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Security Transactions

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conscious of the necessity for a device by which the supreme court may in times of emergency due to illness or disqualification of a judge, or because of the press of work, call in qualified people to act as temporary judges in order that the courts might carry on their work expeditiously and proficiently. By joint resolution, the legislature has placed before the people at the next election, a proposed constitutional amendment which, if approved by the electorate, will authorize a majority of the judges of the supreme court to call upon judges or retired judges of courts of record of this state to perform judicial duties in the supreme court on a temporary basis. While not as broad as the Judicial Council proposal, this resolution, if approved, will eliminate the unhappy 4-to-4 decision and provide the additional man power needed by the court to stay on top of its case load. Every effort should be made by the bench and bar to assure the approval of this measure by the people.

GEORGE NEFF STEVENS

SECURITY TRANSACTIONS

Conditional Sales of Personal Property — Filing. Chapter 159[1] amends RCW 63.12.010, the conditional sale filing statute. Two important changes are made by the amendment. The period during which an unfiled conditional sale contract is effective against creditors of and transferees from the vendee is increased from ten days to twenty days. The range of transactions which are totally exempt from the filing requirement is much expanded. All conditional sales "wherein the total designated unpaid purchase price does not exceed the sum of two hundred and fifty dollars" are excepted, "and such contracts or leases shall be valid as to all bona fide purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors...." Under the earlier statute the critical figure was fifty dollars.

In extending the period during which an unfiled conditional sale is valid this legislation is retrogressive. It creates another difference in the procedures by which the conditional sale and the chattel mortgage (as to which the free-period remains ten days) are created and perfected and each such difference is a trap for the unwary businessman or lawyer. It makes the effecting of a record title check on a chattel virtually impossible. The justification for the change is not readily apparent but is presumably the convenience of dealers who are remote from county seats. It is curious to find that the ten-day period, which

[1] Wash. Sess. Laws 1961, ch. 159.

was adequate when transportation media were considerably more rudimentary, has now become inadequate.

In exempting transactions in which the unpaid price does not exceed two hundred and fifty dollars the legislature has in effect removed from the recording system a major segment of consumer goods retailing on a secured-credit basis. In practice the conditional sale, which has pretty well pre-empted this field already, will of course become the only kind of security transaction used. The modern trend appears to be in the direction taken by this part of chapter 159. The UNIFORM COMMERCIAL CODE, which has already been enacted in thirteen[2] states and which seems destined to become the law in most if not all of the states, excepts from its filing requirements security transactions in consumer goods, and in farm equipment having a purchase price below $2,500.00.[3]

Crops — Lien for Supplier of Fertilizer, Pesticide, Weed Killer. Chapter 264[1] adds another to the long and steadily growing list of statutory liens. The new lien attaches to crops and the proceeds thereof and is as to crops the fifth type of statutory lien.[2]

Protected by chapter 264 liens are persons who furnish "commercial fertilizer, and/or pesticide, and/or weed killer to another for use on the lands owned, contracted to be purchased, used or rented by him."

The lien attaches to "all the crops on which the fertilizer, and/or pesticide, and/or weed killer are used." Since the supplier of such materials will not ordinarily specify in the sale transaction the geographic areas of their application, identification of harvested crops with the land areas treated by the materials in question should occasion some spirited controversies. Where more than one seller is involved the opportunities for complicated litigation are obvious.

Notice of chapter 264 liens must be filed within thirty days after the commencement of deliveries, and the lien attaches "as of the date of such filing." In these details the new statute is in conformity with some of the earlier lien statutes, and not with others. The Washington code exhibits a remarkable diversity in its provisions concerning the filing times and effective dates for the different liens.[3]

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[2] Arkansas, Connecticut, Illinois, Kentucky, Massachusetts, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Wyoming.

[3] UNIFORM COMMERCIAL CODE § 9-302.

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[1] Wash. Sess. Laws 1961, ch. 264.

[2] The others are: RCW 60.12.010 (farm labor, contract haulers, contract harvesters); RCW 60.12.020 (landlord); RCW 60.12.180 (seed supplier); RCW 60.14.010 (dusting or spraying).

[3] See Note, 30 WASH. L. REV. 198 (1955), particularly footnotes 9 and 10.

The provisions of chapter 264 concerning the proceeds of crops in which the lien existed are unusual in lien statutes. The statute reads:

> If the crop, or any part thereof, is sold subsequent to the filing of the lien, or possession delivered to an agent, broker, cooperative agency or other person to be sold or otherwise disposed of and its identity lost, or the crop commingled with other property so that it cannot be segregated, and if the purchaser, agent, broker, cooperative agency or other person is notified of the filing of the lien by being served with a certified copy thereof, the lien shall attach to the proceeds of the sale of the crop or part thereof remaining in the possession of the purchaser, agent, broker, cooperative agency or other person at the time of the notice and to any proceeds of such sale that may thereafter come into the possession of any of such persons and the lien shall be as effective as against such proceeds as against the crop itself.

It will be observed that this passage does not purport to create a lien in proceeds which are in the hands of the debtor.

Extension of the crop lien to proceeds raises some serious questions. Were it not for this part of chapter 264 it could be assumed that the lienor would by reason of his filing be protected against agents or successors of the debtor. The protection would take several forms. So long as the property could be traced and identified it could be foreclosed against. Persons wrongfully exercising dominion over the property would be liable in trover.[4] Identifiable proceeds in the hands of the debtor or in the hands of his agent could be directly reached on a theory of trust[5] and a trustee in bankruptcy for the debtor or agent would take the bankrupt estate subject to the lienor's equity.[6] Loss of identity would, however, bar pursuit of proceeds on a trust theory.[7] Does chapter 264, in creating a legal lien in proceeds in the hands of purchasers from and representatives of the debtor, mean that the lien is to be the lienor's sole interest in proceeds? Arguably it does, and the lienor can-

[4] The chattel mortgage cases would appear to be apposite. The mortgagee can maintain trover against one who converts the goods. Cashmere Valley Bank v. Pacific Fruit & Prod. Co., 198 Wash. 363, 88 P.2d 579 (1939); Spokane Security Fin. Co. v. Crowley Lumber Co., 152 Wash. 697, 279 Pac. 103 (1929); Union State Bank v. Warner, 140 Wash. 220, 248 Pac. 394 (1926); John Smith Co. v. Hardin, 133 Wash. 194, 233 Pac. 628 (1925).

[5] For a discussion of a comparable situation see Annot., *Right of Chattel Mortgagee in Respect of Proceeds of Sale of Mortgaged Property by Mortgagor*, 36 A.L.R. 1379 (1925). See also RCW 63.16.080, which makes a pledgor of a book account a trustee for the proceeds of the account.

[6] A trustee in bankruptcy takes the estate subject to such equitable interests. COLLIER, BANKRUPTCY § 70.25 (14th ed. 1942). Where the ultimate seller is an "agent, broker, cooperative agency or other person," and such seller becomes a bankrupt, the debtor can reach identifiable proceeds as the principal, and the lienor should have a like position.

[7] The problem is acute only when the "trustee" becomes insolvent. For a discussion of the bankruptcy cases, see COLLIER, BANKRUPTCY §§ 60.18, 60.24, 70.25 (14th ed. 1942).

not sue in trover or attempt to follow proceeds as a trust fund. If the statutory interest is exclusive it will no doubt remain exclusive even though it becomes worthless by reason of inability to identify proceeds. Without identifiable proceeds, the statutory lien cannot exist. Chapter 264 does not create a lien in general assets as a substitute for the lien in specific proceeds which are not identifiable, and in this particular must be contrasted with the UNIFORM TRUST RECEIPTS ACT § 10, RCW 61.20.100.[8]

Application of the proceeds-lien to purchasers from the debtor presents another difficult problem. The "proceeds" will be simply the unpaid purchase price. Can a lien attach to the purchaser's promise to pay? If the purchaser becomes a bankrupt, is there any part of his assets in which the lienor can claim a lien? The answers to these questions would appear to be in the negative. If there is no lien as to the purchaser there can be no lien in the money or check received by the debtor from the purchaser.

As to an "agent, broker, cooperative agency or other person," "proceeds" seems clearly enough to mean the avails of their disposition of the property and such disposition will ordinarily be as a representative of the debtor. The character of the avails suggests additional difficulties. These avails will be money or negotiable instruments (checks, perhaps notes or drafts) or book accounts. Does chapter 264 fasten on such assets a lien which will follow them into the hands of a successor of the "agent, broker, cooperative agency or other person?" A construction of this statute which would subordinate a bona fide taker of money for value or a holder in due course of a negotiable instrument to the chapter 264 lien may be very hard to establish in litigation. Even as to book accounts, absence of compliance with the filing statute[9] should be fatal to an attempt to fasten on book accounts a chapter 264 lien which would be good as against a bona fide assignee.

The important matter of priorities is covered by two provisions in chapter 264. These are so phrased as to make litigation about their operation a reasonable expectation. The critical language reads:

[8] This statute, according to what appears to be the better construction, creates not only a lien in identifiable proceeds of entrusted goods, but also a general lien of limited duration in all the trustee's assets. See *In re* Harpeth Motors, 135 F. Supp. 863 (1955); Commerce Union Bank v. Alexander, 312 S.W.2d 611 (Tenn. 1957). *Cf.* In the Matter of Crosstown Motors, Inc., 272 F.2d 224 (7th Cir. 1959), *cert. denied*, 363 U.S. 811 (1960), in which this section was held to create only a priority as to the general assets. The *Harpeth* case is the subject of casenotes in 34 CHI.-KENT L. REV. 294 (1956), and 69 HARV. L. REV. 1343 (1956). The *Crosstown Motors* case is discussed in casenotes in 58 MICH. L. REV. 783 (1960), and 35 N.Y.U.L. REV. 954 (1960).

[9] RCW 63.16.

PROVIDED, That if the commercial fertilizer, and/or pesticide, and/or weed killer is furnished to any tenant farmer, the lien shall apply only to the tenant farmer's interest in the crops unless written consent of the owner of the premises is obtained:
PROVIDED FURTHER, That such lien shall be subordinate to any crop lien or crop mortgage which has been filed for record prior to the furnishing of such materials or products.

What does this language mean, in the instance of a landlord? The legal situation apart from chapter 264 is a composite of two propositions. The landlord under a crop-rental lease is a tenant in common with the lessee as to undivided crops.[10] He has by reason of RCW 60.12.030, a lien on all the crops. This lien secures his right to receive his share of the crops under a crop-rental lease or his right to be paid under a money-rent lease. The phrase in chapter 264, "the lien shall apply only to the tenant farmer's interest in the crops unless written consent of the owner . . . is obtained" is not readily implemented with these propositions. What is the "tenant's interest" which measures the chapter 264 lien as against a non-consenting landlord? To what interest does the lien attach as against a consenting landlord?

Arguably the phrase "tenant's interest" can have a field of application only in a crop-rental lease under which the tenant has an "interest," i.e., a share. Under a money-rental lease the tenant is the owner and as to an owner the word "interest" would be quite inappropriate. So construed, chapter 264 provides a lien on all of the crops if the landlord "consents," and on the tenant's share if the landlord does not consent. This construction is supported by the fact that the phrase "such lien shall be subordinate to any crop lien . . . which has been filed for record prior to the furnishing of such materials or products" does not except the landlord's lien from the term "crop-lien." It was apparently the legislative purpose to preserve the lien of a consenting landlord and to make its operation turn on the filing. The words "the lien shall apply only to the tenant farmer's interest in the crops unless the consent of the owner of the premises is obtained" do not fairly mean "the lien shall be prior to the landlord's lien if the landlord consents."

The word "consent" in this context is also obscure. Does it require consent to have the lien attach to the landlord's share of the crops or does it merely require consent to the tenant's use of the materials? The latter seems an unreasonable and unlikely construction.

The phrase "such lien shall be subordinate to any crop lien or crop

[10] See the discussion in Loudon v. Cooper, 3 Wn.2d 229, 100 P.2d 42 (1940).

mortgage which has been filed for record prior to the furnishing of such materials" does not specify the consequences if the fertilizer and so forth is furnished before the crop lien or crop mortgage is filed. The natural correlative of the quoted words would give priority to the chapter 264 lien. At this point chapter 264 is again ambiguous. It is in conflict with RCW 61.04.020 and with RCW 60.12.030.

RCW 61.04.020, the chattel mortgage filing statute, protects a crop mortgage which is filed within ten days from the date of its execution. If the mortgage is executed on March 1 and filed on or before March 10 it is prior to an interest in the property acquired after March 1. A literal reading of chapter 264 gives priority to a lienor who furnishes fertilizer, pesticide or weed killer after March 1 and prior to the filing. Chapter 264 and RCW 61.04.020 cannot be reconciled. The controlling legislative purpose is probably to be found in RCW 61.04.020. That the legislature intended to amend the chattel mortgage filing statute when enacting chapter 264 seems unlikely.

RCW 60.12 creates crop liens for the landlord, the farm laborer and the provider of seed. RCW 60.12.030 states that these liens "shall be preferred to any other encumbrance upon the crops to which they attach."[11] The landlord is given by RCW 60.12.040 until June 1 to file a claim of lien against the current year's crop. The farm laborer is given by RCW 60.12.040 a period of twenty days "after the cessation of the work or labor" to file his claim of lien. The holder of a seed lien created by RCW 60.12.180 is given by RCW 60.12.190 a period of sixty days "after delivering the seed" within which to file. Chapter 264, in subordinating its liens to prior crop liens which are of record when the fertilizer, pesticide or weed killer is furnished, inferentially makes

[11] It may be noted in passing that RCW 60.12 is itself a fine tangle of conflicting propositions. RCW 60.12.010 creates a lien for farm laborers (including haulers and harvesters) and goes on to provide: "That the interest of any lessor in any portion of the crop raised on demised premises leased in consideration of a share of the crop raised, shall not be subject to the lien provided for in this section." RCW 60.12.020 creates a lien for the landlord, whether his lease provides for a money or a crop rent. It would appear that the landlord's lien is by reason of RCW 60.12.010 prior to the laborer's lien as to a crop rent and of equal rank with it as to money rent. RCW 60.12.140 provides for pro rata distribution of the proceeds of foreclosure sale, among the several holders of judgments in foreclosure actions brought under the chapter, but evidently cannot apply where one of the judgments is had by a lienor who is given priority elsewhere in the chapter. Utter confusion was introduced in 1955 with the enactment of the seed-lien statute and the passage in RCW 60.12.030 reading: "[T]he seed lien provided for in this chapter shall be superior to any lien except a labor lien." This makes the seed lien prior to the lien of any kind of landlord, whereas the landlord's claim for a crop rental is prior to the lien of the laborer which is in turn prior to the lien of the seed supplier. The landlord's claim for a cash rent is of equal rank with the laborer's lien, which is in turn prior to the lien of the seed supplier, which is in turn "superior to any lien except a labor lien."

a chapter 264 lien prior to any crop lien not then of record. Chapter 264 and RCW 60.12 are in conflict. That the traditional priority for the landlord and the farm laborer, and the relatively recent priority obtained by seed lienors, will be surrendered without a fight to the liens created by chapter 264, is not to be expected.

Still further difficulties are encountered, upon an attempt to reconcile chapter 264 with RCW 60.14. RCW 60.14.010 creates liens for persons who provide materials for "crop dusting or spraying crops for the purpose of weed, disease, or insect control." RCW 60.14.020 permits filing "within thirty days after the completion of harvest of crops sprayed or dusted," and provides that the lien shall attach "as of the date of filing." In normal course, RCW 60.14 liens would rank as of the date of filing, with other liens which are not accorded specific statutory priority. Yet chapter 264 liens appear to be given priority, not by a specific priority provision, but by virtue of the correlative meaning of the passage reading: ". . . such [chapter 264] lien shall be subordinate to any crop lien . . . which has been filed for record prior to the furnishing of such materials. . . ."

An even more fruitful source of controversy is the fact that chapter 264 and RCW 60.14 overlap. Materials used in "crop dusting or spraying" for the purpose of "weed, disease, or insect control" will also be "fertilizer, and/or pesticide, and/or weed killer." Since chapter 264 requires filing within thirty days after "the commencement of delivery of such materials" and allows foreclosure within twelve months after filing, whereas RCW 60.14 permits filing within thirty days after "the completion of harvest" and requires foreclosure within eight months after filing, a supplier of these materials may on occasion be able to prevail only if he succeeds in showing that he has the one kind of lien as opposed to the other. It will be interesting indeed to see how the court resolves the problems of lien-identity created by this situation. Maybe these suppliers now have two liens and can prevail on compliance with either set of statutory requirements.

Real Property Mortgage Foreclosure — Redemption. Chapter 196[1] amends RCW 6.24.140, reducing the period during which there can be redemption after the sale of land in a mortgage foreclosure, from one year to eight months. Mortgages executed after June 30, 1961 will come within this chapter. The shorter period appertains, however, only if two conditions are met. The mortgage must have declared "in its terms that the mortgaged property is not used principally for agricul-

[1] Wash. Sess. Laws 1961, ch. 196.

tural or farming purposes," and the complaint in foreclosure must have contained a waiver by the mortgagee of any right to a deficiency judgment. Appropriate conforming modifications are also made by chapter 196 in RCW 6.24.160 (relating to successive redemptions and issuance of a sheriff's deed), in RCW 6.24.210 (relating to possessory and other interests during the statutory redemption period), and in RCW 61.12.070 (relating to deficiency judgments).

This patently ineffectual legislation is the only tangible progress so far achieved in a drive which began in 1955, for reform of Washington's obsolete and inefficient real property mortgage foreclosure system. The evils at which this drive is directed are very real. Their correction is highly important to the future development of the state.[2] The basic foreclosure statute of Washington dates from 1854. It provides for a judicial proceeding and a sheriff's sale—a cumbersome, time-consuming and expensive procedure which even in 1854 had been superseded in several states by statutes and judicial decisions approving non-judicial realization techniques for real property mortgages. This modernization movement has now brought thirty-five states within the group which do not require judicial foreclosure. Since 1869 Washington mortgage foreclosures have been regulated by the general-execution-statute provision for redemption after the sheriff's sale. This is a feature unknown to the common law or to equity, and one which is not a necessary feature of mortgage realization, in some thirty states.

By reason of its continued adherence to both the judicial-proceding type of foreclosure and also the redemption-after-sale type of mortgage statute, Washington is close to achieving the position of being the state in which it costs the most and takes the longest to realize on a real property mortgage. This situation has serious implications for the future, since the development of Washington depends in large measure on the importation of mortgage money from other states.

The drawbacks in a foreclosure-by-action system are the obvious ones, principally the delays and expense inherent in litigation and the extended period which may intervene between the initiation of the action and conclusion of a contested foreclosure. Even more objectionable are the consequences of a post-sale redemption statute. Persons interested in buying land are not attracted to the sale. They cannot

[2] For general discussions of real estate mortgage realization techniques and problems, see Bridewell, *The Effect of Defective Mortgage Laws on Home Financing*, 5 LAW & CONTEMP. PROB. 545 (1938); Comment, *Statutory Redemption: The Enemy of Home Financing*, 28 WASH. L. REV. 39 (1953); Prather, *Foreclosure of The Security Interest*, 1957 U. ILL. L.F. 420; Prather, *A Realistic Approach to Foreclosure*, 14 BUS. LAW. 132 (1958).

buy the land. The most they can acquire is a chance. Bidding is stifled by the risk, however remote, of redemption. Another pernicious by-product of the redemption system is its impact on the calculations of fair value which a bidder must make. If he gets title it will be at a later date. The market value of the land may have deteriorated by then. What the physical condition of the property will then be is unforeseeable. These considerations make the sheriff's sale a farcial caricature of a public auction. Every Washington mortgagor who is so unfortunate as to reach foreclosure is penalized by these defects, since it is he who must foot the bill for the expenses and he who suffers when the property fails to bring its fair value.

It will be observed that chapter 196 strikes only at the post-sale redemption and makes but a feeble gesture in that direction. A reduction from twelve to eight months in the redemption period is no remedy for the existing evils. The practical utility of the new statute is further reduced by the necessity that the mortgagee decide, perhaps months before he can know if such a course is expedient, whether to forego his right to a deficiency. A far more effective attack on the problems of mortgage realization in Washington was made in a bill which was not enacted. This was Senate Bill 120, which proposed a deed of trust system. Under it, realization on a land mortgage by non-judicial procedures would have been legalized as an alternative to foreclosure by action, and the interest of the mortgagor would have been protected by a provision for a period of redemption before rather than after the sale. The latter feature is especially notable, as it assures the mortgagor who can redeem (few can)[3] of ample time within which to do so, and also enables the mortgagor who cannot redeem to stir up some real interest among prospective buyers of the property.

Senate Bill 120 excluded as does chapter 196 the mortgage on farm land. This is an exclusion which makes a good deal of sense. The farmer has crop-year problems which justify special treatment.

Although chapter 196 accomplishes little or nothing, its enactment is an encouraging indication that the legislature is becoming aware of the need for correction of the defects in our foreclosure statutes.

W. L. SHATTUCK

[3] The infrequency with which the redemption right can be exercised amply demonstrates that the redemption risk with its disturbing effect on foreclosure sales has adverse effects which are out of all proportion to the benefits resulting to mortgagors. A recent study conducted by the Washington Mortgage Correspondents Association and covering the period Jan. 1, 1956-Jan. 1, 1960, disclosed that in a representative group of 276 foreclosures there was but one redemption by a mortgagor and but two redemptions by persons other than mortgagors.