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## Secured Transactions (Other Than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code Article 9

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### SECURED TRANSACTIONS (OTHER THAN REAL ESTATE MORTGAGES)— A COMPARISON OF THE LAW IN WASHINGTON AND THE UNIFORM COMMERCIAL CODE, ARTICLE 9

WARREN L. SHATTUCK\*

The National Conference of Commissioners on Uniform State Laws and the American Law Institute in late 1951 approved The Uniform Commercial Code. A few last-minute changes were made in 1953<sup>1</sup> and the Code is presumably now in final form. The period of critical appraisal, evaluation, and legislative consideration is at hand.<sup>2</sup> It is the purpose of this article to indicate the Secured Transactions consequences, were the Code enacted in the state of Washington. An effort will also be made to suggest the relative advantages of the Code and the existing law; these suggestions should be received with caution. The reader can and should decide for himself wherein lies the better solution.

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<sup>1</sup> See pamphlet dated June 1, 1953, entitled RECOMMENDATIONS OF THE EDITORIAL BOARD FOR CHANGES IN THE TEXT AND COMMENTS OF THE UNIFORM COMMERCIAL CODE OFFICIAL DRAFT, TEXT AND COMMENTS EDITION.

<sup>2</sup> A bibliography of legal periodical coverage of Article 9 will appear as a supplement to the final installment of this paper. The Code was submitted in 1953 to the legislatures of California, Connecticut, Illinois, Indiana, Massachusetts, Mississippi, New Hampshire and Pennsylvania. The action taken was: enactment in Pennsylvania; reference to the Law Revision Commission for study and report, in New York; reference to a special commission or committee for study, in Connecticut, Massachusetts and Ohio; adjournment without action in California, Illinois, Indiana and New Hampshire. In Rhode Island a bill creating a special commission to study the Code was enacted. In Wisconsin a bill providing for a study of the Code failed of enactment. The present plan, as indicated by Mr. George Powell, a uniform law commissioner for Washington, calls for presentation to the Washington legislature in 1955.

That there is room for improvement in the existing legal framework for security transactions seems hardly arguable. The Code is avowedly aimed at improvement. The prestige of the sponsoring organizations and the individuals who participated as draftsmen, consultants and critics during the drafting period, entitles the Code to respectful consideration. It is above all, at this point, vital that the profession refrain from captious and uninformed criticism and from objections which have no foundation save in the fact that the Code will effect changes. It is moreover desirable that the Code be understood and evaluated as a whole, and that the decision to support it or not support it be based on a balancing of the merits and demerits as a whole. A project of such magnitude cannot please everyone in all its parts. It is hoped that this paper, in informing about Article 9, will aid in that over-all appraisal.

At the outset, reference must be made to certain of the provisions of Article 1, which are applicable to Article 9.

General standards of construction, and the extent to which Code provisions can be varied by agreement of the parties, are set out in Section 1-102.<sup>2a</sup>

<sup>2a</sup> Section 1—102. Purposes; Rules of Construction.

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

- (a) to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions;
- (b) to preserve flexibility in commercial transactions and to encourage continued expansion of commercial practices and mechanisms through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.

(3) In construing and applying this Act to effect its purposes the following rules shall apply:

- (a) Definitions and formal requirements such as those determining what constitutes a negotiable instrument, a bona fide purchaser, a holder in due course, or due negotiation of documents of title are not subject to variation by agreement;
- (b) Except as otherwise provided by this Act the rights and duties of a third party may not be adversely varied by agreement to which he is not a party or by which he is not otherwise bound;
- (c) The general obligations prescribed by this Act such as good faith, due diligence, commercial reasonableness and reasonable care 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;
- (d) Provisions of this Act which are qualified by the words "unless otherwise agreed" or words of similar import may be waived or modified by agreement and the absence of such words contains no negative implication;
- (e) Subject to the foregoing subsections and except as otherwise specifically provided in this Act, the effect of provisions of this Act may be varied by agreement;
- (f) The Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construc-

Choice of law principles are stated in Section 1-105(5) and 105(6) in these terms: "The Articles on Bulk Transfers (Article 6) and Secured Transactions (Article 9) apply whenever any contract or transaction within their terms is made or occurs after the effective date of this Act and falls within the provisions of Section 6-102 or Sections 9-102 and 9-103." "Whenever a contract, instrument, document, security or transaction bears a reasonable relationship to one or more states or nations in addition to this state the parties may agree that the law of any such state or nation shall govern their rights and duties. In the absence of an agreement which meets the requirements of this subsection, this Act governs." The wisdom of these subsections is arguable and has been argued at length.<sup>3</sup>

A general policy about remedies is laid down in Section 1-106.<sup>3a</sup>

Some basic definitions are set out in Section 1-201. These are numerous and the section must be examined and kept in mind in studying the substantive sections of the Code. Those of the definitions which particularly bear on Article 9 will be referred to later.

A general policy about acceleration clauses is stated in Section 1-208: Section 1—208. Option to Accelerate at Will.

A term providing that one party may accelerate payment or performance or require collateral or additional collateral not on stated contingencies but "at will" or "when he deems himself insecure" or in words of similar import means that he has power to do so only in the good faith belief that the prospect of payment or performance is impaired but the burden of establishing lack of good faith is on the party against whom the power has been exercised.

There is no Washington statute on this subject. There is case authority under which an acceleration clause phrased in terms of "when the lender deems himself insecure" will be construed to permit acceleration only when the obligee has reasonable cause to believe himself insecure. Our court has not undertaken to specify the circumstances which will spell out "reasonable cause." Some, but not much,

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tion and application of this Act but if text and comment conflict, text controls;  
(g) Prior drafts of text and comments may not be used to ascertain legislative intent.

<sup>3</sup> Comment, *Uniform Commercial Code—Conflict of Laws*, 17 ALB. L. REV. 4 (1953); Rheinstejn, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114 (1951).

<sup>3a</sup> Section 1—106. Remedies to be Liberally Administered.

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential nor penal damages may be had except as specifically provided in this Act or by other rule of law.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

light is shed on this critical practical detail by the cited cases and their holdings.<sup>4</sup> Although the Code makes good faith the test, little difference in actual results is to be expected in a shift from a "reasonable cause" standard to a "good faith" standard. It will be observed that the Code places on the obligor the burden of establishing the absence of good faith. The Washington cases are not definitive on this detail. Very probably the obligee would be held by our court to the burden of showing "reasonable cause" in litigation concerning the power to accelerate as defined in the existing cases.

The Code section here discussed relates only to security document acceleration clauses of the "insecurity" variety. It is of some interest that the Revised Code of Washington (referred to hereafter as "RCW") provides, for chattel mortgages only, a right of acceleration where there is reasonable cause for apprehension.<sup>5</sup>

Section 1-208, although titled "Option to Accelerate at Will," goes beyond acceleration provisions. It also governs construction of promises to provide additional collateral "at will" (of the obligee) or when

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<sup>4</sup> The mortgagee "must act in a reasonable manner," *Skookum Lumber Co. v. Sacajawea Lumber & Shingle Co.*, 107 Wash. 356, 181 Pac. 914, 187 Pac. 410 (1919) (mortgagor had disposed of a "few small items of no particular value"; the value of the security had increased since the mortgage was given; insecurity not found); followed in *Hines v. Pacific Car Co.*, 110 Wash. 75, 188 Pac. 29 (1920) noted 21 Col. L. Rev. 100 (1921) (conditional sale contract; facts upon which insecurity alleged not stated in the opinion; court said of the Skookum rule "This rule of good faith and reasonable cause is recognized in other cases . . .," although the Skookum opinion said nothing about "good faith"). In an earlier case, *Allen v. Morris*, 87 Wash. 268, 151 Pac. 827 (1915), the court said of a mortgage insecurity clause, both that the mortgagee could proceed by notice and sale if he chose, and that he "is liable if he act (sic) arbitrarily and without sustaining cause," citing a case construing the Washington statute dealing with foreclosure on insecurity. See note 5 below. The facts upon which the insecurity was asserted were not stated.

<sup>5</sup> RCW 61.08.080 "Action before debt is due. When the debt for which the mortgage is given is not due and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he may bring an immediate action in the superior court of the county where the property is situated, for the recovery of his debt, and the court may make any order it deems fit in order to secure the property so as to make it available for the satisfaction of the debt." RCW 61.08.090 "When mortgagee may take possession—Sale. A mortgagee of personal property, when the debt is due, or if the debt is not yet due and the mortgagee has reasonable ground to believe that his debt is insecure, and that by allowing the property to remain in the hands of the mortgagor he would be in danger of losing his debt or security, may have the property taken from the possession of the mortgagor and sold in the manner provided in this chapter." In *Case Threshing Machine Co. v. Shroll*, 100 Wash. 212, 170 Pac. 564 (1918), insecurity under the statute was found to exist where, to quote the headnote, "the mortgagor had no property subject to execution, had judgments against him and all his property covered by mortgage, had assigned part of the gross earnings, and in order to defeat creditors had proposed operating in the name of another, and that he was careless and incompetent and had damaged the (property)." On the other hand, in *Fitch v. Goetjen*, 83 Wash. 355, 145 Pac. 447 (1915), "reasonable cause" was found not proved by evidence of the mortgagor's expressed purpose to pasture the mortgaged livestock on the neighborhood range, and of the generally bad reputation of the neighborhood for livestock stealing.

the obligee deems himself insecure. Breach of the additional-collateral clause will no doubt be, in the usual document, a ground for acceleration, and in that circumstance lies the reason for the combined coverage of the section. The writer is not aware of any local statute or decision bearing on the interpretation or operation of such promises.

Article 9 begins with a short title section which requires no discussion. The Comment accompanying Section 9-101 is however a good deal more than a comment on the short title. It is a four page commentary on the objectives and scope of and occasion for the Article. Perusal of it would be a good preliminary to the reading of the remainder of this paper. The confusion and complexity which characterize the law of chose and chattel security in the United States generally, and which are pointed out in this Comment, exist also in Washington. That our cases and statutes achieve the results expectable in a hundred years of haphazard and uncoordinated accretion will be only too clearly apparent in the discussion of subsequent sections.

Section 9—102. Policy and Scope of Article.

(1) Except as provided in Section 9—104 on the exclusion of certain security interests and other transactions, this Article applies so far as concerns any personal property within the jurisdiction of this State

- (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property including goods, documents, instruments, chattel paper, accounts or contract rights; and also
- (b) to any financing sale of accounts, contract rights or chattel paper.

(2) Among the transactions to which this Article applies are those in the form of pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, bailment-lease, trust receipt, other lien or title retention contract and a lease intended as security.

A note accompanying the section indicates the range of existing statutes requiring repeal, a detail which is further and directly covered in Article 10. What is believed to be a comprehensive list of the Washington statutes affected will be set-out at the end of this paper.

The Comment accompanying Section 9-102 states in part: "The Article does not in terms abolish existing security devices," and "While most sections of this Article apply to a security interest without regard to the nature of the collateral or its use, some sections state special rules with reference to particular types of collateral." An index of sections where such special rules appear is included in the Comment.

This section does three things. It draws within the Article, that is within one integrated and planned system of legal principles, all man-

ner of security transactions involving chattels, simple choses and chattel paper. It acknowledges (inferentially) the continued possibility of use of variant forms of transaction, under the Article. It states a choice of law principle in providing for coverage of "any personal property within the jurisdiction of this State."

The very statement of the coverage demonstrates one simplification achieved by the Code. In lieu of the existing multiplicity of legal principles, both statutory and common law, comprising the "law" as we now know it in terms of chattel mortgage, conditional sale, pledge, with its diverse subject matter (accounts, notes, securities, bills of lading, warehouse receipts including those taken in field warehousing, and chattels), and trust receipts, the Code creates a set of basic principles common to all security transactions in chattels, choses and chattel paper, followed by some particularized propositions related to particular types of property interest.

Granted the section does not bar the continued use of the old forms, one may surmise that the absence of any reason for continuing to use them will bring about the drafting of security documents which vary only as to recitals covering problems peculiar to the subject matter or the type of financing. The subsequent discussion of Section 9-203 also bears on the probable drafting trend.

Under the existing law there are many opportunities for the unwary draftsman of a security transaction to go astray. On the one hand there are certain criteria for the creation of a type of security, *e.g.*, a chattel mortgage, conditional sale or trust receipt; on the other hand there are separate statutes requiring filing of each type. The penalty for a slip-up in the drafting is very likely to be failure to achieve the intended form, whereas the filing was made on the assumption the form was achieved. The outcome is that there is no effective filing.<sup>6</sup> Less

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<sup>6</sup> Lahn & Simmons v. Matzer Woolen Mills, 147 Wash. 560, 266 Pac. 697 (1928) (conditional sale contract in form and filing; held chattel mortgage and unfiled, because purpose was to secure another obligation in addition to the purchase price); Lyon v. Nourse, 104 Wash. 309, 176 Pac. 359 (1918) (conditional sale contract in form and filing; held chattel mortgage and unfiled, because the transaction was in fact a loan rather than a sale); Veblen v. Foss, 32 Wn.2d 385, 201 P.2d 719 (1949) (conditional sale in form and filing; held chattel mortgage and unfiled, because the original sale was a cash sale which created a debt, the conditional sale contract being an after-thought on the buyer's default); Mahan v. Nelson, 148 Wash. 110, 268 Pac. 144 (1928) (conditional sale in form and filing; held chattel mortgage and unfiled, because the "vendor" was in fact a financier who provided the purchase money, rather than the seller); Hughbanks Inc. v. Gourley, 12 Wn.2d 44, 120 P.2d 523 (1941) (conditional sale in form and filing; held chattel mortgage and unfiled, because the "vendor" was not "in the economic sense a seller"); *In re Chappell*, 77 F.Supp. 573 (D. Ore. 1948) (which, although from an Oregon federal district court, would without doubt be followed in Washington in either state or federal court, and which held that a transaction in form a trust receipt failed as

critical but nonetheless important is the fact that under existing law the remedies are diverse. Failure to achieve the desired form will result in a shift in the available remedies, a shift which may not be discovered until a futile and expensive effort has been made to exercise the remedies pertinent to the desired form.

**Section 9—103. Accounts, Contract Rights and Equipment Relating to Another State; and Incoming Goods Already Subject to a Security Interest.**

(1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this Article; otherwise by the law (including the conflict of laws rules) of the state where such office is located.

The immediate effect of this provision (were it adopted in all the States) would be to make reasonably certain a matter now as uncertain as anything can be—whether and where to file to protect an assignment of receivables. There is in Washington an excellent filing statute;<sup>7</sup>

such and was an unfiled chattel mortgage because the financing was not for the acquisition of the goods); *Farmers State Bank v. Scheel*, 124 Wash. 429, 214 Pac. 825 (1923) (security assignment of lessee's interest under real property lease held a chattel mortgage and vulnerable to the assignor's creditors for lack of filing); *First Guaranty Bank v. Western Cross Arm and Mfg. Co.*, 139 Wash. 614, 247 Pac. 1027 (1926) and *Lloyd L. Hughes, Inc. v. Widders*, 187 Wash. 452, 60 P.2d 243 (1936) (in each of which a security assignment of an executory contract for the sale of chattels was made, in the first case by the buyer, in the second case by the seller; in both, as to the chattels, the court held that the lender could assert no interest as against persons protected by the chattel mortgage filing statute, because a security interest in the chattel, if intended, was a chattel mortgage and unfiled); *West American Finance Co. v. Finstad*, 146 Wash. 315, 262 Pac. 636 (1928) (conditional sale in form and filing; held chattel mortgage and unfiled, because the document provided cumulatively for repossession and deficiency); with this case compare *Allis-Chalmers Mfg. Co. v. Hedlund L. and M. Co.*, 164 Wash. 296, 2 P.2d 708 (1931), which reaches an apparently opposite result.

The foregoing, save for the *Allis-Chalmers* case, are instances of a security holder losing his security for failure to conform to minutia which have become essential for the accomplishment of one particular variety of security transaction. In other instances the secured creditor managed to hold his security against attack by the debtor or others after a lawsuit: *Lloyd v. McCallum*, 127 Wash. 180, 219 Pac. 849 (1923) (conditional sale attacked on ground "vendor" was financier; court held he in fact had title and could be a seller on conditional sale); *Lundberg v. Kitsap County Bank*, 79 Wash. 75, 139 Pac. 769 (1914) (document failed to recite title retained and would pass on payment; attack on the argument that no conditional sale contract resulted; held for the vendor); *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44 (1922) (ambiguity as to pledge or conditional sale contract, court found for the security holder, that pledge existed); *Seaboard Securities Co. v. Berg*, 170 Wash. 681, 17 P.2d 646 (1932) (conditional sale contract provided for repossession or recovery of the contract balance; the court held the alternative form of the recitals saved the transaction from successful attack on the ground the remedies spelled intent to create a chattel mortgage); *Schumaker v. Patterson*, 187 Wash. 33, 59 P.2d 927 (1936) (buyer who lacked down payment transferred other chattels to seller and executed conditional sale contract for all the property; held for the vendor against attack on the ground chattel mortgage existed).

See Lomen, *Resolving Ambiguities Against the Conditional Sale*, 20 WASH. L. REV. 112 (1945); Starr, *Conditional Sales and Chattel Mortgages*, 9 WASH. L. REV. 143, 183 (1934).

<sup>7</sup> RCW 63.16.010 *et seq.*



the awkward problem is to find out when it applies. Few legal questions are more confused than is the conflict of law principle governing the choice of the law which shall control the validity of an assignment of contract rights as against the assignor's creditors or subsequent assignee.<sup>8</sup> There are apparently no significant local decisions on this matter. Enactment in Washington only would give some degree of certainty but leave open the problems raised by the wide diversity of conflicts principles elsewhere.

(2) If the chief place of business of a debtor is in this state, the validity and perfection of a security interest and the possibility and effect of proper filing with regard to equipment of a type which is 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), is governed by this Article; otherwise by the law of the state (including the conflict of laws rules) where such chief place of business is located.

The immediate result of this section (were it enacted in all the states) would be reasonable certainty on a question now unanswerable. Filing statutes, including our own, are typically geared to situs in fixing the place for filing as to a chattel mortgage and vendee's residence in fixing the place for filing as to a conditional sale contract.<sup>9</sup> Under the "situs" approach it is difficult enough to handle chattels

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<sup>8</sup> Concerning the assignee and creditors of the assignor, there is authority for the applicability of the law of the forum, upon garnishment or attachment by a creditor who is a citizen of the forum. *In re Loeb Piano Co., Inc.*, 178 La. 920, 152 So. 565 (1934); *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259, 35 N.E. 757 (1893) (dictum). It has been held that the law of the place of the obligor's domicile controls. *Gordon v. Vallee*, 119 F.2d 118 (C. A. 5th 1941). A few cases have applied the law of the state in which the assignment was made. *Clark v. The Connecticut Peat Company*, 35 Conn. 303 (1868); *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn. 582 (1842). One decision sustains the applicability of the law of the place where the assigned contract was made. *Warren v. Copelin*, 45 Mass. 594 (1842). The law of the place where the obligation was payable has been held to control. *Lewis v. Lawrence*, 30 Minn. 244, 15 N.W. 113 (1883).

The position of successive assignees of the same chose is equally confused. In the following cases, which will not be discussed in detail because the opinions are in general unclear and require careful reading for a fair appraisal, can be found authority, dicta or inference for the applicability of (1) the law of the state in which the account obligor is to pay; (2) the law of the state in which the assignor is domiciled; (3) the law of the state where both assignments were made, although payment was to be elsewhere; (4) the law of the state in which the first assignment was made; (5) the law of the state in which the first assignment was made, provided the requirements of that state as to priority over a second assignment have been satisfied: *In re Rosen*, 157 F.2d 997 (C.A. 3rd 1946); *In re Vardaman Shoe Co.*, 52 F.Supp. 562 (E.D. Mo. 1943); *Hanna v. Lichtenstein*, 169 N.Y.S. 589 (1918); *In re Queensland M. & A. Co.*, 1 Ch. D. 536; *Couret v. Conners*, 118 Miss. 374, 79 So. 230 (1918); *Kelly v. Selwyn 2* (Eng.) Ch. 117, [1905] W. N. 69, 74 L. J. Ch. (N.S.) 567, 53 W.R. 649, 93 L.T.R. (N.S.) 633 (1905); *Wishnick v. Preserves & Honey Inc.*, 153 Misc. 596, 275 N.Y.S. 420 (1934).

<sup>9</sup> The Washington statutes are RCW 61.04.020 *et seq.* (chattel mortgages) and RCW 63.12.010 *et seq.* (conditional sale contracts).

which are not regularly in movement across state lines;<sup>10</sup> chattels which do so move create arguments for the applicability of the law of both jurisdictions, arguments which cannot be surely resolved on the basis of existing case law.<sup>11</sup> Where "residence" is the criterion, domicile is arguably what the legislature intended. As to a corporation this means the place fixed by its charter; as to an individual it is to be determined by factors which have no necessary relation to the place where he or the chattel is at the time.<sup>12</sup>

The merits of the "chief place of business" determinant used by the Code may be arguable. Relief from the uncertainty now existing would be so welcome as to suggest that no serious quarrel with the Code provision is expectable.

If Washington alone enacted the Code, it would be necessary to determine the attitude of each state through which the chattels move, just as it is now.

The coverage of rolling stock and airplanes in this sub-section must be correlated with the federal statutes which govern the filing of se-

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<sup>10</sup> The Washington chattel mortgage filing statute, RCW 61.04.020, requires filing in the county "in which the mortgaged property is situated." One might assume that a chattel is "situated" where it is physically. It is evident from *Muller v. Bardshar*, 119 Wash. 252, 205 Pac. 845 (1922) that the problem is not so easily resolved. The case concerned an automobile sold in King County by a Seattle car dealer to a buyer who resided in Whatcom County, and a purchase money mortgage which recited in part that the mortgagor would retain possession of the car in Whatcom County and not permit it to be removed therefrom. The recitals, plus the fact that the mortgagor resided in Whatcom County, said the court, "in effect, stipulated that the car was delivered to the purchaser in Whatcom County, the county of his residence, and that the situs of the car at the time the mortgage was given should be deemed to be Whatcom County." The court went on to say: "The car having been delivered . . . in Whatcom county, and the chattel mortgage filed for record within ten days after the date of the mortgage, we will assume that that was the proper place for filing the mortgage." Filing was in Whatcom County. Although the case is made to turn on the operation of the re-filing statute, now RCW 61.04.090, if the original filing were ineffective there was no occasion to go into the re-filing problem. The case accordingly seems fairly to mean that the place for filing can be a place where the chattel is not physically, *e.g.*, where the mortgagor resides, or where the chattel is to be retained, or where the parties agree it shall be.

<sup>11</sup> The handling of a security transaction involving an interstate truck or bus is now the principal source of difficulty, the railroad equipment and aircraft problems having been set at rest by federal legislation, as to which see note 14 below.

<sup>12</sup> *First Nat. Bank v. Wilcox*, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203 (1913) (a conditional sale contract was filed where the corporation transacted most of its business, rather than in the county where the charter provided for its main place of business; the filing was held to be invalid).

In *Bucknor-Weatherby Co. v. Wuest*, 167 Wash. 647, 9 P.2d 1104 (1932), conditional sale filing in the county where the corporate vendee did most of its business was held to be invalid because its legal domicile was elsewhere; moreover, there could be no estoppel as against the vendee's receiver by reason of the vendee's misrepresentation as to its domicile. Apparently, these decisions commit our court to the "domicile" construction of the term "residence" as employed in the filing statute.

curity documents covering such chattels and which are evidently paramount. The correlation is made in the next section.

(3) If personal property is already subject to a security interest when it is brought into this state, the validity of the security interest is to be determined by the law of the jurisdiction where the property was when the security interest attached, unless the parties understood at that time that the property would be kept in this state and it was brought here within thirty days thereafter for purposes other than transportation through this state. If the security interest was already perfected under the law of the jurisdiction where the property was kept before being brought into this state, the security interest continues perfected here for four months and also thereafter if within the four month period it is perfected here. The security interest may also be perfected here after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was kept before being brought into this state it may be perfected here; in such case perfection dates from the time of perfection in this state.

This subsection deals with a routine choice of law problem, one on which the local cases are only partly definitive. It appears that the Washington court will recognize as prior a security interest valid in the place from which the chattel came despite the absence of filing in this state save where the security holder knew of or consented to the removal to this state. In the latter event the contrary is presumably the result.<sup>13</sup> The Code would require filing in Washington where the chattel was intended to be brought permanently into the state within thirty days, or is in fact later in the state for four months, and would clarify details on which the local law is now obscure. The Code would also supply a legislative mandate for Washington filing, a mandate now lacking. Provision for filing here as to a transaction not filed at

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<sup>13</sup> There appear to be but two Washington cases concerning the applicability of local filing statutes to chattels which are the subject of foreign security transactions, and which are brought into Washington. In *Rodecker v. Jannah*, 125 Wash. 137, 215 Pac. 364 (1923), the court followed the majority rule, which sustains the validity of a security transaction valid at its inception, as against a local purchaser, encumbrancer or creditor, despite non-compliance with the local filing statute. The court expressly left open the effect on this rule of the security holder's knowledge of the removal.

In *Sound Industrial Loan Co. v. Allyn*, 149 Wash. 123, 270 Pac. 295 (1928), the court adopted the proposition, for which there is elsewhere an increasing amount of support, that the security holder who knows of or consents to the removal must within a reasonable time conform to the laws of the new state, on pain of losing his interest to a creditor or bona fide taker there. The court did not attempt to explain just how the foreign security holder would go about conforming to our statutes, RCW 61.04.020 and 63.12.010, neither of which is at all designed to handle transactions undertaken more than ten days previously and in another state.

The cases involved with these and other conflict of laws problems are considered in: *Conflict of laws as to chattel mortgages and conditional sales of chattels*, 13 A.L.R.2d 1312 (1950).

the place of origin is a sensible one; the point is ignored in the existing opinions.

**Section 9—104: Transactions Excluded From Article.**

This Article does not apply

- (a) to a security interest subject to the Ship Mortgages Act, 1920, or any other statute of the United States to the extent that such statute regulates the rights of parties to and third parties affected by transactions in particular types of property; or

The accompanying Comment indicates that the present federal statute concerning the filing of security interests in aircraft is operative under Article 9-302 (2), in that federal filing is filing under the Code. The Comment also indicates that the substantive operation of aircraft security transactions is not governed by the federal statute, and would accordingly be governed by the Code; a similar situation appertains as to railway rolling stock, under the federal statute which requires filing with the Interstate Commerce Commission.<sup>14</sup> In this connection, subsection (e) of Section 9-104, below, should be noted.

- (b) to a landlord's lien or lien on real estate; or

This subsection seems to require no discussion.

- (c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9—310 on priority of such liens; or

This subsection seems to require no discussion.

- (d) to an assignment or other transfer of a claim for wages, salary or other compensation of an employee; or

Despite the statement, in the accompanying Comment, that this subsection explains itself, it is suggested that the occasion for the exclusion of wage assignments is unclear. Certainly the enactment of the Code would effect a change in our law, since wage assignments are covered by RCW 63.16.010, the assignment of accounts receivable filing statute.<sup>15</sup> If that statute is totally repealed wage assignments will be

<sup>14</sup> 66 STAT. 724 (1952), 49 U.S.C. § 20(c) (Supp. 1952) (railroad rolling stock used in interstate commerce); 52 STAT. 1006 (1938), as amended, 49 U.S.C. § 523 (1951) (aircraft); *In re Veteran's Air Express Co.*, 76 F.Supp. 684 (D. N.J. 1948) (which sustained a security interest for which there was filing pursuant to the federal statute and none in the state); *United States v. United Aircraft Corp.*, 80 F.Supp. 52 (D.Conn. 1948) (which found the property description insufficient for the purposes of the federal filing provision); *Dawson v. General Discount Corp.*, 82 Ga. App. 29, 60 S.E.2d 653 (1950) (which sustained the validity of federal filing).

If RCW 81.36.140 *et seq.*, which sets up a public notice system for railroad rolling stock and also permits a conditional sale of such property to provide both for repossession and sale, and collection of the deficit remaining due on the price, was intended to cover equipment used in interstate commerce, the subsequent federal statute would appear to preclude further application of it to such property.

<sup>15</sup> This statute reads in part: "'Account' . . . includes rights under an unperformed contract . . . for work . . . or services which in the regular course will result in an account receivable; . . ."

free of filing requirements. The small loan legislation<sup>16</sup> and some express wage assignment statutes<sup>17</sup> also bear on such assignments. Since these are by no means a comprehensive treatment of security transactions of this variety, it would be desirable to retain RCW 63.16.010 *et seq.* insofar as it covers wage assignments.

(e) to an equipment trust covering railway rolling stock; or

The reason for this rather odd exclusion is stated in the Comment to be the desire of persons who deal in equipment trusts to retain the legal status quo. The Comment also points out the fact that other security arrangements in rolling stock come within the Code's coverage. In this connection, notice the discussion above under subsection (a).

(f) to a transfer of accounts as part of a sale of the business out of which they arose, or a transfer of a contract right to an assignee who is also to do the performance under the contract.

The Comment states the reason for this exclusion, in the non-financing character of the transfer. It may be noted that the Washington accounts receivable legislation (RCW 63.16.010) contains no such limitation; it covers transfers whether financing or otherwise.

(g) to an assignment of other transfer of an interest or claim in or under any policy of insurance.

This subsection was added in 1953; an accompanying note indicates that the purpose of the amendment "is to make clear that loans on insurance policies are not within the scope of Article 9 of the Code." The reason for the amendment is not explained. Loans against the cash surrender value of life insurance contracts are a common instance of pledge. Premium loans, secured by assignment both of the right to cancel and receive a return premium and the right to the proceeds on loss, are an increasingly important type of security transaction. Apparently neither variety of insurance financing will be governed by the Code.

#### Section 9—105. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires:

(a) "Account debtor" means the person who is indebted on an account, chattel paper or contract right;

<sup>16</sup> RCW 31.08.190: "The payment of five hundred dollars or less . . . as consideration for a sale or assignment . . . of wages . . . whether earned or to be earned, shall for the purpose of regulation hereunder be deemed a loan secured by such assignment . . ."

<sup>17</sup> RCW 31.12.280 (limiting to two months wages, assignments taken by credit unions as collateral); RCW 49.48.090 (assignment of future wages to secure loan of less than \$300 shall not be valid unless accepted in writing by the employer and the acceptance filed); RCW 49.48.100 (assignment of future wages by a married man must be accompanied by the wife's written consent); RCW 49.48.110 (prohibiting assignment of wages payable at a "central place" pursuant to RCW 49.48.010).

The present accounts receivable filing act, RCW 63.16.010, employs the term "debtor" to express this idea.

- (b) "Chattel paper" means a security agreement or lease of a type which is in ordinary course of business transferred by delivery with appropriate indorsement or assignment. When a transaction is evidenced both by chattel paper and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

This is a phrase not heretofore known to the writer. The Comment defines it, in effect, as a "security agreement" (see subsection (h) below), together with the accompanying evidence of debt (where there is such evidence). The subject matter may be choses or title documents as well as chattels, which suggests that the phrase is not the happiest for the purpose. The evident aim is to achieve a generic term which will facilitate talking about what we would now describe as "a pledge of conditional sale contracts" or a "pledge of notes secured by chattel mortgages" or a "repledge of notes secured by pledge, either of chattels, book accounts, notes or title documents." The term is one of art and no doubt useful.

- (c) "Collateral" means the property subject to a security interest, and includes contract rights, chattel paper or accounts which have been sold;

Although the present better usage seems to be "collateral security," the term "collateral" is used as in the Code and is not strange.

- (d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor," unless the context of a particular section otherwise requires, includes the owner of the collateral as well as the person who owes the obligation secured;

This is another term of art and must be accepted as such. Needless to say, we do not now normally speak of one who has sold outright his books accounts or conditional sale contracts as a debtor even though he has obligated himself to repurchase them or has "guaranteed" performance of the account obligors or vendees.

- (e) "Documents" means documents of title;

We are accustomed to the term "document of title"; the single word ought not be too troublesome in this context even though it appears also in many other contexts.

- (f) "Goods" includes all things which are movable at the time the security interest attaches even though they are later affixed to realty, but does not include money, documents of title, instruments, accounts, chattel papers, contract rights and other things in action. "Goods" also includes the unborn young of animals and growing crops;

The key word here is "movable"; it is not a term of art in the common law and may require judicial construction. Since the aim is to get the broadest possible term for what we might otherwise call "chattels," and exclude all manner of choses and title documents, the term may well have utility.

- (g) "Instrument" means a negotiable instrument (defined in Section 3—104), or a security (defined in Section 8—102) or any other writing not itself a security agreement or lease which evidences a right to the payment of money and is of a type which is in ordinary course of business transferred by delivery. When a transaction is evidenced both by chattel paper and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

This term is not a strange one, as to negotiable paper. The remainder of the definition is novel.

- (h) "Security agreement" means an agreement which creates or provides for a security interest;

This is the definition of the key document in the security transactions which come within the article. There is no like term in current use.

- (i) "Secured party" means a lender, seller or other person in whose favor there is a security interest or to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the secured party is the trustee or other representative.

This term of art may well be useful; that its content will require getting used to is evident enough.

(2) Other definitions applying to this Article and the sections in which they appear are:

"Account".	Section 9—106.
"Cash proceeds".	Section 9—306(3).
"Consumer goods".	Section 9—109(1).
"Contract right".	Section 9—106.
"Equipment".	Section 9—109(2).
"Farm products".	Section 9—109(3).
"Inventory".	Section 9—109(4).
"Lien creditor".	Section 9—301(3).
"Proceeds".	Section 9—306(3).

"Purchase money security interest".	Section 9—107.
"Value".	Section 9—108(1).

These definitions will be dealt with as encountered and need no extended comment here; there is some pertinent discussion in note 17a *infra*.

(3) The following definitions in other Articles apply to this Article:	
"Check".	Section 3—104.
"Contract for Sale".	Section 2—106.
"Holder in due course".	Section 3—302.
"Note".	Section 3—104.
"Sale".	Section 2—106.

These terms are discussed in the footnote.<sup>17a</sup>

<sup>17a</sup> Section 2—106. Definitions. "Contract for Sale"; "Sale"; "Present Sale"; "Conforming to Contract"; "Termination"; "Cancellation."

(1) "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2—401).

The present meaning of these terms, as used in the Uniform Sales Act, is: RCW 63.04.020, "(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. (2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

The phrase "holder in due course" is defined in Code Section 3-302: Section 3—302. Holder in Due Course.

- (1) A holder in due course is a holder who takes the instrument
  - (a) for value; and
  - (b) in good faith including observance of the reasonable commercial standards of any business in which the holder may be engaged; and
  - (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.
- (2) A payee may be a holder in due course.
- (3) A holder does not become a holder in due course of an instrument:
  - (a) by purchase of it at a judicial sale or by taking it under legal process; or
  - (b) by acquiring it in taking over an estate; or
  - (c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

The comparable language of the Negotiable Instruments Law, RCW 62.01.052, is: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular on its face; (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

A lengthy and no doubt helpful Comment accompanies Code sec. 3-302. Discussion of the obvious ramifications of the section will not be undertaken here; it belongs more appropriately with a similar study of Article 3.

The Code definitions of "check" and "note" appear in Section 3-104: Section 3—104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note."

- (1) Any writing to be a negotiable instrument within this Article must
  - (a) be signed by the maker or drawer; and
  - (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and



Section 9—106. Definitions: "Account"; "Contract Right."

"Account" means a right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. "Contract right" means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper. A right to wages, salary or other compensation of an employee or a right represented by a judgment is neither a "contract right" nor an "account."

Here again the Code creates terms of art and in the process, inevitably, opportunity for confusion since like terms are now in common usage with other meanings.

RCW 63.16.010 defines "Account" and "account receivable": ". . . an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance or other instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts."

The term "account" as defined in the Code covers only a contract right of the unilateral type, the obligee having performed; under RCW any contract right to be paid for work, goods or services is contemplated, save for conditional sales contracts.

Wage claims are excluded in the Code definition, included in RCW.

Under both Code and RCW, conditional sale contracts, judgments and negotiable paper are excluded from the definition of "account."

The Code definition of "Contract right" excludes any contract right

- 
- (c) be payable on demand or at a definite time; and
  - (d) be payable to order or to bearer.
  - (2) A writing which complies with the requirements of this section is
    - (a) a "draft" ("bill of exchange") if it is an order;
    - (b) a "check" if it is a draft drawn on a bank and payable on demand;
    - (c) a "certificate of deposit" if it is an acknowledgement by a bank of receipt of money with an engagement to repay it;
    - (d) a "note" if it is a promise other than a certificate of deposit.

The comparable provisions of the Negotiable Instruments are: RCW 62.01.184, "A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him"; RCW 62.01.185, "A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check"; RCW 62.01.126, "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

Despite the minor variations evident on comparing the language of Code and present statutes, it seems fair to expect no variation in the results under them.

after performance by one party, a usage not now current.

Section 9—107. Definitions: "Purchase Money Security Interest."

A security interest is a "purchase money security interest" to the extent that it is

- (a) taken or retained by the seller of the collateral to secure all or part of its price; or
- (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used; or
- (c) taken by a person who for the purpose of enabling the debtor to pay for or acquire rights in or the use of collateral makes advances or incurs an obligation not more than ten days before or after the debtor receives possession of the collateral even though the value given is not in fact used to pay the price.

The idea that a financier who provides funds to enable the buyer to buy and who takes security for the advance, acquires a purchase money security, has been recognized by our court.<sup>18</sup>

The Code goes further however, in the phrase "incurring an obligation." Apparently this extension is aimed at sureties for purchase money obligations, who take security in the property purchased.

Advances made or obligations incurred within ten days of the acquisition of possession by the borrower-buyer are for "purchase money," under the Code; there is no comparable doctrine under the existing case authority.

Section 9—108. Definitions: "Value"; When After-Acquired Collateral Security for Antecedent Debt.

(1) A person gives "value" for rights in property if he acquires his rights

- (a) in return for any consideration sufficient to support a simple contract including the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or
- (b) as security for or in total or partial satisfaction of a pre-existing claim; or
- (c) by taking delivery pursuant to a pre-existing contract for purchase.

As the Comment points out, Negotiable Instruments Law, (RCW 62.01.025) and the uniform acts on Trust Receipts, (RCW 61.32.010), Bills of Lading (RCW 81.32.010), and Warehouse Receipts (RCW 22.04.010), define "value" to include a consideration sufficient to support a simple contract, and transactions in which the new interest is

<sup>18</sup>Skuel v. Christenson, 17 Wash. 649, 50 Pac. 466 (1897) (dictum; the case involves a land transaction, as to which the rule should be no different).

taken as security for or in extinguishment of an antecedent obligation. Apart from these statutes, and as a matter of Washington case law, transfers taken to secure old debts are not taken for "value" whereas those taken in satisfaction of old debts are taken for "value."<sup>19</sup> The filing and recording problems which now occasion much of our concern with value are discussed at Sec. 9-301.<sup>20</sup>

Presumably the phrase "consideration sufficient to support a simple contract," which appears in subsection (a), is broad enough to encompass promises and so to make "Value" of a promise to buy and pay. Save as to the uniform acts heretofore adopted in Washington, which contain similar language, this provision seems to be a new idea.<sup>21</sup>

The Comment to this section sheds no light on the phrase "including the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection." The phrase is reminiscent of the Bank Collection Code, and the provision that any credit allowed by a collecting bank shall be revocable pending receipt by it of money or irrevocable credit, and that the bank is an owner to the extent a revocable credit is drawn on.<sup>21a</sup> The area of operation for this phrase in Section 9-108 is not clearly apparent.

The significance of the phrase "by taking delivery pursuant to a pre-existing contract for purchase" is not indicated in the Comment.

<sup>19</sup> Security transactions: *Tucker v. Brown*, 20 Wn.2d 740, 150 P.2d 604 (1944) (involving a pledge); *Seward v. Seward*, 145 Wash. 61, 258 Pac. 856 (1927) (involving a land transaction and citing the earlier cases). The apparently contrary holding in *Worley v. Metropolitan Motor Co.*, 72 Wash. 243, 130 Pac. 107 (1913) is the result of the absence of any reference to value in the Washington conditional sale contract filing statute. See note 57 *infra*, which will appear in the next installment of this paper.

*Sales*: *Long v. McAvoy*, 133 Wash. 472, 233 Pac. 930, 236 Pac. 806 (1925) (which discusses the earlier cases); *Lee Tire & Rubber Co. v. Gay*, 164 Wash. 569, 4 P.2d 503 (1931).

<sup>20</sup> See notes 58-61 *infra*, which will appear in the next installment of this paper.

<sup>21</sup> Uniform statutes now operative: Sales Act, RCW 63.04.010, as to which Professor Williston has written, "Under a proper construction of the Sales Act it seems that not only is one who takes goods in payment of or as security for an antecedent debt a purchaser for value, but so also is one who takes goods, giving in return an executory promise if the terms of the promise are such that it is 'consideration sufficient to support a simple contract'. This doctrine is perhaps opposed to general legal understanding, but is not unsupported by authority." 3 WILLISTON, SALES, § 620 at p. 400; Trust Receipts Act, RCW 61.20.010; Bills of Lading Act, RCW 81.32.010; Warehouse Receipts Act, RCW 22.04.010.

There appear to be no local cases directly on this problem. In general, in other states, apart from statute, an executory promise will not constitute "value." See Annotation, Right of one otherwise protected by recording law against prior unrecorded deed or mortgage as affected by fact that all or part of consideration was unpaid at the time he received notice, actual or constructive, 109 A.L.R. 163 (1937); Comment Note, *Unperformed obligation as value, as regards one's status as a bona fide purchaser freed from prior equities*, 124 A.L.R. 1259 (1940).

<sup>21a</sup> RCW 30.52.020.

The latter does state that the subsection "makes explicit that 'value' it also given—where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation." The writer is not aware of any local decisions indicative of the problems this subsection is aimed to solve. This subsection does serve to emphasize the fact that subsection (a) of this section relates only to rights in property, acquired in return for a consideration sufficient to support a simple contract.

The section further provides:

(2) Where a secured party makes an advance, incurs an obligation or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for such new value and not as security for a pre-existing claim if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made within a reasonable time after the making of the security agreement and pursuant thereto.

The Comment points out that the phrase "new value" is employed in the Article and is undefined therein; the phrase does appear in the Uniform Trust Receipts Act and is defined there.<sup>22</sup>

The use of such a term of art in a uniform statute, without definition, is hardly a commendable technic.

The occasion for this subsection is stated in the Comment: "Subsection (2) makes explicit what has been true under the case law: an after-acquired property interest is not, by virtue of that fact alone, security for a pre-existing claim."

This particular aspect of the after-acquired property clause has not been considered in the several Washington decisions which deal with mortgages containing such provisions.<sup>22a</sup> Our court has had before it the relation-back problem in a different context, e.g. where advances were made against a promise to pledge, when acquired, property not then in the borrower's possession. As against the borrower's liquidator who asserted the subsequent transfer of possession to the lender to be preferential, the lender was sustained.<sup>23</sup>

<sup>22</sup> RCW 61.20.010: "'New Value' includes new advances or loans made, or new obligations incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under RCW 61.20.100; but does not include extensions or renewals of existing obligations of the trustee, nor obligations substituted for such existing obligations."

<sup>22a</sup> *Straus v. Wilsonian Investment Co.*, 177 Wash. 167, 31 P.2d 516 (1934); *Mackall-Paine Veneer Co. v. Vancouver Plywood Co.*, 177 Wash. 503, 32 P.2d 530 (1934); *Reconstruction Finance Corp. v. Hambright*, 16 Wn.2d 81, 133 P.2d 278 (1943).

<sup>23</sup> *Whiting v. Rubenstein*, 7 Wn.2d 204, 109 P.2d 312 (1941). See also *Terhune v. Weise*, 132 Wash. 208, 231 Pac. 954 (1925) and *Horchover v. Pacific Marine Supply*

It would seem that the qualifying language in the subsection, "if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made within a reasonable time after the making of the security agreement and pursuant thereto" states limitations which our court has not voiced. Concededly, however, in the cases referred to above no violation of these limitations was present, and the position the court would take if they were is not determinable.

Section 9—109. Classification of Goods: "Consumer Goods"; "Equipment"; "Farm Products"; "Inventory."

Goods are

(1) "consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "farm products" if they are crops or livestock used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor from whose raising, fattening, grazing or other farming operations they derive or in which they are used. If goods are farm products they are neither equipment nor inventory;

(4) "inventory" if they are held or are being prepared for sale or are to be furnished under a contract of service or if they are raw materials, work in process or materials used or consumed in a business. If goods are inventory they are neither farm products nor equipment.

These definitions are of terms employed elsewhere in the Article. The terms are not presently terms of art in the law. The Comment explains generally the significance of the break-down into property types.

Section 9—110. Sufficiency of Description.

For the purposes of this Article any description is sufficient whether or not it is specific if it reasonably identifies the thing described.

So general a formula as this will of course mean what the court makes it mean. There are several local cases on description in chattel security transactions; it would appear to be a fair summary of them to say that our court has adopted a sensible view of the description

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Co., 171 Wash. 330, 17 P.2d 915 (1933), which were concerned with advances against promised assignments of choses to come into existence later.

requirement, one in harmony with the objective of the Code.<sup>24</sup> There is in fact no occasion to expect that the Code would lead to any change in this regard.

#### Section 9—111. Applicability of Bulk Transfer Laws.

The creation of a security interest is not a bulk transfer under Article 6 (see sec. 6—103).

This provision coincides with the position our court has apparently taken.<sup>25</sup>

<sup>24</sup> *McDonald v. Tower Lbr. Co.*, 10 Wash. 474, 38 Pac. 1122 (1895) (chattel mortgage on specified quantity of lumber at a given location, description insufficient for filing purposes, there being a larger quantity at the location); *MacCallum-Donahoe Finance Co. v. Warren*, 122 Wash. 176, 210 Pac. 368 (1922) (conditional sale contract on automobile gave the wrong serial number; in sustaining the vendor as against a purchaser from the vendee the court said: "There is nothing in the conditional sale statutes above cited to require any specific description of personal property sold under conditional sale. It is a general rule, however, that the contract should properly identify the property but it is not necessary that the description should be such as to identify the property without the aid of parole evidence"); *Bonneviere v. Cole*, 90 Wash. 562, 156 Pac. 527 (1916) (sustained the sufficiency of chattel mortgage describing the property as all those of indicated types at a given location or belonging to the mortgagor, as to property not at the indicated location); *Otto v. England*, 99 Wash. 529, 169 Pac. 964 (1918) (sustained the sufficiency of chattel mortgage describing the property as all of the logs of the mortgagor in the boom at Edmonds, whereas the logs were in fact at Everett, court treating the matter as though the original parties were the contestants); *Goddard v. Morgan*, 193 Wash. 83, 74 P.2d 894 (1937) (sustaining the sufficiency of chattel mortgage, as against successor of the mortgagor, where the description was of all the property of indicated types at a stated location, "A more particular description of said fixtures being hereto attached," and the schedule thus referred to was not in fact attached); *Dillon v. Dillon*, 13 Wash. 594, 43 Pac. 894 (1896) (chattel mortgage sustained against attack by creditors, the description being "The entire stock of merchandise . . . in the store . . . (location given), consisting of clothing, gents' furnishing goods, boots and shoes, hats, caps, oil clothing, rubber boots and shoes, cigars and tobacco . . ."); *Whitler-Corbin Machinery Co. v. Martin*, 47 Wash. 123, 91 Pac. 629 (1907), 53 Wash. 65, 101 Pac. 494 (1909) (conditional sale contract described the subject matter as "1 30-horse power stationary, side-crank slide-valve engine, complete with all fittings, including governor and throttle, band wheels, lubricator, oil cups, and all steam connections," and gave the location as "Lynden, Whatcom county"; the vendee put the engine in a mill near Bellingham; the vendor prevailed in a contest with successors of the vendee, the court summarily disposing of the wrong location point by referring to the filing statute, which evidently contemplates inquiry in terms of the vendee's name rather than chattel location, and indicating that other description deficiencies were not sufficient to preclude constructive notice); *Diamond Iron Works v. Werley*, 135 Wash. 228, 237 Pac. 313 (1925) (conditional sale contract filing sustained, the description being "machinery as per plans and specifications submitted herewith," although no such specifications were attached; the court said that inquiry would have disclosed the identity of the subject matter; the case seems extreme); *Commercial Credit Co. v. Nat. Credit Co.*, 143 Wash. 253, 255 Pac. 104 (1927) (conditional sale contract describing the property as "Nash roadster" was valid between the vendor's assignee and the vendee); *Smith v. Larson*, 36 Wn.2d 236, 217 P.2d 326 (1950) (conditional sale contract was valid between immediate parties; description was "name, goodwill, lease, furniture and fixtures of Arlington Hotel"); *Mott v. Johnson*, 112 Wash. 18, 191 Pac. 844 (1920) (mortgage covered, as against attaching creditor, certain equipment and fixtures not specifically described, where the mortgage referred to "all the furniture and fixtures" in the stated location, and then specifically described part of the property).

<sup>25</sup> *Daniels v. Pacific Brewing & Malting Co.*, 86 Wash. 416, 150 Pac. 609 (1915) (holding that a bill of sale to the mortgaged chattel given in settlement of a debt secured by a mortgage was not within the bulk sales statute, because no money passed; although no direct reference was made to the mortgage itself, it was evidently assumed not to violate the statute).

**Section 9—112. Where Collateral is Not Owned by Debtor.**

When a secured party knows that collateral is owned by a person who is not the debtor, the owner of the collateral shall have the same right as the debtor to receive statements under Section 9—208, to object to a secured party's proposal to retain the collateral in satisfaction of the indebtedness under Section 9—505, to obtain injunctive or other relief under Section 9—507(1) and to recover losses caused to him under Section 9—208(2). Such owner rather than the debtor is entitled to any surplus under Section 9—502(2) or Section 9—504(1).

This section merely recognizes the position of the real surety, one who has created a security interest in his property to secure another's obligation, in the five specific situations enumerated. The section does not say when the knowledge may be acquired, which will invoke these interests for the owner; nor does it touch on the suretyship-defense problem. The existing case law on the latter is evidently left unchanged. Since in present-day thinking the real surety is a mortgagor or pledgor and has all the legal rights which attend that relationship, the only strange aspect of the section is its recognition that the principal also has a right in four of the situations covered. The recognition seems sensible enough. Liability for the ultimate loss rests on the principal, who will be obliged to reimburse the real surety.<sup>26</sup>

**Section 9—201. General Validity of Security Agreement.**

Except as otherwise provided by this Act or by other rule of law or regulation, a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this Article validates any charge or practice illegal under any rule of law or regulation governing usury, small loans, retail installment sales, or the like, or extends the application of any such rule or law or regulation to any transaction not otherwise subject thereto.

The first sentence of this section states a very broad and very obvious proposition: the Code governs the legal relations resulting from transactions within its ambit.

The second sentence seems calculated to prevent any claim for implied repeal of legislation of the types mentioned. Since the Washington usury law does not apply to conditional sales transactions and does to all other types of security transaction,<sup>27</sup> the operation of the usury law, were the Code enacted, is unclear. This is so because the

<sup>26</sup> See, in connection with defenses for and remedies of the real surety, SPENCER, SURETYSHIP §9 (2d ed. 1913); ARNOLD, SURETYSHIP AND GUARANTY §9 (1927); RESTATEMENT, SECURITY §104 (1941).

<sup>27</sup> *Hafer v. Spaeth*, 22 Wn.2d 378, 156 P.2d 408 (1945) (conditional sale transaction); *Goodwin Co. v. National Discount Corp.*, 5 Wn.2d 521, 105 P.2d 805 (1940) (pledge; in an equitable proceeding for an accounting, the debtor was required to credit the principal sum and interest at the legal maximum of 12%, despite usury).

Code contemplates (as the next two sections demonstrate) extinguishment of the distinctions in form which now differentiate the conditional sale from other types of security transaction, but does not prohibit labelling a sale on purchase money security in such a way as to permit argument that the existing usury principles continue to appertain.

Regulatory legislation of various kinds is now extant, for the governance of the lending business. Some of the pertinent material is indicated in the footnote.<sup>28</sup> That the Code leaves these untouched is made clear by this section. There may be other statutes or regulations which come, actually or arguably, within the purpose of the section.

Section 9—202. Title to Collateral Immaterial.

Each provision of the Article with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or the debtor.

The section states a far-reaching and highly important proposition—that the distinctions in terms of title, now made by the substantive law of mortgages and conditional sales, and by the common law cases on trust receipts, shall no longer exist. For example: under existing law, if a seller of goods takes purchase money security he can retain title; if he does retain title, a conditional sale may result but a chattel mortgage cannot. If he parts with title, a chattel mortgage may result; a conditional sale cannot. The mutual inconsistency of the title criterion for the creation of these types of security affords an opportunity for ambiguity, controversy, litigation, and disappointment of a well meaning seller who took one form and filed it as such, only to have a court hold that he achieved the other form and has not filed.<sup>29</sup> Then there are those trust receipt cases in which title is pursued with the intensity of a theological debate, a trust receipt existing only if title never went to the borrower.<sup>30</sup>

<sup>28</sup> RCW 31.04.100 (Industrial Loan Companies); RCW 31.08.150 (Small Loan Companies); RCW 31.12.280 (Credit Union); RCW 31.16.130 (Crop Credit Associations).

<sup>29</sup> *Veblen v. Foss*, 32 Wn.2d 385, 201 P.2d 719, 4 A.L.R.2d 213 (1949) (equipment was delivered at intervals under an agreement that the full price would be paid when the final delivery was made; payment not being then forthcoming, the seller took a conditional sale contract; held that no such security was created, as title passed when deliveries were made).

The confused or overly cautious seller who takes from the buyer both a conditional sale contract and a chattel mortgage achieves ambiguity; the title factor creates the difficulty. See *Smith v. De Vaughn*, 82 Ga. 574, 9 S.E. 425 (1889); *Warren v. Lair*, 179 N.Y.S. 632 (1919); Note 30 COL. L. REV. 493 (1930); 2A UNIFORM LAWS ANNOTATED §10 (1924).

<sup>30</sup> See the discussion in *General Motors Acceptance Corp. v. Kline*, 78 F.2d 618 (C.A. 9th, 1935) at p. 620, and a case cited, *Re A. E. Fountain, Inc.*, 282 Fed. 816 (C.A. 2d 1922). The uniform Trust Receipts Act, RCW 61.20.010 *et seq.*, makes no such requirement.



The Comment to this section points out the fact that for purposes other than those of the Code, taxation for instance, the location of title in a security transaction will have to be determined by resort to principles derived from sources other than the Code. Since this section does not forbid specification by the parties to a security transaction concerning the location of title, presumably such specification could be made if, because of other types of problem, it is expedient to do so.

**Section 9—203. Enforceability of Security Interest: Formal Requisites.**

(1) A security interest is not enforceable against the debtor or third parties unless

- (a) the collateral is in the possession of the secured party; or
- (b) the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops or oil, gas or minerals to be extracted, a description of the land concerned.

(2) A transaction, although subject to this Article, must also comply with (e.g., *any statute regulating small loans, retail installment sales and the like*) in so far as any such statute by its terms applies to the transaction.

Part (1) of this section states the first of several criteria for the accomplishment of a security interest. Phrased in the more usual affirmative manner, a security interest can be created by a verbal statement accompanied by a transfer of possession to or retention of possession by the "secured party" (this term is defined in Sec. 9-105 (i)), or by a writing described as a "security agreement."

Determining the necessary content of this writing is evidently a critical inquiry. The phrase "security agreement" is defined in Sec. 9-105 (h) as "an agreement which creates or provides for a security interest," a definition so broad as to appear on first encounter to be useless. Further thought however demonstrates that the breadth is an important part of a general scheme—elimination of those technical requirements which now demand so much lawyer and court attention and which often defeat a bona fide security transaction.

The Code term "security interest" is defined in Sec. 1-201 (37) as "an interest in property which secures payment or performance of an obligation. The reservation, by a seller or consignor, of property notwithstanding identification of goods to a contract for sale or notwithstanding shipment or delivery, is a 'security interest.' The term also includes the interest of a buyer of accounts, chattel paper, or contract rights."

This, together with Sec. 9-203 (1), means that in non-possessory security transactions of the varieties now handled by trust receipt,

chattel mortgage or conditional sale, the only document necessary under the Code is a writing stating "I hereby create a security interest in X in the following described property. signed Y." Moreover, the language can be any words which mean "I hereby create a security interest." On the other hand the Code does not forbid the addition, to this basic recital, of the usual collateral stipulations about insurance, acceleration and the like.

Just what this means is best seen upon examining the pitfalls created by the existing statutes and cases. The draftsman of a chattel mortgage can get into trouble in an astonishingly large number of ways.<sup>31</sup> The draftsman of a conditional sale too has plenty of opportunity to get his client into difficulties.<sup>32</sup> The trust receipt and the pledge are less treach-

<sup>31</sup> The mortgage description of the secured obligation can, arguably, be too vague or incomplete; the Washington court has not been sympathetic to this type of attack. See *The First National Bank v. Oppenheimer*, 123 Wash. 290, 212 Pac. 164 (1923) (reformation to correct interest rate permitted against mortgagor's receiver); see also *Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752 (1908) (real estate mortgage, sustained between the immediate parties although the mortgage described the secured obligation only as "two notes of even date"). RCW 61.04.030 directs the recording official to indicate on his records, as to a chattel mortgage, "the date due"; presumably this entry is designed to implement the limitation on the effectiveness of filing to the period of two years following maturity of the "mortgage," RCW 61.04.040. Arguably, failure to specify on the mortgage document the maturity date of the secured obligation precludes effective filing. There is no appellate case on the problem, and designation of the maturity date is by no means the common practice in the state.

RCW 61.04.020 requires an affidavit of good faith and an acknowledgment. Each of these details is a potential source of trouble. The mortgage affidavit is a true affidavit, e.g. a statement under oath before an officer authorized to append a jurat. The affiant's signature, and the notarial seal and signature, are necessary: *In re Jesse*, 286 Fed. 305 (C.A. 9th 1923) (affidavit inoperative because the notary failed to sign the jurat). The Washington court has been less rigorous: *Woods v. Young Lumber Co.*, 107 Wash. 432, 181 Pac. 865 (1919) (affidavit sustained although the notary's seal was on the acknowledgment only, not on the jurat); *Puget Sound Pulp & Timber Co. v. Clear Lake Cedar Corp.*, 15 Wn.2d 707, 132 P.2d 363 (1942) (affidavit sustained although it omitted the statutory word "delay").

On the other hand, the Washington court has insisted on the presence of the affidavit, and conformity to the chattel mortgage filing statute in all other particulars, so that a bill of sale taken for security and filed as such was no protection to the lender. *Sullivan v. Lewis*, 170 Wash. 413, 16 P.2d 834 (1932); *Kato v. Union Oil Co.*, 92 Wash. 473, 159 Pac. 692 (1916).

The acknowledgment requirement can be a trap: *Brady v. Frigidair Sales Corp.*, 180 Wash. 472, 40 P.2d 166 (1935) (individual used corporate acknowledgment, which was held to be inoperative); *The Bank of Commerce v. The Kelpine Products Co.*, 167 Wash. 592, 10 P.2d 238 (1932) (corporate acknowledgment, held inoperative because the corporate officer failed to state under oath that he was authorized to execute the acknowledgment); *Bradley Distributing Co. v. Seattle-First National Bank*, 34 Wn.2d 63, 208 P.2d 141 (1949) (sustaining a corporate acknowledgment which was unaccompanied by the corporate seal); *Yukon Investment Co. v. Crescent Meat Co.*, 140 Wash. 136, 248 Pac. 377 (1926) (corporation used individual acknowledgment form, held inoperative).

<sup>32</sup> RCW 63.12.010 requires as to conditional sale transactions involving purchase price obligations exceeding \$50, a writing signed by both vendor and vendee and stating the "terms and conditions, including the rate of interest and the purchase price exclusive of interest, insurance, and all other charges." The signing requirement can cause trouble: *Jennings v. Schwartz*, 82 Wash. 209, 144 Pac. 39 (1914) (vendee signed; vendor's name appeared in the body but not under circumstances the court was willing

erous, withal not entirely free from risk.<sup>88</sup>

There are of course "reasons" for the judge or legislature created formal requirements or use limitations now extant. This is not the place to debate them in detail. It is suggested, simply, that there is not a one of them which is worth the trouble it causes.

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to say meant adoption of it as signature; by way of dictum the court indicated that signing, rather than subscription, was required, the location of the name being immaterial "if the instrument be delivered, acted upon, or disposed of by such person in such manner as to unequivocally show that he intended to adopt and recognize the signature as his own"); *Kennery v. Northwestern Junk Co.*, 108 Wash. 656, 185 Pac. 636 (1919) (holding that the words "Times Square Garage by . . . Vendor" were not a signature, showing intent to insert a name rather than intent to adopt as a signature); *State ex rel Yates etc. Co. v. Sup. Ct.*, 147 Wash. 294, 266 Pac. 134 (1928), noted 3 WASH. L. REV. 193 (1928), (held that no signature resulted when an agent wrote "Jas. Stewart for Yates-American Mach. Co.," Stewart not being a party and the document elsewhere indicating that home office approval of Yates-American Co. was contemplated); *Rychen v. Tacoma Farmers Creamery*, 127 Wash. 359, 220 Pac. 780 (1923) (denying the effectiveness of filing to a document otherwise in good order, but which contained the words "Approved and accepted by the Ice Machinery Company Inc. at Seattle, Washington, the . . . day of . . . 1921. The Ice Machinery Inc. . . .," since these words deferred the legal effectiveness of the document until approval was given and the record contained nothing demonstrating to a searcher the existence of a conditional sale contract in conformity to the statute).

The "terms and conditions" requirement seems reasonably clear; in any event appellate cases on it are infrequent despite the evident opportunity for trouble in the word "interest" as used in the statute: *Adams v. Ingalls Packing Co.*, 30 Wn.2d 282, 191 P.2d 699 (1948) (the court refused to hold that the contract document must contain a recital denying the existence of charges other than those indicated in the document).

Much more serious is the ambiguity hazard, which seems to be the product of judicial distaste for conditional sales transactions, and makes any departure from the clear-cut routine sale pattern an unsafe subject matter for the conditional sale: *Lyon v. Nourse*, 104 Wash. 309, 176 Pac.359 (1918) (holding that a transaction otherwise a conditional sale was a chattel mortgage because a loan rather than a sale was secured); followed in *Mahon v. Nelson*, 148 Wash. 110, 288 Pac. 144 (1928); *Hughbanks, Inc. v. Gourley*, 12 Wn.2d 44, 120 P.2d 523 (1941); *Veblen v. Foss*, 32 Wn.2d 385, 201 P.2d 717 (1949).

Our court has held that a provision for both repossession upon default, and recovery of the balance of the price less the proceeds derived from sale of the property after repossession, renders the transaction a chattel mortgage, although it is otherwise a conditional sale: *West American Finance Co. v. Finstad*, 146 Wash. 315, 262 Pac. 636 (1928); *Raymond Bros. Impact Pulverizer Co. v. Thomas*, 159 Wash. 550, 294 Pac. 219 (1930), noted 31 COL. L. REV. 1051 (1931) (action between vendor and vendee, a 5-4 decision, the minority opinion being grounded both on the fact the action was between the immediate parties, and on the reasoning that the provision for recovery over after repossession was simply inoperative); *Allis-Chalmers Mfg. Co. v. Hedlund L. & M. Co.*, 164 Wash. 296, 2 P.2d 708 (1931) (in an action between the immediate parties the conditional sale was sustained despite a recital which purported to authorize repossession after an unsuccessful effort to collect by way of a suit for the price; without citing or referring to any authority or any other case, the court held the questioned recital to be void. The effect of this decision on the *West American Finance Co.* case is an interesting and unanswerable question).

In *Lahn & Simmons v. Matzen Woolen Mills*, 147 Wash. 560, 266 Pac. 697 (1928), a conditional sale contract which purported to secure both the price of the sprinkler system therein referred to as its subject matter, and a separate obligation, was held to be a chattel mortgage.

In *Schumaker v. Patterson*, 187 Wash. 33, 59 P.2d 927 (1936), a conditional sale transaction was sustained although it covered certain property which the vendee turned over to the vendor and the vendor purported to sell back, this being a device for handling the vendee's inability to make a down payment; the stated reasons for the result were

Whether a bill of sale given for security is a "security agreement" is not clear. No sure answer is provided in the Comment, which dismisses the bill of sale with the statement: "the requirement of this Section that the debtor sign a security agreement is not intended to

"the rights of creditors are not involved and—there was here a clear change of possession"; neither of these would appear to be a relevant circumstance.

See also Lomen, *Resolving Ambiguities in Conditional Sales Contracts*, 20 WASH. L. REV. 112 (1945), and Starr, *Conditional Sales and Chattel Mortgages*, 9 WASH. L. REV. 143, 183 (1934).

<sup>83</sup>The lawyer's difficulties in setting up trust receipt transactions under the Uniform Trust Receipts Act, RCW 61.20.010 *et seq.*, flow from the highly inflexible limitations set by the statute on the use of this type of security.

The Act provides:

"A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

(a) In the case of goods, documents, or instruments, for the purpose of selling or exchanging them, or of procuring their sale or exchange; or

(b) In the case of goods or documents, 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, transshipping, or otherwise dealing with them in a manner preliminary to or necessary to their sale; or

(c) In the case of instruments, for the purpose of delivering them to a principal, under whom the trustee is holding them, or for consummation of some transaction involving delivery to a depository or registrar, or for their presentation, collection, or renewal." RCW 61.20.020 (3);

"Limitations on extent of obligations secured. As against purchasers and creditors, the entruster's security interest may extend to any obligation for which the goods, documents, or instruments were security before the trust receipt transaction, and to any new value given or agreed to be given as a part of the transaction; but not, otherwise, to secure past indebtedness of the trustee, nor shall the obligation secured under a trust receipt transaction extend to obligations of the trustee to be subsequently created." RCW 61.20.140. It further seems to require construction, as to chattels, so as to limit the trust receipt to two business situations—(1) financing the acquisition of the chattels by the trustee; (2) transfer of possession by an entruster who theretofore had a possessory type of security in them, *e.g.*, a pledge of the chattels or of a negotiable bill of lading or warehouse receipt on them: *In re Chappell*, 77 F. Supp. 573 (D. Ore. 1948); *In re San Clemente Electric Supply Co.*, 101 F. Supp. 252 (S. D. Cal. 1951).

Use of the trust receipt to finance a sale by entruster to trustee is in effect a forbidden RCW 61.20.010 (definition of "entruster").

Of course, no document is required for the creation of a pledge, save where a statute directs otherwise. RCW 63.16.020, which requires a written assignment, in connection with a pledge of accounts receivable, is the only local example of such a statute. In practice written pledge agreements are common; they present no particular problems.

It is not inappropriate to regard possession in the pledgee as a requirement of "form," as to a pledge. Many a pledge has failed or been attacked because the evidence of possession was not positive. *Heilbron v. The Guarantee Loan & Trust Co.*, 13 Wash. 645, 43 Pac. 932 (1896) (purported pledge of life insurance policy failed); *Hastings v. Lincoln Trust Co.*, 115 Wash. 492, 197 Pac. 627 (1921) (pledge of negotiable warehouse receipt failed because the pledgor did not indorse the receipt); *Rockwell v. Peyran*, 172 Wash. 434, 20 P 2d 841 (1953) (pledge of stock sustained, pledge being to the corporation whose stock was pledged, the certificate being issued subsequent to the time the alleged pledge took place); *Hodge v. Truax*, 184 Wash. 360, 51 P 2d 357 (1935) (pledge of contract sustained). It will be observed that choses in action present, modernly, the principal difficulties.

Another relatively modern pledge form, the field warehouse, has also caused a fair amount of litigation. See Kane, *The Theory of Field Warehousing*, 12 WASH. L. REV. 20 (1937).

It appears that the Code has not, and indeed could not, obviate fact issues of this type. The Code, in differentiating between collateral in the possession of the secured

reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security." Here is a detail on which the Code will need construction in Washington. Our court treats a bill of sale given for security as a chattel mortgage, forcing the lender into conformity with the chattel mortgage filing statute.<sup>34</sup> The critical question is whether our court will hold a bill of sale to be a "security agreement," and thus within the operation of the Code. The Code, if the Comment is to be taken literally, contemplates that the bill of sale will operate as such save for the equitable protection traditionally afforded the borrower in this situation.

The Comment does somewhat clarify the status of the lender who loans in reliance on the borrower's promise to give security. If he has no written "security agreement" he has no security, even against the borrower. This is an important detail and might better have appeared in the text, despite the provision in Sec. 1-102 (f) for resort to the Comment as an aid in the construction and application of the Code. In neither Text nor Comment is a clear answer given to the question—can a written promise to give security be a "security agreement"? The language in Sec. 9-105 (h), "provides for a security interest," is the language which must be interpreted to find the answer.

The requirement of Sec. 9-203 (b) for land description when the security interests covers crops or oil, gas or minerals to be extracted, does not exactly cover the situations in which a description of land is made necessary by the existing Washington law.<sup>35</sup> The variations do not appear to be significant.

Subsection (2) merely reiterates in affirmative language the like provision of Sec. 9-201.

**Section 9—204. When Security Interest Attaches; After-Acquired Property; Buyer's Enabling Advance; Future Advances.**

(1) A security interest cannot attach until an agreement is made that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights

(a) in crops until they are planted or otherwise become growing crops, in the young of livestock until they are conceived;

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party and other collateral, (and in the filing provisions later discussed), would surely produce some transactions in which the fact of possession would be critical; presumably the fact would be resolved by resort to existing case law.

<sup>34</sup> *Sullivan v. Lewis*, 170 Wash. 413, 16 P.2d 834 (1932).

<sup>35</sup> RCW 61.04.040; RCW 63.12.010; RCW 63.12.020.

- (b) in fish until caught, in oil, gas or minerals until they are extracted, in timber until it is cut;
- (c) in a contract right until the contract has been made;
- (d) in an account until it comes into existence.

(3) Except as provided in subsection (4) a security agreement may provide that collateral, whenever acquired, shall secure any advances made or other value given at any time pursuant to the security agreement.

(4) No security interest attaches under an after-acquired property clause

- (a) to crops which become such more than [ ] year[s] after the security agreement is executed except that a security interest in crops which is given in conjunction with a lease, land purchase mortgage or contract may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction;
- (b) to consumer goods when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.

(5) A security agreement may provide that collateral under it shall secure future advances.

(6) When a buyer makes an advance or otherwise gives new value for the purpose of enabling his seller to obtain or manufacture goods, a security interest in favor of the buyer attaches to the goods by virtue of the contract for sale as soon as they have become identified to the contract.

Subparagraphs (1) through (4), and (6), create a system for the utilization of after-acquired assets as collateral. The full significance of these provisions is sensed only upon reading them with subparagraph (5) and its provision for future advances, and with Sec. 9-205. The end result of Sec. 9-204 and 9-205 is statutory approval of the floating charge, which is the only truly economical and practical financing arrangement for many business situations.

The future property provisions of Section 9-204 are a marked advance over the present law of Washington. It is not possible now to determine whether filing made within ten days of execution will carry constructive notice as to chattels or accounts subsequently acquired.<sup>86</sup>

<sup>86</sup> Mackall-Paine Veneer Co. v. Vancouver Plywood Co., 177 Wash. 503, 32 P.2d 530 (1934), and Reconstruction Finance Corp. v. Hambricht, 16 Wn.2d 81, 133 P.2d 278 (1943), noted 19 WASH. L. REV. 160 (1944), are the cases in which a future property clause was in issue; in neither case did the court discuss nor directly decide the crucial question—will the original filing satisfy the filing statute as to subsequently acquired property? In each case this should have been the controlling question, insofar as the future property was concerned. The contestant, in the Mackall-Paine case, was a trustee in bankruptcy whose contention apparently was limited to an argument that the mortgage did not cover the future property. This the court disposed of summarily on authority of *Bank of California v. Clear Lake Lumber Co.*, 146 Wash. 543, 264 Pac.705 (1928), where the only issue was interpretation and operation of the mortgage provision purporting to cover future property, the mortgagee being sustained on broad and unnecessary accession language. In the *Reconstruction Finance Corporation* case,

Under the Code, the security interest will attach when the "debtor has rights in the collateral" (assuming that the lender has parted with value and that the borrower has signed a security agreement), not as an equitable interest but as a legal one. In a later section, 9-303, express

the contestant was an attaching creditor, who seems clearly to have been entitled to protection under the chattel mortgage filing statute were the mortgage unfiled. The court dismissed his attack by referring to the earlier cases cited above, and stressing the fact the creditor was not a bona fide purchaser.

The end result of these cases is, simply, that it is not possible to determine whether, in Washington, the original filing protects the mortgagee. Our court has not passed on the question. The cases elsewhere are divided. See Cohen and Gerber, *The After-Acquired Property Clause*, 87 U. OF PA. L. REV. 635 (1939).

There are shifting stock mortgage cases in which the mortgagee prevailed and where some of the goods must have been acquired after the mortgage was given; these are interesting but can have little weight on the pre-filing problem as that problem was not discussed. See note 43 *infra*.

The Code does not resolve the problem, of some moment in connection with future property provisions, whether property acquired by the mortgagor's successor in interest will come under the mortgage. The question came up in *Straus v. Wilsonian Investment Co.*, 177 Wash. 167, 31 P.2d 516 (1934), and in meeting the successor's argument that the after-acquired property clause created but a personal covenant of the mortgagor the court relied heavily on its conclusion that the after-acquired property became a part of the mortgaged property by accession. Here again the *Bank of California* case, cited above, was followed to the detriment of clear analysis of the problem before the court. In an earlier case, *Hinchman v. Point Defiance Railway Co.*, 14 Wash. 349, 44 Pac. 867 (1896), the successor's acquisitions were held not to come under the mortgage. The stated reasons were that the new property was neither accession to nor in replacement of that covered by the mortgage originally. These cases are hardly definitive. The problem is a complex one and the successor's position may be best determined by treating the after-acquired property clause as a covenant, which binds the successor only if he has assumed it. See, as examples, *New York Trust Co. v. Bull*, 52 N.Y.S.2d 182 (1944); *Guaranty Trust Co. v. N. Y. & Queens County Ry. Co.*, 253 N. Y. 190, 170 N.E. 887 (1930).

The Code creates a security interest in the lender, in contract rights or accounts, when they come into existence just as in instances of other future property. No new formality or assignment is needed, nor is resort to the fiction of relation back necessary. This is a distinct advance over the existing Washington law, under which it is not possible to determine whether a present transfer can operate on accounts to come into existence later. In *Terhune v. Weise*, 132 Wash. 208, 231 Pac.954 (1925) the court sustained against attack as preferential under the trust fund doctrine, assignments made pursuant to an earlier promise to do so when the contracts in question came into existence, to secure a loan made contemporaneously with the promise. In so holding the court inferentially relied on a relation-back theory. The fate of an unperformed promise to make such an assignment is not entirely clear from that holding; there is in the opinion a dictum to the effect an equitable lien would exist. The *Terhune* case was followed in *Horchover v. Pacific Marine Supply Co.*, 171 Wash. 330, 17 P.2d 915 (1933); the rationale was confused however by the court's statement at page 333: "A fund, to be assignable, does not have to be actually existent; it is sufficient if it is potentially existent. 5 C.J. 854, 924." Further confusion came in *Whiting v. Rubinstein*, 7 Wn.2d 204, 109 P.2d 312 (1941); the court cited both the *Terhune* and *Horchover* cases for the proposition that no preference exists where the creditor's pledge or mortgage is "security for a present consideration." The *Whiting* case involved canned salmon, not chokes; the court after citing the *Terhune* case said: "Where a party by express agreement sufficiently indicates an intention to make specific property a security for a debt or other obligation and promises to transfer such property as security, equity impresses the property with an equitable lien in case security is not given." *Id.* at 219, 109 P.2d at 320.

The Washington accounts receivable filing statute, RCW 63.16.010 *et seq.* contains no language suggesting that an account contract right to come into existence later can be presently assigned; the definition of Account seems rather to contemplate the contrary.

provision is made for effective filing prior to the borrower's acquisition of the collateral.

The point of subsection (2) is in the affirmative of the negative propositions therein stated; these tell us when the debtor has "rights in the collateral" for the purposes of subsection (1).

It is generally assumed that a future property clause in a chattel mortgage can operate only on things similar to those covered by the mortgage at the outset.<sup>37</sup> The Code states no such limitation.

Enactment of the Code would bring about some changes in the handling of crop mortgages. The present differentiations in the future periods during which a present crop mortgage can operate, in terms of types of crop, would disappear in the general limitation of the Code. The Code's provision for unlimited future coverage in connection with a land purchase or lease transaction has no counterpart in our existing statutory or case law.<sup>38</sup>

<sup>37</sup> The Code ignores and therefore repudiates the notion that an after-acquired property clause can operate only in conjunction with a going business or as to property like that covered by the mortgage in the first instance. The Washington court has not rejected any mortgage provision on this ground; the cases cited above, by stressing the going-business aspect, perhaps express indirectly adherence to the requirement. For a general discussion see Comment, *Limitations on the Scope of the After-Acquired Property Clause*, 53 Col. L. Rev. 392 (1953).

<sup>38</sup> RCW 61.04.010 provides:

"Chattel mortgages authorized—Crop mortgages. Mortgages may be made upon all kinds of personal property; and upon growing crops and upon crops before the seed is sown or planted as follows:

(1) Mortgages on annual field crops shall be of no force or effect unless the seed therefore is sown or planted within one year after the execution of the mortgage;

(2) Crops grown upon perennial plants, other than fruit or nut crops may be mortgaged at any time, but not before one year prior to the time the seed, bulbs, roots, or tubers thereof are sown or planted, covering any or all crops to be harvested during the first or second year, or both, after sowing or planting;

(3) Crops grown on perennial plants, other than fruit or nut crops, the seeds, bulbs, or tubers of which have been sown or planted more than two years, may be mortgaged at any time after the third day of November of the year preceding that in which the crops grow and mature;

(4) Crops grown upon biennial plants may be mortgaged at any time, but not before one year prior to the time the seed thereof is sown or planted, covering any or all crops grown from such seed; and

(5) Perennial fruit or nut crops may be mortgaged at any time after the thirtieth day of November of the year preceding the year in which the crops grow and mature."

This statute operates, as would the Code, to create a legal interest in the crops when they come into existence, untrammelled by any vestige of the potential existence doctrine, and protected by filing contemporaneous with execution of the mortgage. See *Community State Bank v. Martin*, 144 Wash. 483, 258 Pac. 498 (1927). The Code does not directly answer the problems which arise when the mortgagor acquires no interest in the land, or disposes of his interest, the contested crop having been planted by his successor, or nurtured and harvested by the successor. See *Third National Bank v. Kniffen*, 143 Wash. 434, 255 Pac. 378 (1927); *First National Bank v. Melbery*, 154 Wash. 69, 280 Pac. 745 (1929); *Pacific Fruit and Produce Co. v. Fruit Production Co.*, 184 Wash. 571, 52 P.2d 311 (1935). Presumably these details will be answered by resort to existing law.

The Code states in so many words that no security interest attaches to crops becoming such after an indicated future period; this is the result achieved by the Washington



The exclusion, in subsection (4) (b), from the enabling provisions of the section, of consumer goods taken as additional security more than ten days after value is given, announces a proposition unknown to the existing law. The areas to which the exclusion will apply must be very few. The "additions and accessions" clause used in automobile security forms seems to be an instance of consumer goods and additional security. Presumably the extra equipment added to a car more than ten days after the financing will not become security, under the Code. The "add-on" arrangement would seem to be another type of transaction in which future consumer goods are sought to be taken as collateral not only for the current credit but also for the old balance. The Comment makes brief reference to the "add-on" type of transaction, indicating that subsection (5) does not apply and suggesting the availability of a security arrangement contemporaneous with the sale, an arrangement making previously purchased articles security too. There are no appellate decisions in Washington discussing the legal effect of such a transaction.

Subsection (6) deals with a problem which has not reached our supreme court. The Comment indicates that a real problem exists since the cases under the Sales Act have, in the situation covered by the subsection, generally required "appropriation" or transfer of possession to the financing buyer. The Code requires identification to the contract, and conformity to the Code filing provisions.

Subsection (5) sanctions security for future advances, with no specifications as to time or amount, or as to any formal requirements. The Comment confirms the evident purpose of the section to authorize future advance provisions without regard to these details. This accords with the present Washington rule.<sup>89</sup>

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court, in construing the present statute: *Atkinson v. Melcher*, 160 Wash. 94, 294 Pac. 567 (1930); *Wenatchee Production Credit Assn. v. Pacific Fruit & Produce Co.*, 199 Wash. 651, 92 P.2d 883 (1939) (which hold that an attempt to mortgage crops past the future period provided in the statute creates no security interest, even between the immediate parties).

The *Atkinson* case cited above contains a dictum which would no doubt be followed, to the effect that a mortgage on crops for future periods past those authorized by the statute would be void.

The present pattern, as to a landlord's lien for rent, is fixed by an express statute rather than by the future crop mortgage statute. Under RCW 60.12.020 and 60.12.050 the landlord has a lien on all crops; his position as to third persons is governed by a two-fold limitation—if the lease is not recorded he must file a notice of his lien each year; recording the lease carries constructive notice of the lien on crops only as to the following three years. Under the Code, a chattel mortgage could be taken by the landlord, covering all crops grown on the land during the lease term.

<sup>89</sup> *Home Savings & Loan Assn. v. Burton*, 20 Wash. 688, 56 Pac.940 (1899) (real estate mortgage reciting that it secured a note for \$16,000; \$2000 only was advanced at the outset; mortgage sustained as to the entire amount as against an intervening

Under the existing principles, there are important distinctions in the legal position of the mortgagee as to third persons, depending on the obligatory or otherwise nature of the future advances.<sup>40</sup> The Code ignores this detail and therefore inferentially accords priority to the future advance whether or not obligatory; specific coverage of such a change in existing law would have been preferable.

If a chattel mortgage or pledge agreement provides for future advances and goes on to specify the purposes for which they will be made, an advance made for some other purpose is probably not under the security. <sup>40a</sup> This is another detail not covered by the Code; caution would suggest thought for the point when preparing a security agreement, in the event the Code is adopted.

#### Section 9—205. Use or Disposition of Collateral Without Accounting Permissible.

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use 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 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.

This revolutionary departure from the rule of *Twyne's Case*<sup>41</sup> and

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interest); *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac.211 (1912) (mortgage securing present obligation and such future advances as might be made, sustained as against intervening interest); *Eltopia Finance Co. v. Colley*, 126 Wash. 554, 219 Pac.24 (1923) (future advance provision sustained; the court did not indicate how it was phrased).

On the other hand, the trust receipt cannot be employed so as to obtain security for subsequent advances, RCW 61.20.140, and the conditional sale contract is evidently unsuited to a future advance transaction because it cannot secure any loans. See the discussion at note 32 *supra*.

<sup>40</sup> The Washington court has held that optional advances made after actual knowledge of an intervening interest are subordinate to that interest, *Elmendorf-Anthony Co. v. Dunn*, 10 Wn.2d 29, 116 P.2d 253 (1941); and that mandatory advances are prior to such an interest, *Cedar v. W. E. Roche Fruit Co.*, 16 Wn.2d 652, 134 P.2d 437 (1943), noted 19 WASH. L. REV. 40 (1944). The fate of future advances made with constructive knowledge of the intervening interest is unclear in the state. Just what agreements between lender and borrower will make advances "mandatory" within the rule is unclear; the Roche case seems to hold that advances are mandatory, withal not the subject of any legal obligation to make them, if necessary for the protection of the property. See Comment, *Future Advances on Mortgages in Washington*, 18 WASH. L. REV. 24 (1943).

<sup>40a</sup> *Shoemer v. Zeran*, 126 Wash. 219, 217 Pac. 1009 (1923).

<sup>41</sup> 3 Co. Rep. 80 b (1601) *Pierce*, indebted to C and to *Twyne*, was sued by C; *Pierce* at once transferred everything he owned to *Twyne* in satisfaction of *Twyne's* claim, but remained in possession and later sold part of the property. In convicting *Twyne* under 13 Eliz. c. 5 (1571) the court stressed, according to *Coke's* comment, two general points—*Pierce* remained in possession and used the goods as his own, and trafficked with others and defrauded and deceived them; *Pierce* really created a trust for himself "and a trust is the cover of fraud").

its extension to choses in *Benedict v. Ratner*<sup>42</sup> removes a major obstacle to the accomplishment of a sound security arrangement in financing against inventory and receivables. Few areas in the security lawyer's operations cause as much anguish as does the planning and drafting of the accounting phase of such financing, under the existing Washington law.<sup>43</sup> It may be assumed that in the typical transaction under the Code, the lender will exact an accounting of at least part of

<sup>42</sup> 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925).

<sup>43</sup> The fraudulent conveyance consequence of the mortgagor's power to sell inventory free of the mortgage is cured by either gross accounting (100% of all proceeds) or net accounting (all proceeds less cost of inventory replacement and overhead). See Kerr, *Chattel Mortgages on Shifting Stocks of Goods in Washington*, 11 WASH. L. REV. 199 (1936); *In re Cascade Fixture Co.*, 8 Wn.2d 263, 111 P.2d 991 (1941); *Puget Sound Co. v. Clear Lake Cedar Corp.* 15 Wn.2d 707, 132 P.2d 363 (1942).

Gross accounting is often feasible only if a revolving loan can be set up; net accounting is complicated by the absence, in the pertinent opinions, of any clear guides to what our court will regard as "inventory replacement" or "overhead."

It will be recalled, too, that either the gross or net accounting financing plan relies heavily on the validity of the future property provision of the mortgage. Whether this provision is operative as against third persons, under the existing filing statute, is unclear. See the discussion at notes 36 and 37 *supra*.

A conditional sale contract, where the vendee is authorized to consume or sell the subject matter without any duty to account, is also a fraudulent transfer. *Schultz v. Wesco Oil Co.*, 149 Wash. 21, 270 Pac.130 (1928).

Before the enactment of an accounts receivable filing statute, now RCW 63.16.010 *et. seq.*, it was virtually impossible to determine what steps were necessary in Washington to create a sound accounts receivable financing arrangement. See *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P.2d 118 (1933), *Peterson v. National Discount Corp.*, 179 Wash. 108, 35 P.2d 1097 (1934); *Brinck, Accounts Receivable as Collateral*, 11 WASH. L. REV. 134 (1936); *Emory and Shattuck, Assigned Conditional Sale Contracts and Accounts Receivable as Collateral in the State of Washington with Suggested Legislative Treatment*, 11 WASH. L. REV. 181 (1936). The cited statute provides: "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." RCW 63.16.080. This provision insulates the assignment itself from attack, while recognizing that particular collections made by the borrower may be lost through failure to adequately police the borrower's accounting methods. Both because of this area of hazard, and because it is sound business to retain a stricter control than is legally necessary, the typical non-notification accounts receivable financing continues to provide carefully for accounting by the borrower. If the lender is to collect, the only difficulty is in the handling of returned merchandise; this problem is usually handled by authorizing the borrower to make the adjustment as the lender's agent, or, in some instances, by denying to the borrower any power to receive returned merchandise without contemporaneous authorization.

The pledge of the vendor's interest under conditional sale contracts will if handled on a non-notification and collection-by-the-borrower basis present the same fraudulent transfer problems as does the pledge of accounts. By statute, the area of risk is much diminished. RCW 63.12.030 provides in part: "No such assignment shall be invalid as against creditors and subsequent purchasers, pledgees, mortgagees, and encumbrancers of the assignor by reason of failure of the assignee to assume control over the contract assigned or the proceeds thereof, or to contract against or to prevent the mingling by the assignor of the proceeds thereof or collections therefrom among his funds or placement of them in his bank account." Here, as in the instance of the accounts receivable statute, the assignment itself is protected but particular proceeds may be lost by failure to have dominion over them. See *Hill v. Brandes*, 1 Wn.2d 196, 95 P.2d 382 (1939) (which involved a sale, not a pledge, of conditional sale contracts, and an assignee who permitted commingling of the proceeds derived by the assignor upon repossession

the proceeds of sale or collection by the borrower; the merit of the Code provision lies in the absence of any standard which the lender must meet on pain of losing his security to a receiver or a trustee in bankruptcy. Accounting clauses can be tailored to the business necessities of the transaction, if the Code becomes the law.

The potential for flexibility in handling complicated commercial loans, opened up by the combination of direct statutory approval of future advances, future property, and accounting clauses geared to the transaction rather than to a chimera of creditor-deceit, is well-nigh unlimited. What this means can best be seen by contrasting the lawyer's job now and under the Code, in a typical situation; for example, a loan for working capital purposes to a food canner. We may assume that a canner requires a line of credit to finance the acquisition of fruit and vegetables and supplies such as sugar and salt, cans and labels, and for payroll. Money is needed at short intervals during the canning season. The finished product, in cans, is stored, some in the borrower's warehouse, some in public warehouses, and is sold over an extended period. Some sales are for cash, some are on open account. On occasion the lender must insist on taking as collateral everything available, which will include machinery, inventory of all kinds, and accounts. What is needed is a line of credit and security in present and future supplies, inventory and accounts to protect present and future advances, with the proceeds of sales providing the main source of repayment.

Under the existing law in Washington, the accomplishment of the security agreement, the forms, and an operating procedure for the lender's employees (to make sure the accounting is properly handled), for this routine and very useful type of financing, is time consuming and nerve racking. There is no way to be sure that a chattel mort-

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and sale of the property; the result, loss of the assignee's interest in the proceeds, would surely be reached in a comparable pledge situation).

The non notification pledge of notes and mortgages would no doubt be vulnerable to fraudulent transfer difficulties; there is no local case in point and no statutory assistance for the pledgee. In practice, this type of financing seems to be handled generally on a collection-by-the-lender basis.

Despite the notion advanced by the Washington court in *Wolfkill v. Johnson*, 34 Wn.2d 759, 209 P.2d 775 (1949), that the fraudulent transfer problem appertains, in chattel mortgages, only to mortgages on the stock in trade of merchants, the power to sell or consume is the source of the defect, not the nature of the mortgagor's business. It would not be wise to assume that the court will follow the *Wolfkill* case on this point.

In summary here, the financing of inventory is seriously impeded, and the pledge of receivables and of conditional sale contracts is partially imperiled (e.g. as to collected proceeds) under the present statutory and case law in this state.

Here is a place at which the adoption of the Code would unarguably accomplish much good; the business community would be particularly benefited.

gage filed at the outset of the transaction will achieve constructive notice as to the after-acquired property;<sup>44</sup> there is a problem on which no appellate cases exist in the state and which cannot be resolved, raised by the fact the mortgage subject matter starts as beans or peaches, goes through a processing stage and ends up as canned goods; there is the necessity for framing an accounting provision (both as to goods and accounts) which will meet the nebulous test of our cases<sup>45</sup>; and there is the need for the utmost care in handling the intransit stages, canner's warehouse to public warehouse, warehouse to buyer. The lawyer is often forced, in the effort to meet all the problems, to the use of highly complex arrangements involving in one financing a trust receipt to cover the acquisition of raws, a chattel mortgage to cover existing inventory and equipment, a pledged warehouse receipt to cover the storage stage, a trust receipt to cover movement from the warehouse to the buyer, and a receivables pledge to cover the collection period. Such complexity, and the expense and risk which are inevitable under our present legal principles, are unnecessary and unjustifiable. Under the Code the entire collateral in such a transaction can be covered in one simple document, and protected by one simple filing.

Section 9—206. Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties by Security Agreement.

(1) An agreement by a buyer of consumer goods as part of the contract for sale that he will not assert against an assignee any claim or defense arising out of the sale is not enforceable by any person. If such a buyer as part of one transaction signs both a negotiable instrument and a security agreement even a holder in due course of the negotiable instrument is subject to such claims or defenses if he seeks to enforce the security interest either by proceeding under the security agreement or by attaching or levying upon the goods in an action upon the instrument.

(2) In all other cases an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

(3) When a seller retains a purchase money security interest in goods the sale is governed by the Article on Sales (Article 2) and a security

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<sup>44</sup> See note 36 *supra*.

<sup>45</sup> See note 43 *supra*.

agreement cannot limit or modify warranties made in the original contract of sale.

This section modifies the existing law in Washington, which can be summarized this way:

An agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller will be a nullity.<sup>46</sup> No distinction will be drawn between buyers who are dealers and buyers who are ultimate consumers,<sup>47</sup> nor in terms of the kind of goods. If the buyer gives a negotiable note, defenses both as to personal liability and realization on the security will be cut off should the note reach a holder in due course.<sup>48</sup> The fact that title to the goods will

<sup>46</sup> *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 298 Pac. 705 (1931) (conditional sale contract). Efforts by an assignee to achieve the desired immunity from defenses, on an estoppel argument, will work if the obligor represented the absence of defenses, when the assignment was made; *Butters v. Oles*, 124 Wash. 380, 214 Pac. 629 (1923) (typical estoppel certificate); *National Bank of Tacoma v. Puget Sound Lumber Co.*, 104 Wash. 363, 176 Pac. 553 (1918) (implied representation cross-claim would not be asserted); in the absence of such a representation, there will be no estoppel, *Doub v. Rawson*, 142 Wash. 190, 252 Pac. 920 (1927). Since, as a practical matter, it is not feasible to take estoppel certificates in commercial financing, lenders are obliged to carry the risks of obligor-defenses or cross actions, where the use of negotiable notes in the original transaction is not possible. In one large and important area, that occupied by the conditional sale, the use of negotiable notes to evidence the buyer's duty to pay is so hazardous in Washington as to effectively discourage the practice of using them. See *Winton Motor Car Co. v. Broadway Auto Co.*, 65 Wash. 650, 118 Pac. 817 (1911), noted 19 CALIF. L. REV. 544, (holding that negotiation of the note vested title to the property in the vendee). The possibility of overcoming the Winton case difficulty by an express assignment of the conditional sale contract too is suggested in *Western Electric Co. v. Norway Pac. Con. & D.*, 124 Wash. 49, 213 Pac. 686 (1923); apparently the possibility has been regarded by most counsel as insufficiently sure to merit taking the risk involved.

Protection for the vendee, which is what the Washington court seems to have had in mind in deciding the Winton case, has been more neatly accomplished in several other states by holding the transferee of the note to be no holder in due course despite the fact he took before maturity and without actual awareness of any defect. One technic is inferred knowledge because of the business connections between the payee and the indorsee, the latter being a finance company. See Annotation, *Finance Company as holder in due course of paper which it purchases from dealer*, 128 A.L.R. 729 (1940). See also Annotation, *Rights of holder in due course of negotiable paper given by buyer under conditional sale contract as affected by the fact that he is also an assignee of rights under the contract in connection with which the paper was given*, 152 A.L.R. 1222 (1944).

The warranty waiver and the "no representations" clause are on occasion employed and have an area of practicability. See Note, 16 WASH. L. REV. 158 (1941); *Hall v. Hall*, 133 Wash. 400, 234 Pac. 2 (1925).

<sup>47</sup> Since the vice in the contract litigated in the Motor Contract Company case, Note 46 *supra*, is in conflict with The Negotiable Instruments Law, the economic status of the buyer is hardly a relevant circumstance.

<sup>48</sup> This is a possibility, where a purchase money mortgage or pledge is employed. Here the issue is whether the transferee of the interest of the mortgagee or pledgee is to have the property rule applied to the security and the chose rule to the debt. The variations are several; for example, fraud in the inducement creates a defect in the title to tangible property, from which a bona fide purchaser takes free; such fraud creates a defense in the obligor on a simple chose, to which an assignee takes subject; it is a personal defense within the framework of the negotiable instruments principles. The Washington court is aligned with those courts which gauge the transferee's total position by his interest in the debt; *American Savings Bank v. Helgesen*, 64 Wash.

probably vest in the vendee if the note is negotiated, has discouraged the use of such notes with conditional sales.<sup>49</sup>

The provision in Subsection three, that if a contract to sell which does not disclaim warranties is followed by a security agreement, no surrender in the latter of the warranties made in the former will be effective, deals with a point upon which there do not appear to be any local decisions. The Comment points out the limited coverage of the subsection; it does not forbid a waiver of warranties in a purchase security transaction of the type now handled by a conditional sale or chattel mortgage, where one document only is involved.

The Code protects the buyer of consumer goods to an extent not now known, in that realization on the security opens up both as to it and the note, even as against a holder in due course of the latter, whatever defenses the buyer may have. On the other hand, the holder in due course can, if he elects, move only under the note, in which instance he has the usual position of a holder in due course. This provision concededly departs from the traditional sanctity of the holder-in-due-course status. The buyer or pledgee of negotiable paper would be obliged, under the Code, to pay some attention to the origin of the accompanying security.

The buyer of non-consumer goods, a category which will apparently take in all commercial buyers, can under this Code section waive as to an assignee all of the defenses not open against a holder in due course of a negotiable instrument. That commercial buyers do not need as much protection, in this particular, as consumers, is at least arguable.

Section 9—207. Rights and Duties When Collateral is in Secured Party's Possession.

(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless the debtor assumes to do so.

No change in the existing law is effected by this subsection.<sup>50</sup>

(2) Unless otherwise agreed, and subject to the provisions of Part 5 after default, when collateral is in the secured party's possession

54, 116 Pac.837 (1911) (negotiable note secured by real estate mortgage; holder in due course of the note could both enforce the note and foreclose the mortgage, despite usury in the loan transaction); see also *Netherlands American Mortgage Bank v. Granfke*, 100 Wash. 188, 170 Pac.876 (1918).

<sup>49</sup> *Winton Motor Car Co. v. Broadway Auto Co.*, discussed in note 46 *supra*.

<sup>50</sup> The writer is not aware of local cases directly in point; the standard of care prescribed by the Code is that normally laid on pledgees and would surely be exacted by the Washington court. See BROWN, *PERSONAL PROPERTY* §§ 130, 134 (1936); *RESTATEMENT, SECURITY* §§ 17, 18 (1941).

- (a) reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody and preservation of the collateral are chargeable to the debtor and are secured by the collateral;

This subsection clarifies and simplifies for the secured party in possession a situation which now usually receives careful handling by the draftsman.<sup>51</sup>

- (b) the risk of accidental loss or damage is on the debtor to the extent of any deficiency in any insurance coverage;

This provision seems obvious enough in its general application; it would change what appears to be the Washington law as to the location of the risk of loss under a conditional sale contract.<sup>52</sup> The present rule, however, has no practical effect, since the typical conditional sale document puts the risk of loss on the vendee.

- (c) the secured party may hold as additional security any increase or profits (except money) received from the collateral, but money so received, unless remitted to the debtor, shall be applied in reduction of the secured obligation;

The subsection states an obvious proposition. It does not resolve a detail—when shall money proceeds be credited on the debt? The lender may prefer to credit such proceeds, not as received, but periodically or as the total reaches a minimum amount. There appears to be no reason why the security agreement cannot so provide.

- (d) the secured party must keep the collateral identifiable but fungible collateral may be commingled;

This subsection requires no comment.

<sup>51</sup> The basic rule is that, in the absence of a future advance clause, the mortgage cannot cover a subsequent advance made to the mortgagor, withal to enable him to preserve the property. *Inland Trading Co. v. Edgecombe*, 57 Wash. 257, 106 Pac.768 (1910).

The mortgagee who pays taxes may tack the outlay to his claim, and may achieve for such outlay the priority of the taxing body, if the tax receipt is duly filed; otherwise it takes the priority of his mortgage. RCW 84.56.330.

A mortgagee in possession may charge preservation expenses against income. See *Sloane v. Lucas*, 37 Wash. 348, 79 Pac.949 (1905) and *TIFFANY REAL PROPERTY* §§ 1423, 1424 (3rd ed. 1939) (which, although concerned with real property mortgages, state basic principles applicable as well to chattel mortgages). A pledgee may tack reasonable preservation expenses. *BROWN, PERSONAL PROPERTY* § 129 (1936).

Outside of these two situations, it must be assumed that the lender's expenditure for whatever purpose is secured only if the mortgage either authorizes it as a type of future advance or obligates the mortgagor to make it so that the mortgagee in doing so is discharging a duty of the mortgagor, under the mortgage. Like principles govern pledge transactions.

<sup>52</sup> *Holt v. Jaussaud*, 132 Wash. 667, 233 Pac.35 (1925) laid the risk of loss on the vendor. Theoretically, this case was supplanted by sec. 22, Uniform Sales Act, RCW 63.04.230. The case nevertheless has retained surprising vitality. See *Seaboard Securities Co. v. Berg*, 170 Wash. 681, 17 P.2d 646 (1932) and *Kuhn v. Ambrose*, 171 Wash. 528, 18 P.2d 485 (1933), which demonstrate no awareness that *Holt v. Jaussaud* is dead. Maybe enactment of the Code would finally retire the case.



- (e) the secured party may not make use of the collateral except in exercise of his duty of custody and preservation, but may repledge it upon terms which do not impair the debtor's rights to redeem it.

The first part of the section states the normal principle; the latter part, in providing expressly for a repledge, recognizes what has become the accepted practice.<sup>53</sup>

(3) A secured party is liable for any loss caused by his failure to meet any obligation imposed by the preceding subsections but does not lose his security interest.

Liability for loss occasioned by nonfeasance or misfeasance is no change; retention of the security interest despite conversion of the security is probably a change, since the normal rule now is that conversion by a pledgee destroys his security interest.<sup>54</sup>

#### Section 9—208. Request for Statement of Account or List of Collateral.

(1) A debtor may sign a statement indicating what he believes to be the aggregate amount of unpaid indebtedness as of a specified date and may send it to the secured party with a request that the statement be approved or corrected and returned to the debtor. When the security agreement or any other record kept by the secured party identifies the collateral a debtor may similarly request the secured party to approve or correct a list of the collateral.

(2) The secured party must comply with such a request within two weeks after receipt by sending a written correction or approval. If the secured party claims a security interest in all of a particular type of collateral owned by the debtor he may indicate that fact in his reply and need not approve or correct an itemized list of such collateral. If the secured party without reasonable excuse fails to comply he is liable for any loss caused to the debtor thereby; and if the debtor has properly included in his request a good faith statement of the obligation or a list of the collateral or both the secured party may claim a security interest only as shown in the statement against persons misled by his failure to comply. If he no longer has an interest in the obligation or collateral at the time the request is received he must disclose the name and address of any successor in interest known to him and he is liable for any loss caused to the debtor as a result of failure to disclose. A successor in interest is not subject to this section until a request is received by him.

(3) A debtor is entitled to such a statement once every six months with-

<sup>53</sup> See Annotation, *Right of broker to repledge customer's securities*, 24 A.L.R. 452 (1923); presumably the Code language, "do not impair the debtor's right to redeem it" refers to the rule which limits the repledge privilege—the repledge may secure an obligation not in excess of the debtor's obligation to the pledgee. *Vance Lumber Co. v. Fraser, Goodwin & Colver*, 162 Wash. 347, 298 Pac.438 (1931).

<sup>54</sup> BROWN, *PERSONAL PROPERTY* § 136 (1936); *RESTATEMENT, SECURITY* §§ 22, 24 (1941).

out charge. The secured party may require payment of a charge not exceeding \$10 for each additional statement furnished.

This proposition has no counter-part in existing law. The practical utility of it seems clear enough, upon remembering that the Code permits security arrangements under which the borrower's current assets are all taken as security and the obligation is a revolving one. The details are neither unclear nor unduly burdensome to lenders.

(The balance of this article will appear in the May and August issues.)