subject to a lien which B may

55. UCC § 9-311 provides:
The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default.

56. UCC § 9-311, Comment 2 raises the procedural problem but suggests no definitive solution. The Comment merely states:
This Section changes those rules [relating to title] by providing that in all security interests the debtor's interest in the collateral remains subject to claims of creditors who take appropriate action. It is left to the law of each state to determine the form of "appropriate process."

57. UCC §§ 9-501 to 9-507.
58. UCC §§ 9-102, Comment on Purposes & Comment 1, 9-104(b)-(d), (b).
59. UCC § 9-504(2).
[But the interest so transferred is subject to the creditor's security interest if it is properly perfected, and nothing stated herein shall be construed to be inconsistent with 21 O.S., § 1834.
thereafter enforce. This solution not only violates Article 9's policy against perfected security interests with less than full effect against the claims of subsequent lienors, it also leaves B to pursue his interest in the collateral against a stranger to the security agreement.

Furthermore, construing Section 9-311 to authorize C's disposal of the collateral at a sheriff's sale takes from B the right which Section 9-306 gives him to repossess collateral from anyone to whom A has transferred it without authorization. Only a narrow reading of 9-311, permitting C to levy not on the collateral itself, but on A's equity in it, avoids a conflict between the two sections. The broader Oklahoma interpretation creates a clear inconsistency within Article 9—a fact which undermines its cogency.

A second interpretation of Section 9-311 would allow C to force a sale of the collateral, but require the sale to meet the standards of commercial reasonableness imposed by Article 9's default provisions. A conceptual problem lurks here because Article 9 does not purport to cover non-consensual liens. Apart from this, the interpretation makes sense for two reasons. First, since Article 9 creates C's right to reach A's equity, it is reasonable that Article 9's standards should govern this right. Second, B should enjoy the same foreclosure procedure he would have had to follow—a procedure designed in part to protect A's other secured creditors. No court which has faced the issue, however, has yet accepted this interpretation and boldly hurdled the conceptual barrier to bringing the enforcement of non-consensual liens within the ambit of Article 9.

62. See UCC §§ 9-201, -301.
63. In order to recover from the purchaser, B apparently would be required to comply with the tracing provisions of UCC § 9-306. See p. 1554 supra.
64. See p. 1554 supra.
65. UCC §§ 9-504(1), (3).
66. See p. 1555 supra.
67. See UCC § 9-504(5).
68. Oblique authority for this interpretation is found in Bloom v. Hilty, 210 Pa. Super. 255, 232 A.2d 26, ree'd on other grounds, 427 Pa. 463, 234 A.2d 860 (1967) and in In re Dennis Mitchell Indus. Inc., 280 F. Supp. 433 (E.D. Pa. 1968). In both these cases the court reached its decision by considering Article 9's default provisions. Neither of their holdings is applicable, but their reasoning sheds light on the Section 9-311 problem.

In Bloom the court upheld the right of a judgment creditor to levy upon and sell collateral subject to a perfected security, basing its decision on Sections 9-501 and 9-504, which deal with a secured party's rights following his debtor's default. 210 Pa. Super. at 261, 264, 232 A.2d at 30, 32. The court was in error in citing these Sections without explaining its position because Article 9 does not govern the enforcement of non-consensual liens. See p. 1555 supra. A possible reading of the case, however, is that any foreclosure on goods subject to a security interest is to be governed by the default provisions of Article 9 whether or not the foreclosing party is the holder of a consensual lien.

Support for this reading is found in the Mitchell case, a proceeding in bankruptcy. There a secured party filed a reclamation petition against a purchaser of equipment who bought at the trustee's judicial sale. The question was whether the rights of the pur-
The third interpretation reads Section 9-311 narrowly to say that C only acquires rights in the collateral by his levy and that B cannot bar C from obtaining his due. B, however, would control the liquidation sale. Coogan's analysis of 9-311,69 which suggests this interpretation, turns on the draftsmen's purpose in including the section, which was designed merely to make clear that the Code's general rejection of title as a test for determining rights of parties70 also applied here.71 Permitting C to enforce his interest while leaving B in control of the collateral serves this limited purpose by preserving the rights of both parties in fair proportion.72 At the same time, it reconciles C's rights under 9-311 with those of B under the rest of Article 9—and especially under Section 9-306.73 Finally, this procedure ensures management of the liquidation to the party whose right to possession matured first. B could then protect himself by providing in the security agreement that the attachment of C's lien constituted a default, giving him an immediate right of possession74 and the advantage of controlling any subsequent disposition of the collateral.

No matter which interpretation of Section 9-311 ultimately prevails in the courts, B cannot prevent C from, at a minimum, forcing him to foreclose a chattel mortgage-type security interest at C's whim. The field pledge device does not avoid this danger, but it does protect B against a dissipation of the collateral and its proceeds by A. Provided

chaser were to be governed by Section 2-403(1). In granting the petition the court adopted a "nature of the sale" test and held that since the rights of a secured party were at issue, the purchaser's rights would be determined by the Article 9 standards, apparently referring to Section 9-504(4). 280 F. Supp. at 436.

If the reasoning in these cases is applied to Section 9-311, it would mean that C may compel a sale of the collateral but that the sale would be governed by the standards of Section 9-504.

69. 1 COOGAN § 8.02, at 867-68.
70. UCC § 9-202.
71. UCC § 9-311, Comment 1.
72. See the distribution provisions in UCC § 9-504(1).
73. See p. 1556 supra.
74. UCC § 9-503 & Comment. See William Iselin & Co. v. Burgess & Leigh, Ltd., 52 Misc. 2d 821, 276 N.Y.S.2d 659 (1967). There the court granted a secured party's petition for vacation of an execution levy. The decision rested on Section 9-503, rather than on Section 9-311, but its reasoning applies to the Section 9-311 problem as well. The court held that the secured party's right to possession matured immediately upon the debtor's default and that the judgment creditor's levy could not subordinate that right. "[T]he right to possession and sale of the collateral... passed from the Debtor to the petitioner at the time of default. Whether or not the Debtor had such rights at the time the levy was made, the Debtor did not have them after default, and the levy is ineffect to transfer such right." Id. at 829, 276 N.Y.S.2d at 663. The case is striking in that it upholds the secured party's right to possession even though the levy occurred prior to the debtor's default. Id. at 823, 276 N.Y.S.2d at 660. This is contrary to the temporal element of Section 9-503. See 2 GILMOUR § 43.3, at 1191-93. Nevertheless, the case stands as good authority for the proposition that a levying creditor cannot preempt the secured party's right to possession once default has occurred.

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the release procedures are handled properly, \( A \) cannot gain access to the inventory until he has paid a portion of his debt. In operation the field pledge is much the same as \( B \)'s reselling the inventory to \( A \) on a cash basis. Moreover, \( B \) can use the field pledge to ensure that \( C \) does not acquire possession of the collateral and control over its liquidation. Once again, \( B \) would have to stipulate in the security agreement that the attachment of \( C \)'s lien constitutes default.\(^5\) Under a pledge arrangement, however, upon default \( B \)'s status automatically shifts from that of a holder of the collateral under Section 9-207 to that of a holder under Section 9-503.\(^6\) \( B \) need not notify either \( A \) or \( C \) of his intention to hold under Section 9-503 in order for his right to dispose of the collateral under Sections 9-501 and 9-504 to become operative.\(^7\) As in the non-possessory context, Section 9-311 compels \( B \) to liquidate at \( C \)'s whim, but, theoretically at least, \( C \) cannot assert a right to possession—and hence a right to control the liquidation—superior to that of \( B \), who has possession from the first.

III. Cost and Inconvenience

After weighing the need for speedy perfection against the risk inherent in surrendering direct control over the collateral and proceeds, \( B \) must consider a third factor—the cost and inconvenience involved in implementing each of the devices. In the hypothetical \( A \) owes \( B \$4,000 \), a debt large enough to warrant a significant expenditure of time and money to secure. With a smaller debt, employing one of the more expensive devices would approach what Gilmore refers to as hunting mosquitoes with a cannon.\(^8\) A creditor in \( B \)'s position should estimate whether securing the debt he holds would repay converting \( A \)'s store-room into a warehouse and hiring an agent to manage the warehouse before he elected to take a field pledge. If he contemplated a bulk transfer, he should calculate the cost and inconvenience of complying with the Article 6 notice requirements\(^9\) and of finding a way to dispose of the merchandise once the transfer had been completed. When the debt

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\(^{75}\) See note 51 supra.

\(^{76}\) UCC § 9-503, Comment compels this conclusion. The Comment states in pertinent part: "Under this Article the secured party's right to possession of the collateral (if he is not already in possession as pledgee) accrues on default. ..." See the discussion of the \( Iselin \) case, note 74 supra.

\(^{77}\) Part 5 imposes a notice requirement on \( B \) only at the time he decides how and when to conduct the liquidation. UCC § 9-504(3); 2 Gilmore § 44.1, at 1213.


\(^{79}\) See p. 1549 & notes 17-20 supra.
is small, expense alone may render these devices uneconomical, leaving only the relatively inexpensive chattel mortgage as a viable alternative.

The absolute cost of implementing each device is not the sole consideration, however; B should also consider cost in relation to the amount of security the device affords. For instance, the chattel mortgage is the easiest and least expensive to perfect. Nevertheless, where A's predicament is critical, the cost of policing A's disposition of the collateral and proceeds might outweigh the protective value of the device. In such cases setting up a field pledge may be cheaper in the long run. Even a bulk transfer would be less expensive if A eventually went bankrupt and B, even as a secured creditor, would have to participate in the proceedings.

On the other hand, when A's problems are likely temporary, a bulk transfer may force B to pay for more security than he needs. Not only is a bulk transfer expensive to negotiate, it also leaves B the onerous task of liquidating the merchandise. Unless he maintains a retail outlet of his own, he may have no way to sell the goods except in bulk to a surplus merchandise dealer or at auction. The distress prices he can expect from such a sale reduces his chances of getting the benefit of his bargain on the total transaction. Whenever A can survive the decline, B will usually find it most economical to allow him to sell the merchandise in the ordinary course of business at retail prices.

80. See note 40 supra. See also UCC §§ 9-203, 9-204(1), 9-302(1), 9-402.
81. See p. 1554 supra.
82. Even if B's participation is no more than filing a reclamation petition for the collateral or defending against the trustee's action to avoid his security interest as a preference, his litigation expenses may be significant.
83. The techniques that B might employ to liquidate merchandise transferred to him in bulk are beyond the scope of this Note. The problem is mentioned here only to indicate a cost factor that B should consider in choosing an appropriate device.