Personal Property as Collateral in Japan and the United States

Kazuaki Sono

Warren L. Shattuck

University of Washington School of Law

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Comparative and Foreign Law Commons, and the Secured Transactions Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol39/iss3/9

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
PERSONAL PROPERTY AS COLLATERAL IN JAPAN AND THE UNITED STATES

KAZUAKI SONO* and WARREN L. SHATTUCK**

It is our purpose to compare Japanese and United States law and practice in the area of personal property security. Since it is not possible to find a precise common terminology for different types of security transactions, it seems desirable to arrange the discussion in terms of possessory and non-possessory security, and to use as subheads in the latter category the names of the American security devices. Security transfers of intangibles, chattel paper, and title documents are discussed under the possessory-security classification. An appendix includes English translations of cited Japanese statutes and pertinent Civil and Commercial Code as well as forms typical of those currently used in Japan.

A few preliminary observations may be helpful. In a comparative study of this kind all concerned are obliged to recognize and adjust to some fundamental differences in approach. The Japanese start their security-transaction analysis and research with a Code or a special sta-

* Visiting Assistant Professor, School of Law, University of Washington; Lecturer, Faculty of Law, Kansai University; Fulbright Scholar, Yale Law School, 1961-62.

** Professor of Law, University of Washington.

1 "Personal property" is a term which in this context encompasses both chattels and intangibles (in the American usage) and movables and obligations (in the Japanese usage). "Obligation" is used here, in reference to Japanese law, in its broadest sense. The exact margins of this category are disputed by Japanese scholars.

2 For the American lawyer the terms “chattel mortgage,” “conditional sale,” “trust receipt,” “factor’s lien,” and “pledge” evoke mental pictures of well-defined types of transactions. These terms do not have exact counterparts in Japan. There the key words are “doṣan teit3,” “furintashi teit5,” “joto tampo;” “torasuto reshiito,” and “shichiken.” The transactions to which these terms are related will be described in the discussion below. In American states in which the Uniform Commercial Code [hereinafter referred to as U.C.C.] is effective, the old terms continue to be used although the statute provides for a sui generis “security interest.” U.C.C. §§ 1-201 (37), 9-101 (Comment), 9-102. Such an interest exists when certain criteria are met. U.C.C. §§ 9-203, 9-204. The statute covers regardless of the form of the transaction, i.e., whether or not cast in the traditional language of chattel mortgage, conditional sale, pledge agreement, or trust receipt. U.C.C. §§ 9-102 (1) (a), (2).

3 This is a U.C.C. term, defined: “‘Chattel paper’ means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.” U.C.C. § 9-105 (1) (b). In common-law terminology the transactions concerned are security assignments of conditional sale contracts and security transfers of notes secured by pledges or mortgages.

4 Bills of lading and warehouse receipts are covered by this term. The U.C.C. uses the single word “document” in § 9-105 (1) (c) to describe the types of arrangement which are defined in § 1-201 (15) (“document of title”) as including not only bills of lading and warehouse receipts but also dock warrants and some analogous transactions.
tute\(^6\) which often does not disclose clear-cut answers. Relatively few appellate decisions are reported and until recently it was difficult for a researcher to locate specific cases in point because there was no one publication which undertook to organize all of the cases topically.\(^6\) Moreover, there is no doctrine of precedent in Japan which accords conclusive effect as law to decided cases.

Theoretically, a Japanese court is never bound to follow its own prior decision and a lower court should resort to basic statutory principles rather than to appellate decisions. The practice is not altogether in conformity with the theory. Decisions are employed by counsel in the argument of litigation, not as obligatory authority but as persuasive to the extent that they involve analogous facts, are logical in reasoning, and reach fair results. Such use of case material is possible only if the opinion contains an adequate statement of the court’s reasoning. Opinions of this kind, more closely resembling the product of Anglo-American appellate courts than is true in some civil law jurisdictions, have become typical in Japan.

Other important practical elements are an appellate judge’s natural desire for at least the appearance of consistency and a trial judge’s reluctance to invite reversal. Experience demonstrates that a position once taken by the Supreme Court is apt to be maintained by the bench

---

5 In the transactions discussed in this article, the critical Japanese legislative material will be the Civil Code, the Commercial Code, or one of the special statutes later discussed. Concerning the interrelation between Codes which are deemed “general” legislation, and statutes which are deemed “special” legislation, see Michida, The Legal Structure for Economic Enterprise: Some Aspects of Japanese Commercial Law in Law in Japan 507-12 (von Mehren ed. 1963).

6 The official reports contain but a few of the decisions. The Supreme Court designates the opinions which are to be printed in these reports and has been selecting less than 10% of its decisions, less than .5% of the High Court (intermediate appeals) decisions, and less than 3% of the District Court (nisi prius) decisions. Several unofficial case-reporting publications have been started during the past several years. These are commercial in purpose and reflect the increasing use of decisions by Japanese lawyers. Some opinions not covered in the official reports are included. Of especial interest is Soao Hanrei Kenkyu Sosho, a publication started in 1956 which resembles the American Law Reports Annotated. It also includes summaries of scholars’ opinions on some points. It now covers the major sectors of Japanese law and is expected in time to become comprehensive.

There is no dearth of litigation in Japan. District Court civil cases are being filed at an annual rate in excess of 70,000; the population now totals about 95,000,000. High Courts decide more than 10,000 civil cases each year. Supreme Court decisions in civil matters number about 1,800 annually. These figures are a projection of those which appear in Supreme Court of Japan, Outline of Japanese Judicial System (1961), and in Supreme Court of Japan, Shōwa sanjūrokkanendo minji jiken no gaikei (General situation of civil cases in 1961), 14 Hoso Jiho (“Lawyers Association Journal”) (No. 12) 47 (1962). In the United States, which has a population of roughly 190,000,000, reported appellate and federal district court decisions (civil and criminal) are appearing at an annual rate of about 25,000. Pollack, Fundamentals of Legal Research 73 (2nd ed. 1962).
which took it and that a lower court will not often hold at variance with an appellate court in its line of appeal. Appeals from the High Court to the Supreme Court are restricted by the *Code of Civil Procedure* article 394 to instances of material error in applying "laws or ordinances," and the latter terms are not deemed to encompass deviations from case precedents. The practice, however, is better indicated in a Supreme Court rule, *i.e.*, Regulations of Civil Procedure (*Minji soshō kisoku*) article 48, which in part requires an appellant who "alleges that the judgment contravenes judicial precedents established by the Supreme Court" to designate specifically such precedents.

Decisions are evidently serving in Japan a function which is at variance with the traditional scholarly stress on the theoretic absence of a doctrine of precedent. The point seems to have been reached at which disregard by the Supreme Court of a prior case in point is not materially more expectable than is such disregard or overruling by an American appellate court. Changes in judicial personnel do introduce an element of doubt, but this is true as well in jurisdictions which adhere to the doctrine of stare decisis. A notable by-product of the trend (and part of its cause, too) is the increasing use of case material by modern Japanese law teachers.

These encroachments on the idea that decisions are not binding precedent must not be overemphasized. The dearth of reported cases often leaves both counsel and teacher with no case in point, and in any situation the Codes and the special statutes which supplement them are the dominant factors.

This is not an environment in which to expect the development of a cohesive body of case law. Yet, such a development has occurred in the evolution of the security device discussed below as "jōto tampo." The legal principles which sustain jōto tampo are primarily derived from decisions sufficient in number and consistency to justify a strong belief in the likelihood of similar judicial results in the future. Usage during half a century provides further assurance. On some points scholars are supplying helpful refinements. Although it would not be proper to label this as an area of Japanese "common law," the process by which jōto tampo has become a useful economic tool resembles the emergence of an Anglo-American common law principle.

The Japanese system has created a context in which scholarly discussions concerning the meaning of ambiguous or ambivalent Code articles, the application of generally phrased Code provisions to partic-
ular problems, the construction of statutes, and the evaluation of judicial decisions have become especially valuable. Such discussions are relied on by counsel in their analysis of clients' problems, in drafting, and in arguments to courts. References to the "weight of scholarly opinion" (tasūsetsu) or, most telling, to the "consensus of scholarly opinion," (tsūsetsu) are both appropriate and routine, and scholars are called to testify as expert witnesses concerning the meaning or application of Code passages. Needless to say, on many points the opinions of scholars differ, and the skill and reputation of a particular writer can be an important factor in the planning of a business transaction or in a court's decision. It is not intended to suggest that a favorable text passage, however scholarly, is an assurance of victory in litigation. Judges feel strongly their responsibility for sound results and may be expected to formulate independent answers for the problem before them.

Japan is, politically and legally, a single unit. Its commercial law is grounded on Codes and special statutes which are nationwide in operation. Its Supreme Court routinely handles appeals in commercial litigation originating anywhere in Japan. In marked contrast with the United States, the Japanese law which governs security transactions is truly a "national" law. If there be doubt about the applicable legal principle, it will be the product of unclear or inconclusive legislation, lack of assurance about the strength of prior reported decisions (if any), or the inability of scholars to agree, rather than of difficulty in resolving internal choice-of-law issues.

American lawyers are buried in decisions7 and are obliged by the doctrine of stare decisis8 to expend much energy in interpreting, analyzing, distinguishing, and applying them. Statutes often gather a fringe of construing cases, inducing as much concern with decisions in statutory areas as in common law ones. Divergent opinions in one jurisdiction are often found. Divergent decisions in differing states are commonplace and are to be found even in the construction of

---

7 Approximately 2,300,000 decisions have been reported and printed in the United States. Prince, Lawbooks Unlimited, 48 A.B.A.J. 134 (1962); Pollack, Fundamentals of Legal Research (2nd ed. 1962).

8 Under this doctrine, a decision resolving a particular point is a precedent which should be followed in a subsequent law suit in the same court involving the same point between similar parties. Since identity of facts is requisite to achieving again the "same point," factual distinctions provide lawyers with arguments and courts with bases for different results. Changing circumstances can induce a court to refuse to follow the earlier case and the framing of arguments that circumstances have so changed is an important advocate's technique. Concerning the U.C.C. and stare decisis, see note 10 infra.
"uniform" statutes. Federal courts sometimes reach conflicting results in litigation involving contracts and other matters controlled by Federal law. Not the least of the lawyer's problems results from the uneven quality of opinions. Some are not models of exposition.

In the mass, American decisions are indeed an extraordinarily confused and intractable body of legal material. Yet this material, and the statutes where there are statutes, is the only "primary authority," no matter how confused and unclear it may be. Text and periodical discussions are on occasion cited to or by a court but are only "secondary authority" and are adjunct to the argument. Secondary sources are expected to elucidate the cases, to organize them into some semblance of order, and to provide appropriate analytic and expository comments. If well done, a publication of this type is helpful to lawyers and to courts and is used by them. Its utility and use resemble but are by no means identical with the utility and use of treatise discussions in Japan.

Still another factor which complicates American practice and comparisons of American law with Japanese law is the splintering of the United States into fifty sovereign states, each with its case and statutory law. The superimposed federal system has its own concomitant body of federal law which is at some points relevant in private commercial transactions. This arrangement of necessity engenders many choice-of-law problems of types encountered by Japanese lawyers only in international transactions and produces comments phrased in terms of the "majority rule" and the "minority rule"—terms which both reflect and summarize the diversity in the laws of the different states. There will also be in a given state various gaps in the case and statutory coverage, a gap which the lawyer fills as best he can at the advisory level by attempting to estimate what the appellate court in his state will hold. In litigation he musters for the argument the precedents from other states in terms both of quality (as he sees it) and quantity. One by-product of this welter of multiple jurisdictions and divergent principles is danger for the person who would attempt sweeping generalizations about the American law. Especially hazardous is the framing of sweeping generalizations about the American law of personal property security. Some of the generalizations made in the discussion which follows take no cognizance of various local deviations.

The remarkable lack of unanimity in the positions earlier reached in the various states on property-security problems is being considerably
ameliorated by enactment of the Uniform Commercial Code (which
will be referred to hereafter as U.C.C.). This statute has been adopted
in 29 states and the District of Columbia, and appears likely to be
enacted in most of the other states. It is remarkably well drafted, is
producing a minimum of litigation in which construction is an issue,
and may in general be taken literally as an indication of the expect-
able results in the situations it covers.9 The provisions of the U.C.C.
are for the most part detailed and specific, giving the lawyer far more
precise answers than are provided by the Codes or special security-
transaction statutes10 of Japan.

POSSESSORY SECURITY

Creating the Security Interest

An obligee who takes tangible personalty of an obligor into his posses-
sion to hold for security (without at the same time purporting to take
a transfer of a proprietary interest, i.e., “title”) will achieve, save for
a few notable exceptions, roughly the same legal relations in Japan as
in the United States. The traditional common law name for such an
arrangement is “pledge,”11 and this nomenclature will probably con-
tinue in U.C.C. states although that statute employs the phrase “secu-

9 The U.C.C. has been enacted in Alaska, Arkansas, California, Connecticut,
Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan,
Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New
York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia,
West Virginia, Wisconsin, and Wyoming. The initial enactment occurred in Pennsyl-
vanian in 1953. Copies of a volume combining the current Official Text of the U.C.C.
and the Official Comments can be obtained from West Publishing Company, St.
Paul, Minnesota. The relatively small volume of appellate cases construing the U.C.C.
is reflected in the pertinent Uniform Laws Annotated volumes. COOGAN, HOGAN &
VAGTS, SECURED TRANSACTIONS UNDER THE U.C.C. (1963), is the first true treatise
on Article 9 of the U.C.C. Volume 1 has been published. Volume 2 is scheduled to
appear soon.

10 These statutes are cited or discussed at notes 78, 122, 124 infra. In the application
of the detailed provisions of the U.C.C. by courts of many states there will be con-
siderable risk of divergence and hence of encroachment on the U.C.C. goal of uni-
formity. It has been suggested that the risk will be diminished if courts will return to
the U.C.C. for answers rather than to case precedent. Hawkland, Article 9 Meth-
odology, 9 WAYNE L. REV. 531 (1963). See also note 181 infra.

11 BROWN, PERSONAL PROPERTY § 128 (2d ed. 1955); RESTATEMENT, SECURITY § 1
(1941).

12 U.C.C. §§ 1-201(37), 9-102(1) (a), 9-203. Section 9-102(2) recognizes that
lawyers and businessmen may wish to use the prior terminology and documentation
by providing: “This Article applies to security interests created by contract including
pledge, assignment,...”

13 CIVIL CODE arts. 342-68 appertain to pledges. In the general organization of the
law relating to property interests, CIVIL CODE art. 175 recognizes several kinds of
derlying the property transaction (i.e., the transfer of possession), there will be an agreement which need not in either country be in writing. Good commercial practice, however, dictates documentation which will obviate the risk of dispute, and written pledge agreements are common in both countries.

What is involved in taking "possession"? The obvious answer is that there must be an actual physical delivery of the thing, but this is just a beginning point. Principles and techniques have evolved in the United States which permit a pledge in things already in the obligee's possession, of things in the possession of a third person, and of bulky things the manual transmission of which is impracticable. It is also possible at common law for a pledgee to surrender a pledged chattel to the pledgor for limited periods and purposes; the pledge continues as to the pledgor and his creditors, although bona fide purchasers from the pledgor will take free of it. There even are a few situations in which a legal relationship denominated "pledge" can exist, in some states, without possession. The Uniform Trust Receipts Act provides for a short-duration pledge without delivery of the subject matter through relationships denominated "real rights." Shichiken is included. Article 175 also expressly forbids the creation of other kinds of real rights save as may be permitted by special statutes. See the discussion at notes 76, 78, 122 infra.

---

14 BROWN, op. cit. supra note 11, at 625, text accompanying n. 10; RESTATEMENT, SECURITY § 5 (1941).
15 BROWN, op. cit. supra note 11, at 626, text accompanying n. 13; RESTATEMENT, SECURITY § 7 (1941). This common law principle presumably appertains in U.C.C. states. The U.C.C. does not define "possession."
16 BROWN, op. cit. supra note 11, at 626, text accompanying n. 14; RESTATEMENT, SECURITY § 8 (1941). Although the U.C.C. does not undertake a general definition of "possession," it does provide that a "secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest" where the collateral is in the hands of a bailee. U.C.C. § 9-305. See also § 9-304(3). These sections state perfection standards; it seems clear that possession so taken will also satisfy § 9-203(1) (a).
17 BROWN, op. cit. supra note 11, at 626, text accompanying n. 14; RESTATEMENT, SECURITY § 8 (1941). This common law principle presumably appertains in U.C.C. states.
18 BROWN, op. cit. supra note 11, at 683-85; RESTATEMENT, SECURITY § 11(2) (1941). U.C.C. coverage of this situation is in terms of perfection rather than of substantive law. Under § 9-304(5), perfection continues for "21 days without filing where a secured party having a perfected security interest in an instrument, a negotiable document or goods in possession of a bailee other than one who has issued a negotiable document therefor..." if the collateral is surrendered to the debtor for certain specified purposes. It will be noted that this dispensation does not pertain to chattels other than as indicated. Since continuation of the perfection would not be meaningful if the security interest does not also continue, the section evidently contemplates continued existence of such interest even though it was created by taking possession under § 9-203(1) (a). In the case of a negotiable instrument or document, § 9-309 must also be considered. Even a perfected security interest may be lost to a holder in due course of an instrument or a bona fide purchaser of a document.
19 UNIFORM TRUST RECEIPTS ACT § 3. This statute has been repealed in the states which have enacted the U.C.C. The latter has no comparable provision. It does
In other than U.C.C. states contracts to deliver things in pledge will, after the obligee has extended his credit and when the obligor has the things, produce a relationship known as an "equitable pledge" which gives the obligee some of the protection accorded a pledgee. There are no comparable relationships under the U.C.C. A secured party can acquire security either by taking possession or by taking a security agreement, but an obligee who has neither has no security, legal or equitable.

For the creation of a pledge Civil Code of Japan article 344 demands "delivery" of the thing to the pledgee. The conduct requisite to satisfaction of this demand is specified in Civil Code articles 181, 182, 184 under the subheading "acquisition of possessory right." In addition to actual physical delivery, provision is made for accomplishing the needed possessory control over things already in the obligee's hands or in those of a third person. Intent is the critical element, including intent of the obligee that possession be held for him by another as his representative. Notice to a third person and consent of the obligee suffice to create the requisite representative relationship and the pledge.

provide for a short period of perfection as to instruments or negotiable documents without possession or filing, but only where there is a security agreement. U.C.C. § 9-304(4).

20 Brown, op. cit. supra note 11, at 627, text accompanying n. 17, 638-41; Restatement, Security § 10 (1941). An "equitable pledge" is a relationship which permits the obligee to force delivery or to realize on the things as though he held them. These steps must however be taken before the intervention of a bona fide purchaser for value or a levying creditor. State courts, in some number, have protected an equitable pledgee who succeeded in getting a legal pledge or realization, against a subsequent liquidator. See e.g., Whiting v. Rubinstein, 7 Wn2d 204, 109 P.2d 312 (1941), in which the liquidator's attack was made under a state preference statute. The present Federal Bankruptcy Act appears to be incompatible with the relation back theory on which these cases rest. See the discussion: Hanna, Preferences as Affected by Section 60c and Section 67b of the Bankruptcy Law, 25 Wash. L. Rev. 1 (1950); 2 Glenn, Fraudulent Conveyances and Preferences §§ 475-90 (rev. ed. 1940); 3 Collier, Bankruptcy ¶ 60.50 (14th ed. 1964). The relation back doctrine is rejected by U.C.C. § 9-305, see comment 3.

21 Section 9-203(1) permits the creation of a security interest by either a transfer of possession to the secured party or the execution of a security agreement, but there must be one of these. The "security agreement" must be in writing and this requirement is a Statute of Frauds which bars any remedy on a non-conforming agreement. An obligee with a conforming writing has a security interest even though the obligor refuses to perform an accompanying promise to surrender possession. See § 9-203, comment 5. A security agreement must be in writing, must be signed by the debtor, and must describe the collateral. Section 9-203(1) (b). Section 9-105(h) reads: "Security agreement' means an agreement which creates or provides for a security interest . . . ."

22 These articles are not directly concerned with art. 344 or with "delivery." It is, however, the consensus of scholarly opinion that their specification of the techniques by which possessory rights can be acquired provides also a standard by which the fact of delivery is to be established.

---

23 Wagatsuma, Tampo Bukkenho (Law of security interests) 86 (3 Minpo kogi ed. 1955); Yunoki, Tampo Bukkenho 90 (19 Horitsugaku zenshu ed. 1959); Kanayama, Shichiken (Pledge) in Minji Hogaku Jiten (Dictionary of civil juris-
If a pledgee permits the pledgor to resume possession there is some disagreement in Japan concerning the legal consequences as between the immediate parties. The decisions sustain a pledgee who asserts continuation of the pledge but a majority of scholars dispute the correctness of this result. Courts have found that Civil Code article 344 makes possession a requisite for the creation of a pledge but not for its continuance. The opposed scholarly opinions prefer the contrary construction of this article. As against the pledgor's transferees and creditors, the pledgee's situation is governed by Civil Code article 352, which requires continued possession and makes no provision for temporary return of the collateral to the pledgor for any purpose. The pledgee will accordingly lose both to creditors and to purchasers (including encumbrancers), whether or not they take in good faith.

Field warehousing, an arrangement under which a part of the borrower's premises are leased to a warehouseman whose receipts are taken by the lender as collateral, has produced in the United States a good deal of litigation in which the warehouseman's possession has been the critical issue. There seems to be no comparable business practice in Japan.

Possession of a document of title such as a negotiable bill of lading or negotiable warehouse receipt gives an obvious kind of control over both document and goods. Delivery of the document for security will accordingly suffice in the United States to create a pledge of document and goods, although in practice negotiable documents of title are bound to have a broad area of control over the goods. See WILLISTON, CONTRACTS § 1042, text accompanying n. 10 at 2910 (rev. ed. 1936); BROWN, op. cit. supra note 11, at 627-29; RESTATEMENT, SECURITY § 2(2) (1941). The U.C.C. permits the creation of a security interest by either a transfer of possession or the execution of a security agreement. Section 9-203(1). This statute provides for perfection of security in documents of title, by either taking possession or filing with the proper authorities.
usually indorsed as well; Japanese law requires indorsement in addition to delivery.\textsuperscript{28}

If a non-negotiable bill of lading or warehouse receipt is issued naming a lender as consignee or depositor the resulting possessory control will produce a pledge under American law.\textsuperscript{29} In Japan such an arrangement is rarely used. It would probably result in a proprietary security (\textit{jōto tampo}) rather than a possessory security.

Negotiable notes and bills of exchange are instruments which closely interrelate the paper with the right-duty relation of the parties. Delivery of the paper will sustain a pledge in the United States; in Japan order paper must also be indorsed.\textsuperscript{30} In practice, order instruments are usually indorsed in the United States as well as delivered.

A transfer of a stock certificate for security is normally accomplished in the United States by delivery of the certificate, indorsed or accompanied by a separate written assignment.\textsuperscript{31} The practice in Japan is

\begin{itemize}
\item filing, and states that perfection as to the document is perfection as to the goods.
\item U.C.C. §§ 9-304, 9-305. Section 7-504(1) of the U.C.C. reads: "A transferee of a document, whether negotiable or non-negotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey." Section 7-506 reads: "The transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement but the transfer becomes a negotiation only as of the time the indorsement is supplied."
\item First Nat'l Bank v. Lincoln Grain Co., 116 Neb. 809, 219 N.W. 192 (1928); \textit{Restatement, Security} § 8, comment a (1941). The U.C.C. provides for perfection by issuance of the document in the name of the secured party. Section 9-304(3). This step will evidently also satisfy U.C.C. § 9-203(1)(a). This type of pledge and the use of a non-negotiable document are preferred by some American lenders in the case of warehoused goods. Surrender of portions of the goods to this borrower under trust receipts is thereby facilitated. The price paid for this convenience is loss of whatever advantage the secured party might have had as a taker of a negotiable instrument. \textit{Cf. U.C.C.} § 9-309. See Funk, \textit{Trust Receipt v. Warehouse Receipt—Which Prevails When They Cover the Same Goods?}, 19 Bus. Law 627 (1964).
\item \textit{Brown}, op. cit. supra note 11, at 629-30; \textit{Restatement, Security} § 2(3) (1941); \textit{Wagatsuma}, op. cit. supra note 23, at 114; \textit{Yunoki}, op. cit. supra note 23, at 124. The U.C.C. makes the taking of possession the only method by which security in a negotiable instrument can be perfected. Section 9-304(1). Sections 9-304(4) and (5) state limited exceptions. Section 3-201 of the U.C.C. reads: "(1) Transfer of an instrument vests in the transferee such rights as the transferor has [with exceptions not here germane].... (2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred. (3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner." In Japan the Law on Bills (\textit{Tegatahō}) art. 19 (Law No. 20, 1932) provides for a specific type of pledge-indorsement but this is rarely used and ordinary indorsements are customary. A transaction of this type may contain elements of \textit{jōto tampo}.
\item \textit{Uniform Stock Transfer Act} §§ 1, 9; \textit{Brown}, op. cit. supra note 11, at 630, text accompanying n. 24. The additional requirement of a change in the registration on the corporate books, made in a few states, is discussed in \textit{Brown}, id. at 631. As to
\end{itemize}
the same. Although the Commercial Code of Japan transfer requirement (delivery and indorsement) is not applicable to pledges, as to which delivery alone suffices,\textsuperscript{32} indorsements or separate assignments continue to be demanded by most lenders.\textsuperscript{33}

In both countries the indorsement and delivery for security of a stock certificate, a negotiable document of title, or a negotiable instrument has preponderantly title-transfer (as opposed to possessory control) connotations. The transfer method used is the one routinely followed by a seller of assets like these. Although it would accordingly be possible to argue with some plausibility that the legal relations between secured party and debtor are those of a proprietary security, which would be a mortgage in the United States and jōto tampo in Japan, the pledge analysis has so long prevailed as to make it unlikely that a court in either country would now follow the argument.\textsuperscript{34}

Also productive of some analytic uncertainty is the American practice of employing assignments as the documentation for security transfers of intangibles such as book accounts and contract rights. In the nature of things these interests cannot be “delivered” and possessory security in them is arguably impossible. Despite the apparent anomaly, this type of security arrangement is now commonly thought of in the United States as a pledge and the applicable legal principles are consonant with the usage. “Assignment” of an existing account or contract right is equated with “possessory control.”\textsuperscript{35} Japanese practice and

\textsuperscript{32} Articles 205-07; WAGATSUMA, \textit{op. cit. supra} note 23, at 122; YUNOKI, \textit{op. cit. supra} note 23, at 136; Shiota, \textit{Kabushiki no shichiire} (Pledge of stock certificate) in \textit{MINJI HOGAKU JITEN} (Dictionary of civil jurisprudence) 238 (1960).

\textsuperscript{33} Most frequently, the lender will insist on delivery of the certificate and a written assignment which neither refers to the security purpose nor names the assignee. The lender will often require further that the debtor sign a written agreement authorizing sale of the certificate. The purpose behind this method of operation is to facilitate insofar as can be the lender’s realization steps. \textit{Cf.} note 53 \textit{infra}. Whether the end result is a pledge is not free from doubt. A transaction of this type may contain elements of jōto tampo. WAGATSUMA, \textit{op. cit. supra} note 23, at 125; Shiota, \textit{supra} note 32, at 239.

Although a change of registration on the corporation’s books is not legally requisite to the creation of a pledge, failure to take this step will affect the pledgee’s legal relations with the corporation. The latter will not be obliged to treat the pledgee as a “transferee” of the original stockholder. COMMERCIAL CODE arts. 208, 209.

\textsuperscript{34} A possible limited exception in Japan is discussed in the text accompanying notes 30, 33 \textit{infra}. Also see SHINOMIYA, \textit{Joto tampo} 269-71 (17 Sogo hanrei kenkyu sosho mimpo ed. 1962).

\textsuperscript{35} BROWN, \textit{op. cit. supra} note 11, at 629, text accompanying n. 21 at 632-34; 4 WILLISTON, \textit{op. cit. supra} note 27, \S 1042, text accompanying n. 13 at 2910; Comment, \textit{Contract Rights as Commercial Security: Present and Future Intangibles}, 67 YALE L.J. 847 (1958). The U.C.C. makes filing the only perfection method for accounts,
theory in this area have achieved a comparable level of assurance, withal on different bases. *Civil Code* article 362 both permits a pledge of intangibles and directs the application to such a pledge (insofar as appropriate) of the general pledge sections.\(^{36}\) “Delivery” is a vital factor in Japan because “assignment” does not equate with “possessory control” under Japanese law. If the obligation is evidenced by a writing, the writing must under *Civil Code* article 363 be handed over even though it lacks the elements of control which characterize a “critical document” under American law. If the obligation is not evidenced by a writing (for example, a book account) there is nothing which can be delivered. Since “assignment” will not provide a sufficient theoretic basis for pledge-creation, a shift in approach from “delivery” to “contract” must be made. A pledge of assets like these can be accomplished only by the formation of a contract between pledgor and pledgee by which the security interest is acknowledged. The end product of such a contract is *shichiken* (pledge), a real right, rather than “obligation.” In normal practice the contract serves also to assign the intangibles which are the subject matter of the pledge.

**Legal Relations Prior to Default**

The American common law treats the pledgee of a chattel as a bailee under a bailment not for use. He is obliged to take reasonable custodial care of the collateral, has no right to use it, is entitled to reimbursement for reasonable preservation outlays, is prior in right to interests subsequently created including federal tax liens, and cannot be disturbed in the debtor’s subsequent bankruptcy proceedings.\(^{37}\) Presumably, use

---

\(^{36}\) WAGATSUMA, *op. cit.* supra note 23, at 112-15; YUNOKI, *op. cit.* supra note 23, at 119-25. The wisdom of article 362 is questioned in BRAUCHER & MICHA, *2 AMERIKA SHOTORIHIKO TO NIHON MINSHOHO* (“American Law on Commercial Transactions and the Japanese Civil and Commercial Codes”) 383 (1961). Under *Civil Code*art. 364 the pledgee is obliged to notify the obligor of the assigned chose, not to create the pledge, but to protect himself against discharge transactions between the obligor and the pledgor, against a second assignee, and against garnishment by creditors of the pledgor. Such notice serves the same function as does filing under U.C.C. § 9-302.

\(^{37}\) BROWN, *op. cit.* supra note 11, § 130; 4 WILLISTON, *op. cit.* supra note 27, § 1044 at 2920; RESTATEMENT, Security §§ 17, 22 (1941). Under the Int. Rev. Code of 1954, § 6323, a pledgee takes free from federal tax liens subsequently accruing, and also from tax liens which accrued earlier, if such liens were not filed or if the collateral is a “security” and he takes without knowledge. The tax lien will of course attach to the debtor’s equity in the property. Legislation providing for personal property taxes
can be authorized by the pledgor in or subsequent to the pledge agreement. The U.C.C states comparable duties of care and of reimbursement, and further provides for a limited right in the secured party to use the collateral. A pledgee of intangibles must be reasonably diligent both in collecting and in taking whatever steps, such as presentment and notice, are requisite to preserve the liability of secondary parties. In Japan, a pledgee’s priority position and custodial duties are very much like those of an American pledgee.

Bailment principles supply some additional theoretic boundaries for American chattel-pledges, particularly significant being the idea of a divided property. Although the pledgee’s possessory interest is a “special property” and a piece of the over-all proprietorship, the “title” is said to remain in the pledgor. Of great practical importance is the basic principle which prevents the pledgee’s possession from giving him the power, prior to default by the pledgor, to divest the pledgor’s title by a sale of non-negotiable collateral, even to a bona fide purchaser for value. DistRAINTS on default can be so framed as to give the taxing body priority over antecedent security interests. Statutes of this type are not ordinarily made applicable to the kinds of property which are taken in pledge. Under the Federal Bankruptcy Act § 70(a), 52 Stat. 883 (1938), 11 U.S.C. § 110(a) (1958), the trustee in bankruptcy takes the debtor’s assets subject to an existing pledge and can redeem as could the debtor but cannot disturb the pledgee’s possession nor interfere with the pledgee’s remedies. 4 COLLIER, op. cit. supra note 20, ¶ 70.04, text accompanying n. 20 at 953-54. This proposition assumes that the pledge is not vulnerable to recovery by the trustee as a preference under the Federal Bankruptcy Act § 60, 52 Stat. 883 (1938), 11 U.S.C. §96 (1958). Different principles apply in reorganization proceedings.

Section 9-207. The duty to use reasonable care cannot be contracted away. Section 1-102(3).

Section 9-207. The duty to use reasonable care cannot be contracted away. Section 1-102(3).

A pledgee holds free of subsequently created national tax liens (to use the American term) and can hold the collateral against a liquidator appointed for the debtor in subsequent bankruptcy proceedings. WAGATSUMA, op. cit. supra note 23, at 95; YUNOKI, op. cit. supra note 23, at 103-05; CIVIL CODE arts. 334, 355; National Tax Collection Law (Kokuzei chōshihō) arts. 15, 17, 18 (Law No. 147, 1959); Bankruptcy Law (Hasanho) art. 92 (Law No. 71, 1922); Public Sales Law (Keibaiho) art. 2 (Law No. 15, 1898). It must be recalled that to liens are not filed and can be ascertained only by actual inquiry of the appropriate public official. A prospective pledgee is always concerned with the possibility that tax liens may have previously attached. A pledgee’s priority over general creditors of the pledgor is assured by Civil Code art. 342. His priority over successors of the pledgor is a necessary corollary of the Civil Code articles authorizing pledges.

A pledgee in possession must exercise the care and attention of a good prudent manager. He is entitled to reimbursement for necessary expenses incurred in the discharge of this duty. He may, with the consent of the pledgor, use, lend (lease), or repledge the collateral. As to intangibles, the duty of a good and prudent manager will embrace whatever steps are necessary to preserve the liability of secondary parties. CIVIL CODE arts. 350, 298, 299, 348; WAGATSUMA, op. cit. supra note 23, at 103; YUNOKI, op. cit. supra note 23, at 107. Under Civil Code art. 299, “reasonable preservation expenses” are divided into two categories—“necessary expenses” and “useful [i.e., beneficial] expenses.” Reimbursement in the latter category is limited. It will be observed that the pledgee’s duties have their source directly in Civil Code art. 350, not in bailment principles.
value. On the other hand, the pledgee's possession constitutes a kind of caveat to persons who deal with the pledgor and precludes their acquiring title free from the pledgee's interest.

Comparable problems are resolved in Japan by quite different legal principles. The idea of a "divided property" is not recognized there. "Ownership" is a real right and the "branch rights" (shibunken) such as pledge, which can be created by an owner, are also real rights. There is however a Civil Code article under which one who acquires a movable without negligence and who "has peacefully and publicly commenced to possess" it obtains ownership. The process is known as "primitive acquisition" (genshi shutoku) and the new real right extinguishes the prior ownership by force of the Code. In the operation of this principle freedom from negligence is a key factor. One who buys from a person who does not have actual possession may have difficulty in showing that he was not negligent. One who buys from a person in actual possession and who has no knowledge of or reason to suspect a title defect will probably obtain ownership. It follows that a person out of actual possession will have trouble finding a buyer. A pledgor has no practicable means of selling the property free of the pledge. A pledgee can on occasion find a buyer who meets the indicated standards and who will extinguish the pledgor's interest even though the sale is made before the secured debt matures. This is a major point of difference in the pledge law of the two countries. For a wrongful sale a Japanese pledgee is liable to the pledgor, but for breach of contract rather than for invasion of a property right in the collateral. This is another point of divergence between Japanese and American law.

Redemption

Under the American common law, a pledgor has a right to redeem which can be exercised after the obligation falls due and prior to sale

41 Petition, op. cit. supra note 27, § 1044, text accompanying n. 6 at 2918; Restatement, Security § 23 (1941). As the discussion in Williston indicates, a bona fide purchaser will take whatever rights the wrongful seller has, which means in effect that he acquires the rights of a pledgee. See also Brown, op. cit. supra note 11, at 694. In the case of negotiable paper, a holder in due course will take free from the pledgor's interest. Uniform Negotiable Instruments Law § 57; U.C.C. § 3-305. A comparable principle applies to negotiable documents of title. Uniform Warehouse Receipts Act §§ 40, 41; U.C.C. §§ 7-501(4), 7-502. The U.C.C. states a similar rule for securities. Sections 8-301, 8-302.

42 Civil Code art. 192. As to negotiable paper, stock certificates, and documents of title, see Law on Bills (Tegeteho) arts. 16(2), 77(1) (Law No. 20, 1932); Law on Checks (Kogitteh) art. 21 (Law No. 57, 1933); Commercial Code arts. 229, 519. Also see note 115 infra.
or foreclosure by the pledgee. An important incident of the common law redemption interest is a principle under which a pledge is extinguished by a tender even though the tender is not kept good. The U.C.C. provides broadly for redemption by all persons who have created security interests, whether possessory or otherwise.

The Japanese Codes say nothing about redemption but it seems clear on theory that the basic conception of pledge as a security transaction places on the pledgee a duty to return the collateral when the obligation is discharged. Breach of this duty should create a cause of action for recovery of the collateral and damages for its wrongful detention. No tender rule applicable to pledgors appears to have developed in Japan, and this is another difference in the pledge law of the two countries. If a proffer of payment is refused the pledgor’s recourse must be to litigation comparable in purpose and results to the American redemption action. There is a Civil Code provision which protects some pledgors against forfeitures.

Remedies of a Pledge

Public sale of pledged tangibles upon due notice to the pledgor and to the public, and collection of pledged intangibles, have been the traditional common law remedies. Foreclosure by action is also available in the infrequent situation which makes it desirable. In practice, these remedies are often supplemented by draftsmen of pledge agreements, as courts have sustained significant contractual amplifications of a pledgee’s remedial position. American judges have devised an important counterbalancing safety factor in a requirement that a pledgee’s sale be fairly conducted.

---

43 Restatement, Security § 54 (1941).
44 Brown, op. cit. supra note 11, text accompanying nn. 89 and 90 at 678, 679; 4 Williston, op. cit. supra note 27, § 1043, text accompanying n. 2 at 2913; Restatement, Security § 37 (1941).
45 Section 9-506: “At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 or before the obligation has been discharged under Section 9-505(2) the debtor or any other secured party may, unless otherwise agreed in writing after default, redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party. ...” The phrase “tendering fulfillment” apparently contemplates payment rather than a proffer of payment. See comment 1.
47 Civil Code art. 349 forbids pledge-agreement terms which would (to use the American term) clog the pledgor’s equity of redemption. This Civil Code article does not apply to a “commercial transaction” (shōkōi). Commercial Code art. 515. See also note 51 infra.
48 Brown, op. cit. supra note 11, at 655-77; 4 Williston, op. cit. supra note 27, § 1043; Restatement, Security §§ 16, 48, 49 (1941).
49 Typical contract variations include a right to sell at private sale, a right to sell
The U.C.C.'s highly flexible realization system is available to all secured parties, who may choose between foreclosure by suit and sale out of court in any commercially reasonable manner. In appropriate situations a pledgee can sell publicly or privately, in gross or in lots, for cash or on credit. Notice to the pledgor is required, save in the case of perishable goods or goods which threaten to deteriorate rapidly in value.50

At the point of remedies the Japanese law of pledges is a composite of diverse elements. In "commercial transactions" Commercial Code article 515 permits remedies agreements of the type familiar in the United States.52 Where this provision is not operative, the Civil Code controls. Under it, a pledgee is normally obliged to proceed in conformity with the Public Sales Law,53 and thus must procure sale by a public official, who will sell the collateral after notice ("at least five days") to the "interested parties" and to the public. On a showing that special relief is needed, the pledgee can realize by a type of judicial proceeding which bears some resemblance to an American foreclosure action;54 the successful pledgee obtains a decree which directs that he shall have title by paying a sum fixed by court-appointed appraisers.55

without notice to the pledgor, a right in the pledgee to purchase at his own sale, and a right to sell intangibles. Brown, op. cit. supra note 11, at 660, 661, text accompanying n. 67 at 672. "A pledgee, in exercising his right to sell the subject matter of the pledge to satisfy the debt, has placed on him many of the duties of a fiduciary for the pledgor, bound to deal fairly with the latter and to secure a reasonable price for the property sold." Brown, id. at 662.

51 "Commercial transactions" are defined in Commercial Code arts. 501-03. In practice article 515 encompasses pledges made by a merchant.

52 See Wagatsuma, op. cit. supra note 23, at 97; Yunoki, op. cit. supra note 23, at 106.

53 Civil Code art. 342; Public Sales Law (Keibaiho) arts. 3, 7-9 (Law No. 15, 1898). The relief is routinely obtainable on default by the pledgor. Wagatsuma, op. cit. supra note 23, at 95; Yunoki, op. cit. supra note 23, at 104. Civil Code art. 349 in effect forbids sale by a pledgee, and accordingly operates to prevent pledge-agreement clauses calculated to permit either public or private sale by the pledgee from being operative. This section does not however prohibit agreements between the parties concerning disposition of the collateral, entered into after default. Wagatsuma, op. cit. supra note 23, at 95, 96; Yakuishi, op. cit. supra note 24, at 94. It is also of some theoretic interest to observe that a pledge agreement can give the pledgor an option to surrender title to the pledgee in satisfaction of the debt at maturity. Takahashi v. Kavamura, 10 Daishin-in minji hanketsuroku [hereafter cited Minroku] 431, 434 (Sup. Ct., April 5, 1904); Yunoki, op. cit. supra, at 106; Yakuishi, op. cit. supra, at 99.
54 Civil Code art. 354. A showing that public sale would entail expenses which would be excessive in relation to the value of the collateral should suffice. Wagatsuma, op. cit. supra note 23, at 95.
55 To the extent of the debt-balance, "payment" is in practice made by crediting the pledgor.
Accounts Receivable—Some Special Problems

Dominion and Control. In the distribution of goods, unsecured open-account credit has long been a striking feature of American business practice at all levels—manufacturer to wholesaler, wholesaler to retailer, and retailer to consumer. Pending collection it is often desired to turn accounts into currently available working capital and highly refined techniques for doing so have evolved. Accounts are sometimes sold outright to a buyer who will at once inform the account debtors and effect collection himself. Accounts may be used as collateral, and as previously indicated, the resulting security transaction is commonly denominated a "pledge." A pledgor often wants to collect the pledged accounts in order to maintain contact with his customers and to save on collection expenses. He may prefer that his customers not be informed of the assignment. Both purposes are, on occasion, implemented in an arrangement known as "non-notification financing."

An assignment of an account involves the assignee in a complex of basic contract and statutory principles which regulate his legal relations with a second assignee and with the assignor’s creditors. As to successive assignments, the American common law developed a schism. In a majority of states, the first assignee would prevail over a subsequent one, whereas in a minority of states, a first assignee who failed to inform the account debtor of his assignment would lose to a subsequent bona fide purchaser of the account for value. At common law an assignee was generally protected against the assignor’s creditors. The American practice has been much changed by statutes, including the U.C.C. In many states an assignee, whether by way of sale or pledge, is now obliged to file a notice of his financing with a public official on pain of subordination to other assignees and creditors of the assignor.

There was a period in the United States during which a pledgee of

---

56 See text accompanying note 35 supra.
57 4 CORBIN, CONTRACTS § 902 (1951); 3 WILLISTON, CONTRACTS § 435 (3rd ed. 1960).
58 4 CORBIN, op. cit. supra note 57, § 903; 3 WILLISTON, op. cit. supra note 57, § 434.
59 See the discussion in 3 WILLISTON, op. cit. supra note 57, § 435A of the situation apart from the U.C.C. The U.C.C. requires the execution of a security agreement as to collateral which cannot be taken into the secured party’s possession (§ 9-203), and demands filing for assignments of contract rights, accounts receivable, and general intangibles. Sections 9-102, 9-302(1). The consequences of non-perfection are indicated in § 9-301. See Comment, Effect of Uniform Commercial Code on Receivables Financing, 76 HARV. L. REV. 1529 (1963). Although the U.C.C. does not define “possession,” it is inferable from § 9-305 (which deals specifically with perfection) that possession cannot under this statute be taken of accounts, contract rights, and general intangibles. U.C.C. § 9-305, comment 1.
intangibles who permitted his pledgor to collect them was in many states obliged to cope with some special and very serious problems. The concept of "dominion and control," which is an application to intangibles of a fraudulent conveyance principle first stated in relation to chattels and which, in effect, makes a non-conforming transfer voidable as to creditors and liquidators of the assignor, gained wide currency in the years following the 1925 decision of Benedict v. Ratner. Because failure to achieve "dominion and control" had such drastic consequences, and because the precise boundaries of the controlling legal principles were impossible to ascertain, draftsmen felt it necessary to employ various expedients in an endeavor to achieve safety for a non-notification pledge of receivables. These expedients covered a wide range. Common were agreements requiring 100% accounting by the pledgor, in specie, and deposit of all proceeds at frequent intervals into a special bank account to which the pledgee alone had access. Not unknown were agreements requiring that all the pledgor's ledger sheets be stamped "Assigned to (the pledgee)," and contracts designating an employee of the assignor as the assignee's agent to collect. Also used were various complicated arrangements calculated to resolve the problems created by return of defective or unwanted merchandise by an account debtor.

The intolerable demands of the dominion and control rule, and its uncertainties, induced a movement for its legislative amelioration or abolition, a movement to which the U.C.C. has given momentum. It may be doubted that the dominion and control idea will have in the

---


61 Note, Accounts Receivable Financing—Limitation Upon Control by Borrower, 24 N.Y.U.L. Rev. 598, 601 n. 31 (1949). U.C.C. § 9-205 provides: "A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contract rights or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral." Rev. Code WASH. § 63.12.030 reads: "Irrespective of acquiescence, consent or permission by the assignee, no act or omission (including the exercise of dominion and control), by the assignor with respect to an assigned account, the proceeds thereof, or goods sold and returned, shall invalidate the right or lien of the assignee upon any balance remaining owing on any such account or on any other assigned account." Rev. Code WASH. § 63.12.030 contains a similar provision applicable to security assignments of the vendor's interest in a conditional sale.
future any commercially significant application in the United States in accounts receivable financing.

There are no priority or dominion problems in Japanese pledges of accounts. *Civil Code* article 364 provides that an assignment is inoperative against the account-obligor and all third persons unless the account-obligor is notified or consents. The article evidently means that the assignee's position is invulnerable if he gives such notice or obtains such consent. In practice, account debtors are routinely notified and disputes about priorities do not arise.

The idea that the account-obligor must be notified, on pain of his effective discharge by performance to or settlement with the assignor, is entirely familiar in the United States. The idea that such notice is a necessary safeguard to third persons has been rejected in most of the United States, as was noted above. Public notice by filing, the solution for third party protection which is rapidly becoming the American rule, has found no place in the Japanese law as to intangibles.

No rule like that of *Benedict v. Ratner* exists in Japan. A Japanese pledgee of accounts usually prefers to collect them and does so, but for business rather than legal reasons. *Civil Code* article 367 states his right to collect, and the pledge-contract need not contain any particular reference to this detail.

That non-notification financing is occasionally used was found in the course of a field investigation of security practices by the Japan Association of Private Law, and was reported in *Shihō* (1959). As accounts become a more commonly used collateral, this type of arrangement may very well come into wider favor. Properly employed, it has advantages for both parties.

After some travail and a period during which the legal position of a Japanese security arrangement encompassing future accounts was doubtful, a favorable decision involving a comparable future-inventory problem has appeared. This case, which was concerned with *jōto tampo* and is discussed later in connection with inventory,62 may encourage continued efforts to work out an effective method for taking security in an asset pool which consists of or contains intangibles.63 A

---

62 Kishimoto Shōten v. Mori Denki Kōgyō, *infra* note 121.
63 The necessity for notifying account debtors poses obvious practical problems in the handling of future accounts. The lender must ascertain the identity of the account debtors as accounts come into existence. Some writers feel the problems are probably insuperable. Wagatsuma, op. cit. supra note 23, at 117. Yakuishi, *Kenri Shichi* (Pledge of intangibles) 165-72 (19 SoGo Hanrei Kenkyu Soshō Mimpo ed. 1963). On the theoretic side, the contract should suffice to create the pledge when accounts are created, and the in rem character of a pledge should not pose any serious obstacles. If
non-specific mass such as "all the debtor's accounts, now extant or hereinafter created," can be the subject matter of a contract, and the contract concept of a pledge of intangibles not evidenced by documents appears likely to outweigh whatever assignment difficulties may be present.

**Secondary Financing.** An American secured party, whether his security be possessory or non-possessory, will often transfer his interest to another. Such transfers may be sales, or may be security transactions. In either situation the transfer involves fundamentally the contract right and the collateral ordinarily follows along by either implied or express assignment. Where the transfer is for security the end result is a pledge, even though the chattel which secures the assigned obligation is not, as in the case of an assigned conditional sale or mortgage, in the possession of the pledgee. Secondary financing is an important function of banks and finance companies, the amounts annually involved aggregating many billions of dollars. No further discussion of the American legal situation in this area will be undertaken, beyond noting that the U.C.C provides some interesting coverage.

Japanese business practices have not yet developed a comparable range and volume of secondary financing, although a highly important start has been made. For a long time credit sales of goods were made either on open account or under security arrangements worked out between the buyer and someone other than the dealer, typically a financing agency of the manufacturer. A good deal of selling is still done that way. But the automobile industry has generated such a volume of documents evidencing the future obligations are anticipated, it must be remembered that their delivery will be essential.

---

64 Wagatsuma, op. cit. supra note 23, at 117; see also note 63 supra.
65 Osborne, Mortgages § 224 (1951); Restatement, Security § 29 (1941); 2A Uniform Laws Annotated § 40 (1924); Annot., Effect of Assignment of a Conditional-Sale Contract as Collateral, 36 A.L.R. 759 (1925). That this is the result under the U.C.C seems to be an inescapable inference. Sections 9-105(1)(b); 9-306(5). Some jurisdictions have held, in litigation not controlled by the U.C.C., that a security assignment of a conditional sale vendor's right to receive payment does not per se transfer his title in the chattel. See, e.g., Bank of California v. Danamiller, 125 Wash. 255, 215 Pac. 321 (1923).
66 Section 9-105(1)(b) defines chattel paper as "a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper." Transfers of chattel paper are regulated by the statute. Section 9-102(1)(a). Security in chattel paper can be perfected by filing, § 9-204(1), or by taking possession, § 9-305. Filing alone is not complete protection, as a bona fide purchaser of chattel paper who takes it for value and in the ordinary course of his business acquires a prior interest if he also receives possession. Section 9-308. Some of the awkward problems created by the return of the goods to a seller who has already sold the chattel paper are covered by § 9-306(5).
financing need that sources of credit other than the manufacturers have become essential. First to enter the field were the commercial banks, which now provide a significant volume of secondary financing by purchasing automobile paper from dealers on a recourse basis.\textsuperscript{67} Several finance companies have recently been organized and will function like those in the United States. It now seems likely that other kinds of consumer goods having substantial values will achieve the mass market necessary to support a thriving secondary-financing industry.\textsuperscript{68} It also seems likely that purchase with recourse, rather than pledge, will continue to be the preferred secondary financing technique.

**Non-Possessory Security**

**Basic Types**

In the area of non-possessory security there is much divergence between Japanese and American practice. A security transfer of a proprietary interest in a chattel was recognized early in English legal history although general use of the method was inhibited by the fact that a mortgagee who failed to take possession was vulnerable to attack by or on behalf of the mortgagor's creditors.\textsuperscript{69} With the enactment during

\textsuperscript{67} It is estimated that sixty percent of the financing of automobiles is now being handled by commercial banks. This proportion of bank participation seems likely to diminish. With increased emphasis on selling has come a drop in the average credit standing of buyers, a phenomenon well known in the United States. Banks will probably be selective and they may be expected to absorb a reduced percentage of car paper as the gross volume of sales goes up. One manufacturer has sought to make the paper of its dealers more attractive by organizing a company which guaranties such paper to banks. Banks are currently providing credit at a rate to the buyer of about 8%, which is half the rate charged by other sources.

One interesting aspect of secondary financing is the increased freedom it affords dealers. Where a sale can be made only if the buyer and the manufacturer's financing agency can reach agreement on terms, there is a kind of control over the sale which may not be present if the dealer can arrange his own secured-sale and find a market for his paper.

\textsuperscript{68} About 30 to 40% of the electrical appliances now sold in Japan are bought on credit, most of which is still supplied by manufacturer-supported agencies. Banks are beginning to move into this area on a secondary-financing basis. Finance companies have not yet done so.

Yajima, *Kinyūmen yori mita kappu hambai no mondai* (Problems of installment sales reviewed—the financing aspects), and Satō, *Shōkisha shin'yō no genjō to mondai-ten* (Present situation and problems of consumer's loans), *Kigyo ho kenkyū* (Journal of enterprise law) (No. 103) 21 and 25 (1963), give an interesting general survey of secondary financing in Japan, and a comparison of the Japanese experience with that in the United States. Although the dealer-customer transaction falls generally within the area later discussed under the heading "Conditional Sale," the customer is required to execute a note, and the dealer is in turn required by the bank or finance company to indorse this note. The dealer may also be required to enter into a separate recourse contract which supplements his liability as an indorser.

\textsuperscript{69} Glenn, *Fraudulent Conveyances and Preferences* §§ 491a-95 (rev. ed. 1940). There is some later authority holding that the presumption of fraud is rebuttable rather than conclusive. Jones, *Chattel Mortgages and Conditional Sales* §§ 319-28 (6th ed. 1933).
the nineteenth century of filing statutes the chattel mortgage came into wide use in the United States.

The retained-title variety of security transaction, in which a contract to sell is coupled to a bailment, the buyer being put into possession pending full payment, is also of some antiquity in Anglo-American law. Now known as a "conditional sale," this device is the mainstay of modern sales security in consumer goods.\textsuperscript{70}

Neither the mortgage nor the conditional sale is adequately flexible for the handling of security in inventory, whether of finished goods or of raw materials. To help fill the need for such financing there developed in the United States during the latter part of the nineteenth century a tailor-made arrangement called a "trust receipt," characterized by title in the lender and possession in a borrower who held avowedly as a "trustee" with specified powers of disposition or processing. After some years of experience in the courts, it became evident that the trust receipt as a commercial device was in danger of extinction. Judges in increasing numbers refused to recognize a trust receipt as sui generis and free from the requirements and limitations imposed by mortgage and conditional sales principles and filing statutes.\textsuperscript{71} Statutory assistance was evidently needed and the Uniform Trust Receipts Act was prepared by the National Conference of Commissioners on Uniform State Laws and promulgated in 1933. This statute was widely adopted in the period preceding the promulgation of the U.C.C in 1952.\textsuperscript{72} Even more specialized coverage of inventory financing was, at one time, provided in a number of states by factor's lien acts.\textsuperscript{73}

The proliferation of security devices in the United States brought both advantages and disadvantages. Each type has characteristics which makes its use of particular interest in specific situations, and the over-all system permits considerable flexibility. On the other hand, the legal criteria for accomplishing each type of security and the appurtenant filing requirements are extremely inflexible, making it possible for a draftsman to get his client into trouble in various technical ways.

In one sense, chattel-security legal development in the United States

\textsuperscript{70} Glenn, \textit{op. cit. supra} note 69, §§ 506a-14.

\textsuperscript{71} Id. at §§ 556-61.

\textsuperscript{72} Id. at §§ 561-64. By 1952, 34 states had enacted the Uniform Trust Receipts Act. 9C U.S. \textit{Com. Laws Annotated} (Supp. 1958, at 28). A statute of this type is repealed in the enactment of the U.C.C. There remain, however, several jurisdictions in which the Uniform Trust Receipts Act is operative.

\textsuperscript{73} See the discussion, Skilton, \textit{The Factor's Lien on Merchandise}, 1955 \textit{Wis. L. Rev.} 356, 609. A statute of this type is repealed in the enactment of the U.C.C. Factors Lien Acts are no longer a significant element in American commercial law.
prior to the U.C.C was evolutionary. Certainly the end product was far from an ideal security system. Many of the flaws have been corrected in the U.C.C. A major contribution of that statute is its formulation, for the creation of non-possessory security, of a method which is so simple as to be almost foolproof.\textsuperscript{74} It also provides perfection techniques which are equally free from serious technical pitfalls.\textsuperscript{75} Security documents bearing the labels "chattel mortage," "trust receipt," and "conditional sale," and containing much of the language traditionally associated with the label, continue to be used in U.C.C. states. This is to be explained by the desire of the parties to continue adherence to the documentary and terminological bases on which business has heretofore been done. These differences in form do not per se reflect or produce any differences in legal relations or results, although the presence or absence of a particular clause (e.g., a power to sell the collateral free of the security interest) may produce divergences.

In the Japanese property system, the basic relationship is a "real right" (i.e., "right in rem"). Article 175 of the Civil Code recognizes but ten kinds of real rights and forbids the creation of other types save as specific laws permit. For movables (i.e., tangible personality) the only kind of conventional consensual security to be found among the enumerated categories is shichiken (pledge). The reasons for Civil Code restrictions on real rights may be summarized this way: a real right is one which is exercised directly over a specific thing to the exclusion of any third person who asserts a conflicting interest; the thing can be pursued and taken, wherever found; so pervasive an interest must be carefully controlled; obligations should be freely created, but not real rights.\textsuperscript{76}

\textsuperscript{74} Sections 9-105(h), 9-203, 9-204. Non-possessory security exists when the debtor signs a security agreement (i.e., a writing which creates or provides for a security interest) in which the collateral is identified, value has been given by the secured party, and the debtor has rights in the collateral. Business considerations will of course often dictate documentation which goes beyond the U.C.C.'s legal minimum and which may indeed closely approximate pre-Code drafting. See COogan, HOGAN & VAGTS, \textit{op. cit. supra} note 60, §§ 2.02-2.04(3). That the U.C.C. security-interest-creation method is not entirely foolproof is demonstrated by American Card Co. v. H. M. H. Co. 196 A.2d 150 (R.I. 1963) (holding that a financing statement was not a sufficient security agreement). Noted 25 U. Pirr. L. Ray. 619 (1964).

\textsuperscript{75} The document which is filed is signed by both parties, gives their addresses, and describes the property by types or items; in the case of crops or fixtures, the land must also be described; the debtor's signature may be omitted where the collateral is proceeds or property brought into the state from another jurisdiction. This document can be the security agreement, or it can be a separate document. Section 9-402.

\textsuperscript{76} FUNAHASHI, \textit{BUKKENHO} (Law of real rights) 16-19 (18 Horitsugaku Zenshu ed. 1962); WAGATSUMA, \textit{BUKKENHO} 23 (2 Mippo Kogi ed. 1955). The ten classes of real rights are: (1) possessory right (senyiken); (2) ownership (shoyiken); (3) superficies (chijiken); (4) emphyteusis (eikosakuken); (5) servitudes (chiekiken);...
There is a close resemblance between this rationalization and the broad concept of third-party protection which underlies the legislation known collectively in the United States as the "filing system" (or as the "recording system"). The same concept produced the earlier common law principle under which a chattel mortgagee who left his mortgagor in possession was guilty of a fraudulent conveyance.\textsuperscript{77}

It is evident that the Civil Code of Japan hardly makes adequate provision for the financing needs of a modern manufacturing and trading nation. A partial solution has been attempted in the enactment of special statutes, as is contemplated by article 175. These statutes (which are discussed below under the subheading "Chattel Mortgage") permit the creation of non-possessor security ("hypothec") in some types of personalty. A routine incident of each statute is a public notice requirement.\textsuperscript{78}

As was surely not contemplated by the framers of the Civil Code, movables have come into general use as security in arrangements known as jōto tampo, for which there is no direct Code or statutory sanction. The incidents of these transactions are roughly analogous to those of the transactions known in the United States as "chattel mortgage," "trust receipt," and "conditional sale" and are discussed below under subheadings to which the American names are appended. The discussion will demonstrate the existence of some uncertainties about basic theory. It will also indicate that the expectable third-party problems are arising and are currently matters of much concern to legal scholars. Whether the Japanese Diet will legislate in the area encompassed by these security arrangements is, at this writing, quite undeterminable. It has been suggested that the enactment of a general filing (\textit{i.e.}, "registration") law for movables would provide a theoretic basis for the hypothecation of such property, in addition to serving the more obvious functions of a filing or recording system.\textsuperscript{79} No such statute has as yet received serious legislative consideration.

\begin{itemize}
\item \textsuperscript{6} right of common (\textit{tōkaiken})
\item \textsuperscript{7} possessory lien (\textit{ryūchikken})
\item \textsuperscript{8} preferential right or charging lien (\textit{sakidoritokken})
\item \textsuperscript{9} right of pledge (\textit{shichiken})
\item \textsuperscript{10} hypothecation (\textit{teitōken})
\end{itemize}

\textsuperscript{77} See text accompanying note 69 supra.

\textsuperscript{78} Farming Movables Credit Law (Nōgyō dōsan shin'yōhō) (Law No. 187, 1951) in 2 EHS No. 2191; Motor Vehicles Hypothecation Law (Jidōsha teitōhō) (Law No. 187, 1951) in 2 EHS No. 2185; Aircrafts Hypothecation Law (Kūkōki teitōhō) (Law No. 66, 1953) in 2 EHS No. 2186; Construction Machinery Hypothecation Law (Kensetsu kikai teitōhō) (Law No. 97, 1954) in 2 EHS No. 2187. See the discussion at notes 122, 124, 125 infra.

\textsuperscript{79} Harashima, Dōsan teitō (Chattel mortgage) in Minji hōgaku jiten (Dictionary of civil jurisprudence) 1487 (1960); Wagatsuna, Tampo bukkenho (Law of
Chattel Mortgage

The mortgage has become the familiar work-horse in all manner of borrowed money security transactions in the United States, and is occasionally used in purchase money transactions. Drafting is variously handled. In some states the simple phrase "I mortgage" serves to indicate both grant and defeasance. In others the traditional bill of sale plus a defeasance phrased in null-and-void language is still used. In some states legal title is said to pass to the mortgagee, while in others the mortgagee is said to receive only a lien. It would probably be sounder to say that in any state only a security interest passes and the exact nature of that interest varies in different jurisdictions.\footnote{Jones, op. cit. supra note 69, §§ 1-34.} If the mortgagee does not take possession of the chattel, he is obliged to accomplish public notice of his claim in the manner provided by the controlling state or federal statute. Although these statutes vary in details, the essence of their demand (apart from the U.C.C.) is that a copy of the mortgage shall be placed in files which are in the custody of a public official who will index them alphabetically (on a grantor-grantee basis). Under the U.C.C., either the security agreement or a short form of notice can be filed. These files are open to public inspection.\footnote{Id. at §§ 176-235; Hanna, The Extension of Public Recordation, 31 Colum. L. Rev. 617 (1931); U.C.C. §§ 9-301, 9-402. See note 75 supra.}

The mortgagor ordinarily remains in possession, has remedies against anyone who wrongfully interferes with his possession or damages the chattel, can use the chattel in the customary ways, and can alienate his interest.\footnote{Jones, op. cit. supra note 69, §§ 447a, 448, 454, 455. Under the U.C.C., the right to possession is a matter for agreement (§§ 9-201, 9-503) and the alienability of the debtor's interest is expressly declared (§ 9-311).} When the debt matures, and pending realization by the mortgagee, the mortgagor and his successors in interest have a right to redeem the property by paying the secured obligation.\footnote{Jones, op. cit. supra note 69, §§ 681-91; U.C.C. § 9-506. A legal tender also terminates the security interest, in some states. Jones, op. cit. supra §§ 632-37; Note, Tender Necessary to Discharge a Mortgage Lien, 10 Colum. L. Rev. 252 (1910).} This redemp-
tion interest is not vulnerable to creditors, liquidators, or successors of the mortgagee. Third persons who deal with a mortgagor in possession are, in theory, protected by public notice of the mortgage.

A mortgagee who perfects his interest by filing or by taking possession is prior to subsequently accruing federal tax liens and (in general) to subsequent artisans’ liens, has appropriate remedies against third persons who damage his interest, and on default can foreclose or (in most states) exercise a power to effect a non-judicial sale of the collateral if the mortgage document or a statute so provides. The mortgagee’s proprietary interest under a perfected mortgage is not vulnerable to successors, transferees, general creditors, or liquidators of the mortgagor, with a limited exception as to inventory and buyers in ordinary course, which will be discussed later.

There are no legal restrictions on the kinds of financing which can be secured by a mortgage; it can be used to secure a loan, a contract or statutory duty, or the unpaid purchase price in a sale transaction. There are no legal restrictions on the use of mortgages, in terms of the purpose for which the loan shall be made (e.g., to provide working capital, to finance the acquisition of capital assets, to defray operating expenses). A mortgage can be used to secure an obligation antecedently incurred by the mortgagor or by another; as it is a conveyance, there

---

84 JONES, op. cit. supra note 69, §§ 447, 447a, 448, 474. Federal tax lien priorities are governed by the statute discussed in note 37 supra. Personal property taxes, levied by states, ordinarily become liens only on distraint or some comparable process. The relative priority of such a lien and a prior filed mortgage is variously determined in different states. See the discussion, Casenote, Mortgages—Priorities—Liens on Real Estate Arising from Taxes on Personal Property, 42 HARV. L. REV. 961 (1929); Note, Conditional Sales: Tax Lien: Priority of New York State Highway Use Tax Liens Over Conditional Vendors’ Interests: International Harvester Credit Corp. v. Goodrich, 350 U.S. 537 (1956), 42 CORNELL L.Q. 558 (1957); Note, Iowa Tax Liens and Their Priorities, 47 IOWA L. REV. 121 (1961). Different kinds of personal property tax may be handled differently in one state. Cf. REV. CODE WASH. §§ 82.32.220; 84.60.020. As to artisans’ liens, see Whiteside, Priorities Between Chattel Mortgagor or Conditional Seller and Subsequent Lienors, 10 CORNELL L.Q. 331 (1925). If the mortgagor was in possession, some types of artisans’ liens will in some states be prior even though the mortgage is filed. If the mortgagor becomes a bankrupt while in possession the custody of the property passes to the bankruptcy court and the permission of that court must be obtained before undertaking realization steps. The court will ordinarily grant a petition for leave to realize, but may, if the best interest of the estate appears to be thereby served, direct sale by the trustee in bankruptcy free of the mortgage. The mortgagee’s interest will then attach to the proceeds of such sale. Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734 (1931), Noted 7 IND. L.J. 502, 16 MINN. L. REV. 94, 80 U. PA. L. REV. 412 YALE L.J. 445; COLLIER, BANKRUPTCY ¶ 70.97(2) (14th ed. 1964). It is assumed that the mortgage was properly filed and that it was not preferential.

85 JONES, op. cit. supra note 69, §§ 699-712. It will be noticed that in a few states the mortgagor’s interest ends on his default, subject to equitable intervention. The U.C.C. contains detailed and sensible remedies provisions. Sections 9-501 through 9-507 permit realization by either foreclosure or a non-judicial sale. The latter, which can be public or private, must meet a standard of “commercial reasonableness.”
is no requirement either of consideration or of value for its accomplishment. Generally speaking, any kind of chattel can be mortgaged, and any alienable interest in a chattel. Any kind of obligation, past, present or future, can be secured.

The mortgage is indeed a flexible security, one which adapts readily to a wide variety of business situations. It does have weaknesses. The principal ones are consequences of the failure of the American common law to develop a theory under which after-acquired assets can be adequately handled, and of fraudulent conveyance rules which hamper the use of inventory as collateral.

Save where a statute otherwise provides, an attempt to presently mortgage assets to be subsequently acquired by the mortgagor is abortive at law. The purported transfer will, however, be given effect in equity between the immediate parties and between the mortgagee and a successor of the mortgagor who is not a bona fide purchaser for value, provided the mortgagee has extended his credit and the property has actually been acquired by the mortgagor. Statutes authorizing the

---

86 Some states have enacted restrictive legislation governing security transactions in inventory. Skilton, The Law of Mortgages on Merchandise, 1963 Wis. L. Rev. 359, 391 n. 64. The U.C.C. excludes a few types of chattel; i.e., such as are regulated by the Ship Mortgage Act of 1920 or a comparable statute, and railroad equipment or rolling stock. Section 9-102(a), (e).

87 Optional advances made with actual knowledge of an intervening interest in the property will be protected by the mortgage but the mortgagee will, as to these advances, be subordinate to such interest. There is some difference of opinion as to what constitutes an optional advance. An advance made pursuant to legal obligation is certainly not optional. An advance made to protect a previously-acquired security interest in the property is probably “mandatory” rather than optional. Jones, op. cit. supra note 69, § 97; Osborne, op. cit. supra note 65, § 120 at 295, n. 54. Much of the litigation and discussion in this area has involved real property mortgages. See Note, Mortgages Securing Future Advances—A Need for Legislation, 47 Iowa L. Rev. 432 (1962). The U.C.C. puts mandatory and optional advances on the same footing for most purposes. Section 9-204(5); cf. § 9-313(4) (c). The priorities position of optional advances under the U.C.C. has, however, been questioned. See Coogan, Hogan & Vagts, op. cit. supra note 60, ¶¶ 4.09(4) (b), 7.03(2) (b).

88 Glenn, op. cit. supra note 69, §§ 569-71; Jones, op. cit. supra note 69, § 138. In some states an exception has been made as to crops. Jones, op. cit. supra § 143.

89 Glenn, op. cit. supra note 69, § 577; Jones, op. cit. supra note 69, §§ 170-75. The cited references indicate that an equitable mortgagee will lose the collateral to an intervening bona fide taker for value and that his position in a contest with a levying creditor has been variously determined. Of particular significance is the position of an equitable mortgage or pledge in a contest with a liquidator of the debtor. Insofar as the liquidator takes the position of creditors, the answer is to be found in the local rule about creditors. More important is the preference problem. The security interest cannot exist until the debtor has the property. The credit will have been previously extended, and the security which comes later may be preferential. Many state courts have resolved this issue against the liquidator on a relation back theory which destroys by judicial fiat the time interval between credit and security. The present federal bankruptcy act, however, appears to have created a federal rule which will override the state law on this detail. Collier, op. cit. supra note 84, ¶¶ 60.37, 60.50. The U.C.C. attempts to meet this difficulty. See note 91 infra.
mortgaging of future crops became common but future property problems received little other legislative attention before the U.C.C. The latter statute gives effect at law to a security agreement covering collateral to be subsequently acquired by the debtor. When the property is acquired, the security interest attaches without any contemporaneous expression of transfer purpose, provided value has been given by the secured party. Perfection can be achieved under a filing effected before the mortgagor acquired the property.

If a mortgagor is authorized by the mortgagee to sell the collateral free of the encumbrance, and is not required to account to the mortgagee for the proceeds, the mortgage is arguably fraudulent as to creditors and voidable by them. The argument has been received with varying degrees of cordiality by American courts. Some have gone so far as to hold the entire mortgage to be fraudulent as a matter of law. Others have held such a mortgage to be prima facie fraudulent. A mortgage-clause requirement of gross accounting (i.e., of all proceeds) cures the difficulty but the cure is often impracticable. Inventory financing is ordinarily not possible unless the debtor can withhold part of the proceeds to pay overhead and replace the goods sold. Although a number of American courts have conceded in principle the validity of net-accounting mortgages, the critical details (i.e., precisely what items of overhead expense can be paid from proceeds and precisely what is permitted in inventory replacement) have usually been left unspecified in the opinions. Typically unanswered too are the obvious questions about the frequency and method of accounting. The resulting uncertainties make the net-accounting mortgage somewhat less than an ideal security device even where it is theoretically possible.

---

90 Jones, op. cit. supra note 69, § 143 at 237, n. 41.
91 Section 9-204(3) states when a security interest attaches. Subsection (4) states a limited range of future-property exceptions. Section 9-303 makes prior filing effective. There is perfection when the security interest attaches. In an attempt to overcome the preference problem indicated in note 89 supra, the U.C.C. provides that after-acquired collateral "shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given," provided the secured party initially gave new value to be secured by the after-acquired property. Section 9-103. Whether this section will prevail against federal bankruptcy attack is still a mooted question. See: Friedman, The Bankruptcy Preference Challenge to After-Acquired Property Clauses under the Code, 108 U. PA. L. REV. 194 (1959); Gordon, The Security Interest in Inventory under Article 9 of the Uniform Commercial Code and the Preference Problem, 62 COLUM. L. REV. 49 (1962); Kennedy, The Trustee in Bankruptcy under the Uniform Commercial Code, 14 Rutgers L. REV. 518 (1960). See also COogan, HOGAN & VACTS, op. cit. supra note 60, §§ 11.01-11.07.
92 Glenn, op. cit. supra note 69, §§ 582-591; Collier, op. cit. supra note 84, ¶ 70.77.
93 Cohen and Gerber, Mortgages of Merchandise, 39 COLUM. L. REV. 1338 (1939);
The obvious solution to the confusion and restriction evident in these common-law developments is legislation. A movement for this method of correction has reached its fullest expression in the U.C.C, which completely abrogates the hampering principles.94

A lender may be tempted to solve the fraudulent conveyance problems discussed above by simply forbidding sale by the mortgagor, where the inventory is of a type (such as motor vehicles and major appliances) which lends itself to the arrangement. Typically such a mortgage will provide for the release of individual items of collateral on payment of indicated amounts to the mortgagee, and forbid sale by the mortgagor save on prior consent of the mortgagee. The idea is that the mortgagor will find a buyer and close a sale with a contemporaneous payment on the secured debt. Courts have discouraged resort to this expedient, by decisions which give clear title to a buyer in ordinary course of business even though the mortgage is filed and the mortgagee has not consented to the sale. The U.C.C codifies a comparable rule.95


94 Section 9-205, quoted in note 61 supra. Whether the threat to general creditors ever justified the common-law rule is debatable. Certainly modern credit practices have achieved a level of sophistication such that trade creditors are not apt to be deceived by the existence of inventory security no matter what the details of it may be. Meanwhile, a general law of fraudulent conveyances has developed which is entirely adequate in the instance of transfers actually fraudulent, whether by reason of intent or by reason of inadequacy in the value paid by the transferee. These factors, plus the business pressures for some sensible basis on which the very large values tied up in inventory can be utilized as collateral for working-capital loans, achieved some legislative recognition before the U.C.C. See Skilton, supra note 86, at 392, n. 64. Statutes such as Rev. Code WASH. §§ 63.12.030 and 63.16.080 are also indicative. These, in effect, abrogate the common-law fraudulent transfer rules as to pledges of accounts receivable and conditional sale contracts. The enactment of a corrective statute does not mean that lenders will permit borrowers to sell the collateral and pocket the proceeds. Accounting will continue to be required because it is sound business. The accounting details, which must otherwise be tailored to various technical demands the exact scope of which can only dimly be perceived, may under such a statute be tailored to the business situation.

95 On one theory or another, the preferred explanations being ostensible ownership, estoppel, or apparent authority, the buyer has usually prevailed despite the obvious implications of the filing system and the fact the mortgage in question was filed. Skilton, Cars for Sale: Some Comments on the Wholesale Financing of Automobiles, 1957 WIS. L. REV. 352, 400; Comment, Waiver of Chattel Mortgage Lien by Estoppel or by Implied Consent of Mortgagee, With Special Reference to Automobile Cases, 1 IDAHO L. J. (1931); Annot., Record of Chattel Mortgage on, or Conditional Sale of, Automobile or Other Chattel Put or Left in Hands of Dealer, as Constructive Notice, 136 A.L.R. 821 (1942). U.C.C. § 9-307(1) reads: "A buyer in ordinary course of business [§ 1-201(9)] other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence."
During the latter part of the nineteenth century, Japan moved rapidly from agrarian feudalism into the industrial age. The transition entailed heavy capital demands which were in the early stages largely met by the government. Thereafter an expanding banking system became an increasingly important source of credit both for operations and for expansion, although the Japanese Government continued to (and still does) provide some financing assistance of this kind. Heavy industry and public transportation were the first concern, with general manufacturing a close second. In recent years there has been much emphasis on consumer goods and on the export trade in general. It was inevitable that these economic changes would both increase the incidence and importance of movables and vastly expand the demand for credit. In a maturing economy the pledge cannot satisfy the need for personal property secured-credit simply because the debtor must retain possession in many of the transactions in which chattels are a factor. Severe pressures are accordingly put on the legal system for the creation of principles which permit security to be safely taken from a debtor who retains possession.

Civil Code article 175 and its limitations on the creation of real rights were discussed above. That article contemplates legislative expansion of real rights but the Japanese Diet did not enact such a statute for moveables until 1933. Long before then the Japanese business community was impelled by sheer necessity to devise a way in which to attain the needed ends in the many types of situations not encompassed by the Code. They have succeeded, through an ingenious adaptation of the civil law concept of “obligation” (contract). This development of jōto tampo will remind American lawyers of the development of analogous relationships in the common law, and is especially interesting because it has occurred in the interstices of a civil law code system. The adaptability of jōto tampo will remind an American lawyer of the facility with which a security interest under the U.C.C can be made to serve variant security needs.

The nuances of the legal theory which supports jōto tampo continue to engage the attention of Japanese scholars, who are far from being in agreement on some details. That the secured party acquires a legal

---

96 See the text accompanying note 78 supra. Concerning the special legislation for “estate” or “foundation” hypothecs (i.e., blanket hypothecs on enterprise assets) covering both immovables and some kinds of personalty, see note 122 infra.

97 The following discussion is limited to personal property transactions. Jōto tampo is not in either theory or practice so restricted. It can be used in real property security transactions.
relationship to the chattel is well enough established. Moreover, when the legal incidents are totted up, his interest is a great deal more like "title" than it is like a "lien" (to use the American terminology).

Under the more commonly accepted analysis his relationship to the collateral is the product of contract rather than of grant, and the quantum of his proprietary interest can be varied by contract terms. This is not a reasoning sequence through which an American lawyer can move with comfort. A conception of contract as a legally binding executory promise must be supplemented by more than equitable lien or equitable conversion ideas in order to achieve an end-result approximating jōto tampo.

Since it is an application of obligation theory to ownership, jōto tampo is inherently flexible. In various forms of documentation it serves in both security-transfer and security-retaining transactions. In one variety of the former the lender can take "general ownership" and achieve much the same position as an American lender would occupy if he received an absolute transfer for security and did not have to contend with the rule against clogging the equity of redemption.


99 The most emphatic manifestation of this idea is seen in Bankruptcy Law (Haksan) art. 88 (Law No. 71, 1922), which refers expressly to jōto tampo and denies the debtor's right to assert his title against the secured party's liquidator. The secured party has all of the powers ordinarily associated with "general ownership," although their assertion may in a particular situation be in violation of the agreement between the parties and be a legal wrong in the sense of breach of contract. There is no "fraudulent conveyance" theory or "equitable remedy" under Japanese law. See the discussion at notes 106, 113, 114, 119, 145, 153-59 infra.

100 WAGATSUMA, op. cit. supra note 79, at 228; YUNOKI, TAMPO BUKKENHO (Law of security interests) 389-91 (19 HORITSUGAKU ZENSHU ed. 1959); Hamagami, Jōto tampo in MINJI HOGAKU JITEN (Dictionary of civil jurisprudence) 979 (1960).

101 The Exhibits are examples of forms in current use. It will be noted that no form for a "strict" (as to "strict" see the text discussion following note 102) jōto tampo transaction of the chattel mortgage type is included. Transactions of that kind are uncommon. See Katō's report of a field investigation on jōto tampo in SHIHO ("Journal of Private Law") (No. 21) 190, 201 (1959). Notice too that appropriate differences in language characterize shoyaken ryūho (retained title) and trust receipt transactions from those of the chattel mortgage variety.

102 JONES, op. cit. supra note 69. The mortgagor's redemption right is discussed
PERSONAL PROPERTY AS COLLATERAL

The Japanese debtor cannot, however, expect any help from a chancellor and has only such solace as can be derived from the fact that he is not liable for a deficiency. In this type of *jōto tampo*, which may be referred to as “strict,” the debtor is personally liable on the obligation if the lender chooses to enforce it but as to the property, the lender has only a relationship analogous to an option. The lender must elect between asserting his ownership, or pursuing the personal obligation. Possessory rights are purportedly fixed by the agreement, which will usually provide for retention of the property by the debtor pending maturity of his obligation. Under an agreement like this the debtor is a baillee rather than an owner in possession. Bailments are in general governed by *Civil Code* article 662, which provides that a bailor can take back the goods at will even though there exists a bailment agreement fixing a term. Whether this article applies to *jōto tampo* transactions is debatable. Failure of the debtor to pay or tender at maturity terminates his right to re-acquire the property, as would failure to pay on the “law day” in the early period of Anglo-American mortgage law. Nothing in the way of realization procedures, judicial or otherwise, is needed by the lender in order to establish or clear his title. If the debtor does not surrender the property on demand he is a “converter” and vulnerable to damages or to a summary repossession remedy resembling the American replevin action.

The impact of the idea that the lender has “general ownership” is

---

103 Wagatsuma, *op. cit. supra* note 79, at 234; Shinozuka, *Jōto Tampo* 151–54 (17 Sogo Hanrei Kenkyu sosho mimpo ed. 1962). If he decides to retain the ownership in satisfaction of the debt, the decision is irrevocable. The document will have expressly recited that he can exercise such a power, and its exercise cannot be retracted. On the other hand, if he decides that he prefers to be paid, title does not revest in the debtor unless and until the obligation is actually discharged.

104 Concerning the duties of a debtor in possession, as to the goods, see the discussion of the comparable trust receipt situation in the text at note 149 infra. See also notes 150 and 151 infra, as to maintenance and preservation expenses. Arguably *Civil Code* art. 662, which is framed generally and was drafted with an eye to the usual bailment situation, is inappropriate in a security transaction in which the debtor becomes a bailee only because the severance of ownership and possession leads to this analysis. It can be argued with some force that the agreement ought to control rather than article 662. Cf. the discussion of a comparable land *jōto tampo* problem, Wagatsuma, *op. cit. supra* note 79, at 232; Shinozuka, *op. cit. supra* note 103, at 59, 60, 123–32. See also Kondo v. Yamada, 18 Minroku 815 (Sup. Ct., Oct. 7, 1912); Sonohara v. Matsuba, 12 Kakyii saibansho minji hanreishii [hereafter cited Kakyii minshii] 1416, 1425 (Sendai High Ct., Dec. 7, 1951).

105 In the early common-law period a mortgage conveyed title subject to defeasance on payment or tender. Failure to pay or tender on the law day ended the mortgagor’s title. Jones, *op. cit. supra* note 69, § 1.

106 Haraguchi v. Miyabe, 27 Minroku 570, 577 (Sup. Ct., March 23, 1921); Wagatsuma, *op. cit. supra* note 79, at 234; Yunoki, *op. cit. supra* note 98, at 399. In § 681. The evolution of the equitable principles which have ameliorated the early common-law mortgage rules is best seen in the real property area. They are discussed in Osborne, *op. cit. supra* note 65, §§ 6, 7.
most evident in contests between the debtor and third persons. The lender’s transferee who takes before the debtor defaults (whether or not a bona fide purchaser for value), his levying creditor, and his liquidator in bankruptcy, will take the property free from all proprietary, redemption, and contract rights of the debtor. A legal wrong is done the debtor if any of these contingencies develop, a wrong for which there is only a contract remedy for damages.\footnote{107}

A second and much more common variety of jōto tampo, which may for ease in reference be called “liberal,” comes a good deal closer to the incidents of a modern American mortgage. The parties may agree, explicitly or by inference, that the lender shall have a proprietary interest only for security purposes, i.e., he gets the ostensible or “external” ownership while the actual, beneficial, or “internal” ownership remains in the debtor.\footnote{108} The agreement will usually provide for repossession and sale of the collateral on default.\footnote{109} The sale can be either private or public and the lender can be a buyer; the lender must account for a surplus; and the debtor is liable for a deficiency.\footnote{110} The

\footnote{107} Such a wrongful disposition would be a breach of contract for which compensatory damages would be recoverable. Civil Code arts. 415, 416. Supreme Court decisions: Kobayashi v. Naruse, 10 Minshū 685, 689 (April 24, 1931); Satō v. Masaki, 27 Minroku 1024, 1026 (May 30, 1921); Kusayanagi v. Saitō, 26 Minroku 1028, 1032 (June 21, 1920). See also Shinomiya, op. cit. supra note 103, at 173-191; Wagatsuma, op. cit. supra note 79, at 234; Yunoki, op. cit. supra note 98, at 399; Hamagami, supra note 98, at 980, and the text accompanying notes 100 supra and 139 infra.

\footnote{108} Nagata v. Takahashi, 12 Minshū 667, 772 (Sup. Ct., April 26, 1933). The idea that external and internal ownership can be severed in this way runs counter to basic property concepts and is accordingly a debatable rationale. Wagatsuma, op. cit. supra note 79, at 228; Hamagami, supra note 98, at 980. It seems preferable to acknowledge the existence of identical ownership relations in both types of jōto tampo and to attribute the differences in their operation solely to differences in the terms of the security agreements. Wagatsuma, op. cit. supra at 228, 235; Yunoki, op. cit. supra note 98, at 395. See also on this detail the Supreme Court decision cited above.

\footnote{109} Even if an express provision to this effect is not included, a liberal jōto tampo agreement will produce the same result by interpretation. Yasuda v. Fukumishī, 21 Minroku 174 (Sup. Ct., Feb. 22, 1915); Sugita v. Kawabe, 5 Kōto saibansho minji hanreishī 618, 623 (Osaka High Ct., March 26, 1952); Shinomiya, op. cit. supra note 103, at 164-66; Wagatsuma, op. cit. supra note 79, at 233. Repossession before maturity may not be a legal wrong. Civil Code art. 692, previously mentioned in connection with strict jōto tampo, may operate also in the instance of liberal jōto tampo to give the lender, as a baior, a right to retake the collateral despite a contract agreement. (But see the text accompanying note 104 supra.) Sale as owner, before the debtor’s default, is a legal wrong. See the text accompanying notes 107 supra and 139 infra.

\footnote{110} Supreme Court decisions: Toyoyama v. Ishikawa, 27 Minroku 475, 480 (March 5, 1921); Kusayanagi v. Saitō, 26 Minroku 1028, 1032 (June 21, 1920); Muratan v. Shiraishi, 26 Minroku 1373, 1378 (July 9, 1919). Wagatsuma, op. cit. supra note 79, at 233; Yunoki, op. cit. supra note 98, at 398; Hamagami, supra note 98, at 980. A jōto tampo clause authorizing sale after default merely declares a right which the lender would have anyway, as a matter of law. Since the lender already has the “ownership,” the idea of a sale to himself presents serious theoretic problems. Japanese scholars prefer to describe the process by which the lender excludes the debtor without
lender's interest ends if the debtor pays or tenders his obligation prior to sale, and disputes about the fact of default can be brought to issue by the debtor in litigation which resembles an American redemption action. When it comes to contests between the debtor and third persons, however, there is no difference between liberal and strict jōto tampō. The debtor will lose to the types of persons referred to at note 107 above.

The problems created by a severance of title and possession are well-known to American lawyers. In both types of jōto tampō there is a considerable risk of conflict between the lender and persons who deal with a debtor left in possession. In Anglo-American jurisprudence solutions were first found in common-law fraudulent conveyance principles, the gist of which is that a mortgagee who leaves his mortgagor in possession may lose the property to a levying creditor or liquidator of, or a bona fide purchaser from, the mortgagor. From this base point the development in England and the United States has been along the general line drawn by statutes which permit the mortgagee to accomplish public notice through filing with a public official, in lieu of taking possession. Nothing comparable to the indicated fraudulent conveyance rule has evolved in Japan for the protection of creditors nor has any filing statute applicable to jōto tampō been enacted. The lender will prevail in a contest with a levying creditor of the debtor and can remove the property from the debtor's estate in bankruptcy. If, however, the debtor sells the collateral to a bona fide purchaser the lender cannot recover it. The reason lies in a basic Japanese legal principle which protects any purchaser who takes in good faith and without negligence from a person in possession. A subsequent taker...
of security, whether by pledge or jōto tampo, qualifies as a "purchaser" for this purpose.

That Japanese law should have worked out to this end-result as to a debtor's general creditors is anomalous. A policy of protection against secret interests is apparent in the limitations on real rights which are implicit in Civil Code article 175,\(^\text{116}\) in the filing provisions of the special hypothec statutes enacted by the Japanese Diet,\(^\text{117}\) and in the rule which protects a bona fide purchaser. Yet even now, when the expanding volume of jōto tampo transactions has emphasized the risks to persons who extend unsecured credit to the debtor, the wisdom of requiring public notice for this type of security is a curiously controversial topic.\(^\text{118}\)

Jōto tampo is evidently not a perfect security device. It has aspects which will probably impress an American lawyer as archaic and quite inadequate for an advanced economy such as that of Japan. Nor is it passing unscathed through the crucible of scholarly scrutiny in Japan.

Proponents of a conception of jōto tampo which would produce results more closely analogous to those now reached under a mortgage in a lien-theory American jurisdiction have been encouraged by a recent tax statute which enables the Japanese Government to seize the known to him which would indicate the possibility of a defect in the seller's interest, he may well be found by a court to have been negligent. In the case of wrongful sale by the debtor the lender has the remedies of a bailor. He can reach identifiable non-cash "replacement things" (i.e., proceeds) on a theory of subrogation.

\(^\text{116}\) See the text accompanying note 75 supra. Although Civil Code art. 178 provides that transfers of real rights relating to movables cannot be set up against third persons unless the movables are delivered, the force of this provision is virtually destroyed by article 181, which permits possession by proxy. An argument therefore that the policy behind article 178 demands subordination of the lender in jōto tampo transactions to persons who deal with the debtor would accomplish nothing, even were the court persuaded that the lender was intended to receive a kind of real right. It is of some interest that the Japanese law relating to immovables closely approximates modern American land law insofar as third-party protection is concerned. Civil Code art. 177 states that the acquisition, loss, or alteration of real rights in immovables cannot be set up against third persons unless the holder conforms to the demands of the registration law.

\(^\text{117}\) These statutes are cited in note 78 supra and discussed infra at notes 124, 125. They require filing.

\(^\text{118}\) See the statements of Professors Wagatsuma, Hoshino, and Ishii in the Symposium, Jōto tampo, Shīroku ("Journal of Private Law") (No. 22) 16, 37, 38 (1960); and Harashima, supra note 79, at 1488. Particularly interesting is the suggestion of Professor Wagatsuma that commercial needs would be best served by a jōto tampo system of filing which would operate in terms of debtor-identification rather than in terms of identification of specific property. Such a statute would closely resemble the filing provisions of the Uniform Trust Receipts Act and the U.C.C. The broad familiarity of Japanese scholars, lawyers, and businessmen with the objectives, advantages, and drawbacks of public notice legislation in both civil law and common law countries will make the endeavor to achieve the very best type of statute well worth American observation, if the Japanese Diet reaches the point of considering a jōto tampo filing system.
property in satisfaction of the debtor’s unpaid taxes, to the exclusion of the lender, where the due date of the tax precedes the security transaction.\textsuperscript{119} There is not, however, as of this writing any indication that \textit{jōto tampo} will receive further legislative attention.

In some particulars, notably in future property and future advance financing, \textit{jōto tampo} theory readily leads to logical and desirable results. Future specific property has occasioned little theoretic or practical difficulty. \textit{Jōto tampo} can as a contract operate to create the contemplated general or external ownership in property to be subsequently acquired, when it is acquired, provided the thing can be specifically identified in the contract.\textsuperscript{120} Future assets which cannot be identified, including asset pools such as inventory, have been a good deal more troublesome. Read literally, \textit{Civil Code} article 85, which defines “things” as \textit{yūtaibutsu}, i.e., “material” or “corporeal,” demands that transfer purpose operate on specific things or not at all. In other words, an attempt to create a floating lien in inventory may theoret-

\textsuperscript{119} Although it may be doubted that the Japanese Diet was motivated by other than a desire to foster the collection of taxes, \textit{National Tax Collection Law (Kokuzei chōshihō)} art. 24 (Law No. 147, 1959) has been seen by some Japanese scholars as affecting the theory of \textit{jōto tampo} and as a move toward general recognition of the security-holder’s proprietary interest as only a security interest. See the report of Professor Mikazuki, in the symposium cited supra note 118 at 2-13. In evaluating legislative attitudes, however, it may be noted that \textit{Bankruptcy Law} art. 68, supra note 99, remains unchanged and is of course quite incompatible with any analysis of \textit{jōto tampo} as vesting only a “lien” or “security interest” in the security holder. See the statement of Professor Yunoki in the symposium cited supra note 118 at 19, and the statement of Professor Nakagawa in the same symposium at 24. See also \textit{Yunoki, op. cit. supra} note 98, at 402-04. Meanwhile, apropos of the tax statute, procedures relative to tax receipts and public notice of tax liens which are well known to American lawyers are evidently necessary for the protection of the security holder. Japanese lenders, and particularly banks, have not so far adjusted their practices to conform with the new tax statute with the unanimity which would be expectable. The statute also emphasizes a kind of dispute which is familiar to American lawyers, viz., whether a transfer absolute on its face is in actuality for security. See the statement of Professor Yunoki in the symposium cited supra note 118 at 19.

Another area in which disagreement about the proper theoretical analysis of \textit{jōto tampo} occurs is in the operation of the \textit{Corporate Reorganization Law (Kaisha kōséihō)} art. 123 (Law No. 172, 1952). That statute, as does the comparable American legislation, \textit{Federal Bankruptcy Act} § 116(4), 52 Stat. 883 (1938), 11 U.S.C. 516(4) (1958), permits the stay of realization steps by secured creditors. The specific reference in the Japanese statute is to hypothecs and rights of preference. Some lenders have sought to avoid its possible applicability by using \textit{jōto tampo}. See the statement of Professor Kawamoto in the symposium cited supra note 118 at 31. The predominant scholarly opinion is that the maneuver is theoretically sound, however practically objectionable it may be; there is, however, some contrary opinion. See the statement of Mr. Ishida, supra note 118, at 28.

\textsuperscript{120} The “intention” principle in the transfer of real rights supports this conclusion. See \textit{Civil Code} arts. 176, 183.
ically fail as to the future goods for lack of subject matter. Despite the theoretic problems, security transactions of this kind were occasionally used before 1955, primarily because there was no other practicable way in which to handle some kinds of financing. An important breakthrough came in that year in an Osaka District Court case sustaining such a *jōto tamпо* transaction. The floating-lien type of security in inventory may in the future become increasingly common.

Something of the economic and legal pressures operating in the general area of the Japanese floating lien can also be observed in the Enterprise Hypothecation Law. This statute authorizes the creation of a blanket hypothec on all of the assets of a borrower, for the security of a bond issue. Public notice is required and takes the form of a notation in the corporation registry maintained by the Bureau of

121 Kishimoto Shōten v. Mori Denki Kōgyō, 6 Kakyū minshū 2559 (Dec. 6, 1955), HANREI JIHO (No. 67) 16 (1956). This case involved inventory stored in a warehouse owned by the debtor. The *jōto tamпо* was created to secure a seller’s present and future credit sales and contained a cross-tie provision which made all of the collateral security for all of the debtor’s obligations. The debtor was authorized to sell the goods in the ordinary course of business. He was required to account for ten percent of proceeds and to replace the goods sold. The debtor defaulted and the seller sued to obtain possession of the collateral. The debtor defended, asserting the *jōto tamпо* to be void because the subject matter was not specified when the agreement was made. This defense was not successful. Said the court: “Where a debtor establishes *jōto tamпо* on the whole of his inventory, the content of which is always changing, it would be against the parties’ intention to break up ‘inventory’ into its component small pieces. Since the inventory as a whole can be taken as having an independent economic value apart from its parts, in the present economic environment, it must be possible under our law to take ownership in the whole for security, recognizing it to be one independent thing (especially in this case, where the warehouse is independent from the debtor’s other assets and all of the inventory in that warehouse was covered by the agreement). Therefore, we hold that the *jōto tamпо* of the inventory as a whole is a contract to transfer ownership of one thing as security.”

Particularly interesting in the court’s decision is the combination of two ideas—inventory can be owned as a whole although individual component goods can be separately owned. The former provides the theoretic base on which Civil Code art. 85 is deemed to be satisfied, with the latter sustains sales of individual units by the debtor. Favorable comments on the case are: SHINOMIYA, op. cit. supra note 102 at 251-55; BRAUCHER & MICHIDA, 2 AMERIKA SHOTORIKIHO TO NIHON MINSHOHO (“American Law on Commercial Transactions and the Japanese Civil and Commercial Codes”) 484-86 (1961); Hasebe, *Shōhin no jōto tamпо o meguru hōritsu mondai* (Legal problems of *jōto tamпо* on merchandise), KINYU HOMU JIJO (No. 96) (1955); Itō, *Shōgōbutsu no jōto tamпо ni tsuite* (*jōto tamпо* on group assets), KINYU HOMU JIJO (No. 116) (1956). The court’s analysis is one which Professor Wagatsuma has advocated. He argues that so long as an assemblage of goods has an independent economic value there is no reason why it should not be treated as one thing under the law. Wagatsuma, *Shōgōbutsu* (Group assets) in HōritsuGaku Jiten (Dictionary of jurisprudence) 1231 (1935); WAGATSUMA, DOSAN TEITO SENDO (Chattel mortgage system) 61-65 (1957); WAGATSUMA, MIMO SOSOKU (General principles of civil law) 178-80 (1 MIMO KOJI ed. 1955). Also see Kai, *Shōgōbutsu* (Group assets) in MINJI HOGAKU JITEN (Dictionary of civil jurisprudence) 872 (1960).

The court’s emphasis on the fact that all of the goods in the warehouse were covered by the *jōto tamпо* suggests that it might not be possible to take security in an unsegregated part of inventory, even if the obvious description difficulty could be overcome.
Judicial Affairs to the effect that a hypothec has been created in all of the corporate enterprise. There is no public notice as to individual assets. Presumably there was a need for this kind of financing and the wisdom of preserving the going-concern value of the debtor dictated coverage of all assets as of any given point in time—including assets acquired after the hypothec was given. The Japanese Diet went on, however, to subordinate the security of the bond holders to subsequent transactions in which specific collateral was taken by other lenders. The limitation, which apparently stemmed from an unwillingness to sustain fully the security in an asset pool, has effectively discouraged use of hypothecs of this kind, save for borrowers of exceptional financial stature.

Future advances are critical in a floating lien transaction, and are often important in other types of financing. Jōto tampo future advance clauses present no legal problems in Japan.  

122 Enterprise Hypothecation Law (Kigyō tampo) (Law No. 106, 1958) in 2 EHS No. 2198. As to the background of this statute and the prospects for analogous future legislation, see Michida, The Legal Structure for Economic Enterprise: Some Aspects of Japanese Commercial Law in Law in Japan 528-30 (Von Mehren ed. 1963); Yunoki, op. cit. supra note 98, at 377-85; Mizushima, Kigyō tampo (Enterprise security) in Minji hōgaku iten (Dictionary of civil jurisprudence) 318 (1960). This was the first Japanese statute in which the "floating lien" idea was adopted. Its conception of public notice in terms of the overall enterprise is unusual in Japan. Although an "estate" or "foundation" hypothec (saiman teto) covering both land and personality has been made possible in several situations by special statutes providing for blanket hypothecs, enacted after 1905 and designed to promote the development of Japanese industry, these statutes have approached the problem of public notice in terms of individual assets. The lender must "register," i.e., file with the relevant administrative office, a document which lists the individual items of property. Omissions and errors in the enumeration will enable third persons to defeat the lender’s security interest in the affected assets. Where the registration is properly accomplished, the lender can recover personally from a bona fide purchaser who took from the debtor. This right, which a lender does not have in a jōto tampo transaction (see the text accompanying note 115 supra), is of course explained by the fact that registration and the notice given by it changes the basic position of purchasers. Another striking feature of saiman teto is the inclusion in the enabling statutes of provisions prohibiting alienation of the encumbered assets by the debtor, even for business purposes.

The saiman teto statutes currently operative are: Factory Hypothecation Law (Kajō teto) (Law No. 54, 1905); Railway Hypothecation Law (Tetsudō teto) (Law No. 53, 1905); Mining Hypothecation Law (Kōgyō teto) (Law No. 55, 1905); Canal Law (Ungahō) art. 13 (Law No. 16, 1913); Fishery Estate Hypothecation Law (Gyogyō saidan teto) (Law No. 9, 1925); Road Transport Business Activities Law (Kōsha unsō jigyō teto) arts. 23-28 (Law No. 161, 1951); and Small-Gauge Railway Hypothecation Law (Kidō no teto ni kansuru hōritsu) (Law No. 28, 1909). 2 EHS 2160-series. For discussions of these statutes, see Wagatsuma, op. cit. supra note 79, at 209-16; Yunoki, op. cit. supra note 98, at 366-77; Michida, supra at 524-28. These writers call attention to the fact that the saiman teto legislation is not accomplishing its intended purpose. The statutes are not often used and a major factor in their disuse is the very burdensome registration demand made by them. Also see Katō, supra note 101, at 196.

123 Shinomiya, op. cit. supra note 103, at 81, 82. Katō, supra note 101, at 191. So long as the security agreement provides for the loans which were in fact made, the
Beginning in 1933 the Japanese Diet has enacted several statutes which authorize the creation of hypothecs in specified types of movables, viz., farmers' equipment, motor vehicles, airplanes, and construction machinery. These special statutes follow the general scheme of the Civil Code provisions dealing with hypothecs of immovables, both as to public notice and as to remedies.

Registration is required, and in a very burdensome way. The amount and maturity of the debt, and the rate of interest, must be stated. A separate registration certificate must be prepared and filed for each chattel. A general notice phrased in terms of "all the collateral" of a particular kind or type cannot be used, even in the instance of farm equipment as to which it would be particularly helpful. Failure to satisfy the registration demands means vulnerability to levying creditors of the debtor, to his trustee in bankruptcy, and to his bona fide transferee. In the case of farmers' equipment, the lender loses to a bona fide taker from the debtor even though registration has been accomplished, probably because a hypothec of this type often covers small items as to which the burden of a record check would be excessive.

The remedy imposed on the lender by these statutes is the procedure provided by the Public Sales Law, which was discussed above at note 53 and which is far from an ideal realization method.

Although sound enough in its objectives, the hypothec legislation for movables has not been a success. The main reason for its failure is the registration requirement. Particularly objectionable is the demand for the disclosure of interest rates and other debt details. Japanese businessmen regard this information as confidential, as do many of their opposite numbers in the United States.

Both because of the specialized nature of the transactions which are covered, and because the hypothec statutes are not being used even where they are available, this legislation has not displaced jōto tampo to any significant degree.

lender's security interest as against both the debtor and third persons is not vulnerable even though the advances were "optional" rather than "mandatory."

124 The official statutory references are indicated in note 78 supra. These statutes are discussed in Wagatsuma, op. cit. supra note 79, at 216-19; Yunoki, op. cit. supra note 98, at 360-62. Commercial Code art. 848 provides for hypothecs in vessels but vessels are treated under Japanese law as a type of immovable and are hence outside the scope of this paper.

125 Although an amount must be stated, the figure which appears in the registration notice need not be the sum then actually loaned. It can be a ceiling amount, as in the instance of a future advance transaction. See Yunoki, op. cit. supra note 98, at 215-29.
Trust Receipts*

The Uniform Trust Receipts Act is the context in which the American law governing this type of security will be examined. As to goods, it requires delivery to the borrower ("trustee") from either the lender ("entruster") or a third person. The delivery must be pursuant to a financing arrangement which is restricted both in type and purpose. Various other details, including public notice requirements, are closely regulated. This is a carefully drafted statute specifically designed to facilitate the movement of goods in the channels of commerce.

*The authors acknowledge their thanks to Professor Sadatarō Ikegaki, Law Faculty, Kansai University, for his suggestions and assistance in preparing the material on trust receipts.

128 Under the U.C.C. a trust receipt has no special legal characteristics. The common-law trust receipt has no significant commercial utility in the United States. The American common law of trust receipts provides an interesting case history of an attempt to develop a new and sui generis type of security. As the device gained some currency in the United States during the early nineteen-twenties, it came increasingly into litigation in which the key issue was the applicability of a chattel mortgage filing statute. The documentation typically moved title from a seller of goods to a financing lender while possession went to the buyer-borrower purportedly as a trust for the lender. The borrower was usually authorized to sell or process the goods and was obliged to account carefully for them or their proceeds. Freedom from both the filing system and from chattel mortgage foreclosure statutes was part of the draftsman’s objective. Courts in increasing numbers saw a concealed chattel mortgage. The common law trust receipt appeared headed for oblivion when the Uniform Trust Receipts Act was promulgated in 1933. See: the text accompanying notes 71, 72 supra; JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 33c, d, e (6th ed. 1933); Frederick, The Trust Receipt as Security, 22 COLUM. L. REV. 395, 546 (1922); Hanna, Trust Receipts, 29 COLUM. L. REV. 545 (1929); Bacon, A Trust Receipt Transaction, 5 FORDHAM L. REV. 17, 240 (1936); Annot., 49 A.L.R. 282 (1927); Supp. 87 A.L.R. 302 (1933), 101 A.L.R. 454 (1936), 168 A.L.R. 359 (1947).

127 A statutory trust receipt cannot be used by a seller to finance his own sale, or by anyone to secure an old debt not incurred in connection with the financing of the same goods, or to secure future advances. In the instance of goods, the financing must be for the purpose of "manufacturing or processing the goods delivered or covered by the documents, with the purpose of ultimate sale, or for the purpose of loading, unloading, storing, shipping, trans-shipping, or otherwise dealing with them in a manner preliminary to or necessary to their sale." Sections 1, 2(1), 2(2), 14.

128 The trust receipt must be in writing. Sections 2(1) (c) (i), 2(2). The entruster’s remedies are basically those of a pledgee. The time and method of sale are specified in the statute. Section 6. The public notice demands of the Act are simple. A short form stating that the parties contemplate trust receipt financing involving an indicated type of personalty is filed with a state official. This notice may be filed before any trust receipt has been executed. Section 13. The entruster is protected against the trustee’s creditors for thirty days without filing but is thereafter vulnerable to a lien creditor unless he files. Section 8. The entruster who does not file may lose the property to a buyer not in ordinary course but will prevail over such a buyer if there be filing. Section 9(2) (b). A buyer in ordinary course of trade takes free of the entruster’s interest, even though there be filing and even though the trust receipt forbids sale. Section 9(2) (a). The entruster’s rights in proceeds are spelled out with care. Section 10. Concerning the operation of these provisions, see Bacon, supra note 126, at 240 et seq.; McGOWAN, TRUST RECEIPTS (1946). The usual trust receipt document requires gross accounting by the debtor-trustee and hence presents no dominant and control problem. Processing of the type which destroys the identity of the collateral can raise questions for which there are no clear-cut answers. A transaction involving this type of collateral may require a security arrangement in which a trust receipt is used, if at all, in conjunction with another type of security.
merce on a secured basis. In part its purpose is to provide answers for some of the problems which plague users of mortgages in similar business situations. Especially important are the entruster’s legal interest in proceeds and the assurance with which he can pre-file (i.e., file ahead of a loan and a security transaction). The simplicity of the document which goes to file is a further safeguard. It has few technical details either in content or execution and leaves little opportunity for the draftsman to make mistakes. These advantages are coupled to flexible remedies. It is accordingly understandable that trust receipts have gained wide use in domestic trade, especially in the financing of the incoming inventory of automobile and appliance dealers, while continuing to play an important part in the import trade. Experience has been favorable in terms of disputes and litigation, favorable enough in fact to induce several legislatures to broaden the permitted range of financing to encompass certain types of goods which have previously been delivered to the borrower.129

In Japan, the adaptability inherent in the concept of jōto tampo as essentially contractual has permitted the development of a security arrangement (torasuto reshiito) which resembles the American statutory trust receipt.130 This device is used only in import transactions and as a second stage in a financing sequence which commences with a letter to credit.

In a typical Japanese letter of credit, the beneficiary is a foreign seller of goods to be shipped under a negotiable title document. The customer (importer) enters into an agreement with the issuer which recites that the issuer shall be the owner of documents and goods, as collateral security, with a power of sale. It is understood that the issuer must account for any surplus and that the customer is liable for any

---

129 The uniform act has generated a surprisingly modest amount of appellate litigation. A few lenders have got into trouble by attempting to use trust receipts without meeting the demand for delivery as part of the financing. *In re* Chappell, 77 F. Supp. 573 (1948); *In re* San Clemente Electric Supply, 101 F. Supp. 252 (1951). The opinion in the former case suggests an unnecessary and unfortunate limitation of the trust receipt to “acquisition” financing. The limitation would bar use of the trust receipt as a second stage of a transaction which starts as a pledge of warehouse receipts and of the goods they control. The Act contains no such limitation. The 1957 amendment of REV. CODE WASH. § 61.20.020, discussed in Shattuck, *Security Transactions, Washington Legislation—1957*, 32 WASH. L. REV. 208 (1957), is typical of several in its authorization of trust receipts in goods previously delivered to the debtor. It covers motor vehicles as do several similar statutes. It also covers house trailers, boats, aircraft, and farm machinery.

130 Izawa, Shogyo shinyojo ron (Commercial letters of credit) 638 (1958); Hamada, Nigawase (Documentary drafts) in Minji hogaku jiten (Dictionary of civil jurisprudence) 1571 (1960); Kosaka, Boeki jitsumu (Trading business) 335 (1962); Ishida, Boeki shoku ron (Trading business) 402 (1960).
It seems reasonably clear that the "ownership" of the issuer is intended to be for security and "external" rather than "general," and that the "internal" ownership is intended to reside in the customer-debtor. Possession of the documents means possessory control both of documents and goods, and the correct analysis of the issuer's security interest (after receiving the documents) is far from obvious. Ownership in the issuer is incompatible with pledge. The combination of debt and external ownership in the issuer for security points toward jōto tampo of the liberal variety and this is probably the expectable judicial classification, although the transaction deviates from the jōto tampo norm in that the issuer also has possessory control. In jurisdictions which do not have the U.C.C. an American issuer's security interest presents a similar analytic problem.

An issuer which has honored a letter of credit will often be willing to defer reimbursement by the customer until the goods have been processed or sold, provided ample security in the goods can be given. At this point a Japanese issuer (which will always be a bank) might take a chattel-mortgage type of jōto tampo. For reasons which are not clearly determinable, banks have chosen instead to use security agreements which approximate in wording a typical American trust receipt. The forms used are entitled "trust receipt" and that term has become a part of the Japanese nomenclature. The agreement refers to the collateral which the bank already has as an issuer, states that the bank shall remain the "owner" of the collateral, and incorporates the letter of credit indemnity agreements as to details (such as remedies provisions) which are not otherwise covered. Standing alone, these recitals

132 Izawa, op. cit. supra note 130, at 541, 544; Hamada, Nigawase (Documentary drafts) 133, 165, 193, 194 (3 Sogo Hanrei Kenkyu Sosho Shoho ed. 1961); Waga-Tsuma, Kindai Ho niokeru saiken no yuetsu ki chii (Superior position of obligations in modern law) 139 (1962). The typical American trust receipt document recites that the issuer shall be the "owner" of the documents and goods. It is assumed, however, by banks and their customers that the legal relations are those of pledge. There appears to be no decisive case authority clarifying the situation. Shattuck & Guernsey, Letters of Credit—A Comparison of Article 5 of the Uniform Commercial Code and the Washington Practice, 37 WASH. L. REV. 500, 533, nn. 126, 129, 536 (1962). U.C.C. § 9-102(1)(a) states the coverage of secured transactions in personally so broadly as to include the interest of an issuer. Compliance is, however, no problem. Where possession is taken, no other formality is requisite to accomplishing a security interest. Section 9-203(1), (2). Possession of negotiable documents perfects the secured party's interest in both documents and the goods represented by them. Sections 9-304(2), 9-305.

133 See Exhibits 3 and 4. The bank's interest is not imperilled as to the debtor's creditors when the debtor takes possession under a trust receipt. See the discussion, Izawa, op. cit. supra note 130, at 538 et seq.
would provide little ground for disputes about theory. An agreement, an obligation to be secured, and ownership in the bank for security are the basic elements of *jöto tampo*.' The Japanese form, however, goes on to recite that the debtor holds possession of and may sell the collateral as "agent" for the bank. This language, which was apparently taken from the forms used by some early American entrusters, departs both from the modern American recital of a holding in trust by the debtor, and from the chattel-mortgage type of *jöto tampo*. It has accordingly complicated the analysis of the over-all legal relations between the parties and has occasioned discussion among Japanese scholars concerning the proper classification of the transaction. The consensus now is that these are instances of *jöto tampo*, because the essence of the intended relationship is security rather than agency. Since the agreement contemplates sale of the collateral for the benefit of both parties as the bank's remedy if the debtor defaults, this is a liberal variety of *jöto tampo*.

Although a trust receipt as currently used in Japan is a secondary stage of acquisition financing in which the debtor neither has nor has ever had title to the goods, for the purpose of sale, transportation, or storage, these details reflect business rather than legal criteria. In notable contrast with the restricted and technical elements of the American trust receipt, there is no legal demand that there be "delivery" of the goods to the trustee as part of the financing, nor that the financing shall be for acquisition of the goods, nor that the financing shall be for any particular kind of purpose.

The fact that this device is used exclusively in import transactions likewise reflects business rather than legal considerations. In domestic trade, the great bulk of inventory moves to the buyer on open account.

---

134 Wagatsuma, Tambo Bukkenho (Law of security interests) 230, 231 (3 Minpo kogy ed. 1955); Yunoki, op. cit. supra note 98, at 400. The fact that the bank's "ownership" came to it from a third person rather than from the debtor does not affect the analysis.

135 Sale by the debtor is commonly (but not always) authorized. Cf. para. 2, Exhibits 3 and 4. Transshipment and storage are routine purposes. Processing, as in the case of raw materials, is not ordinarily within the contemplation of Japanese users of trust receipts. Some raw materials which have been imported by manufacturers under letters of credit are released by issuers, on trust receipts, but without expectation that the bank can after processing enforce a security interest against the things into which the raw materials have gone. See the discussion at note 145 infra.

136 Izawa, op. cit. supra note 130, at 640-45; Wagatsuma, op. cit. supra note 134, at 231.

137 Izawa, op. cit. supra note 130, at 639-42. Existing inventory can theoretically be taken as collateral under a trust receipt. A simple recital that the bank has title suffices to create the necessary security ownership. Issues about "delivery" cannot arise. Concerning comparable U.S. developments, see note 129 supra.
If security is required, "jōto tampo" of the title-retaining or chattel-mortgage type is used, not because a trust receipt would not be legally effective but because the practice has developed this way.\(^{138}\)

Thanks to the absence of an inhibiting legal straightjacket, the Japanese trust receipt is a very flexible security device. Much of the same kind of flexibility is possible under the U.C.C., which makes but limited formal and technical demands for the creation of security interests. Documents labelled "trust receipt" and worded as before continue to be used in U.C.C. states in the business situations in which trust receipts were previously used. Precisely the same legal results would, of course, be achieved under a document bearing some other label and containing no language about a "trust."

When the trust receipt stage of a financing transaction is reached, a Japanese debtor's obligation will be embodied in a promissory note. Pending its maturity the bank has the power to convey the goods to another (as is indicated below at note 153) but not the right to do so. Such a sale is a legal wrong for which the debtor can recover damages.\(^{139}\) Where a trust receipt follows a letter of credit, the debtor's note will replace and supersede his duty to reimburse under the letter of credit.\(^{140}\) When the note falls due, non-payment will be a default for which the bank's remedy against the collateral will be under the trust receipt. The bank can sell the goods at public or private sale without notice to the debtor, and can be a buyer.\(^{141}\) The debtor is entitled to a surplus and is liable for a deficiency.\(^{142}\) Suit on the debt is an alternative remedy in the first instance. Until the bank sells, the debtor can redeem.\(^{143}\)

Theoretically it would be possible for the parties to provide in the trust receipt that on default the bank could become the absolute owner by so electing (i.e., the parties could create "strict" jōto tampo).\(^{144}\) This is not, however, the practice.

Normal property principles operate to give the bank the ownership

\(^{138}\) At this time it seems unlikely that the agency provisions which are the distinguishing characteristics of a Japanese trust receipt will be deemed desirable or necessary in domestic trade situations.\(^{139}\) Izawa, op. cit. supra note 130, at 638, 648. See the discussion at note 107 supra.\(^{140}\) As to the reimbursement obligation of the customer in a letter of credit transaction see para. 4, Exhibit 5, Izawa, Sono & Shattuck, supra note 131, at 214.\(^{141}\) Izawa, op. cit. supra note 130, at 647. See the text accompanying note 110 supra.\(^{142}\) Izawa, op. cit. supra note 130, at 643, 647. Also see the text accompanying note 110 supra.\(^{143}\) Izawa, op. cit. supra note 130, at 647. Also see the text accompanying note 111 supra.\(^{144}\) Izawa, op. cit. supra note 130, at 647; Wagatsuma, op. cit. supra note 134, at 234; Hamagami, supra note 98 at 980. See the text accompanying note 103 supra.
of things which become part of the goods by accession and agency principles regulate its relation to proceeds. A debtor who holds and sells does so as agent and hence as a fiduciary. Proceeds and things acquired with proceeds (such as replacement goods) are therefore held in trust for the bank. The usual trust receipt requires the debtor to maintain insurance with loss payable to the bank. Even without such a provision the bank would have a measure of protection. It could

---

145 Izawa, op. cit. supra note 130, at 643; Yunoki, op. cit. supra note 98, at 396. Also of interest are some principles akin to the American doctrines of accession by added labor, confusion, and merger. Adjunction (fugō) occurs where two or more material things are joined together so as to make up a single entity. If movables belonging to different owners are so joined that they cannot be separated without damage, or if the separation would entail disproportionate expense, the ownership of the composite thing vests in the owner of the principal movable. Civil Code art. 243. Which is the principal and which is the accessory thing must normally be determined by the nature of the things rather than by their respective values. If this standard proves to be unworkable, the parties become joint owners, in proportions measured by the values of the parts contributed. Civil Code art. 244. Mixture (konda) occurs when dry things such as grain (kongo) or liquids (yūwa) are combined. When things belonging to different owners are mixed, Civil Code art. 245 provides that article 243 governs if there be principal and accessory things, and article 244 governs otherwise. Application of work (kakō) occurs where a movable is transformed by labor into a different or more valuable thing. Usually, the owner of the original movable owns the final form, but if the value of the work greatly exceeds the value of the material, the workman owns it. Civil Code art. 246(1). If the workman supplies part of the material, he owns the final form of the thing where the value of the work and the value of his material exceeds the value of the other material. Civil Code art. 246(2).

(Professor Wagatsuma deems these adjunction provisions to be variable by agreement; Wagatsuma, op. cit. supra note 132, at 161-63.) Article 248 provides that a person who suffers loss in the application of the foregoing principles can claim compensation under articles 703 and 704, which deal with unjust enrichment. A person who in bad faith brings about adjunction, mixture, or the application of work is liable to restore the benefit received with interest and pay damages. A person who acted in good faith is liable to make restitution only for the actual increment received.

146 Izawa, op. cit. supra note 130, at 644. See also Wagatsuma, op. cit. supra note 134, at 231; Shinomiya, op. cit. supra note 103, at 249; Hamagami, supra note 98 at 980. The relationships discussed at note 145 may be of interest in connection with proceeds. If the bank cannot trace and identify the proceeds the trust will of course fail, as is true in the United States. There appears to be no alternative theory or analysis which will aid the bank as to unidentifiable proceeds. Japanese law has no principle comparable to U.C.C. § 9-306(4) and Uniform Trust Receipts Act § 10, which purport to create a limited preferential position in the estate of an insolvent debtor, for a claimant who has a right to proceeds but cannot identify them. Whether § 10 of the Trust Receipts Act is operative in proceedings under the Federal Bankruptcy Act is mooted; there are conflicting decisions. Cf. In re Harpeth Motors, 135 F. Supp. 862 (1955), noted 69 Harv. L. Rev. 1343 (1956), and In re Crosstown Motors, Inc., 272 F.2d 224 (1959), noted 58 Mich. L. Rev. 783 (1960). See also note 163 infra. Civil Code art. 304 may pose a further problem. This article provides that a holder of a charging lien (sakitoritokken) must impress his interest on unidentifiable proceeds before they reach the debtor. (Although the article refers to "money or other things" it is the consensus of scholars that it is aimed at unidentifiable assets.) Whether article 304 states a basic principle which will apply to other types of security, such as jōto tampo, is not clear. Yunoki, op. cit. supra note 98, at 397. Especially debatable is the application of article 304 to trust receipts, in which the debtor occupies a representative capacity.

Concerning the bank's relation to persons who acquire proceeds from the debtor, see the discussion at note 161 infra.

147 Para. 8, Exhibit infra.
reach the proceeds of any insurance taken by the debtor, as a substitute collateral.\textsuperscript{148}

Possession of the goods by the debtor is so much an integral part of a trust receipt transaction that an agreement which lacked this element would not as a matter of definition be a trust receipt. From the debtor’s point of view, the objective of the financing is that he shall obtain the goods in order that they can be sold, either currently or after processing or a period of storage.

In legal analysis, however, the possessory part of the transaction is a bailment governed by the \textit{Civil} and \textit{Commercial Codes}\.\textsuperscript{149} These place on a bailee the duties of a “good manager” and give him a right to reimbursement for expenses necessarily incurred in protecting the goods. The latter provision would operate for the benefit of the debtor if the bank wrongfully sold the goods or its creditors seized them (see the following paragraph) but otherwise yields to a contrary agreement. The typical trust receipt form expressly shifts certain types of expense to the debtor.\textsuperscript{150} Apart from such a provision, the security nature of the bank’s position as bailor adequately demonstrates an implied understanding that the debtor will bear all expenses relating to the goods.\textsuperscript{151} Correlatively, the debtor expects to remain in possession pending sale of the goods or maturity of his obligation. If he does not misconduct himself in regard to the goods, this expectation is normally borne out in experience. On the legal side, however, his possessory right is a limited one. The bailment is terminable at the will of the bank.\textsuperscript{152}

A person who buys from a debtor authorized to sell will, of course, take a good title in Japan, but the legal position of other types of third persons is adjusted by Japanese law in ways different either in approach or result from American law. The bank has the power to transfer good title, either before or after maturity of the secured debt, and

\textsuperscript{148} Doi v. Mōri, 12 Minshū 2680, 2683 (Sup. Ct., Dec. 19, 1933). See also the references cited at note 146 \textit{supra}, and Shinomiya, \textit{op. cit. supra} note 103, at 107-14.

\textsuperscript{149} Izawa, \textit{op. cit. supra} note 130, at 644; \textit{Civil Code} art. 665 (which refers to arts. 646-50); \textit{Commercial Code} art. 593.

\textsuperscript{150} Para. 3, Exhibit 3; Para. 5, Exhibit 4.

\textsuperscript{151} Izawa, \textit{op. cit. supra} note 130, at 645; Wagatsuma, \textit{op. cit. supra} note 134, at 233; Shinomiya, \textit{op. cit. supra} note 103, at 60, 137-40; Hamagami, \textit{Jōto tambo} in \textit{MINJI HOGAKU JITEN} (Dictionary of civil jurisprudence) 980 (1960).

\textsuperscript{152} \textit{Civil Code} art. 662 provides that a bailor can claim a return of the goods at any time even though the bailment-agreement fixes a term. Moreover, the typical trust receipt expressly provides that the entruster shall have possession at his will. Para. 6, Exhibit 3. See also Izawa, \textit{op. cit. supra} note 130, at 644. But see the text accompanying note 104 \textit{supra}. 
without regard to the bona fides of the buyer. Its creditors can reach the goods by process and its liquidator in bankruptcy takes the goods free of the debtor's interest. If a general creditor of the debtor levies on the goods the bank can totally defeat the levy. If the debtor becomes a bankrupt the goods are not included in the asset inventory of his estate. These results follow logically from the external ownership obtained by the bank through the contract. The developing school of scholarly thought critical of jōto tampo analyses which take insufficient cognizance of the essentially security nature of the transaction is concerned about trust receipts as well as about other kinds of jōto tampo. Especially criticized is the power of the secured party's creditors and liquidator to seize the goods in derogation of the debtor's rights. There appears to be no evidence so far that Japanese courts will be persuaded by the criticism.

153 Izawa, op. cit. supra note 130, at 648; Wagatsuma, op. cit. supra note 134, at 235; Yunoki, Tampo Bukkenho (Law of security interests) 392 (19 Horigusaku zenshu ed. 1959); Hamagami, supra note 151, at 981. But see discussion in Shinomiya, Jōto tampo 196-200 (17 Sogo Hanrei Kenkyu Sosho Mippo ed. 1962). Section 6(1)(c) of the Uniform Trust Receipts Act protects a buyer from the entruster in the instance of a wrongful sale, but only if the buyer takes for value and in good faith. The U.C.C. provides, as to a sale made after the debtor has defaulted, that a good faith buyer at a private sale takes free of the debtor's interest, and that a buyer at a public sale who neither colludes with the secured party or other persons nor knows of defects in the sale likewise takes free of the debtor's interest. Section 9-504(4).

154 See Izawa, op. cit. supra note 130, at 648; Wagatsuma, op. cit. supra note 134, at 235; Yunoki, op. cit. supra note 153, at 393.

155 Bankruptcy Law (Hasanho) art. 88 (Law No. 71, 1922); Izawa, op. cit. supra note 130, at 648; Wagatsuma, op. cit. supra note 134, at 235; Yunoki, op. cit. supra note 153, at 981; Hamagami, supra note 151, at 981. See also the text accompanying notes 99, 119 infra.

156 Code of Civil Procedure art. 549. Izawa, op. cit. supra note 130, at 648; Wagatsuma, op. cit. supra note 134, at 235; Yunoki, op. cit. supra note 153, at 393; Hamagami, supra note 151, at 981; Hida v. Kume, 20 Minoku 865, 872 (Sup. Ct. Nov. 2, 1914). See also Professor Mikazuki's report in the symposium, note 118 supra, at 3; the statement by Mr. Ishida, supra at 28, and the discussion at note 158 infra. Although a judgment creditor of the debtor cannot seize the property and sell it subject to the jōto tampo, he can achieve the same general result by levying on the redemption right as an intangible and combining a proffer of payment to the secured party at maturity with a simultaneous levy on the property.

157 Bankruptcy Law (Hasanho) art. 87 (Law No. 71, 1922); Izawa, op. cit. supra note 130, at 648; Wagatsuma, op. cit. supra note 134, at 235; Yunoki, op. cit. supra note 153, at 393.

158 See the text accompanying notes 107, 119 supra. Professor Kaneko has argued with much force that upon a pleading by the security-giver that the security-holder had only a security ownership, the attacking creditor or liquidator must restrict his claim to the preferential-payment right of the security-holder. Kaneko, Kyo-set shikomo (Execution law) 64 (1961). See also Shinomiya, op. cit. supra note 153, at 204-17; Onoki, Jōto tampo to zashinsae, 36 Hogaku Bonsô (Kyoto University L. Rev.) 1144 (1937), and the symposium cited in note 118 supra at 4. This problem is, of course, not acute in trust receipt transactions because in current practice the entruster is always a bank and not apt to be the subject of either process or liquidation.

159 See the statement of Professor Yunoki in the symposium cited in note 118 supra at 19. The theoretic significance of the 1959 tax statute which enables the government,
An unauthorized sale by the debtor and a subsequent pledge or security transfer by him will fall within the general principle of *Civil Code* article 192, which protects one who takes in good faith and without negligence from a person in possession.\(^{160}\) The bank cannot escape article 192 by either drafting or filing. Like results follow if the debtor wrongfully transfers proceeds, whether chattels taken in trade, checks, notes or conditional sale contracts.\(^{161}\) It is not likely that a stock certificate will be received as a proceed. If this should happen and the debtor wrongfully transfers it, the buyer would be

\(^{160}\) As to documents of title the relevant coverage is in *Commercial Code* art. 519, which requires bona fides and an absence of "gross negligence." The burden of proof under this article is on the secured party. The comparable chattel mortgage problem was discussed at notes 95, 115 *supra*. It will be observed that the principle applies indifferently to the various types of *jūto tampo*, to buyers in ordinary course, and to buyers not in ordinary course (i.e., bulk buyers). It may be expected, however, that the latter will have difficulty in meeting the "good faith without negligence" standard unless some investigation of the buyer's right to sell has been made. Such an investigation would usually disclose the existence of the trust receipt. Under § 9(1) (a) of the Uniform Trust Receipts Act, a bona fide purchaser for value of negotiable paper or of an instrument which, although not negotiable, is "by common practice purchased and sold as if negotiable" takes free of the entruster's interest. The "value" requirement is not found in Japanese law in comparable situations. The Japanese concept of "good faith" is strictly concerned with "notice" or "knowledge." This does not necessarily mean that different end results are expectable in the two legal systems as to purchasers of entrusted instruments or documents. Buried in the evidentiary aspects of "negligence" are ideas which can penalize one who takes as a gift or upon an unequal exchange of monetary values. Failure to investigate can be negligence. Suspicion of the "gift horse" will often be rational, and may demand investigation which would disclose the title defect.

In practice, fraudulent sales by Japanese debtors are so rare as to pose no practical impediment to the use of trust receipts. In sales by the debtor the full impact of the agency theory which Japanese banks incorporate into their trust receipts is felt. The bank is probably a principal and liable as such for breaches of warranty as well as breach of contract, whether the agency be disclosed or not disclosed by the debtor. Correlatively, the debtor who discloses his agency is probably not liable to the buyer for either breach of contract or breach of warranty. Lack of disclosure will, of course, make the debtor personally liable. As to these details *Commercial Code* art. 504 is in point. Liability of the bank for breaches of warranty seems particularly undesirable. Whether a shift in theory to "trust" would resolve the difficulty is debatable. Concerning the approach of the Uniform Trust Receipts Act to this problem see the discussion at note 128 *supra* and §§ 9(2) (b) and 12. The latter section denies the liability of an entruster as principal or as vendor under a sale or contract to sell made by the trustee-debtor, even though sale was expressly authorized. So does the U.C.C. which provides in § 9-317: "The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions."

\(^{161}\) *Civil Code* art. 192 will cover trade-ins. Law on Checks (*Kogiitehō*) art. 21 (Law No. 57, 1933) governs checks. Law on Bills (*Tegataho*) arts. 16(2), 77 (Law No. 20, 1932) apply to notes and bills of exchange, secured or otherwise. "Proceeds" may encompass the fruits of a secured-credit sale. Conditional sales (i.e., *jūto tampo*, retained-title type) may or may not be accompanied by a note. If not, the assignee comes under *Civil Code* art. 192. A bona fide taker of cash proceeds will prevail but the reason is disputed. See *Wagatsuma, Bukkenho* (Law of real rights) 145, 146 (2nd ed. 1955); *Suzuki*, *op. cit.* *supra* note 115, at 149-53.
protected.162 Save for negotiable types, the American law gives the entruster a considerably greater degree of protection in proceeds.163

The concern of Japanese scholars with jōto tampo public-notice problems has already been mentioned.164 If legislation comes it will probably be framed in terms of all jōto tampo transactions, including trust receipts.

**Seller's Lien**

Under the Uniform Sales Act, if his buyer becomes insolvent an unpaid seller who still has possession of the goods can abrogate a credit term in the sales contract, withhold delivery, retake title (if title has passed), and recover damages if the buyer does not come forward with the purchase price, in cash, within a reasonable time.165 This array of rights and remedies is called a "seller's lien," but the name is not entirely apt. If there be a lien it is a possessory one only. The U.C.C. has retained the Sales Act ideas, but has dropped the term "lien" and has extended the seller's protection to include a limited right of reclamation after delivery.166 An unpaid seller has under Japanese law a "preferential right" which survives delivery and would accordingly seem to have potential as a kind of purchase-

---

162 See para. 5 of Exhibit 3 and Commercial Code art. 229.
163 Under § 9 (1) (b) of the Uniform Trust Receipts Act, the interest of the entruster in proceeds will be lost if the proceeds are negotiable paper or an instrument bought and sold as negotiable, and reach a bona fide purchaser for value. U.C.C. § 9-309 produces the same results.

As to non-negotiable types of proceeds, § 10 of the Act accords priority in identifiable proceeds "to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee." This is also the basic position of U.C.C. § 9-306. Both of these statutes state a limited advantage for a secured party in the general assets of an insolvent debtor, as to unidentifiable proceeds received during the ten days preceding the institution of insolvency proceeding. Whether the Uniform Trust Receipts Act provision is operative bankruptcy is disputed. See note 146 supra.

164 See note 118 supra.
165 Sections 54, 62, 63. See also Williston, Sales §§ 502-07 (rev. ed. 1948).
166 Section 2-702 provides: "(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article (§ 2-705). (2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay. (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this Article (§ 2-403). Successful reclamation of goods excludes all other remedies with respect to them."

A contract term purporting to reserve title after delivery creates a security interest which is regulated by Article 9 of the U.C.C. §§ 2-401(1), 1-201(37), 9-102(1), (2).
money-security-device. It falls well short of that utility, however, because of Civil Code provisions subordinating his interest to various interests subsequently created by the buyer. In neither country is there a convenient non-consensual relationship under which goods can move into the hands of a credit buyer from an unpaid seller who expects to be secured by the goods.

**Conditional Sale**

In both countries a sales contract plus bailment (the buyer being the bailee and the title-retaining seller the bailor) is the consensual security arrangement most commonly used by a seller. It is known in the United States as a conditional sale and in Japan as shoyūken ryūho (reservation of title).

By the time the U.C.C. appeared, the American law of conditional sales varied widely from state to state. Some jurisdictions operated under the common law, some under a combination of filing statute and common law, and some under the Uniform Conditional Sales Act. Public notice through filing is required in most but not all non-U.C.C. states and is in general demanded by the U.C.C. A vendor who perfects his security, by whatever method the jurisdiction requires, will be prior to creditors and liquidators of the buyer and will, in general, be prior to the buyer’s successors. The property can be

---

167 The seller’s interest is prior to that of a levying creditor of the buyer. Civil Code arts. 303, 311, 322. It is prior to that of the buyer’s liquidator in bankruptcy. Bankruptcy Law (Hasanjo) art. 92 (Law No. 71, 1922). But the seller probably cannot repossess the goods and must find his remedy in the complicated public sale procedures provided by the Public Sales Law (Keibaiho) (Law No. 15, 1898). The most serious defect in his position is his vulnerability to subsequently created interests. A purchaser from the buyer, whether or not in good faith, will exclude the seller entirely. Civil Code arts. 333, 183; Kawai v. Nemoto, 23 Minroku 1203, 1209 (Sup. Ct., July 26, 1917); Wagatsuma, op. cit. supra note 134, at 63; Yuno, op. cit. supra note 153, at 67. So will a subsequent encumbrancer. A pledgee’s priority is expressly stated in Civil Code art. 334. The priority of a jōto tampo taker follows from the fact that he acquires general ownership and is accordingly a “purchaser.” An artisan’s lien for preservation work done without actual knowledge of the seller’s interest is prior under Civil Code art. 330.

168 Glenn, Fraudulent Conveyances and Preferences §§ 506-13 (rev. ed. 1940); Jones, Chattel Mortgages and Conditional Sales §§ 1004-56 (6th ed. 1933); Williston, op. cit. supra note 165, §§ 324-27a. The U.C.C. § 9-302(1) requires filing in order to perfect a conditional-sale type of security, save for consumer goods other than fixtures or motor vehicles and some kinds of farm equipment. Section 9-302(1). The practical operation of the exemption is much narrowed by § 9-307(2), which gives priority in such assets to a subsequent bona fide purchaser for value and for his own use, if the secured party has not filed. It follows that there is considerable pressure on the conditional vendor to file, and many of such transactions are being protected by filing in U.C.C. states.

Conditional sales are not often used to finance a merchant’s inventory. If the arrangement is used, the principles discussed at note 95 supra, including U.C.C. § 9-307(1), will protect a buyer in ordinary course from the vendee.
taken by the vendor from a defaulting buyer but interference with
the possession of a buyer not in default is a conversion. Rightful
retaking will in some states extinguish the buyer’s duty to pay while
in others the property can be sold and a deficiency recovered if sale-
proceeds are less than the debt-balance. In some states a reposess-
ing seller can retain all of the buyer’s payments. In others he must
account for payments made, less use value. In still others he must
sell and account for a surplus above the unpaid debt-balance.
Despite these variations, which make the nationwide picture a highly
confused one, a conditional sale contract carefully tailored to the law
of the state in which it is employed has proved to be a useful and
safe kind of security device. It continues in general use in states
which have enacted the U.C.C. even though its legal incidents in such
states will not differ from those of other types of security agreements.
Notably, under the U.C.C. there is no forced election between repos-
session and suit for the price, and no forfeiture of the buyer’s equity.

Installment selling on a secured basis is a relatively new element in
the Japanese economy and one for which there was, until recently,
neither Code nor special-statute coverage. When legislation came it
was regulatory rather than declaratory of the seller’s security interest,
as will be indicated below.

Meanwhile the ubiquitous jōto tampo again provided a contractual
framework within which a considerable degree of refinement in install-
ment-selling documentation has been achieved. These transactions
rest on the assumption that a seller’s retained general ownership
functions as does the general ownership acquired by a lender. The
assumption seems justified, although helpful appellate decisions
have not appeared.

169 Glenn, op. cit. supra note 168, §§ 513-15; Williston, op. cit. supra note 165,
§§ 571, 579-79h. Pending his default the buyer’s possession cannot rightfully be
disturbed by the seller. As against third persons the buyer has the normal rights and
remedies of a bailee.

170 Williston, op. cit. supra note 165, § 579c; 2 Williston, Contracts § 736 at 483
et seq. (3d ed. 1961).

171 The seller can repossess under § 9-503 and is required by § 9-505(1) to sell the
collateral save for the limited exceptions stated in § 9-505(2). He can recover a
deficiency and must account for a surplus. Section 9-504(1), (2).

172 Brauch & Michida, 2 Amerika shōtorihikō to Nihon minshōho
(“American Law on Commercial Transactions and the Japanese Civil and Commercial
Codes”) 371 (1961); Katō, supra note 100, at 190, 192; Inamura, Kappu hambai
(Installment sales) 30, 31 (1961); Kaji, Kappu hambai no hōritsu (Law of install-
ment sales), Kappu hambai no hōritsu kaikai zaimu (Law and accounting of
installment sales) 144-146 (Shinada ed. 1961); Tanaka, Kappu hambai keiyaku no
ichi kōsatsu (A survey of installment sales contracts), Kigyo kōkenyu (Journal
of enterprise law) (No. 103) 4, 5 (1963). See also article 7 of the Installment Sales
Law, cited at note 177 infra. The traditional term in installment sales transactions is
In this variety of 短期賃借 most of the distinguishing characteristics of the agreement resemble those of the common law conditional sale—title is to pass if and when the price is fully paid; the buyer's contract and possessory rights are contingent on his non-default; default on even one installment gives the seller a right to repossess and to retain all payments made by the debtor (as rental rather than as liquidated damages). There is, however, no legal requirement that the vendor elect between repossession and recovery of the debt balance, this being a detail which the parties can fix by agreement. Repossession by peaceful self-help is not unlawful and a typical document will authorize this method. The substantive relationships in this variety of liberal 短期賃借 do not otherwise differ from those indicated in the discussion of chattel mortgages and trust receipts.

Financing charges for the privilege of paying in installments are variously handled. Some dealers will quote two prices, one a cash price and the other a time price; the difference is apt to work out at about 16% when translated into interest terms. The actual difference is often greater. Cash buyers may be able to chaffer and to buy at well below the quoted cash price. Discounts of 20% to 30% are not unknown. These practices are most often encountered in the retailing of household goods and household appliances. In other situations, and especially in the automobile trade, the dealer states a list price which is in effect a cash price. A time buyer will be required to pay in addition a carrying charge of the type familiar to some millions of American car buyers. This too will average around 16% in terms of interest, save for buyers of high credit rating whose paper can be discounted by the dealer to a bank. Japan has a usury law but the idea that a time-price differential is not interest obtains there as it does in most of the United States. So does the idea that a carrying

173 Braucher & Michida, op. cit. supra note 172, at 429. Some Japanese self-help clauses purport to authorize trespass to persons or land in the repossession process. The legality of such clauses is doubtful, although definitive decisions have not yet appeared in Japan. Clauses like these are in general void in the United States, as to trespass to persons. The trespass to land cases divide. Comment, Limitations on the Use of Force in Repossession of Chattels Sold Under Conditional Sales Contracts, 36 Geo. L.J. 218 (1948).

174 Fifteen to sixteen percent is the normal range (i.e., 7½ or 8% of a total unpaid price which is repayable in twelve monthly installments). Ordinary secured bank loans carry 7% to 9% interest, including notes secured by retained-title sale-security 短期賃借 and taken by the bank from the originating dealer. See notes 67, 68 supra.

175 Braucher & Michida, op. cit. supra note 172, at 432. As to the situation in the United States see: Annot., 143 A.L.R. 238 (1943); Berger, Usury in Installment Sales, 2 LAW & CONTEMP. PROB. 148 (1935); Note, Usury Statutes; Their Appla-
charge is a kind of time-price differential. Competitive factors are stabilizing conditional sale credit charges and there seems to be no likelihood that rates will get higher. Excessive pricing in all manner of sale transactions involving goods is forbidden by a special statute,¹⁷⁶ but there does not appear to have been any instance in which it has been judicially applied to a time-price differential.

In 1961 the Japanese Diet enacted its first installment sale statute.¹⁷⁷ Many of the details¹⁷⁸ resemble those of comparable consumer protection legislation now being widely enacted in the United States.¹⁷⁹ Some of the American statutes regulate credit charges. The Japanese law does not.

**CONCLUSION**

The main themes running through Japanese chattel-security law are those to be observed in the Codes and the special hypothec statutes,

---

¹⁷⁶ Excessive Profit Regulation Ordinance (Bukka tōseirei) (Ordinance No. 118, 1946). A nonconforming contract would be void under CIVIL CODE art. 90.

¹⁷⁷ Installment Sales Law (Kappū hambaihō) (Law No. 159, 1961). The precise scope of this statute is not entirely clear. It refers generally to “installment sales” but goes on to state in article 7 a presumption that the seller retains title in an installment sale until he is fully paid. That this passage is intended to limit the coverage of the statute to transactions in which title is retained is doubtful. Arguably the presumption stated is rebuttable and a seller is bound by the regulatory sections even though he puts title in the buyer on an unsecured basis. Certainly the purpose of the statute cannot be accomplished if its operation can be escaped by putting title in the buyer and taking back a chattel mortgage type of security. Japanese courts would probably construe the statute as applying broadly to installment sales, however secured. Article 7 can be explained as inserted to protect sellers who fail to expressly include a security provision in the sales agreement.

¹⁷⁸ The main features are these: the seller must give twenty days' written notice before cancelling the contract and contrary clauses are void (art. 5); a repossessing seller can recover no more than the deficiency between contract price and worth of the repossessed goods (art. 6); a seller who cannot or does not recover the goods can recover the unpaid contract balance (art. 6); a copy of the contract in writing must be given to the buyer (art. 4). As to the details of this statute and for a general practical discussion of installment sales, see Kaji, supra note 172, at 63-235.

¹⁷⁹ See, e.g., REV. CODE WASH. ch. 63.14. These statutes are discussed in Hogan, A Survey of Retail Installment Financing, 44 CORNELL L.Q. 38 (1958); Warren, Regulation of Finance Charges in Retail Installment Sales, 66 YALE L.J. 859 (1959). The California statute is examined in detail in Comment, Legislative Regulation of Retail Installment Financing, 7 U.C.L.A. L. Rev. 623 (1960). Cases construing statutes of this type in relation to automobile financing are gathered in Annot., 73 A.L.R. 2d 1430 (1960). Parallel common law developments in the buyer-protection area are taking place. An increasing number of courts are refusing to treat finance company transferees of notes given by conditional sale buyers as holders in due course, and the traditional view of carrying charges as a time-price differential rather than interest (i.e., usury; see note 175 supra) is coming under more critical examination. See Consumer Credit Symposium: Developments in the Law, 55 NW. U. L. Rev. 30 et seq. (1960). As the cited discussions indicate, in a few states the installment sales statute regulates time-price differentials.
and those which are manifested in jōto tampo. The Code theme is essentially restrictive. That of the special statutes is limited tolerance. Jōto tampo is a free-wheeling application of contract principles to property security problems, which for the most part finds its legal support only in decisions.

The Codes make a wholly inadequate contribution to the development of commercially feasible security arrangements. Although the Civil Code does a reasonably adequate job for possessory security and security assignments of intangibles, it makes no practicable provision for security in movables left in the debtor’s hands. Indeed, article 192 in protecting a bona fide non-negligent purchaser from a person in possession creates a direct and drastic impediment to the creation of non-possessory security. The Commercial Code ignores personal property security, save for a few sections on pledges.

Special hypothec legislation for movables has not succeeded in filling the gaps left by the Codes. The statutes are inherently unattractive to the business community by reason of the excessively rigorous public notice demands and because of the requirement that realization be pursued under the Public Sales Law. Apart from these details, a piece-meal attack of this kind, in which particular kinds of personal property are singled out for special treatment, seems foredoomed. What is needed is a sensible security system geared to all kinds of movables.

The substantive pledge coverage of the Civil Code is in general excellent but the pledgee like the secured party in a statutory hypothec of movables, is accorded insufficient leeway in realization methods. Any system of collateral liquidation which demands a cash sale by public auction is bound to work inefficiently. The obvious justification for requiring sale by a public official is that the debtor is accorded some needed protection. Even this laudable objective is not being realized in practice because many of the sales conducted under the Public Sales Law are controlled by entrepreneurs whose hired bidders dominate the proceeding and restrain bidding. It would seem on balance that the debtor would be better served in a fair sale handled by the secured party and experience with jōto tampo is building up significant and apparently favorable data on lender-controlled sales. Lenders also have a stake in realization procedures and the Public Sales Law does not accord them sufficient assurance that the maximum will be realized from the collateral. Experience in the United States
demonstrates that the interests of both parties are best safeguarded by legal principles which permit lenders a wide range of discretion at the point of realization and which police the exercise of that discretion. Judicial restraints of the kind developed by American courts may or may not be practicable in Japan, as a policing technique. If not, some other control method can certainly be found.

That jōto tampo should have appeared in Japan is only expectable. That it has survived is a remarkable demonstration of the inherent vitality of customary law under codes as rigidly constructed as are the Civil and Commercial Codes of Japan. It would seem, however, that the point has been reached at which the uncertainties inevitable in the situation, uncertainties the seriousness of which is accentuated by the intellectual unease induced by conflicts between basic Code concepts and what is actually being done, are becoming intolerable. Jōto tampo has the kind of potential for trouble which exists in the United States when a court grounds a commercially important and recurring relationship on a patent fiction. It is not possible for the interested parties to be sure that the court will not re-examine its position.

In both pledge and jōto tampo transactions, the corrective which would seem to an American observer to be most obviously desirable is a reorientation of the principles regulating the position of third persons. Some workable methods can surely be devised which will both protect the debtor against loss of his interest to a levying creditor or liquidator of the secured party or in a sale by the secured party at a time when the debtor is not in default, and also protect the secured party in the instance of unauthorized sale of non-negotiable collateral, not in the ordinary course of business, by a debtor left in possession. Protection of the debtor's general creditors seems also a worthwhile objective.

There are items to be entered on the asset side of the Japanese ledger. In jōto tampo they have developed a concept of security which is in some of its aspects an advance accomplished in the United States only by the U.C.C. Freedom of the parties to fix the details of their transaction as the business situation dictates is certainly a desideratum of an ideal security system. Restraint of the occasional unscrupulous lender is also a necessary part of such a system. The Chancellor's intervention in Anglo-American pledge and mortgage transactions, beneficial though it was, left a kind of schizophrenia. There has been a continual struggle between the property aspects of these trans-
actions, and their contract aspects. American courts have fixed the
drafting margins at diverse points but all agree that the debtor's
"equity of redemption" is incompatible with full freedom of contract.
Some states have put an analogous limitation on conditional sales, by
a requirement that the vendor elect between repossession and en-
forcement of the promise to pay. Trust receipts are much circum-
scribed by the uniform statute. One obvious end-product of these
developments was a need for further efforts to find the best solution for
the basic problems. Fortunately for the future progress of American
commercial law the work was done. The U.C.C. is the result. The
keystone of Article 9 is a contract conception of personal property
security. 180

Another Japanese asset of great value is the nationwide operation
of security transaction principles. This is an advantage which is only
now being substantially achieved in the United States with enactment
of the U.C.C. More uniformity in the law of this area is long past due.
By the mid-twentieth century, generations of American legislators
and judges had built for the then forty-eight states an array of personal
property security principles which comprised, in gross, about as un-
national a body of law as could be accomplished in one nation. Since
mores differ both in time and in space and there are bound to be
vagaries in the application of intellect to problems, complete uniformity
in a broad area of state law can probably never be achieved in the
United States. The U.C.C. appears likely to come as close as can be
to a unitary system of security law. 181

180 For a general discussion of U.C.C. Article 9 and freedom of contract, see King,
Policy Decisions and Security Agreements Under the Uniform Commercial Code, 9
WAYNE L. REV. 556 (1963). Several U.C.C. sections are directly relevant. U.C.C.
§ 9-201(1) reads: "Except as otherwise provided by this Act a security agreement is
effective according to its terms between the parties, against purchasers of the collateral
and against creditors...." Under § 9-501(1) the secured party has agreed-on remedies,
with certain exceptions stated in § 9-501(3). Section 1-102(3) is also relevant here.
It provides: "The effect of provisions of this Act may be varied by agreement, except
as otherwise provided in this Act and except that the obligations of good faith,
diligence, reasonableness, and care prescribed by this Act may not be disclaimed by
agreement but the parties may by agreement determine the standards by which the
performance of such obligations is to be measured if such standards are not manifestly
unreasonable." Implicit in the limitations on drafting indicated above is protection for
the debtor. Third persons who deal with the debtor are protected amply, some by
filing, others by priorities.

181 The unitary-system objective of the U.C.C. can be defeated by divergent con-
struction or application of the statute and the risks will be compounded by blind adher-
ence to stare decisis. See Hawkland, Article 9 Methodology, 9 WAYNE L. REV. 531
(1963). Professor Hawkland suggests that in construing the U.C.C. courts should:
"(1) use analogy rather than 'outside law' to fill Code gaps; (2) rely somewhat more
heavily on the decisions of other Code states in making their own decisions; and (3)
give their own decisions somewhat less permanent precedential value." A particularly
The impressive roster of defects and inadequacies which characterize the American law of personal property security apart from the U.C.C. has been considerably reduced by that statute. Financing and business operations under the U.C.C. can be conducted with certainty, precision, and simplicity impossible in non-U.C.C. states and impossible at this time in Japan. The U.C.C. also strikes a carefully contrived and fair balance between the interests of the immediate parties, and between their interests and those of persons who deal with one of them.

Improvement of Japanese law in this area would seem best accomplished by something resembling Article 9 of the U.C.C. in scope and approach; in other words, by a full-scale legislative attack on personal property security problems of all kinds. The basic research and planning which would of necessity precede the drafting of a comprehensive statute might come from a legislative committee or from a governmental agency. There does not appear to be any substantial prospect that private organizations will or could undertake such a burden.

---

... the insistence of some legislatures on departures from the official text of the U.C.C. in their enactment of the statute. The extent of these deviations and their dangerous potentialities are discussed in Schnader, Looking Ahead at the Uniform Commercial Code, 19 BUS. LAW 771 (1964).

Like problems exist in other uniform-legislation areas. The difficulties which the National Conference of Commissioners on Uniform State Laws has experienced in devising a method for coping with divergence in the construction of uniform legislation are indicated in the Report of Standing Committee on Uniformity of Judicial Decisions, 1963 Handbook of the Nat’l Conf. of Com. on Uniform State Laws 161.
APPENDIX

This Appendix includes only the statutory sections which the authors deem necessary for an understanding of the text. For further references see the English translation of Japanese statutes in 2 EIBUN HÖREISHA LAW BULLETIN SERIES, JAPAN.

The translation of the material which appears in this Appendix was done by Professor Sono.

CIVIL CODE

Things. Art. 85. A thing within the meaning of this Code is a corporeal thing.

Art. 86. 1. Land and things firmly affixed thereto are immovables.
2. All other things are movables.
3. Obligations performable to a bearer shall be deemed to be movables.

Art. 88. 1. Products obtained in the ordinary use of a thing are natural fruits.
2. Money and other things received as consideration for the use of a thing are legal fruits.

Art. 89. 1. Natural fruits belong to the person who has the right to take them at the time of their severance from the principal thing.
2. Legal fruits shall accrue in proportion to the number of days during which the right to acquire them continues to exist.

Juristic Act. Art. 90. A juristic act which has for its object such matters as are contrary to public policy or good morals is null and void.

Art. 99. 1. An expression of intention made by a representative within the scope of his authority and disclosing the fact that he is acting for a principal shall be effective directly against his principal.
2. The provisions of the preceding paragraph shall apply mutatis mutandis to an expression of intention made by a third person to a representative.

Art. 100. An expression of intention made by a representative without disclosing that he is acting for a principal is deemed to have been made on his own behalf, but the provisions of para. 1 of the preceding article shall apply with necessary modifications if the other party was aware, or should have been aware, that it was made on behalf of the principal. (Cf. COMMERCIAL CODE art. 504.)

General Provisions of Real Rights. Art. 175. No real rights can be created other than those provided for in this Code or in other laws.

Art. 176. The creation and transfer of real rights takes effect by a mere expression of intention by the parties concerned. (Cf. art. 344.)

Art. 177. The acquisition or loss of, or any alteration in a real right over, an immovable cannot be set up against a third person until it has
been registered in accordance with the provisions of law concerning registration of property.

Art. 178. The transfer of a real right over a movable cannot be set up against a third person until the movable has been delivered.

**Possessor Right.** Art. 181. A possessory right may be acquired by proxy.

Art. 182. 1. The transfer of a possessory right is effected by delivery of the thing in possession.

2. Where the transferee or his representative actually holds a thing, the transfer of the possessory right may be effected by a mere expression of intention by the parties.

Art. 184. If, where a thing is possessed through a representative, the principal directs him to hold the thing thereafter on behalf of a third person and the third person gives his consent thereto, such third person shall acquire the possessory right.

Art. 186. 1. A possessor is presumed to be in possession with the intention of holding as owner, in good faith, peacefully and publicly.

Art. 188. A possessor shall be presumed to hold lawfully the right which he exercises over the thing in possession.

Art. 192. If a person has peacefully and publicly commenced to possess a movable, acting in good faith and without negligence, he shall immediately acquire the right which he purports to exercise over such movable. (Ref. art. 186(1), 188; Cjf. Law on Bills art. 16(2), 77(1); Law on Checks art. 21; Commercial Code arts. 229, 519.)

Art. 200. 1. If a possessor has been deprived of his possession, he may by an action for recovery of possession demand the return of the thing as well as reparation in damages.

Art. 202. 1. Possessory actions and actions on title shall not exclude each other.

2. Possessory actions may not be decided upon grounds relating to the original title.

**Ownership.** Art. 243. If two or more moveables belonging to different owners are so united together that they can no longer be separated without damage, the ownership of the composite thing vests in the owner of the principal movables. The same shall apply if their severance would entail excessive expense.

Art. 244. If in regard to moveables united together no distinction of principal and accessory can be made, the owners of such moveables shall own the composite thing jointly in proportion to the value of the moveables at the time they were united together.

Art. 245. The provisions of the preceding two articles shall apply mutatis mutandis, if things belonging to different owners are mixed together so as to be no longer distinguishable from each other.

Art. 246. 1. When a person has applied work to a movable belonging to another person, the ownership of the thing created by the work shall
belong to the owner of the material; but if the value arising out of such workmanship considerably exceeds that of the material, the person who has applied the work shall acquire the ownership of the thing.

2. If a person who has applied work has furnished a part of the material, he shall acquire the ownership of the thing only if the value of the material so furnished together with the value arising out of his workmanship exceeds the value of the material furnished by the other person.

Art. 248. A person who has suffered a loss by the application of the provisions of any of the preceding six articles may claim compensation in accordance with the provisions of arts. 703 and 704 (unjust enrichment provisions).

Possessory Lien. Art. 296. A person having a possessory lien may exercise his right over the whole of the thing retained until his claim has been fully satisfied.

Art. 297. 1. A person having a possessory lien may collect the fruits proceeding from the thing retained and may appropriate them to the satisfaction of his claim in preference to other creditors.

2. The fruit mentioned in the preceding paragraph must first be appropriated to the payment of the interest and the surplus, if any, to the principal. (Ref. arts. 88, 89.)

Art. 298. 1. A person having a possessory lien must keep the thing retained with the care of a good, prudent manager.

2. A person having a possessory lien may not without the consent of the debtor use or let the thing retained or give it as security; but this shall not apply to such use of the thing as is necessary for its preservation.

3. If a person having a possessory lien contravenes the provisions of the preceding two paragraphs, the debtor may demand the extinction of the right of possessory lien.

Art. 299. 1. If a person having a possessory lien has defrayed necessary expenses for the thing retained, he may require the owner to reimburse him.

2. If a person having a possessory lien has defrayed useful expenses for the thing retained, he may, so long as an increase in value remains subsisting, require that reimbursement be made of either the amount defrayed or the amount by which its value has increased at the option of the owner; but the court may upon the application of the owner allow him a reasonable time for reimbursement.

Art. 300. The existence of a possessory lien shall not prevent the Statute of Limitations from running against the claim.

Preferential Right. Art. 303. A person having a preferential right in accordance with the provisions of this Code or other laws has a right to obtain satisfaction of his claim out of the property of the debtor in preference to other creditors.

Art. 304. 1. A preferential right may also be exercised against money or other things which the debtor is entitled to receive by reason of the sale, letting, or loss of the object of such right, or of damage sustained by it;
but the person having such preferential right must levy an attachment thereon prior to their payment or delivery.

2. The same shall apply to the consideration for a real right created by the debtor on the object of the preferential right.

Art. 311. A person who has a claim which has arisen from any of the causes mentioned below has a preferential right over the specific movable of the debtor:
1. - 4. (omitted)
5. Preservation of movables;
6. Sale of movables;
7, 8. (omitted)

Art. 322. The preferential right given a seller of a movable covers the price and interest thereon.

Art. 330. 1. Where several specific preferential rights co-exist in one and the same movable, their priority shall be in the following order:
A. Preferential rights for the lease of an immovable, for lodging at an inn, and for carriage;
B. Preferential right for the preservation of the movable; but if there are two or more preservers, the later preserved shall take precedence over the earlier one;
c. Preferential rights for the sale of the movable; for the supply of seeds, seedlings, or fertilizers; and for agricultural and industrial labor.
2. If a person having a preferential right of the first rank was aware, at the time he acquired it, of the existence of a person having a preferential right of the second or third rank, he may not exercise his right of priority as against such person; the same shall apply as against a person who has preserved a thing for the benefit of the person having a preferential right of the first rank.

Art. 333. After the debtor has delivered the movable to a transferee, the preferential right cannot be exercised over it.

Art. 334. Where a preferential right and a pledge co-exist over a movable, the pledger shall have the same right as the person having a preferential right of the first rank mentioned in art. 330.

General Provision of Pledge. Art. 342. A pledgee is entitled to hold possession of the thing which he has received from the debtor or a third person as security for his obligation, and to obtain satisfaction of his claim out of the thing in preference to other creditors.

Art. 343. A thing which is not assignable cannot be made the subject of a pledge.

Art. 344. A pledge shall become effective upon the delivery to the creditor of the thing pledged. (Ref. arts. 181, 182, 184.)

Art. 345. A pledgee cannot let the pledgor hold possession of the thing pledged on his behalf. (Ref. arts. 181, 182, 184.)

Art. 346. Unless otherwise provided in the act of creation, a pledge shall secure the principal, interest, penalty, expense for enforcement of the pledge, expense for preservation of the thing pledged, and the damages
arising from the non-performance of the obligation or from latent defects in the thing pledged.

Art. 347. A pledgee may retain the thing pledged until he obtains satisfaction of his claim mentioned in the preceding article; but this right cannot be set up against any creditor who has priority over him. (Ref. arts. 334, 330, 355; National Tax Collection Law arts. 15, 17, 18.)

Art. 348. The pledgee may on his own responsibility repledge the thing pledged for a period of time not exceeding the duration of his own right; in such case he shall be responsible for damage due to vis major which would not have occurred, if the thing had not been repledged.

Art. 349. A pledgor may not, either by the act of creation or by a contract made before the time the obligation becomes due, agree that the pledgee shall by way of satisfaction of his claim acquire the ownership of the thing pledged or dispose of it otherwise than in the manner provided for by law. (Cf. Commercial Code art. 515.)

Art. 350. The provisions of arts. 296 to 300 (provisions on possessory liens) and art. 304 shall apply mutatis mutandis to pledges.

Art. 351. If a person who has pledged his own property to secure a debt of another discharges the debt or loses the ownership of the thing pledged in consequence of the enforcement of the pledge, he is entitled to be indemnified by the debtor in accordance with the provisions relating to suretyship.

**Pledge of Movable.** Art. 352. The pledgee of a movable cannot set up his pledge against a third person unless he continuously holds possession of the thing pledged.

Art. 353. If the pledgee of a movable is deprived of his possession of the thing pledged, he can recover it only by an action for recovery of possession. (Ref. arts. 200, 202.)

Art. 354. If the pledgee of a movable does not obtain performance of his obligation, he may apply to the court to have the thing pledged appropriated to himself in satisfaction of the obligation to the extent of its value appraised by an expert, provided there is just reason for doing so. In such case the pledgee must give the debtor notice of the application in advance.

Art. 355. If several pledges have been created on a movable to secure several obligations, the order of their priority shall be according to the date of their creation.

**Pledge of Intangibles.** Art. 362. 1. Intangibles may be the object of pledge.

2. The provisions of the last three Sections (arts. 342-361) shall apply mutatis mutandis to the pledges mentioned in the preceding paragraph, in addition to the provisions of this Section (arts. 362-368).

Art. 363. When an obligation evidenced by a writing is pledged, the pledge is effected by the delivery of the writing. (See also art. 366.)

Art. 364. 1. Where a nominative debt has been made the object of a
pledge, the pledge cannot be set up against the original debtor or other third person unless the debtor has been notified of the creation of the pledge in accordance with the provisions of art. 467 or unless he has given his consent thereto.

2. The provisions of the preceding paragraph shall not apply to non-bearer shares. (Ref. art. 363; Commercial Code arts. 207, 209.)

Art. 365. Where a non-bearer debenture has been made the object of a pledge, the pledge cannot be set up against the company or other third person unless the creation of the pledge has been entered in the books of the company in accordance with the provisions relating to the transfer of debentures.

Art. 366. Where a debt payable to order has been made the object of a pledge, the pledge cannot be set up against a third person unless its creation is indorsed on the instrument. (n.b., It is the opinion of scholars that this article should be read as stating a requirement for the creation of a pledge even as between the immediate parties. That delivery and indorsement will create a pledge seems clear. If the instrument is a negotiable one and the indorsement is "regular," the indorsee is prima facie the owner and the indorser may be unable to rebut the presumption and so will never reach the pledge issue. Theoretically a regular indorsement will satisfy the article and such indorsements are used. Indorsements "for security" or "in pledge" readily satisfy the articles but are restrictive and are for that reason not widely used.)

Art. 367. 1. A pledgee may directly collect the obligation which is the subject of the pledge.

2. If the subject-matter of the obligation is money, the pledgee may collect only such portion thereof as corresponds to the amount of his own claim.

3. If the obligation mentioned above has fallen due earlier than the pledgee's claim, the pledgee may require the original obligor to deposit the amount payable with the Court Depository. In such case the pledge shall exist over the money so deposited.

4. If the subject-matter of the obligation is not money, the pledgee has a right of pledge in the thing received in performance thereof.

Art. 368. In addition to the interests and remedies provided for in the preceding article, a pledgee may enforce his pledge by compulsory process as provided for in the Code of Civil Procedure.

Obligations. Art. 415. If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may claim damages; the same shall apply to cases where performance becomes impossible for any cause for which the obligor is responsible.

Art. 416. 1. A demand of compensation for damages shall be for the amount of such damages as would ordinarily arise from the non-performance of an obligation.

2. The obligee may also recover the damages which have arisen through
special circumstances if the parties had foreseen or could have foreseen such circumstances.

Art. 417. Unless a different intention has been expressed, the amount of damages shall be assessed in money.

Art. 418. If there has been any fault on the part of the obligee in regard to the non-performance of the obligation, the court shall take it into account in determining the responsibility for, and assessing the amount of the damages.

Art. 467. 1. The assignment of a nominative debt cannot be set up against the debtor or any other third person unless the assignor has given notice thereof to the debtor or the debtor has consented thereto.

2. The notice or consent mentioned in the preceding paragraph cannot be set up against a third person other than the debtor unless it is made by a document having an authenticated date.

**Bailment.** Art. 662. Even where a time has been fixed by the parties for the return of the thing bailed, the bailor may at any time demand its return.

Art. 665. The provisions of arts. 646 to 649 inclusive and art. 650(1) tnd (2) (Mandate provisions) shall apply mutatis mutandis to bailments.

(Art. 650(1) reads: "If a mandatory has defrayed any expenses which can be recognized as necessary for the management of the business entrusted to him, he may demand from the mandator the reimbursement of such expenses with interest thereon from the day on which they were defrayed.")

**Unjust Enrichment.** Art. 703. A person who without any legal ground acquires benefit from the property or services of another and thereby causes loss to the latter is bound to return such benefit to the extent that it still exists.

Art. 704. A person who is enriched in bad faith must return the benefit received by him together with interest thereon, and if there has been any damage, he is bound also to make compensation for it.

**COMMERCIAL CODE**

Art. 4. 1. A merchant within the meaning of this Code is a person who, on his own behalf, engages in commercial transactions as a business. (Ref. arts. 501-503)

2. A person who engages in the sale of goods as a business with a shop or similar equipment or a person who carries on mining business shall be deemed to be a merchant even if he does not engage in commercial transactions as a business. The same shall apply to a company of the nature mentioned in art. 52(2).

Art. 52. 1. The term “company” as used in this Code shall mean an association incorporated for the purpose of engaging in commercial transactions as a business.
2. An association which has for its object the acquisition of gain and is incorporated in accordance with the provisions of this Book [Book II—Companies] shall be deemed to be a company even if it does not engage in commercial transactions as a business.

Art. 205. 1. A non-bearer share shall be transferred on the share certificate or by the delivery of the certificate with a separate instrument of assignment signed by the person whose name appears on the certificate as the owner.

2. The provisions of arts. 12 (Requisites of indorsement) and 13 (Form of indorsement), art. 14(2) (Effect of indorsement), and art. 16(1) of the Law on Bills shall apply mutatis mutandis to indorsements on a share certificate.

3. The possessor of a non-bearer share certificate shall be deemed to be the lawful holder if he establishes his title to the share by means of the instrument of assignment mentioned in para. 1. The same shall also apply in cases where the full name of an assignee is not mentioned in such instrument.

Art. 206. 1. The transfer of a non-bearer share cannot be set up against the company until the full name and permanent residence of the transferee have been entered in the register of shareholders.

Art. 207. 1. In order to effect a pledge of a non-bearer share, the share certificate shall be delivered to the pledgee.

2. Unless a pledgee continues to be in possession of the share certificate, he cannot set up his pledge against third persons.

Art. 208. When there has been retirement, consolidation, splitting up, conversion, purchase, or the issuance of shares made in accordance with the provisions of art. 293-3(2) (Crediting the reserve fund to the stated capital), a pledge over the former shares shall extend to the money or shares which the shareholder is to receive in consequence of the retirement, consolidation, splitting up, conversion, purchase, or the issuance of shares made in accordance with the provisions of art. 293-3(2).

Art. 209. 1. If, in cases where a pledge has been created over a non-bearer share, the company has entered upon application by the pledgor the full name and permanent residence of the pledgee in the register of shareholders and his full name in the share certificate, the pledgee may receive from the company the distribution of profits and interest or the distribution of the surplus assets or money mentioned in the preceding article and may appropriate them to the discharge of obligations due to him in preference to other creditors.

2. The provisions of art 367(3) of the Civil Code shall apply mutatis mutandis to the case mentioned in the preceding paragraph.

3. The right of the pledgee mentioned in paragraph 1 shall extend to shares to be received by the shareholder in accordance with the provisions of art. 293-2(1) (Dividend in the shape of shares).

4. The pledgee mentioned in para. 1 may demand of the company delivery of the share certificate which is to be received by the shareholder mentioned in the preceding paragraph or the preceding article.
Art. 229. The provisions of art. 21 of the Law on Checks shall apply *mutatis mutandis* in cases where a share certificate is a share certificate to bearer or where a share certificate is a non-bearer share certificate and the holder thereof established his right in accordance with the provisions of art. 205(2) or (3).

Art. 501. The transactions mentioned below are commercial transactions:
1. Transactions the object of which is either the acquisition for value of movables, immovables, or valuable instruments with the intention of disposing of them at a profit, or the disposal of objects so acquired;
2. Contracts for the supply of movables or valuable instruments which are to be acquired from others, and transactions the object of which is to acquire them for value in order to carry out such contracts;
3. Transactions on exchange;
4. Transactions relating to bills and other commercial papers.

Art. 502. The transactions mentioned below, if effected as a business, are commercial transactions, except such transactions as are effected by persons who manufacture articles or render services solely for the purpose of earning wages:
1. Transactions the object of which is the acquisition for value or the hire of movables or immovables with the intention of letting them, or the letting of objects so acquired or hired;
2. Transactions relating to the manufacture or working up of things for other persons;
3. Transactions relating to the supply of electricity or gas;
4. Transactions relating to carriage;
5. Contracts for the execution of works or for the supply of labor;
6. Transactions relating to publishing, printing, or photographing;
7. Transactions relating to the operation of establishments the object of which is to receive visitors;
8. Money changing and other banking transactions;
9. Insurance;
10. Acceptance of deposits;
11. Transactions relating to brokerage or commission agencies;
12. Acceptance of agency for commercial transactions.

Art. 503. 1. Transactions effected by a merchant for the purpose of his business are commercial transactions. (Ref. art. 4.)
2. The transactions of a merchant shall be presumed to be effected for the purpose of his business.

Art. 504. A commercial transaction by a representative shall be effective as against his principal even though the representative has not disclosed the fact that he is acting for the principal. However, this shall not prevent the other party from demanding performance from the representative if he did not know that the transaction was effected on behalf of the principal. (*Cf.* Civil Code arts. 99, 100.)

Art. 515 The provisions of art. 349 of the *Civil Code* shall not apply to
a pledge created to secure an obligation which has arisen out of a commercial transaction.

Art. 519. The provisions of arts. 12 to 14(2) inclusive (Requisites of indorsement, form of indorsement, effect of indorsement) of the Law of Bills and of art. 5(2) (Indication of payee) and arts. 19 and 21 of the Law on Checks shall apply mutatis mutandis to valuable instruments which have for their object the payment or delivery of money or other things or of valuable instruments.

Art. 573. Where a bill of lading has been made, no disposition of the goods shall be effected except by means of the bill of lading. (Arts. 573-575 are applied mutatis mutandis to a warehouse receipt at art. 604 and to an ocean bill of lading at art. 776.)

Art. 574. Even where a bill of lading has been issued in favor of a specified person, it may be transferred by indorsement unless the bill itself contains provisions forbidding indorsement.

Art. 575. If a bill of lading has been delivered to a person who is entitled thereby to receive the goods, such delivery shall have the same effect in respect to the acquisition of rights exercisable over the goods as the delivery of the goods themselves.

Art. 584. In cases where a bill of lading has been issued, no delivery of the goods can be demanded except upon surrender of such bill of lading.

Art. 593. Where a merchant has accepted a deposit (bailment) within the scope of his business, he shall exercise the care of a good, prudent manager even though he has received no remuneration.

Art. 848. 1. A registered ship may form the subject-matter of a hypothec.

2. A hypothec on a ship shall extend to its appurtenances.

3. The provisions relating to hypothec on immovables shall apply mutatis mutandis to hypothec on ships.

Law on Bills (Tegatahō) (Law No. 20, 1932)

Art. 16. 1. The possessor of a bill of exchange is presumed to be the lawful holder if he establishes his title to the bill through an uninterrupted series of indorsements, even if the last indorsement is in blank. In this connection, cancelled indorsements shall be disregarded. When an indorsement in blank is followed by another indorsement, the person who signed this last indorsement is presumed to have acquired the bill by the indorsement in blank.

2. Where a person has been dispossessed of a bill of exchange, in any manner whatsoever, the holder who establishes his right thereto in the manner mentioned in the preceding paragraph is not bound to give up the bill unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross negligence.

Art. 19. 1. When an indorsement contains the statements "value in security," "value in pledge," or any other statement implying a pledge, the holder may exercise all the rights arising out of the bill of exchange, but an
indorsement by him has the effects only of an indorsement by a representative.

Art. 77. 1. The following provisions relating to bills of exchange apply mutatis mutandis to promissory notes so far as they are not inconsistent with the nature of these instruments, vis.:
   1. Indorsement (arts. 11 to 20);
   2. —(9) (omitted).

LAW ON CHECKS (Kogittehō) (Law No. 57, 1933)

Art. 19. The possessor of an indorsable check is presumed to be the lawful holder if he establishes his title to the check through an uninterrupted series of indorsements, even if the last indorsement is in blank. In this connection cancelled indorsements shall be disregarded. When an indorsement in blank is followed by another indorsement, the person who signed this last indorsement is presumed to have acquired the check by the indorsement in blank.

Art. 21. Where a person has, in any manner whatsoever, been dispossessed of a check (whether it is a check to bearer or an indorsable check to which the holder establishes his right in the manner mentioned in art. 19), the holder into whose possession the check has come is not bound to give up the check unless he has acquired it in bad faith, or unless in acquiring it he has been guilty of gross negligence.

CODE OF CIVIL PROCEDURE

Art. 394. The second appeal may be made only on the ground that there is an error in construction of the Constitution or other violation of the Constitution in a judgment, or that there exists a violation of law or ordinance material to a judgment.

Art. 549. 1. Where a third person claims ownership in the objects of execution, or where he asserts that he has such a right as may prevent the transfer or the delivery of the same, he is to assert his objection against the execution by way of an action against the creditor or, where the debtor does not consider the objection to be well founded, against both the creditor and the debtor.

CIVIL PROCEDURE REGULATIONS (Minji soshō kisoku)

(Enacted on Mar. 1, 1956, by Supreme Court Regulation No. 2 of 1956; enforced from June 1, 1956.)

Art. 48. In case the second appeal is lodged on the ground that there is a contravention of laws or ordinances in the judgment, if it is alleged that the judgment contravenes judicial precedents established by the Supreme Court, the former Supreme Court (Daishin-in), or High Courts as the Court of the second appeal, such judicial precedents shall be specifically pointed out.
Bankruptcy Act (Hasanhd) (Law No. 71, 1922)

Art. 87. An adjudication of bankruptcy shall not affect the right to recover properties not belonging to the bankrupt from the bankrupt estate.

Art. 88. Any person who transferred property to a bankrupt prior to the adjudication of bankruptcy may not recover the property on the ground that the transfer has been made for the purpose of security.

Art. 92. A person who has a specific preferential right, right of pledge, or right of hypothec over property belonging to the bankrupt estate shall have the right of exclusion on property forming the subject-matter of these rights.

Corporate Reorganization Law (Kaisha köseihö) (Law No. 172, 1952)

Art. 123. 1. Reorganization claims, or claims against persons other than the company arising out of causes existent prior to the commencement of reorganization procedure, which are secured by the assets of the company at the time of commencement or reorganization procedure such as a specific preferential right, pledge, hypothec, or the right of possessory lien under the Commercial Code, shall be reorganization security rights.

Public Sales Law (Keibaihö) (Law No. 15, 1898)

Art. 2. 3. The purchaser may not receive the delivery of the subject matter of the public sale unless he performs the obligation to holders of the possessory lien, pledgees holding rights of priority against the seller, as well as to creditors who possess rights of priority against such pledgees.

Art. 3. 1. The public sale of movables shall be conducted by a bailiff of the summary court wherein the sale is to be carried out, upon mandate by a person holding the possessory lien or the preferential right, or a pledgee, as well as by other persons who intend to carry out the sale by virtue of the provisions of the Civil Code or of the Commercial Code.

Art. 7. 1. Notice of the place and time of the sale must be given to the public in advance.

Art. 8. Notice of the place and time of the sale must be sent to interested parties; this shall not apply, however, where the address and the residence of such parties are unknown.

Art. 9. There must be a period of not less than five days between the public notice and the public sale, unless there exist circumstances which require earlier conduct of the sale.

National Tax Collection Law (Kokuzei chōshūhö) (Law No. 147, 1959)

Art. 15. 1. Where a taxpayer has created a pledge on his property prior to the statutory due date of payment, the national tax shall be collected from the conversion proceeds after the obligation secured by such pledge has been collected: (omitted)
Art. 17. 1. Where a taxpayer has been transferred property on which a pledge or hypothec is created, the national tax shall be collected from the conversion proceeds of the property after the obligation secured by the pledge or hypothec has been collected.

Art. 18. 1. The amount of principal of the obligations secured by a pledge or hypothec which precedes a national tax by virtue of the provisions of the preceding three articles shall be limited to the amount of obligation at the time the pledges or hypothecary obligee has received the notice of attachment or demand for delivery relative to the national tax; provided, however, that this shall not apply in cases where the right of a person possessing another obligation which precedes the national tax concerned is likely to be affected.

Art. 24. 1. Where a taxpayer has failed to pay a national tax, if there exists property which he transferred and which constitutes because of such transfer the subject matter of security (hereinafter referred to as "property subject to jōto tampo"), the taxpayer's national tax may be collected from the property subject to jōto tampo only where it is considered that the tax delinquency measures taken against the other assets of the taxpayer would be insufficient for the payment of the national tax to be collected.
Exhibits*

No. 1

PLEDGE AGREEMENT ON TANGIBLES

Name and Address of 
the Pledgee-Creditor:

Name and Address of 
the Pledgor-Debtor:

We, the above-mentioned parties, hereby enter into the following agreement for loans and creation of pledges.

1. The debtor has received from the creditor the sum of ................................................... Yen (¥..........................) as a loan.

2. The parties agree that the debt shall be due on ........................................... 19......

3. The parties agree that the interest for the loan shall be ........................................... Yen (¥..........................) a month and the debtor agrees to pay the said amount by the last day of each month.

4. The parties agree that the debt shall be paid at the creditor’s address at the time of performance.

5. Upon the occurrence of default in the payment of interest for any two months, all the indebtedness shall immediately become due, with benefit of maturity waived.

6. The debtor has created pledge-rights on the following tangibles for the creditor as collateral security for due payment of his debt and the creditor has received the delivery of the collateral.
   a) ........................................................................................................
   b) ..............................................................................................

7. The pledgee-creditor shall be secured by this pledge to any and all his claims against the debtor including charges incurred in connection with preservation of the pledged tangibles, expenses for the realization on the pledge-right as well as the principal sum of the debt and its interest.

8. The parties agree that the place for returning the pledged things to the debtor shall be the place of their actual location.

Date

Signature of 
Pledgee-Creditor: .................................................. (Seal)

Signature of 
Pledgor-Debtor: ...................................................... (Seal)

*These exhibits only illustrate the basic types of forms used. The forms may be modified to meet different situations, and examples of modified versions can be found in ONO & IMANISHI, KEIYAKU ZENSHO (Complete collection of contracts) (1962) and BRAUCHER & MICHDIA, 2 AMERIKA SHÔTORIHIHO TO NIHON MINSHÔHÔ ("American Law on Commercial Transactions and the Japanese Civil and Commercial Codes") 460-483 (1961).
1. The debtor has received from the creditor the sum of..............................Yen (£..........................) as a loan.

2. The parties agree that the debt shall be due on..............................19............ payable at the creditor's address at the time of performance.

3. The parties agree the interest rate for this loan shall be..............................% a year and the debtor agrees to pay the interest monthly by the last day of each month.

4. Upon the occurrence of any of the following events, the debt shall immediately become due, with benefit of maturity waived, without any notice from the creditor.
   a. Default in the payment of interest for any month.
   b. Default in reporting any change in the debtor's address or residence.
   c. In the event of an application being made by a third party for attachment, provisional attachment, provisional disposition, bankruptcy, or official auction of property against the debtor.
   d. And further, any breach of this agreement.

5. In order to secure the debt, the debtor has transferred his ownership to the goods described in paragraph 7 to the creditor and delivered the same to the creditor as collateral security under the following conditions.
   a. The ownership to the goods shall be transferred to the debtor upon the full payment of his debt.
   b. If the debtor fails to perform any duty or obligation stipulated in this agreement, the creditor may dispose of the collateral furnished by the debtor and may appropriate the proceeds to the debtor's obligations. Also, we agree that the debtor is liable for any deficiency.

6. The parties agree that the creditor lent and delivered the said goods to the debtor enabling him to use them free of charge until the due date of the debt indicated in paragraph 2 and that the debtor received the delivery of the said goods under the following conditions.
   a. On debtor's default in observing any of the conditions prescribed in this agreement, the lease shall be rescinded and the debtor shall return and deliver immediately all the borrowed goods to the creditor.
   b. Upon the full performance by the debtor of all his obligations, the relation of the parties to the goods as prescribed in this paragraph shall terminate without any action.

7. Description of the goods for collateral security (jōto tampo):

8. The debtor warrants that there are no conflicting interests held by others in the goods and shall be responsible for this warranty.

9. In case the goods decrease in their value excessively due to any reason, thus becoming insufficient as the collateral security, the debtor agrees to provide the creditor with such additional collateral as may be required by the creditor or to make immediate partial payment of the debt as may be required by the creditor.

Date

Name and Address of the Creditor: .................................................................
Signature: .............................................................................................

Name and Address of the Debtor: .................................................................
Signature: .............................................................................................
# TRUST RECEIPT (A)*

## EXAMPLE

To

THE BANK OF TOKYO, LTD.**

<table>
<thead>
<tr>
<th>B/L No.</th>
<th>Date</th>
<th>Shipping Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Draft No.</td>
<td>Due Date</td>
<td>Amount (¥)</td>
</tr>
<tr>
<td>Commodity</td>
<td>Cargo Marks and Numbers</td>
<td></td>
</tr>
<tr>
<td>Quantity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unit Price</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Terms</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Port of Shipment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Port of Discharge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date of Cargo Arrival</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>L/C</th>
<th>Your L/C No.</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Foreign Bank’s L/C No.</td>
<td></td>
</tr>
<tr>
<td>L/C Amount</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In consideration of your granting at my/our request the delivery to me/us of the following shipping documents for the purpose of my/our taking custody of or disposing of the goods covered thereby for and on behalf of your Bank, viz:

1. Bill of Lading in .......... copies
2. Invoice in .......... copies
3. Certificate of Origin in .......... copies
5. ............... which your Bank holds as collateral security for due payment of the Bill of Exchange drawn upon .......... by Messrs.......... under the above-mentioned Letter of Credit or ..... and accepted by me/us, or for due payment of the Promissory Note issued by me/us No. .......... , Bank Reference No. .......... for the amount of .......... payable on date of .......... , I/we hereby agree to perform all of the following terms.

1. I/We acknowledge that unless and until the said Bill of Exchange accepted by me/us or Promissory Note issued by me/us is duly paid by me/us, your Bank shall remain owner of the said Bill(s) of Lading or the relative goods as long as they are held in my/our custody.

2. I/We undertake to act as agent for and on behalf of your Bank for the purpose of effecting discharge, clearance, storage, insurance, and/or sale of the said goods and to immediately pay to your Bank the proceeds of any or all sales thereof when received by me/us.

---

* It is customary, where trust financing is contemplated, for a Japanese bank to take from its customer an "agreement" which sets out many of the details of the proposed transactions. Some of these details are reiterated in the actual trust receipts later executed and some are not. The practice varies and a particular provision, such as an insurance clause, which is typically in the underlying agreement, may or may not recur in the trust receipts.

** Forms 3 and 4 are reproduced here with the consent of the Bank of Tokyo.
3. I/We undertake to bear any and all charges incurred in connection with the discharge, clearance, carriage, storage, insurance, and/or sale of the said goods, as well as import duty and other taxes thereof, if any.

4. In case I/we sell the said goods for and on behalf of your Bank, I/we undertake that I/we shall not sell them on credit to the buyer(s) thereof without the written consent of your Bank, and further undertake to inform your Bank promptly of the means of payment thereof and other terms relating to the said sale(s).

5. I/We undertake to make it a general principle to deliver the said goods only against cash payment, but in the event that delivery of the said goods shall be made against other means of payment such as a Bill of Exchange or a Promissory Note, I/we further undertake to notify your Bank beforehand of the name(s) of the party(ies) thereof and to obtain the approval of your Bank before any such delivery(ies) of the goods are effected, and to lodge the Bill of Exchange or the Promissory Note, etc., with your Bank without delay when it is received by me/us. I/We acknowledge that your Bank is entirely at liberty whether to collect at maturity or to discount before maturity the said Bill of Exchange or Promissory Note etc. or to return the same entrusting me/us with the disposal thereof.

6. In case the said goods shall be stored in the warehouse owned by me/us with the consent of your Bank I/we undertake to keep the said goods separately from other goods, and to place them in the particular space allotted to your Bank and I/we shall make no objection to your Bank against your inspecting the said goods at any time or times, either alone or conjointly with other interested parties. I/We further agree to return the said goods to your Bank at any time or times forthwith upon request of your Bank. If the said goods are to be stored in a warehouse other than mine/ours, I/we engage to comply with any instructions of your Bank issued in connection therewith.

7. I/We hold myself/ourselves wholly responsible for any and all losses and/or damages which may occur to the said goods, and, moreover, in case your Bank may judge the goods to be decreasing in their value due to the above or any other reasons, thus becoming insufficient as the collateral security, I/we agree to provide you with such collateral money, equivalent collateral, or additional collateral as may be required by your Bank.

8. I/We further agree to keep the said goods insured up to the maximum insurable value thereof against fire and/or damages of any other nature, and I/we undertake to contract with the insurance company for providing insurance claims to be made payable by the said insurance company direct to our Bank.

9. As to any matters not stipulated in this Agreement, I/we undertake to observe any and all of the terms of the Commercial Letter of Credit Agreement which I/we have signed and presented to your Bank.

Signature

Full Name

Address

I/We hold myself/ourselves responsible jointly and severally with the above principal party, for the due fulfilment of the obligations enumerated in this Trust Receipt, and keep your Bank perfectly free from any and all losses and/or damages in connection therewith.

Signature

Full Name

Address

(Im. Form No. 10-B)
TRUST RECEIPT (B)

EXAMPLE

<table>
<thead>
<tr>
<th>B/L</th>
<th>No.</th>
<th>Date</th>
<th>Shipping Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Draft</td>
<td>No.</td>
<td>Due Date</td>
<td>Amount</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(¥)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Commodity</th>
<th>Cargo Marks and Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity</td>
<td></td>
</tr>
<tr>
<td>Unit Price</td>
<td></td>
</tr>
<tr>
<td>Terms</td>
<td></td>
</tr>
<tr>
<td>Port of Shipment</td>
<td></td>
</tr>
<tr>
<td>Port of Discharge</td>
<td></td>
</tr>
<tr>
<td>Date of Cargo Arrival</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>L/C</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Your L/C No.</td>
<td></td>
</tr>
<tr>
<td>Foreign Bank's L/C No.</td>
<td></td>
</tr>
<tr>
<td>L/C Amount</td>
<td></td>
</tr>
</tbody>
</table>

In consideration of your granting at my/our request the delivery to me/us of the following shipping documents for the purpose of my/our effecting discharge, clearance, and storage of the goods covered thereby for and on behalf of your Bank, viz:

1. Bill of Lading in .................... copies  
2. Invoice in .................... copies  
3. Certificate of Origin in .................... copies  
4. Marine Insurance Policy in .................... copies  
5. ........................................

which your Bank holds as collateral security for the due payment of the Bills of Exchange drawn upon ........................................... by Messrs. ................. of ........................................... under the above-mentioned Letter of Credit or ........................................... and accepted by me/us, or for the due payment of the Promissory Note issued by me/us No. ........................................... Bank Reference No. ........................................... for the amount of ........................................... payable on the date of ........................................... I/we hereby agree to perform all of the following terms.

1. I/We acknowledge that your Bank shall remain owner of the said Bill(s) of Lading or the relative goods.
2. I/We undertake to act as agent for and on behalf of your Bank for the purpose of effecting discharge, clearance, and/or storage of the goods covered by the said Bill(s) of Lading.
3. I/We undertake to store the said goods in a warehouse designated by your Bank at ........................................... after discharging and clearing the said goods, and agree to submit to you immediately the relative warehouse warrant issued in the name of your Bank.
4. I/We agree to indemnify you against any and all losses or damages which may occur to the said goods during voyage and/or discharge, and to sue on your behalf for compensation thereof from the Shipping Company and/or Insurance Agent.

5. I/We undertake to pay any and all charges and expenses necessary for discharge, clearance, carriage, or storage of the said goods as well as import duties and other taxes thereof.

6. As to any matters not stipulated in this Agreement, I/we undertake to observe any and all of the terms of the Commercial Letter of Credit Agreement which I/we have signed and presented to your Bank.

<table>
<thead>
<tr>
<th>Signature</th>
<th>.............................................................................</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full Name</td>
<td>.............................................................................</td>
</tr>
<tr>
<td>Address</td>
<td>.............................................................................</td>
</tr>
</tbody>
</table>

In consideration of my/our undertaking upon request of the above principal party the discharge and storage of the said goods on your behalf, I/we hold myself/ourselves responsible jointly and severally with the above principal party for the due fulfilment of the obligations enumerated in this Trust Receipt, and keep your Bank perfectly free from any and all loss and/or damage in connection therewith.

<table>
<thead>
<tr>
<th>Signature</th>
<th>.............................................................................</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full Name</td>
<td>.............................................................................</td>
</tr>
<tr>
<td>Address</td>
<td>.............................................................................</td>
</tr>
</tbody>
</table>

(Rev. Form No. 11-B)
INSTALLMENT SALES CONTRACT*

To THE..............................................COMPANY, LTD.

Description of Merchandise

Type: ..................  Set No.: ..................  Quantity: ..................
Sale Price: ...........  Yen (¥.................)

This is to certify that I have purchased from you the merchandise above mentioned
under the following agreements.

1. In consideration of receiving the above merchandise from the Company I have paid
............................................................................Yen (¥..................), the first payment on delivery of the
merchandise to me, and I agree to pay on..............................day of each month to the
Company or to the collector of the Company without notice or demand the sum of
............................................................................Yen (¥..................) in monthly payments until the full
price of the merchandise has been paid by me.

2. It is expressly understood and agreed to by me that the ownership of the said mer-
chandise will remain in the Company until I have paid the full price of the merchandise
as above mentioned and I agree to hold the said merchandise with the care of a good
manager.

3. Upon the occurrence of any of the following events, the Company may at its pleasure
claim the immediate payment of the full value of the merchandise or rescind the con-
tract and repossess the merchandise.
   A. Default in the payment of any single installment when due.
   B. Default in my observing any of the conditions prescribed in paragraphs 5, 6,
      or 8.
   C. And further, any default in my performance of the duties for the custody of
      the merchandise.

4. Should the Company decide to rescind the contract entered into according to the
preceding paragraph, I agree that I will forfeit to the Company the amount I have paid
which is to reimburse them for the use and wear of the merchandise and I hereby
authorize and empower the Company or its Representatives to enter the premises
wherever the merchandise may be and take and carry the same away even while in my
absence.

5. I agree not to change the location of the merchandise without first receiving written
consent from the Company, and I shall never attempt to assign, pledge, or rent the
merchandise so long as this contract remains in force.

6. If any change in the description of the purchaser or the guarantor occurs, I agree to
report such a change immediately to the Company.

7. If the merchandise is damaged or destroyed because of fire, theft, loss, etc., before
the full payment of the price, I agree to pay all the rest of the price immediately upon
your request.

8. In the event of an application being made by a third party for attachment, provi-
sional attachment, etc., against the said merchandise, I agree that I will try to prove
your ownership to the merchandise, using my best efforts to show the necessary facts.
I also agree that I will report the event immediately to you.

9. I agree to make competent the law court having jurisdiction over the location of

---

* The Installment Sales Law applies to transactions of this type. See the text accompanying
notes 177, 178 supra.
Office of the Company in conducting any litigation or lawsuit relating to the stipulations contained in this contract.

Name and Address: ........................................... Date
Signature: ................................................................

I hereby jointly and severally guarantee with the principal party the due performance of this contract.

Name and Address: ........................................... Date
Signature: ................................................................

RECEIPT OF THE MERCHANDISE

To The.......................................................Company, Ltd.

Description of merchandise:

Type: ....................... Set No.: ....................... Quantity: ....................... Sale Price: ....................... Yen (¥.......................)

This is to certify that the above-mentioned merchandise has been placed in my custody. I agree to return the same merchandise will be returned at any time on your request.

Name and Address: ........................................... Signature: ...........................................

Date