(40)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re	Bankruptcy No. B-79-00037
UTAH AGRICORP, INC. a Delaware corporation,	
Bankrupt.	
BORG-WARNER ACCEPTANCE CORPORATION, a Delaware corporation,	
Plaintiff,	AMENDED MEMORANDUM DECISION
vs.	
RAY TWELVES, Trustee, ROBERT CLENDENEN, Successor-Trustee, and SEARS BANK AND TRUST,	
Defendants.	

Pursuant to a memorandum decision issued by the Court, judgment was entered in this case on December 5, 1980. On December 15, 1980, the plaintiff, Borg Warner Acceptance Corporation (Borg Warner), filed a Motion to Alter or Amend the Judgment. The Court's findings of fact are not brought into question. Rather, the motion contends there has been a misapplication of the law to the facts in question. Specifically, the motion asserts two grounds of legal misconstruction. The first is that Borg Warner gained constructive possession of the equipment upon its return to the debtor, and thus held a perfected security interest as against the trustee in bankruptcy. The second contention is that the Court misapplied UTAH CODE ANN. §70A-9-103(3)(e) to the harvester in question that this subsection applies only to mobile goods held as inventory leased or held for lease and not to such goods when held for retail sale. Thus, the governing subsection would be instead UTAH CODE ANN. §70A-9-103(1)(d) which, Borg Warner contends, obviates the necessity of reperfecting in this state. Both parties filed memoranda on these issues, and the Court heard oral argument. The motion was taken under advisement for the

Court to more fully consider the impact of these contentions on its earlier rendered decision.

The claim of Borg Warner to perfection by possession as against the trustee is without merit. Borg Warner apparently asserts that the debtor, Utah Agricorp, and subsequently the trustee, obtained possession of the harvester when it was returned by Christensen Implement Company essentially as a "bailee," or entity holding the property in trust for the lawful owner, allegedly Borg Warner. Borg Warner claims that this "constructive possession" arose pursuant to their prompt notification to the trustee on August 15, 1979 of their claim to the harvester given via the filing of a complaint in reclamation. This "notification" would have occurred within the four month reperfection period of UTAH CODE ANN. §70A-9-103, if applicable. In the alternative, they claim perfection by possession by virtue of actual possession of the equipment granted by the Court in the course of the litigation.

Utah Agricorp filed a Chapter XI petition for reorganization under the bankruptcy laws on January 15, 1979. The harvester in question was returned to the debtor on June 22, 1979, and the debtor was adjudicated bankrupt under Chapter VII on June 28, 1979. On this date an interim trustee was appointed, who on July 2, 1979 became, by order of the Court, the permanent trustee in this case. Therefore, when the harvester was returned, it was returned to a debtor-in-possession operating under the Act, and immediately thereafter was transferred to a trustee in bankruptcy.

Although it is true that a secured party may perfect its security interest in "goods" by obtaining possession of the collateral under UTAH CODE ANN. §70A-9-305, the collateral must be in the actual possession of the secured party or its agent, which may include a properly notified "bailee." Official Comment 2 to §9-305 of the Uniform Commercial Code, however, clearly specifies that "the debtor or a person

controlled by him cannot qualify as such an agent for the secured party." Here, when Utah Agricorp regained possession of the collateral, it took possession as a substituted debtor who, by obtaining possession of the equipment, became primarily liable for the debt owed Borg Warner, which originated from the initial purchase of the equipment. As a debtor in this debtor-creditor relationship, Utah Agricorp could not have held the harvester as an agent or bailee for Borg Warner so as to perfect Borg Warner against intervening third parties.

Furthermore, when the property was returned to Utah Agricorp, it was returned to a debtor-in-possession operating under Chapter XI of the Act and shortly thereafter became subject to the interest of a trustee appointed under Chapter VII of the Act. By virtue of Section 188 of the Bankruptcy Act, the debtor-in-possession was vested with the rights of a trustee who in turn, under §70c of the Bankruptcy Act, 11 U.S.C. §110c, was entitled to assert the status of a lien creditor against the property in question. This status is not only inconsistent with the position of a bailee or other entity holding the property in trust for another, but by virtue of its operation, both the debtor-in-possession and the trustee could assert rights to directly challenge and defeat any security interest of Borg Warner which was not properly perfected. Clearly then, whether prompt notification occurred or not, the possession of the harvester by Utah Agricorp and then the trustee did not constitute possession on behalf of Borg Warner so as to perfect its interest under UTAH CODE ANN. §70A-9-305.

Plaintiff's further argument that they obtained possession, so as to perfect their interest, by virtue of the Court's permission given in the course of the reclamation suit, would also not qualify as perfection by possession under UTAH CODE ANN. §70A-9-305. Any possession awarded by the

Court during the course of the litgation was done not as an acknowledgment prior to adjudication of the superior rights of one party over another, but rather to safekeep the property until an ultimate decision could be reached. Thus, the awarding of custody of the property was made specifically subject to the trustee's or other party's rights, pending the decision of the Court. This qualified possession under supervision of the Court is certainly not the kind of possession contemplated in UTAH CODE ANN. §70A-9-305 which can amount to the perfection of a secured interest.

Turning then to Borg Warner's second contention, the Court is persuaded that UTAH CODE ANN. §9-103(1)(d) does indeed govern this transaction rather than Section 70A-9-103(3) (e) as formerly applied by the Court. However, upon close scrutiny of the application of subsection (1)(d), the Court is convinced that the result must be the same.

UTAH CODE ANN. §70A-9-103(3)(e), which is the section applied by the Court in its earlier memorandum decision, applies only to "goods which are mobile...if the goods are equipment or are inventory leased or held for lease by the debtor to others." The Comments to §9-103(3) of the U.C.C. reemphasize the language of the statute in that not all mobile goods held as inventory are governed by §9-103(3), but only those held as inventory "leased or held for lease." Here, the Court specifically found the harvester in question to constitute inventory held for retail sale. Thus, as this "mobile good" was held as inventory for sale, not lease, the Court misapplied §9-103(3)(e) to its perfection upon removal across state lines. The correct subsection to be applied is §9-103(1)(d), which is essentially the catch-all provision covering all collateral not governed by specific rules found in subsections (2), (3), (4), (5), and (6).

UTAH CODE ANN. §70A-9-103(1)(d) states:

> When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this Article to perfect the security interest,
>
> (i) if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;
>
> (ii) if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter.

Borg Warner contends that this subsection should be interpreted to say that if the collateral is brought into this state subject to a perfected security interest, it remains perfected without further action. It claims that Section 9-103(1)(d)'s reference to Part 3 of the U.C.C. does not require the reperfection of collateral in the new state, but only deals with the initial perfection of collateral. A close look at §9-103(1)(d), however, reveals this interpretation of the law to be erroneous.

The application of UTAH CODE ANN. §70A-9-103(1)(d) is triggered "when collateral is brought into and kept in this state" while subject to a security interest perfected in the state from which it was removed. Upon removal of the collateral into this state, this subsection states that "the security interest remains perfected, but if action is required by Part 3 of this Article to perfect the security interest," that action must be taken within four months after the collateral is removed or before the expiration of the period of perfection in the other jurisdiction, whichever occurs first. As with Section 9-103(3)(e), if the necessary action is not taken within the four months, then pursuant to Section 9-103(1)(d)(i), the security interest becomes unperfected and "is thereafter deemed to have been unperfected as against a person who became a purchaser after removal."

Thus, just as with subsection (3)(e), inaction will result in the security interest becoming unperfected relating back to the date of removal. If the necessary action is taken, however, pursuant to Section 9-103(1)(d)(ii), perfection of the security interest will be continuous. The question then arises as to when action under Part 3, as specified in subsection (1)(d), is necessary to continue perfection of a security interest in removed collateral, and consequently, when does the four month grace period provided in subsections (1)(d)(i) and (ii) come into play.

The four month grace period referred to in §9-103(1)(d) applies when "action is required by Part 3 of this Article to perfect the security interest." Referring back to Part 3 of Article 9 of the Uniform Commercial Code, enacted in this state in UTAH CODE ANN. §70A-9-301 et.seq., its provisions specifically set forth the requirements necessary to perfect a security interest. By virtue of UTAH CODE ANN. §70A-9-302, a financing statement must be filed in this state to perfect a security interest in goods such as the harvester here. Alternatively, a secured party of goods may perfect by possession under Section 70A-9-305, but as previously discussed, this situtation is not present here. Since then, action by filing is required in this state to perfect a security interest in goods such as the harvester concerned, the four month grace period does apply, and unless that action is taken by refiling within the four months, the security interest will become unperfected in this state as against the trustee, who is a "purchaser" under the Code and who took an interest in the collateral during the four month period. Thus, the effect of Section 9-103(1)(d) is essentially the same as Section 9-103(3)(e) except that the four month grace period is triggered by the removal of the collateral in subsection (1)(d) and by the change of the debtor's location under subsection (3)(e).

That this is the intended interpretation of Section

9-10391)(d) is apparent from Official Comment 7 to Section 9-103 which states:

> In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this state" (i.e., a destination state after removal) adds its own rules requiring reperfection following removal of collateral other than that described in subsections (2),(3), and (5). "This state" will for four months recognize perfection under the law of the jurisdiction from which the collateral came, unless the remaining period of effectiveness of the perfection in that jurisdiction was less than four months (paragraph (1)(d)). After the four month period or the remaining period of effectiveness, whichever is shorter, the secured party must comply with perfection requirements in this state. (Emphasis added.)

Thus, the fact that a security interest may be perfected in another jurisdiction does not guarantee its continual perfection in "this state", or the state to which the collateral was removed. Rather, it only guarantees that perfection will continue for a long enough period of time to protect the interests of a secured party until that party can comply with the perfection requirements, including filing, which are mandated by this state. As mentioned further on in the Comments to Section 9-103(1)(d):

> Paragraph (1)(d) proceeds on the theory that not only the secured party whose collateral has been removed but also creditors of and purchasers from the debtor "in this state" should be considered.

Thus, this provision, like Section 9-103(3)(e) is set up to balance the rights of secured creditors perfected in a previous state with the rights of innocent intervening third parties which may arise in this state.

Therefore, as action is required of Borg Warner under Part 3 of Article 9 as enacted in this state, Borg Warner must reperfect by filing within four months following removal of the collateral. As previously analyzed by the Court in its earlier opinion, since Borg Warner failed to take the necessary action to reperfect within the four month period, its interest became unperfected as of the date of removal.

As the debtor-in-possession, and then the trustee, took as a "purchaser" under the Code within the four month grace period, their rights to the collateral ripened into a superior interest upon the failure of Borg Warner to act.

One last issue, which, although not raised directly, is certainly raised by implication in the course of the arguments made, is whether the filing of a suit for reclamation by Borg Warner within the four month grace period somehow tolled the running of that period so as to make refiling unnecessary to perfect its interest against the trustee. In addressing this issue, a close look at the provision of Article 9 of the Uniform Commercial Code, as adopted in Utah, and the Bankruptcy Act make it clear that no such tolling effect takes place.

As discussed in the Court's earlier memorandum decision, the automatic stay does not prevent the filing of a financing statement on a secured interest when the perfection of that interest relates back to before the filing in bankrutpcy. This exception under the old Act is clearly codified in the new Code under 11 U.S.C. §362(b)(3). Thus, the secured party is free to take the necessary action by filing to insure the continuing priority of its secured interest. With this in mind, it should be further noted that there is nothing in the Uniform Commercial Code, as enacted in Utah, which specifically tolls the Section 9-103(1)(d) four month grace period either upon the institution of a suit over the collateral or upon the institution of insolvency proceedings involving the debtor. The fact that a suit in reclamation is instituted may give notice to the trustee or other party actually involved in the suit of the purported claim to perfection asserted by the secured party, but it provides no general notice to third parties of the claimed security interest, which is the whole policy behind requiring a centralized filing to

perfect an interest. The filing of a suit in reclamation is neither the statutory nor functional equivalent of a filing within this state.

UTAH CODE ANN. §70A-9-403(2) obviates the necessity of filing a continuation statement during the course of insolvency proceedings. A security interest, to come under the protection of that section, must first be perfected by a filing in this state for continuation of that perfection during the insolvency proceedings. Thus, it deals with the narrow issue of the necessity of continuation statements, or in otherwords, the period of effectiveness of a properly filed financing statement. It does not apply to extend the temporary grace periods given in §9-103 and §9-304(5) which allow perfection for a short period of time without filing in this state if filing is eventually accomplished within the set period. The fact that Section 9-403 specifically deals with the tolling of the necessity of filing continuation statements in insolvency proceedings makes the absence of any mention of such an extension for the temporary grace period allowed in Section 9-103 further indicative of the Code's intent not to extend such periods in insolvency proceedings. As previously noted, secured parties are given the opportunity under the bankruptcy laws to protect their temporary rights, and, unlike the situation addressed in Section 9-403(2) where a filing already exists in the state to give general notice to third parties. no such general protection via notice would be available upon the statutory or equitable extension of the Section 9-103 grace period. Therefore, as there exists no legal basis for the tolling of the Section 9-103 grace period, filing in this state was necessary within the four months or the interest became, as here, unperfected.

Based upon this memorandum decision,

IT IS NOW ORDERED that the Court's previous conclusions

of law be amended as herein laid out to correct its misapplication of the law and that the judgment as previously rendered be affirmed based upon this corrected analysis of the law. Plaintiff's motion to amend the judgment is therefore granted as heretofore set forth.

DATED this 16 day of July, 1981.

Ralph R. Mabey
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF UTAH

Central Division

In re:	)	In Bankruptcy No. B-79-00037
	)	
UTAH AGRICORP, INC., A Delaware corporation,	)	
	)	
Bankrupt.	)	
	)	
BORG WARNER ACCEPTANCE CORPORATION, a Delaware corporation,	)	
	)	
Plaintiff,	)	MEMORANDUM AND ORDER
	)	
vs.	)	
	)	
RAY TWELVES, Trustee ROBERT CLENDENEN, Successor-Trustee, and SEARS BANK AND TRUST,	)	
	)	
Defendants.	)	

The above matter was tried to this Court on January 9, 1980 with Jay V. Barney of Day & Barney, Murray, Utah appearing for plaintiff, and Roger G. Segal of Cohne, Rappaport and Segal, Salt Lake City, Utah, appearing for defendant, Trustee.

MEMORANDUM

Plaintiff (hereinafter "Borg Warner") brought this action asserting rights to certain property and funds currently in the possession of the Trustee.

Before trial, the parties resolved all disputed claims except those related to the ownership rights in a Model 686 Potato Harvester and accessories (hereinafter "the harvester"). The defendant, Sears Bank and Trust, has received full satisfaction of its claim and is therefore no longer a necessary party to this action.

FACTS

During all times relevant to this action, the bankrupt (hereinafter "bankrupt" or "Utah Agricorp") was in the business of manufacturing, selling, and servicing farm equipment. Utah Agricorp has always had its principal place of business in Nibley, Utah. Borg Warner is in the business

of financing the purchase of farm equipment by various retail farm equipment dealers throughout the western states.

On July 1, 1977, Borg Warner entered into a financing agreement with Utah Agricorp to finance the purchase of farm equipment from Utah Agricorp by certain farm equipment dealers with which Borg Warner had floor plan agreements.

Christiansen Implement Company (hereinafter "Christiansen") is a farm equipment dealer whose only business location is in American Falls, Idaho. On July 6, 1978, Christiansen and Borg Warner entered into a floor plan agreement whereby Borg Warner was to finance Christiansen's purchase of farm equipment for retail sale and was to receive a security interest in the equipment so financed.

On April 10, 1978, Utah Agricorp and Christiansen entered into a contract whereby Christiansen would serve as an authorized dealer in Utah Agricorp's farm equipment. This contract provided for termination at any time by either party by giving 30 days notice to the other by certified mail. The contract further provided that upon termination by Christiansen, Utah Agricorp had the right to repurchase all new, current, unused, and salable goods from Utah Agricorp's inventory on hand in Christiansen's stock.

In August of 1978, Christiansen acted pursuant to its contract with Utah Agricorp and its financing agreement with Borg Warner and purchased the harvester which is the subject of this action. Borg Warner financed this purchase by paying Utah Agricorp the purchase price of $16,822.85 by check, dated August 18, 1978. The harvester was delivered to Christiansen on or before August 25, 1978. On August 25, 1978, Borg Warner filed financing statements on the harvester with the County Recorder of Power County, Idaho and the Idaho Secretary of State. The Trustee concedes that Borg Warner had, in the the State of Idaho, a perfected security interest in the harvester.

On January 15, 1979, Utah Agricorp filed for reorgani-

zation under Chapter XI of the Bankruptcy Act and was adjudicated bankrupt on June 28, 1979.

During June of 1979, Christiansen terminated its dealer contract and, on June 22, 1979, returned the harvester to Utah Agricorp. Utah Agricorp apparently accepted the termination and issued a credit memo in favor of Christiansen for the harvester on June 28, 1979. Upon adjudication, the Trustee took possession of the harvester.

BORG WARNER'S SECURITY INTEREST

The Trustee does not dispute Borg Warner's perfected security interest in the harvester in the State of Idaho as of August 25, 1978. The dispute in this action concerns the legal effect resulting from the return of the harvester across the state line to Utah Agricorp.

Subsection 9-306(2) of the Uniform Commercial Code as adopted in Utah and Idaho provides that:

> (2) Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof [by the debtor] unless [his action was] the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

UTAH CODE ANN. §70A-9-306(2)(1977) (does not include bracketed portion). IDAHO CODE §28-9-306(1967) (does not include underlined portion).[1] Under this provision of the Uniform Commercial Code (hereinafter "U.C.C."), a security interest is established as one of the most tenacious beasts in the law. Once it latches onto collateral, it is designed to stay with the collateral. See T. QUINN, UNIFORM COMMERCIAL CODE, COMMENTARY AND LAW DIGEST ¶9-306 [A][2], at 9-169 (1st ed. 1978). Under Section 9-306(2), absent payment of the underlying obligation, the only limitations on the power of the security

[1]Since the law is essentially the same in both states, it is unnecessary for this Court to determine which state's law governs.

interest to stay with the collateral must be found within Article 9 of the U.C.C.. The only sections of Article 9 which the Trustee suggests could release the harvester from the Borg Warner's perfected security interest under the present facts are Section 9-307 (buyer in ordinary course) and Section 9-103 (multi-state transaction).

THE CREDIT MEMO

The Court addresses first the issue of whether or not the credit memo issued by Utah Agricorp on June 28, 1979 constituted payment to Borg Warner such as would release its security interest.

The credit memo was issued in favor of Christiansen and lists Christiansen at its address in American Falls, Idaho. There is nothing on the face of the credit memo which would indicate that Borg Warner had any interest in the credit it represents. Based upon the memo itself, Christiansen was free to use the credit represented by the memo in any manner. The Trustee has not presented any contractual provision whereby Christiansen was required to assign credit to Borg Warner in satisfaction of its security interest. The credit memo was not drawn in favor of Borg Warner and did not run to the benefit of Borg Warner.

In his trial brief, the Trustee refers to paragraph 11 of the July 1, 1977 contract between Borg Warner and Utah Agricorp as a basis for the claim that the credit memo was issued for the benefit of Borg Warner. This paragraph specifically makes reference to credits as being the property of the dealer, in this case Christiansen. It states in part:

> Seller shall notify BWAC promptly of any returned goods, allowances or other credits given to Seller's Dealers for which BWAC holds Dealer Paper and furnish to BWAC a copy of all credit memorandums issued pursuant thereto.

As relates to the harvester credit memo in question, Utah Agricorp is the seller, Borg Warner is BWAC, and Christiansen is the Seller's Dealer. The paragraph reaffirms the Court's conclusion that the credit was issued to the Seller's Dealer, Christiansen, and not to Borg Warner.

As the credit memo was issued to Christiansen, and was not given for the benefit of Borg Warner, the Court holds that the issuance of the credit memo did not entitle Utah Agricorp to a release of Borg Warner's security interest in the harvester.

Although argument was made concerning the title to the the harvester, the location of title is, on these facts, not dispositive in either law or equity. The Court does not feel "compelled to engage in purely theoretical exercises of locating 'title', nor should consideration of where 'title lies' influence the courts in the exercise of their equitable discretion." Fruehof Corp. v. Yale Express, 370 F.2d 433 (2nd Cir. 1966). The location of "title" is irrelevant in the application of the U.C.C.

Having resolved that no payment was made on the underlying obligation, the Court now turns to the applicable provisions of the U.C.C., Sections 9-307 (buyer in ordinary course) and 9-103 (multi-state transactions), to determine whether a release occurred under one of these provisions.

BUYER IN ORDINARY COURSE, U.C.C.§9-307(1)

For purposes of this discussion, the Court assumes that Utah Agricorp qualified as a buyer when it accepted Christiansen's return of the harvester and executed the credit memo in favor of Christiansen. Under this assumption, Utah Agricorp may possibly qualify as a buyer in the ordinary course and thus have received the harvester free from Borg Warner's security interest.

Section 9-307(1) of the U.C.C., as adopted in both Idaho and Utah provides that:

> (1) A buyer in ordinary course of business (subsection (9) of Section 1-201) 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.

IDAHO CODE §28-9-307(1)(1967); UTAH CODE ANN. §70A-9-307(1) (1977). Under this section, a buyer who fits into the category of "buyer in ordinary course" is protected against any existing security interest. Subsection 1-201(9) of the U.C.C. defines a buyer in ordinary course as one whose transaction provides an affirmative answer to each of three questions:

1. Was the seller a person "in the business of selling goods of the kind" purchased?
2. Did the buyer act in "good faith" and without knowledge that the sale to him was "in violation of the security interest of a third party"?
3. Were the goods purchased "in ordinary course"?

See T. QUINN, UNIFORM COMMERCIAL CODE, COMMENTARY AND LAW DIGEST, ¶9-307 [A][7], at 9-189(1st ed. 1978).

By applying the Section 1-201(9) test to Utah Agricorp when it received the harvester, it is clear that it was not a buyer in ordinary course such as to receive the protection of Section 9-307(1) of the U.C.C..

The transfer of the harvester satisfies the first part of the Section 1-201(9) test since Christiansen was in the business of selling farm equipment and the harvester was a type of farm equipment. Also, under the "good faith" portion of the second part of the Section 1-201(9) test, Utah Agricorp meets the requirements. Borg Warner has presented no evidence that Utah Agricorp was acting in anything but good faith. Utah Agricorp, however, satisfies neither the knowledge aspect of the second part of the Section 1-201(9) test nor the third part of the test.

Utah Agricorp had received the original payment of the

harvester directly from Borg Warner. It was also in a contractual relationship with Borg Warner by reason of the July 1, 1977 agreement. This agreement provided that Borg Warner would be financing the purchase of various farm equipment for various dealers. These two facts are sufficient to charge Utah Agricorp with the knowledge that the sale was in violation of, or subject to, the security interest of Borg Warner.

Under the third part of the test, courts have generally looked to the nature and purposes of the underlying transaction in determining if the purchase was made "in ordinary course of business". See, e.g., Morey Machinery Co. v. Great Western Industrial Machinery Co., 507 F.2d 987 (5th Cir. 1975); Martin Marieta Corp. v. New Jersey National Bank, 25 U.C.C. REP. 1458 (C.D.N.J. 1979); Taylor Motor Rental Inc. v. Associates Discount, 173 A.2d 688 (Pa. Super Ct. 1961). A purchase must usually be at the retail level from a merchant to a consumer before the purchase would qualify as "in ordinary course". See, e.g., In re Kline, 1 U.C.C. REP. 628 (E.D. Pa. 1956); Martin Marieta Corp. v. New Jersey National Bank, supra. In Martin Marieta, the Court found that where the buyer bought sand from the seller as part of prospective acquisition of the seller, the purchase was not "in ordinary course" and the buyer took subject to the security interest. In Rhode Island Hospital Trust Co. v. Leo's Used Car Exchange, Inc., 314 F. Supp. 254, 8 U.C.C. REP. 93 (D. Mass. 1970), the Court held that the fact that the sale of the car took place away from the normal place of business of the seller was sufficient evidence that the car was not sold "in ordinary course".

Utah Agricorp's status as a manufacturer-repurchaser does not automatically make the repurchase here outside the scope of ordinary course of business. Some Courts have found purchases by dealers can be sufficiently in the ordinary course of business to be free from security interests

under Section 9-307(1) of the U.C.C. See, e.g., Associated Discount Corp. v. Banner Chevrolet Co., 462 S.W.2d 546, 8 U.C.C. REP. 117 (Tex. 1970). The present circumstances, however, do not support such a finding. The harvester was returned after Christiansen had terminated its dealership relationship with the bankrupt. Christiansen was apparently concerned about Utah Agricorp's filing under Chapter XI of the Bankruptcy Act. A repurchase of goods under such circumstances is not "in ordinary course". Thus, Utah Agricorp cannot qualify as a buyer in ordinary course of business which would purchase the harvester free of Borg Warner's security interest.

MULTI-STATE TRANSACTION

Since the return of the harvester involved the moving of the harvester across the state line between Utah and Idaho, Section 9-103 (multiple state transactions) must be examined to determine the perfection or non-perfection of the plaintiff's security interest in Utah. Both Idaho's and Utah's version of Section 9-103 must be consulted.

Under Idaho's version of Section 9-103, IDAHO CODE §28-9-103(2)(1967), a security interest on goods "of a type which are normally used in more than one jurisdiction such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like" and which are the type of goods upon which no certificate of title has been issued, is perfected by complying with Idaho filing laws whenever "the debtor's chief place of business" is in Idaho.

The harvester, as a type of commercial harvesting equipment normally used in more than one jurisdiction, triggers the application of IDAHO CODE §28-9-103(2)(1967). Thus, since Christiansen was the debtor up until the harvester was returned to Utah, and Christiansen had its chief place of business in Idaho, Borg Warner properly perfected its

security interest by complying with the filing requirements of Idaho law.

The propriety of Borg Warner's filing in Idaho is also supported in Utah law. Under the 1972 version of Section 9-103 of the U.C.C., adopted in UTAH CODE ANN. §70A-9-103 (Supp. 1979), subsection 9-103(3) applies to multi-state transactions involving mobile goods upon which no certificate of title has been issued, such as the harvester involved here. UTAH CODE ANN. §70A-9-103(3)(b) (Supp. 1979) provides:

> (b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or nonperfection of the security interest.

Thus, since the location of Christiansen, the original debtor in this case, was in Idaho, Borg Warner properly perfected its security interest under Idaho law.

Once it is established that Borg Warner held a perfected interest in the harvester while it remained the property of Christiansen, the Court must then explore the effect the removal of the goods to Utah had on that perfected security interest under the U.C.C. When the harvester was transferred to Utah Agricorp, and it issued the credit memo to Christiansen, Utah Agricorp became substitute debtor for the purposes of Section 9-103 analysis of Borg Warner's security interest. This substitution of Utah Agricorp as the debtor for purposes of Section 9-103(3) resulted in the location of the debtor being changed from Idaho to Utah.

It is clear from Official Comment 7 to U.C.C. §9-103, that the state of destination after removal, in this case Utah, applies its law to determine the effect removal has on a perfected security interest.[2] UTAH CODE ANN. §70A-9-103 (3)(e)(Supp. 1979) states:

> A security interest perfected under the law of the jurisdiction of the location of the debtor

[2] Comment 7 states: "In addition to the foregoing rules defining which jurisdiction governs perfection of a security interest in the first instance, "this state" (i.e. a destination state after removal) adds its own rules requiring reperfection following removal of collateral."

> is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

This provision, which is the 1972 version of the U.C.C., gives Borg Warner, the secured creditor, a grace period of four months from the change of the debtor's location within which it must reperfect its interest in the new jurisdiction.

Under the 1962 version of the U.C.C., there existed a split of opinion over the effect to be given the four month period of perfection found in section 9-103(3), which applied upon the transfer of the secured property to another state. Some courts interpreted this provision as creating an absolute perfection of the secured party's interest for four months in the new state which could thereafter be continued by refiling in the new state before the expiration of the four months. See United States v. Burnette-Carter Co., 575 F.2d 587 (6th Cir. 1978); American State Bank v. White, 217 Kan. 78, 535 P.2d 424 (1975); Community Credit Co. v. Gillham, 191 Neb. 198, 214 N.W.2d 384 (1974). Other courts held that the 1962 version of section 9-103(3) created only a period of conditional perfection which ripened into a continuous period of absolute perfection only if the creditor refiled in the new state within the four month period. See United States v. Squires, 378 F. Supp. 798 (S.D. Iowa 1974); Arrow Ford, Inc. v. Western Landscape Construction Co., Inc., 23 Ariz. App. 281, 532 P.2d 553 (1975). Under the first interpretation, a third-party purchasing the collateral within the four month period would obtain an interest subordinate to the original secured party whether or not that party refiled in the new state within the four month period. Under the second interpretation, a third-party purchasing within the four month grace period would receive an interest subordinate to the original secured

four month period.

party's interest, which would, however, ripen into a prior interest if the original party failed to refile in the new state within four months after removal.

The 1972 version of U.C.C. §9-103(3), adopted in Utah in UTAH CODE ANN. §70A-9-103(3) (Supp. 1979), was redrafted to follow the "conditional perfection" interpretation of the four month grace period. Its redrafting cleared up as well the application of the multiple state transaction rules in regards to specific types of property. Thus, where the four month period was triggered by the change of the location of the collateral under the 1962 version of U.C.C. §9-103(3), under the 1972 version of the U.C.C. §9-103(3)(e), the four month grace period is activated for mobile goods such as the harvester here, at the change of the debtor's location, the place designated as the proper place to perfect interests in these types of property. Section 9-103(3)(e) then clearly states that if an interest is not reperfected in the new state within the four month period, "it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change" of location. (Emphasis added.)[3] The term "purchaser" is defined in UTAH CODE ANN. §70A-1-201(33)(1968) (U.C.C. §1-201 (33)) as a person who takes "by purchase." Section 1-201(32), UTAH CODE ANN. §70A-1-201(32), then defines purchase as including "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." Under §70c of the Bankruptcy Act, former 11 U.S.C. §110c, the trustee is given the rights and powers of a judgment creditor, a lien creditor, or a creditor with an execution returned unsatisfied as of the date of the filing of bankruptcy. The trustee, therefore, qualifies as a "purchaser" of the harvester under UTAH CODE ANN. §70A-1-201(33)(1968).

The date at which the trustee becomes a "purchaser", however, is confusing. Section 70c of the Bankruptcy Act,

[3] Official Comment 7 to U.C.C. §9-103 reinforces the provision's clear meaning when it states: "In case of delay beyond the [illegible] there is no 'relation back' . . . ."

11 U.S.C. §110c, gives the trustee status as a lien creditor or judgment creditor as of "the date of bankruptcy." The "date of bankruptcy" is defined in Section 1(13) of the Bankruptcy Act, 11 §1(13), as "the date when the petition was filed." This is to be distinguished from the "date of adjudication", which constitutes another major measuring point in the Act and is defined in Section 1(12), 11 U.S.C. §1(12), as "the date of the filing of any petition which operates as an adjudication, or the date of entry of a decree of adjudication." Thus, it would appear that the trustee's rights under Section 70c must, in fact, relate back to and be determined as of January 15, 1979, the date of the filing of Utah Agricorp's Chapter XI petition. See In re Forrest Paschal Machinery Company, Inc., 3 B.C.D. 1227 (M.D.N.C. 1977). This determination is complicated, however, by the specific facts of this case, for as of the "date of bankruptcy", Utah Agricorp had no interest in the harvester. Rather, it was not until June 22, 1979 when the harvester was returned to Utah Agricorp and thus became part of the estate, that either the debtor or the trustee could assert an interest in and to it.

In the normal situation, the relation back of the trustee's status would enable the trustee to claim priority over an interest which was unperfected at the time of the filing of the original petition but which was perfected before the actual date of adjudication. Here, however, although the interest in the harvester was perfected at the time the petition was filed, the debtor had no interest in or claim to the property at that time. The debtor did not acquire an interest in the harvester until almost six months later when the property was returned to the debtor. It would seem logical, then, that the trustee's rights in the property, under Section 70c, if nonexistant at the time of the "date of bankruptcy", must be determined as of the first time thereafter that the property becomes the property of the

party perfecting

estate or that the debtor obtains an interest in it. Therefore, the trustee then became a "purchaser" of the harvester pursuant to Section 70c of the Bankruptcy Act, 11 U.S.C. §110c, and UTAH CODE ANN. §70A-1-201(33)(1968), on June 22, 1979, the date the debtor first obtained an interest in the property subsequent to the filing of bankruptcy.

Although there appears to be no case law directly on point, by the plain terms of Section 9-103(3)(e), if a secured party does not reperfect in the new jurisdiction within the four months following the change of location, his rights become inferior to those of the intervening trustee in bankruptcy who acquires an interest which would qualify him as a "purchaser" during the four month period under §70c of the Bankruptcy Act, former 11 U.S.C. §110c. This result is analogous to the effect of other provisions in the U.C.C. which give creditors a period of grace within which to perfect their lien and, if accomplished within the specified period, the perfection of the lien will relate back to the creation of the lien and will take priority over intervening creditors acquiring an interest during that period. One such provision is found in U.C.C. §9-301(2).

Under Section 9-301(2), a period of ten days from the date on which the collateral comes into possession of the debtor is allowed to the creditor as a grace period within which to perfect. If filing is accomplished within the 10 days, perfection relates back to the earlier of when the agreement was made or value was given. If filing is not accomplished within the grace period, as with Section 9-103(3)(e), perfection will date from the actual date of filing without the benefit of relation back. It is clear that since the trustee in bankruptcy takes as a lien creditor whose priority of interest must be determined as of the date of filing bankruptcy, he is subject to the effect, or benefits from the absence of effect, of the Section 9-301(2) grace period the same as any other intervening creditor. See 4B COLLIERS ON BANKRUPTCY ¶70.62A, at 719 (14th ed. (1978). Thus, a secured [illegible] after the filing of

bankruptcy, but within the allowed grace period will take priority over the rights of the trustee. Likewise, if the secured party fails to perfect within the grace period, his rights will become subordinate to the intervening trustee in bankruptcy. In 4B COLLIERS ON BANKRUPTCY ¶70.51, at 619 (14th ed. 1978), it states:

> We have noted elsewhere in this treatise that as to certain transactions some state laws may provide a certain length of time or period of grace within which required recordation may be effected, so that if such recordation is properly accomplished within the time permitted it will "relate back" to the time the transaction was completed and thus prevail over creditors or other third persons just as if recordation had been effected immediately. Such "relation back" under local law may, therefore, permit a lien based on a transaction effected prior to bankruptcy to be perfected by recordation or filing subsequently thereto and yet acquire superiority over the trustee's lien conferred by §70c as of the date of bankruptcy.

Just as these types of liens can take priority over the trustee even if perfected subsequent to the filing of bankruptcy but within the allowed grace period, so if these liens are not perfected within that grace period, interests will be created which are subordinate to that of the trustee. This same result is mandated under UTAH CODE ANN. §70A-9-103(3)(e)(Supp. 1979). As noted in COLLIERS, the automatic stay provides no interference in the perfection of these types of liens by filings subsequent to bankruptcy. Perfection by possession is, however, naturally another matter. Id at 619, n. 15.

The facts of this case show that the secured party in this case, Borg Warner, failed to reperfect its interest in the State of Utah within four months after the removal of the collateral into this state. Under UTAH CODE ANN. §70A-9-103(3)(e) (Supp. 1979), the intervening trustee in bankruptcy obtained an interest on June 22, 1979, originally subordinate to Borg Warner's interest which, however, ripened into a superior interest upon Borg Warner's failure to act.

Pursuant to the foregoing reasoning,

IT IS THEREFORE ORDERED:

1. The trustee has a superior interest in the Model 686 Potato Harvester and is therefore entitled to retain possession of the same.

2. Borg Warner Acceptance Corporation is determined to be an unsecured creditor in the amount of $16,822.85 as its lien is subordinate to the interest of the trustee.

DATED this 20 day of October, 1980.

Ralph R. Mabey
United States Bankruptcy Judge