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THE SECURITY ASPECTS OF CONDITIONAL SALES IN SWEDEN WITH A COMPARISON OF THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

Conditional sales can be approached from two points of view: the seller-buyer relationship and the social impact of installment sales and their related problems, or the conditional sale as a financing device and the question of the seller's secured position by virtue of the conditional sales contract. This article will deal with the latter point of view, considering in the main, Swedish law, the relevant provisions of the Uniform Commercial Code and their basic differences in approach.

A. *History of the Conditional Sale in Sweden*

The conditional sale is both old and young in Swedish law. It is old in the sense that it was recognized as a valid means of securing payment in the beginning of the eighteenth century.¹ A literal translation of the Swedish phrase that corresponds to "conditional sale" would be "sale under retention of ownership." As a result, when Swedish lawyers discuss problems in this area, they generally speak only of "retention of ownership." This has not had the effect of removing the discussion from the context of sales, but it probably has something to do with the fact that, with few exceptions, the problem has been treated as one of ownership or transfer of ownership.

The legal writers during the eighteenth and nineteenth centuries mentioned and condoned the conditional sale. The great law commissions that were at work in Sweden during the nineteenth century with

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¹ Almén, *Om köp och byte av lös egendom* (On Sale and Barter of Personal Property) (4th ed. 1960) (hereinafter cited as Almén) 412 n.143; Undén, *Svensk sakrätt I. Lös egendom* (Swedish Rights in Rem. I. Personal Property) (3d ed. 1955) (hereinafter cited as Undén) 102 n.82.

the purpose of giving Sweden a new code (it was never enacted) also mentioned the conditional sale. However, most of the statements are brief and do not give reasons or contain proposals for the theory of the conditional sale.² Practically all of them note the conditional sale in connection with the problem of the seller's rights as against the buyer and his creditors after a contract of sale has been concluded but where the goods have not been delivered nor payment made.³ Most of these writers agree that in this position the seller has the right to keep the goods if the buyer goes bankrupt. He does not have to deliver the goods according to the contract and seek payment for them in competition with other creditors. In this light, the conditional sale is viewed as the extension of this right in that the goods have been delivered and the seller has retained ownership rights under the contract.

It can also be said that conditional sales is descriptively young since it did not attract the interest of the legal scholars nor find its way into common usage until late in the nineteenth century.⁴ One of its most distinguished advocates was Tore Almén who perhaps furnished the most widely accepted theory of the conditional sale.

The installment sale, as it relates to conditional sales was introduced and fostered in Sweden as a result of the Singer sewing machine. Exported from the United States, it was sold all over the world through conditional sales.⁵ However, as with all commercial innovation, difficulties ensued and to cope with the problems emanating from the installment sales business, the Swedish Installment Sales Act⁶ was enacted in 1915. This was substantially amended in 1953.

B. Theories of Swedish Legal Writers

1. *Almén.* Almén's ideas were directly derived from his theory concerning the situation where neither transfer of possession nor payment for the goods has taken place. About this situation he says: "The buyer acquires a right of ownership conditioned by the payment of the price."⁷ And later he writes about the conditional sale: "The legal relation might be construed to mean that both the seller and the buyer have a conditioned right of ownership to the goods. The buyer has a right of ownership suspensively conditioned by the payment, the seller, a right of ownership resolutorily dependent on the same condition."⁸ Almén probably derived the main parts of his theory from Torp, a

² Schmidt, *Om ägareförbehåll och avbetalningsköp* (On Conditional Sales and Installment Sales) (hereinafter cited as Schmidt) 93-96.

³ Lag den 11 juni 1915 om avbetalningsköp (§ 28).

⁴ *Nytt Juridiskt Arkiv, Avdelning II* (hereinafter cited as *NJA II*) 296 at 300 (1915); Schmidt, *supra* note 2, at 93-96.

⁵ Schmidt, *supra* note 2, at 10-11.

⁶ Lag den 11 juni 1915 om avbetalningsköp.

⁷ Almén, *supra* note 1, at 151.

⁸ Schmidt, *supra* note 2, at 102.

Danish scholar who developed a similar construction at the Tenth Scandinavian Law Conference in 1902. There, Almén criticized Torp, but apparently he later changed his mind.⁹

Almén also had ideas about why the conditional sale existed and argued in favor of its validity against the buyer's creditors and his trustee in bankruptcy. As for the general reason for conditional sale, he says that the seller must have some guarantee for the payment of the price when the buyer can produce neither a surety nor a real estate mortgage. The seller cannot get a mortgage in the goods sold because of the rule in modern law that one can only get security in personal property by taking it as a pledge. Consequently, the seller invented the way of reserving his ownership in the goods so that he could take them back if the buyer should default.¹⁰ As to the validity of the conditional sales against creditors, he says that the "rule of modern law" mentioned above might be alleged against such validity as well as the principles underlying the *Statute on Sales without Transfer of Possession*¹¹ (which provides for a very cumbersome filing system and announcements in church, etc.). But he continues: "Between those cases there is, after all, the important difference that in one case goods that have belonged to the seller and still remain in his possession should be withdrawn from his general creditors, whereas in the other case, one should give the buyer's creditors the right to seize goods to which the seller never gave up his title although the buyer has the possession." And he goes on to say that such a restriction of the freedom of contract would not be sufficiently justified by the argument that the creditors might have looked to the goods in the buyer's possession when they extended the credit.¹²

2: *Undén*. In his book on *Rights in Rem. I. Personal Property*, Undén formulates a general theory on the transfer of title in sales, treating conditional sales in immediate connection with this theory, but offering no special construction of the conditional sale. He states that transfer of ownership in a sale really presents two problems: (1) how to solve a number of practical questions such as the rights of the seller's creditors against the buyer, the rights of the buyer's creditors against the seller, and the different parties' rights in a double sale; (2) the characterization and systematization of the legal relations at

⁹ Id. at 100-02.

¹⁰ Förslag till lag om avtal och andra rättshandlingar på förmögenhetsrättens område, lag om avbetalningsköp m.m. avgivna den 31 jan. 1914 av därtill utsedda kommitterade (Draftsmen's Comments on the Statute on Contracts and the Installment Sales Act, etc.), (hereinafter cited as Förslag) 170 (1914). Almén distinguishes the conditional sale from the chattel mortgage and the sale without transfer of possession by stating that in the conditional sale case there is only newly acquired possession whereas in the other case there is former title and former and present possession.

¹¹ KF 20 nov. 1845 i avseende på handel om lösören, som koperen låter i saljarens vård kvarbliva.

¹² Undén, *supra* note 1, at 179.

different points in the sales process.¹³ His final answer to the first of these problems is spelled out in the different chapters on special issues, one of which is the conditional sale. As for the second problem, he says: "The right of ownership as the totality of the powers that generally are vested in an owner, is transferred immediately from the seller to the buyer if the contract, the delivery and the payment are made at the same time. Otherwise there is a successive transfer."¹⁴ However, he fails to discuss whether or not it is disadvantageous that, according to Swedish law, the right of ownership is not established as a unitarian right at a certain point of time. In construing the conditional sale, he raises the question whether the seller can effectively make the transfer dependent on a suspensive condition.¹⁵ As will be pointed out later, there are problems involved in comparing Undén's and Almén's use of the terms "suspensive" and "resolatory" conditions.¹⁶ During his subsequent treatment of the problem he consistently refers to the seller's right as "reserved" ownership and the buyer's right as "conditioned" ownership.¹⁷ He also says that "the seller's reserved ownership is limited by the buyer's conditioned ownership."¹⁸ This seems to indicate that both parties have some kind of ownership, reciprocally limited and possibly a little stronger for the seller than for the buyer.

When it comes to refuting the arguments against the validity of conditional sales as to the buyer's creditors, Undén has some interesting things to say. Undén, like Almén, anticipates the argument: "We do not recognize the validity of pledges without transfer of possession. We recognize sales without transfer of possession only if extensive publication measures are taken. Why should we recognize the seller's title when the buyer has possession?" Undén answers that this is because the actual situation is so different. The possibility of sale or pledge without transfer of possession would enable the debtor unduly to prefer some creditors over others or would at least tempt the debtor to dissipate these last assets in a final desperate effort to get money. In a conditional sale the real situation is that the buyer needs a certain thing and permits security in it until it is paid for. As he cannot resell without criminal liability, the risk is fairly small that this kind of transaction will hurt his creditors.¹⁹

Undén looks at the conditional sale as part of the problem of transfer of ownership, characterizes the rights of the parties as the seller's reserved and the buyer's conditioned right of ownership,

¹³ Id. at 95.

¹⁴ Id. at 121-22.

¹⁵ Id. at 100. See discussion, *infra* p. 17, for definition of suspensive.

¹⁶ *Supra*, note 8.

¹⁷ Undén, *supra* note 1 at 100-07, 122.

¹⁸ Id. at 106.

¹⁹ Id. at 101-02.

compares it with other security transactions and sees the difference in the fact that the conditional sale is a way to secure purchase money.

3. *Schmidt*. Schmidt discusses the conditional sales theory in two chapters of his book²⁰ entitled "Problems of Construction" and "Aspects of Credit Security in Swedish Chattel Law." In the former he first considers transfer of ownership and then goes on to examine the construction problem of the conditional sale. He describes the different theories that have been expounded and critically analyzes Almén's theory at length. A point of refutation is Almén's contention that when the contract is concluded the seller has a resolutely conditioned right of ownership, the buyer a suspensively conditioned right of ownership and the condition for both parties is the payment of the purchase price. To this Schmidt replies: "If one accepts the meaning of those types of condition that is generally attributed to them in legal theory, the quoted passage would mean that the ownership of the buyer is not established until the condition is fulfilled. The seller's right of ownership on the other hand would remain unrestricted up to the point where the condition is fulfilled and the right goes over to the buyer."²¹ Schmidt continues to say that this is obviously wrong, since the buyer has some kind of right as soon as the contract is concluded. He points out that this is what Almén really believes; consequently, the construction does not suit Almén's own description. When Almén says that the buyer has some kind of right at the conclusion of the contract he commits another error in assuming that this right must be a right of *ownership*. Schmidt points out that it might very well be some other kind of right. In this context, he refers back to his general analysis of the transfer of ownership, wherein he argues that "transfer of ownership" is a metaphorical way of speaking which is not entirely correct. Ownership is a certain legal position in which the seller at one time finds himself. When certain acts are done a very similar kind of position is established for the buyer. But some of the rights that the buyer acquires have never belonged to the seller, such as cutting off the seller's creditors.²² Therefore, it is possible that during the sale the buyer acquires some kind of right which is not ownership and which the seller never had.²³

However, when it comes to deciding whether the label "conditioned ownership" should be used to describe the buyer's and the seller's rights in the conditional sale transaction, Schmidt says that there can be no serious objections to this description. His reasons for retaining it are that both courts and private individuals have a certain

²⁰ *Supra* note 2.

²¹ *Id.* at 105.

²² *Id.* at 90-91.

²³ *Id.* at 106-08.

respect for the label "ownership," and, since it is good for practical policy reasons that the buyer's right be secure as against the seller's creditors, the label should be retained.²⁴

Under "Problems of Credit Security" Schmidt explores the reasons for recognizing the validity of the conditional sale. He digests what earlier writers have said on the subject; treats the impact on the open credit standing of the debtor if different kinds of secured credit were allowed; and finally discusses the reasons for the other types of security transactions possible in Swedish law. He concludes with a summary²⁵ in which he points out that any security device must be judged on essentially two counts. First, does it give satisfactory security to the creditor so that credit will be reasonably cheap under the device in question? Second, are the advantages of this security device so great that they outweigh the inevitable damage to the open credit standing of the debtor? In a later chapter he gives a positive answer to the first,²⁶ and presumably this can be taken as a positive answer to the second.

4. *Bergendal*. In his interesting review²⁷ of Schmidt's book, Erik Bergendal adopts an altogether different construction of the conditional sale. He says that there is an obvious need for some kind of security for purchase money in the goods sold. The retention-of-ownership device was used only because sellers knew that a pledge without possession would not be held valid. Actually the seller does not want ownership of the goods; he only wants security for the purchase money in the goods. Bergendal says that present Swedish law probably warrants the description of the seller's right as ownership, but maintains that some of the legal effects that are supposed to follow from this view actually do not follow. Therefore, he would prefer a statutory change whereby the seller would get some kind of purchase money chattel mortgage in the goods.

It is difficult to follow Bergendal's line of thought. In the beginning it appears as though he is going to maintain that the existing Swedish law on conditional sales could better be described as a kind of chattel security. Instead, he states that the existing rules should be described as rules of transfer of ownership and that what he proposes is a legislative change.

5. *Evaluation*. To evaluate the different theories set out above, it might be wise to begin with a clearer investigation of the meaning of the words "resolatory" and "suspensive" in connection with con-

²⁴ *Id.* at 109.

²⁵ *Id.* at 134-36.

²⁶ *Id.* at 165.

²⁷ Bergendal, *Anmälan av Folke Schmidt: On ägareförbehåll och avbetalningsköp* (A Review of Schmidt), *Svensk Juristtidning* (the Swedish Law Review, hereinafter cited as *SvJT*) 670 (1938).

ditions. As we have seen, both Almén and Undén use the terms, and part of the criticism that Schmidt voices builds on an interpretation of those words. It is submitted that the confusion arises from the slightly different context in which these terms were used by the Swedish writers. In Finland and Sweden the terms are commonly connected with the effect of a legal act—a contract or the like. A suspensive condition is one which must be fulfilled in order to make the effect of the legal act occur; the effect is suspended until the condition occurs. The happening of a resolutive condition, on the other hand, nullifies the effect that came into force immediately when the legal act was done.²⁸ This use of the two words is designed to qualify the condition which, in this scheme, must be either the one or the other.²⁹

However, in Fredrik Vinding Kruse's book, *The Right of Property*,³⁰ another use of the words "resolutive" and "suspensive" is found. Kruse speaks about a situation where two persons have the ownership of a thing "in such a way that A shall first and alone be invested with the actual right to dispose, and that this right shall subsequently be transferred to B." He then adds: "We may . . . state the right of property of A to be subject to a resolutive condition as the occurrence . . . of a certain event will resolve the right of A . . . and . . . the right of property of B . . . [to be] subject to a suspensive condition, and the same condition which brings the right of A to an end keeps the right of B suspended as long as the condition is not fulfilled." We see here a totally different use of the two words.³¹ They are no longer connected with a legal act, nor are they really used to qualify different kinds of conditions since the same is called both a resolutive and a suspensive condition. Rather they are used to qualify different kinds of *rights*. If one adopts this meaning of the two words, the results reached will be contra to Swedish law concerning contracts to sell real property. This is because the use of resolutive conditions is prohibited in such contracts whereas the use of suspensive conditions is permitted.³² Such phrasing would be meaningless if the contract stated that the property should go over from A to B when B reached

²⁸ Black, *Law Dictionary* (4th ed. 1951) (hereinafter cited as Black) 365; Kivimäki & Ylöstalo, *Lärobok i Finlands civilrätt. Allmän del* (Finland's Civil Law. General Part) 227 (1961); Undén, *Svensk sakrätt II:1. Fast egendom* (Swedish Rights in Rem II:1. Real Property) (3d ed. 1961) (hereinafter cited as Undén II:1) 112-13.

²⁹ This classification comes rather close to the common law division of conditions: (1) into conditions precedent which correspond to suspensive, and (2) conditions subsequent which correspond to resolutive.

³⁰ Vinding Kruse, *The Right of Property* (Danish) 243 (1939).

³¹ The Swedish words are "resolutiv" and "suspensiv." Black uses the words "resolutive" and "suspensive" whereas Vinding Kruse translates "resolutive" and "suspensive." I will consistently use "resolutive."

³² Art. 2, ch. 1, of the Section on Land of the Code (Jordabalken); Undén II:1, supra note 28, at 110-16.

majority because, in Vinding Kruse's terminology, this condition would be both resolute (for A) and consequently forbidden, and at the same time suspensive (for B) and therefore permitted.

In terms of construction and policy of the conditional sale, it would appear that Almén employs Vinding Kruse's terminology³³ since his theory is thought to have come from the Danish jurist, Torp. Almén states that the seller's right is "resolutive dependent on the same condition" that suspensively conditions the buyer's right. Here, the same condition receives both labels and this is irreconcilable with the common Swedish theory.

It is probable that Schmidt did not fully notice the difference and in criticising Almén, assumed that the meaning of the words was the one generally used in legal theory. He notes a contradiction between the construction where the seller has a right "without restriction" until the condition is fulfilled and Almén's statements which point out that immediately after the conclusion of the contract both parties have some rights. But if Almén adopted Vinding Kruse's terminology this contradiction does not exist because the import of this language indicates that the right of ownership of the seller is not without restriction after the sale but rather, it is modified by the buyer's "eventual" right.

Undén's concept of the transfer of ownership is very realistic. He rejects the method, so common in earlier German and Swedish legal writing, of determining the question of transfer of ownership on a few recognized legal rules (such as where the buyer takes free of the seller's creditors) or on a single act in the transaction (*e.g.*, the transfer of possession). He believes that all connected problems should be solved first on their factual merits and that thereafter, those results should be used to determine where and when the ownership goes over. The need for this determination should then be purely systematical and pedagogical.

In this scheme he treats the conditional sale as one of the connected problems and, in discussing it, compares it with security transactions such as the pledge and the sale without transfer of possession. He spells out the detailed rules of the conditional sale as to the rights of the buyer and seller in various situations. From the terminology he employs ("seller's reserved and buyer's conditioned ownership," "successive transfer of ownership") he indicates that the parties have common ownership to the goods during the transaction. This, however, seems somewhat at odds with his discussion of the validity of conditional sales where his sole comparisons are to secured

³³ I do not mean to say that Almén got his theory from Vinding Kruse, for Almén published his theory before the first edition of "The Right of Property" was published. But it is rather plausible that their terminology is derived from common Danish sources.

transactions.³⁴ This indicates that the seller's right is a mere security interest in the goods.

This disturbing lack of connection between the construction of and the policy reasons for the conditional sale in the theories of the Swedish writers has no parallel under the Uniform Commercial Code.

C. *The Uniform Commercial Code*

When one compares the UCC, he cannot use the term "conditional sale," but must resort to descriptions like "similar transactions under the UCC." This indicates an important break with earlier American concepts. In Article 9, the UCC treats all transactions where the intention of the parties is to give the creditor security in a chattel.³⁵ Such a transaction is called a "secured transaction."³⁶ The classification of different kinds of security transactions is new, and there is in the Code no class entitled "conditional sales."³⁷ Therefore, the theory of the UCC in secured transactions, which would have been conditional sales under previous law, requires discussion.

The principal approach in the UCC is that it treats all secured transactions as an integrated category comprising what was formerly covered by chattel mortgage, conditional sales, trust receipts, factor's liens, etc.³⁸ In so doing, it recognizes the general legitimacy of secured financing and the need for a statutory scheme that makes the arrangement of such financing simple and inexpensive. In other words, the UCC does not share the formerly common hostility against the secured creditor.³⁹ What Article 9 furnishes is legal security and it is an important point in the outlook of the Code that this concept is distinguished from credit risk. The secured party retains his security interest against unsecured creditors whether he polices his security interest or not.⁴⁰ Even if he leaves the collateral in the unfettered dominion of the debtor his legal priority will be preserved.

Although the UCC looks upon secured transactions as one integrated category, it does have different rules for the various kinds of transactions. In this differentiation it does not use the terms con-

³⁴ In the Swedish language the same word is used to designate (1) the law of pledge, and (2) the law concerning the whole area of pledge, lien, mortgage, etc.

³⁵ Spivack, *Secured Transactions under the Uniform Commercial Code* 3, 4 (1960) (hereinafter cited as Spivack).

³⁶ See UCC § 9-301.

³⁷ This is not to say that the UCC prohibits the use of this term or invalidates a transaction given that name by the parties, official comment 2 to UCC § 9-102. But the Code itself classifies along other lines, and in the Code's analysis it does not matter whether the transaction is a conditional sale in the pre-code sense of the word.

³⁸ Spivack, *supra* note 35 at 1-2.

³⁹ *Ibid.* 2; Gilmore & Axelrod, *Chattel Security*, 57 *Yale L.J.* 518, 761 (hereinafter cited as Gilmore & Axelrod).

⁴⁰ UCC § 9-206 and official comments. This is a conscious break with the doctrine of *Benedict v. Ratner*, 268 U.S. 353 (1925).

ditional sales, chattel mortgage, assignment of accounts receivable, etc. Those devices are regarded as conceptual and the UCC purports to make its differentiation along functional rather than conceptual lines.⁴¹

The basis for the classification in the UCC is mainly the type and function of the collateral used⁴² and the intended purpose of the credit extended.⁴³ In this pattern the conditional sale can be classified as a purchase money security interest.⁴⁴ However, a car can be sold under a conditional sale both between the manufacturer and the dealer and between the dealer and the consumer. Prior to the UCC, these two sales were regulated entirely by the same legal rules (in the absence of a Retail Instalment Sales Act) but under the Code different rules apply to different aspects of each transaction.⁴⁵ In the first sale the car is classified as inventory⁴⁶ and in the second, as consumer goods.⁴⁷

The result is that the construction of the conditional sale under the UCC is not made in terms of ownership, title or lien. The language used to describe this type of transaction was invented for the Code and does not have any reference to American law outside the Code.⁴⁸ The reason for recognizing the validity of the conditional sale is the same as the reason favoring recognition of all secured transactions: secured financing is an integral part of the American economy and should be facilitated.⁴⁹

Also, prior to the UCC, American chattel security law was not thought about as an "integrated category."⁵⁰ There were many incoherent security devices of different historical origin, nonfunctional in the sense that there was a device invented to suit each demand. For example, the chattel mortgage was an attempt to borrow the mortgage concept from real estate law and use it to meet the need for chattel security.⁵¹ The result was a certain gap or discrepancy between the construction of the device and the policy reason for having it. The draftsmen of the Code, enjoying the freedom of making new law, eliminated this type of inconsistency. In short, they made security law functional by closing the gap. Employing new terminology which

⁴¹ Spivack, *supra* note 35 at 3-6.

⁴² Collateral is classified as goods; accounts, contract rights and general intangibles; instruments, documents and chattel paper, UCC §§ 9-105 & 9-106; cf. Spivack, *supra* note 35, at VIII.

⁴³ Reference is made to the division in purchase money security interests, UCC § 9-107 and other security interests.

⁴⁴ UCC § 9-107.

⁴⁵ E.g., UCC §§ 9-307 & 9-312.

⁴⁶ UCC § 9-109(4).

⁴⁷ UCC § 9-109(1).

⁴⁸ Official Comment 1 to UCC § 9-105.

⁴⁹ Spivack, *supra* note 35 at 2.

⁵⁰ *Id.* at 1.

⁵¹ Gilmore & Axelrod, *supra* note 39, at 529.

closely reflected the present social pattern in which commercial devices should work ("consumer goods and inventory," "purchase money security," etc.) the draftsmen laid a highly commendable foundation for such a volatile body of law.

D. *Closing the Gap in Sweden*

For the Swedish law makers, the task is more formidable. Bound by the existing case law and the language of the statutes, they must formulate new rules and adopt theories of construction from a restricted position which, considering the retention of the ownership theory, might well be described as protracted.

The final question then is whether in Swedish theory it is possible to use language which aptly describes what happens in a conditional sale. Can this gap be closed without alienating this transaction too far from the language and concepts found in the present day statutes, cases and other sources of the law.

In resolving this, it must be borne in mind that the conditional sale is functionally akin to both the sale and the secured transaction. Viewed under the UCC, it has correctly been decided that it is the fact of securing purchase money that the two are connected and since the security aspect is more important than the sale, the result is better termed a secured transaction. In Sweden it would be more appropriate to say that the buyer has ownership of the goods and the seller a security interest in the same goods when the contract is made. Such a conclusion is based on rules which prevent the seller from taking back the goods without giving the buyer the surplus after the goods have satisfied the debt⁵² and on the *Statute of Damages Caused by Automobiles* which places ownership liability on the buyer under a conditional sale.⁵³

A fortiori, in order to close the gap, the reference to the seller's right in Swedish legal writing and forms of contract should be viewed as a security interest, not a retention of ownership. The courts should give this new clause the same legal effect afforded the retention of ownership clause. This recommendation is not trouble-free, however, in that the use of the words security interest might not square with the language of certain statutes. A poignant example is the Rule of Priorities (where the owner of goods in the debtor's possession is allowed to take them from his possession or from the trustee in bankruptcy)⁵⁴

⁵² This is obviously so if the sale falls under the Installment Sales Act. But if not, Article 37 of the Statute on Contracts (Lag 11 juni 1915 om evtal och andra rättshandlingar på förmögenhetsrättens område) should work approximately the same result.

⁵³ Article 1, paragraph 3 of the statute mentioned (Lag 30 juni 1916 ang. ansvarighet för skada i följd av automobiltrafik). The same kind of rule makes the buyer responsible for the taking of the compulsory insurance on cars.

⁵⁴ Article 2 of chapter 17 of the Commercial Section of the Code (Handelsbalken).

because of the retention-of-ownership clauses. This can be avoided by a broad interpretation of the regulation on pledges⁵⁵ under the Rule of Priorities. On the plus side, clauses such as the one in the *Statute on Damages Caused by Automobile* would become unnecessary since the new language would more realistically define the transaction.

II. THE AGREEMENT AND ITS VALIDITY

A. *General Requirements for the Formation of a Conditional Sale*

The UCC has worked out a rather precise scheme as to how and when the security interest comes into being. First, the transaction must be incorporated in a signed writing describing the collateral.⁵⁶ It is then shaped over two distinct points of time, the attachment, when the security interest comes into existence, and the perfection, when it becomes protected against the interests of most third parties.⁵⁷

Under Swedish law the process is not so elaborate. Just exactly when the security interest becomes valid between the parties and against third parties is not discussed in the cases or in the books. The governing rules, therefore, must be gleaned from the statutes and cases, particularly the Swedish Act on Contracts of 1915. It is interesting to note that Swedish law has no requirement of consideration and generally speaking no Statute of Frauds.⁵⁸ Neither is there any parol evidence rule, for in all proceedings evidence can be introduced to explain away the contents of a written contract.

Perhaps the best indicator as to when the security agreement is effective between the parties and against third parties is the Sales Act which adopts the conclusion of the contract as the applicable time. Since the retention of ownership is always a clause in a sales contract, the security agreement is valid only if the sales contract is valid. When the contract is concluded, the seller has a duty to deliver the goods on the agreed day (against the down payment if such was contracted for).⁵⁹ If the buyer becomes bankrupt before the goods are delivered, the seller, according to articles 39 and 40 of the Sales Act, has a right to demand security for the price. Once obtaining this security, he must be deemed to be under a duty to deliver the goods. On the other hand,

⁵⁵ Article 3 of chapter 17 of the Commercial Section of the Code: "If anyone has a pledge in his possession he will enjoy payment out of the pledge before anyone else."

⁵⁶ UCC § 9-203.

⁵⁷ "Attachment" was a word invented for the Code but "perfection," according to Official Comment 1 to UCC § 9-301, is taken from section 60 of the Federal Bankruptcy Act. The definitions I have given of the two words are, broadly speaking, correct, although the attachment immediately gives right to some third parties and perfection gives varying priority in certain cases.

⁵⁸ A contract in writing is required for the sale of real property and in an installment sale as we shall see below.

⁵⁹ Articles 12 & 14 of the Sales Act. (Lag 10 juni 1905 om köp och byte av lös gegendom).

because only contracts that damage creditors can be rescinded,⁶⁰ if the seller goes bankrupt, it follows that the buyer can also demand specific performance. Thus it can be seen that after the contract is concluded, the security agreement is valid between the seller and the buyer and against third parties.

In spite of the general informality of Swedish contract law, there are some prerequisites for the validity of the retention-of-ownership clause in a conditional sale. The first is that this clause must be agreed upon before the buyer takes possession of the goods.⁶¹ This is thought to be a consequence of the general rule in Swedish law that a pledge for its validity requires possession by the secured party. It is also said to follow from the principles underlying the *Statute on Sales without Transfer of Possession*, which requires filing, announcement in church, etc., to validate such an agreement. The basic policy for this rule is illustrated in Undén's reason for recognizing the conditional sale as opposed to pledge without possession: whereas the motive for the conditional sales agreement is the need for a certain thing, the motives for pledges without possession would be (if admitted) to postpone bankruptcy as long as possible, or to satisfy some creditors at the expense of others. If the retention-of-ownership agreement is made after the sale, it is probably for the latter reason and this should not be encouraged. However, there are some interesting comments on a case where the retention of ownership was agreed upon after the sale and where the buyer later sold the goods to a third party who knew about the security agreement.⁶² The security agreement was held valid between the parties "and as the corporation (the third party) consequently had never had title to the machines in question but had only acquired the right that . . . the buyer had," the security agreement was deemed valid against the trustee in bankruptcy of the corporation. The technical reason for this judgment is simple enough. In the typical conditional sale the buyer does not get title to the goods until the price is paid. If the buyer tries to give the seller security in the goods after he has received the title this agreement is invalid against third parties. But if, in the latter case, the buyer sells his rights to the goods to somebody who knows about the security agreement, the relation between the second buyer and the original seller is the same as in the typical conditional sale: buyer never had title and seller never lost it. If this writer's proposal is adopted—i.e., that seller loses the title at the transfer of possession—Undén's argument can be used that if the security agreement is recognized in this situation, little harm is

⁶⁰ Chapter 2 of the Bankruptcy Section of the Code (Konkurslagen); Olivecrona, *Utsökning (Creditors' Rights)* 19 (2d ed. 1955) (hereinafter cited as Olivecrona).

⁶¹ Schmidt, *supra* note 2, at 147-49; Undén, *supra* note 1, at 103. See also *Nytt Juridiskt Arkiv*, Avdelning I, 755 (1932) (hereinafter cited as NJA).

⁶² NJA, *supra* note 61, at 80 (1923).

done to the second buyer's creditors, because the motive is the second buyer's need for a certain thing.

A second requirement for the validity of the conditional sale is that the retention of ownership attaches to an individual thing.⁶³ A security agreement concerning a percentage of a carload of goods would therefore be invalid. This is a problem touching upon the question of commingling the goods, but here the commingling is done before the delivery of the goods, thus the consideration behind the rule is slightly different. The rule is regarded as a consequence of a general idea that a right in rem must be attached to an individual thing.⁶⁴ As a rule subject to exceptions (certain of the Swedish statutes accept the "floating lien," the object of much debate in American law)⁶⁵ it remains open to further exception. But however subject to change, the basic reason for the rule is the establishment of security and order in legal life.⁶⁶

This is readily seen in the situation where the seller of a shipload of wheat reserves his ownership in one-third of the wheat. In the absence of the rule, serious problems of the buyer's rights to commingle or sell would be open for determination. Stated more specifically, would the buyer be obligated to retain the load intact or could he dispose of two-thirds of it?

A further requirement in the formation of a conditional sale in which Swedish law appears remiss is in the area of enforcement. Article 10 of the Installment Sales Act provides that there must be a written contract signed by the purchaser, preserving the right of ownership in the seller, giving the cash price and stating how much the buyer has to pay and the dates when the installments are due. Legal liability is well defined. Such is not the case in Sweden. If the seller is to have the benefit of the sheriff's assistance in the repossession of his goods without having to obtain a judgment, certain formalities must be added to the Installment Sales Act.⁶⁷

It becomes apparent then, that Swedish law has shown little concern with the problems relating to how and when a security interest springs into existence. On the contrary, legal thinking has been focused on the various problems of invalidity: what happens when the goods sold are affixed to real or personal property, are commingled or processed, or are resold?

B. *What Happens When Goods are Affixed to Real Property?*

Section 9-313 of the UCC lays down a set of rules regulating security interests in fixtures. The section begins with a clause leaving

⁶³ Schmidt, *supra* note 2, at 149; Undén, *supra* note 1, at 102.

⁶⁴ Schmidt, *supra* note 2, at 150.

⁶⁵ Gilmore & Axelrod, *supra* note 39, at 533-40.

⁶⁶ Schmidt, *supra* note 2, at 150.

⁶⁷ See generally, chapter VII *infra*.

to the state the determination of when goods become fixtures, but deciding that what has been "incorporated into a structure in the manner of lumber" etc., shall not be the collateral for a security interest created under Article 9. The section thus creates two classes of fixtures that make up a part of real property. It then goes on to give rules of priorities largely depending upon when the security interest attaches, concluding with subsection (5) which does away with the "material-injury" test that created so much confusion under the Uniform Conditional Sales Act.⁶⁸

The problem treated in UCC section 9-313 is one of the most debated in the law of conditional sales in Sweden. Leading cases have solved most of the problems, but certain troublesome areas remain. Typical is Sweden's statute, enacted in 1895, on *What is Part of Real Property*.⁶⁹ It is an enumeration in six articles, beginning with "Real property is land," later adding houses and things in houses ("fences, rails, . . . doors, waterpipes, radiators," etc.) Swedish law does not distinguish between two classes of the things that are realty as it exists in American law both prior to⁷⁰ and under the UCC. On the contrary, article 4 of the Swedish statute provides: "If anybody, according to special statutory regulation or on other grounds valid against everybody, has the ownership of a house or anything else that according to previous articles should belong to another person's real property, it shall not be deemed to belong to the real property." This article is generally conceded to be poorly drafted, but the main problem has been whether a retention of ownership in a conditional sale is a ground "valid against everybody."

The problem was raised in a series of early cases,⁷¹ and the principal question in those cases was: is a conditional sale of radiators or elevators which are affixed to the buyer's real property valid against the buyer's trustee in bankruptcy and against a subsequent purchaser of the real property?

In the beginning it was suggested that the answer should depend on whether there was material injury to the property, but after some hesitation the Supreme Court did not agree. The leading case came down in 1918.⁷² It dealt with a conditional sale of water and gas pipes that had been built into the buyer's house. The house was sold on execution auction and the buyers were notified of the conditional sales contract. The Supreme Court confirmed the judgment of the

⁶⁸ Official Comment 5 to UCC § 9-313. The test (in Section 7 of the UCSA) meant that if repossession of the collateral would cause material injury to the real property to which it was affixed, the reservation of ownership was void.

⁶⁹ Lag 24 maj 1895 ang. vad till fast egendom är att hänföra.

⁷⁰ Brown, *The Law of Personal Property* 698 n.1 (2d ed. 1955) (hereinafter cited as Brown).

⁷¹ NJA, *supra* note 61, at 278 (1909); 697 (1913); 263 (1914); 441 (1918); 602 (1923).

⁷² *Id.* at 441 (1918).

trial court⁷³ which held that as the pipes had been made part of the house, the retention of ownership in the contract could not be valid against the subsequent purchaser. In a later case⁷⁴ involving the buyer's trustee in bankruptcy, the Supreme Court took a similar position, while invalidating the conditional sale. Considering that the goods fell under the Statute of 1895, they held that the conditional sale was not a ground valid against everybody according to article 4. Therefore the goods were to be deemed to belong to the house "whether they had been more or less inseparably attached to the same," and that consequently the right to get the goods back, which nevertheless might be had against the buyer, could not be valid against his trustee in bankruptcy.

This case does away with the "material-injury" test and leaves open the question of whether the conditional sale is valid between the parties. The two cases come out clearly against the validity of the security agreement against creditors and purchasers acquiring interests in the realty, but the judgments are short and do not discuss the reasons for and against such a rule. However, insight can be gained from a reading of the legal literature. In the opinion of the writers, the most important argument for the position taken by the Supreme Court is that it was necessary to preserve the value and accessibility of real estate mortgages.⁷⁵ The banks would hesitate to give loans on such security if parts of the realty (according to the statute of 1895) were consistently under conditional sales. On the other hand, it has been said that the principle behind the statute of 1895 was to have a precise definition of what belongs to real property, to have order and certainty in the field of realty, and that this principle would be violated if conditional sales were allowed.⁷⁶ Another reason advanced was that the tenants would be unduly damaged if the bathtub or radiator should be taken out, and so, it was argued that what is a working economic unit should not be dispersed. Many of the things taken back would have been specifically made for a house and would not fit well elsewhere.⁷⁷

Against the validity of these arguments is the contention that such a rule would give the creditors of the houseowner an unearned windfall. By putting in bathtubs, radiators, etc., the conditional seller has added value to the real property which would be enjoyed by the conditional vendee's creditors gratuitously. Of course, this is only true as long as the sellers of what is to become fixtures continue to make conditional sales, believing that their security interest will be recog-

⁷³ Generally speaking, Swedish Supreme Court cases are infinitely more succinct than American ones, and often the Supreme Court just affirms the judgment of one of the lower courts without writing a new opinion.

⁷⁴ NJA, *supra* note 61, at 602 (1923).

⁷⁵ Schmidt, *supra* note 2, at 172; Undén, *supra* note 1, at 104-05.

⁷⁶ Undén, *supra* note 1, at 105.

⁷⁷ Schmidt, *supra* note 2, at 172-73.

nized. Therefore, the ultimate argument against the adopted rule would be the general need for purchase money security.

If the seller cannot make a conditional sale, how is he going to secure payment for the goods? True, in the normal situation, the buyer owns property, so the financing might be made with a mortgage,⁷⁸ but if the house is already heavily mortgaged, the seller's (or other financier's) mortgage will be the last satisfied from an ultimate execution sale. Consequently, it is possible he might realize nothing from such a sale. The other mortgagees will then have profited by the increase in value caused by the goods sold and affixed.

If the mortgage financing in many instances is not practicable, should the conditional sale be recognized to satisfy the need for purchase money security? Perhaps not! It is true that construction financing is a much-debated and unsolved problem in Swedish law.⁷⁹ It is also true that there is a great shortage of housing in Sweden today. Although this might be argued as a reason for the nonavailability of installment sales for construction material, it is probably more the effect of the sweeping legislation on rents and credit-giving enacted in Sweden, which keeps rents low (approximately one-third of the level in the United States) and which tightly regulates the credit market. Construction financing is a problem, but the conditional sale, for reasons given, is not a feasible solution. Perhaps a change in the Swedish legislation on mortgages would be a possible remedy.

If an American lawyer were faced with this situation, he would probably attempt to validate the conditional sale of what is to become a fixture by obtaining the consent of mortgagees and other creditors. This solution has not been tried in Sweden and would probably not be accepted by the courts for the reasons outlined above apart from the argument that it would damage the mortgage security.

Although it appeared that the 1918⁸⁰ and 1923⁸¹ cases resolved the problems in this area, the subcontractors and suppliers of building materials, by the device of a conditional sales contract providing for arbitration in case of disagreement or default, attempted to reverse the results of the decisions. Subsequently there were instances when the buyer went bankrupt and the judgment of the arbitrators was that the contractor had a right to repossess the goods. It wasn't until 1931⁸² that

⁷⁸ Lagerström, Något om ägandräktsförbehåll till värmeledningar och liknande tillbehör till fastighet (Conditional Sales of Radiators and Similar Parts of Real Property) SvJT, supra note 27, at 417, 426 (1932) (hereinafter cited as Lagerström).

⁷⁹ See Lundstedt, Byggnadsborgenärernas rättsliga ställning i Sverige och utlandet (The Legal Position of the Construction Creditors in Sweden and Abroad) (1917) and Statens Offentliga Utredningar (the State's Public Investigations, abbreviated SOU) no. 26 (1922); no. 10 (1938); no. 62 (1946).

⁸⁰ Supra, note 72.

⁸¹ Supra, note 74.

⁸² Id. at 647 (1931).

such an arbitration award case involving a trustee in bankruptcy came up. Fortunately, the Supreme Court adhered to its earlier convictions and invalidated the conditional sales contract since the goods had been installed in the realty. The suppliers had relied on the "validity of an arbitration agreement against a trustee in bankruptcy" under a leading 1913 case⁸³ which the court distinguished on its facts. They reasoned that in 1913, the question was the size of a certain debt, whereas here, the issue is the actual validity of a claim against the trustee in bankruptcy.

The import of the 1918 and 1923 decisions in summary form then, is that the security agreement is not valid against subsequent purchasers of realty, with or without notice. Nor is it valid against creditors, which means that even if the seller has a judgment to repossess the goods, it could not be executed if a creditor seized the property before, or if the buyer went bankrupt.⁸⁴ This also pertains to arbitration decisions to repossess if the buyer suffers bankruptcy, for an arbitration decision cannot be valid where a judgment by a court would not be valid.⁸⁵

Apart from the above, the 1923 case should be considered further since the language of that case infers that the seller might still have some rights against the buyer. This supposition raises two very interesting questions. If the buyer defaults and agrees to repossession, does the seller have a right to enter and repossess? Secondly, does the seller have a right to a judgment and execution as long as the real property is in the buyer's possession and before creditors have closed in? As to these two questions an argument has been made⁸⁶ that as the owner of realty can sell parts of his property to be severed from the rest, he should also be allowed to contract so that parts can be taken away from him, if he fails to pay for them.

The question becomes more complicated if the interests of tenants are introduced into the picture. Clearly, the tenant has a right to damages if, for example, the landlord sells the bathtub or, in the alternative, the tenant could buy a new bathtub and sue the landlord for the price⁸⁷ (since he probably cannot stop the sale). These rules are supported in the statutes on execution and bankruptcy preserving the rights of tenants,⁸⁸ and prohibiting the splitting of real property.⁸⁹

⁸³ *Supra* note 61, at 191 (1913).

⁸⁴ Schmidt, *supra* note 2, at 173.

⁸⁵ *Id.* at 182.

⁸⁶ Lagerström, *supra* note 78, at 418.

⁸⁷ See generally, Statute on Landlord and Tenant, ch. 3, Arts. 11, 15, 16 (Lag 14 juni 1907 on nyttjanderätt till fast egendom).

⁸⁸ Articles 107 and 133 of the Section on Creditors' Rights of the Code (Utsökningslagen) to which Article 70 of the Section on Bankruptcy of the Code refers.

⁸⁹ Article 78 of the Section on Creditors' Rights of the Code to which Article 70 of the Section on Bankruptcy of the Code refers.

Under the present law which prevents the sheriff from executing such an agreement or judgment, it would seem that the seller should not be allowed to take goods back even when in agreement with the owner of the house. The principles underlying the cited statutory provisions appear to be in opposition to such repossession. Reference is made to the principles that an execution should not violate the rights of third parties and that the law should not permit splitting of valuable economic units.⁹⁰

The previous discussion has concerned cases where the buyer of the goods was the owner of the real property. The problem where he is a tenant first reached the Supreme Court in 1933.⁹¹ A company sold an oven under a conditional sale to a tenant-baker. The oven was installed bringing into play, the Statute of 1895. The baker left the house without paying for the oven and shortly thereafter the company sued the baker and the landlord for the price or repossession of the oven. The Supreme Court affirmed the trial court's judgment reasoning that *as* the installation of the oven had been caused by the tenant and in her interest, *as* the oven could be separated from the real property without material injury to the same and *as* the suit had been brought shortly after the tenant had moved, the security agreement was valid.

The court did not have to strain to reach this result because Article 4 of the Statute of 1895 was devised, among other things, to exempt items that have been inserted by a tenant. Since the tenant can exercise rights of ownership over this part of the real property, no reason can be advanced for restricting the seller's retention of ownership, conditioned, of course, by the holding in the "baker" case.⁹² Whether the rule that a tenant can have separate ownership of a part of a house is a sound one is a problem beyond the scope of this article.

C. *What Happens if the Goods are Attached to Personal Property or are Commingled or Processed?*

Sections 9-314 and 9-315 of the UCC cover the security interests when the collateral is attached to personal property or is commingled or processed. In all such cases the security interest is deemed valid against third parties in opposition to prior law in many states. In Sweden when the security interest is deemed valid, and the collateral is commingled or processed, the major problem presented is the repossession. What and how much should the seller be allowed to repossess when the goods have lost their identity?

The Swedish approach has been to discuss the problem of attach-

⁹⁰ Schmidt, *supra* note 2, at 177-78.

⁹¹ NJA, *supra* note 61, at 447 (1933).

⁹² *Ibid.*

ment first. The commingling or processing of the goods is then regarded as a "worse" kind of attachment to personal property. This is based on a belief that when collateral attaches to personal property, the security agreement is invalidated. Therefore, commingling and processing, where the collateral completely loses its identity, would produce the same effect.

Of the five Swedish cases dealing with attachment, four have involved conditional sales of machines that have been installed in marine vessels. In this context it should be mentioned that Sweden has a statute regulating mortgages on vessels⁹³ which provides for possible security in vessels of over three tons by filing.

The problem first came up in 1925,⁹⁴ concerning a conditional sale of a machine installed in a small boat. When the shipowner's creditors seized the boat for payment of his debt, the conditional seller protested against the seizure of the machine alleging his retention of ownership. The trial court found for the seller on the ground that the attachment of the machine to the ship did not cause the invalidation of the ownership of the seller. The appellate court affirmed on this rather tenuous ground which in legal reality is no ground at all; it is merely stating the rule one has adopted without giving reasons.⁹⁵

The second case was a 1934 decision,⁹⁶ in which the pattern was the same. There was a sale, installation and seizure of the vessel containing the equipment. However, the results were quite different. The Supreme Court found that the installation of the machine had invalidated the security agreement, because repossession would necessitate considerable work and would cause material injury to the craft.

In 1935⁹⁷ the owners of a power fishing boat had gone bankrupt and the seller sought to repossess the motor from the trustee in bankruptcy. It was proven that the motor could be removed at negligible cost and without any damage to the ship. The Supreme Court denied repossession on the ground that if it was allowed, the ship would essentially lose its fitness for use as a fishing boat.

The fourth case came down during the war, in 1942.⁹⁸ It concerned the conditional sale of an auxiliary motor which was attached to a boat originally built as a sailboat. The motor could be taken away without injury to the boat simply by loosening some nuts. During the previous war years, because of the fuel shortage, the motor, although installed, had not been used. The case came up as a protest

⁹³ Lag 10 maj 1901 om inteckning i fartyg.

⁹⁴ SvJT, supra note 27, 58 (case) (1925).

⁹⁵ A very common habit with Swedish courts, unfortunately.

⁹⁶ NJA, supra note 61, at 234 (1934).

⁹⁷ Id. at 416 (1935).

⁹⁸ Id. at 195 (1942).

against the seizure of the boat and motor to satisfy the creditors of the owner. The Supreme Court denied repossession "as the motor . . . by the installation must be regarded as having been so attached to . . . [the ship] that the retention of ownership could not be claimed at the seizure." This again is no reason at all.

The most recent case occurred in 1960⁹⁹ and involved a collision of two conditional sales. On March 10, 1956, the buyer bought a car under a conditional sale. On March 18, he bought two tires from another seller under a conditional sale and put them on the car. On October 30, the buyer allowed repossession of the car as he could not pay. It was resold by the seller on April 23, 1957. The car dealer knew about the conditional sale of the tires when he repossessed the car. The seller of the tires then brought an action against the car dealer for payment of the tires which the dealer knew belonged to the tire vendor. The car dealer claimed that the retention of ownership in the tires ceased when they were put on the car. The Supreme Court found for the car dealer "as the tires . . . must be regarded as having become parts of or accessories to the car in such a way that, . . . [the tire vendor] cannot, on the basis of the retention of ownership, claim a right to the tires valid against everybody." In a concurring opinion,¹⁰⁰ Justice Karlgren,¹⁰¹ explained his stand on the issue by stating that the law should not permit value destruction. Therefore, when the repossession of the goods involves considerable cost or material injury to that which it is attached, the seller's reserved title must be regarded as void. However, there is more reason for hesitation when the goods attached are things that are easily exchangeable such as tires. It is true that a car without tires is unusable, but it is not valueless. A buyer simply calculates what it must cost to buy tires and bids accordingly. Nevertheless, Justice Karlgren concludes, a certain value destruction occurs even in such a case. Especially if other parts of the car are also sold under conditional sale, the execution sale might be of a skeleton of a car and the purchasing price a nominal one. The law should try to preserve economic units in spite of the fact that the exchangeability of tires might justify a special rule since it is not shown that conditional sales of this item are so common to require such a rule.

In each of three Supreme Court cases dealing with boat motors the Court appears to abandon its position taken in the preceding

⁹⁹ *Id.* at 9 (1960).

¹⁰⁰ The voting system in the Swedish Supreme Court is, at least in some respects, a mystery. "Concurring opinion" here means that Mr. Justice Karlgren first concurs in the majority opinion (i.e., both in the reason and in the result) and thereafter writes his own opinion (the concurring opinion), usually a much longer and more specific one to explain exactly what *he* meant by the majority opinion.

¹⁰¹ Probably the most well known and prominent of the present Swedish Supreme Court justices.

case. The initial case seemed predicated on a material injury test. When the next case arose, involving no material injury, the Court shifted to what could be called a fitness for purpose test. Then in 1942, the boat without the motor was still fit for fishing and so the Court neglects the use of any test whatsoever. The only safe assumption that one could possibly derive from this line of cases is that once the motor is in the boat the security is gone. Considering this along with the tire case and Justice Karlgren's opinion, we would have a crystallized rule of law: a retention of ownership to an accessory loses its validity as soon as it is attached to the main object however easy it is to take away. Possibly, an exception might be made for things that are not at all necessary for the functioning of the main object. Take, for example, a car radio. It can easily be taken away and the car loses very little in value.¹⁰²

Two problems remain. The first is whether the conditional sale should be deemed valid between the parties when some thing has been attached to personal property. This is the kind of legal problem that seldom comes into court. If the seller wants to repossess the motor in a car and the buyer refuses to allow the separation and no other creditors meddle in the affair, it is easier and cheaper for the seller to get a judgment against the buyer for the debt and seize the whole car and sell it. From the above mentioned series of judgments the probable implication would be that the conditional sale is also invalid as between the parties. However, this should not be stated as the "existing rule" since the cases do not make it obvious that it will be followed.

The remaining problem is what to do when none of the goods that are assembled can be regarded as the main product, *e.g.*, the situation of a car dealer who buys the motor from one manufacturer, the chassis from another and the body from a third, all under conditional sales.¹⁰³ Schmidt has proposed joint ownership of the car for the three sellers. If this rule means that they would not be allowed to separate the parts but at default should repossess it jointly and sell it and divide the proceeds, this is a good rule and in line with the trend of the Supreme Court judgments. But the question is not a practical one and therefore very difficult to discuss.

A noteworthy corollary to the above is the situation where goods are commingled but where nobody owns a major part of the goods. Here, certainly, joint ownership to the goods as proposed by Schmidt could be utilized. For an apt illustration, consider the 1959 case¹⁰⁴ which involved the sale of pigs for breeding and slaughtering, sold under three conditional sales' contracts. The sellers sold 240, 38 and 44 pigs respectively. Later the buyer's financial position became wobbly, so

¹⁰² At least in Sweden, where car radios are not (yet) standard.

¹⁰³ Schmidt, *supra* note 2, at 192-93.

¹⁰⁴ NJA, *supra* note 61, at 590 (1959).

he contracted with the three sellers to take back jointly 206 pigs and sell them to satisfy their claims, remitting any balance. Shortly thereafter, the buyer went bankrupt. The trustee sought return of the money, alleging that the retention of ownership was void on two counts: (1) the buyer was allowed to sell the pigs before payment and (2) the pigs had been so commingled that each sellers' pigs could not be distinguished. The first count was not regarded as proven. As to the second the Supreme Court simply stated that because the pigs were delivered by the seller to the buyer and commingled, this does not have the effect of transferring title to the buyer. This must be taken to mean that the sellers have joint ownership of the pigs.

The accepted Swedish rules therefore tend to restrict considerably the area in which the conditional sale can effectively exist. As will be discussed later, the seller even loses his right against a bona fide purchaser of the goods from the buyer. This means that in cases where it is likely that the goods will be affixed, attached, commingled, processed or sold, the conditional sale is impracticable as a security transaction. Its use is restricted to situations involving a sale to the ultimate user of goods that in themselves constitute an economic unit, and are not to disappear in ultimate use (as is the case with fuel, food, cigarettes, etc.). The field will then be the one typically occupied by installment sales. Yet, it should be clear that purchase money security is needed in other cases, which is the strong stand of the UCC. As the seller of the boat motor contended in the 1935¹⁰⁵ case, his customers—mainly fishermen—often badly needed credit which the seller could only give against security in the goods sold. However, the arguments against the validity of this conditional sale are likewise quite convincing.

The situation is such that if security for purchase money credit is needed, it must be given by legislating another type of security device.¹⁰⁶ Of course, if Sweden had a similar opportunity to make new law as was enjoyed by the draftsmen of the UCC, the conditional sale could be made to work, the militating factors eliminated and the current needs adequately met.

D. The Validity of the Security Clause in a Conditional Sale, Where the Buyer is Allowed to Commingle, Process or Sell the Goods

In section 9-205 the UCC makes a break with prior law by expressly validating security agreements even if the debtor has the right to use, commingle or otherwise deal with the goods. This was a deliberate break with previous doctrine clearly expressed by Mr.

¹⁰⁵ Supra note, 43.

¹⁰⁶ There are other security devices but they are restricted to certain categories of debtors. See Chapter IV *infra*.

Justice Brandeis in *Benedict v. Ratner*¹⁰⁷ where he said that when the debtor has the unfettered dominion over the collateral, the transaction is void. The UCC reasons that it is for the businessman to decide, upon business judgments, how much dominion can be safely left to the debtor and that the legal validity of the lien should not hinge on this consideration.¹⁰⁸

As for conditional sales, the Swedish rule is that when the agreement allows the buyer to commingle goods with other goods or to process or resell them, the retention of ownership in the seller is void.¹⁰⁹

Almén's explanation of the rule is that the retention-of-ownership clause in these cases was "not seriously meant." His only critic was Schmidt, who argued for the rule on the ground that it is practical and just. According to Schmidt, if another rule existed and a dealer became bankrupt, it would be a mere coincidence if the goods of seller A rather than those of seller B remain in the debtor's possession; consequently, some arbitrarily lucky creditors have security in what the debtor possesses and the rest of the creditors remain without payment.¹¹⁰

Under a sale on commission, the commission merchant sells goods in his own name that are the property of his principal. Here the principal's ownership is recognized until the goods are sold. There is, therefore, a need to have some grounds on which to decide whether a merchant holds goods for sale on commission or as the buyer in a conditional sale, and cases have actually turned on whether the label "commission" was accepted by the court. Whether a court will find a commission¹¹¹ situation will depend upon whether: (1) the commission merchant is under a duty to keep the commission goods separated and also to keep incoming payments separate; (2) the principal sets the price; (3) the commission merchant gets his salary as a provision on goods sold; (4) he has a right to return unsold goods; (5) he is under a duty to account regularly to the principal.

Where the right to dispose of the goods has been proven the cases have denied the validity of the security agreement. In two such cases¹¹² the parties had termed their relation "commission" and the Supreme Court found that it was actually a sale and, since the buyer was permitted to sell, the security agreement was void. In another case, the German corporation Krupp sold some threshing machines to a Swedish company which was to sell them and pay Krupp out of the purchase money. Krupp also reserved security in the proceeds, which indicated

¹⁰⁷ 268 U.S. 353 (1925).

¹⁰⁸ Official Comments to UCC § 9-205, especially Comment 5; Spivack, *supra* note 35, at 9-15.

¹⁰⁹ Almén, *supra* note 1, at 408; Förslag, *supra* note 10, at 179-80; Schmidt, *supra* note 2, at 195-96; Undén, *supra* note 1, at 103-06.

¹¹⁰ Schmidt, *supra* note 2, at 204-05.

¹¹¹ *Id.* at 206.

¹¹² NJA, *supra* note 61, at 449 (1908); 591 (1937).

that the contract was drafted according to German law, since such security is not allowed in Swedish conditional sales but is common in German conditional sales.¹¹³ Krupp's retention of ownership was deemed void as against the company's trustee in bankruptcy because the company previously had a right to resell the machines. A 1960 case¹¹⁴ dealt with doors that were to be affixed to real property. The Supreme Court regarded it as evident from the circumstances that the contractor was entitled to affix the doors before he had paid for them. Under such conditions the retention of ownership is void.

To properly evaluate this consistent dichotomy running between the Swedish view and that of the Uniform Commercial Code, the reasoning behind the *Benedict v. Ratner* ruling and UCC opposition to it must be determined. Mr. Justice Brandeis' rationale in the *Benedict* case is one of conceptual contradiction more than of practical consideration. He denies that his ruling rests upon ostensible ownership; states that the rule he is following "implies fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien."¹¹⁵ It seems that he is saying—especially in the light of what follows—that the conceptual nature of mortgages and other liens is inconsistent with the debtor's unrestricted dominion over the collateral. If this interpretation is correct, it is no wonder that the UCC with its functional approach opposes such reasoning. The main concern of the UCC seems to have been to validate the floating lien,¹¹⁶ which heretofore had been hindered by the *Benedict* rule. Under Swedish law there have long existed security devices which permitted a floating lien. The reason for the Swedish rule is not one of conceptual inconsistency—at least not exclusively—as is shown by Schmidt. While section 9-205 concerns security transactions in general, the Swedish rule separates conditional sales, and holds that once the goods have been affixed, attached, commingled or sold, the security interest of the original seller is gone.

E. *Swedish Combination and American Future Advances and After-Acquired Property*

In Sweden it was formerly very common for an installment sales contract to carry a clause that the seller retained the ownership of the goods until the buyer had paid the full debt. This clause was often used when the buyer wanted to buy new things before he had made the last payment on prior purchases. The seller then had security for the purchase money in the latter sale, not only in the goods in that sale, but also in the goods first sold. Since he generally used exactly the same

¹¹³ Schmidt, *supra* note 2, at 64.

¹¹⁴ NJA, *supra* note 61, at 21 (1960).

¹¹⁵ *Benedict v. Ratner*, *supra* note 52, at 363.

¹¹⁶ Official Comment 1 to UCC § 9-205.

printed contract in both cases, it is also true that the goods sold last were security for the purchase money in the first sale. This was called a combination of sales. The number of sales in the combination was unlimited. The clause in the contract was also used to secure such obligations as payment of repair costs when a car was sold and the buyer, before the last payment was made, had the car repaired at the seller's shop. Even debts totally unconnected with sales or the goods sold were covered by the clause.

In American terminology this would be a question of after-acquired property and future advances. In general, UCC section 9-204 regards as valid a security agreement which purports to cover property that is to be acquired after the agreement and to secure advances that are to be made. However, there is a time limitation on after-acquired crops or consumer goods.¹¹⁷

In Sweden a conditional sale that purports to cover future advances whether in the form of combinations or otherwise has long been deemed valid. The draftsmen's comment to the Installment Sales Act of 1915 stated that they probably were valid both between the parties and against creditors.¹¹⁸ Schmidt recognizes their validity although he is critical and believes the rule should be altered.¹¹⁹ His attack¹²⁰ on combinations and other forms of future advances is based on the same reasoning that fostered the reluctance of American courts to accept the floating charge,¹²¹ *i.e.*, a buyer could by this device withdraw practically all his assets from his unsecured creditors. Schmidt adds that the buyer's social dependence on one seller becomes more pressing than under a usual installment sale.

One of the uncertainties in Swedish law was whether a combination would be valid if the first conditional sale did not carry a combination clause even though the parties might agree at the time of the second conditional sale that a combination should be made. Two Supreme Court cases¹²² which endorsed the future advance and the combination shed no light on the problem since they both contained future advance clauses. However, it is interesting to note the vigorous dissent in the earlier of the two cases¹²³ by the prominent Justice Alexanderson. He reasoned that the law recognizes the validity of a conditional sale because it secures the normal winding up of a credit sale. Thus the combination is a misuse of the conditional sale and should not be allowed.

In the 1953 changes of the Installment Sales Act, the combination

¹¹⁷ UCC § 9-204(4)(a) & (b).

¹¹⁸ Förslag, *supra* note 10, at 201-02.

¹¹⁹ Schmidt, *supra* note 2, at 154-60.

¹²⁰ Schmidt, *supra* note 2, at 158-59.

¹²¹ Official Comment 3 to UCC § 9-205.

¹²² NJA, *supra* note 61, at 184 (1944); 152 (1948).

¹²³ *Id.* at 184, 189-91 (1944).

was prohibited. According to the act, the security agreement could not cover more than the purchase price and related costs. If it purported to cover future advances, it was void. An exception was made for repairs and a seller might still repair the goods sold with security in the goods for the cost. The reason given for the change was that a combination clause in the contract was often overlooked by the buyer. When the buyer later wanted to buy new goods the seller could offer them without down payment (for the seller already had security) and thus compete effectively even if his goods actually were not as good as those of his competitors.¹²⁴

The exception for repairs in the Installment Sales Act was that it had been shown at interviews with representatives of car dealers, car owners and buyers that this was a desirable security device. This was especially true for small truck-owners since it enabled them to get truck repairs on credit without having to leave the car in the possession of the repair shop until the cost was paid. Under the present law they can get secured credit from the seller.¹²⁵ However, these reasons were attacked by the Legislative Council, which said that the arguments for the general prohibition against combination were valid even here. As for the buyer's need for repairs on credit, it was probable that such credit would be given anyway, because if the buyer used the car to earn his living, the seller would be interested in letting him keep the car so that he could pay for the repairs.¹²⁶

It seems to this writer that the prohibition of combinations and other kinds of future advances in conditional sales is sound. The conditional sale is an effective way of securing purchase money credit and while other kinds of non-possessory financing might be needed, they should be created by legislation. Problems such as the need for filing when debts other than purchase money are secured should be discussed. Consequently, the exception for repairs in the Installment Sales Act was regrettable. It would be better if the rule was universal, *i.e.*, conditional sales can never secure anything but the purchase money and related costs.

III. THE RIGHTS TO SUBSTITUTES FOR AND TO PROFITS, OFFSPRING AND OTHER INCREMENTS RECEIVED FROM THE COLLATERAL

The problem of substitutes for the collateral is treated in the UCC under section 9-306. Although the statute is extremely comprehensive, no specific mention is made of expropriation and insurance money in either text or comments. However, the language in subsection (1) "when collateral . . . is . . . otherwise disposed of" would seem to

¹²⁴ Nytt Juridiskt Arkiv. Audekning II 259, 295 (1953) (hereinafter cited as NJA II) (Draftsmen's Comments to the Amendments of 1953 to the Installment Sales Act).

¹²⁵ Supra note 124, at 296-97.

¹²⁶ Id. at 303-04.

warrant their inclusion. Therefore, without reciting the enumerated provisions as to filing, perfecting the security interest, etc., the basic import of the section is that a security interest in such proceeds is valid.

In Swedish law this is a difficult problem because virtually nothing has been written on the subject and there have been only three cases decided in this area. Two¹²⁷ are war-time cases concerning cars that had been taken by the Swedish state for military purposes under a requisition statute. In both cases the cars were sold under a conditional sale. The buyer submitted them to a Requisition Commission, which issued a promissory note for a sum determined by the Commission to be paid by the Swedish State Bank. The notes were not payable immediately as the Swedish government did not want to release too much purchasing power at a time when the supply of goods was restricted. Since sixty per cent of the cars were sold under conditional sales, the bank was required to investigate before paying the notes in order to ascertain the correct creditor. If this could not be determined the bank was to pay the governor¹²⁸ according to the *Statute of 1927 on the Payment of Debts by the Deposit of Money in Public Custody*.¹²⁹

In the first of these two cases a conditional buyer of a truck submitted the truck to the Requisition Commission before having paid the last payment. When he was about to receive the promissory note from the State Bank, the sheriff intervened and seized the note in satisfaction of an executory judgment in favor of still another creditor. The buyer protested, claiming that he owed the money to the conditional seller, but to no avail. The conditional seller's protest proved more successful and the Supreme Court reversed the seizure to the extent of the remaining debt on the purchase price. The Court reasoned that since the note was made to the buyer but delivered to the sheriff by the chairman, there could be no actual payment received by the buyer from the state.

The second case was even more complicated. The buyer submitted a bus to the commission and received his note. However, he still owed the seller a substantial part of the purchase money. He took the note to a private bank (as he could not get money on it immediately) and sold part of his interest in the note. This transfer was authorized by the Swedish State Bank. Shortly afterwards the buyer defaulted on his payment for the bus, and the seller obtained a judgment against him. The sheriff seized the buyer's claim on the state bank. The private bank, which had bought part of that claim, protested, alleging that its property had been seized. The Supreme Court decided that

¹²⁷ NJA, supra note 61, at 711 (I & II) (1941).

¹²⁸ Appointed by the central government and similar to the *prefet* in France. Sweden does not have the federal system.

¹²⁹ (Lag 24 mars 1927 on gälds betalning genom pennigars nedsättande i allmänt förvar). This statute serves the same function as the Anglo-American interpleader.

since payment for the bus had been made by the State Bank to the buyer, the fact that payment out of that account was barred for some time did not *per se* deprive him of the ability to transfer part of his right to the account. Further, the buyer was obligated to pay the seller the remainder of the purchase price out of that account; consequently, he had only the right to dispose of the account to the extent that it exceeded the debt. The Court was of the opinion that since the private bank, at the time of transfer, had reason to believe that the bus was bought under a conditional sale and had failed to investigate the possibility of an outstanding debt, they could not have a valid claim to the extent of this debt.

The third case¹³⁰ involved a conditional sale of a horse. The buyer, realizing that he could not pay, arranged to have the price paid by a third person who thereby acquired the seller's rights to the horse. Shortly thereafter something happened to the horse and the buyer was awarded an account receivable from the insurance company which was seized by the sheriff to satisfy the buyer's debt to another creditor. The third party immediately brought suit. The appellate court held for the third party on the grounds that it was proven that he had acquired the seller's right to the horse and therefore had the right before the buyer's creditor to collect the insurance.

All three cases present peculiarities which make conclusions difficult, although it is significant that all three cases deal with proceeds that are separate and identifiable. It is beyond doubt that Swedish law does not extend to the seller any security rights to the proceeds in the simple case where the goods are sold and the money commingled with the buyer's general assets. If this be considered the general rule, then the cases should be looked upon as exceptions to this rule founded on the principle that a conditional sale must concern an individual thing, not priority up to a certain value in the assets of the debtor-buyer. The first case escapes the general rule by pointing out that payment in full has not been made. Probably, an analogy was drawn with the *Statute on Expropriation*,¹³¹ which had elaborate rules determining how the different interests in expropriated property should be satisfied.¹³² The second case probably held for the seller not on any rules of rights in rem (he was not termed the owner of the money) but because of the buyer's obligation to pay coupled with the bank's failure to investigate. This is an interpretation suggested by Karlgren¹³³ and seems to be in agreement with the terminology used.

¹³⁰ SvJT, supra note 27, at 51 (case) (1949).

¹³¹ Karlgren, Svensk rättspraxis. Sakrätt. 1940-42 (Swedish Cases. Rights in Rem. 1940-42) SvJT, supra note 27, at 400-01 (1944) (hereinafter cited as Karlgren) 401.

¹³² Articles 22 & 31 of the Statute of 1917 on Expropriation (Lag om expropriation 12 maj 1917).

¹³³ Karlgren, supra note 131, at 401. (Mr. Karlgren was appointed to the Supreme Court in 1946).

However, it is difficult to see how the buyer should be obliged to pay the seller *out of the account* in the state bank, if the seller has no right to this account. A debtor has the right to pay his creditors out of any assets. The third case was decided taking into account the *Statute on Insurance Contracts*,¹³⁴ article 54 of which says that when goods are insured and no special interest is designated as the object of the insurance, it is deemed to insure the interests of anybody who, being the owner, pledgee, etc., has an interest in seeing that the goods are not destroyed. As the insurance had not been collected, the decision simply regarded article 54 as also covering a case of conditional sale where the seller's interest had been transferred.

The above would indicate that existing Swedish law is represented by the following rules: Basically the seller in a conditional sale has no right to proceeds. Exceptions can be made when insured events occur or when expropriations or similar actions are taken by the state, if the money has not yet been paid to the buyer. It is improbable that a Swedish court would recognize a security interest in proceeds that the buyer has received even if the money collected were held in a separate bank account or the like. However, if these are the rules, they seem contradictory. The general principle that a conditional sale should create a security interest in an individual thing is sound. A security interest should not be allowed to cover non-identifiable proceeds. On the other hand, if the Supreme Court deemed it equitable to recognize the seller's security interest in proceeds when the state has taken the goods by expropriation or requisition, it would seem to follow that equity should give the seller rights in all proceeds when they are clearly identifiable. If, for example, the price is not yet paid to the buyer, or if the buyer holds a draft or a check, there would appear to be no reason to refuse recognition of the seller's right to the proceeds.

The rights of the seller to the offspring of animals sold or similar yield of goods are not dealt with directly or specifically in the UCC. Probably, the applicable section is 9-204 on attachment of the security interest to after-acquired property, although this presupposes that there is an after-acquired property clause in the security agreement. The Swedish Sales Act, article 18, provides that yield from the goods sold is the property of the seller if it falls before the appointed date of delivery; otherwise it belongs to the buyer.¹³⁵ This article likewise does not apply to the immediate question, as it presupposes a regular sale where the goods have not been taken back for default. If there is no default, the rule applies even to a conditional sale, and there can be no question that the yield is covered by the seller's security interest. The issue is whether or not the yield serves as security when the

¹³⁴ Lag 8 april 1927 om försäkringsavtal.

¹³⁵ With the exception that if the yield could reasonably have been expected to fall at another time it shall be deemed as having fallen at that time.

contract is silent, and even if the contract covers this, will the courts recognize the intent of the parties?

In commenting on the rescission article in the Sales Act, Almén¹³⁶ seems to think that in case there is no agreement the seller has a right in the yield; possibly the buyer and his creditors have a right to compensation for storage of and work in procuring the yield. It has been suggested that this statement should be applied to a default situation in a conditional sale. Schmidt¹³⁷ does not give any rule for the case where there is no agreement, but thinks that there should be some limit to the validity of an agreement if the yield occurs a long time after the sale. This is because of the difficulties in securing evidence as to the quantity and value of the yield.

Two cases have been reported on this question, both dealing with the offspring of animals. In the first case¹³⁸ the conditional sale took place at a horse and cow auction. When the buyer went bankrupt the seller repossessed and sold the animals and their offspring. The trustee in bankruptcy sued the seller for the value of the offspring. The Supreme Court held for the seller because the sale had been rescinded, and the trustee had not alleged circumstances giving him any right to the offspring, nor had the trustee demanded any compensation for their breeding. This is clearly built upon Almén's view and equates default in a conditional sale with the rescission for a breach of warranty in an ordinary sale. It should be noted that the Installment Sales Act did not apply in this case. If the act had been applicable, it would of course be error to give the buyer compensation for custody or breeding, because in dealing with the settlement of the parties' rights at repossession it excludes other compensation. In cases outside the act, however, Almén's view seems reasonable.

The second case¹³⁹ involved a seizure for a debt of 15 hogs. The conditional seller of the ancestors of the hogs protested against the seizure. The appellate court dismissed the protest on the ground that "even if at the sale . . . it had been convened that the retention of ownership should concern also the offspring fallen after the sale, such a retention of ownership cannot be alleged in this case where the offspring in question has fallen a considerable time after the sale" (for thirteen of the hogs the time elapsed was one and a half years). This seems to mirror Schmidt's view rather closely.

In principle then, the security agreement in Sweden covers yield. At a certain time after the transfer of possession, however, the yield is no longer security. It seems that both rules are applied regardless of what the parties have agreed to (unless they have agreed that the yield

¹³⁶ Almén, *supra* note 1, at 758.

¹³⁷ Schmidt, *supra* note 2, at 151-53.

¹³⁸ NJA, *supra* note 61, at 33 (1935).

¹³⁹ SvJT, *supra* note 27, at 79 (case) (1961).

is not covered by the security agreement; however, this alternative is less likely to occur, as we are here dealing with a strong seller-weak buyer situation). Nevertheless, there are many such questions concerning rent for the goods earned before, but due after the sale, or milk and other current yield of sold cattle left unanswered as no cases have been reported.

IV. RIGHTS OF UNSECURED CREDITORS

When stated above that a conditional sale is "valid" or is "recognized," this has simply been another way of saying that the seller has a security in the goods prior to the unsecured creditors of the buyer. The major problems in this area deal with the seller's rights when the unsecured creditors of the buyer seize his property or force him into bankruptcy and with the buyer's right when the seller is insolvent, although this is a less frequent and less complicated case. Often, when a person is insolvent, his only non-exempt assets are those goods sold under a conditional sale and for which payment in full has not been made. If the value of these goods is higher than what is left for the buyer-debtor to pay, the right to acquire the goods is a valuable asset.

The simplest solution to the "seizure" situation is for the creditor or the trustee in bankruptcy to pay the remainder of the purchase price to the seller and then auction off the goods in the usual way. All writers¹⁴⁰ agree that the seller cannot refuse to take an early payment in this case, the argument being that the seller's credit to the buyer is not really an investment¹⁴¹ and that furthermore, the interest is often hidden in the price. A variation of this is to put the goods up for sale on an execution auction fixing the lowest bid equal to the buyer's remaining debt plus the costs of the auction. These are the most expedient and commonly used solutions. However, available alternatives without seller consent have been the subject of wide speculation. Since the buyer has a right to the goods after payment of the purchase price, most writers agree that this right is a proper subject of sale provided the possession of the goods or the obligation to pay is not transferred. Clearly, this is very impractical, but theoretically it is a possible solution.¹⁴² It would be better to sell the totality of the buyer's rights and duties under the contract, but this would require the permission of the seller.¹⁴³

¹⁴⁰ Eilard, *Exekutionsrättsliga uppsatser* (Essays on Creditors' Rights) 36 (1958) (hereinafter cited as Eilard); Eklund & Nordström, *Lagen om avbetalningsköp* (the Installment Sales Act) art. 1 comment 14 (1953) (hereinafter cited as Eklund & Nordström); af Hällström, *Avbetalningsköpet* (the Installment Sale) SvJT, supra note 27, at 670, 676-77 (1941) (hereinafter cited as af Hällström); Undén, supra note 1, at 106; see also NJA, supra note 61, at 195 (1952).

¹⁴¹ af Hällström, supra note 140, at 676-77.

¹⁴² Eklund & Nordström, supra note 140, art. 1 comment 14.

¹⁴³ Undén, supra note 1, at 106.

As early as 1924¹⁴⁴ the Supreme Court recognized the buyer's right to the goods as against the seller's creditors, rejecting the argument of the seller's trustee in bankruptcy that because the seller had reserved the title, the creditors were entitled to the total value of the goods. As a result, the preservation of the buyer's right poses little practical difficulty: He remains in possession and pays his debt as it becomes due and the creditors must either wait for or assign this "account receivable" to a bank.

V. RIGHTS OF SECURED CREDITORS TO THE GOODS

Section 9-312 of the UCC and sections referred to therein, outline rules on priorities among conflicting security interests in the same collateral. A detailed comparison between American and Swedish law on this point would exceed available space and will not be undertaken. However, it should be noted that section 9-312 refers to and contains rules formerly covered by the law on conditional sales. Special rules apply to purchase money security interests which in their turn are classified according to the kind of collateral involved in the agreement (crops, inventory, collateral other than inventory). It should also be remembered that the term "purchase money security interest" covers not only conditional sales but also other devices such as chattel mortgages and trust receipts. As a matter of fact, the UCC makes perhaps the most important break with earlier American law through its functional approach to the difficult questions of priority in section 9-312.

Swedish security devices can be divided along the same lines as those used in Article 9, *i.e.*, consensual security interests and others. The difference in groupings is that the consensual security interests are created by legal actions, the sole purpose and effect of which is to secure an obligation, whereas common law and statutory liens and their corollaries in Swedish law are but side effects (and purposes) of legal actions, the main effect of which is something else (renting an apartment, repairing a car, etc.).

A. Consensual Security Interests

Historically, and theoretically, the basic consensual security interest in Sweden is the pledge. The rules do not differ too much from those in Anglo-American law; possession is required for validity, risk of loss is on the pledgor, and the pledgee has a right to sell the pledge if the pledgor does not pay.

A later security device was created in 1845 by the *Statute on Sale of Goods which are to Remain in the Seller's Possession* (referred to as the *Statute on Sale without Transfer of Possession*). It is important, not so much because of its practical significance, but because it has

¹⁴⁴ NJA, *supra* note 61, at 588 (1924).

always served as the basis for discussion of Swedish security law, especially on the problem of possession. It is a statutory expression of the general unwillingness to recognize non-possessory liens. Most transactions under the act are not sales but security transactions; the apparent sales contract is combined with an express or tacit agreement that if the "seller" returns the purchase price he has a right to keep the goods. The statute requires the agreement to be written, witnessed and announced from the pulpit in the church¹⁴⁵ the following Sunday and that it be subsequently recorded in the trial court. Thirty days after all of this is accomplished the sale becomes valid against the unsecured creditors of the seller.

The floating charge, as a consensual security device, is accepted in Swedish law in the *Statute on Mortgage on Factory Equipment, Raw Materials, Goods in Process, and Manufactured Goods*.¹⁴⁶ The mortgage is available to industries, hotels, restaurants and pharmacies. The security interest is valid in proceeds and in things acquired after the recording of the mortgage. While it can only be alleged in bankruptcy, seizure by mortgagor's creditors of the collateral is sufficient ground for the mortgagee to have the mortgagor declared bankrupt. In 1932 a similar *Statute on Mortgage of Farm Equipment*¹⁴⁷ was enacted followed in 1958 by one on *Mortgage on Petroleum Stock*.¹⁴⁸

A separate statute deals with security interests in crops. Because the price of grain drops considerably at harvest time, the *Statute on Mortgage on Crops*¹⁴⁹ was enacted in 1924 enabling the farmers to stabilize their offering price throughout the year. By the terms of the statute the crops must be reaped on the farm, stored and inspected by two witnesses and the mortgage recorded. This security device is valid for a year and does not conflict with the security interest of a conditional seller as the crops must be reaped on the land of the farmer seeking the mortgage, which means that they cannot be acquired under a conditional sales contract.

B. Non-consensual Security Interests¹⁵⁰

There are two different types of non-consensual security interests in Swedish law just as in other Civil law. They differ in that one gives the secured party the right to sell the collateral in case of default, whereas the other gives him only the right to possession.¹⁵¹ The

¹⁴⁵ Sweden still has a state church.

¹⁴⁶ KF 13 april 1883 ang. förlagsintechning.

¹⁴⁷ Lag 3 juni 1932 om intechning i jordbruksinventarier.

¹⁴⁸ Lag 21 febr. 1958 om förlagsintechning i vissa oljelager.

¹⁴⁹ Lag 20 juni 1924 om viss panträtt i spannmål.

¹⁵⁰ Roughly the same as lien by operation of law, Black, *supra* note 28, at 1072, but translation in this area is a difficult matter, so I prefer to use a term that does not have a traditional legal meaning in English.

¹⁵¹ Undén, *supra* note 1, at 226-27.

latter is called retention.¹⁵² A literal translation of the former would be "legal pledge," and would actually be quite similar to what in Black's Dictionary is called "lien by operation of law." Of this type, the most important are the mechanic's lien and the factor's lien (in its original function the factor is really a commission merchant), both of which have equivalents in Anglo-American law. Another is a lien of a "floating association in logs" (the logs are floated down rivers from the forests in the interior to the sawmills at the estuaries). This lien secures the members' dues to the association and reflects the enormous importance of the forests in Swedish economy. Once, farming was similarly important and this too was reflected in a special statutory lien.

The second type of non-consensual security interest, the right of retention, arises in a number of situations in Swedish law. The bailee has a retention right for expenses and for the bailment, the party hiring something has a right of retention for necessary expenses for the goods.¹⁵³ A factor has a right of retention in samples and patterns as well as other things that are not for sale. The landlord's lien is a right of retention in Swedish law but is generally weaker than the above-mentioned rights of retention.

C. *Conflicting Interests in the Collateral*

1. *Conditional Seller vs. Subsequent Pledgee.* For purposes here, a pledge must be a thing of commercial value. It can be created by transfer of possession, if the pledge be of goods or of a negotiable instrument, and by notice to the debtor when the pledge is a contract right or accounts receivable. The basic conflict between seller and pledgee is solved by statute in Sweden. Accordingly, if the buyer pledges the goods to a bona fide pledgee, the seller cannot repossess the goods without paying the debt which the pledge secures.¹⁵⁴

Two cases deal specifically with this problem. The first¹⁵⁵ concerned a car which A sold to B under a conditional sales contract. B then pledged the car to C, a mala fide pledgee. When A sued C for the value of the car at the time of pledge, C attempted to assert the same rights available to B under the Installment Sales Act which would have limited A's recovery to value at the time of trial (the amount involved was considerable since the value of the car was very low at the time of the trial). The Supreme Court, in a 3-2 decision, held for A; C did not succeed to B's rights, but had to pay the full value of the car at the time of the pledge. If the case is viewed as a title problem, A

¹⁵² Cf. Black, *supra* note 28, at 1479.

¹⁵³ Article 3 of ch. 11 & art. 8 of ch. 12 of the Commercial Section of the Code.

¹⁵⁴ Article 6 of ch. 10, art. 4 of ch. 11, & art. 4 of ch. 12 of the Commercial Section of the Code.

¹⁵⁵ NJA, *supra* note 61, at 663 (1931).

cannot get more than the car, and if viewed as a tort problem, he cannot get more than he would have obtained from B. Therefore, from a policy standpoint it would seem to be more reasonable that C should not be required to do any more than indemnify A for the effects caused by his mala fide action.

In the second case,¹⁵⁶ the seller sold an automobile on conditional sale to A who in turn sold his rights under the contract to B. When A went into bankruptcy B obtained possession of the car paying the outstanding purchase price to the seller. The trustee in bankruptcy then sued B for return of the car against payment of what B had paid the seller. The lower court found for the trustee. On appeal the Supreme Court affirmed holding that B's contract with A was invalid as against A's trustee in bankruptcy on the ground that it was only by reason of A's bankruptcy that B was able to obtain possession of the car. This avoided the problem that the trial court struggled with, namely, how to classify the contract between A and B, which they concluded to be one of pledge. If this is also the Supreme Court's conclusion, it means that the right of the buyer is not a contract right, otherwise notice to the seller and not transfer of possession would have been the decisive factor. In any event the decision means that the buyer cannot use his right under the contract as security. He cannot pledge this right without giving up possession of the car and this he could not do under the terms of the contract. This is a wise ruling. The buyer should be viewed as the owner of the goods and to allow him to pledge the goods without transfer of possession would violate the basic principles of Swedish pledge law.

2. *Conditional Seller vs. Subsequent Buyer.* A conflict between a conditional sale and a transaction according to the *Statute on Sales without Transfer of Possession* occurs when the conditional buyer sells the goods under the statute without telling his buyer that he has not made the last payment. The publication measures in the statute for a *Sale without Transfer of Possession* are not equivalent to possession in a double sale. The general rule in Sweden is that if A sells a chattel to B and later to C and C gets possession of it, he may keep it (whether B has a right to acquire it against the price paid by C is not certain). If B gets possession first, he keeps the goods. However, if B is a buyer under the *Statute on Sales without Transfer of Possession*, and C gets possession of the goods, C will still prevail.¹⁵⁷

It is against this background that the principal Swedish case¹⁵⁸ on this point was decided in 1958. The Supreme Court found for the conditional seller reasoning that since the ultimate buyer, after

¹⁵⁶ NJA, *supra* note 61, at 44 (1936).

¹⁵⁷ Undén, *supra* note 1, at 119-21.

¹⁵⁸ NJA, *supra* note 61, at 117 (1958).

publication measures according to the statute, had left the goods in the possession of the conditional buyer, he should have no "better right" to the goods than the conditional buyer, regardless of good faith. Of course this was no reason; it was only a statement of the rule that the Supreme Court had decided to follow. The use of the words "better right" indicates that the Court has regarded it as a title question and as the conditional seller retains the ownership the situation is analogous to the double sale.

3. *Conditional Seller vs. Subsequent Mortgagees.* It is quite clear from the draftsmen's comments on the *Statute on Mortgages on Farm Equipment*¹⁵⁹ that the conditional seller should prevail over the mortgagee. This solution is accepted as existing law by the doctrinaires¹⁶⁰ and has won approval in the dictum of a 1952 case.¹⁶¹ However, Lödberg,¹⁶² questioning the soundness of the rule, takes an opposite view. His main argument for letting the mortgagee prevail is that the mortgage is better publicized (recording) than the conditional sale. On the other hand, he points out that conditional sales are very frequent and that credit against the *Mortgage on Factory Equipment*, etc., is expensive, but does not feel that this is enough to sway his judgment.

4. *Conditional Seller vs. Holders of Liens by Operation of Law.* The conflict between the conditional sale and the mechanic's lien has very practical overtones judging from the case law on this issue. The common situation involves an automobile left to a repair shop by the conditional buyer who can pay neither the seller nor the repair shop. The latter then refuses to deliver the car to the seller until the repair bill is paid. The court sanctions this right of retention, the outer limit of which was settled in a 1924 case.¹⁶³ There the repair shop had two claims, but between repair jobs the buyer had been in possession of the car. The court awarded priority to the repair shop but only for the last claim. This is consistent with the general rule that possessory security requires continuous possession.

With respect to liens in general, the views expressed by Justice Alexanderson¹⁶⁴ are perhaps the most indicative of Swedish policy. He

¹⁵⁹ NJA II, supra note 124, at 211, 223 (1932) (comment by the Minister of Justice).

¹⁶⁰ Lödberg, *Studier över förlagointechningoinstitutet* (Studies on the Mortgage on Factory Equipment, etc.) 290-95 (1947) (hereinafter cited as Lödberg).

¹⁶¹ NJA, supra note 61, at 195 (1952). The issue was whether the mortgagee or the unsecured creditors had the right to the goods, once the seller had been paid off by the trustee in bankruptcy. The court held for the mortgagee.

¹⁶² Lödberg, supra note 160, at 290-95.

¹⁶³ NJA, supra note 61, at 581 (1924). This question was not the main issue and was not appealed to the Supreme Court, hence the absence of any reasons for the decision.

¹⁶⁴ NJA, supra note 61, at 650 (1936) (concurring opinion). It should be noted that at this time the mechanic's lien was rather a right of retention; the right to sell the

treats all non-consensual security interests as a class, favoring those which require transfer of possession. Thus the mechanic's and the bailee's lien would have priority over the conditional sale whereas the landlord's lien would not. He takes this position, even though it could be argued that the collateral was brought within the landlord's sphere of control, for the simple reason that no voluntary act of transfer could be alleged. However, whether or not the conditional buyer has the right to transfer possession is a question that caused Alexanderson some concern. He concludes that he does, but qualifies his approval, *e.g.*, limiting the buyer's right of repair to an emergency situation in which the seller's consent could not easily be obtained (car trouble in a snowstorm miles from home is what he is hinting at). By acknowledging the right, he obviates any discussion of good faith or knowledge of the conditional sale on the part of the repair shop.

Alexanderson's theory can be traced directly to early German doctrine¹⁶⁵ which developed from the rule in the German code that gave a right in the pledge against the seller, but was silent on non-consensual security interests. The German legal writers assumed from this that non-consensual security interests, which resembled the pledge in that they required transfer of possession, were also valid against conditional sellers. There is firm ground for accepting this analogy as a means of establishing existing Swedish law, since the Swedish code contains the same kind of statutory rule as to pledges. Therefore, the non-consensual security interests will not be discussed separately. In most cases, the conflict is not likely to arise, and if it should, the Alexanderson theory might well be applied.

Some cases of conflict, however, are quite frequent. One is the dispute between the landlord's lien on the tenant's furniture for the unpaid rent and the conditional seller's security interest in the same furniture. Swedish doctrine is in accord with Alexanderson that the landlord must yield to the conditional seller in this case.¹⁶⁶ Another involves Alexanderson's theory that a bailee prevails over the conditional seller.¹⁶⁷ This question was raised as a side issue in an appellate court decision¹⁶⁸ dealing with a procedural question. The conditional seller had sued the garage owner (with whom the buyer had left the car for repossession), and the garage owner refused to deliver the car without being paid for storage. The court, in requesting that the buyer testify, indicated that *either* they had difficulty in deciding whether or not the relationship was a bailment or a lease, *or* that the

goods was added by statute in 1950. It seems, however, that in Alexanderson's reasoning this is of minor importance.

¹⁶⁵ NJA, *supra* note 61, at 650, 653-54 (1936).

¹⁶⁶ Almén, *supra* note 1, at 410, n.135, Vadén, *supra* note 1, at 252.

¹⁶⁷ Undén, *supra* note 1, at 253; *contra* Almén, *supra* note 1, at 410, n.135.

¹⁶⁸ SvJT, *supra* note 27, at 49 (case) (1943).

garage owner's good faith was in issue, *or* both. The problem was not squarely met by the Supreme Court until 1946.¹⁶⁹ The facts were similar in that the parties to the conditional sale of a car had agreed that the seller should retake the car, which was being stored in a garage. The trial court held for the garage owner after having established his good faith. The Supreme Court affirmed. Although he was not explicitly termed a bailee in the opinion, the words used indicated rather clearly that this was how the Court regarded him.

Even though existing Swedish law follows Alexanderson's theory, it is difficult to see why the presence or absence of a voluntary act of transfer of possession should be the sole reason to validate a security interest against a conditional seller. The rule adopted should be built upon reason, considering all aspects of the two conflicting security interests. For example, in the case of the landlord's lien, although the rule adopted seems reasonable, the policy considerations merely tend to confuse. This is serious considering the fact that the conditional sale is a necessary security device. The credit allowed in many cases would not be given if security in the goods were not permitted by law. As most buyers in Sweden live in rented apartments, an opposite ruling giving the landlord's lien priority over the conditional sale would seriously impair the latter's usefulness. Although it does not seem absolutely necessary to give security for the rent, landlords probably do not rely too much on the security in the landlord's lien and the leases would certainly take place anyway. Nevertheless, the result of this weighing of arguments indicates that the existing rule is more in the public interest than an opposite one and it avoids the legal subtleties with which the courts and legal writers have involved themselves under the doctrinal approach.

VI. SALE OF THE GOODS, OF THE RIGHT TO GOODS AND OF PROMISSORY NOTES ISSUED BY THE BUYER

A. *Buyer's Sale of the Goods*

The effect of the unauthorized sale by the conditional buyer is covered in the UCC section 9-307. Accordingly, the rule applied will depend upon whether the secondary buyer is a buyer in the ordinary course of business and upon the kind of collateral involved, the consideration, the buyer's good faith and the ultimate use of the goods.

In contrast, the Swedish law courts look only to the "good faith" involved. If the subsequent purchaser can be labeled *bona fide* he will prevail over the conditional seller.¹⁷⁰ However, the test used in

¹⁶⁹ NJA, *supra* note 61, at 341 (1946).

¹⁷⁰ There are situations which would place the secondary buyer under a duty to deliver the goods to the conditional seller against the price he paid for the goods. However, this kind of redemption right seems to be unknown in common law jurisdictions and is very rarely used in Sweden. See, Undén, *supra* note 1, at 107, 119-21.

determining good faith is markedly different. Under the UCC, whether or not the secondary buyer has notice of the conditional sale is subjectively determined. It is actual knowledge or from all the facts and circumstances known to him at the time in question, he has reason to know that it exists.¹⁷¹ In Sweden the secondary buyer is not so favored. In the first case to reach the Supreme Court, the Court held that even if the subsequent purchaser did not know that the car had been sold under a conditional sale and was not yet paid for, "he nevertheless ought to have suspected this." Consequently, he was bound to deliver the car to the conditional seller.¹⁷² The test is severely objective and rigidly followed¹⁷³ as seen in a more recent case involving the resale of a motorbike. The Court determined that the secondary buyer, a car dealer, was not bona fide based on his failure to inquire whether the bike was fully paid for because the conditional buyer was "relatively young" (twenty-five).¹⁷⁴

The result is that a car dealer has to be extremely cautious in order to insure his title behind the shield of his good faith. As a practical matter, he must either communicate with the seller or ask for written proof that the vehicle is paid for. Why the "good faith" requirement is so demanding in this commercial area has never fully been explained since no where else in Swedish law is this the case.¹⁷⁵ Perhaps it is because the unauthorized resale of cars is so common while the other "good faith" situations are rare (double sale, theft, sale of pledge, etc.).

¹⁷¹ UCC § 1-201(25).

¹⁷² NJA, *supra* note 61, at 523 (1945).

¹⁷³ *Id.* at 305 (1951). (A conditional buyer drove his newly purchased truck 360 miles south for resale. Although the car dealer was satisfied with the conditional buyer's story that he purchased the truck for a business venture which never materialized and so, drove south because of the better market, the Supreme Court was not. The truck went back to the conditional seller based on the Court's reasoning that a car dealer should know that motor vehicles are sold under conditional sales, especially where the truck was expensive and hardly used and where the offer was made so far from the place of purchase. The car dealer should have inquired as to the conditional seller's name and contacted him.) *Id.* at 152 (1948). (This case involved the traditional auto sale by the conditional buyer to the unwary car dealer, only here the dealer was informed that the last payment was due on the car. The dealer paid it by remitting a bank draft. Unfortunately, by the device of combination, the car was also security for other advances by the conditional seller. The Court stated that because of the payment and his occupational knowledge, the car dealer should have investigated the conditions under which the conditional buyer possessed the car before contracting. Finding "good faith" lacking, the conditional seller prevailed.) But see, NJA, *supra* note 61, at 256 (1952). (The car dealer was allowed to keep the car where the conditional buyer had forged a receipt indicating that he had paid in full.)

¹⁷⁴ SvJT, *supra* note 27, at 37 (case) (1954).

¹⁷⁵ Hessler, Några anteckningar om avbetalningsköp i anslutning till en ny kommentar (A review of Eklund & Nordström). SvJT, *supra* note 27, at 417, 421 (1954). However, note that many unauthorized resales do not result in litigation because the conditional buyer makes the last payment with the resale purchase money.

B. *Seller's Sale of his Rights*

The seller, of course, can never sell the goods again once the buyer has them in his possession, but he can assign his rights under the contract.¹⁷⁶ He can draw bills of exchange on the buyer and discount them in a bank. However, there have been no Swedish cases dealing with these transactions and relatively little has been written about them. Basically the problem is twofold: (1) is the transaction valid against the unsecured creditors of the seller and (2) can the buyer set up his defenses against the seller as well as against the bank?

The first problem has been treated in an article by Benckert¹⁷⁷ who suggests that a sale of the seller's right under the contract is valid against the seller's creditors even if the formalities in the *Statute on Sales without Transfer of Possession* have not been complied with. This seems correct as the seller's interest is merely a security interest. There could be a problem if the seller is looked upon as the owner of the goods; however, Benckert resolves it by saying that the principles of the statute do not require its application when the goods are in the possession of a third party.

A discount of a draft is, of course, valid against the unsecured creditors of the seller.

C. *Buyer's Rights Against Assignee*

If the contract rights are assigned to a bank, the buyer would seem to have the same rights against the bank as he had against the seller.¹⁷⁸ He can pay the seller with discharging effect if he has not been notified of the assignment. On the other hand, if the buyer has accepted drafts that have been discounted by a bank, he cannot assert against the bank defenses relating to the goods delivered and their quality or payment to the seller.¹⁷⁹ He can, however, go against the seller and collect damages.¹⁸⁰

Banks in Sweden today tend to discount drafts without requiring assignment of the contract, although they have little experience with the situation, not uncommon in the United States, where the drafts are discounted in one bank and the contract assigned to another. Sometimes the banks give loans to sellers against security in the contract. In this case a form is used, signed both by the seller and buyer. The buyer declares that he has no right to set-off against the bank because

¹⁷⁶ UCC § 9-102. Sale by the seller of his rights under the contract is a security transaction whether or not the assignment is the security for a loan or whether the contract right or account is sold.

¹⁷⁷ Benckert, Om överlåtelse av avbetalningskontrakt till säkerhet för säljarens gäld (Assignment of the Installment Sales Contract as Security for the Debt of the Seller), Festskrift för Marks von württemberg 1931, 31 *passim* (1931).

¹⁷⁸ Rodhe, Obligationsrätt (The Law of Obligations) ¶ 62, n.3 (1956).

¹⁷⁹ Hult, Värdepappersrätt (Bills & Notes) 104 (3d ed. 1961).

¹⁸⁰ NJA II, *supra* note 124, at 259, 293 (1953).

of counter-claims against the seller and that in case the goods shall be repossessed according to the contract, he will deliver them to the bank and not to the seller. Finally, it is interesting to note that lately it has become more and more frequent for the seller not to discount the drafts to the bank, but only to assign them as security for advances by the bank. The seller in this case endorses the drafts and delivers them to the bank. When they become due they are remitted to the seller.¹⁸¹

The Uniform Commercial Code section most relevant to this discussion is perhaps 9-306(5) which sets out the rules dealing with the security conflict that results when the seller or secured party repossesses the goods after the seller has transferred the account.

VII. DEFAULT

In Article 9 of the UCC, Part 5 deals with default. Spivack calls this part unique in that "the remedies of a secured party following the debtor's default are substantially what a businessman would expect those remedies to be."¹⁸² He is referring to the great flexibility in the rules concerning both the repossession and subsequent sale of the collateral. Repossession can be made both with and without judicial process and may involve taking only part of the collateral or disposing of it on the debtor's premises.¹⁸³ This disposal can be accomplished in any way that is commercially reasonable.¹⁸⁴

One basic difference between the default system under the UCC and in Swedish law is that the latter always requires the assistance of the sheriff in order to repossess.¹⁸⁵ Formerly, sellers inserted in their contracts a clause giving them a right to foreclose, consistent with American practice, but it was afforded no legal force.¹⁸⁶ If the seller repossesses the goods on his own, he will be prosecuted under the prohibition to "take one's own right" in Swedish criminal law.¹⁸⁷ Swedish legal policy does not seem to have accepted the reasoning which appears to be the basis of the American rule, namely, that if the seller is not allowed to foreclose he will not give the credit. Perhaps the Swedish lawmakers consider it undesirable for the seller to extend credit when the risk is great, and that the seller's interest does not outweigh the risk of a breach of the peace incident to foreclosure.

¹⁸¹ Banking practices of the largest commercial banks in Sweden.

¹⁸² Spivack, *supra* note 35, at 133.

¹⁸³ UCC § 9-503.

¹⁸⁴ UCC § 9-504; Spivack, *supra* note 35, at 136-37.

¹⁸⁵ The word "sheriff" designates the Swedish official with roughly the same functions. There are, however, great differences; the most important are that the Swedish official is appointed and is subordinate to an authority who decides more important matters and to whom the decisions of the "sheriff" can be appealed.

¹⁸⁶ Eklund & Nordström, *supra* note 140, art. 10 comment 2.

¹⁸⁷ Article 7 of ch. 20 of the Criminal Section of the Code (Strafflagen).

However, this harsh rule is softened somewhat by the fact that at times the sheriff has authority to act without a court order which is the case under the Installment Sales Act. Another difference is that the goods are evaluated at the time of repossession. Any surplus is then paid to the buyer and this subsequent sale does not affect the rights of the buyer.

In dealing with the seller's security, three aspects of default seem to be especially important: the evaluation of the goods and of the seller's claims and the settlement of those accounts; the exemption clauses in the act; and the possibility of enforcing the seller's claim by other means than repossession.

A. *Settling Accounts*

At the repossession and sale the seller has a right to the sum total of the following items: (1) unpaid installments due at the time of repossession; (2) other unpaid installments discounted at a rate based upon the relation between the installment price and the cash price; (3) interest and insurance premiums which were not included in the price; (4) cost of repossession; (5) repair costs if secured by the goods.¹⁸⁸ The purchaser pays this along with the value of the goods. If this amount exceeds the seller's price, the original buyer receives the surplus; if it is less than, he remains liable for the balance.

The installment discounting, item (2), has caused considerable anxiety in the cases, especially where the seller asserts that installment and cash price are identical. In the ordinary case, the sheriff accepts the seller's information as to the cash price provided it cannot be assumed that the goods could have been bought more cheaply. However, when the seller states the cash price is the same as the installment price, this assumption is usually made. The conclusion may well be a non-sequitur since such statements of identical pricing have been recognized in book sales and in cases where the seller specializes in installment selling and does not want to sell for cash.¹⁸⁹

Additional problems are encountered in the evaluation of the goods. The statute says that the value shall be estimated in accordance with the price the seller could get through a sale conducted in a reasonable manner.¹⁹⁰ This language is similar to that used under the UCC.¹⁹¹ The Swedish statute and the UCC are close in their outlook. From the price so obtained the costs of reselling and eventual repairs and transportation are deducted, and the remaining amount is then

¹⁸⁸ Article 4 of the Installment Sales Act.

¹⁸⁹ Eilard, *supra* note 140, at 117-18.

¹⁹⁰ Article 3 of the Installment Sales Act.

¹⁹¹ UCC §§ 9-504(1) & 9-507(2).

considered to be the value of the goods.¹⁹² Obviously, the sheriff has a difficult and delicate task at the repossession, and although he does have the right to call in an expert, it is submitted that the statute demands too much of the sheriff in this situation.¹⁹³

B. *Exemptions*

One of the changes introduced in 1953 was to exempt certain items from repossession according to the pattern of the general exemption clauses in Swedish law. However, under the Installment Sales Act, the exemption is restricted to living necessities (the seller cannot repossess clothes and bed-clothes that are absolutely necessary for the buyer and his family).¹⁹⁴

C. *Other Means of Enforcement*

A problem often discussed prior to the 1953 revision of the Swedish Installment Sales Act was whether the seller has the right to act as an unsecured creditor, *i.e.*, get a judgment on his claim and levy execution on the goods instead of repossessing. The amended act resolved the problem in the negative. Under present law, the seller can only reach the collateral in satisfaction of claim by way of repossession.¹⁹⁵ However, he still has the right to levy execution in the ordinary way on *other* goods owned by the buyer. According to the definition in the Installment Sales Act, conditional sales will fall outside the act if the price is not payable in installments. This type of conditional sale is common when goods are sold at an auction and may be used in other sales as well.

D. *Conditional Sales Outside the Installment Sales Act*

The general purpose, broadly stated, of the Installment Sales Act is to protect the buyer against the superior bargaining power of the seller. The contract clause that legislatures are most eager to invalidate is usually the forfeiture clause through which the buyer authorizes the seller to repossess the goods at default and to keep whatever has already been paid even if this is a substantial part of the price. Such clauses are now held void in transactions under Installment Sales Act, but then, what about conditional sales outside the act?

In Swedish law, article 37 of the *Statute on Contracts* might apply. It states that if a party to a contract has promised that in case of

¹⁹² Eilard, *supra* note 140, at 118-19.

¹⁹³ *Id.* at 120; Eilard, *Den nye lagstiftningen om avbetalningsköp* (The New Legislation on Installment Sales) SvJT, *supra* note 27, at 281, 283-84 (1957).

¹⁹⁴ Article 11 of the Installment Sales Act.

¹⁹⁵ Article 16 of the Installment Sales Act. The reason for the seller to avoid repossession under the act was that he feared that he would not be able to sell the goods for what he thought would be the estimated price at repossession; see NJA, *supra* note 61, at 160 (1945).

rescission of the contract by default, the other party may keep what has been paid to him and the court has a right to modify this clause if the application of it should be manifestly unreasonable. However, this is not as advantageous for the buyer as the scheme in the Installment Sales Act. It is only when the court thinks it is quite evident that the seller has made an unjust gain at the repossession will it then mitigate the results of a forfeiture clause.¹⁹⁶ Furthermore, Swedish courts are generally cautious in using this kind of sweeping statutory provision.

The second paragraph of article 37 states that clauses confessing forfeiture of pledges or other security at default are void. If one accepts the construction of the conditional sale herein proposed, this paragraph would pertain to conditional sales and the application of the first paragraph of the article would be unnecessary.

Another problem of default in conditional sales outside the Installment Sales Act is that of the settlement of the parties' rights if there is no forfeiture clause in the contract. When this occurs, settlement will be decided according to the general provisions of the Sales Act.¹⁹⁷ The seller will then have a right to rescission and damages. In the absence of contrary evidence, damages will be estimated to be the purchase price of the goods minus the market price at the time of default. In a conditional sales situation the seller will most probably try to prove greater damages caused by the use of the goods.¹⁹⁸

Finally, the question of the seller's right to levy an ordinary execution of the goods instead of repossessing them has also come up in conditional sales outside the Installment Sales Act. More specifically, three questions have been presented: (1) Can the seller do this at all? (2) If so, must he waive his right to repossession? (3) If he does not have to waive his right to repossession, and if he does levy an execution against the goods in question, is this an *implied* waiver of the right to repossession?

The three questions were answered in a recent Supreme Court case¹⁹⁹ involving a cow sold at public auction under a conditional sale (Installment Sales Act not applicable). When the buyer defaulted, the seller levied execution against the cow. Less than thirty days later the buyer went bankrupt, which according to Swedish bankruptcy law, invalidated the execution.²⁰⁰ The trustee in bankruptcy sold the cow, and the conditional seller, claiming his retention of ownership, sued for the value of the cow. The trustee responded that the seller must be

¹⁹⁶ Cf. Almén & Eklund, *Lagen om avtal* (The Statute on Contracts) 162, 166 (6th ed. 1954).

¹⁹⁷ Article 24, 28 & 30 of the Sales Act.

¹⁹⁸ Article 57 of the Sales Act.

¹⁹⁹ NJA, *supra* note 61, at 557 (1960).

²⁰⁰ Article 31 of the Section on Bankruptcy of the Code.

considered to have waived his title to the cow when he elected to levy execution. Swedish law prohibits the execution of goods that are not the property of the debtor;²⁰¹ consequently, it is impossible to levy an execution against goods in which ownership is retained without waiving the right of ownership so retained. The seller retorted that this provision must have been drafted for the benefit of the owner of the goods and therefore could not be alleged against him. The appellate court in an opinion affirmed by the Supreme Court held for the seller on the ground that to levy execution against the goods was not *per se* a waiver of the right of repossession.

It seems rather obvious that the seller should retain his right to repossession, if a levy tried by him is invalidated by an intervening order of bankruptcy. The provision that prohibits the seizure of goods that are not the property of the debtor is obviously designed to protect the true owner. The seller, who has retained the ownership of the goods, should not be restrained from using means other than repossession to enforce his claim when no special provision has been given to protect the buyer in default. It is difficult to understand what the seller can gain by choosing means other than repossession. It might be that it is easier to get a judgment on his clear right to the purchase money and then enforce this judgment by selling the goods sold at an execution auction. If the auction price does not pay his claim, he can then seize and sell more of the buyer's property. This might be cheaper and less troublesome than proving damages in a suit for repossession. In the instant case the seller did not have to go to court to levy execution; Swedish law permits the sheriff to enforce the seller's right directly, if the goods were sold at a public auction, and the buyer admits the debt in writing.²⁰²

VIII. CONCLUSION

The Swedish law on chattel security is widely dispersed in different statutes. To a large extent it is not codified, and is not often treated as an integrated whole in Swedish doctrine. The rules of the conditional sale are applied to transactions that differ considerably in type and function. This state of affairs resembles the condition of American chattel security law before the enactment of the UCC. Would it be feasible to make a similar codification in Sweden?

It would be a contribution to Swedish law if the law of secured transactions was codified into an integrated whole. There are many problems to which the present Swedish law does not have any answers. Still, the need for something similar to Article 9 of the UCC is not as pressing in Sweden as it was in the United States.

²⁰¹ Article 68 of the Section on Creditors' Rights of the Code.

²⁰² Article 55 of the Section on Creditors' Rights of the Code.

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First of all, there are not so many different kinds of chattel security in Sweden; lawyers seldom get confused over which one to apply to a certain situation. Secondly, it does not appear that Swedish commercial life has been searching for and inventing new kinds of chattel security as has been the case in the United States. Some of the possibilities of chattel security that were created by the government to help certain strata of the population have actually been used very little, such as the mortgage on farm equipment.²⁰³ As far as can be judged from the information available, conditional sales are used less in Sweden than in the United States. Furthermore, the amount of litigation in the area seems to be much less in Sweden; the cases cited herein are practically all that have been reported.

The conclusion, then, would be that a codification such as Article 9 of the UCC, although profitable, might be a little premature in Sweden. Perhaps this is more a statement of political plausibility than of desirability; it is not probable that the government will initiate new legislation in an area about which few complaints have been made.

²⁰³ Schmidt, *supra* note 2, at 134.