Secured Transactions (Other Than Real Estate Mortgages)—A Comparison of the Law in Washington and the Uniform Commercial Code, Article 9 [Part 2]

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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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Section 9—301. Persons Who Take Priority Over Unperfected Security Interests; “Lien Creditor”.

(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of
   (a) persons as to whom a perfected security interest is subordinate (subsection (2) of Section 9—303);
   (b) a subsequent secured party who becomes such without knowledge of the earlier security interest and perfects his interest before the earlier security interest is perfected;
   (c) a lien creditor who becomes such without knowledge of the security interest and before it is perfected;
   (d) a transferee in bulk or other buyer not in ordinary course of business to the extent that he receives delivery of the collateral without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase-money security interest before or within ten days after he gives value, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A “lien creditor” means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest. A creditor who secures the issuance of process which within a reasonable time results in attachment, levy or the like is a lien creditor from the time of issuance of the process.

This section and the following sections through 9—315 provide the principles which govern the legal relations between the security holder and the debtor’s successors in interest. The area is roughly that now encompassed by the filing system, and the fraudulent conveyance

† Continued from last issue.
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propositions out of which it grew. The Code aims to be all-inclusive, and to that end has adopted from the Federal Bankruptcy Act § 60 (so the Comment informs us) the idea of "perfected" and "unperfected" transactions. This terminology was introduced by the 1938 amendments to the Bankruptcy Act and has become familiar to attorneys who regularly work with security problems.

For most security transactions under the Code, certain formalities must be met, if invulnerability against third persons is to be achieved; these formalities are in general calculated to give the transaction publicity. Sec. 9—301 spells out the penalties laid on the security holder who fails to conform, in which event the transaction is "unperfected." The Code treatment is rather more detailed and complicated than under the usual filing statute, and departs at several places from the present Washington law.

The traditional "subsequent bona fide purchaser or encumbrancer" phrase is not employed in the Code. There are, instead several subcategories—subsequent secured parties, subsequent bulk transferees, subsequent buyers not in ordinary course, and subsequent buyers in ordinary course. These serve to increase the flexibility with which the consequences of meeting or not meeting the perfection criteria are defined.

The unperfected transaction is by subsection (1) (a) made vulnerable to some persons who are to be identified by examining Sec. 9—303, which in turn takes the search on to other sections. It is enough for present purposes to indicate that no material extension or contraction of the area of vulnerability for noncompliance with a filing or fraudulent conveyance requirement is to be found in this part of the Code.

Subsection (1) (b) deals with the problems now usually discussed in relation to "subsequent bona fide encumbrancers for value." This familiar phrase does not mean quite the same as the Code term "secured party," which includes buyers of accounts, contract rights and chattel paper.

Particularly significant is the omission in this subsection of the phrase "for value," an omission which means that a subsequent security transfer will be prior to an unperfected transaction although made to secure an antecedent obligation. On the question of value the Code

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55 The term "secured party" is defined in Sec. 9-105 (1) (i).
56 The Comment accompanying Sec. 9-105 (1) (i) tells us that the term "secured party" includes any person "in whose favor there is a security interest (defined in
would bring consistency into the Washington law, which is now contained in several statutes of divergent phrasing and effect. The Washington chattel mortgage statute will not protect, against an unfiled mortgage, a later encumbrance given to secure an old debt. The conditional sale contract statute apparently will receive a contrary construction, as will also the accounts receivable statute. The Uni-

Section 201)." The latter section states, in part 38: "'Security interest' means 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 financing buyer of accounts, chattel paper, or contract rights." "Value" is not a part of the process by which an obligee becomes a "secured party."

There is an astonishing diversity in the language of the Washington filing statutes: RCW 61.040.020 (chattel mortgages) refers to "all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith"; RCW 63.12.010 (conditional sale contracts) refers to "bona fide purchasers, pledgees, mortgagees, encumbrancers"; RCW 63.16.030 (accounts receivable) refers simply to "a subsequent assignee of such account without knowledge of such assignment"; RCW 61.20.010 and 61.20.090 (2) (ii) in combination mean that an unfiled trust receipt transaction may be vulnerable to a subsequent transfer made to secure an antecedent obligation. The bill of sale recording statute, RCW 65.08.040, also omits any reference to value, referring only to "innocent purchasers." The real property recording statute refers to "subsequent purchaser or mortgagee in-good faith and for a valuable consideration"; RCW 65.08.070. The critical issue is whether the unfiled transaction is vulnerable to a subsequent security transaction effected to secure a prior rather than a contemporary extension of credit.

There appears to be but one case construing the chattel mortgage statute in this particular; it held the subsequent encumbrance to be subordinate to the earlier and unfiled mortgage. Hicks v. National Surety Co., 50 Wash. 16, 96 Pac. 515 (1908). The real property statute has received the same construction in a number of decisions. McDonald & Co. v. Johns, 62 Wash. 521, 114 Pac. 175 (1911); Malm v. Griffith, 109 Wash. 30, 186 Pac. 647 (1919); Seward v. Seward, 145 Wash. 61, 258 Pac. 856 (1927). Other land mortgage cases of interest here are Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882 (1897); Connecticut Inv. Co. v. Demick, 105 Wash. 265, 177 Pac. 676 (1919); Spiers v. Jahnson, 143 Wash. 297, 255 Pac. 117 (1927). In each of these the mortgage was subordinated to a previous interest because taken to secure a prior debt and hence, so the court said, not for value. Since the Washington court evidently regards the problem of value as a general one on which the land cases are significant, although the case before it involves another type of property, the Hicks case result would certainly be reached were the chattel statute litigated again. In Tucker v. Brown, 20 Wn.2d 740 (at hn. 74), 150 P.2d 604 (1944), which involved trust property wrongfully pledged to secure an antecedent debt, the court cited both the Hicks case and the number of land mortgage cases. Whether the mortgagee who takes a mortgage to secure his old claim thereby loses his position as a "creditor" for filing statute purposes is discussed at note 64 infra.

RCW 63.12.010, which is the pertinent statute, says nothing about value; this circumstances was examined in Worley v. Metropolitan Motor Car Co., 72 Wash. 243, 130 Pac. 107 (1913) and the conclusion reached that the statutory requirement of "good faith" is both the sole requirement and amply met by a transfer to secure an antecedent obligation. In an earlier case, Johnston v. Wood, 19 Wash. 341, 53 Pac. 707 (1898), a creditor who took the property in payment of his claim was held to be a good faith purchaser; a like result was reached in Lee Tire & Rubber Co. v. Gray, 164 Wash. 569, 4 P.2d 503 (1931). See also Long v. McAvoy, 133 Wash. 472, 233 Pac. 930, 236 Pac. 806 (1925). There is no reason to anticipate an overruling of the Worley holding.

RCW 63.16.030, the pertinent accounts receivable statute section, is silent on the matter of value and will presumably receive the same construction as has been given.
form Trust Receipts Act is explicit on the matter, and defines "value" to include an antecedent obligation.61

The Code language, "without knowledge of the earlier security interest" is not apt to acquire a meaning different from that given the phrase "bona fide."62

The rule of diligence adopted in this subsection, limiting protection to a subsequent encumbrancer who perfects his own interest before the earlier one is perfected is a change, although well known in land transactions.63

Subsection (1) (c) and subsection (3) indicate the extent to which unperfected transactions are vulnerable to the debtor's other creditors. The adoption of these provisions would clarify a local situation now considerably confused, and to some extent restrict the range of creditors able to upset an imperfect transaction.64

The wisdom of the

61 RCW 61.20.010 and 61.20.090 (2) (b) (ii) are the significant statutory sections; the former defines "value" to include transactions in which security is taken for a prior debt; the latter invalidates the unfiled trust receipt transaction as against persons who take for value after the thirty-day clear period and who receive delivery before filing is accomplished.

62 "A purchaser, encumbrancer, or subsequent creditor in good faith is, therefore, one who takes without notice..."; Worley v. Metropolitan Motor Car Co., 72 Wash. 243, 130 Pac. 107 (1913). Notice or knowledge of the previous and unfiled transaction is evidently the criterion, however the thought is expressed in the statute. The several phrases used in the Washington statutes are indicated in note 57 supra. On the refinements of inferred knowledge there is a dearth of local authority.

63 RCW 65.08.070, the real property recording statute, restricts protection to a subsequent taker whose "conveyance is first duly recorded." The trust receipts act, RCW 61.20.090 (2) (b) (ii), contains a somewhat similar provision; the subsequent taker, to prevail, must receive delivery before the trust receipt is perfected.

64 The most notable aspect of the present Washington statutes is the utter lack of harmony in their definitions of the protected creditor group. RCW 61.04.020 (chattel mortgages) reads, "all existing and subsequent creditors of the mortgagor, whether or not they have or claim a lien upon the property"; RCW 61.04.090 (chattel mortgages; property removed to another county) is thoroughly ambiguous in this particular, invalidating the mortgage save as to "those having actual notice thereof" (creditors not being mentioned) unless there is filing in the new county within thirty days of the removal, and providing that filing thereafter "restores the operation of the mortgage as to all parties except purchasers and encumbrancers" (creditors not mentioned); RCW 61.20.080 (trust receipts) is very like the Code, reading: "void as against lien creditors who become such after the thirty day period and without notice of such interest and before filing"; RCW 63.12.010 (conditional sale contracts) refers to "subsequent creditors, whether or not such creditors have or claim a lien upon the property"; RCW 63.16.010 and 63.16.030 (accounts receivable) define "creditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent" and invalidate the unfiled pledge transaction as against "present or future creditors of the assignor."

The bill of sale recording statute, RCW 65.08.040, refers only to "existing creditors"; the real property recording statute, RCW 65.08.070, contains no reference to creditors. The filing system follows an earlier period in which only creditors with liens were entitled to the type of remedies accorded now by filing or recording statutes; such statutes for the most part limit the protected class to creditors with liens, the contrary Washington statutes being unusual. JONES, CHATTLE MORTGAGES AND CONDITIONAL
Restriction may be arguable; the worth of the uniformity and assurance in operation which would be achieved by the Code is not.\footnote{65}

Subsection (3) defines “lien creditor” with such precision as to make controversy about the meaning of the term most unlikely; since certainty is the important factor here, there seems to be no occasion to evaluate the details insofar as individual creditors are concerned. There are no significant Washington decisions in point.\footnote{68} Garnishment is an important type of process in this state and will evidently come within the Code phrase “or the like.”\footnote{67} Whether successful supple-

SALES § 245, 247b (Bowers ed. 1933).

In some states the unfiled transaction is vulnerable only to creditors whose credit was extended during the period of non-filing; in others no such limitation appertains. Great emphasis is placed on the necessity of a lien in order to be protected. The Code is silent on this detail and evidently does not contemplate the limitation. The Washington statutes are diverse, referring variously to “existing and subsequent,” “subsequent,” “present and future” and “existing creditors.” Although the time at which credit was extended will determine conformity to these requirements, as to which see Harrison v. National Cash Register Co., 196 Wash. 83, 82 P.2d 136 (1938), the emphasis is rather different than exists in states where credit extended during a period of non-filing is adequate. In such states the point is that subsequent filing is ineffective as to the creditor whose credit was extended during the period of non-filing. The subsequent filing problem is directly disposed of in the Washington statutes. See the discussion below, of Sec. 9-301 (2) of the Code.

Save for the trust receipts statute, the Washington statutes are silent on the matter of creditor-knowledge of the earlier and unfiled transaction. This is a point on which the statutes ought to be precise, since the risk of deception is the only justification for a system of public notification. It is clearly repugnant to the idea of deception for a creditor to claim priority despite his awareness of the unfiled transaction, when credit was extended. The more commonly prevailing view goes even further, insisting on absence of knowledge when the creditor acquires a lien by levy or attachment: JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 247b (Bowers ed. 1933). The Code follows the usual rule. The Washington situation is not altogether ambiguous; at worst, a creditor may be able to establish priority despite his awareness of the security transaction when he extended credit. The pertinent earlier cases are discussed in Comment, 9 WASH. L. REV. 49 (1934). \textit{See also} Cardwell v. Ruchert, 187 Wash. 92, 59 P.2d 1120 (1936). That a creditor who extended unsecured credit in ignorance of the prior transaction is within the protected class seems clear enough as to those statutes which do not require a lien; it has been held that if such a creditor thereafter takes security, he does not lose his priority. Seaboard Dairy Credit Corp. v. Paulsen, 174 Wash. 594, 25 P.2d 974 (1933) \textit{(which cites several earlier cases)}. Cf. Farmers State Bank of Lind v. McCulley, 133 Wash. 364, 233 Pac. 661 (1925); First State Bank v. McGregor L. & L. Co., 141 Wash. 549, 251 Pac. 865 (1927).

\footnote{66} The complete absence of any basic theory or system, demonstrated in the lack of uniformity in the handling of creditors under the several Washington statutes, is appalling enough; the nation-wide picture is even worse. See Hanna, \textit{The Extension of Public Recordation}, 31 COL. L. REV. 617 (1931) and the appendix which starts at page 638. It would appear that the proponents of more stringent filing provisions have the burden of proof, and might find it difficult to establish on behalf of creditors even the initial premise that creditors are misled by security transactions in which possessory control is retained by the debtor.

\footnote{67} Questions about lien-creditor status cannot arise under our chattel mortgage, conditional sale contract and accounts receivable statutes. See note 64 supra. The trust receipt statute provided the pattern for this Code subsection. See RCW 61.20.080 (3) (b).

\footnote{68} The garnishment statutes are RCW 7.32.010 \textit{et seq.} (superior courts); RCW 12.32.010 \textit{et seq.} (justice courts).
mental proceedings will also come within it is not so clear.\textsuperscript{68}

The provision in this subsection that an assignee for the benefit of creditors or a receiver is a lien creditor and can meet the no-knowledge requirement if any individual creditor is unaware of the security transaction is interesting and important. Presumably the knowledge question is to be resolved by the facts as of the date of the assignment or receiver's appointment. The assignee or receiver can evidently be a lien creditor although none of the individual creditors have liens. The trust receipts act has a similar provision, and Washington has adopted by case law the proposition that an assignee represents creditors; subsection (3) is accordingly not startling.\textsuperscript{69} The receiver's position is equally strong under the Washington cases.\textsuperscript{70}

Subsection (1) (d) represents a sharp break from the traditional filing statute with its simple "subsequent bona fide purchaser for value"

\textsuperscript{68} The pertinent statute, now RCW 6.32.010, was invoked in Field v. Greiner, 11 Wash. 8, 39 Pac. 259 (1895). The court said: "The proceedings supplemental to execution are mainly for the purpose of discovery, and it cannot be successfully contended that the general lien upon real property flowing from the judgment is thereby converted into a specific lien upon any particular property." Whether a similar analysis is expectable where the property is chose or chattel is questionable. The statutory proceedings are but a manifestation of the traditional power of equity to aid a judgment creditor (see Knettle v. Knettle, 164 Wash. 468, 3 P.2d 133 (1931), which indicates that our statute supplements rather than supersedes the creditors bill), and the creditors bill if successful produces a priority (if the debtor is solvent) which can only be described as a species of "lien." See GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 26 et. seq. (rev. ed. 1940). Our statute is actually a good deal more than a discovery statute; the court can issue orders which directly effect specific property. Pappas v. Taylor, 138 Wash. 22, 244 Pac. 390 (1926) and the discussion in Washington Trust Co. v. Blalock, 155 Wash. 510, 285 Pac. 449 (1930) are indicative. It is unlikely that another creditor could by any type of process fasten a superior or coordinate lien on the property after such an order.

\textsuperscript{69} In Seattle Assn. etc. v. University Chev. Co., 181 Wash. 390, 43 P.2d 46 (1935), an assignee was permitted to maintain conversion against a conditional sale vendor who had failed to file and who repossessed after the assignment by the vendee; the court referred to Keyes v. Sabin, 101 Wash. 618, 172 Pac. 835 (1918), in a way which suggests that an unfiled chattel mortgage will also be inoperative as against an assignee. The Keyes case involved a chattel mortgage, but the issue was whether the assignee was obliged to accord the mortgagee a priority-claimant status in the proceeds of the collateral, sold by the assignee, the mortgage being a shifting stock one and invalid for lack of a sufficient accounting clause. Nevertheless, in holding that the assignee could contest the validity of the mortgage by denying the mortgagee more than 4 general-creditor classification, the court provided assignees with a strong argument under both the chattel mortgage and accounts receivable statutes. The trust receipts act was followed by the Code draftsmen at this point and is accordingly the same. RCW 61.20.080 (3) (b).

\textsuperscript{70} The liquidating receivership is a common method of winding up an insolvent corporation; the statutes which now regulate the appointment and operations of receivers, RCW 7.60.010 et. seq. and RCW 23.44.010 et. seq., are not specific on the receiver's powers under the filing system. There was at one time some doubt about the position of the receiver in this particular (see the discussion in Keyes v. Sabin, 101 Wash. 618 at 624, 172 Pac. 835 at 837 (1918), but his representation of creditors for the purpose of defeating an unfiled security transfer seems now to be unquestioned. Illustrative recent cases are: Treadwell v. Kristoferson, Inc., 32 Wn.2d 145, 200 P.2d 740 (1948); Bradley Dist. Co. v. Seattle-1st N. Bk, 34 Wn.2d 63, 208 P.2d 141 (1949).
language; it would effect a change in the Washington law. Under all of our chattel and chose filing statutes save the trust receipts act (which resembles the Code on this detail), purchasers are lumped together and acquire priority upon buying without knowledge of the earlier transaction. Under this Code subsection, delivery will also be a requisite, and knowledge is to be tested as of the date of delivery. The reason for this additional requirement is not explained in the Comment, nor was it explained by the draftsmen of the Uniform Trust Receipts Act. The aim appears to be to put pressure on the buyer to clarify his position for the benefit of all third persons, an idea also implemented in the requirement of subsection (1) (b) that the second transaction be perfected first.

The phrase "a transferee in bulk" is not defined in the Code; whether the definition of "bulk transfer" in Sec. 6—102 is pertinent here is unclear.

The phrase "buyer in ordinary course of business" is defined in Sec. 1—201(9). The phrase "buyer not in ordinary course" may be determined by that definition, although the phrase seems rather to contemplate all purchasers not governed by Sec. 9—303(2) and the several sections to which reference is there made.

In the final analysis, some buyers would receive increased protection under the Code; some would receive a little less. The increased protection for buyers in ordinary course is the important change and discussion of it must be deferred until the sections referred to in Sec. 9—303(2) are reached.

Subsection (2) introduces a limited free-period provision, qualifying Sec. 9—303, the general filing section of the Code, under which no retroactive effect is according filing. The exceptional treatment given purchase-money security in this regard is not explained in the Comment and no reason for it is indicated in Sec. 9—107, which defines the term "purchase money security interest." The advantage is not great and there seems to be no reason to speculate about the draftsmen's thinking. Far more significant is the fact that in general there is no free period under the Code. No one detail of the present Washington statutes causes more unjustifiable trouble for all of the persons whose interests are affected than does the free period.
feature of a free-period provision creates confusion in the record-checking process and hazards for the unwary checker. The free period also creates serious risks for the security holder; the construction given by our court to the chattel mortgage and conditional sale contract statutes precludes the accomplishment of any constructive notice if the statutory period passes without filing; so severe a penalty seems entirely unjustifiable. The penalty in Washington for late filing is particularly drastic in light of the difficulty the secured creditor often encounters

( chattel mortgages) “within ten days from the time of its execution”; RCW 61.20.070 (trust receipts) within thirty days; RCW 63.12.010 “within ten days after the taking possession by the vendee”; RCW 63.16.030 (accounts receivable) at the time of the making of such assignment or within ten days thereafter.” The bill of sale recording statute conforms, reading “within ten days after the sale was made.” RCW 65.08.040.

73 From the point of view of one who is examining the records in an endeavor to ascertain the existence of interests in the property, the free period with its retroactive characteristic creates a maddening element of uncertainty. The subsequent buyer or encumbrancer, or the credit manager attempting to determine credit policy, the people the statute purports to protect if there is no filing, and who are theoretically able to protect themselves if there is filing, find that a record check with negative results means nothing. The only safe course would be to examine the records twice, the intervening time interval being the free period, with the papers on the current transaction being at the beginning of the period executed, filed, and escrowed, disbursement being deferred until the second record-check has been made. Needless to say, this cumbersome solution will rarely be feasible and is not commonly employed. The fact that personal property title checks are infrequently made in either sales or financing situations is well known; one reason must be awareness of the futility of such a check. It is not too strong an indictment of the free period feature of our statutes to say that the filing system as a source of public notification, which is indeed the only justification for the system, fails miserably by reason of the free period. The filing system has deteriorated into a technical requirement which affords an occasional opportunity for successful attack on a careless lender or conditional sale vendor, by a liquidator or by a creditor who never did look at the records, and a continual temptation to such persons to attack (with an eye to getting a settlement) transactions which may arguably be vulnerable.

74 Under the bill of sale and trust receipts statutes, filing after the stated period will produce constructive notice from the time of filing. Umbarger v. Berrian, 195 Wash. 348, 80 P.2d 818 (1938) so construed the bill of sale statute; the trust receipts act specifically so provides, RCW 61.20.070. Late filing under the other statutes is a legal nullity. Clark v. Kilian, 116 Wash. 532, 199 Pac. 721 (1921) (chattel mortgages); Worley v. Metropolitan Motor Car Co., 72 Wash. 243, 130 Pac. 107 (1913) (conditional sale contracts); the accounts receivable statute has not been litigated on this point but seems indistinguishable. Although the salvaging of a chattel mortgage or conditional sale which has slipped past the time limit is still an uncertain operation for lack of adequate case authority, it would appear that a rescission of the old transaction followed immediately by the execution of a note (new or renewal, depending on whether the original deal was a mortgage or a conditional sale contract) and a mortgage on the property to secure it would result in a document which could be filed promptly and produce constructive notice for the future. There seems to be only one Washington case on the problem, Robinson, Thieme & Morris v. Whittier, 112 Wash. 6, 191 Pac. 763 (1920); it held that re-dating and re-acknowledging the mortgage was not enough to validate the late filing. The court cited Allen v. American Loan & Trust Co., 79 Fed. 695 (C.A. 9th 1897) without disapproval, as holding that the effect of attaching an affidavit of good faith late “was equal to a rewriting, resigning and reacknowledgment of the instrument” and theretofore started a new ten day period. It would evidently be both neater and safer to actually rewrite, re-sign and reacknowledge. The conditional sale contract must be replaced by a mortgage, to escape the rule which precludes the use of such a contract to secure a debt. Lyon v. Nourse, 104 Wash. 309, 176 Pac. 359 (1918); Veblen v. Foss, 32 Wn.2d 385, 201 P.2d 719. The suggested technic can of course be used only if the debtor cooperates.
in determining when the ten day-period shall commence, under either the chattel mortgage\textsuperscript{75} or conditional sale contract\textsuperscript{76} statutes. Some

\textsuperscript{75} There are serious complexities in determining when the statutory period begins. Under the chattel mortgage statute the date of execution is the critical date. In \textit{Fenby v. Hunt}, 53 Wash. 127, 101 Pac. 492 (1909) the court held that the date of delivery was the date of execution, not the date which appeared on the mortgage. In so holding the court used language which squares with the normal understanding of the term "execution": "The execution of a chattel mortgage means and includes the doing of those formal acts necessary to give the instrument validity as between the parties. There certainly could be no validity to a mortgage without a delivery and acceptance." In \textit{Myers-Shepley Co. v. Milwaukee G.E. Co.}, 124 Wash. 583, 214 Pac. 1051 (1923) the mortgage was dated January 22; verification and acknowledgment occurred on January 29; the actual date of delivery is not stated in the opinion. In holding that filing on February 5 was timely, the court in effect followed the \textit{Fenby} case, by refusing to take the mortgage date; the language of the opinion is confusing, however: "The mortgage was not executed until it was verified and acknowledged; and there can be no presumption that it was delivered prior to that time." This can be read to mean that the date of acknowledgment controls, although more properly it seems to mean that the date of acknowledgment is presumptively the date of delivery, which controls. These cases, if they together mean that delivery is the key act, are certain as to law but indicative of the vice in making execution govern the time computation. Delivery is typically not demonstrable by documentary proof. The proponent of filing is accordingly subjected to the hazards of verbal proof in establishing the date of delivery.

A subsequent case purports to make the date of signing control, rather than the date of delivery. \textit{Greenberg v. Manganese Prod. Inc.}, 39 Wn.2d 794, 238 P.2d 1194 (1951). The mortgage was signed and acknowledged on October 5, delivered October 18, filed October 20; the filing was held to be imperative. The \textit{Fenby} case was distinguished on the ground that it involved the 1899 statute, whereas in 1915 the statute was changed to the present wording, "acknowledged and filed within ten days from the time of its execution." The court did not explain just how this change destroyed the relevance of delivery as a requisite to execution, beyond saying that under the statutory language, acknowledgment is contemplated after execution, which must therefore mean signing rather than delivery. Since the construction given in the \textit{Greenberg} case leads to absurd results wherever a mortgage is signed but delivery is withheld pending receipt of the contemplated loan, the document meanwhile having no legal efficacy, it is strange that the court was so quick to assume the location of the word "acknowledgment" and the absence of a comma after it, in the 1915 statute, were the product of reasoned legislative purpose. More serious is the argument that filing prior to delivery of the instrument cannot be effective because there is not then any "chattel mortgage." The \textit{Greenberg} case seems highly vulnerable; it ought to be overruled. The deeper fault lies in the statutory word "execution"; another and more explicit term should be substituted by amendment.

The conditional sale statute requires filing "within ten days after the taking possession by the vendee." Here, as in the chattel mortgage statute, the legislature has used a phrase which makes the critical time period start with conduct not established by the documents. There are obvious difficulties in determining as a fact when "possession" is taken, as well as room for argument about the acts requisite to constitute "taking possession." The section has induced a fair amount of litigation. In strange contrast with the \textit{Fenby} case, cited in note 75 \textit{supra}, the court said in \textit{Grunbaum Bros. Furn. Co. v. Humphrey Inv. Corp.}, 141 Wash. 329, 251 Pac. 567 (1926), that where the contract recited a delivery date the ten day period started then although delivery actually occurred later. The opinion is an odd one, as filing was made eleven days after delivery, and the basic problem really was the power of a seller to retain title upon sale to a contractor knowing the goods were to be installed in a building under construction. The opinion is quite devoid of any reasoning. Nevertheless it was followed uncritically in \textit{Malott v. General Mach. Co.}, 19 Wn.2d 62, 141 P.2d 146 (1943).

An earlier federal district court case involving a bankruptcy matter and holding that the ten day period started when possession actually passed, not on the date which appeared on the contract, is in accord with the \textit{Fenby} case. \textit{In re Kracke}, 1 F.2d 606 (W.D. Wash. 1924).

The statute is not definitive as to transactions in which the goods pass into the
years of experience with a land-recording system which contains no free-period feature suggests that both the business and legal communities can operate effectively under a filing arrangement which contemplates the accomplishment of constructive notice upon filing, not before, without penalties for delay other than vulnerability to intervening interests. There is adequate pressure to file promptly, in the fact of vulnerability to intervening interests; the 21-day provision of the current Federal Bankruptcy Act § 60a puts on additional pressure.

buyers' hands in two or more deliveries; such transactions, which are fairly common, cannot now be handled with assurance. Where the subject matter is one machine or article, delivered in parts, our court has held "possession" passed when the final delivery took place. Anderson v. Langford, 91 Wash. 176, 157 Pac. 456 (1916); Mentzer v. Commercial Lumber Co., 110 Wash. 155, 188 Pac. 9 (1920). There is a dictum in Monotype Co. v. Guie, 134 Wash. 81, 234 Pac. 1046 (1925), extending the same reasoning to a single contract covering diverse items; the actual holding however was that filing on April 20 sufficed where part of the goods were delivered on April 4 and part on June 22. Three judges joined in a dissent. Until further light is shed on this situation by our court, the multiple delivery transaction will be hazardous.

Another type of problem is apparent in National Bread Wrapping Mach. Co. v. Crowl, 137 Wash. 621, 243 Pac. 840 (1926); a contract to buy and sell a machine called for installation and proof of successful operation, after which a conditional sale contract would be executed; filing within 10 days after proof of successful operation and execution of the conditional sale contract was held to be inoperative. The court said: "If a preliminary contract can be made, the property covered by it delivered, months elapse before the conditional bill of sale is executed and filed, and the rights of creditors thus defeated, the mandatory requirements of the statute would be of little avail." The decision seems questionable since the statute purports to cover "conditional sales" and not other types of sale transaction, such as contracts to sell.

Although the statute reads "within ten days after the taking possession," which would appear to foreclose any question of effectiveness for filing before delivery, in Adams v. Ingalls Packing Co., 30 Wn.2d 282, 191 P.2d 699 (1948) the court sustained filing effected the day before possession was taken by the vendee. In so doing the word "within" was examined and stressed and the word "after" was ignored. The opinion seems to put a limit of 10 days on the pre-filing, which renders the case of little help in solving the problem indicated in the multiple delivery and test-period cases.

Subsection (7) I of section 60a, 11 U.S.C. § 96, reads: "Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer." Subsection (7) II continues: "Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have made or suffered immediately before the filing of such petition." The significance of these tests for determining the "date of transfer" lies in the perfection provision introduced by the
Section 9-302. When Filing is Required to Perfect Security Interest; Security Interests to Which Filing Provisions of This Article Do Not Apply.

(1) A financing statement must be filed to perfect all security interests except those covered in subsection (2) and the following:
   (a) a security interest in collateral in possession of the secured party under Section 9-305;
   (b) a security interest in instruments or documents perfected without delivery under Section 9-304;
   (c) a purchase money security interest in farm equipment having a purchase price not in excess of $2500; but filing is required if the equipment is part of the realty under Section 9-313 or a motor vehicle required to be licensed;
   (d) a purchase money security interest in consumer goods; but filing is required if the goods are part of the realty under Section 9-313 or a motor vehicle required to be licensed;
   (e) an assignment of accounts or contract rights which either is for the purpose of collection only or does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor;
   (f) if an assignee finances accounts, chattel paper or contract rights in the ordinary course of his business, a further assignment by him of any such collateral already assigned to him.

The general policy of the Code is that all security transactions shall be accorded the publicity which the filing of a financing statement provides. This subsection both states the policy and specifies exceptions; the exceptions represent some deviation from the existing Washington practice.

Part (a) is covered in the later discussion of Section 9-305.

Part (b) is covered in the later discussion of Section 9-304.

Parts (c) and (d) state exceptions for which there is no counterpart in existing Washington law and which represent a preference by the draftsmen (so the Comment states) for the practice in those states which do not require conditional sale contracts to be filed. The terms "consumer goods" and "equipment" are defined in Section 9-109; the term "farm equipment" is not defined and must be taken to mean "equipment" used or bought for use primarily in farming. The evident opportunities for controversy as to what is farm equipment should not prove too serious in view of the fact that questioned items will probably

1938 amendments to the Act; a loan against contemporary security may nevertheless be preferential if the "date of transfer" occurs within the four months preceding bankruptcy.

78 The mechanics of filing will be discussed with Section 9-403.
be consumer goods if not farm equipment.

At first encounter the idea that a considerable area of routine financing should be taken out of the filing requirement seems to represent quite a serious departure from the traditional Washington policy. A moment's reflection however will disclose the existence of a wide gap between policy and practice, which suggests that the policy represented by the Washington chattel mortgage and conditional sale contract statutes no longer squares with reality and needs re-stating. The statutes postulate an environment in which papers will be filed and records examined. In practice relatively few conditional sale contracts covering consumer goods other than motor vehicles are filed in this state. The use of purchase money mortgages to secure sales of consumer goods is virtually unknown. Sales of farm equipment are variously handled; here, as in the case of motor vehicles, even substantial dollar values do not always induce the seller to file and a surprising number of conditional sale contracts never reach the public records. In practice the public records are more often ignored than examined by persons who contemplate buying or loaning against personal property. When to these circumstances are added the qualifications which the Code puts on the exceptions set forth in these two subsections the exceptions should become unobjectionable.

Part (e) in its treatment of assignments for collection states a qualification which probably exists under the Washington accounts receivable statute. In exempting a partial assignment affecting an insignificant part of the assignor's accounts the Code departs from the local statute, which covers casual single assignments as well as others.

Part (f) must be considered with subsection (2), which reads:

(2) The filing provisions of this Article do not apply to the assignment of a perfected security interest, or to a security interest:
   (a) in property subject to a statute of the United States which provides for national registration or filing of all security interests in such property; or

79 In addition to the limitations inherent in the specification of purchase money security in particular types of goods, notice that Section 9-307 (2) states an important qualification; certain buyers will take free of the security interest even though it is perfected. Motor vehicles would be governed by subsection (2) of Section 9-302, rather than by subsection (1) (d).

80 Although the definition of "assignment" in RCW 63.16.010 is "any transfer, pledge, mortgage or sale," which is arguably broad enough to cover an assignment for collection, it seems fairly evident that there can be no conflict of interest between an assignee for collection and successors of the assignor. It should follow that filing can serve no useful purpose and a construction of the statute making filing necessary is not to be expected.
(b) in property subject to a statute of this state which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property. Compliance with any such statute is equivalent to filing under this Article.

The phrase "does not apply to the assignment of a perfected security interest" can be misleading. The phrase "security interest" is very broad, covering both transferred and retained interests in property (chattel or chose) and financing purchases of accounts, chattel paper and contract rights, so that this subsection seems to cover all secondary financing. Actually it does not. Transactions involving chattel paper are within the operation of Sections 9-302 (1) and 9-308.

The word "assignment" is used here in its common-law connotation and will cover both security assignments and discount transactions.

Where the subsection applies, perfection of the secondary-financer's security interest is simple and sure, requiring only the execution of a security agreement and the requisite assignments.

The existing Washington situation is diverse. Retail dealers of many kinds sell on conditional sale contracts and obtain working capital from banks or finance companies on the basis either of a pledge of such contracts or a sale of them. Apart from fraudulent conveyance problems the draftsman proceeds now with a fair amount of confidence so far as the accomplishment of a transaction valid against the dealer's creditors and successors is concerned. There is some chattel financing done on the basis of note and mortgage; a good deal of such paper goes ultimately to banks and finance companies by pledge. So does much of the paper originated by mortgage houses who loan directly to land owners although the bulk of such paper is sold rather than pledged

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81 The term "security interest" is defined in Sec. 1-201 (37): "Security interest means 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 financing buyer of accounts, chattel paper, or contract rights." The terms "account," "contract right" and "chattel paper" are defined in Sec. 9-105 and 9-106; it will be observed that "chattel paper" includes a security agreement under the Code, together with the accompanying evidence of debt.

81a See particularly the discussion infra of Sec. 9-308. The Comment to that section makes clear the drafting purpose to require filing for security or financing transactions in chattel paper. Sec. 9-305 (5) should also be examined.

82 See the discussion of Sec. 9-303 (1) infra.

83 These problems were discussed with Sec. 9-205.

84 Security assignments of the vendor's interest under conditional sale contracts are expressly exempted from any filing requirement by RCW 63.12.030. The accounts receivable statute expressly excludes conditional sale contracts, RCW 63.16.010. Sales of the vendor's interest are not the subject of any express filing statute. Possession of the chattel will typically be in the conditional sale contract vendee and the bill of sale statute cannot apply, RCW 65.08.040. If the vendor reacquires possession the filing problem may be complicated. See notes 134 and 137 infra.
In the handling of these mortgage assignment transactions the draftsman is harrassed by a serious recording problem. There does not appear to be any extensive financing locally. In Price v. Northern Bond & Mortgage Co., 161 Wash. 690, 297 Pac. 786 (1931), and its companion case, Northern Bond & Mortgage Co. v. Cowell, 172 Wash. 217, 20 P.2d 11 (1933). In these cases a note (presumably negotiable) and mortgage were assigned to a bank as trustee, for the security of a bond issue; the assignment was not recorded; the assignor subsequently issued and sold so-called "participation certificates" purportedly representing a partial interest in the obligation and mortgage; the purchaser of such a certificate did not of course receive the note (which remained in the bank's possession). The opinion makes two points, first, that the trust agreement demonstrated concern only for security, the mortgage, not for the note so that the property aspect of the transaction properly governed; and second, that the assignor procured and delivered to each purchaser of a participation certificate a title company policy naming the assignor as the record holder of the mortgage. The first point is hardly valid since a mortgage can have no life apart from the note. The second point is strongly put in the opinion: "... it must be held that the wrong was perpetrated because of the negligent withholding of the assignment of the mortgage from record, and that, if the assignment had been recorded in a timely manner... (no) wrong would have resulted. ..." The answer to it appears to be this—the state of the record is not relevant on the issue of mortgage ownership; one who sets about determining who owns a particular mortgage must address himself to ownership of the debt which the mortgage secures, and anyone who relies on a title report or search which is negative on assignment of the mortgage does so without justification.

The litigation was concerned with rights in the mortgagor's final payment; the participation certificate holders prevailed. Despite the vulnerability of these cases, they have not been overruled; on the contrary, the Price case was cited with approval in Berger v. Baist, 165 Wash. 590, 6 P.2d 412 (1931). Until they are overruled, secondary financing on the basis of assigned notes and real property mortgages without recordation of the assignments is hazardous; although it is not likely that buyers so gullible as those who bought the participation certificates involved in the Price case can be found in any number, or that assignors willing to perpetrate frauds of that type are numerous, the perfection language of section 60a of the Federal Bankruptcy Act makes the borrower's insolvency a source of peril in every such financing. Recording the assignments and releases entails substantial additional overhead. There has been no local litigation, so far as the writer is aware, raising in a chattel mortgage transaction a problem like that of the Price case. Any argument either for the authorization of or the necessity of recording an assignment of a chattel mortgage must rest entirely...
by banks or finance companies on the basis of pledge of accounts or conditional sale contracts owned by the borrower, or re-pledge of accounts held in pledge. The Washington accounts receivable statute does not differentiate between assignments in a way which would remove re-pledge transactions from its operation, and presumably any secondary financing secured by accounts would have to be filed. Although the greatest advantage of the Code in the area of secondary financing would be relief from the *Benedict v. Ratner* difficulties, positive assurance of perfection and uniformity of treatment would certainly also be advantages. Granted that the necessity for filing in comparable situations under the Code will turn on classification of the collateral as chattel paper or otherwise, a classification which depends on the development of usage in the transferring of the security agreements concerned, it appears expectable that security agreements will generally come to be transferred by indorsement or assignment and delivery and so to be chattel paper. There is a theoretic uncertainty; it will surely disappear rapidly if the Code is enacted.

The way in which subsection (1) (f) fits into this picture is far from clear; being limited to an assignment by one who is himself an assignee, the whole range of dealer financing against transfers of the dealer’s sales-security or accounts, and of wholesaler or manufacturer financing against receivables, is excluded. All that is left, in the area of commercial financing, is the secondary financing of finance companies and discount houses. Since they will invariably be in the business of financing accounts, chattel paper or contract rights in ordinary course, their transfers seem to fit the specifications of part (f). It would appear that their transfers, if perfected, also come within subsection (2), leaving as the sole effect of Part (f) the exemption from filing of such of their transfers as are not perfected. There is nothing in the present Washington case or statutory situation to suggest that a problem exists for which Part (f) is significant.

Part (a) of subsection (2) evidently contemplates federal statutes on inferences drawn from RCW 61.16.010. Too much of the language of the Price opinion could, however, be made applicable to a chattel mortgage transaction to permit of any assurance in secondary financing against unrecorded chattel mortgage assignments. See for example General Credit Corp. v. Lee James, Inc., 8 Wn.2d 185, 111 P.2d 762 (1941), noted 17 Wash. L. Rev. 114 which involved a contest between an assignee of a chattel mortgage, and the holder of a subsequent interest in the property, taken in reliance on a release, by the mortgagee, of the assigned mortgage.

RCW 63.16.010 defines “assignment” to include “any transfer, pledge, mortgage or sale of an account”; language so broad would surely cover a re-pledge or a pledge by a financing purchaser.

These difficulties are discussed with Sec. 9-205.
such as those pertaining to aircraft and railroad rolling stock. The Comment points out that the notice requirements of the Assignment of Claims Act are not "registration" or "filing."

The intended field of operation for part (b) is obscure. The Comment seems to envisage some state statutes which require central filing for specific and unusual types of property, statutes which would be retained despite enactment of the Code. Washington has no such legislation. The chattel mortgage, accounts receivable and trust receipts statutes require or permit central filing, these statutes will certainly be repealed if the Code is enacted here.

The language in part (b) which refers to certificates of title is of course aimed at motor vehicle registration statutes. The Comment tells us that the words "such security interests" means interests of the types governed by the Code as opposed to statutory lien rights or other varieties of interest. The words "requires indication" are not amplified elsewhere, so the Washington motor vehicle statute appears to be a registration statute for this purpose although it is not in a true sense a filing statute. The enactment of the Code would in this particular accomplish a reform long past due in Washington, and clarify a situation which is now extremely confusing.


90 RCW 61.04.020 (chattel mortgages); RCW 61.20.130 (trust receipts); RCW 63.16.010 (6) (accounts receivable).

91 RCW 46.12, Certificates of Ownership, still adheres to the now obsolete police-measure theory of title registration as opposed to the modern theory under which the certificate serves a public-notice or even a Torrens System purpose as well. For a discussion of a more modern statute see In re Berlin, 147 F.2d 491 (C.A. 3rd 1945). See also Comment, The Effect of Motor Vehicle Registration Statutes on Security Transactions and Recordations, 1951 Wash. U.L.Q. 539; Note, Certificate of Title as Notice of Liens upon Motor Vehicles, 25 Ind. L. J. 337 (1950); Annotation, Motor Vehicle Certificate of Title or Similar Documents as, in Hands of One Other than Legal Owner, Indicia of Ownership Justifying Reliance by Subsequent Purchaser or Mortgagee without Actual Notice of Other Interests, 18 A.L.R. 2d 813 (1951).

92 The reform would be in making the title certificate a means of notification and in abolition of the necessity for both filing and meeting the registration statute; the clarification would be in the effect of not going on the certificate. Neither the chattel mortgage (RCW 61.04.010 et seq.) nor conditional sale contract (RCW 63.12.010 et seq.) statutes excepts motor vehicles; non-filing accordingly results in vulnerability to persons within the protected classes under these statutes and filing results in constructive notice to such persons. Meanwhile the title registration requirements of RCW 46.12.010 et seq. must also be met. There is a dual burden on the security holder, which would not be too serious were the motor vehicle statute restrained strictly within its avowed field of operation. The average layman however is inclined to place his confidence in the title certificate, which is actually a trap, the interest not noted thereon
Section 9—303. When Security Interest is Perfected; Persons Who Take Priority Over Perfected Security Interest; Perfection of Security Interest in Instruments and Documents.

(1) Except as provided in Section 9—103 with reference to property which is already subject to a perfected security interest when it is brought into this state, a security interest is perfected

(a) if filing is required under Section 9—302(1), at the time of filing, except that if filing occurs before the security interest attaches, the security interest is perfected when it attaches;

(b) if no filing is required under Section 9—302(1), at the time specified in Section 9—304 or 9—305 in cases falling under those sections and in all other cases at the time the security interest attaches;

(c) in the cases covered by Section 9—302(2) when, as may be provided in the relevant statute, the security interest is registered or filed or when the security interest is noted on the certificate of title.

The reference in subsection 1 to property brought into the state takes us back to Section 9—103(3), which in turn indicates that there will come a time at which steps to perfect the security interest in Washington are necessary. The earlier section also tells us that local perfection is operative "from the date of perfection," which necessitates resort to this subsection, since it supplies the significant date; the wording, "Except as provided," with which the subsection opens, being constructively known to him if filed. The Washington court has been moved by this fact to a decision protecting such a taker, employing the principle that "where one of two innocent parties must suffer a loss, due to the wrongful act of a third, the loss should fall upon that party whose negligence or inattention made it possible for the wrongful act to be done." As the court saw it the mortgagor did the wrongful act, in selling the car as unencumbered, and the mortgagee was negligent in failing to have the title certificate changed to note its lien. The obvious and glaring flaw in this reasoning lies in the subsequent purchaser’s failure to examine the chattel mortgage file, which would have disclosed the existence of the mortgage and which is expressly designed to enable purchasers of chattels to protect themselves. The motor vehicle statute is made by this decision to serve indirectly as a criterion of "negligence" and even more indirectly to supersede the filing statute. The result, as is so often true of bad decisions, is confusion. The case is Merchants Rating & Adjusting Co. v. Skaug, 4 Wn. 2d 46, 102 P.2d 227 (1940), discussed in Comment, The Motor Vehicle Registration Act as a Limitation on the Chattel Mortgage Recording Act, 15 Wash. L. Rev. 182 (1940). The holding of course puts pressure on the security holder to be sure the title certificate shows his interest. The subsequent taker however has no assurance of priority where the title certificate does not since each case must turn on its own facts. In a later case, Junkin v. Anderson, 12 Wn. 2d 58, 120 P.2d 546, 123 P.2d 759 (1941) the court held, without citing or discussing the Merchants Rating case, that a judgment creditor of one who transferred a motor vehicle was not enabled to seize it on process, by the transferee’s failure to procure a certificate of title in his name.

Under the Code, conformity to the title certificate requirements would alone suffice to insure invulnerability as to third persons. It would be desirable to amend the Washington motor vehicle statute, which is now ill-suited to a notification purpose; what is needed is a provision for filing security or sale documents, with the appropriate public official, together with express coverage of the notice consequences of conformity or non-conformity. Provision should also be made for dealer-owned vehicles.
is accordingly unfortunate. The mode of local perfection is determined by Section 9—302 and the several sections to which it refers.

Motor vehicles would be an important instance of property brought into Washington; local perfection technics would under Section 9—302 (2) be those provided in the motor vehicle statute.

Another preliminary observation is necessary here; although this section purports only to fix the time at which perfection occurs, it answers some important "what is perfection" questions too. The preceding section is so phrased as to leave unsettled the conduct which perfects transactions which fall within the exceptions there stated.

Part (a) and its provision for combining subsequently acquired property with precedent filing, would remove a major hazard in inventory financing which rests in part on after-acquired property. It would also very much simplify the handling of sales-security transactions in which multiple deliveries are desirable. Both types of financing could be employed, were the Code enacted, with assurance regarding the fact and time of perfection.

That portion of part (a) which relates the time of perfection to the date of filing, without reference to the date of the extension of credit or the execution of a security agreement, would effect a worthwhile improvement in the Washington filing system; the difficulties created by the free-period feature of the present statutes were discussed with Section 9—301.

An important feature of part (b) is the catch-all phrase with which it ends; where filing is not necessary, perfection is achieved automatically when the security interest attaches save for the exceptions indicated.

Part (c) completes the provision of Section 9—302(2) concerning federal statutes, and makes perfection turn on the accomplishment of filing pursuant to the applicable statute; this part also completes the motor vehicle coverage. Amendment of the Washington motor vehicle statute would be necessary to implement this perfection test; under the present statute it is not possible to determine with sufficient exactness the point at which the security interest is "noted on the certificate of title."

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93 The cases are discussed at note 36 supra. See also the discussion under Sec. 9-108.
94 The problem is discussed in relation to the present-day statutory filing requirements, in note 79 supra.
95 See notes 72-74 supra.
96 The act requisite to the existence of a security interest are indicated in Sec. 9-204.
97 This statute is discussed in notes 91 and 92 supra.
(2) A perfected security interest may be or become subordinate to the rights of the following persons:
   (a) a buyer in ordinary course or other buyer taking free of a security interest under Section 9—307;
   (b) a purchaser of chattel paper under Section 9—308;
   (c) a holder in due course of a negotiable instrument or a holder to whom a negotiable document has been duly negotiated or a bona fide purchaser of a security under Section 9—309;
   (d) a person having a lien for services or materials under Section 9—310;
   (e) a secured party with a previously perfected security interest.

The several parts of this subsection will be covered in the discussion of the sections referred to therein.

(3) Except as provided in Section 9—304, a security interest in documents or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession of the collateral.

The stated exception will be discussed with Section 9—304; save for the 21 day grace period provided there, it is clear enough that the lender is obliged to assume possession of documents or instruments if he is to have a perfected security interest. The stated exception for instruments which are a part of chattel paper is of considerable practical importance, covering as it does the note plus mortgage or note plus conditional sale contract situations. The apparent hazards for third
persons opened up by that exception are adequately taken care of in Section 9—309. Some care is required in the process of fitting Subsection (3) into the general perfection pattern. The idea of the subsection is simply that a security interest in negotiable bills of lading, warehouse receipts or notes, or in stocks or bonds, is to be acquired by assuming possession of the paper; this conforms to current practice in Washington.

Section 9—304. Temporarily Perfected Security Interest in Instruments or Documents Without Transfer of Possession.

(1) A security interest in instruments or documents (even though not in the possession of the secured party) is perfected against all creditors of the debtor and against all transferees other than those specified in Section 9—309 for twenty-five days from the time it attaches if the security interest arises by reason of an agreement signed by the debtor under which the secured party makes a new advance, releases a perfected security interest or incurs a new obligation. It ceases to be a perfected security interest and becomes unperfected at the end of the twenty-one day period unless within that period the collateral has come into the possession of the secured party.

(2) A secured party who has possession of instruments or documents may turn over such collateral to the debtor and nevertheless continue to have a perfected security interest under this section for twenty-one days from the time of turning over.

The narrow range of operation for this section is quite apparent. Since purchasers to whom the debtor wrongfully sells will in the ordinary transaction be protected by Section 9—309, the real effect of the section is to insulate these temporary arrangements against creditor attack. The duration of the immunity coincides with the Federal Bank-
ruptcy Act § 60a limitation on perfection without filing or change of possession. The occasion for subsection (1) is said by the Comment to be the need for short term transactions of the type concerned, and the burden which filing would entail. The occasion for subsection (2) is said to be the need for temporary return to the borrower for the accomplishment of various legitimate objectives. The idea of a temporary pledge without possession is not new; it was introduced by the Uniform Trust Receipts Act. The idea that a pledge can be retained so far as the immediate parties and creditors of the pledgor are concerned despite a limited resumption of possession by the pledgor is a familiar proposition in the common law of pledges as well as under the trust receipts act. This Code section represents some departure in details but no serious break with the existing law; it seems to serve a worthwhile purpose.


(1) When goods, instruments, documents or chattel paper come into or are in the possession of a secured party as collateral his security interest in that collateral is perfected without filing from the time he takes possession and while the collateral remains in his possession. If the collateral is held by a bailee the time of perfection is when the bailee receives notification of the secured party's interest. When a security agreement contemplates possession by a secured party before default, the security interest may attach as provided in Section 9—204 before such possession is obtained but, unless perfected under Section 9—304, is perfected only from the time possession is obtained and without relation back.

In excepting from any filing requirement all manner of tangible-property security transactions coupled with possession in the secured party, the Code follows the traditional view. It will be noticed that

103 This bankruptcy act feature is discussed in note 77 supra.
106 RCW 61.20.030 (1).
108 See Brown, Personal Property, 612 et. seq. (1936); Restatement, Security § 11 (1941); RCW 61.20.030 (2). The Washington court would apparently adhere to the common law rule as stated. See Lippman v. Ross, 130 Wash. 319, 226 Pac. 1017 (1924).
109 "Goods, instruments, documents or chattel paper" are terms defined in Sec. 9-105. See also Sec. 1-201 (15), which defines "document of title." Chattel mortgage filing statutes have their origin in the common law principle which made continued possession in the mortgagor a fraud on his creditors, Glenn, Fraudulent Conveyances and Preferences, § 491a et. seq. (rev. ed. 1940). It is not surprising that the mortgagee who takes possession need not file; the critical issue is just what conduct amounts to "taking possession." See Annotation, Requisites and Sufficiency of Change of Possession under an Unrecorded Chattel Mortgage, 79 A.L.R. 1018 (1932). That the Washington chattel mortgage statute does not operate against a mortgagee who promptly takes possession was held very early. Marsh v. Wade, 1 Wash. 538, 20 Pac. 578 (1889);
accounts and contract rights are not included; these are assets for which any real transfer of "possession" is not practicable. The inclusion of instruments, documents and chattel paper coincides with present thinking. We typically use the pledge form now in taking security in property of comparable types, take possession of the documentary evidence of obligation, and are not obliged to file. It will be recalled in this connection that the Code in Section 9—303(3) makes it impossible to use any but a possessory security for instruments and documents, while authorizing the use of a security agreement-plus-filing arrangement for chattel paper (including the accompanying instrument).

The fact of possession will be of obvious importance and may of course be a disputed fact under the Code just as it is now in pledge and filing statute controversies. The Code undertakes no definition of "possession," beyond the provision here for the effectiveness of notice to a bailee.

Section 9—204 must be read with the final sentence of this subsection; the two together would put an end to the equitable pledge


107 The meaning of these terms is discussed in Sec. 9-106.

108 Filing is now mandatory for security transactions in such property. RCW 63.16.010.

109 In Heermans v. Blakeslee, 97 Wash. 647, 167 Pac. 128 (1917) the Washington chattel mortgage statute was construed to cover tangible property only; there has been no attempt subsequently, so far as the appellate decisions disclose, to persuade the court to draw choices associated with documents, e.g. notes, bill of lading and warehouse receipts if within the term "tangible property." The issue will probably not arise because of the general practice of employing the pledge form in taking security in such property. The accounts receivable filing statute was carefully drafted to operate only in the book account and simple contract-right areas. RCW 63.16.010. Although that statute introduced in Washington the idea that a pledge must be filed, the pledges concerned are the very ones for which "possession" is a totally artificial concept. The intangible embodied in a document which can be taken into possession effectively, is excluded by the statute.

110 See also Sec. 9-309 in this connection.

111 The Comment says of this provision "this rule rejects the common law doctrine that it is necessary for the bailee to attorn to the secured party or acknowledge that he now holds on his behalf." The Code does not specify the source of notice; presumably notice by either security holder or debtor will suffice. The RESTATEMENT, SECURITY, § 8 reads: "Where the chattel is in the possession of a third person a pledge may be created by assent of the pledgor and notification by either pledgor or pledgee, to the third person, that the chattel has been pledged to the pledgee."

The Code provision is phrased in terms of "perfection"; at present and under pledge principles there is no change of possession and hence no pledge until and unless the person in possession is in some manner made to hold for the pledgee. See for example Hastings v. Lincoln Trust Co., 115 Wash. 492, 197 Pac. 627 (1921) (non-negotiable warehouse receipt; no pledge resulted from delivery of the receipt to the lender). The mode by which the person in possession must come to hold for the pledgee is not clear in Washington, although the basic idea that a pledge can exist where a third person holds actual physical possession is well enough settled. See Lippman v. Ross, 130 Wash. 319, 226 Pac. 1017 (1924).
problem. The earlier section brings a security interest into existence upon the coincidence of three things, agreement, value and a property interest of the debtor in the collateral. It does not however define the operation of an understanding between the parties that the secured party should receive possession before default by the debtor. This desirable adjunct appears here; the existence of a security interest is not thereby postponed. Possession is relegated to a public-notice function and postponement of possession merely means postponement of perfection where there is no effective filing. The present law is confused by a conflict between state court holdings and certain provisions of the Federal Bankruptcy Act.

(2) When goods are stored under a field warehousing or similar arrangement on premises which are part of the place of business of the debtor or which are within the debtor's premises or substantially contiguous thereto, a security interest in the goods can be perfected only by filing notwithstanding delivery of a warehouse receipt covering such goods and even though the storage premises are identified as being under independent control by sign, presence of custodian and the like.

112 The use in Sec. 9-305 (1) of the word "may" in this connection evidently refers to the fact that in Sec. 9-204 (1) the possibility for an express agreement postponing the existence of a security interest is acknowledged.

113 The phrase "but, unless perfected under Section 9-304, is perfected only from the time possession is obtained" cannot mean that filing would not perfect the transaction. The only exception is Sec. 9-303 (3), which requires the secured party to take possession of documents or instruments. As to goods and chattel paper, the combination of Sec. 9-302 (1) and 9-303 (1) points conclusively to filing as a means of perfection; Sec. 9-305 states an alternative method only.

114 At the state court level there is confusion in theory but fairly well defined end results. The fundamental difficulties are conceptual. On the one hand a legal pledge cannot exist unless the pledgee receives possession. On the other hand a promise to create a pledge, backed by value, invokes equally strong equitable security propositions and the real problem is the operation of the imperfect pledge as against the pledgor's creditors or other successors in interest. The present approach is in terms of the security interest itself; the Code takes the more sensible notification approach. The Washington cases follow the generally accepted notions in sustaining the pledgee who manages to acquire possession before creditors of the pledgor attach or levy, or insolvency proceedings intervene, Whiting v. Rubenstein, 7 Wn.2d 204, 109 P.2d 312 (1941), and in refusing to sustain the pledgee who does not, Hastings v. Lincoln Trust Co., 115 Wash. 492, 197 Pac. 627 (1921). The future property aspect of this problem is discussed at note 36 supra. On the general problem see Glenn, Fraudulent Conveyances and Preferences § 292 et seq., 476 et seq. (rev. ed. 1940); Restatement, Security § 10 (1941). The Whiting case, cited above, rests squarely on the court's willingness to relate the assumption of possession back to the time the loan was made; the transfer of possession was under attack as preferential and the attack failed.

The bankruptcy act solution is now equally clear. The relation-back theory operated at one period to balk not only receivers and general assignees but trustees in bankruptcy as well; this was by some deemed unfortunate. Following the 1938 amendments of sec. 60 of the Federal Bankruptcy Act, additional changes were made in 1950 and the present sec. 60a (6), 11 U.S.C. § 96 is the result. It ties the perfection of equitable pledges, for the purposes of bankruptcy preferences, to the time at which possession is taken by the pledgee. See the discussion of Collier, Bankruptcy § 60.50 (14th ed. 1941). As the Comment to Sec. 9-305 points out, the Code takes the same position and would bring the state and federal propositions into harmony.
This subsection would change the existing Washington law. The change would be beneficial. In return for filing, which is no hardship, field warehousing would become a certain and safe security. There is now an inescapable element of risk in this type of collateral; the security is grounded on a theory of pledge and the lender perforce gambles on the effectiveness of the warehouseman’s assumption and retention of possession. The Code would make field warehousing a more attractive technic for handling those inventory transactions in which close physical control by the lender is desirable.


(1) When collateral is sold, exchanged, collected or otherwise disposed of by the debtor the security interest continues on any identifiable proceeds received by the debtor except as otherwise provided in subsection (2); the security interest also continues in the original collateral unless the debtor's action was authorized by the secured party in the security agreement or otherwise or unless it is otherwise provided in Sections 9—301, 9—303(2), 9—307, 9—308 and 9—309. The security interest in proceeds is a perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) the financing statement covering the original collateral also includes the proceeds received on disposition of such collateral; or
(b) it is perfected before the expiration of the ten day period.

This subsection is aimed at three problems. What happens to the security interest when the debtor sells the property (as opposed to his interest in it) or collects the assigned obligation? What is the interest of the secured creditor in the proceeds of unauthorized sale or collection? What is the interest of the secured creditor in the proceeds of

The Code position is a sensible one and desirable one. The financing problems which have produced the difficult equitable pledge cases exist because the present law is deficient. It makes no adequate provision for financing against after-acquired and future goods and accounts; these deficiencies are in no sense remedied by changes in the bankruptcy law. The Code on the contrary does remedy them and it is appropriate in the process to strike down what would under the Code by an unnecessarily loose way of transaction-handling.

There is no statutory provision in Washington for the filing or recording of anything in connection with a field warehousing transaction.

See Kane, The Theory of Field Warehousing, 12 Wash. L. Rev. 20 (1937); Annotation, Validity as Against Third Persons of Sale or Pledge of Goods, or Receipts Issued for Goods, Retained in Warehouse on Premises of Seller or Pledgor (field warehousing), 133 A.L.R. 209 (1941). There are concerns which make a business of serving as warehousemen in field warehousing transactions and which have worked out methods much diminishing the hazards; no amount of systemization however can completely overcome the basic difficulty, which is that possession is a fact and open to scrutiny at every point in each transaction.
authorized sale or collection?\textsuperscript{117}

The term "collateral" is defined in Section 9—105(1) (c) so broadly as to include every type of interest encompassed by the Code.\textsuperscript{118} To use the present terminology, the coverage is of accounts, contract rights, chattels, notes with or without mortgages, conditional sale contracts, and both pledges and discounts of obligations of all kinds.

In providing for continuation of the security interest (which includes the interest of a financing purchaser)\textsuperscript{119} despite an unauthorized transfer the Code merely states the obvious consequence of perfection; the provision appears here in order to indicate that the basic security interest is not destroyed by the declared existence of rights in proceeds.

There is an analogous problem where the debtor (a term which includes a seller of an obligation) effects an unauthorized collection of an account or other chose. It is to be expected that the security interest will or will not survive depending on the obligor's awareness of the assignment.\textsuperscript{120}

The idea that a security holder who has conformed to the applicable filing or recording statutes or other notice requirements can pursue the property into the hands of the debtor's transferee is a familiar one.\textsuperscript{121} So is the idea that this right is lost if the security holder authorized the transfer, ratified it or runs afoul of some over-riding notions

\textsuperscript{117} See the discussion, at notes 41-43 supra of the fraudulent conveyance difficulties. To the extent that the debtor has in fact accounted, the only issues are preference ones, resolved by fraudulent conveyance and filing statute inquiries. The present discussion revolves around the unperformed duty to account.

\textsuperscript{118} The definition is: "'Collateral' means the property subject to a security interest and includes contract rights, chattel paper or accounts which have been sold."

\textsuperscript{119} "Security interest" is defined in Sec. 1-201 (37). See note 56, supra.

\textsuperscript{120} The collection point is not expressly made in subsection (a) or elsewhere; the language "the security interest also continues in the original collateral unless the debtor's action was authorized" must mean that unauthorized collection is without prejudice to the secured creditor's right to force performance by the obligor; the extent to which authorization may be inferred is discussed with Sec. 9-318 (3). The Code preserves in Sec. 9-318 (1) the common-law principle which protects an obligor who performs to the obligee-assignor in ignorance of the assignment. See the discussion infra under that section. The correlative proposition is that the obligor with notice of the assignment cannot discharge his duty by performing to the original obligee, save where the latter is authorized to collect. The point is not too significant; commercial financing will be on a non-notification basis, with the assignor authorized to collect, or the obligor will be promptly notified.

\textsuperscript{121} See JONES, CHATTLE MORTGAGES AND CONDITIONAL SALES § 460, 1362 (Bowers ed. 1933); 2A U.L.A. § 43. There are many Washington cases; the following are illustrative: United Iron Works v. Hurley, 71 Wash. 275, 128 Pac. 209 (1912); Bollen v. Wilson Creek Union Grain & T. Co., 90 Wash. 400, 156 Pac. 404 (1916); McCallum-Donahoe Finance Co. v. Warren, 122 Wash. 176, 210 Pac. 368 (1922); Union State Bank of Wapato v. Warner, 140 Wash. 220, 248 Pac. 394 (1926); Spokane Sec. Finance Co. v. Crowley Lum. Co., 152 Wash. 697, 279 Pac. 103 (1929); Loudon v. Cooper, 3 Wn.2d 229, 100 P.2d 42 (1940); cf. Bank of California v. American Fruit Growers, 4 Wn.2d 186, 103 P.2d 27 (1940).
about estoppel or ostensible ownership which can be summarized in the phrase "apparent authority."\textsuperscript{122}

The legal relation of the secured creditor to the proceeds of wrongful sale or collection by the debtor has been variously defined in the existing cases, the constructive trust analysis apparently being preferred. Identifiable proceeds can be reached as against the debtor and his creditor or liquidator but not as against a bona fide transferee for value.\textsuperscript{123} The Code very sensibly regards such proceeds as subject to a security interest which is uncomplicated by any of the distinctions between legal and equitable rights, and regulates the operation of this interest with the detail necessary to obviate controversy. In providing for continuation of the security interest if the original collateral was perfected, the Code inferentially denies perfection for proceeds where the original collateral was not perfected. Although this is a refinement on which the present law is nebulous, it is generally assumed that proceeds are vulnerable to creditors if the original security was vulnerable to them. The Code accords only a ten day perfection period save where the original financing statement mentioned proceeds or there is a new filing or assumption of possession during the ten day period. This is a change; the trust now impressed on the proceeds of wrongful sale or collection is subject to no such time limitation. It may be that financing statements for security other than goods (as to which Sec. 9—307 makes the technic inadvisable) could, under the Code, routinely mention proceeds even though the security agreement precludes sale or collection, thus removing the need for later filing.

Since the secured creditor is entitled only to satisfaction of his claim, the point at which his pursuit of the property will bar his pursuit of the proceeds, or vice versa, is a detail of some practical importance; it is not specified in the Code and is therefore left to be determined by general principles.\textsuperscript{124}

\textsuperscript{122} See the discussion at Sec. 9-307 infra.

\textsuperscript{123} See Annotation, Right of Chattel Mortgagee in Respect of Proceeds of Sale of Mortgaged Property by Mortgagor, 36 A.L.R. 1379, 1379-1383 (1925); Glenn, Fraudulent Conveyances and Preferences § 528 (rev. ed. 1940); Collier, Bankruptcy § 70.25 (14th ed. 1942); Williston, Contracts § 445 n. 2 (rev. ed. 1936); Corbin, Contracts § 904 n. 79, 80 (1951). Aside from RCW 63.16.080, which declares the proceeds of collection to be held by the assignor in trust for the assignee, evidently without regard to the authorized or unauthorized nature of the collection, the Washington situation is not determinable.

\textsuperscript{124} The Comment to Sec. 9-306 after informing us that the secured party can have only one satisfaction, continues: "This section, however, states no fixed period within which a secured party must elect his course of action." The matter of election in terms both of the conduct requisite thereto and the effect of delay, is properly left to the existing law; each state will have general principles which should govern.
The references in the subsection to other sections which state limitations on the secured creditor’s ability to hold proceeds as against transferees are particularly significant because proceeds are apt to be cash or instruments or chattel paper; this risk is however of small import when compared to the certainty of holding proceeds as against the debtor’s creditor or liquidator.

There are few areas of commercial financing in which the lawyer moves at present with less assurance than in drafting and advising about the accounting phase of financing against inventory, accounts, assigned conditional sale contracts or assigned chattel mortgages. There are a few points of certainty; beyond them the lawyer is obliged to navigate, like the early airplane pilot, by the seat of his pants. The gist of the problem is that upon authorized sale or collection the debtor will come into possession of the proceeds; these may be (to use the current terminology) cash, book account, check, note, mortgage, conditional sale contract, trust receipt, or other sale security such as a pledge of a bill of lading or a warehouse receipt. The secured creditor expects his lien to carry over to proceeds. The lawyer is conscious of the fact that proceeds while in the debtor’s hands are in a real sense an agreed-on future security, and is bedeviled by doubts about the applicability of filing statutes and by other problems.

The basic fact that an equitable lien is vulnerable to a trustee in bankruptcy provides a source of anxiety; when to it is added the other preference difficulties, created by the perfection requirement of the Federal Bankruptcy Act § 60, it will be seen that proceeds may raise all the familiar future property difficulties.

The extent to which the applicability of the principles which require the execution of assignments or other transfers, and conformity to filing statutes, can be met by arguing that the proceeds are held by the debtor as an agent of or trustee for the secured creditor, is unclear. The argument may be valid where the proceeds are cash; it is probably unsound where the proceeds are in truth a substitute collateral, e.g., sales security such as conditional sale contract or note plus chattel mortgage, or negotiable paper. In sales of receivables or contracts where the discounting seller collects, the argument has merit, although even there the existence of guaranty and repurchase agreements make it difficult to predict with assurance an analysis of a particular transaction as a sale rather than a security transaction. Concerning the legal relation of secured creditor to proceeds, see Annotation, Right of Chattel Mortgagee in Respect of Proceeds of Sale of Mortgaged Property by Mortgagor, 36 A.L.R. 1379 (1925). If the existence of a trust relation can be established, the proceeds so long as they are indentifiable can be reclaimed even against a trustee in bankruptcy. See COLLIER, BANKRUPTCY § 70.25 (14th ed. 1942). The situation where accounts receivable are the original collateral is determined in Washington by RCW 63.16.080, which makes the proceeds of assigned accounts a trust fund in the debtor’s hands. It is generally assumed that accounts which are themselves proceeds, as where the original collateral is inventory, are required to conform to RCW 63.16.010 et seq. It is the practice to stipulate in the original papers for periodic assignments of such accounts, and to file. Whether the original drafting can supply the required written assignment is an unanswerable question.

Cash proceeds from the sale of inventory have been held to be subject to the mortgage lien where “the mortgagor sells pursuant to an agreement with the mortgagee to apply the proceeds on the mortgage debt.” Puget Sd. Pulp Co. v. Clear Lake Cedar
The Code would provide a simple and certain solution; it would be a great improvement.126

(2) In insolvency proceedings a secured party with a perfected security interest has a right to the cash and bank accounts of the debtor equal to the amount of cash proceeds received by the debtor within ten days before the institution of such proceedings less the amount of such proceeds received by the debtor and paid over to the secured party during the ten day period, but no other right to or lien on cash proceeds not subjected to his control before insolvency proceedings are instituted. Nothing in this subsection shall affect any right of set-off which might otherwise exist.

The Code at this point follows and amplifies an idea which was introduced by the Uniform Trust Receipts Act and which is otherwise at variance with the existing law.127 In striking a balance between the

Corps., 15 Wn.2d 707 at 712, 132 P.2d 363 (1942). See also Annotation, Chattel Mortgagee's Consent to Sale to Mortgaged Property as Waiver of Lien, 97 A.L.R. 646 (1935). It would appear that conditional sale contracts as proceeds are governed by RCW 62.12.030, which for security assignments requires a written assignment but does not require filing; whether the original papers can include an effective assignment of future contracts is unclear. There are no cases construing the statute on the details pertinent here.

Checks and other negotiable proceeds while still in the debtor's hands present unanswerable problems about perfection, although it may be surmised that the Washington court would apply to them the reasoning of the Puget Sd. Pulp Co. case, supra. If a chattel mortgage is a proceed it will likely secure a negotiable note and the secured creditor would if an assignee of the mortgage be embroiled in the filing problem discussed at note 85 supra.

In summary of the existing situation in Washington, it is fair to say that practical operations are hampered by a lack of certainty as to the Washington law and by bankruptcy hazards which cannot now be met with assurance.128 The Code provision, applying without regard to when or in what form proceeds come into existence, for a ten day perfection period if the original security was perfected, and for continued perfection if the original financing statement refers to proceeds, creates certainty as against attack by creditors or liquidators. Since sale or collection of the collateral is contemplated the initial filing can normally be made to meet the perfection requirement. There will be vulnerability only to the limited extent imposed by subsection (4) of this section, and by Sec. 9-307, 9-308 and 9-309, a small price indeed to pay for relief from the creditor and liquidator problems. Inability to identify proceeds would be the real risk.

Enactment of the Code would put an end to the inclination, now evident, toward the use of straight "flooring" rather than shifting stock inventory mortgages. This would be a helpful development; the "flooring" form is used to avoid the uncertainties of the accounting needed in a shifting stock form and usually involves added expense and diminished flexibility. Sec. 9-307 of the Code would in fact preclude in many situations any successful attempt to prohibit sale by the debtor. The Code also seems to be sound in restricting the secured creditor's power to reach cash and checks, in the manner stated in subsections (2) and (3). The provision in subsection (4) for purchase of chattel paper free of the original security interest is more debatable; the practical difficulties should however not be serious as it is to be expected that transfers to other financial institutions will be uncommon.

127 RCW 61.20.100 is the Washington enactment of § 10, Uniform Trust Receipts Act; the general rule apart from this statute is that the claimant who fails to identify his property among the assets of the insolvent must forego his right to pursue it. COLIER, BANKRUPTCY § 70.25 at p. 1141 et seq. (14th ed. 1942). See also GLENN, LIQUIDATION, §§ 541-543 (1935); In re Supreme Appliance & Heating Co., 113 F. Supp. 228 (W.D. Ky. 1953). It is evident that the Washington court would, apart
present unlimited right to pursue identifiable proceeds and the general
proposition that proceeds cannot be reached at all unless identifiable,
a fair compromise of the conflict of interests between the secured
creditor and unsecured creditors would appear to have been reached.
Needless to say close policing by security holders, of the accounting
stage of the transaction, will be as desirable under the Code as it is now.

(3) On sale or exchange of collateral or collection of accounts or chattel
paper by the debtor, "proceeds" are received and when the right to pay-
ment has been earned under a contract right, the resulting account is a
"proceed." "Cash proceeds" include checks and money received on disposi-
tion of collateral or on collection or transfer of non-cash proceeds but not
notes, time bills, chattel paper, accounts and goods received in exchange.

The first sentence of this subsection states the expectable definition
of "proceeds." The second sentence supplies information needed to
operate subsection (2) above.

(4) If the proceeds resulting from a sale or other disposition of inven-
tory consists of chattel paper, nothing in this section prevents a transfer
thereof for new value in the ordinary course of business, and the security
interest or any other right of any such transferee shall have priority over
the security interest based on a claim to proceeds under subsection (1).

No reference is made in this subsection to any requirement of bona
fides; the Comment tells us that the omission is deliberate and calcu-
lated to prevent a person who finances inventory from acquiring a
legal monopoly on the secondary financing of sales-security paper
acquired by the debtor. If inventory is of a type which will produce
chattel paper, e.g. machinery, large appliances and motor vehicles, the
lender must face the fact that "proceeds" may as to him be the pro-
ceds of the chattel paper.128

(5) If collateral which has been sold is returned to the debtor, the fol-
lowing rules determine the priorities:
(a) As between the debtor and a secured party to whom the indebted-
ness originally secured by the collateral has not been paid, the
original security interest continues;
(b) As between the debtor and an unpaid transferee of the chattel

from the trust receipt statute, follow the general rule. Hill v. Brandes, 1 Wn.2d 196,
95 P.2d 382 (1939). Correlatively, the trust can now be impressed on such proceeds
as can be identified, without regard to the time lapse.

128 In the definition of proceeds in subsection (3), the phrase "collection of—chattel
paper—" is broad enough to pick up the proceeds of such paper. No valid quarrel
can be had with the avowed purpose of subsection (4) and the resulting risks to the
lender are not as serious as might appear at first glance. See the discussion, note 126
supra.
paper arising from the sale, the transferee shall have a security interest in the property returned, but such security interest must be perfected for protection against third parties;

(c) The security interest of an unpaid transferee under (b) shall have priority over a security interest claimed under (a).

Subsection (5) is aimed at some problems which badly need solving. It would be helpful even though the Code solutions are stated here with rather less than ideal clarity. The returned-merchandise facet of accounts and inventory financing now engages the attorney's attention primarily because of its fraudulent conveyance potential. In fact he is apt to become so engrossed in meeting that hazard as to make no serious effort to solve the future property, identification and filing obstacles to the existence of a valid security in the returned merchandise. The relation of the financing assignee of conditional sale contracts or chattel mortgages, to the chattels, although clearer is far from perfectly defined.

Part (a) adequately indicates the secured party's interest in returned goods where the original financing was of inventory, and when read with the Comment must be construed to make the interest a perfected one if the original security was perfected. This part does not in its literal language cover returned merchandise where the original financing was of accounts; there is language in the Comment which suggests a draftsmen's purpose to include such merchandise. Whether perfection as to goods would be achieved on the filing of a financing statement covering accounts but silent about goods is not clear; caution would dictate the inclusion of recitals which do cover the goods. Here and in the following parts of this subsection the word "return" is not a precise enough term.

129 See the discussion at note 43 supra.
130 There is apparently no Washington case on this phase of the problem.
131 See the discussion in note 134 infra.
132 The subsection is deficient in failing to define the term "return," a word likely to cause controversy because of the varying ways in which the debtor may reacquire possession of the goods. He may receive possession only, with no semblance of proprietary interest (e.g., for storage or repair or to sell on commission); he may acquire possession and the title of the original buyer, as where the buyer rescinds for breach of warranty or upon a voluntary rescission by mutual agreement; or he may acquire possession under circumstances which give him a type of subrogation interest in the property by reason of his guaranty or repurchase obligation. At one point, the Comment in discussing part (b) indicates that a buyer in ordinary course from the dealer will be protected as against the financing assignee even though the dealer reacquired possession as a mere custodian. This suggests that the word "return" covers all manner of reacquisitions, yet it would be absurd to say that the assignee acquires a security interest in the car when brought into the dealer's shop for a grease job; and the Comment at another place indicates that goods coming into the dealer's hands "for a purpose such as storage or repair" are not "returned."
Part (b) adequately indicates the interest of a security transferee of chattel paper in the goods upon receipt by the debtor and clearly enough states the perfection requirement. It covers a very important financing area and would involve some change in the existing law.

Part (c) adequately disposes of disputes over returned merchandise,

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133 The Comment must be resorted to in order to piece out the assignee's position in a contest with purchasers from the dealer; it provides the needed cross-references to Sec. 2-403 (2) and Sec. 9-307 (1), under which such interest as the assignee has would be lost to a bona fide taker from the dealer.

134 Within this part would come all of the financing of types now handled by assigned conditional sale contracts and chattel mortgages. The relation of the pledgee of the vendor's interest in a conditional sale contract, to the chattel, was for a time made ambiguous by Bank of California v. Danamiller, 125 Wash. 255, 215 Pac. 321 (1923), but is now covered in most particulars by RCW 63.12.030; that statute gives the assignee a lien on the property which is good against third persons without filing. Just how good the lien really is in a conflict between the assignee and a bona fide purchaser from the assignor, a dealer, who in some way reacquired possession of the chattel, remains to be seen. The cases cited in the discussion of Sec. 9-307 infra demonstrate the probabilities. That the lien will stand up in a contest with a creditor or liquidator of the dealer seems clear enough. The Code in requiring perfection of the chattel interest if it is to be held against third persons, puts a burden on this type of financing which is not now present.

The buyer of conditional sale paper gets the vendor's interest in the chattel as well as in the chose. State Bank of Black Diamond v. Johnson, 104 Wash. 550, 177 Pac. 340 (1918). Our court has held that the sale is not converted into a security transaction by the seller's guaranty of payment by the conditional sale contract vendee. Flynn v. Garford Motor Truck Co., 149 Wash. 264, at 275, 270 Pac. 806 (1928). That this decision is complete assurance of a like construction of all the various guaranty, reserve fund and repurchase agreements exacted of dealers by financing purchasers of this type of paper is by no means clear. In any event the exact relation of the dealer to the chattel, should it come again into his possession, is not free from difficulty. See for example Fales Paper Co. v. Bortner, 142 Wash. 81, 252 Pac. 539 (1927). This complicates the determination of the assignee's position as against creditors or successors of the assignor-dealer.

The Flynn case, cited above, applied the bill of sale recording act to defeat a conditional sale vendee who left the vendor in possession, even though the conditional sale contract was filed. An assignee of the contract would surely be in no better position. The assignee has been sustained in a contest with a receiver of the assignor as to cars repossessed by the assignor and in his possession when the receivership proceedings were initiated. General Motors Acceptance Corp. v. Seattle Ass'n Cr. Men, 192 Wash. 613, 74 P.2d 198 (1937). Between these two situations there is a considerable range of possibilities. The significant cases are cited with the discussion of Sec. 9-307 of the Code.

Pledges and sales of notes secured by chattel mortgages can create all the problems which have arisen in connection with conditional sales contracts but apparently have not come to litigation, in these ways, in Washington.

The area of vulnerability opened up by the perfection requirement of part (b) is complicated by the fact that in some transactions no filing is needed for either the original sales security or the chattel-paper assignment (see Sec. 9-302) so the obvious tactic of original filing in broad enough terms to cover both chattel paper and chattel is not practicable. Perfection after reacquisition by the dealer would not be particularly onerous if the assignee is informed of the need for it and one of the unsettled questions about the word "return" is whether there can be "return" in a transaction of which the assignee is totally ignorant. It may be that financing assignees of chattel paper could and should file in terms of the merchandise even though filing in terms of the paper is not necessary. Under Sec. 9-402 (2), the secured creditor can accomplish filing as to proceeds by his unilaterally executed financing statement. Whether returned merchandise is a "proceed" is not entirely clear. See subsection (3) of Sec. 9-306.
arising between a secured party whose collateral is inventory and one whose collateral is chattel paper.


(1) In the case of inventory, and in the case of other goods as to which the secured party files a financing statement in which he claims a security interest in proceeds, a buyer in ordinary course of business takes free of a security interest even though perfected and even though the buyer knows of the terms of the security agreement.

In protecting the buyer in ordinary course\(^{126}\) of inventory\(^{136}\) this subsection states in the form of a legal proposition an idea which the Washington court has several times expressed in terms of estoppel and in other ways which make each case turn on its own facts.\(^{137}\) There is

\(^{126}\) Sec. 1-201 (9) defines "buyer in ordinary course" as "a person who buys goods in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker or person buying goods from a farmer. 'Buying' may be for cash or on secured or unsecured credit and includes receiving goods, securities or documents of title under a pre-existing contract for sale, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt."

The phrase "transfer in bulk" should cause no confusion. Although it seems to have a flavor of piece-meal retail sales, it must be examined in light of the seller's business. A manufacturer selling in car-load lots to a wholesaler is not for these purposes selling in bulk; he would be if he sold to another manufacturer who bought for re-sale to wholesalers.

\(^{136}\) "Inventory" is defined in Sec. 9-109 (4) to include goods "held or . . . being prepared for sale or . . . to be furnished under a contract of service or . . . raw materials, work in process or materials used or consumed in a business." The term "goods" is defined in Sec. 9-105 (1) (f) to mean, in effect, tangible personality. The stock in trade of a retail or wholesale dealer, and the finished product of a manufacturer, all seem to come within the inventory definition.

\(^{137}\) The following are the cases, in chronological order; it will be observed that they are consistent neither in result nor in rationale, and are utterly irreconcilable with the existing filing statutes, which contain no exceptions for dealer transactions and in terms contemplate the very severance of security interest and possession which costs the security holder his security (when he loses): State Bank of Black Diamond v. Johnson, 104 Wash. 550, 177 Pac. 340 (1918) (after assignment of conditional sale contract by vendor, to the vendee's knowledge, and filing of the contract, upon which the assignment appeared, the vendee and the vendor went through a purported rescission because the vendee found he could not pay; thereafter the vendor sold the property to another buyer who took for value and without actual knowledge of the prior transaction; in holding for the assignee the court assumed that the conditional sale filing carried no constructive notice to such a buyer, found no grounds for estoppel, and held squarely on the basis of the vendor's absence of title); General Motors etc. Corp. v. Arthaud L. Co., 118 Wash. 593, 204 Pac. 194 (1922) (assignee of conditional sale contract held estopped to assert its interest, in a contest with a buyer from the vendor into whose possession the property had again come); Hardin v. State Bank of Seattle, 119 Wash. 169, 205 Pac. 382 (1922) (a dealer mortgaged one car then in his stock and subsequently sold it to a buyer who took for value and without actual knowledge of the mortgage; in sustaining the mortgagee against the buyer the court examined the latter's argument for an estoppel and rejected it on the facts, and relied on the fact the mortgage was filed, a fact which precluded the buyer from successfully claiming to be the beneficiary of the proposition that "when one of two innocent persons must suffer, he whose conduct was the cause of the loss must bear the loss."); Gramm-Bernstein M.T. Co. v. Todd, 121 Wash. 145, 209 Pac. 3 (1922) (conditional sale contract vendor lost to a buyer from the vendee, a dealer; the stated reason was estoppel based on some evidence indicating that the dealer had in past transactions been permitted to sell free of the vendor's interest, although there was nothing in the opinion to indicate that the buyer
also precedent for the Code provision, in the Uniform Trust Receipts Act. In limiting the protection to buyers, the Code seems to accord with the existing law; in extending the protection to buyers without regard to their knowledge of the encumbrance the Code goes beyond the limit the local cases have set. The extension of protection to

knew of those transactions, and of letters from the vendor to the vendee urging him to sell the property, there being no indication in the opinion that the buyer knew of these letters); Commercial Credit Co. v. Nat. Credit Co., 143 Wash. 253, 255 Pac. 104 (1927) (assignee of conditional sale contract repossessed on vendee’s default and stored the property with the vendor, who entered into a second conditional sale contract with the original vendee and assigned the new contract to another finance company; the initial assignee prevailed over the second one, for the stated reason that the vendor was a bailee only when he purported to make the second sale); Flynn v. Garford Motor Truck Co., 149 Wash. 264, 270 Pac. 806 (1928) (conditional sale vendee left vendor in possession; vendor sold to another, who was held to prevail over the vendee by reason of the bill of sale recording statute); Northwestern Finance Co. v. Russell, 161 Wash. 389, 297 Pac. 186 (1931) (assignee of conditional sale contract, vendor being a dealer and vendee his salesman, the car being kept at the vendor’s place of business, lost to a buyer from the vendor; the stated reason was apparently “comparative innocence” and the fact the circumstances made the bill of sale recording statute applicable); Bauer v. Commercial Credit Co., 163 Wash. 210, 300 Pac. 1049 (1931) (owner of car put it in the hands of a dealer for sale; the dealer mortgaged it; the owner lost in a contest with the mortgagee; the stated rationale was apparent ownership created in the dealer by the owner); Schoenfeld’s Standard Furniture Co. v. Stoe, 175 Wash. 201, 27 P.2d 564 (1933) (conditional sale vendor who sold goods to a vendee who was engaged in the business of installing such goods in houses and selling the houses, lost to a buyer from the vendee; the stated reason was implied authority in the vendee to sell free of the contract); Commercial Credit Co. v. Cutler, 176 Wash. 423, 29 P.2d 686 (1934) (assignee of a conditional contract wherein a dealer was the vendor and his salesman the vendee, prevailed over a buyer from the vendor although the car carried dealers’ plates and was on occasion in the vendor’s salesroom; the court declined to apply the bill of sale recording statute in aid of the buyer and could find no other basis for protecting him; three judges dissented, seeing no basis for differentiating Northern Finance Co. v. Russell, cited above).

The end result of these decisions is that as to bona fide purchasers and for all practical purposes inventory may as well be financed by a shifting stock mortgage in which sale is authorized, rather than by a flooring type in which sale is forbidden, unless the lender is prepared to do the constant policing needed to make sure the goods stay in storage. These cases also mean that a lender who takes assignments of conditional sale contracts or chattel mortgages is quite unable to predict the fate of his collateral interest in the goods should the debtor reacquire possession of them and sell them to a bona fide purchaser. On the other hand, these cases do not demonstrate vulnerability to creditors or liquidators of the dealer.

\[138\] RCW 61.20.090 is the Washington enactment of § 9, Uniform Trust Receipts Act, which protects a buyer in ordinary course (defined in RCW 61.20.010) despite a limitation on the trustee’s liberty to sell unless the limitation is known to the buyer. The point is not free from doubt. In Bauer v. Commercial Credit Co., 163 Wash. 210, 300 Pac. 1049 (1931) an owner lost to a mortgagee from a dealer to whom the owner had handed the property for sale; the case rests on apparent ownership and would appear to be distinguishable from the usual instance of purchaser protection. See the cases cited in note 137 supra. One of the difficulties resulting from the nebulous rationales indicated in some of those cases is that one never knows what may happen in the next case.

\[140\] Both RCW 61.20.090, which expressly protects a buyer in ordinary course from a trust receipt trustee provided a limitation on the trustee’s power to sell is not known to the buyer, and the several cases discussed in note 137 supra which protect the buyer on bases of estoppel, comparative innocence or implied authority, evidently contemplate that a restriction on the debtor’s power to sell inventory is operative against a buyer who knows of it.
instances in which the financing statement claims an interest in pro-
ceeds has no present counterpart. The enactment of this subsection
would represent a change in details but not in principle.

(2) In the case of consumer goods and in the case of farm equipment
having an original purchase price not in excess of $2500 (other than goods
or equipment which are part of the realty, see Section 9—313), a buyer
takes free of a security interest even though perfected if he buys without
knowledge of the security interest, for value and for his own personal,
family or household purposes or his own farming operations unless prior
to the purchase the secured party has filed a financing statement covering
such goods.

This subsection serves to qualify Section 9—302(1) (c) and (d)
and to protect buyers of the types here indicated, who buy consumer
goods or farm equipment for use from a seller in whose hands the
property was held for use. The end result is that the seller, bank or
finance company which takes or retains purchase money security need
not file it to prevail over the buyer’s creditors or a subsequent security
transferee or a second hand dealer, but must assume the risk of sale
by the debtor to a neighbor for use save where filing has been accom-
plished. In Washington, motor vehicles would be governed by the title
registration statute. Neither the exemption from filing stated in
Section 9—302 nor the qualification stated here has any analogy in
existing Washington law.

Section 9—308. Security Interest in Chattel Paper Without Transfer of
Possession.

Filing with regard to chattel paper not transferred to the possession of
the secured party perfects a security interest in such paper against all
creditors of the debtor and all transferees except a purchaser for new value
and in the ordinary course of his business who takes possession of the
paper and who does not have actual knowledge that the specific chattel
paper is subject to a security interest.

It may be assumed that the debtor will be left in possession of chattel

142 The Comment points out the obvious inference from such a provision, that the
debtor is empowered to sell free of the security interest.

143 Sec. 9-109 (1) defines “consumer goods” as those “used or bought for use
primarily for personal, family or household purposes.”

144 Sec. 9-109 (2) defines “equipment” as things “used or bought for use primarily
in business (including farming or a profession) . . . or if the goods are not included
in the definitions of inventory, farm products or consumer goods.” The phrase “farm
equipment” is not otherwise defined.

145 Goods evidently become “consumer goods” or “equipment” only after they have
moved from “inventory” into the hands of a buyer who aims to use them.

146 Motor vehicles would in Washington come within the operation of Sec. 9-302
(2), which contains a blanket exemption from any filing requirement where a title
certificate system is operative.
paper only where he is to handle collections. The practical effect of this section will be to make the security assignee in such a transaction vulnerable to a subsequent assignee who meets the requirements stated. Apparently the draftsmen deem it more important that purchasers of chattel paper be free to buy without examining the records than that the initial assignee be protected. As the Comment points out, however, adequate protection can be had by stamping the paper so as to show the assignee's interest. A later buyer who took possession could not readily escape the resulting inference of actual knowledge. It would appear that one effect of the section would be to force persons who finance chattel paper on a non-notification basis to file and stamp the paper. Banks and finance companies could purchase it if no stamp is evident and actual knowledge does not exist, regardless of prior filing.

The central idea, that chattel paper ought to pass freely in the manner of negotiable paper, has no exact counterpart in existing Washington law. Security transactions in secured notes and conditional sale contracts are of course commonplace. A transferee of a negotiable note who leaves it in the possession of the transferor will now lose both the note and any security for it to a subsequent holder in due course; the outcome where the subsequent transfer occurs after maturity or the note is not negotiable, or where conditional sale contracts rather than notes are concerned, is obscure.\footnote{Concerning negotiable paper see the discussion with Sec. 9—309. Assignments of conditional sale contracts are excluded from the operation of RCW 63.16.010 \textit{et seq.} (the accounts receivable statute). Security assignments of such contracts are governed generally by RCW 63.12.030 but that section deals only indirectly with successive assignments of the paper itself; it would support an argument for priority in the initial assignee.}

Section 9—309. Purchasers of Instruments and Documents.

Nothing in this Article except Section 9—206(1) limits the rights of a holder in due course of a negotiable instrument (Section 3—302) or a holder to whom a negotiable document of title has been duly negotiated (Section 7—502 or a bona fide purchaser of a security (Section 8—301) and such holders or purchasers take priority over an earlier security interest even though perfected. Filing under this Article does not constitute notice of the security interest to such holders or purchasers.\footnote{The term "chattel paper" is defined in Sec. 9-105 (1) (b) to mean "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." Only experience under the Code would develop the data upon which to determine whether particular types of security agreement are chattel paper. It may be surmised from current practice in which conditional sale contracts, chattel mortgages and trust receipts support a vast area of secondary financing, that security agreements in general will be chattel paper.}
Despite the provision in Sec. 9—303(3) for perfection of transactions in instruments (other than those accompanying chattel paper) and documents, only by the assumption of possession, there is a field of operation for this section.\(^{148}\) In the propositions that a taker in due course or a similar transferee of document or security will hold free of third party equities, and that filing cannot be made to convey such notice as will vary this result, the Code conforms to the existing ideas.\(^{148a}\)

Section 9—310. Priority of Certain Liens Arising by Operation of Law.

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

Save for the Uniform Trust Receipts Act\(^{149}\) there is no comparable statute in Washington now. The local statutory lien situation is so confused that the effect of the Code cannot be determined with any assurance. The awkward question is whether the statutes can be said to "expressly provide otherwise" or whether they are "silent." If they are silent, we are instructed by the Comment in these words: "If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this Section provides a rule of interpretation that the lien should take priority over the security interest." Actually, the Washington statutes contain some language about priorities. The trouble is that the language is ambiguous and has taken or will take construction to fix the relative positions of lien and prior security interest. It will be seen that the Code does not exactly fit into the present picture. Some liens

\(^{148}\) The language in this section, "take priority over an earlier security interest even though perfected" may be confusing; it must be remembered that although Sec. 9-303 (3) requires assumption of possession as the mode of perfecting security interests in instruments (other than those accompanying chattel paper), documents, and securities (which come within the definition of "instrument"), while Sections 3-202, 7-501 and 8-301 contemplate delivery (which means the same as assumption of possession, Sec. 1-201 part 14) as a condition to a transferee's acquisition of the holder in due course status (or the comparable relationship to document or security), there will be instruments accompanying chattel paper and instruments and documents which are proceeds under Sec. 9-306, as to which Sec. 9-309 is a necessary regulation. The temporary perfection provision of Sec. 9-304 also requires this qualification.

\(^{148a}\) B R I T T O N, B I L L S A N D N O T E S § 155 (1943); RCW 61.20.090 (1) (trusts receipts act). RCW 63.16.010 et seq., the only local statute which provides for the filing of choses in action, expressly excludes instruments for the payment of money. It certainly does not cover bills of lading or warehouse receipts, either.

\(^{149}\) RCW 61.20.110 is the local enactment of § 11, Uniform Trust Receipts Act. It creates priority for liens accruing in the course of the trustee's ordinary business operations.
are now junior to earlier security interests, others are prior. The Code might encourage an argument that the types of lien which are now subordinate are advanced to priority. If the Code is enacted, amendment of the pertinent lien statutes to insure continuance of the present order of priorities would be desirable.\textsuperscript{150}


The debtor’s rights in collateral

(a) are alienable, although the security agreement may make disposition without the secured party’s consent adequate; and

(b) may be reached by attachment, levy, garnishment or other appropriate judicial process.

Subsection (a) both prohibits restraints on transfer of the debtor’s interest and authorizes the use of acceleration clauses keyed to alienation not consented to by the secured party. The apparent anomaly may be justified in terms of protection for transferees.

The present status in Washington of a no-transfer clause is unclear.\textsuperscript{151} Subsection (b) is in accord with the present Washington practice.\textsuperscript{152}

\textsuperscript{150}See RCW 60.04.050, construed in Lipscomb v. Exchange National Bank, 80 Wash. 296, 141 Pac. 686 (1914) and John & Co. v. Mortgage Trust & Sav. Bank, 97 Wash. 504, 166 Pac. 1137 (1917); RCW 60.08.030, as to which Rothweiler v. Winton Motor Car Co., 92 Wash. 215, 158 Pac. 737 (1916) is of interest; RCW 60.12.030, construed in Sitton v. Lilenthal, 14 Wash. 624, 45 Pac. 303 (1896) and Musgrave v. Atkinson, 118 Wash. 323, 203 Pac. 973 (1922); RCW 60.24.090, construed in Greely v. Bank of Stevenson, 169 Wash. 181, 12 P.2d 493 (1932); RCW 60.32.010, construed in Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147 (1901) and In re Cascade Fixture Co., 8 Wn.2d 263, 111 P.2d 991 (1941); RCW 60.34.010 et seq., which is the latest of these statutes and is the subject of a legislation note entitled Creditors’ Rights, 28 Wash. L. Rev. 172 (1953), which also reviews the earlier statutes and cases.

\textsuperscript{151}The existing decisions are not addressed to the validity of the provision. Tope v. Brattain, 172 Wash. 556, 21 P.2d 241 (1933) (held no-transfer clause could not be invoked by a levying creditor to defeat the vendee’s mortgagee); Snow v. Mitchell, 2 Wn.2d 424, 97 P.2d 1097 (1940) (in a contest between the vendor’s assignee and the vendee’s mortgagee, the issue being the latter’s right to notice and a chance to pay before forfeiture by the assignee for non-payment, the court made the odd statement that the no-transfer clause need not be considered because the assignee was forfeiting for non-payment rather than for violation of the no-transfer clause). These cases at least contain no language suggesting that a no-transfer clause is invalid. The same may be said of Seattle Automobile Co. v. Essex, 138 Wash. 409, 244 Pac. 705 (1926), in which the court found as a fact that no transfer had occurred.

In the nature of things a clause making alienation a default will be meaningful only if tied to an acceleration clause or to a forfeiture clause phrased in terms of “any default.” There appears to be no local decision testing the effectiveness of such drafting.

\textsuperscript{152}Conditional sale contract: Hess v. Starwich, 149 Wash. 679, 272 Pac. 75 (1928), noted 4 Wash. L. Rev. 89 (1929) (held that the vendee has an interest subject to attachment); Western Bond & Mfg. Co. v. Chester, 145 Wash. 81, 259 Pac. 13 (1927) (indicating that process against the vendee’s interest must be had with due regard for the vendor’s interest). A chattel mortgagor has title in Washington and there is no doubt but what his interest can be reached by process. The details are regulated by RCW 61.08.120. A pledgor’s interest can be reached too. See Holman v. Tjosevig, 136 Wash. 261, 239 Pac. 545 (1925); Edward L. Eyre & Co. v. Hirsch, 36 Wn.2d 439, 218 P.2d 888 (1950).

When conflicting security interests attach to the same collateral, such interests rank in the order of time of perfection with the following exceptions:

(1) An interest which attaches after filing takes priority from the time of filing, but in case of conflict this rule is subject to the rules stated in the following subsections.

The basic proposition stated here, that priorities are fixed by the time order in which the transactions occurred, is the traditional one. It will be recalled that Section 9—301 governs where one security interest is not perfected.

Subsection (1) is concerned with a difficulty which is routine under a notice filing system. The security transaction will often come after filing. It is quite possible for two persons to loan against the same collateral and for the one who filed last to loan first. The Code accords priority to the one who filed first even though he loaned last, and would effect a change in Washington so far as accounts receivable financing is concerned.\(^{155}\) In other types of future property financing the local law is not clear.\(^{164}\)

(2) A secured party who has a perfected security interest and who makes later advances to the debtor on the same collateral and under the same security agreement takes priority as to the later advances from the time when his security interest was originally perfected.

This subsection implements Section 9—204(5). It seems to contemplate a security agreement providing for future advances and is most significant in ignoring any distinction between mandatory and voluntary advances. In so doing it would change the local law,\(^{155}\) for the better.

(3) A secured party who has a perfected security interest and who acquires rights in after-acquired collateral under a term in the security agreement takes priority as to such rights from the time when his security interest was originally perfected, whether or not he makes advances on

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\(^{155}\) RCW 63.16.090 determines priority by the time order in which the assignments were made.

\(^{164}\) The Uniform Trust Receipts Act, RCW 61.20.130, provides for notice filing and under it a conflict between entrusters could develop. There are no local decisions on that point. In Donn v. Auto Dealers Inv. Co., 385 Ill. 211, 52 N.E.2d 695 (1944), the entruster who first advanced credit and received a trust receipt was given priority. There are some other areas of future property financing; a conflict between crop mortgages would no doubt be resolved by reference to the filing statute, RCW 61.04.010, 61.04.020. The controlling principles are so obscure in the inventory field as to make it impossible to predict the outcome of a contest between conflicting mortgages. See note 36 supra.

\(^{155}\) See note 40 supra.
the after-acquired collateral, except as otherwise provided in subsection (4).

This subsection also serves to round out the coverage of Section 9—204. It accords with subsection (1) of Section 9—312, in taking the date of the original perfection. On this detail the present Washington rule is obscure. The idea that a security interest attaches to future property when acquired, without regard to any contemporaneous advance, is of course a familiar one.

(4) A purchase money security interest has priority over a conflicting interest in the same collateral which is claimed under an after-acquired property clause if the purchase money security interest is perfected at the time the debtor receives the collateral or within ten days thereafter and, where the collateral is inventory, if before the debtor receives it the purchase money party also notifies any secured party who has made a prior filing covering inventory of the type concerned. Such notification must describe the inventory concerned, state that the interest is a purchase money security interest and specify its amount. If, however, the interest claimed under an after-acquired property clause is itself a purchase money security interest, the rule stated in subsection (5) applies.

In recognizing the priority of purchase money security the Code adheres to the traditional view. The limitations on that priority stated in the subsection are new; they seem sensible enough.

(5) When there are conflicting purchase money security interests, the interest of a seller or of a secured party whose advance was used at his direction to pay a seller takes priority if he has perfected his interest at the time the debtor receives the collateral or within ten days thereafter. In any other case of conflicting purchase money security interests they rank equally.

Since purchase money security can exist both where a seller is unpaid and where a third party loans purchase money, conflicts between seller and lender can arise, as well as conflicts between several lenders each of whom provided a part of the purchase money. This is a detail on which there is no definitive local authority. The Code solution

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186 See note 36 supra.
187 Community State Bank v. Martin, 144 Wash. 483, 258 Pac. 498 (1927) (crop mortgage held subordinate to subsequently executed lease with crop rent clause and provision that crops would secure advances by the lessor, court treating the lease like a purchase money mortgage); Bisbee v. Carey, 17 Wash. 224, 49 Pac. 220 (land mortgage securing purchase money held superior to the lien of an antecedent judgment).
188 The filing system can occasionally provide a solution. See for instance Worley v. Metropolitan Motor Car Co., 72 Wash. 243, 130 Pac. 107 (1913), in which a lender who furnished part of the purchase money took a mortgage which prevailed over the seller's conditional sale contract because the latter was not filed.
appears to be clear enough.

(6) When the collateral is crops the interest of a later secured party who, in order to enable the debtor to produce them, makes a new advance, incurs a new obligation, releases a perfected security interest or gives other new value during the production season or not more than three months before the crops are planted or otherwise becoming growing crops, takes priority over the interest of an earlier secured party to the extent that the earlier interest secured obligations (such as rent, interest or mortgage principal amortization) due more than six months before the crops are planted or otherwise become growing crops.

The Comment indicates that it is the aim of this subsection to insure priority for financing which goes to produce the current crop, as against antecedent security interests, which might be for last year’s rent or crop financing. There is no comparable principle now discernible in the Washington law. The Code solution seems to have real merit.

(7) Section 9—373 on goods which are part of the realty, Section 9—314 on goods which are affixed to other goods and Section 9—315 on goods which are commingled or processed state rules of priority which supplement the rules stated in this section.

The following discussion of the sections cited makes any comment on this subsection unnecessary.

Section 9—313. Priority When Goods Are Part of Realty.

(1) When under other rules of law goods are so affixed or related to the realty as to be a part thereof, a security interest in such goods which attaches before they become part of the realty takes priority as to such goods over the claims of all persons who have an interest in the realty except:

(a) a subsequent purchaser for value of any interest in the realty; or
(b) a subsequent judgment creditor with a lien on the realty; or
(c) a prior encumbrancer of the realty to the extent that he makes subsequent advances

provided that the purchaser or lien creditor becomes such or the prior encumbrancer makes such advances without knowledge of the security interest and before its perfection. A purchaser of the realty at a foreclosure sale is a subsequent purchaser within this Section unless he was the prior encumbrancer.

(2) When under subsection (1) a secured party has priority over the claims of all persons who have an interest in the realty he may on default subject to the provisions of Part 5 remove his collateral from the realty but he must reimburse any encumbrancer or owner of the realty who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the realty caused by the absence of the goods removed or by any necessity for replacing...
them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

The gist of subsection (1) is that a security interest in a chattel survives and has priority over all interests in the realty, upon subsequent affixation to the realty, and provided it was perfected prior to affixation. Even where not perfected, the chattel security survives and is prior to an antecedent land mortgage (save as to future advances thereunder made in ignorance of the chattel security) and to donees, purchasers with knowledge and creditors who levy with knowledge. The Code would both settle some problems now unanswerable in Washington, and also probably change the existing law. The latter has

159 Perfection, in this context, is governed by Sec. 9-302 (1), including (1) (d), and Sec. 9-401 (1). It will be observed that the determination whether a chattel is so affixed to realty as to become a part thereof is left by the Code to the existing law. Seen in this connection Note, 22 Wash. L. Rev. 140 (1947). The Code does not deal with the problems which arise when an effort is made to use a chattel mortgage to take security in things which have in the past been affixed to the land. See for instance Parrish v. S.W. Wash. etc. Ass'n, 41 Wn.2d 586, 250 P.2d 973 (1953) (document in form a chattel mortgage purported to cover a sprinkling system antecedently installed in land).

The several Washington decisions involving security in chattels, sought to be asserted after affixation to land, leave some loose ends. In Provident Mutual Life Ins. Co. v. Smith, 175 Wash. 356, 27 P.2d 580 (1933), the court disposed of a contest between 1:nd mortgagee and chattel mortgagee, over refrigeration equipment installed in an apartment house, by finding that the chattels never lost their character as such. It is impossible to determine whether the case is a technical fixtures holding or means that the chattel mortgage prevailed because the subject matter of his mortgage could be removed without injury to the building.

In King v. Title Trust Co., 111 Wash. 508, 191 Pac. 748 (1920), the court sustained the land mortgagee in a contest with vendor who had sold an elevator to the mortgagor on conditional sale contract. The elevator was installed as the mortgagee's disbursements under a construction loan were made. The mortgage was treated as a subsequent one, protected under the general rule which gives priority to a subsequent bona fide purchaser of the land as against an earlier security interest filed as a chattel interest only, and purporting to cover things affixed to the land. The court indicated that its result would have been otherwise had the mortgagee taken with knowledge of the vendor's interest, or had the contest been between the vendor and the vendee. These are views generally held. See Glenn, Mortgages, § 357.1 (1943).

In German Savings and Loan Society v. Weber, 16 Wash. 95, 47 Pac. 224 (1896), unpaid vendors of chattels under a contract closely resembling a conditional sale contract were permitted to remove the chattels as against a prior mortgagee of the land upon a finding that the removal could be accomplished without material injury to the land. The test apparently applied was whether the security originally acquired by the mortgagee would be diminished by the removal. This holding appears to commit the Washington court to the line of authority which makes injury to the land the test in a controversy between a purchase money security in the chattel and a prior land mortgage. See Glenn, Mortgages § 356 et seq. (1943).

Although the basic legal propositions upon which conflicts between chattel and land security holders are to be resolved are provided in these cases, there remain serious practical difficulties in their application. The determination whether a particular transaction will result in the chattel becoming a fixture is often impossible without litigation. So is the determination whether the manner of affixation will be such that removal can be effected without injury to the land. The fact that chattel filing carries no constructive notice to a subsequent buyer of the land suggests as a possible solution the
The perfection technic where affixation to land is contemplated requires special consideration and is discussed with Section 9—401. Similar difficulties exist now and are imperfectly handled under the present statutes.\footnote{See Comment, 13 Wash. L. Rev. 46 (1938), and the discussion in note 159 supra. Notice also Sec. 9-203 of the Code.}

Section 9—314. Priority When Goods Are Affixed to Other Goods.

(1) A security interest in goods which attaches before they are installed in or affixed to other goods takes priority as to the goods installed or affixed (called in this section “accessions”) over the claims of all persons to the whole except

(a) a subsequent purchaser of the whole for value; or
(b) a subsequent judgment creditor with a lien on the whole; or
(c) a prior secured party with a security interest in the whole to the extent that he makes subsequent advances.

provided that the purchaser or lien creditor becomes such or the prior secured party makes such advances without knowledge of the security interest in the accessions and before its perfection.

(2) Where under subsection (1) a secured party has an interest in accessions which has priority over the claims of all persons to the whole, he may on default subject to the provision of Part 5 remove his collateral from the whole but he must reimburse a person with an interest in the whole who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

There are no local cases on the problem to which this section is addressed. The cases elsewhere are in confusion. To the Code solution, recordation of the security in the elevator or what-not as a land security. This immediately poses the problem—will a land security interest rather than a chattel one then exist? Can the unpaid seller play it both ways, taking the goods on default as chattels, treating the transaction as one in land for purposes of recording? This particular part of the difficulty has been a little helped by comparatively recent legislation. The chattel mortgage and conditional sale contract statutes have both been amended to provide for the inclusion of a description of the land and for recordation in the land records. Despite rather queer negative phrasing, the statutes evidently contemplate constructive notice to persons subsequently acquiring interests in the land, and that such notice shall enable the chattel security holder to sever and remove them without regard to harm done in the process. RCW 61.04.040 (chattel mortgage); RCW 63.12.010 (conditional sale contract). Both statutes, however, exclude industrial and manufacturing machinery and equipment.\footnote{Annotation, Accession to Property Which is the Subject of a Conditional Sale or Chattel Mortgage, 68 A.L.R. 1242 (1930); Annotation, Law of Accession as Applied to
which follows the scheme of the preceding section, is both clear and workable. 162

Section 9—315. Priority When Goods Are Commingled or Processed.

(1) If raw materials, component parts or other goods which contribute to a product are manufactured, processed or commingled so that their identity is lost, a security interest in any of them continues on the product or resulting mass if the security agreement so provides or if the secured party has not acquiesced in the loss of identity. The security interest continues as a perfected security interest if the financing statement indicates that the interest covers the product or mass or, even though the statement does not so indicate, if the secured party did not acquiesce in the loss of identity.

(2) When under subsection (1) more than one security interest attaches to the product or mass, they rank equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

This section would provide answers for some questions which are now most troublesome. The lawyer who sets-up a security transaction in which a manufacturing or processing stage is involved is hard pressed to know how to proceed. Raw materials such as fish, fruit, lumber or steel, and adjuncts such as cans or boxes, are often an important factor in the lender’s collateral position. Whether these things can be held at all in view of the contemplated destruction of their separate identity, and what the security in the end-product will be, are the main difficulties. On these details the Washington law is now unsettled. 163 The Code in recognizing that the original filing can cover both raw materials or component parts and end product conforms to the general Code treatment of future property. Under it the lawyer’s course would be easily charted. The financing agreement can readily be made to cover everything and so can the filing.

Commingling not consented to by the secured party will not be a

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162 The Code would permit the secured seller of the chattel which was attached and who perfected his interest, to remove it upon default of the debtor with liability only for the damage done in the removal process. For example (as the Comment indicates) the seller of an automobile engine on secured credit. The Code would both provide a sure rule in lieu of the present confused situation, and extend the area within which the secured seller of the part would prevail.

163 Save for the trust receipt, which can cover things to be processed or manufactured, RCW 61.20.020, but which can be used in few of the situations in which the problem arises, there is no clear-cut legal machinery. See the discussion of future property problems at note 36 supra.
common problem; the Code in protecting the secured party adopts the view now generally entertained.104

Section 9—316. Priority Subject to Subordination.

Nothing in this Article prevents subordination by agreement by any person entitled to priority.

In recognizing the operative effect of a subordination agreement the Code states an obvious principle. It does not however state whether the agreement can or should be filed.105


A contract made by a debtor concerning collateral does not impose a personal obligation on the secured party merely because of his security interest or his authority given to the debtor to dispose of or use the collateral.

The Comment explains the purpose of this section; it is to insure the secured party's freedom from warranty liability upon the debtor's authorized sale of the goods. The Uniform Trust Receipts Act has a similar provision.106 There are apparently no local cases on the point. The mortgagee's possible liability in this particular is one of those questions which clients occasionally ask and which the attorney now finds it difficult to answer categorically. The Code would be helpful, in providing an answer.

Section 9—318. Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective; Identification and Proof of Assignment.

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 9—206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

104 See BROWN, PERSONAL PROPERTY § 36 (1936). There is some opposed authority and the impact of modern filing statutes on the common law proposition is a problem which is a long way from being settled. The whole area of confusion of goods in relation to security transactions is now highly unsatisfactory. See JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, § 481 et seq. (Bowers ed. 1933); BROWN, op. cit. § 30 et seq. (which is concerned with confusion of goods in general).

105 The only Washington case involving a subordination agreement is Richards v. Lawing, 175 Wash. 544, 27 P.2d 730 (1933). It is concerned with land and the notice effect of recording such an agreement. The impact of a subordination agreement on transferers of the participants is as likely to come into issue in chattel or chose financing. The land recording statute clearly covers a subordination agreement. There is no comparable chattel statute.

106 RCW 61.20.120 is the Washington enactment of § 12 of the Uniform Trust Receipts Act.
(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment or of the arrangement for assignment.

Since the term “account debtor” means “the person who is indebted on an account, chattel paper or contract,” the propositions stated in the subsection will be recognized as basic contract law. They would represent no fundamental change in the Washington situation so far as defenses or recoupment are concerned and would clarify the local rule as to set-off.

(2) So far as the right to payment under an assigned contract right has not already become an account, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

167 See Sec. 9-105 (1) (a). The terms “account” and “contract right” are defined in Sec. 9-106: “‘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 or an ‘account.’” The term “chattel paper” is defined in Sec. 9-105 (b) to include the security agreement plus whatever instrument accompanies it. The term “instrument” is defined in Sec. 9-105 (1) (g) to include a note, negotiable or otherwise. The use in this subsection of the term “assignee” will restrict its operation in the case of negotiable paper to transferees other than holders in due course.

168 See for example Doub v. Rawson, 142 Wash. 190, 252 Pac. 920 (1927), in which the assignee of the vendor's interest under a conditional sale contract was held to take subject to a collateral agreement between vendor and vendee under which the latter's duty was to pay by furnishing advertising; and Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 Pac. 705 (1931), in which the assignee of the vendor's interest under a conditional sale contract was held subject to a counterclaim by the vendee.

170 That the draftsmen intended to include matters of set-off in the phrase “defense or claim” is made clear by the Comment.

The subsection uses the term “accrue,” as does the Uniform Trust Receipts Act, RCW 61.20.090 (3). The term is not in this context entirely free from ambiguity. Whether the word “claim” means a matured right or merely the contract transaction out of which such a right will eventually develop, is an important inquiry. In some jurisdictions a matter in set-off can be asserted against an assignee only if matured at the time of the assignment; in some others, only if matured at the time of notice of the assignment. See WILLISTON, CONTRACTS § 432 (rev. ed. 1936); CORBIN, CONTRACTS § 892 et seq. (1951); RESTATEMENT, CONTRACTS § 167 (1932).

The construction probably contemplated by the Code draftsmen is that the assignee takes subject to set-off obligations due the obligor from the assignor, mature when asserted in litigation, and grounded on a contract which existed when notice of the assignment reached the obligor; and that maturity of the
This subsection in acknowledging a limited power to modify a contract would apparently effect no substantial change in the local law, 171 The existence of an interest in the modified or substituted contract has not come to issue in Washington; the Code result seems the expectable one. 172

(3) When an assignee permits the assignor to collect accounts or leaves or puts the assignor in possession of chattel paper which does not specify a place of payment other than the assignor's place of business, an account debtor is authorized to pay the assignor until he receives notification that payment is to be made to the assignee.

In creating authorization to pay the assignor in the situations set out in the subsection, the Code goes beyond the area so far litigated. 173

assigned claim at the time of the assignment is not a requirement for the assertion of the set-off.

Washington has two statutes, RCW 4.08.080 and 4.32.110, which together control set-off in general and which are in combination thoroughly unclear as far as the present problem is concerned. It would appear from King v. West Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081 (1913), the only decision construing the statutes as to this detail, that the assigned claim must have been matured at the time of the assignment. The court's reasoning seems also to require that the matter in set-off be matured at the time of the assignment. RCW 63.16.020, which is expressly concerned with assignments of accounts, reads: "... shall have as against the assignee any right of setoff, counterclaim or defense against such assignor or person existing in his favor at the time he is so notified." The end result of these three Washington statutes is utter confusion concerning just what matters in set-off can be employed against a security assignee.

The Code handling of the problem is sound. The obligor should be free to enter into transactions with his obligee in reliance on an ultimate right of set-off, so long as he has no knowledge of an assignment. Limitations on set-off, in terms of maturity of the assigned right or the matter in set-off at the time of the assignment or knowledge of it, are entirely artificial.

171 The Comment suggests that this subsection is intended to permit modification of a subcontract upon modification of the main one, a situation which is in fact normally disposed of by a provision in the subcontract authorizing such modification. Changes are effected by the unilateral action of the main contractor rather than by agreement between the main and subcontractors. The assignee of the subcontractor's right to be paid takes subject to this provision.

Existing cases disclose another type of problem, which must be common in commercial financing only in construction or supply contracts; even there it is not often serious because the lending is usually made against earned estimates, which are "accounts," rather than "contract rights." (See the definitions in note 167 supra.) As such they are not within the power to modify specified in this subsection. The problem is whether the obligor of the assigned contract right can deduct as to the assignee, advances made to keep an assignor, who is in difficulties, from abandoning the job. Compare Brice v. Bannister, L.R. 3 Q.B.D. 569 (1878), with Homer v. Shaw, 212 Mass. 113, 98 N.E. 697 (1912). These are the leading cases; they reach opposite conclusions on fairly similar facts. See also St. Mary's Bank v. Cianchette, 99 F. Supp. 994 (D. Maine 1951); Rhode Island Discount Co. v. United States, 94 F. Supp. 669 (Cr. Cl. 1951); Peden Iron & Steel Co. v. McKnight, 60 Tex. Civ. App. 45, 128 S.W. 156 (1910). The Washington court has aligned itself with the view which permits modification. Stansbery v. Medo-Land Dairy, Inc., 5 Wn.2d 328, 105 P.2d 86 (1940).

172 Just how the Code will work is not entirely clear. If the "modification" is a pre-payment to a builder to enable him to go ahead with the work there is nothing to which the assignee's interest can attach. There is also evident some potential for difficulty concerning the identification of "substituted" contracts.

173 The cases have involved the significance of notice; having had notice the obligor
The Code solution seems sound enough.

(4) A term prohibiting assignment of an account or contract right is ineffective. Before making payment, an account debtor may, however, require an assignee to furnish reasonable proof of the making of the assignment. Until an assignee furnishes reasonable identification of the account or contract right assigned, the account debtor may make payment to the assignor.

The Washington court is apparently committed to the view that a contract clause prohibiting the assignment of rights under the contract will be operative. The Code would therefore effect a change in the local law. The change is a desirable one. The second and third sentences of the subsection state propositions about which there can be no real argument.

(The balance of this article will appear in the August issue.)

is not discharged by payment to the assignor; otherwise he is discharged. See Stansbery v. Medo-Land Dairy, Inc., 5 Wn.2d 328, 105 P.2d 86 (1940); RCW 63.16.010.

174 Bonds-Foster Lum. Co. v. Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877 (1909); Lockerby v. Amon, 64 Wash. 24, 116 Pac. 463 (1911); Boyd v. Bondy, 113 Wash. 384, 194 Pac. 393 (1920); Bethel v. Matthews, 187 Wash. 175, 59 P.2d 125 (1936). Three of these cases involve real estate contracts prohibiting alienation by the vendee; the other involves a bill of lading. All are therefore arguably distinguishable from the types of bilateral contract right, assignments of which are employed in commercial financing.

175 Although the traditional view has been that prohibitions of the assignment of contract rights are operative, the cases are much confused in analysis and in result. See Williston, Contracts § 422 (rev. ed. 1936); Corbin, Contracts §§ 872, 873 (1951). As this type of property has gained in economic importance, and as its character as property has come to be generally recognized, the impropriety of routine restraints on its alienation has become increasingly clear. See Note, Validity of Prohibitions Against Assignment—The Caristo Case and the Commercial Code, 1952 Wisc. L. Rev. 740. In commercial financing the construction and supply types of contract and loans against earned estimates or the supplier's right to payment would appear to be the significant examples of transactions in which prohibitory clauses may be encountered.