A Summary View of the Changes Wrought in Virginia Security Law by the Adoption of Article 9 of the UCC

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A SUMMARY VIEW OF THE CHANGES WROUGHT IN VIRGINIA SECURITY LAW BY THE ADOPTION OF ARTICLE 9 OF THE U.C.C.

INTRODUCTION

It can probably be said without exaggeration that with the exception of the introduction of code pleading, the adoption of the Uniform Commercial Code has caused one of the most extensive changes in Virginia law since the founding of the Commonwealth.

Naturally, with such an extensive piece of legislation taking effect at the beginning of 1966, all attorneys who have any clients having significant interests in areas covered by the Code must re-orient themselves and their clients to operate efficiently under the Code. As Professor Woltz has stated, “Lawyers are not worried so much by their ignorance of the law, but rather by the law they know that’s been changed.”

While the general concern over procedures under the Code applies to all nine titles, the greatest interest seems to center around the provisions of the sections covering security financing—Article 9. Many members of the Bar have noted this concern. The major problem seems to arise, however, from the feeling held apparently by many practicing attorneys that “Article 9 is completely novel” and “implied with this objection is the further objection that lawyers would find article 9 foreign and would have to learn security law all over again.” In addition, this concern seems to be compounded with the idea prevalent within many sections of the Bar that any changes in security law cannot do anything but make more difficult, an already difficult area of the law.

In order to analyze the causes of this concern and to help provide the practicing attorney with a working understanding of security law under Article 9 this paper will attempt to summarize the changes that have been wrought in Virginia security law by the adoption of Article 9 of the U.C.C.


4. Ibid.
CONCEPTUAL CHANGES

For the practicing attorney to develop a truly working understanding of security law under the Code, it is necessary that he understand the basic conceptual changes that permeate Article 9. Without this understanding, the concern over the changes wrought by Article 9 could well prove to be correct. With it, on the other hand, all of security law falls into a homogeneous easily followed system.

Under the old security law there was no philosophy which would or could allow one to form an intelligent overall concept of this particular field of law. Anyone dealing in security law to any extent had more or less to memorize a number of totally unconnected, and often opposing rules, forms, and statutory requirements. The adoption of the U.C.C. completely changes this situation, by inherently providing an overall conceptual basis for operation under the Code: i.e., To unite all consensual security interests in personal property under one easily comprehendible, and broadly flexible sets of laws TO the extent that financing transactions of this nature may be used to their fullest capabilities, and that the intent of the parties may be best assured of being fully effected.

THE UNIFYING OF ALL CONSENSUAL INTERESTS UNDER THE CODE

The first important part of this conceptual basis is the idea that all security law be brought, with the exception of a few specifically excluded situations, together under one section of the Virginia Code; and while this section must be read in pari materia with all other sections of the Code, anyone with a reasonable understanding of the Code can be sure that he has before him all the law dealing with his particular interest.

5. Under prior Virginia law it is almost impossible for anyone to obtain a completely accurate and complete command of security law without extensive experience in the particular field due to the fact that it was so widely scattered throughout the various volumes of the Virginia Code. Thus, the attorney desiring such a command of security law had for example to be familiar with sec. 55-88 & 89 (conditional sales); sec. 55-96 (Recordation requirements for Deeds of trust and Chattel Mortgages); secs. 43-44–43-61 (agricultural deeds of trust); sec. 43-27 & 43-28 (crop liens); sec. 55-88.1 and 55-96.1 (security interests in connection with the business of a contractor, logger or sawmill); sec. 55-100 (security interests in civil aircraft); sec. 6-550–6-568 (Trust receipts); secs. 55-143–55-150 (Factor’s Liens); sec. 11-5–11-7 (assignments of accounts receivable) and sec. 61-1–61-58 (Field warehousing).

7. Id., Title 8.9.
8. Professor Woltz, supra note 1.
In addition to the inclusion of most of the presently used security devices, the Code is also intended to cover all consensual security interests that might be developed in the future, thus assuring a stability and security in the area of such commercial transactions hitherto unknown under a system where each new device required its own period of court interpretation and development before those using it could be sure that their intent would be effectuated.

THE INTENT CONCEPT UNDER THE CODE

Probably the most important aspect of the new conceptual basis of the Code is the proposition that all sections of the security law should be read in the light which would best effect the intent of the parties to the agreement, rather than according to the old formal distinctions and the minute technicalities which usually depended on the form of the security interest, and which often served to defeat the interest where because of accident or ignorance they were not strictly complied with.

In line with this concept, the Code makes three operational changes which carry throughout Article 9:

First, if Article 9 applies it does not matter in whom or where the title to the secured property may be.

Secondly, under the Code, there are, in several instances, specific self-correcting clauses which provide that in almost all cases where the parties intended that their actions have a certain effect, both parties dealing in good faith, the Code allows such intent takes precedence over the otherwise applicable procedures under the Code. Thus:

... the article does not in terms abolish security devices. The conditional sale for example is not prohibited; but even though it is used,

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9. See supra note 5, for specific exclusions.
10. "... when it is found that a security interest ... was intended, this article applies regardless of the form of the transaction or the name by which the parties may have christened it. The list of Security devices in Sec. (2) [of 8.9-102] is illustrative only; other old devices as well as any new ones are included so long as the requisite intent is found"—Va. Code Ann., op. cit., sec. 8.9-102, official comment.
11. See for example: Corbett v. Riddle, 209 F. 811, 814-815. (4th C.C.A. 1913); The Henry S., 4 F. Supp. 953, 954 (E.D. Va. 1933); Mullins v. Sutherland, 131 Va. 547, 109 S.E. 420 (1921); Ambler v. D. Warwick & Co., 28 Va. (1 Leigh) 194, 212-13 (1829); Robert's Adm'r v. Cocke's Ex'r 22 Va. (1 Rand.) 121 (1822) which has controlled the Virginia law in this area until the Code goes into effect.
12. "If Article 9 applies ... it applies without regard to the form or device chosen [and] the technical distinction [formerly in the law as to who held the title] ... is immaterial ... [under the code]." Va. Code Ann., op. cit., sec. 8.9-202.
the rules of this Article [to the extent that the former technicalities and distinctions will not defeat the intent of the parties] will govern.

Similarly, where the parties in good faith attempted to meet the recording requirements, and through ignorance or accident, failed to do so, their intent to create a valid security interest would not be defeated.

Thirdly, following the general objective that the Code be as simple as possible, and that the intent of the parties not be defeated by the formal distinctions and/or requirements characteristic of prior law, Article 9 has taken the major step of abandoning the conceptual dividing lines between the traditional security devices.

Now the approach is functional, i.e., rights, duties, priorities, turn on what purpose the security was intended to serve rather than the conceptual form of the security, e.g., having the controversy turn upon whether a particular instrument was a chattel mortgage or a conditional sale does not happen under Article 9.

SPECIFIC APPLICATION--SUBSTANTIVE CHANGES

It is not of course, possible for a paper of this scope to discuss in detail, or even mention in passing, every minute question which may arise in secured financing under the Code in a given situation. Indeed, it will not even be possible to recognize every area of security law that has or has not been changed by Article 9 until there is time to see what attitude the courts will take in the course of its interpretation.

13. As Henson pointed out in his article “Secured Financing Under U.C.C.”, The Bus. Lawyer 337, 1963 “... since legal security is made so simple under the Code, no purpose would be served by recognizing equitable [or oral] security interests ...”, and a great deal of stability can be achieved by this simple requirement.


17. “Under this article the traditional distinctions among security devices, based largely on form are not retained; the Article applies to all transactions intended to create security interests in personal property, and fixtures, and the single term ‘security interests’ substitutes for the variety of descriptive terms which has grown up at common law and over a hundred year accretion of statutes.”--American Law Institute, Uniform Commercial Code 1958 Text and Comments, p. 589.


19. Cf. Va. Code Ann., § 8.9-102 (1960), Official Comment. “Since prior Virginia law has not developed in exactly the same way, it is not possible to state categorically every aspect of Virginia law that is [and is not changed] by the U.C.C. . . . . For instance, . . . while literally within the coverage of title 8,9, statutes such as those giving liens on the offspring of stallions, jackasses and bulls might be excluded from the U.C.C. on the theory that there no commercial transaction is involved.”
There are, however, some major substantive changes which have been effected by the adoption of Article 9 which are of major import; and which must be recognized by anyone dealing at all in the area of secured financing.

**CHANGES IN TERMINOLOGY UNDER THE CODE**

The first change in security law to be recognized by any attorney attempting to readjust himself to conditions under the Code is the abandonment of the numerous formal distinctions which characterized prior Virginia security law. That is, the Code in Article 9 has completely done away with the need for the extensive terminology required in dealing with security law under the prior system, and has replaced it with its own entirely new and much less complicated vocabulary. Ray Henson, in his excellent paper on “Secured Financing Under the U.C.C.” very succinctly explains the differences:

To a large extent each of the pre-code security devices had its own peculiar terminology, but the use of such [old terms] ... is no longer significant to us. Instead of such old terms:

- Secured party replaces mortgagee, conditional seller, entruster, factor, assignee of accounts;
- Debtor replaces mortgagor, conditional buyer, trustee, assignor of accounts;
- Security interest replaces mortgage, "title" in conditional sales, trust receipts, factor's liens, and assignments of accounts;
- Security agreement states the arrangement between the debtor and the secured party;
- Financing statement is filed to give public notice; [and]
- Collateral is the subject of the security agreement (or sale)

**THE EXTENSION OF THE STATUTE OF FRAUDS CONCEPT TO SECURED INTERESTS**

One of the more important statutory changes wrought by the adop-

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20. See discussion page 5.
22. Ibid.
23. I use the word "concept" here, because the Code does not, in Article 9, specifically use the words "statute of frauds." The Official Comment and other commentary, however, make it clear that that is the effect intended in sec. 8.9-203. It should be noted also at this point that this should not be confused with the general statute of frauds in sec. 8.1-206 which specifically excludes security transactions covered under Article 9 from its provisions.
tion of the U.C.C. is the effect of section 8.9-203 which requires that there be a writing signed by the debtor in order for there to be an enforceable security interest created. While this change may be minimized insofar as it may place additional burdens on the parties to a security agreement due to the already prevalent recording requirements, it does extend the effect of the statute of frauds to all security interests—a requirement that was not present in former Virginia law.

This change, as most of the others rendered by the adoption of the Code, should, in the long run, make the matter of security law in Virginia less complex and more easily handled.

The only requirements for the enforceability of non-possessory security interests in cases not involving land are a) a writing; b) the debtor’s signature, and; c) a description of the collateral or kinds of collateral.

As to the description, it is made clear in the Code that, unlike the very strict requirements often stipulated under prior recording acts any description sufficient to enable a court to identify the property subject to the agreement with reasonable assurance of accuracy will be sufficient.

In this whole matter however, it is essential that the practitioner recognize that this writing requirement is in the nature of a statute of frauds and is not merely for the benefit of third parties to the agreement. Thus:

The formal requisites found in [sec. 8.9-203] are not only conditions to the enforceability of a security interest against third parties. . . . Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies subsection (1) (b), Is not enforceable even against the debtor and cannot be made so on any theory of Equitable mortgage. [Emphasis supplied.]

CHANGES EFFECTED IN THE RECORDATION REQUIREMENTS NECESSARY TO PERFECT A SECURITY INTEREST

Another area of changes in security law of great importance for any-

25. Id., Official Comment.
26. Id.
27. See supra note 13.
one operating under the Code is that involving changes in the various recordation requirements for perfecting a given security interest.

Under the old system, the difficulty involved in making sure that a security interest under the prior law was properly recorded was immense, since it was based solely on the character of the one security interest which it recorded. Thus in Callahan v. Young where the strict requirements of the law were not met by the party seeking to file by docketing a conditional sale contract, the court would not compel the clerk to record the abstract and the security failed. Likewise under prior law it was required that chattel mortgages, deeds of trusts, and factor's liens all had to be recorded in full. On the other hand various agricultural liens were required to be docketed only, and agricultural deeds of trust were left up to the creditor as to whether he wanted them recorded in full or merely docketed, and finally, it was merely required for trust receipt financing and conditional sales contracts that a statement of their existence be filed. Under the Code, all of this is simplified to the extent that the only thing that is required insofar as the form of the recording is concerned is that a short, uniform financing statement be filed regardless of what type of property may be subject to the security agreement. In addition, the exact form of the statement is explicitly laid out in the Code.

As to the place of recordation, the Code makes changes, once again,

29. An excellent example of the confusion rendered under the old law as to filing can be seen in the Official Comment of sec. 55-88 where it is stated that as to conditional sales of property removed into the state from other states where it was validly recorded at the time of the agreement, Virginia law would not require re-recordation in Virginia [see: Osmund-Barringer Co. v. Hey, 7 Va. Law Reg. N.S. 175 (1921); C. I. T. Corp. v. Guy, 970 Va. 16, 195 S.E. 659 (19 ); and Universal C. I. T. Credit Corp. v. Kaplan, 198 Va. 67, 92 S.E. (2d) 399.] On the other hand, as to chattel mortgages or deeds of trust or other encumbrances, if the agreement had been made in another state where the security interest was at the time, and the property was then brought into Virginia, the security interest would have to be re-recorded in Virginia to retain its validity in Virginia [8 VA. CODE ANN., op. cit., sec. 55-99.]

32. VA. CODE ANN., § 55-96 (1950).
33. Id., sec. 55-96.1.
34. Id., sec. 55-145.
36. Id., sec. 43-53.
38. See VA. CODE ANN., § 8.9-402 (2) (1950) for statutory form.
39. Ibid.
only to the extent that it greatly simplifies and stabilizes the require-
ments.\textsuperscript{40}

Under the new law there are three possible places at which a security
interest may properly be recorded, depending on the \textit{general} nature of
the collateral. Briefly, any goods bought by individuals for ultimate
consumption or for farm production require recording in the county
or city of the buyer's residence;\textsuperscript{41} goods which are, or will be, closely
related to real estate—\textit{i.e.}, fixtures—will follow the recording site of the
real estate;\textsuperscript{42} and all other goods—basically those bought in commerce
for further processing or resale—will be centrally recorded unless there
be only one place of business of the buyer, in which case recording will
\textit{also} be required in the county or city of the buyer's resident.\textsuperscript{43} This
scheme as to the place of recordation basically follows that set up under
prior law, with a greatly expanded emphasis on central recording (which
was formerly used only in the case of trust receipt financing.)

The only real problems that should arise under the Code in the
area of recordation, will be that of getting used to the central filing
requirement on many transactions which required only local filing
before. Thus a conditional sale of the basic equipment to set up a retail
store which once would have required only local filing to be perfected
as a security interest\textsuperscript{44} would now require central filing, and, if the
debtor had only one place of business, local filing as well.\textsuperscript{45}

While it is possible, however, that this double recording requirement,
if left in the context of prior Virginia law, could prove extremely
troublesome, an additional change in the Code has made it almost negli-
gible, insofar as improper recordation defeating the intended security
interest is concerned.\textsuperscript{46} Under the prior law if a security interest was
filed in the wrong place, the filing was void, and the security interest
lost unless refiled in the proper place prior to its being defeated by a

\textsuperscript{40} The Official Text of the U.C.C. had 2 alternative provisions as to the place of
filing. The Virginia Code Commission, in its draft for adoption by Virginia selected
the second alternative so as to "make the fewest changes in the pattern of existing Vir-
\textsuperscript{42} Id., § 8.9-401 (1) (b).
\textsuperscript{43} Id., § 8.9-401 (1) (c).
\textsuperscript{44} See Newcomb v. Guthrie, 145 Va. 627, 134 S.E. 585 (1926).
\textsuperscript{45} Similar changes would be wrought in the decisions in National Cash Register Co.
v. Norfolk City Realty, 110 Va. 791, 67 S.E. 372 (1910); Monarch Laundry v. Westbrook,
109 Va. 382, 383-84, 63 S.E. 1070 (1909); Groner v. Babcock Printing Press Co., 267
F. 822 (4 C.C.A. 1920).
\textsuperscript{46} Cf. supra p. 5.
subsequent interest or assignment. This problem is eliminated under the Code provision whereby

A filing which is made in good faith in an improper place or not in all of the places required by this section [emphasis supplied] is nevertheless effective with regard to any collateral as to which the filing [otherwise] complied with the requirements of this title. 

One final change that is made by the Code in regard to the proper recordation of security interests is the repeal of section 55-984 which required that any time any property which served as collateral was moved to another city or county the agreement secured by that property would have to be re-recorded in the latter jurisdiction within one year after it was so removed. Under the U.C.C. the original filing remains valid without such re-recording.

It might appear that under the recording scheme of the Code problems would result whenever the security interest was secured by property which could be easily moved from jurisdiction to jurisdiction (such as, for example, a private automobile). Under the Code, however, in such cases, the existing practice of recording security interests in such property on the title certificate continues, and it is not necessary to make any further recording to perfect any such lien.

After-acquired property; the "floating lien"; and Virginia's factor's acts

One of the most glamorous and probably most "dangerous" changes wrought by Article 9 is the expansion of the doctrine allowing a creditor

48. See supra note 15.
49. VA. CODE ANN., § 55-98 (1950).
51. What other problems this policy might raise as to the proper searching of any such liens by subsequent lien holders, are not within the scope of this paper. It is submitted, however, that this last change may conceivably cause as many problems to a party seeking to establish the priority of his own lien.
52 VA. CODE ANN., § 8.9-401 (1950), Official Comment.
53. "The lawyer, on first reviewing Article 9 and its provisions for Sec. Int. in future Rev. might very well think that the "millennium had arrived" ... and like any child with a new toy . . . [is] probably going to want to use this floating lien! Our advice is don't. At least not until you can't find any other way to meet your client's needs, and know all the [pitfalls] of Article 9's 'floating lien.' . . ."

"Don't ever let laziness cause you to use the 'shot gun' approach offered by the
to take security interests in property which may be left under the full control of the debtor even to the extent of a valid resale to a bona fide purchaser and/or property which the debtor may as yet not even have. This doctrine is the basis of the famous (and to many, mysterious) "floating lien".55

Actually the concept of a "floating lien" type of security device is not completely new in Virginia. In the Factor's Acts, Virginia law recognized a concept which was very close to what is found in the Code under the "floating lien": i.e., that is the concept of a permanent lien on a shifting inventory. The changees made by the Code under the "floating lien" are simply the extension of this device to all security transactions covered by the Act. Thus, while in most instances the doctrine of Lang v. Lee58 and its more famous New York cousin, Benedict v. Ratner56 have remained as good law in the case of most security

54. In the Official Comment relating to § 8.9-205 it is specifically stated that "This § provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for proceeds or substitute new collateral. It repeals the rule of Benedict v. Ratner... and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral. See O.C. § 8.0-306 (4). Burns, Snead and Speidel, AN INTRODUCTION TO THE U.C.C. The Michie Co., Charlottesville, 1964.

55. The Code itself nowhere specifically authorizes or otherwise mentions a "floating lien." It is a term devised by those dealing with the Code to designate the combined effect of several sections, e.g., 8.9-204 with 8.9-312.


57. While many practicing attorneys may think of the floating lien as being entirely alien in Virginia law due to the influence of Lang v. Lee, 24 Va. 410 (1825) which had held that a floating lien on a shifting stock of goods is invalid as a matter of law [cf. Consolidated Tramway Co. v. Germania Bank, 121 Va. 331, 93 S.E. 572 (1917); Wray v. Davenport, 79 Va. 19 (1884); and Addington v. Etheridge, 53 Va. (12 Gratt.) 436 (1855)], the Va. Code has, since 1944, at least to factors and suppliers recognized a shifting or floating lien on inventories of merchants. Thus in 55-146 it is said: "... Purchasers for value from the borrower in the usual course of business shall take free of the lien created by this chapter whether they know of the lien or not. When the goods or merchandise... are sold in the ordinary course of business of the borrower, such lien shall attach without further act... to the accounts receivable or proceeds of such sale in the hands of the borrower."

58. See discussion supra note 56.

transactions, many Virginia attorneys are already familiar with operations taken under the contra view taken by the Code.

Besides the extension of the doctrine allowing a lien on a shifting stock of goods already recognized by the Factor’s Acts to all security transactions, the Code has made one further change in connection with the “floating lien” concept which is a major departure from prior law. That is the complete about face it takes in regards to a security interest in after-acquired property.

Formerly, under sec. 55-105 it was deemed that a subsequent purchase of property by the debtor would not be effected in any way by “the record of a deed or contract made by a person... before he acquired title of record.” Now, however, under section 8.9-312 (which replaces sec. 55-105) it is specifically stated that as long as the transaction meet certain conditions (including the requirement that it not be for an antecedent debt) a creditor may make a loan validly secured “in whole or in part by after-acquired property.”

The effect of these changes is considerably to expand the horizons of potential secured transactions by allowing a party who may have a significant lack of liquidity in re his capital account, to either obtain credit which he otherwise could not obtain by hypothecating any given class or classes of property which he might in the future acquire, or to increase his liquidity by allowing a direct lien on property which he otherwise could not afford to subject to the restrictions formerly imposed on property subject to such security interests. At the same time, however, it may very well allow a creditor to “tie up” not only all the assets presently owned by the debtor, but also any that he may acquire in the future.

It should be noted, however, that though the “floating lien” does considerably broaden the potential scope of secured financing in per-

under Federal Bankruptcy Act by Mr. Justice Brandeis, purporting to state the law of New York.

60. VA. CODE ANN., § 55-105 (1950).
61. Ibid.
63. Id., § 8.9-312 (3) and (4); cf. § 8.9-204 which states “Subsections (1) and (3) read together make clear that a security interest arising by virtue of an after acquired property clause has ‘qual status with a security interest in collateral in which the debtor has rights at the time value is given under the security agreement.’” VA. CODE ANN., § 8.9-204, 1950.
64. It is hard to determine at this time what effect Federal Bankruptcy laws may have on this insofar as its potential effect on the law of fraudulent conveyances. It would appear that this particular aspect of the Code will have to await the interpretation of the U. S. Supreme Court for a definitive rule.
sonal property, it is highly complex and has many ramifications which, though too extensive for adequate treatment in a paper of this scope, must be thoroughly understood before used, and even then, if the same result can be achieved by the use of one of the more stable security devices it would probably be advisable to stay with the latter.\footnote{5}

It should be further noted in regards to the provisions allowing a security interest in after-acquired property, that while it is recognized under the Code, such an interest does not attach until the debtor has rights in the property;\footnote{6} and while the whole idea of after-acquired property being valid security is new in this particular aspect, it is in accord with the doctrine long established in Virginia law of real property, \textit{i.e.,} deed by estoppel, a doctrine early recognized in the case of \textit{Henry's Ex'r v. Payne} as applying to chattels.\footnote{7}

\begin{center}
\textbf{MISCELLANEOUS CHANGES OF WHICH THE PRACTICING ATTORNEY SHOULD BE AWARE}
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In addition to the more important changes wrought by Article 9 which are discussed above, there are numerous changes of lesser importance, which, while an ignorance of them is not likely to severely damage a party operating under the Code (since they are mainly changes aimed at simplifying the law, and are not intended to be absolute requirements) a recognition of their existence can make operation under the Code considerably more efficient and successful.

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\textbf{AGRICULTURAL SECURITY TRANSACTIONS}
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One of the first of these miscellaneous changes is the class dealing with crop liens and other agricultural security interests. While it is true that a landlord's lien is specifically excluded from the operation of the Code, such is not the case for liens taken on crops.\footnote{88} Generally the law under the Code remains the same as it was under prior law.\footnote{69}

\footnote{5. See \textit{supra} note 53.}
\footnote{7. \textit{Henry's Ex'r v. Payne}, 126 Va. 1, S.E. (1919). In that case where a son had tried to mortgage a library belonging to his father it was held that the mortgage holder had no valid security because the son, though he could have expected the library to pass to him, actually never owned the library. The court pointed out, however: "But this is permitted at C/L, for independent of a statute, a creditor stands in the shoes of his debtor and can subject no greater rights of property than the debtor . . . has . . . ."}
\footnote{68. See § 812-501; 8.9-109/203, 204 and 401 of the Virginia Code for provisions specifically applicable to such liens.}
\footnote{69. \textit{E.g.}, In spite of the fact that Virginia law formerly did not recognize a valid}
The only major change as to crop liens is that, while formerly the advancement always had to be within the same year that the crops were harvested, under the Code the advancement may be had for a longer period of time provided it is coupled with an interest in the real estate on which the crops are growing.\(^\text{70}\) One other important change in this area is that under the former law any such advancement on crops had to be given specifically "... for the purpose of ... cultivation of the crops upon which the lien [was] claimed."\(^\text{71}\) Furthermore, anyone trying to challenge the lien so acquired could require proof that such funds were actually so used.\(^\text{72}\) This limitation is eliminated under the Code, so that growing crops may now become subject to a valid security interest regardless of the intended use for the advanced funds.

**RE-RECORDATION NO LONGER REQUIRED**

A second change wrought by the Code which may be limited in effect, but of some value to note is the abandonment of the re-recordation formerly required in the case where property subject to a chattel mortgage or deed of trust was moved from one jurisdiction to another.

Under former Virginia law, whenever a security agreement in the nature of either one of these devices was made in another state and later removed to Virginia, the agreement had to be re-recorded in Virginia in order for it to be valid as against a subsequent purchaser or lien holder in Virginia.\(^\text{73}\) Thus under the former law, a distinction had to be made as to whether the article had been actually removed to Virginia, or was merely passing through,\(^\text{74}\) and the problem was even more acute due to the fact that under the former view\(^\text{75}\) there was no grace period for recordation.

Under the Code, this problem is easily met, by the laying down of a flat four month rule which requires that all such interests kept within security interest in after acquired property, by reason sec. 43-27 of the Virginia Code a specific exception was made for seeded or growing crops.


\(^{72}\) Ibid.


\(^{76}\) Thus, one having any security interest in any such property necessarily ran the risk of having to determine whether the property was in fact "removed" to Virginia and having his interest lost if he did not decide correctly or in time.
Virginia more than four months must be recorded to remain valid beyond that period.\textsuperscript{77} Since, for the most part, this new rule does not include security interests which, created on property outside the State and subsequently brought in, which would not have come under the old rule anyway, it does not create any significant new burdens. It does, however, require that any party seeking to establish his own lien on any property, recently removed from another state, which may have been subject to such an interest there, to either check for recordation of such an interest in such other state, or wait at least four months from the date of such removal in order to be absolutely certain of his rights.

**Specific Application—Areas of the Law Left Unchanged by the Code**

In carrying out its basic purpose (as set forth above), the Code not only has attempted to change security law in areas where there were, under prior law, unnecessary restrictions and/or complications, but it has also been careful to leave unchanged those areas of security law which would not appear to need reform. These include the laws in which: 1) the value of consistency and/or public policy within the individual state outweighs the value of conformity among the states—e.g., security interests in real property; 2) the former security law has proven best able to handle peculiar to situations that it was specifically designed to handle—e.g., equipment trusts in railway rolling stock; and 3) the security law among the states is already uniform and/or could not be changed by unilateral state action due to Federal pre-emption in the particular field, e.g., the Ship Mortgage Act of 1920.

The changes which have come about in Virginia security law from the adoption of the Code are not nearly as numerous or complex as they might appear from the extent of comment that has and will be focused upon it. The areas left unchanged by the Code for organizational purposes may best be arranged in two classifications: 1) those covered by the provisions of Article 9 that remain the same as prior law; and 2) those which remain the same because of their exclusion from the provisions of the Code.

**Areas Covered by the Code but Remaining the Same**

It is difficult at this early stage to be able to accurately project all of the changes that may possibly be made by court construction of the

\textsuperscript{77} VA. CODE ANN., § 8.9-103 (1950).
There are, however, several areas which, though they might appear to be potentially troublesome, are actually handled in much the same way under the Code as they have been under prior law.

CONTINUATION OF DISTINCTIONS NOT DIRECTLY RELATED TO SECURITY LAW

One of these areas is the distinction usually made between "goods and chattels" and choses-in-action. Under the Code, the doctrine laid down in *1st Nat'l Bank of Richmond v. Holland* which held that "chooses-in-action" or other intangible assets were not to be treated as one in the same with "goods and chattels" under the various property law provisions calling for special handling of the latter—will continue in full force. It is true that both choses-in-action and "goods and chattels" will be treated as subjects of a valid security agreement, and as such will be equally subject to Article 9. This does not mean, however, that the two are merged into one entity or that the old doctrine of *Jusdem generis* is abandoned. It simply means that they will be subject to the same law when they are subjects of such security agreements.

The Continuation of Policies Established Under Virginia's Factor's Acts

Another area covered specifically by the Code but which will remain generally unchanged—except for an extension of rules formerly governing it to other security interests—will be found in the field of factor financing.

As to coverage, while it is true that the Code extends the concept of a lien on a shifting stock of goods to all other consensual security interests (with the exclusions mentioned under sec. 8.9-104), it in no way eliminates any such interests which formerly would have come under Virginia's Factor's Acts.

Under these acts, Virginia has recognized at least partially the "float-

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78. *Supra* note 19.
80. The case in *1st Nat'l Bank* (supra) dealt with the question of whether delivery necessary to complete a gift from a husband to his wife was achieved in view of the statute which made delivery of *goods and chattels* incomplete when transferred from one person to another both parties living under the same roof, and the "goods and chattels" never left the house.
81. "Under subsection 8.9-102 (2) all security interests created by contract are within the scope of 8.9. In accordance with this provision, choses-in-action may be used for security, but this approach does not affect the Virginia holdings that choses-in-action are not 'goods and chattels.'"—*Va. Code Ann.* (1950).
The “floating lien” concept which is one of the more famous and least understood aspects of commercial financing under the Article.82 The only difference between the Code in this area, and the “floating lien” type of provisions in Virginia’s Factor’s Acts, is that this security device, long used in connection with factor financing, has been made available to most other security transactions.

In addition to the continuation and expansion of the provisions allowing for the acquisition of a lien on after-acquired property, it should be noted that the requirements for proper notice laid down for such liens by the Factor’s Acts are followed fairly closely in the requirements for such notice under the Code, the only difference being that the requirements under the Code, if anything, are simpler. Thus, under the Factor’s Acts the notice must contain: a) the name of the factor, b) the name under which the factor does business, c) the principal place of business of the factor within the state, and d) the names and addresses of the major parties to the business. In addition the notice must contain the name of the borrower and whatever interest he may have in the merchandise; and finally it requires a statement as to the general character of the items which are now or may become subject to the lien and the period of time over which the particular financing arrangement is to extend.83

Under the Code, as under these present provisions, the agreement must be signed by the debtor, and must contain the general description of the security which reasonably identifies the collateral. (As to the other requirements listed above, the Code, in its endeavors to simplify such financing transactions, has eliminated them altogether.)84

Priorities in Secured Transactions Basically the Same Under Article 9

Again as to secured transactions, the law under the Code, while possibly more elaborate in the case of provisions concerning priorities than under prior law, remains basically the same.

82. See Burton, Factor’s Lien and Accounts Receivable Financing and Article 9, 20 W & L Law Rev. 306 (Fall 1963). “If a writing so provides, the factor has a continuing lien on all the goods and merchandise of the borrower on all loans made from time to time [Va. Code Ann., sec. 55-144, 1950]. As soon as a notice of this agreement has been recorded, the lien is valid and covers after acquired property of the borrower [emphasis supplied].”

“The lien is effectual from the time it is admitted to record against all later claims against the merchandise except common law and statutory liens.”


Under the Code, an interest that has attached is perfected when the financing statement is admitted to record. The artisan’s possessory lien arising by operation of law is superior to even a perfected security interest. If the financing statement covers the proceeds from the sale of collateral the security interest continues in such proceeds. All these rules are substantially the same as in [the prior Virginia law].

Even where the Code is significantly different from prior Virginia priorities, e.g., the landlord’s lien, such priorities are generally unaffected by the operation of the Code since they are expressly excluded from its operation.

Security Interests in Fixtures Basically Unchanged

Finally, among those interests which are covered, but which will be handled basically in the same way as under prior law are those security interests in goods which may become fixtures. Thus in sec. 8.9-313 of the Code, subsection (1) the basic definition of fixtures which may be subject to a security interest is in accord with the prior Virginia law set down in *Monarch Laundry v. Westbrook*. Likewise, subsection (2) is in accord with prior Virginia law as to security interests taken in fixtures subsequent to a mortgage on the realty, but prior to their becoming affixed to the realty.

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87. Monarch Laundry v. Westbrook, 109 Va. 382, 63 S.E. 1070 (1909). In this case it was held the intent of the parties was such as to make certain machinery installed in a laundry subject to a security interest (a chattel mortgage) and where the machines were not so constructed so as to become a part of the realty (even though they could be so constructed) and the security interest were properly recorded, that a vendee or mortgagee of realty, with notice (actual or constructive) of the rights of third parties in the machines would take subject to such rights. Cf. “The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, . . . glass . . . and the like and no security interest in them exists under this title unless the structure remains personal property under applicable law. The law of this State other than this act determines whether and when other goods become fixtures. . . .”—Va. Code Ann., sec. 8.9-313 (1) (1950).
88. Under the prior Virginia rule, where the Williamsburg Knitting Mill Co. had installed an automatic sprinkler system in its plant subject to a chattel deed of trust, but the deed of trust was not recorded according to Virginia law, it was held—after the knitting mill had taken out bankruptcy and the note holder under an earlier deed of trust on the realty and any property “that may be acquired and placed upon said premises during the continuance of this trust” claimed priority on the sprinkler system—that where a security instrument on real estate, even though purporting to cover after-acquired property is made not on faith of certain specific property which is later
SECURITY INTERESTS NOT COVERED BY THE CODE

In section 8.9-104 there are listed eleven items which are specifically excluded from the provisions of Article 9. These include: 1) any security interest which is subject to any Federal statute to the extent that such statute affects the rights of any parties involved; 2) any landlord's lien; 3) any lien given by law for services or materials; 4) any transfer of assignment for any form of compensation received by an employee for his services; 5) an equipment trust covering railroad rolling stock; 6) a sale of commercial paper whose purpose is for collection only; 7) a transfer of assignment of any insurance interest; 8) any right of set-off; 9) any right represented by judgment; 10) any lien on or in real property; & 11) any claim arising from tort, or banking or savings transactions.

There are various reasons following the basic philosophy of the Code as to why these eleven specific financing transactions are excluded from the Code, but regardless of why they may be excluded, the important matter in the context of this paper is that as regards these eleven transactions, Article 9 does not apply, and therefore the prior law governing them remains in effect (unless, as in the case of commercial paper, they are governed by another section of the Code.)

acquired and affixed to the land, and a later security instrument, even though not properly recorded, was made on the faith of the fixture, the later will prevail. [See Holt v. Henley, 232 U.S. 637 (1914).] The theory of this doctrine was that the recording acts are to protect those who make advancements on the basis of certain specific property as opposed to those who make advancements which incidentally will cover general property which later may or may not be acquired. This same rule and theory is to be carried forward under the Code.—See Va. Code Ann., op. cit., § 8.9-104.

90. E.g., the Ship Mortgage Act of 1920.

91. It is to be noted that though this subsection does cover such liens to the extent that they are given priority over any security interest gained under the provisions of the Code, the purpose of this limited coverage is to assure that the law of mechanic's lien—so closely tied to State public policy—is unaffected by the adoption of the Code. Cf. Code sec. 8.9-310.

92. While it may be difficult at first glance to understand why some of these security interests are excluded, the reasoning behind their exclusion becomes evident when taken in context with the philosophy of the Code. Thus, the excluded interests are generally such if they fall into one of three general classifications: 1) those already covered by other articles of the Code or other legislation which has the effect of unifying the law among the several states; 2) those areas in which the individual states have historically had a greater interest, and the value of consistency within the State outweighs the need for conformity among the states; or 3) a sort of middle ground which may be combined with either the first or second or both or which are only indirectly connected with the law governing actual security transactions.
In addition to those secured transactions specifically excluded from the operation of the Code by sec. 8.9-104, there are several other areas of commercial security law which, because of their nature as being merely ancillary to the main question of giving and/or receiving a security interest in personal property, appear to remain outside the provisions of Article 9 and therefore are unchanged. These include various regulatory statutes formerly connected with financing arrangements, successive assignments of the same funds, true leases, and various mechanic's liens.

Ray Henson points out that "Article 9 does not replace regulatory legislation such as the usury statutes, the consumer finance acts or retail installment sales act . . ." 93 Hence in sec. 8.9-203 it is stated that an transaction which may subject to the Code and which is also subject to the Virginia laws governing small loan companies and small loan transactions;94 or to the Virginia statute prescribing certain minimum requirements for contracts for the regulation of installment sales of personal property;95 would in the case of conflict be governed by the regulatory statutes rather than the Code;96 as would occur in cases where the Code came into conflict with the Virginia law regulating the installment sales of motor vehicles.97

"Similarly, successive assignments of the same deposit of money . . . which are not intended to create security interests are not within the scope of title 8.9 . . ." 98 Thus the decision in Evans v. Joyner99 will not be changed by the operation of the Code, and Virginia's rule in such cases of "first in time, first in right" will still control.

In addition, the law laid down in Southern Dairies v. Cooper 100 where it was held that where an arrangement was meant to be a true lease and there was no intention by either party that the lease be a mere security device101 the court will apply the law of bailment and not that of security to any controversy arising out of the agreement—is carried forward by the Code. Thus:

93. Henson, supra note 21.
100. Southern Dairies v. Cooper, 35 F. 2d 439, 440 (4 C.C.A. 1929).
101. Here, a lease was made to a confectioner by an ice cream firm of a freezer unit which was to be used to store ice cream supplied by the lessor under an agreement that the lessee should purchase a certain quantity of ice cream a year, or pay rent based on the deficiency.
The U.C.C. in title 8.9 only covers transactions "intended" to create a security interest in personal property. Consequently the section is in accord [with former Virginia cases] in its holding that true leases, not bailment leases, are not security transactions, and so would not be within the scope of Article 9.\textsuperscript{102}

In brief, the job of acclimatizing oneself to the changes made in Virginia security law by the operation of Article 9 of the Code may be made much easier if one remembers that the ultimate effect of the article is to leave unchanged the law governing the liens of landlords and farmers for advances to tenants and laborers,\textsuperscript{103} the liens of livery stable keepers,\textsuperscript{104} innkeepers, and materialmen's liens, laundries, dry cleaners and garagemen\textsuperscript{105} mechanic's and materialmen's liens,\textsuperscript{106} liens of franchises and property of transportation and similar enterprises,\textsuperscript{107} and any wage assignments.\textsuperscript{108}

\textbf{IN SUMMATION}

At least several decades before the Code was thought of, the idea was accepted that a debtor could hypothecate some or even all of his personal property. To accomplish that purpose under the pre-Code law the debtor had to execute a number of different instruments and often do so at different times. Under the Code he can do the same thing with one instrument. To the extent that the requirements for different forms were intended to discourage the use of chattel security the Code does mark a change in social philosophy—but only to that extent. To the extent that the state has expressed its social thinking in specific statutes such as those on usury, requirements for disclosure of finance charges, and the like the adoption of the Code means no change.\textsuperscript{109}

As to substantive changes in the law the security and financing capabilities of the single security interest, there is hardly any difference from those available under the old security devices, \textit{i.e.}, it doesn't open any broad new roads to capitalization or secured transactions, but it does have considerable advantages procedurally speaking over the multitudinous devices and minute technicalities required under the old system.\textsuperscript{110}

\textsuperscript{103} § 43-29–43-30.
\textsuperscript{104} § 43-31–43-40.
\textsuperscript{105} § 43-1–43-26.
\textsuperscript{106} Ibid.
\textsuperscript{107} § 55-161–55-167.
\textsuperscript{108} Ibid.
\textsuperscript{109} Coogan, op. cit., p. 696.
\textsuperscript{110} As to substantive changes in the law the security and financing capabilities of
In short, the changes wrought by the adoption of Article 9 in the Virginia law of secured transactions, are neither profound nor particularly burdensome. Those changes that are made, generally have the effect of greatly liberalizing security law and guaranteeing that the intent of parties acting in good faith will be carried out. The Code is basically so drafted that anyone operating even in ignorance of the Code's provisions can generally be assured of succeeding in his purpose. On the other hand, for those who take the time to master even the most general changes made by the Code, it should make transactions involving secured interests considerably easier, and more effective.

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Single Security interest can hardly be differentiated from those available under the old security devices, *i.e.*, it doesn't open any broad new roads to capitalization or secured transactions, but it docs have considerable advantages procedurally speaking over the multidinous devices required under the old system.

"Under the old law a debtor could effectively hypothecate all of his currently owned tangible and intangible personal property, but not with one instrument (unless state law permitted the use in one piece of paper of two or more separate security devices). He could secure a loan through a security interest in his fixed assets only through a chattel mortgage, unless it was the kind of property practically capable of being physically pledged. The conditional sale could cover the same kind of collateral but only in a transaction which resulted in the debtor's purchase of that collateral. In many states a chattel mortgage could theoretically have covered inventory as well as fixed assets but the mechanical requirements of description, recording, etc. made it practically unavailable. . . . The Uniform Trust Receipts Act and the factor's lien acts are by their terms limited to inventory (and accounts receivable and chattel paper produced through its sale. . . . The accounts receivable statutes, of course, could cover only accounts. Each of these devices has its own set of rules for execution, filing, priorities and remedies." (Coogan, *op. cit.* at 695, 96).