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Security Transactions

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SECURITY TRANSACTIONS

Foreign Corporations, Organizations—Mortgages—Right of Action. Chapter 139 declares that a lending institution[1] organized in another state or in a territory may acquire, deal in, and enforce notes secured by mortgages on Washington real property,[2] and may foreclose such mortgages, all without qualifying as a foreign corporation under RCW 23.52 or paying the fees levied under RCW 23.28.060 on foreign corporations which do business in this state.[3] Property, the ownership of which is acquired by purchase at foreclosure sale or by conveyance in lieu of foreclosure, can be held and operated for five years; thereafter an agent must be appointed pursuant to RCW 23.52.051 and, presumably, the immunities conferred by Chapter 139 end, as to that property.

Legislation of this general type has been enacted in fifteen other states.[4] The reason is no doubt to be found in the fact that many states

[1] The statute enumerates: "Any corporation, bank, trust company, mutual savings bank, savings and loan association, national banking association, or other corporation or association organized and existing under the laws of the United States or under the laws of any state or territory of the United States other than the state of Washington (including without restriction of the generality of the foregoing description, employee pension fund organizations, trust funds, or other funds, foundations or trusts engaged in the investment of moneys, and trustees of such organizations, foundations, funds or trusts), and which are not admitted to conduct business in the state of Washington . . ." Section 1. That all of the types of lending institutions mentioned are "foreign corporations" within the previous coverage of RCW 23.28 and RCW 23.52 seems most unlikely. The extreme breadth of the enumeration in the new legislation is no doubt calculated both to obviate controversy about what is a "foreign corporation" and also to guard against amplification of the "foreign corporation" category in future amendments of RCW 23.28 and RCW 23.52.

[2] The language of the statute concerning permitted activities is: "purchase, acquire, hold, sell, assign, transfer and enforce notes secured by real estate mortgages covering real property situated in this state and the security interests thereby provided, and may make commitments to purchase or acquire such notes so secured. Such non-admitted organizations shall have the right to foreclose such mortgages under the laws of this state or to receive voluntary conveyance in lieu of foreclosure, and in the course of such foreclosure or of such receipt of conveyance in lieu of foreclosure, to acquire the mortgaged property, and to hold and own such property and to dispose thereof." Sections 1 and 2. Although collection of maturing installments and loan servicing activities, such as are involved in implementing the insurance and tax provisions of the typical mortgage, are not expressly mentioned, these seem clearly enough to be within the protection contemplated by the legislature.

[3] Section 3 of Chapter 139 provides that the authorized activities "shall not constitute 'conducting business,' 'carrying on business,' 'transacting business,' 'doing business' within the meaning of chapter 23.52 RCW and section 23.28.060 RCW as derived from Chapter 70, Laws of 1937."

[4] Arizona, Rev. Stat. Ann. 1956 sec. 10-485; Florida, Stat. 1955 sec. 613-07, 659.57; Illinois, Rev. Stat. 1955 sec. 32-212; Michigan, Comp. Laws 1948 sec. 450.97 as amended by Act 180 1953 Pub. Acts; Missouri, Vernon's Ann. Stat. sec. 362,435(2); Nevada, Ch. 228 Laws of 1954-1955, page 361; New Mexico, Stat. 1953 sec. 51-10-4 (b); North Carolina, Gen. Stat. 1955 Cum. Supp. sec. 55-131 (b 6 and 7); Oklahoma, Stat. 1951 Tit. 18 sec. 1.199 f; Oregon, Rev. Stat. 1953 sec. 57.820-824; South Carolina, Code 1952 sec. 12-706; South Dakota, Code 1939 sec. 11-2102; Tennessee, Code Ann. sec. 45-1201-1203, amended by Chapter 47 sec. 2 Laws 1953 and Chapter 111 Laws

do not generate internally sufficient capital funds to meet the demands of their economies for the improvement of real property. They must rely in part on the investment in local mortgages of funds built up elsewhere, particularly by insurance companies, savings and loan institutions and pension funds. To the extent there is in a particular state risk of inability to enforce the security because of non-qualification[5] or the possibility of any substantial expense in the shape of license fees or tax burdens, investment in mortgages in that state is discouraged. Washington labors under a serious enough handicap in the competition for investment funds by reason of its cumbersome, antiquated and expensive foreclosure procedure.[6] The enactment of Chapter 139 was accordingly a particularly sound move by our legislature.[7]

Chapter 139 further authorizes suit, by the obligor on a mortgage note, against the non-admitted lending institution which has purchased the note, on service on the secretary of state, venue being in the county or counties wherein the mortgaged land is situated.[8] This provision was apparently deemed desirable because RCW 4.28.080(9), which permits

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1957; Texas, Vernon's Tex. Stat. 1954 Supp. Bus. Corp. Art. 8.01B; Wisconsin, Stat. 1955 sec. 180.80(2).

[5] RCW 23.28.090 reads: "No corporation shall be permitted to prosecute any suit, action, or proceeding in any court of this state, without alleging and proving that it has paid or contracted to pay all fees due the state under this chapter." Foreign corporations doing business in Washington are required to pay annual license fees measured by the proportion of its capital stock represented by its assets in this state. RCW 23.28.060; RCW 23.52.010. It follows that a foreign corporation doing an intrastate business here must pay the fee or be unable to maintain any action in a Washington court.

[6] See Murray, Statutory Redemption: The Enemy of Home Financing, 28 Wash. L. R. 39. Bills proposing legislation which would have permitted the use of trust deeds as security and authorized realization on such security by out-of-court sale under a power of sale were introduced in the 1955 and 1957 sessions of the Washington legislature, and failed of enactment. Correction of the existing defects in our foreclosure machinery is well past due and will no doubt come in time, by enactment of trust deed or comparable legislation.

[7] The apprehension of nonadmitted lending institutions was not entirely unfounded. In John Hancock Mutual Life Insurance Company v. Girard, 57 Ida. 198, 64 P.2d 254 (1937), the insurance company was held to be doing business in Idaho, in the various activities involved in its investment in Idaho mortgages. There are opposed decisions. *Cf.* Mortgage Bond Co. v. Stephens, 118 Okla. 182, 72 P.2d 831 (1937). See Annotation, What constitutes doing business within state by foreign insurance corporation, 137 A.L.R. 1128, 1147. Our own court in International Shoe Co. v. State, 22 Wn.2d 146, 154 P.2d 801 (1945), affirmed 326 U.S. 310 (1945); In re Continental Car-Na-Var Corp., 22 Wn.2d 857, 157 P.2d 724 (1945); State ex rel Verd v. Sup'r Ct., 31 Wn.2d 625, 198 P.2d 663 (1948) and Thys v. State, 31 Wn.2d 739, 199 P.2d 68 (1948), achieved definitions of "doing an intrastate business" and of "doing business" which certainly added nothing to the peace of mind of foreign lending institutions with investments in Washington mortgages and mortgage obligations. It is of course by no means certain that our court would have regarded their activities to be doing business in Washington; the possibility of such a holding was an unnecessary deterrent which Chapter 139 has removed. For an estimate of the situation in other states see Redfield, Restrictive State Laws Obstruct a Healthy Building Industry, Banking, April 1957, p. 47.

[8] Sections 4, 5 and 6.

service on a foreign corporation by serving its agent, cashier or secretary, applies only where the corporation is doing business here. The statutory language concerning the obligor's action is "any action in law or equity—on the said notes. . . ." Under what circumstances the maker will want to sue the holder, "on the note," is not clear.

Materialmen's Liens—Time and Manner of Giving Notice of Lien to Property Owners. Chapter 214 amends RCW 60.04.020, traditionally known as the "five-day notice" statute. The changes made are of three types. The time within which the supplier of materials to the contractor or agent shall notify the owner that a lien may be claimed is extended to ten days in the instance of "any single family residence or garage" and to sixty days in all other instances. The notice must now indicate that materials have been furnished; formerly it indicated that the supplier had commenced to deliver materials. Notice must now be given by registered or certified mail "in an envelope addressed to the owner or reputed owner at his place of residence or reputed residence;" the previous statute required the supplier to "deliver or mail to the owner or the reputed owner . . . a notice in writing. . . ."

It is not easy to see just what objective is sought to be accomplished by the sixty-day provision. Chapter 214 requires, as did its predecessor, that time be computed from the day on which the initial delivery was made. The fact that suppliers are usually paid within sixty days of delivery date hardly explains the amendment, since on jobs of any magnitude materials will often be supplied over a period of several months, and the latter part of that period will extend beyond the time within which notice must be given. On some jobs and as to some sales or subcontracts the amendment may enable the supplier to dispense with a notice he would otherwise have felt obliged to give. On the other hand, the owner must now always regulate his payment of earned estimates with an eye to the possibility that notices may thereafter be received concerning materials for which he has already paid the contractor.

The purpose of the ten-day provision is equally obscure. The supplier may find it more convenient to have the additional time within which to get out his notice. He will not usually be paid within ten days and will not often be able to avoid giving notice by reason of the additional time.

What, if any, real difference there is between "I have commenced to deliver" and "I have furnished" is not apparent. Some suppliers will

no doubt want to change their printed forms of notice to conform to the language of Chapter 214.

In requiring transmission by registered or certified mail the legislature has helped materially to prevent the type of controversy, all too common under the old statute, engendered by the supplier's insistence that he mailed or delivered a notice and the owner's insistence that he received none. Several quarrels of this complexion have reached our Supreme Court. The decisions demonstrate that the supplier has had much the better position; his testimony or that of his employee to the effect that notice was duly mailed has proved to be sufficient to win for him.[1] The receipts received by the sender of certified or registered mail will identify the addressee and should protect the sender against false assertion that notice was not mailed. Inability of a lien claimant to produce such a receipt should facilitate justice when no notice was in fact mailed. The receipts taken from the addressees of registered mail are retained by the post office department for three years; those taken from the addressees of certified mail are retained for six months. The existence of such a receipt can be established by counsel for the lien claimant in the instance of registered mail, should receipt of the notice by the property owner come into issue. Whether the existence of the receipt can in the instance of certified mail be established is unclear; postal regulations apparently do not provide a technique by which this can be done. Of course, the sender of either registered or certified mail can at the time of mailing request transmission to him of a return receipt. The added charge for this service may deter routine use of the method by suppliers. Although manual delivery of notices would seem to have been uncommon, any supplier whose practice it has been to use that method will have to change his system.

The statutory requirement stated in the phrase "in an envelope" seems redundant; only matter in envelops can now be sent by registered or certified mail.

The words "reputed residence" contained in Chapter 214 are evidently designed to relieve the supplier from the burden of ascertaining the owner's correct address. Since these words are patently ambiguous in this context, only the inevitable litigation about their meaning will reveal the extent to which our court will go in shifting to the owner the risks implicit in the transmission of notices to incorrect addresses. Since notices actually received by the owner have been held to be

[1] Hillyard Lumber Co. v. Codd, 85 Wash. 612, 149 Pac. 30 (1915); Building Supplies, Inc. v. Gillingham, 17 Wn.2d 489, 135 P.2d 832 (1943).

effective although incorrectly addressed, the new words "reputed residence" can have meaning only where the notice is in fact not received.[2]

Trust Receipts. Chapter 249 broadens the area within which trust receipts are a permitted security device, by adding to RCW 61.20.020 (1) a new subsection numbered (c) and reading:

> Pursuant to a trust receipt, a motor vehicle, house trailer, trailer, semitrailer, boat, aircraft, or farm machinery dealer as trustee obtains new value from an entruster upon the transfer to the latter of a security interest in new or used motor vehicles, house trailers, trailers, semitrailers, boats, aircraft or farm machinery, identifiable by the manufacturer's serial or identification number, whether or not such vehicles, trailers, boats, aircraft or farm machinery are owned or possessed by the trustee prior or subsequent to the execution of the trust receipt document, and whether or not such vehicles, trailers, boats, aircraft or farm machinery are thereafter retained in the trustee's possession.[1]

The new subsection is implemented with the filing provisions of the trust receipts statute, by appropriate changes in RCW 61.20.080; these make the thirty-day clear period, during which the security is valid against creditors and purchasers not in ordinary course without filing, operate from the date on which new value was given, as to goods retained by the trustee.[2]

Nine other states have previously enacted similar legislation varying the Uniform Trust Receipts Act as promulgated by the National Conference of Commissioners on Uniform State Laws.[3] Although the legislative language has varied somewhat in different states as to details, the general purpose has been to free trust receipt financing, in the area encompassed, from the "acquisition-financing" limitation. This limitation is implicit in the demands of RCW 61.20.020(1) subsection (a) [Sec. 2(1)(a) of the Uniform Act] that the trustee receive delivery of the goods from the entruster or a third person as a part of the trust receipt transaction, that the entruster then give new value save where he has previously had a security interest in the goods, and

[2] Brace & Hergbert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803 (1915); Blossom Provine Lumber Co. v. Schumacher, 147 Wash. 369, 266 Pac. 167 (1928).

[1] Section 1. The quoted new material is preceded by the original language of section (1), RCW 61.20.020, reading: "A trust receipt transaction, within the meaning of this chapter. is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subsection (3) whereby:"

[2] Section 2.

[3] The original and 1956 pocket part of that portion of Vol. 9 U.L.A. covering the Uniform Trust Receipts Act lists California, Connecticut, Florida, Indiana, Oregon, Maine, Nevada, Tennessee and Wisconsin; Statutory Notes to Section 2.

that the entruster acquire his security then or promptly thereafter save where he previously had a security interest in the goods. As stated in *In re Chappell,* concerning a transaction in which the entruster had no previous security interest, possessory or otherwise, "the delivery of the goods to the dealer must stem from an arrangement between the bank and the dealer for the acquisition of the goods by means of advances from the bank."[4]

The key words in the new subsection are "whether or not such vehicles . . . are owned or possessed by the trustee prior or subsequent to the execution of the trust receipt document. . . ." Under this language neither the purpose of the financing nor the chronology or circumstances of the trustee's acquisition of the goods are relevant inquiries. Prior possession or prior ownership does not preclude the use of a trust receipt. Absence of possession or of ownership does not either; the trust receipt will attach to whatever interest the trustee then had or thereafter acquires.

That subsection (c) permits existing inventory of the types it describes to be used in trust receipt financing is quite evident. Less obvious but of equal importance is the impact of this legislation on acquisition financing. The buyer of goods on occasion seeks a loan to enable him to pay for them, but does so after the goods have been ordered and shipped. Goods in transit present serious problems under subsection (a), because of the word "delivers." That word can be troublesome when projected against some of the sales-contract documents in current use, and against the shipping documents issued by rail and van carriers. Subsection (c) can be used for goods in transit without apprehension of invalidity in the trust receipt. If the goods have already reached the buyer when the financing is sought, subsection (a) certainly cannot be used. Subsection (c) can be used without regard to sales-contract terms which purport to condition the passage of title on payment.

In both of these situations the lender may be obliged to handle the disbursement of his loan in the way which will insure receipt of payment by the seller, not because this is requisite to the accomplishment of a valid trust receipt, but because issues about ownership which an unpaid seller might raise are thereby precluded.

Subsection (c) encompasses a transaction in which, "pursuant to a trust receipt," the dealer "obtains new value from an entruster upon the transfer to the latter of a security interest. . . ." The necessary docu-

[4] 77 F. Supp. 573 (1948). For a similar holding, see In re San Clemente Electric Supply, 101 F. Supp. 252 (1951).

mentation will include a writing "reciting that a security interest therein remains in or will remain in, or has passed to or will pass to the entruster."[5] The draftsman who sets about preparing forms for use by entrusters will quickly discover that a transfer of a security interest pursuant to a trust receipt does not fit well with the required trust receipt recitals. An attempt to cover the transfer in the trust receipt leads to such strange language as "I hereby transfer; I acknowledge that a security interest remains in or will remain in, or has passed to or will pass to the entruster." A separate document transferring a security interest, signed before the trust receipt, would encounter the statutory words, "Pursuant to a trust receipt . . . obtains new value upon the transfer. . . ." No useful purpose would be served by a separate transfer document taken after the trust receipt has been executed. The evident inconvenience of separate trust receipt and transfer stages and documents suggests that the combined form may be preferable despite the necessary peculiarity of its wording.

It will have been noted that only dealers can be trustees under the new subsection. The term "dealer" is not defined in the Act and there may be some theoretic potential for controversy about its meaning. It would appear that in current practice trust receipt financing is restricted to borrowers whose activities should meet any fair definition of "dealer" and that the risks of trouble with the term are minimal under subsection (c).

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TORTS

Guest Statute. Chapter 132 of the session laws amends the Guest Statute[1] to an extent which may only be described as opening up gorgeous vistas to the guest-litigant and his attorney; thar is gold in them hills now, and the one or two prospectors a year who set out to stake their claims under or around the old statute are bound to be followed by a horde of new ones. That statute, passed in 1933, limited recovery by guests to battery situations—to damages resulting from "accidents" which were "intentional," as it was put—which as a practical matter precluded any recovery under the statute itself. This left the alternative of proving that the plaintiff was not a guest at all, a goal attempted either by showing joint adventure, payment for trans-

[5] This material, which was continued from the original statute, follows the new subsection (c) as quoted.

[1] RCW 46.08.080.