possible submission to speculative temptations, and removes it from this category. Only time and experience will indicate whether restrictions with respect to management and liquidation, placed on mortgage pools alone, are necessary to the successful operation of the common fund and single mortgage or security forms of commingled investment. In addition, taxability under the present statutory structure must await interpretations of the Federal Reserve Board. One thing, however, seems clear: since the granting of certain privileges under the statute conflict with fundamental principles of trust law, it would seem well to require strict compliance with the act and careful supervision of commingled investment.

C. A. W., Jr.

NOTE

Rights of an Assignee of an Installment Sales Contract as Against a Subsequent Claimant Through the Original Seller

The ever-increasing amount of business being transacted by installment sales [1] and the rise of the financing company as a substitute for large capitalization in retail business together place a premium on anticipating the result of a contest between an assignee of an installment contract and a subsequent party claiming a superior right to the property through the same seller. The operative facts in such a conflict are these: *A* sells goods to *B* under an installment sales contract, reserving title in himself until the full purchase price is paid. *A* then assigns the contract to *C*, usually a financing company. Subsequently *D*, some fourth party, acquires through *A* a claim to the property which he sets up against *C*. Obviously, further particularization is required before the complete picture of a specific case can be obtained. These additional facts may be secured by any combination of the following possibilities: the assignment from *A* to *C* may be absolute or merely for collateral; at the time of the assignment *A* may or may not have been in possession of the goods which were the subject of the installment sale; if *A* was not in possession at the time of the assignment, he may or may not have retaken possession before *D* acquired his interest; finally, *D* may be either a creditor of *A*, a bona fide purchaser from *A*, or a trustee in bankruptcy, administering the estate of *A*. An endeavor has been made to study the cases that have come before the courts with this basic set of facts present and to catalog them according to additional facts which have been found to be of significance in producing the results obtained. Occasionally, the underlying factors of the decisions have been indicated. However, it is the primary purpose of this Note to indicate what the courts have done in the past with reference to a particular fact situation in the hope that this will prove of assistance in determining what is likely to happen in the future should a similar situation arise.

1. Installment sale is used throughout this Note to indicate either a conditional sale or a bailment lease with an option to buy. Although different in many respects, the courts treat them exactly alike with relation to this problem.

This Note does not deal with cases involving the sale of goods held by the seller under a trust receipt. This is a very common instrument for security purposes and is similar in many respects to the instant problem. Considerations of time and space have precluded its inclusion here. An excellent discussion of the cases involving trust receipts is available. See Hanna, *Trust Receipts* (1931) 19 CALIF. L. REV. 257.

I. Absolute Assignment

A. *Assignor in Possession of the Goods*

The first situation to be considered arises where *A* has entered into an installment sales contract for the sale of goods but has never delivered them to *B*. This situation frequently presents itself where *A* is an automobile dealer and wishes to acquire automobiles to use as demonstrators, without having to put up the capital himself. He executes the installment contract with one of his salesmen and immediately assigns it absolutely to *C*, a financing company, who supplies him with the necessary money to pay the manufacturer. *A* at all times retains possession and finally *D*, some fourth party, either attaches the car for a debt owed by *A*, or buys the car from *A*.[2] If purely abstract concepts are applied to all the above transactions it might be said that *A* retained title to the car when he executed the installment contract with *B*, who would acquire the right to obtain title upon payment of the installments. After *A* assigned his title to *C*, he no longer had any interest in the car that could be sold or attached. It would then seem to follow that *C*'s claim is superior to that of *D*. Or Section 25 of the Uniform Sales Act[3] might be applied; *A* would be regarded as an owner who had conveyed title but retained possession. Then if *D* is a person acting in good faith, his right is superior to that of *C*. If only the results of the cases are observed, it appears that out of the ten cases which have arisen involving these facts, six protect the right of the bona fide purchaser, *D*, while the remaining four extend the superior right to the assignee, *C*. In arriving at these results the courts have sometimes followed doctrinal reasoning and sometimes cut through the legal picture to examine the facts. The following principal cases exemplify different analyses.

Assignee v. Creditors of Sellers: Apparently this situation has arisen only once.[4] In that one case, the court was not willing to restrict itself to employment of traditional dogma. It reasoned that since the original installment contract was fictitious and the dealer, *A*, at all times intended to pay the installments himself, he had in effect assigned the title to *C* as security for a loan for he could regain title by repaying the amount advanced. This was in effect a chattel mortgage; not being recorded as such it was invalid as to everyone except the immediate parties. The result was to give *D*, the creditor of *A*, a right superior to that of *C*, the financing company.

Assignee v. Bona Fide Purchaser from Seller: Of cases in this situation from nine separate jurisdictions, strikingly enough, five were decided in favor of the bona fide purchaser and four in favor of the assignee. The rights of the bona fide purchaser were upheld on at least three different theories. *Tripp v. National Shawmut Bank of Boston*[5] adopted the view that *A* was an owner who passed title to *C* but retained possession of the goods; therefore he was within Section 25 of the Uniform Sales Act[6] and could give title to *D*, a bona fide purchaser.[7] In *Kearby v. Western States*

2. See Tripp v. National Shawmut Bank, 263 Mass. 505, 161 N. E. 904 (1928) for a good discussion of the business situation involved in these salesmen cases.

3. 2 U. L. A. § 25.

4. Hartford Accident & Indemnity Co. v. Callahan, 271 Mass. 556, 171 N. E. 820 (1930).

5. 263 Mass. 505, 161 N. E. 904 (1928); General Credit Corp. v. Kapun, 237 App. Div. 694, 262 N. Y. Supp. 421 (2d Dep't, 1933).

6. 2 U. L. A. § 25.

7. Here the Massachusetts court did not hold that it was a chattel mortgage as they did in a later case arising on substantially similar facts, except that the contest was with a creditor. See *supra* note 3.

Securities Co.,[8] since the assignee financing company was aware of the custom of *A* to retain possession of the cars, the court applied the doctrine of estoppel to prevent the assignee from setting up a superior right over the bona fide purchaser. *Gump Investment Co. v. Jackson*[9] presents the practical argument that the assignee financing company is constantly dealing with this sort of transaction and is in the field for profit and is therefore in a better position to bear the loss than an individual purchaser who walks into a dealer's establishment to buy a new car.

On the other hand, *Patterson Co. v. Peoples Loan and Savings Co.*[10] adopts the strictly "legalistic" approach that *A* had divested himself of all title to the car when he assigned the installment contract to *C*, and thereafter he could convey nothing to *D*, the bona fide purchaser. The court refused to apply any doctrine of estoppel unless "actual fraud" could be shown, which of course would rarely be the case. In addition, it seemed to feel that the recording of the installment contract should have put the purchaser on notice that *A* could no longer deal with the car as his own, and though no provision was made for recording the assignment, he should have inquired to find if one had in fact been made.

In most of these situations the courts seemed particularly concerned with the nature of the transaction that took place between *A*, the dealer, and *B*, the salesman of *A*. Was this a real or a fictitious sale? Did *A* ever give possession to *B*? Perhaps the courts feel that this situation presents a well-prepared scheme to defraud innocent purchasers from *A*, and it would best be prevented by requiring the assignee to inquire at the time of the assignment to see that there is a real purchaser for the purported installment contract and that the dealer was not standing in a position to defraud an innocent purchaser.

B. *Assignor Not in Possession at the Time of the Assignment*

The next situation to be examined arises when *A* enters into a concededly valid installment sales contract with *B*, transferring possession of the goods to him and retaining title till the full purchase price is paid. *A* then assigns the contract to *C*. It has been found important to distinguish the cases in which, at the time *D* claimed his interest, *A* was in possession, from those in which *A* was not in possession.

(1) A *Not in Possession:* As might be expected, cases seldom arise where *D* subsequently claims an interest from *A* when the latter had never been repossessed of the goods. This would seem to be the clearest case for the court to apply the reasoning that *A* has completely divested himself of

8. 31 Ariz. 104, 250 Pac. 766 (1926). In Finance Corp. of America v. Walpole, 132 Kan. 250, 295 Pac. 643 (1931) the court placed particular emphasis on the fact that the assignee had authorized the dealer to repossess.

9. 142 Va. 190, 128 S. E. 506 (1925).

10. 158 Ga. 503, 123 S. E. 704 (1924). Here the vendor had subsequently mortgaged the property. However, the court treated the mortgagee in the light of a bona fide purchaser. In Drew v. Feuer, 185 Minn. 133, 240 N. W. 114 (1931) the court declared that the interest of the assignee would be protected unless actual fraud could be shown. The court expressly refused to follow Gump Investment Co. v. Jackson, 142 Va. 190, 128 S. E. 506 (1925). Commercial Credit Co. v. Hardin, 175 Ark. 811, 300 S. W. 434 (1927) is an example of how complicated the facts of cases within the present study can become. Although it is not clear, the case seems to uphold the rights of the assignee on the basis of a straight question of priority in time. Commercial Credit Co. v. Cutler, 176 Wash. 423, 29 P. (2d) 686 (1934), in a six to three decision, upheld the rights of the assignee. The majority of the court seemed to base its opinion on the grounds that there was a valid sales contract with the salesman; the dissenters point out that the trial court found to the contrary.

any power to deal with the goods by his assignment to *C*, and that subsequently *D* could acquire nothing from *A*. In apparently the only case on point, the court upheld the rights of *C*, the assignee, using principally this type of reasoning.[11] *A*, after assigning the first installment contract, had entered into a new contract with the same buyer and assigned the second contract to a bona fide purchaser.[12] The first contract had been recorded with the assignment indicated. In addition to the above reasoning, the court also indicated that the recording of the installment contract (no mention of the assignment) gave notice to the subsequent assignee of the new contract and therefore protected the assignee of the first contract. *Linton v. Butz* [13] is often cited for the proposition that the assignee would prevail over creditors of a seller who subsequent to the assignment had never been repossessed. There a lessor assigned his interest in the leased chattels to the plaintiff who left the goods with the same lessee. The defendant, a creditor of the original lessor, then attached the goods in the hands of the lessee. The court upheld the rights of the assignee on the ground that there had been a valid transfer of the lessor's interest prior to the attachment. The force of the holding is greatly enhanced by the realization that a typical installment sale in Pennsylvania is the bailment lease, where the seller is treated as a lessor and the buyer as a lessee.[14] In view of the economic utility of the practice of assigning installment contracts to financing companies, this seems the clearest case for protecting their interests.

(2) A *Retakes Possession:* Most common of all the possible factual situations heretofore outlined is that occurring when *A*, having made the installment contract, delivered possession of the goods to *B*, and assigned his interest absolutely to *C*, then becomes repossessed of the goods; whereupon a fourth party *D* claims an interest in the goods superior to that of *C*. Again if the dogma that a person can acquire no more title than the person had through whom he claims were applied, then it would appear that *C* had a superior right to *D*, for *A* had no interest that *D* could acquire. On the other hand, it might be said that *D* is an innocent purchaser for value from *A* who had apparent title to the goods. Then it would follow that *C*, though the true owner, would be estopped to assert his claim. The result of the eleven cases that have arisen on these facts has been that in eight the superior right was given to *C*, the assignee, and in the remaining three *D's* claim was upheld. The following cases indicate the language the courts have used to express their views.

Assignee v. Creditors of Seller: Both of the cases found in which the creditors of the seller claimed a superior right to the goods after they had been returned to his possession upheld the rights of the prior assignee. In *Western States Securities Co. v. Mosher* [15] *A*'s landlord attached the goods for rent while they were being displayed in his showroom after having been returned by the installment buyer. The court adopted the view

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11. New Britain Real Estate & Title Co. v. Hartford Acceptance Corp., 112 Conn. 613, 153 Atl. 658 (1931).

12. There may be some question in other fields of the law as to whether an assignee for value is a bona fide purchaser. However, in none of these cases does the problem seem to have been raised, inasmuch as the court always treats a subsequent assignee of a second contract as a bona fide purchaser without any discussion of a contrary view.

13. 7 Pa. 89 (1847).

14. Montgomery, *The Pennsylvania Bailment Lease* (1931) 79 U. OF PA. L. REV. 920.

15. 28 Ariz. 420, 237 Pac. 192 (1925).

that inasmuch as *A* had previously parted with all his title to *C*, nothing was left which *D* could attach.[16]

Assignee v. Bona Fide Purchaser from A: In cases from eight jurisdictions, five courts upheld the right of the assignee and three favor the bona fide purchaser. It would seem very important to determine whether the assignee knew or had reason to know of the repossession if the courts are willing to work out an estoppel. However, the reports of most of the cases do not indicate whether there was authority for or knowledge of repossession. Even in the cases where the courts consider the question, it is not clear what factors control their decision. It is therefore impossible to classify such cases on the existence or non-existence of these factors. The selection of cases that follow typify the manner in which the courts have handled this problem.

Probably the case most frequently cited to support the claims of *C*, assignee, is *State Bank of Black Diamond v. Johnson.*[17] In this case *B* returned the goods to *A* who resold them to *D*. It is not indicated whether *C* knew of the repossession. The court applied the dogma that *A* had divested himself of title by assigning his interest to *C* and had nothing left to convey to *D*. Such would-be purchasers, said the court, bought ". . . from one who had no title whatever therein. They acquired no more title or interest . . . than as if they had purchased it from one who had stolen it."[18] *Lynn Morris Plan Co. v. Gordon*[19] is another leading case using the same kind of language. The court said that *A* was "no better than a stranger to the transaction. The defendant (*D*) acquired no greater title than the vendor (*A*) was able to convey."[20]

In direct contrast is *Truck Tractor & Forwarding Co. v. Baker.*[21] The court did not clearly express its reasons for upholding the right of *D*, the bona fide purchaser. It is not indicated whether the assignee knew of the repossession; but from the tenor of the opinion it would have made little difference one way or the other.[22] The underlying theme of the opinion seems to be estoppel based on a public policy against secret liens.[23]

Assignee v. Trustee in Bankruptcy: Only one case has ever been reported which clearly involved the situation where, after assigning the

16. General Motors Acceptance Corp. v. Seattle Ass'n of Credit Men, 192 Wash. 613, 74 P. (2d) 198 (1937), the other case, involving a receiver of the then insolvent seller, upheld the rights of the assignee on precisely the same grounds.

17. 104 Wash. 550, 177 Pac. 340 (1918) (the court discussed the possible effect that the recording of the assignment might have had, but did not pass upon it). Accord: Commercial Credit Co. v. Neel, 91 Fla. 505, 107 So. 639 (1926); C. I. T. Corp. v. First Nat'l Bank of Winslow, 33 Ariz. 483, 266 Pac. 6 (1928). Abels v. National Bond & Investment Co., 13 N. E. (2d) 903 (Ind. App. 1938) *semble.*

18. State Bank of Black Diamond v. Johnson, 104 Wash. 550, 559, 117 Pac. 340, 342 (1918).

19. 251 Mass. 323, 146 N. E. 685 (1925). Accord: Colella v. Essex County Acceptance Corp., 288 Mass. 221, 192 N. E. 622 (1934).

20. 251 Mass. at 325, 146 N. E. at 685.

21. 281 Pa. 145, 126 Atl. 239 (1924). Accord: Iowa Guarantee Mtge. Corp. v. Universal Credit Co., 217 Iowa 1243, 253 N. W. 23 (1934) (in this case the assignee had clearly authorized the repossession).

22. The court discusses the possibility of agency between the assignee and the dealer. There is also language indicating apparent ownership. 281 Pa. at 148, 126 Atl. at 241. The emphasis seems to be placed on the latter. However, the court declared that "so far as it appears the tractor company never held the truck as bailee of the plaintiff". 281 Pa. at 149, 126 Atl. at 241. This seems to preclude any chance that the plaintiff authorized the dealer to repossess.

23. The only case denying an assignee a superior right to that of a subsequent bona fide purchaser because of failure to record the installment contract or the notes indicating the retention of title involved facts falling within the instant group of cases. See Chattanooga Finance Corp. v. Bitting, 38 Ga. App. 490, 144 S. E. 331 (1928).

installment contract to *C*, *A* went bankrupt having repossessed the goods.[24] The court upheld the right of the assignee using the traditional language that *A* had parted with all his title to *C* and there was nothing for the trustee in bankruptcy to acquire.

It is submitted that perhaps the courts are placing more emphasis on the fact that the assignee, *C*, knew or did not know of the repossession than the reports of the cases would seem to indicate. The tenor of most of the opinions that uphold his rights seems to be that there was nothing that he could have done to protect himself and in view of the economic importance of the business he should be protected. The opinions that support the bona fide purchaser emphasize the "duty" of the assignee to investigate and find out if *A* has possession of the goods.

II. Assignment as Collateral Security

Many courts and commentators declare that the important distinguishing fact in deciding a controversy between the assignee of an installment contract and a subsequent party claiming through the same seller is whether the assignment was for security or an absolute transfer.[25] However, to obtain an adequate picture of the existing case law, other facts must also be considered. For purposes of clarity and comparison, the categorical arrangements of the previous section dealing with absolute assignments will be adopted.

A. *Assignor in Possession*

The fact situation now involved arises when *A* executes an installment contract with *B* but does not give *B* possession of the goods. Having assigned his interest in the contract to *C* as security for a loan, *A* purports to transfer title to the goods to *D*. Again, the dogma could be applied that since *A* had previously assigned all his title to *C* there was nothing left to convey to *D*. Or, since in effect *A* is assigning his interest in goods of which he is presently possessed to *C* who is then holding the interest as security, the transaction might be looked upon as a "chattel mortgage" and unless recorded as such, it would be invalid as against all subsequent claimants. Only three cases seem to have arisen on these facts, two sustaining the claim of *D* and the other appearing to give the superior right to *C*.

Assignee v. Bona Fide Purchaser: Burnett County Abstract Co. v. Eau Claire Citizens Loan & Investment Co.[26] involved a typical installment sales contract between the seller and his salesman, which had been assigned as collateral for a loan. The court upheld the rights of the bona fide purchaser on two separate grounds. First, inasmuch as there was no delivery to the first "purchaser", the sale was void or at least fraudulent. Therefore, as the assignee claimed through this sale, his rights were inferior to

24. *In re* B. & B. Motor Sales Corporation, 277 Fed. 808 (D. N. J., 1922). In Taylor v. Goodrich Tire & Rubber Co., 20 Tenn. App. 352, 98 S. E. (2d) 1094 (1935) there were several contracts and cars involved. The court divides its discussion on each one, and at p. 1106 (*Bumpus-Irwen Car*) seems to be in accord with the B. & B. case.

25. Lynn Morris Plan Co. v. Gordon, 251 Mass. 323, 146 N. E. 685 (1925); Estrich, Instalment Sales (1926) § 166; Note (1932) 16 Minn. L. Rev. 689, 691. While the latter treats the same subject as the instant Note, an attempt has been made to present the problem from a different approach.

26. 216 Wis. 35, 255 N. E. 890 (1934), 19 Marq. L. Rev. 45. Actually here the "bona fide purchaser" was the assignee of a second installment contract, the assignment being absolute.

those of the subsequent purchaser. Secondly since this was a transfer of the dealer's interest in personalty as security, it was deemed to be a chattel mortgage and, unrecorded as such, was invalid as against subsequent purchasers. While *Parsons v. Rice*,[27] the only other decision on point, does not clearly set forth what the court regards as the controlling principle, it is certain that the court did not consider the transaction recordable as a chattel mortgage. In fact, it was shown that the recording would do no good since no statute authorized the recordation of assignments of installment contracts. A new trial was ordered to determine, on the basis of new testimony, whether or not the assignee had authorized the seller to resell the goods. However, it seemed clear from the previous testimony that the assignee knew of the seller's possession, yet the decision of the court below had been for the assignee. This case would seem to stand for the proposition that unless the assignee has authorized the seller to resell, his interests are superior to those of the bona fide purchaser.

Assignee v. Trustee in Bankruptcy: Straus v. Commercial Delivery Co.[28] seems to be the only case that has arisen under this set of facts. After carefully analyzing them, with emphasis on *A's* possession and the assignment being for security, the court concludes that "While the instrument is not in form a chattel mortgage, it is in substance," [29] and since it was not recorded as such, it was not valid as against the trustee in bankruptcy.

The opinions deciding controversies arising above, as was noted in the case of an absolute assignment, seem to emphasize the fictitious nature of the *A-B* transaction and indicate that the court does not consider it unreasonable to require the financing companies to inquire and ascertain that there was a valid installment sale.

B. *Assignor Not in Possession*

Here the assignment as collateral security was made at a time when the goods were in the hands of the installment buyer. There are relatively few cases that have arisen involving these facts so it is not clear how important is the distinction between the cases where *A* has never again taken possession from those in which he did again acquire possession. One case indicates that it is of no import, while another seems to rest its opinion on the fact of repossession. In view of the few decisions on these facts, and the great difference in the use of language by the courts, no thread can be found running throughout. Probably the best picture can be obtained by simply presenting the cases.

(1) *Possession Never Retaken:* This is the situation where *A*, having delivered the goods to *B* and assigned the *A-B* installment contract to *C* as collateral, attempts to convey the title to the goods to *D*, or *D*, a creditor of *A* attaches the goods.

Assignee v. Creditors of Seller: Although there appears to be no reported decision involving these exact facts, a Pennsylvania case involving a straight lease may be considered strong persuasive authority in protecting the assignee under these circumstances.[30] Here the lessor having assigned his interest in the leased goods to secure a loan, upon the default of the lessee, the assignee secured the sale of the chattels in order to protect

27. 81 Mont. 509, 264 Pac. 396 (1928).
28. 113 Atl. 604 (N. J. Ch. 1919).
29. *Id.* at 605.
30. Mosher v. Grange Nat'l Bank of Susquehanna, 8 D. & C. 617 (Pa. C. P., 1926). It must be kept in mind that Pennsylvania does not have a chattel mortgage act.

his loan. The creditors of the lessor then sued for the proceeds of the sale. The rights of the assignee were sustained on the ground that the transfer of the lessor's interest when the goods were in the possession of the lessee was an effective transfer of the former's right to possession upon default of the lessee. When the assignee repossessed, he completed his right to the property which was superior to that of the creditors of the lessor.

Assignee v. Bona Fide Purchaser: Worcester Morris Plan Co. v. Mader [31] is a leading case cited for the proposition that any assignment of an installment sales contract as collateral security for a loan is a chattel mortgage and, unless recorded as such, is invalid as to third parties. Moreover, the circumstances involved fit perfectly within the outline of the hypothetical facts of this section. In treating of the assignment of *A*'s interest, the court remarked that "It was in effect a bill of sale, and as it was given as security for the payment of a debt, it constituted a mortgage." [32] Expressly considered of no significance was the fact that the possession of the goods was in the installment buyer and therefore delivery could not be made.

Assignee v. Trustee in Bankruptcy: Unfortunately, a case involving the basic set of facts sought under this sub-title could not be found. However, there is a case involving circumstances in which a bailor transferred his interest in the bailed chattels as security for a loan.[33] In his subsequent bankruptcy, the trustee sought to establish a superior right in himself as against the assignee. In upholding the rights of the assignee, the court declared that inasmuch as a valid assignment had occurred, nothing remained in the bankrupt which might pass to his trustee. The tenor of the opinion would indicate that an assignment of an installment sales contract would be regarded in the same light.

(2) *Dealer Retakes Possession:* Strangely enough, only three cases seem to have arisen which involve the instant set of facts. All three involved suits between the assignee, *C*, and a bona fide purchaser, *D*. In two the rights of the bona fide purchaser were upheld, while in the third the claim of the assignee was sustained. In *Commercial Motors Mortgage Corp. v. Waters* [34] a seller assigned the installment contract to the plaintiff as collateral. Upon default, the seller repossessed the goods and placed them in his show room. The defendant then bought the goods, believing them to belong to the seller. Finding that plaintiff either knew or had reason to know of the repossession, the court upheld the rights of the bona fide purchaser on the basis of estoppel. This it found present from a very close relationship over a series of dealings between the seller and the assignee and from the display of the goods in the seller's show room. In direct conflict is *Pacific Acceptance Corp. v. Bank of Italy,*[35] in which the controlling facts were the same as those of the *Waters* case except that there it was perfectly clear that the assignee had authorized the seller to repossess. However, the court points out that there was no authority to sell and that merely allowing the seller to repossess the goods would be no grounds for an estoppel.

31. 236 Mass. 435, 128 N. E. 777 (1920).

32. *Id.* at 438, 128 N. E. at 777. Mass. Gen. Acts (1915) c. 226 deals with the recording of mortgages on personalty, and expressly makes bills of sale given for security recordable under the act. The court refused to treat this case on an assignment of a chose in action.

33. *In re* Miller Pure Rye Distilling Co., 176 Fed. 606 (E. D. Pa., 1910).

34. 280 Pa. 177, 124 Atl. 327 (1924).

35. 59 Cal. App. 76, 209 Pac. 1024 (1922).

Bank of California v. Danamiller [36] is one of the cases most frequently cited for the proposition that a bona fide purchaser's interests are protected if the assignment is merely for collateral. In this case, the assignee had no knowledge of the repossession by the seller. Nevertheless, the court decided in favor of the bona fide purchaser but was not very clear in explaining its reasons. Perhaps it was on the ground that since the assignment was for collateral, the assignee only secured a right to payment and not to the goods. A more probable basis was that, since the assignee could have protected himself by taking a chattel mortgage, and since he was organized to do business in this sort of thing, he should bear the loss. The court did not discuss this as a possible chattel mortgage which had not been recorded.

It cannot be said that an assignment of an installment contract as security is or is not a chattel mortgage. Since chattel mortgages are creatures of statute for purposes of recordation, it is purely a question of statutory construction in each state. However, it might safely be said that the situation that prompted the passage of the statutes, i. e., the possibility of secret liens, applies equally well to both fact situations.

III. Effect of Recordation

A primary objective of the present study has been to discover precisely the effect of recording the installment contract or the assignment thereof in protecting the interests of the assignee. However, it has proved impossible to catalog the cases either on the basis of their facts or their holdings. An effort has been made to indicate those cases in which recording was considered. Only a few courts have dealt with the problem clearly enough to supply a basis for expressing an opinion as to what that court might do in the future if the problem were properly urged upon it.

In Connecticut [37] and Georgia [38] the courts are fairly well committed to the doctrine that the recording of the installment contract, with an indication of the assignment, will be notice to the world sufficient to protect the assignee's interests from any subsequent claimants. In Minnesota [39] there is a case holding that the mere recording of the installment contract before the assignment will suffice to protect the assignee against a subsequent bona fide purchaser from the seller who retained possession.

On the other hand, Arizona [40] and Montana [41] have both definitely stated that the recording of both the contract and the assignment will not serve as constructive notice to anyone. "There is no provision of law for the filing of the assignment, and, as it was not entitled to filing, such action did not import constructive notice to plaintiff." [42]

Only one state has passed a statute directed at the recordation of the assignment of installment contracts.[43] However, in providing for recording only when the assignment is for collateral security, the applicability of the statute is greatly curtailed.

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36. 125 Wash. 255, 215 Pac. 321 (1923).
37. New Britain Real Estate and Title Co. v. Hartford Acceptance Corp., 112 Conn. 613, 153 Atl. 658 (1931).
38. Patterson Co. v. Peoples Loan & Saving Co., 158 Ga. 503, 123 S. E. 704 (1924); Chattanooga Finance Corp. v. Bitting, 38 Ga. App. 490, 144 S. E. 331 (1928).
39. Drew v. Feuer, 185 Minn. 133, 240 N. W. 114 (1931).
40. Kearby v. Western States Securities Co., 31 Ariz. 104, 250 Pac. 766 (1926).
41. Parsons v. Rice, 81 Mont. 509, 264 Pac. 396 (1928).
42. *Id.* at 525, 264 Pac. at 403.
43. Wash. Rev. Stat. (Remington, 1932) § 3791-1. For a discussion of this statute see (1936) 11 Wash. L. Rev. 1181.

Conclusion

In view of the general conflict of opinion illustrated by the decisions heretofore discussed, dogmatic conclusions as to the state of the law can serve no worthwhile end. However, purely on the basis of actual results obtained in the foregoing cases, the following tendencies would seem to be indicated:

(1) When the assignment is absolute but the assignor has retained possession all the time, the court will go into the true nature of the seller's purported installment sale, and finding it "colorable" will uphold the superior right of the subsequent claimant.

(2) When the assignment is absolute and the assignor has transferred possession to the installment buyer but subsequently retakes possession, the court will endeavor to protect the assignee; but if the subsequent claimant can prove that the assignee knew of the repossession, then *quaere*.

(3) When the assignment is for collateral security, the court will usually protect the subsequent claimant. Particularly if the seller was in possession of the goods at the time of the assignment, the courts would tend to treat the transaction as a chattel mortgage and require it to be recorded as such.

Perhaps the confusion in the cases that have dealt with this problem is due in no small measure to an attempt on the part of the courts to apply abstract legal analysis in reaching a preconceived result. When a decision is based on whether "title" passed from the seller to the assignee and thereby decides whether there is anything for the seller to pass to a fourth party, it becomes difficult to distinguish reasons from conclusions. This is emphasized by a realization that cases deciding that as between the seller and the conditional buyer, title remained in the seller, and as between the seller and the assignee the title passed to the assignee, seem to be of doubtful authority in deciding who has "title" as between the assignee and a fourth party claiming through the seller. Probably the controlling considerations that sway the courts are: who is in the better position to take additional precautions to protect himself; who can better bear the inevitable loss; what result will best foster in the long run the growth of an apparently necessary addition to the financing of small business. However, until express consideration of these factors finds its way into the opinions, the relative importance of any or all of them will continue to be a matter of mere speculation.

R. W., Jr.