Secured Interest in the Growing and Future-Growing Crops Under the Uniform Commercial Code

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SECURED INTERESTS IN GROWING AND FUTURE-GROWING CROPS UNDER THE UNIFORM COMMERCIAL CODE

With the adoption of the *Uniform Commercial Code* in twenty-eight states[1] and with other states considering its adoption,[2] an understanding of the Code's effect on various phases of commercial law is important. One phase of commercial law upon which the effect of the Code has been significant is that of secured transactions.[3] The Code's secured transactions section, article 9, covers a broad span of debtor-creditor and buyer-seller relationships. Within the scope of article 9, the drafters of the Code have sought to solve many perplexing legal questions. This Note will consider some of the problems connected with securing an interest in a growing or future-growing crop.[4] Attention will be focused on the pre-Code law relating to secured interests in crops as compared with the Code's provisions for such interests; and various restrictions on the use of such interests will be noted. The Code's filing provisions will be surveyed and the effect of a crop security on the rights and interests of third parties will be discussed.

I. Nature of Crops

The historical development of legal and equitable interests in crops has been complicated by the chameleonic nature of crops. A crop may be considered realty for some purposes, while for others it may be deemed personalty.[5] Courts have generally held that unless title to crops is reserved to the vendor of land, as between vendor and vendee, the title to the crops passes with conveyance of the land as part of the realty.[6] On the other hand, in some cases crops have been

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[1] For a list of the states which had adopted the *Uniform Commercial Code* as of August 1, 1961, see 1 Anderson, Uniform Commercial Code at vii (1961). For a list of states which adopted the Code between August 1, 1961, and September 1, 1963, see 1 Anderson, Uniform Commercial Code 3 (Supp. 1963).

[2] Iowa is among the states considering adoption of the Code. Iowa Acts 1963, ch. 375, at 565.

[3] For a discussion of secured transactions under the *Uniform Commercial Code*, see generally Coogan, *A Suggested Analytical Approach to Article 9 of the Uniform Commercial Code*, 63 Colum. L. Rev. 1 (1963); Summers, *Secured Transactions Under the Uniform Commercial Code*, 42 Ore. L. Rev. 1 (1962).

[4] For a discussion of the effect of the *Uniform Commercial Code* on agricultural financing, see generally Bunn, *Financing Farmers*, 1954 Wis. L. Rev. 353 (1954); Davis, *The Law of Secured Transactions and Article Nine of the Uniform Commercial Code*, 6 S.D.L. Rev. 173, 184-87 (1961); Goebel, *The Uniform Commercial Code and the Farmer*, 1962 U. Ill. L.F. 374, 381 (1962).

[5] See 1 Thompson, Real Property § 137 (1939) [hereinafter cited as 1 Thompson].

[6] See, *e.g.*, Clark v. Strohbeen, 190 Iowa 989, 181 N.W. 430 (1921); Boyd v. Lake County, 72 S.D. 431, 36 N.W.2d 384 (1949); Pellissier v. Hunter, 209 Cal. App. 2d 306, 310, 25 Cal. Rptr. 779, 781 (4th Dist. 1962) (dictum); North v. Jackson, 320 S.W.2d 597, 601 (Mo. Ct. App. 1959) (dictum). Courts are divided as to whether a mature crop unsevered from the soil passes with a conveyance of the realty. *Compare* Wood v. Wood, 116 Colo. 593, 183 P.2d 889 (1947) (mature crop does not pass with conveyance of the realty), *and* Jones v. Anderson, 171 Kan. 430, 436, 233 P.2d 483, 488 (1951) (dictum) (same), *with* Clark v. Strohbeen, *supra*.

held to be personalty.[7] In determining the nature of crops, the courts have relied on a distinction between natural-growing crops and industrial-growing crops.[8] Natural-growing crops or *fructus naturales* have been defined as "any plant which has perennial roots, such as trees, shrubs and grasses,"[9] while industrial-growing crops or *fructus industriales* have been defined as plants "which are sown annually and grown primarily by manual labor, such as wheat, corn, and vegetables."[10]

The importance of this distinction becomes apparent when considering secured transactions, because if a crop were found to be an industrial-growing crop, it could be a proper subject of a chattel transaction.[11] However, if the court found the crop to be a natural-growing crop, it could not be considered personalty and not a proper subject of a chattel transaction.[12] The *Uniform Commercial Code* has removed this distinction by simply providing that growing crops may be the subject of chattel transactions.[13] Nevertheless, in some relationships, such as between vendor and vendee of realty, crop interests will still be considered as interests in realty if non-Code law so dictates, for article 9, with the exception of certain provisions concerning fixtures, does not apply to real interests.[14]

II. Secured Chattel Interest

A. Types

Realizing that a crop may be the subject of a chattel transaction, it is necessary to determine the extent to which chattel laws and concepts are applicable to crop interests. Prior to the advent of the *Uniform Commercial Code,* many courts recognized the possibility of a sale or mortgage of growing and future-growing crops.[15] The courts generally

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[7] See, *e.g.*, Tolland Co. v. First State Bank, 95 Colo. 321, 35 P.2d 867 (1934) (by implication); Stoltzfus v. Covington County Bank, 154 So. 2d 866 (Fla. Dist. Ct. App. 1963); Blough v. Steffens, 349 Mich. 365, 84 N.W.2d 854 (1957).

[8] See generally 1 Thompson §§ 110-52.

[9] Key v. Loder, 182 A.2d 60, 61 (D.C. Munic. Ct. App. 1962); *accord,* Clark v. Strohbeen, 190 Iowa 989, 994, 181 N.W. 430, 433 (1921) (dictum).

[10] Key v. Loder, *supra* note 9, at 61. "At common law the fruit of perennial plants was also *fructus naturales,* but with the advent of commercial fruit farming, which requires a great amount of labor and fertilizer, the fruit is considered *fructus industriales* while the trees are *fructus naturales.*" *Ibid.*

[11] Stoltzfus v. Covington County Bank, 154 So. 2d 866 (Fla. Dist. Ct. App. 1963) (corn).

[12] Key v. Loder, 182 A.2d 60 (D.C. Munic. Ct. App. 1962) (rosebushes and shrubs).

[13] Goods are defined under both § 2-105 and § 9-105 to include growing crops. § 2-105, comment 1 suggests that "the concept of 'industrial' growing crops has been abandoned, for under modern practices fruit, perennial hay, nursery stock and the like must be brought within the scope of this Article."

[14] Uniform Commercial Code § 9-104(j) [hereinafter cited as U.C.C.].

[15] See, *e.g.*, Jones v. California Growers & Shippers, Inc., 182 Cal. 777, 190 Pac. 172 (1920) (sale of growing crops); Wheeler v. Becker, 68 Iowa 723, 28 N.W. 40 (1886) (chattel mortgage on future growing crops); Kohler Improvement Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935) (chattel mortgage on growing crops).

had little problem in sustaining such transactions with respect to growing crops; however, the sale or mortgage of a crop to be grown in the future presented the courts with the conceptual difficulty of upholding a property interest in a nonexistent thing.[16] In overcoming this difficulty, the early decisions relied on either a potential-possession theory or an equitable-lien theory. The rationale for the potential-possession theory has been that ownership of land capable of producing crops gives the landowner a special legal interest in any future crops which could be sold or mortgaged with legal title to the crops passing when the crops came into existence.[17] The equitable-lien theory, on the other hand, causes a chattel mortgage or sale of future crops to operate as an executory agreement with the beneficial interest in the crops passing to the mortgagee or buyer when the crop comes into existence.[18] Under article 9, these theories appear to be of no importance,

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Many states have legislatively approved chattel mortgages of growing and future-growing crops. See, *e.g.*, GA. CODE ANN. § 67-1101 (1957); ILL. REV. STAT. ch. 95 § 1a (1961); ME. REV. STAT. ANN. ch. 178, § 7 (1954); S.D. CODE § 39.0406 (1939). *But cf.* N.D. CENT. CODE § 35-05-01 (1960).

[16] The common-law rule was that a sale or mortgage would operate only upon things in existence at the time of the sale or mortgage. 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 138 (Bower ed. 1933) [hereinafter cited as JONES]. For a discussion of the courts' rationale in sustaining sales and mortgages of after-acquired property, see Williston, *Transfers of After-Acquired Property*, 19 HARV. L. REV. 557 (1906).

[17] See, *e.g.*, Argues v. Wasson, 51 Cal. 620 (1877) (chattel mortgage); Hogue-Kellogg Co. v. Baker, 47 Cal. App. 247, 190 Pac. 493 (2d Dist. 1920) (sale); Sanger Bros. v. Hunsucker, 212 S.W. 514 (Tex. Civ. App. 1919) (sale). *But see*, Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894) (chattel mortgage). See 1 JONES §§ 140-43; VOLD, SALES § 45 (2d ed. 1959). Vold suggests that with respect to sales the doctrine of potential possession was repealed by the Uniform Sales Act. He indicates that a purported present sale operates as a contract to sell under the Sales Act. *Id.* at 240.

Theoretically, the potential-possession theory gave the grantee a legal interest in future crops upon their sale or mortgage to him. The leading case to which most authorities trace the doctrine is Grantham v. Hawley, Hob. 132, 80 Eng. Rep. 281 (1616). The potential-possession theory was stated by the court as follows:

> And though the lessor had it [the corn] not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. *Id.* at 132, 80 Eng. Rep. at 282.

[18] See, *e.g.*, Hurst & McWhorter v. Bell & Co., 72 Ala. 336 (1882) (chattel mortgage); Wheeler v. Becker, 68 Iowa 723, 28 N.W. 40 (1886) (by implication) (same); Cheatham v. Tennell's Assignee, 170 Ky. 429, 186 S.W. 128 (1916) (same). *Contra*, Kohler Improvement Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935) (chattel mortgage). See 1 JONES §§ 170-73; VOLD, SALES § 46 (2d ed. 1959). Judge Jones described the equitable-lien theory as follows:

> The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortagagor being regarded as a trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done. 1 JONES § 170, at 282.

for the Code provides for the creation of a statutory interest in growing and future-growing crops.[19] Nevertheless, the nature of the secured party's interest in the future crop would appear to be similar to an interest created under the pre-Code theories, for no interest attaches to the crops before the debtor acquires rights in them upon planting[20] or when they otherwise become growing crops.[21] Additionally, before a Code security interest attaches, not only must the debtor acquire rights in the crops but also the parties must agree that a security interest attach and value must be given.[22]

While it is clear that a Code security interest would encompass a chattel mortgage of crops executed before or after planting,[23] there may be some question whether a purported present sale of growing or future-growing crops will be recognized by the courts as being within the scope of a Code-secured interest. When crops are planted or otherwise become growing crops, the buyer under a contract to sell future crops acquires what the sales article of the Code terms a "special property."[24] Although the Code provides that this special property is not a security interest, it does specifically provide that a buyer may acquire a security interest by complying with article 9.[25] Similarly, the fact that a "purported present sale of future goods operates as a contract to sell"[26] would not prevent a security interest from attaching to a future crop, for the Code provisions speak in terms of a "contract for sale" which by definition encompasses both a present

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The leading Iowa case involving chattel mortgages of after-acquired property is Scharfenburg v. Bishop, 35 Iowa 60 (1872). The Iowa court in *Scharfenburg* departed from other state holdings to apply the equitable-lien theory to goods other than crops. Subsequently, in Wheeler v. Becker, *supra*, the Iowa court relied on the equitable-lien theory to uphold a chattel mortgage on future-growing crops. See Note, 10 IOWA L. BULL. 224 (1925).

[19] U.C.C. § 9-204.

[20] U.C.C. § 9-204(2)(a). That the interest created should attach to the crop immediately upon planting as a crop then in existence is supported by the fact that proving the time of actual germination would be virtually impossible. See Wilkinson v. Ketler, 69 Ala. 435 (1881); Ayers v. Hawk, 11 Atl. 744 (N.J. Ch. 1887). Nevertheless, it has been stated that no interest attaches to crops until the seed is planted and germinated. See Michigan Sugar Co. v. Falkenhagen, 243 Mich. 698, 701, 220 N.W. 760, 761 (1928) (dictum).

[21] The Code language "otherwise become growing crops" appears to be designed to cover such crops as fruits and grasses. For instance, the Iowa court has held that while dormant during the winter alfalfa cannot be considered a growing crop. Apparently, only when such a crop revives does it become a growing crop. Sonka v. Yonkers, 191 Iowa 599, 180 N.W. 876 (1921).

[22] U.C.C. § 9-204(1). The requirements of the security agreement are set out in U.C.C. § 9-203. U.C.C. § 1-201(44)(d) defines value as any consideration sufficient to support a simple contract. Thus, when a buyer promises to buy and the seller promises to sell, the buyer has given value which satisfies the value requirement.

[23] The Code "security interest" encompasses all of the traditional means of creating secured interests. U.C.C. § 9-102(2).

[24] See U.C.C. §§ 2-401, 2-501.

[25] U.C.C. § 1-201(37).

[26] U.C.C. § 2-105(2).

sale and a contract to sell.[27] Therefore, it seems that if the parties so desire, a contract for sale, executed in conformity with the Code requisites for creating a security interest,[28] may be used to secure an obligation to deliver crops or to secure advances made to the seller.

While adoption of the Code's provisions for creating a security interest in growing and future-growing crops by means of a chattel mortgage will change the law in some particulars in almost every state, the Code provisions with respect to such interests generally will approve the effect of pre-existing law.[29] On the other hand, the possibility of a similar Code interest with respect to a contract for sale of future-growing crops seems to present a departure from pre-Code law in many states.[30]

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[27] U.C.C. § 2-106(1).

[28] U.C.C. § 9-203. An oral contract for sale would not qualify as a security agreement for this section provides that, unless the secured party has possession of the property, a security interest is not enforceable against the debtor or third parties until the debtor has signed a written security agreement. The reference to a debtor signing the security agreement would for the purposes of a contract for sale include a seller. See U.C.C. § 9-105(d) which defines a debtor as "the person who owes payment or other performance of the obligation secured."

[29] The adoption of the present form of the *Uniform Commerical Code* in North Dakota or Wisconsin would substantially change the law in those states. See N.D. CENT. CODE § 35-05-01 (1960) (crop mortgage generally not allowed); Kohler Improvement Co. v. Preder, 217 Wis. 641, 259 N.W. 833 (1935) (future crop mortgage not allowed).

[30] While state courts have upheld the sale of growing crops, they have seldom upheld the sale of a crop to be grown in the future. 1 WILLISTON, SALES § 135 (rev. ed. 1948). The Iowa court has apparently never passed on the validity of a purported present sale of a future-growing crop. The court was faced with the question in Snyder v. Tibbals, 32 Iowa 447 (1871), but the court avoided deciding the issue by holding that the parties did not intend a present sale. In light of Ellithorpe v. Reidesil, 71 Iowa 315, 32 N.W. 238 (1887), which held that an immature growing crop could not be the subject of a present sale, it appears that the possibility of creating a Code security interest by means of a contract for sale of growing or future-growing crops would be a change in the Iowa law. However, some states have enacted statutes which provide for recording of cooperative marketing association contracts for the sale of growing and future-growing crops. See HANNA, CASES AND MATERIALS ON SECURITY 355-59 (1959). The concept of securing an interest in growing and future-growing crops is apparently not a new one in these states. It may be argued that a security interest in crops is unimportant to a marketing association where it is given a right to specific performance by statute. See IOWA CODE § 499.9 (1962). However, such a remedy would be ineffective where the vendor has conveyed his interest in the property involved to a third party, for the courts have generally denied specific performance in such a case because of the impossibility to convey without title. See, *e.g.*, Grummel v. Hollenstein, 90 Ariz. 356, 367 P.2d 960 (1962); Yarborough v. Harkey, 67 N.M. 204, 354 P.2d 137 (1960); Newman v. Resnick, 38 Misc. 2d 94, 238 N.Y.S.2d 119 (Sup. Ct. 1963). See 5 WILLISTON, CONTRACTS § 1422 (rev. ed. 1937). Conversely, the secured party with an immediate right to possession upon default may gain possession of the collateral even though it has been transferred to a third party. See, *e.g.*, Montgomery v. Grattan, 156 Cal. App. 2d 832, 320 P.2d 106 (1st Dist. 1958); Ashley v. Keenan, 157 Iowa 1, 137 N.W.

B. Limitations

Although in most states it is possible to create an interest in growing and future-growing crops, it should be recognized that the use of such an interest has been restricted by various pre-Code rules and statutes. One such limitation has been the requirement that at the time of execution of a crop chattel mortgage the mortgagor must have an interest in the land upon which the crop is to be grown,[31] but generally this interest need only be a contemplated interest.[32] Additionally, both the non-Code law[33] and the Code[34] indicate that a security interest in crops will not attach unless the debtor has rights in the crops upon execution of a security agreement or later acquires rights in them. These requirements make an interest in future crops extremely uncertain, for the Code follows pre-Code law to the effect that a mortgagee's interest in future crops would end with the termination of his mortgagor's interest in the land upon which the crops were to be grown.[35]

Another limitation on the use of secured crop interests is the fact that in many jurisdictions non-Code statutes limit chattel mortgages on crops to one year prior to planting.[36] In accord with most pre-Code

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1041 (1912); Farmers Nat'l Bank v. Scheidt, 121 Minn. 248, 141 N.W. 103 (1913). See 2 JONES, § 443.

For a discussion of the buyer's power under the Code over the goods in which he has no security interest, see Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety,* 38 B.U.L. REV. 571, 589 (1958).

[31] See Moring v. Helms, 210 Ala. 175, 97 So. 647 (1923); Louisville Joint Stock Land Bank v. Watts, 251 Ky. 832, 66 S.W.2d 39 (1933) (alternative holding).

[32] That the mortgagor was required to have a contemplated interest in the land seems to have been implied from the fact that the mortgage had to adequately describe the land upon which the crop was to be grown. See, *e.g.,* Hurst & McWhorter v. Bell & Co., 72 Ala. 336 (1882); Richardson v. Washington & Costley Bros., 88 Tex. 339, 31 S.W. 614 (1895); Community State Bank v. Martin, 144 Wash. 483, 258 Pac. 498 (1927). Since the Code continues the description requirement, U.C.C. § 9-203(1), it, in effect, requires the expectation that crops from given land will be used as the collateral.

[33] See, *e.g.,* First Nat'l Bank v. Crawford, 227 Ala. 188, 149 So. 228 (1933); Knaebel v. Wilson, 92 Iowa 536, 61 N.W. 178 (1894); Williams v. King, 206 S.W. 106 (Tex. Civ. App. 1918).

[34] U.C.C. § 9-204.

[35] See, *e.g.,* Snerly v. Stacey, 174 Ark. 978, 289 S.W. 213 (1927) (sale of realty); First Nat'l Bank v. Brashear, 200 Cal. 389, 253 Pac. 143 (1927) (mortgagee's interest terminated upon termination of tenant mortgagor's tenancy); Fawcett Inv. Co. v. Rullestad, 218 Iowa 654, 253 N.W. 131 (1934) (death of mortgagor). *But see,* Eberhardt v. Bass, 39 Cal. 2d 1, 243 P.2d 789 (1952), where the court recognized the rule that a mortgage on crops to be grown, executed by a tenant, normally terminates upon expiration of the tenancy, but concluded that a subordination agreement continued the rights of the mortgagee as to the crops.

[36] See statutes cited note 15 *supra.* However, some states provide for longer limits. See, *e.g.,* MISS. CODE ANN. § 851 (1957) (thirty-six months); ORE. REV. STAT. § 86:310 (Supp. 1961) (two years); S.C. CODE § 45-152 (1962) (five years). Iowa is among a minority of states that have enacted no legislation dealing with the

limitations, the Code provides that no security interest attaches to crops "which become such more than one year after the security agreement is executed."[37]

This one-year limitation is applicable only to after-acquired property in the form of crops. Thus, the question has been asked, "Is there a greater need to protect an owner of a 100 acre farm from his folly than there is to protect the businessman who runs the village shoe repair shop?"[38] It has been suggested that the motive behind the one-year limitation is one of paternalism for the farmer.[39] However, if the rationale of the drafters was that a farmer is an "unsophisticated debtor" who needs "the public policy protection from the 'over-reaching' lender or seller,"[40] it would seem to be an unrealistic view, particularly in light of commercialization of present farm practices.[41] It should be noted, however, that protection of the farmer may not be the only reason for the Code's limitation. The creditor is also protected in the sense that the one-year limitation prevents an overextension of credit in reliance on a long-term crop mortgage which, as noted, would be subject to termination with the grantor's interest in the future crops. Additionally, by preventing the farmer from mortgaging his crop interests over long periods of time, the limitation appears to offer protection for purchasers and creditors generally.[42] Finally, the one-year limitation recommends itself in that it conforms with what appears to be the current commercial practice of using the chattel mortgage on future crops for short-term loans.[43]

Notwithstanding the various arguments in favor of the one-year limitation, it would seem that there is no greater reason to protect the farmer and his creditor than there is to protect those engaged in other businesses. This seems particularly true in light of the large capital requirements of modern farming operations and consequent credit needs[44] which indicate that perhaps the farmer should not be restricted

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problem of chattel mortgages on crops. The only time limit on the effectiveness of filing crop chattel mortgages in Iowa appears to be the general five-year limitation applicable to all chattel mortgages. See IOWA CODE § 556.12.

[37] U.C.C. § 9-204(4)(a).

[38] Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535, 546 (1963).

[39] See Spivak, *The Impact of Article 9 of the Uniform Commercial Code on Creditors' Rights in Bankruptcy*, 36 TEMP. L.Q. 183, 185 (1963).

[40] *Id.* at 185-86.

[41] Leavitt, *A Bank Examiner Looks at Agricultural Lending*, 49 FED. RESERVE BULL. 922 (1963). "Farming has changed from a 'way of life' to a 'way of business,' and farm credit must be treated like business credit." *Id.* at 926. See generally HIGHBEE, FARMS AND FARMERS IN AN URBAN AGE (1963).

[42] See BROWN, PERSONAL PROPERTY § 164, at 828-29 (2d ed. 1955).

[43] Typically, the chattel mortgage on crops is taken on a year-to-year production-credit loan. See MURRAY & NELSON, AGRICULTURAL FINANCE 47-48, 195-97 (1960).

[44] See MURRAY & NELSON, *op. cit. supra* note 43, at 6-17; Doll, *Farm Debt as Related to Value of Sales*, 49 FED. RESERVE BULL. 140 (1963); Leavitt, *supra* note 41, at 928.

in the use of future crop financing techniques.[45] Furthermore, because of risks highly dependent on the forces of nature, the secured interest in crops is inherently a very uncertain security.[46] Clearly, a lender would be more likely to extend the farmer credit on such a security if the security covered more than one year's crop. Also, aside from credit considerations, it seems that the one-year limitation may unnecessarily restrict the ability of purchasers such as cooperative-marketing associations[47] or packers and canners to secure interest in future crops, for reliance on such a security with respect to production planning will normally be limited to one year in advance.[48]

Regardless of the conclusion reached concerning the one-year limitation,[49] three important exceptions to the limitation should be noted. The limitation does not apply to a security interest which is given in conjunction with a lease, land purchase, or land-improvement transaction.[50] The Code provides that such interests "may if so agreed attach to crops to be grown on the land concerned during the period of such real estate transaction."[51]

In the land-lease situation, the ramifications of the exception to the one-year limitation are not certain for the Code does not change the status of pre-Code landlord's liens[52] which give the landlord an interest in his tenant's crops for the duration of the lease. Of course, in

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[45] Although the current-production loan may be the most common type secured by chattel mortgages on crops, it appears that the most needed loan is one covering a period of from one to seven years. Leavitt, *supra* note 41, at 928.

[46] "Crop mortgages are naturally indefinite throughout the period of their existence." MURRAY & NELSON, *op. cit. supra* note 43, at 195. See generally *id.* at 134-47.

[47] The retention by certain Code-adopting states of pre-Code provisions for recording marketing-association contracts, providing limitations longer than one year, demonstrates state concern for the affairs of these associations. See N.M. STAT. ANN. § 45-14-16 (1953) (three years); WIS. STAT. ANN. § 185.42(2) (1957) (five years). Iowa statutes provide for the creation of agricultural-marketing associations, but no provision is made for recording association contracts. See IOWA CODE chs. 497, 499 (1962).

[48] It is recognized that a purchaser such as a marketing association or canner may not need to file a financing statement under article 9 in order to protect an interest in growing or future-growing crops. U.C.C. § 2-107(3) provides:

> The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

[49] Even though the one-year limitation may seem somewhat discriminatory, only three adopting states have altered the one-year limitation of U.C.C. § 9-204(4)(a). See GA. CODE ANN. § 109 A-9-204(4)(a) (1962) (increased to seven years); ORE. REV. STAT. § 79.2040(4)(a) (Supp. 1963) (increased to two years). By eliminating § 9-204(4)(a), California has removed any time limitation on crop security interests.

[50] U.C.C. § 9-204(4)(a).

[51] U.C.C. § 9-204(4)(a).

[52] U.C.C. § 9-104(b).

states which do not provide for a landlord's crop lien,[53] it would seem advantageous for a landlord to create a Code security in conjunction with a land lease. Whether the same will be true in states which do provide for a landlord's crop lien appears to depend on the types and status of such liens. For instance, although Iowa provides a landlord's crop lien for unpaid rent,[54] Iowa does not provide a similar lien for loans or advances made to the tenant.[55] Thus, in a state such as Iowa, it appears that the land-lease exception from the one-year limitation may be significant, for if a Code security interest in crops were created in conjunction with the land lease it could attach to the tenant's crops throughout the period of the land lease.

The status of the land-purchase exception to the one-year limitation is also somewhat uncertain. This exception may be interpreted as being limited to a transaction which involves a vendor's conveyance of land. For example, a security interest in crops taken by the land vendor in conjunction with a purchase-money mortgage of the realty clearly seems to be encompassed by the phrase "land-purchase transaction." However, since the Code has defined "purchase" to include taking by mortgage,[56] the land-purchase exception may apply to a crop security interest given with a real mortgage in return for an ordinary loan of money.[57] Regardless of the interpretation accorded the phrase "land-purchase transaction," an additional question concerns the means of securing a crop interest in conjunction with such a transaction. As suggested, the ordinary chattel security interest will probably suffice as a security device for this purpose, but an additional device may be a rents-and-profits clause within a real mortgage. Generally, the real mortgagor who remains in possession is entitled to the rents, issues, and profits until foreclosure and sale;[58] however, the mortgage may stipulate to the contrary by a pledge of the rents, issues, and profits.[59] In most states the real estate mortgagee would become entitled to crops under a rents-and-profits clause only upon foreclosure or upon taking other active steps to secure possession of

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[53] For example, Massachusetts, Michigan, and Wyoming are among the states that make no statutory provision for a landlord's lien on his tenant's crops.

[54] IOWA CODE § 570.1 (1962). A statutory landlord's lien for unpaid rent is relatively common. See, *e.g.*, ILL. REV. STAT. ch. 80, § 31 (1961); KAN. GEN. STAT. ANN. § 67-524 (1949); OKLA. STAT. tit. 41, § 23 (1961).

[55] A number of states provide for a landlord's crop lien for crop production advances made to a tenant. See, *e.g.*, MD. ANN. CODE art. 53, § 25 (1957); MISS. CODE ANN. § 908 (1957); TEX. REV. CIV. STAT. ANN. art. 5222 (1962).

[56] U.C.C. § 1-201 (32).

[57] Arguably, interpreting "land-purchase transactions" to include real mortagages taken in return for ordinary loans of money could lead to sham transactions. For instance, it might be urged that a security interest given in conjunction with a real mortgage which was exchanged for a loan of one dollar should avoid the one-year limitation. However, it seems that this transaction could be struck down as not being in good faith. See U.C.C. § 1-203.

[58] See 9 THOMPSON, REAL PROPERTY § 4700 (repl. 1958).

[59] *Ibid.* Logically, crops as the issue or profit from the land fall within the scope of such a pledge. See Equitable Life Ins. Co. v. Brown, 220 Iowa 585, 262 N.W. 124 (1935); cf. Norwood Sav. Bank v. Romer, 43 Ohio App. 224, 227, 183 N.E. 45, 46 (1932) (dictum) (rents and profits are chattels).

the rents and profits.[60] However, a problem which few courts have faced is whether or not a rents-and-profits provision in a real mortgage may constitute a valid crop security interest.[61] The Iowa court has considered this problem and has held that a conveyance of "rents, issues, profits, and crops" in a real mortgage will constitute a valid chattel mortgage.[62] Under an Iowa statute, indexing in the chattel records is notice to the world of the mortgagee's interest in the personalty.[63] Whether a grant of rents and profits is a chattel mortgage is significant in that the chattel mortgagee's interest is effective from the date of execution of the mortgage,[64] as opposed to the time when foreclosure proceedings are begun. It should be noted, however, that a rents-and-profits provision interpreted as a chattel mortgage on crops

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[60] See, *e.g.*, Pollack v. Sampsell, 174 F.2d 415 (9th Cir. 1949); First Trust Joint Stock Land Bank v. Stevenson, 215 Iowa 1114, 245 N.W. 434 (1932); Hall v. Goldsworthy, 136 Kan. 247, 14 P.2d 659 (1932). See generally Note, 50 YALE L.J. 1424 (1941).

In Hall v. Goldsworthy, *supra*, the court stated:

> Reason and authority lead us to the conclusion that the mortgagee is not entitled to the benefits of the contract for rents and profits of the land until he has, by appropriate proceedings through the courts, taken the possession and control of such rents and profits. . . . Any proper procedure which would empower the court to control the rents and profits would be sufficient to vest the mortgagee with the title thereto, which must, of course, be applied on the mortgage indebtedness. *Id.* at 252, 14 P.2d at 661-62.

For a discussion of variations from the rule that a mortgagee is entitled to rents and profits only upon foreclosure, see OSBORNE, MORTGAGES § 150 (1951).

One of the most common means of assuring an interest in rents and profits is the institution of foreclosure proceedings with a request that the court appoint a receiver. Usually the court will not appoint a receiver under a provision for rents and profits unless the security of the real mortgage is inadequate to cover the indebtedness. See, *e.g.*, First Trust Joint Stock Land Bank v. Blount, 223 Iowa 1339, 275 N.W. 64 (1937); Anderson v. Marietta Nat'l Bank, 93 Okla. 241, 220 Pac. 883 (1923); Greenland v. Pryor, 360 S.W.2d 423 (Tex. Civ. App. 1962). Even after a receiver is appointed it is possible for him to waive the rentals. Jackson County Agricultural Credit Corp. v. Emrich, 191 Ark. 1054, 89 S.W.2d 598 (1936).

[61] The Iowa court has apparently decided the bulk of the cases dealing with this particular question. Consequently, this discussion has been limited largely to the position taken by the Iowa Supreme Court. For a discussion of this problem, see Schaupp, *Chattel Mortgage Clauses in Iowa Real Estate Mortgages*, 5 IOWA BAR. REV. 94 (1939).

[62] *E.g.*, Bankers Life Co. v. Garlock, 227 Iowa 1335, 291 N.W. 536 (1940); Equitable Life Ins. Co. v. Brown, 220 Iowa 585, 262 N.W. 124 (1935); Farmers Trust & Sav. Bank v. Miller, 203 Iowa 1380, 214 N.W. 546 (1927). See IOWA CODE § 556.21 (1962).

In California, it has been decided that a rents-and-profits clause may never constitute a valid chattel mortgage. Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552 (1898) (no amount of notice would make a pledge of rents and profits a chattel mortgage). For a discussion of the present position taken by the California courts with respect to the rents-and-profits question, see Smith, *Security Interests in Crops*, 10 HASTINGS L.J. 156 (1958).

[63] IOWA CODE § 556.21 (1962); see Equitable Life Ins. Co. v. Brown, 220 Iowa 585, 592, 262 N.W. 124, 128 (1935).

[64] Equitable Life Ins. Co. v. Brown, *supra* note 63.

not yet planted would terminate upon termination of the mortgagor's interest in the land,[65] while the interest created by the ordinary pledge of rents and profits would not so terminate,[66] for the subsequent grantee of land normally takes subject to a rents and profits clause.

In light of the pre-Code possibility of executing a real mortgage which includes a chattel mortgage on growing and future-growing crops, the exception of a land-purchase contract from the one-year limitation may be significant. Presumably, an interest similar to pre-Code Iowa law could be created by complying with the Code security interest requirements, for the Code suggestion that a security interest may be created in conjunction with a land-purchase transaction would appear to recognize a chattel interest created in a real mortgage. Therefore, it appears that by the use of a Code security interest in a real mortgage, the one-year limitation could be circumvented.

The final exception to the limitation concerns a security interest given in conjunction with land-improvement transactions.[67] The scope of this exception is not clear. As noted, the exceptions to the one-year limitation apply only if the crop security interest is given "in conjunction with a lease or a land purchase or improvement transaction."[68] If the basic rationale behind these exceptions lies in the increase in value of the land to the debtor, a security interest in crops to be planted more than one year in the future should be valid as security for a debt contracted to lay a tile drainage line as much as for a debt contracted to purchase the land. On the other hand, the clause creating the exceptions goes on to say that the "lease or a land purchase or improvement transaction [must be] evidenced by a contract, mortgage, or deed of trust."[69] The official comment on this section indicates that the exceptions are limited to security interests "in future crops in favor of a real estate lessor, mortgagee, conditional vendor or other encumbrancer during the continuance of his interest in the realty."[70] Thus, the philosophy underlying the exceptions to the one-year limitation seems to be that the crop security interest must be subsidiary to a primary security interest in the land itself. Under this interpretation, the connotation of the word "contract" appears to be limited to a land-purchase contract and "mortgage" to a real estate mortgage. Hence, it appears that in order for a security interest in crops given in conjunction with a land-improvement transaction to qualify as an

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[65] Fawcett Inv. Co. v. Rullestad, 218 Iowa 654, 253 N.W. 131 (1934) (death of mortgagor).

[66] *E.g.*, Mutual Benefit Life Ins. Co. v. Netsch, 233 Iowa 332, 7 N.W.2d 14 (1942) (death of mortgagor); Equitable Life Ins. Co. v. Jeffers, 215 Iowa 696, 246 N.W. 784 (1933) (conveyance of land).

[67] For examples of land improvements, see, *e.g.*, Mazel v. Bain, 272 Ala. 640, 133 So. 2d 44 (1961) (clearing and grading); Kauffman v. Miller, 214 Ill. App. 213 (1919) (tile); Rachou v. McQuitty, 125 Mont. 1, 11, 229 P.2d 965, 970 (1951) (fences); Johnson v. Schwarz, 349 S.W.2d 56 (Mo. 1961) (buildings); Cities Service Gas Co. v. Christian, 340 P.2d 929 (Okla. 1959) (trees); Dunham v. Davis, 232 S.C. 175, 101 S.E.2d 278 (1957) (fertilizer).

[68] U.C.C. § 9-204(4)(a).

[69] U.C.C. § 9-204(4)(a).

[70] U.C.C. § 9-204, comment 6.

exception to the one-year limitation, it may be necessary to give not only an interest in future crops but also an interest in the realty such as a real estate mortgage. However, even under this rationale it may be possible to secure a debt contracted for a land-improvement project by a security interest in crops to be planted more than one year in the future without tying it to a real estate mortgage. This could be done by the creditor perfecting a mechanic's lien as an interest in the real estate. By so doing the secured party would seemingly have followed the notion that the exceptions apply only where the secured party has an interest in real estate. The "contract" then called for by the Code would be the contract for the land-improvement project.[71]

III. Interests of Third Parties

Having concluded that it is possible to create a security interest in growing and future-growing crops, the question arises as to the effect of this interest on the rights and interests of third parties. Consideration of such a question leads to an examination of the Code's filing provisions.[72] In order to perfect a Code security interest in crops, it will be necessary in the usual situation to file a financing statement.[73]

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[71] The perfection of a mechanic's lien could not be used in a state such as Iowa as a means of creating an interest in real estate after having taken a security interest in crops prior to the completion of the improvement. See Iowa Code § 572.3 (1962).

[72] For a complete discussion of notice filing under the Code and under pre-Code law, see Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing,"* 47 Iowa L. Rev. 289 (1962).

[73] The place where a financing statement must be filed depends on one of two alternatives chosen by an adopting state. A state may select only central filing as provided in U.C.C. § 9-401, First Alternative Subsection (1). Only two of the twenty-eight adopting states have chosen this alternative. Conn. Gen. Stat. Rev. § 42a-9-401 (1962); Mich. Comp. Laws § 440.9401(1) (Supp. 1962). On the other hand, a state may require filing in the county of the debtor's residence *and* in the county where the crop is growing or to be grown as provided in U.C.C. § 9-401, Second and Third Alternatives Subsection (1). The majority of adopting states have selected the second or third alternative as recommended. Two adopting states have omitted the requirement that crop interests be filed in the county where the crop is growing or to be grown. N.H. Rev. Stat. Ann. § 382-A:9-401(1)(a) (1961); Wyo. Stat. Ann. § 34-9-401(1)(c) (Supp. 1963). Inclusion of the requirement for filing in the county where the crop is growing or to be grown would be a change in the Iowa law with respect to filing chattel mortgages. Iowa Code § 556.3 (1962) (requires filing only in the debtor's county of residence). *But see,* Iowa Code § 556.21 (1962). Because under this statute any real mortgage creating an encumbrance on personal property must be filed in the realty records first and then in the chattel index, it is possible that a chattel mortgage could be filed in both the county of the debtor's residence and the county where the crops are to be grown.

Apparently the provision for local filing was designed to provide a record of which the local purchaser would most likely be aware. While this filing procedure may protect the local buyer, it would seem to place a burden on the packer, canner, or milling company which buys crops in large volume from

The Code's formal list of requisites for a financing statement, however, supplies only a partial answer to a troublesome pre-Code question of whether the instrument filed contained a sufficient description of the crop involved. The Code states that "when the financing statement covers crops growing or to be grown . . . the statement must also contain a description of the real estate concerned."[74] This provision appears to be in accord with pre-Code requirements,[75] but the difficulty has been in deciding what constitutes a sufficient description of the real estate.[76] The Code requires that the description reasonably identify what is described.[77] Thus, the courts of the various jurisdictions have been given the problem of determining the limits of reasonable identification. Presumably, under the pre-Code rule any identification which would put a subsequent purchaser on inquiry notice will constitute a sufficient description.[78]

Another filing requirement promulgated by some courts has been that the instrument filed must contain a definite statement of the time during which the security interest in crops to be grown is to be effective.[79] The Code provides no similar specification, but the courts may continue this limitation for the purposes of reasonable identification required by the Code. However, the one-year limitation on interests in crops to be grown may cause the courts to find that even though a financing statement mentions no specific date, the one-year limitation

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various parts of a state. See 1 WILLISTON, SALES § 138, at 381 (rev. ed. 1948). Furthermore, the whole question of filing may be nothing more than an academic problem in light of the fact that it is common commercial practice not to file chattel mortgages.

[74] U.C.C. § 9-402(1).

[75] See, *e.g.*, Smith v. Mixon, 25 Ala. App. 521, 149 So. 721 (1933) (statutory requirement); E.W. Kimbrell Co. v. Mills & Young Co., 100 S.C. 443, 84 S.E. 996 (1914) (same); Commercial State Bank v. Interstate Elevator Co., 14 S.D. 276, 85 N.W. 219 (1901) (common-law requirement). "[G]rain . . . can only be identified by the description of the particular real property upon which the grain is to be raised." *Id.* at 280, 85 N.W. at 220.

[76] *Compare* Valleyfield Gin Co. v. Robinson, 216 Ark. 716, 227 S.W.2d 168 (1950) (incorrect recital of farm name—sufficient), *and* Security State Bank v. Clovis Mill & Elevator Co., 41 N.M. 341, 68 P.2d 918 (1937) (future crops on "my 300 acres ten miles north of Clovis"—sufficient), *and* Ake v. General Grain Co., 181 Okla. 117, 72 P.2d 735 (1937) (failure to name county where crop was to grown—sufficient), *with* Pace v. Threewit, 31 Cal. App. 2d 509, 88 P.2d 247 (4th Dist. 1939) ("upon any other land in county or state owned and planted by mortgagor"—insufficient), *and* Strong City Gin Co. v. Herring & Young, 182 Okla. 628, 79 P.2d 582 (1938) ("cotton which is not mortgaged to the bank"—insufficient).

[77] U.C.C. § 9-110.

[78] See, *e.g.*, United States v. Fleming, 69 F. Supp. 252 (N.D. Iowa 1946); Valleyfield Gin Co. v. Robinson, 216 Ark. 716, 227 S.W.2d 168 (1950); State Bank v. Dixon, 214 Minn. 39, 7 N.W.2d 351 (1943); Harp v. First Nat'l Bank, 169 Okla. 548, 37 P.2d 930 (1934).

[79] See, *e.g.*, Sonka v. Yonkers, 191 Iowa 599, 180 N.W. 876 (1921); Barnard State Bank v. Lankford, 223 Mo. App. 519, 11 S.W.2d 1084 (1928); Fisher v. Bank of Spanish Fork, 93 Utah 514, 74 P.2d 659 (1937). *Contra*, United States v. Brown, 199 F.2d 887 (5th Cir. 1952).

sufficiently defines the period during which the security interest is to be effective.[80]

One crop security filing question which the Code ignores is whether or not a security interest in crops must be filed in both the chattel index and a real estate index.[81] Having noted that in the majority of jurisdictions crops growing on the land, unless reserved, pass to the vendee of the land, it might be argued that a security interest in crops should be filed in the realty index to notify land purchasers of possible adverse interests.[82] Nevertheless, the majority view seems to be that an interest in growing crops such as a chattel mortgage, although filed only in the chattel index, takes precedence over the interest of a subsequent vendee of the land, for the crops may be constructively severed[83] or simply considered personalty.[84] In Code-adopting states which require filing of crop interests in both the county of the debtor's residence and in the county where the crops are to be grown, the burden placed on the realty purchaser to check the chattel index for possible adverse crop interests seems to be outweighed by the additional time and expense which would be required of the secured party to file in the realty records. Nevertheless, the answer to this question has been left to the adopting states.

Assuming that a financing statement covering growing or future growing crops has been filed in compliance with the Code and any other state rule, the crop interest will be perfected upon attachment. However, if the debtor has yet to acquire rights in the crops at the time of filing, the secured party's interest will not become a perfected interest until the crops are planted or otherwise become growing crops. At that time, the security interest will attach to the crops[85] and be perfected automatically.[86]

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[80] See Livestock Credit Corp. v. Corbett, 53 Idaho 190, 22 P.2d 874 (1933) (discusses effect of state time limitation).

[81] Article 9 is not applicable to interests in realty except to the extent that provision is made for fixtures. U.C.C. § 9-104(j). To a limited extent, however, the Code does suggest that an interest in crops may be filed in the realty records. See U.C.C. § 2-107(3) which provides that a contract for sale of growing crops may be filed in the realty records as transferring an interest in land. Thus, if a buyer creates a security interest by complying with article 9, it seems that article 2 would permit filing of the contract in the realty records and protect the buyer from subsequent purchasers of the realty.

[82] See Nicholson v. People's Nat'l Bank, 119 Okla. 113, 249 Pac. 336 (1926) (chattel mortgage of fruit crop must be filed in realty records). The Iowa Supreme Court has not faced this question directly, but the court has held that a county recorder could not refuse realty recording of a chattel mortgage on crops to be grown in the future. Weyrauch v. Johnson, 201 Iowa 1197, 208 N.W. 706 (1926).

[83] See Owen v. Commissioner, 192 F.2d 1006, 1008 (5th Cir. 1951) (dictum); Gulf Stream Realty Co. v. Monte Alto Citrus Ass'n, 253 S.W.2d 933, 936 (Tex. Civ. App. 1952) (dictum); 1 THOMPSON § 141.

[84] See Congdon v. G.M.H. Wagner & Sons, 207 Cal. 373, 278 Pac. 863 (1929).

[85] U.C.C. § 9-204(2).

[86] U.C.C. § 9-303. This provision seems to be in accord with pre-Code law. See Hostetter v. Brooks Elevator Co., 4 N.D. 357, 61 N.W. 49 (1894); First Nat'l Bank v. Johnson, 221 Mo. App. 31, 297 S.W. 724 (1927).

The purpose of perfecting a Code security interest is to insure the priority of such an interest against subsequent purchasers and lien creditors.[87] However, a perfected security interest in growing crops may be subordinated to various liens and bailment contracts. The Code provides for such subordination if the harvested crop is in the possession of a person who has furnished services or materials with respect to goods subject to a security interest and if the person is given a lien on such goods by statute or rule of law.[88] Furthermore, a perfected security interest may be subordinated to a Code-exempt preference lien for nonpossessory services performed in harvesting the crop.[89] Similarly, the perfected security interest may be superseded by a Code-exempt landlord's lien[90] which in most states is preferred over other crop interests either by statute[91] or rule of law.[92] Presumably, priority between perfected security interests and liens to which article 9 does not apply will be determined according to the preference given such liens by the particular non-Code state law.[93]

Although a bailment is not the most common means of assuring an interest in future-growing crops, it has been successfully used for this purpose. In *Cash Crops Co-op. v. Green Giant Co.*,[94] a canning company delivered seed to a farmer under a contract wherein the farmer agreed to raise a crop from the seed. By the same contract the canning company reserved title to the seed and any crop to be grown from the seed. The Wisconsin court held that such an agreement was a valid reservation of title to the crop and that the farmer was a contractor hired by the company. Thus, any crop interest that might have attached under a prior-recorded contract was defeated for the court held that the farmer never had anything to sell.[95] Similarly, it seems

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[87] See Casterline v. General Motors Acceptance Corp., 195 Pa. Super. 344, 351, 171 A.2d 813, 816 (1961) (dictum).

[88] U.C.C. § 9-310. For example, a marketing corporation may be given a factor's lien for services rendered in selling harvested crops. See Wenatchee Prod. Credit Ass'n v. Pacific Fruit & Produce Co., 199 Wash. 651, 92 P.2d 883 (1939).

[89] U.C.C. § 9-104(c). For instance, Iowa provides for a thresher's lien which takes priority over any landlord's lien or mortgage lien on the crops concerned. IOWA CODE § 571.2 (1962). For similar statutes see MINN. STAT. ANN. § 514.65 (1947) (preferred except over purchase-money lien for crop seed); MONT. REV. CODE ANN. § 45-804 (1947) (same); N.D. CENT. CODE § 35-07-03 (1960) (preferred over all other liens).

[90] U.C.C. § 9-104(b).

[91] See, *e.g.*, FLA. STAT. ANN. § 83.08(1) (1943); N.M. STAT. ANN. § 61-6-1 (1943); TEX. REV. CIV. STAT. ANN. art. 5222 (1962).

[92] For example, while Iowa provides for a landlord's lien by statute, IOWA CODE § 570.1 (1962), this lien is not given a preference by statute. However, the courts have held such a lien superior to prior crop interests when they attach at about the same time. Dilenbeck v. Security Sav. Bank, 186 Iowa 308, 169 N.W. 675 (1918). See Note, *Relative Priority of Landlord's Liens in Iowa*, 21 IOWA L. REV. 109 (1935).

[93] See Matter of Einhorn Bros., 272 F.2d 434 (3d Cir. 1959) (pre-Code landlord's lien superior to perfected Code security interest). See generally Note, 65 W. VA. L. REV. 40 (1963).

[94] 263 Wis. 353, 57 N.W.2d 376 (1953).

[95] Although the *Green Giant* case involved a third party's attempt to reach crop proceeds in the hands of the bailor, courts have held that by means of a

that a perfected Code security interest may be subordinated to a bailment contract.[96] Since the Code does not specifically prevent the circumvention of its provisions by means of a bailment, a solution to the possible problem rests with the various Code-adopting states.[97]

The Code also provides other situations in which perfected security interests may be subordinated. Section 9-312(2) provides that a holder of such an interest in crops will take priority over an earlier perfected security interest which secures obligations due more than six months prior to the time when the crops come into existence[98] if three requirements are met. The subsequent perfected security interest: 1) must have been given for new value, 2) must have been given to enable the debtor to produce the crops during the production season, and 3) new value must have been given not more than three months before the crops become growing crops.[99] While the effect of this provision is to encourage direct production loans,[100] it has been urged that the priority established by this provision is "so limited as to be of questionable practicable value to anyone."[101] Conversely, it seems that section 9-312(2) adversely affects crop security interests by reducing the assurance that priority will be given an interest securing obligations due more than six months before the crop begins to grow.

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bailment, crop interests may be secured against subsequent purchasers without actual or record notice. First State Bank v. Simmons, 91 Colo. 160, 13 P.2d 259 (1932). In the *Simmons* case, a seed company delivered seed to a farmer under a bailment contract. The farmer agreed to raise a crop for the company. Subsequently, the farmer gave a chattel mortgage on the crop to a bona fide purchaser. In holding the interest of the mortgagee inferior to that of the seed company, the court pointed out that the bailor had effectively preserved title to the crops by means of the bailment contract. *Accord,* Ferry & Co. v. Forquer, 61 Mont. 336, 202 Pac. 193 (1921). *But see,* Schoonover v. Igleheart Bros., 163 Kan. 689, 186 P.2d 109 (1947); Robinson v. Stricklin, 73 Neb. 242, 102 N.W. 479 (1905).

[96] See Bunn, *Financing Farmers,* 1954 WIS. L. REV. 357, 363. "The result seems pretty plainly contrary to the philosophy of the Commercial Code, but seems not to be overruled directly by any of its specific provisions." *Ibid.* It is recognized, however, that if a court should consider a bailment to be a security interest the bailment would fall within the provisions of the Code. See U.C.C. § 9-102(2). For a discussion of other devices used to circumvent pre-Code restrictions on the creation of secured interests in future crops, see COATES, LAW AND PRACTICE IN CHATTEL SECURED FARM CREDIT 12-17 (1954).

[97] See U.C.C. § 1-103. It appears that a court could reasonably pierce such a transaction by finding that the bailor is estopped from setting up his title against a bona fide purchaser from his bailee upon whom apparent right in the crop had been conferred. See also Town of Andover v. McAllister, 119 Me. 153, 109 Atl. 750 (1920); Thompson v. Sanborn, 11 N.H. 201 (1840); Fuller & Co. v. Longmire, 97 Wash. 254, 166 Pac. 263 (1917).

[98] Examples of such obligations might be rent, interest, or mortgage principal amortization. U.C.C. § 9-312, comment 2.

[99] U.C.C. § 9-312(2). Subsection (2) is in effect a limited purchase money interest.

[100] COATES, *op. cit. supra* note 96, at 38.

[101] Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer,* 38 IND. L.J. 535, 544 (1963).

Nevertheless, of the twenty-eight adopting states, only two have omitted this subsection.[102]

If the priority problem between conflicting crop interests does not fall within the special category of subsection (2), priority conflicts involving secured interests in growing and future-growing crops, which can be perfected *only* by filing a financing statement, will be determined according to the order of filing.[103] This provision would seem to make actual notice unimportant, while the race to the court house becomes all-important.[104] However, if no financing statement is filed, priorities will be determined in the order of attachment.[105]

Another priority question which may arise concerns commingling, or confusion of the crop after it has been harvested. Because of the fungible character of harvested crops, they may be readily commingled beyond identification. Section 9-315 provides that when goods which are the subject of a perfected security interest are so confused the interest attaches to the mass, and the secured party is preferred over

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[102] CAL. U.C.C. ANN. § 9312 (1963); N.J. STAT. ANN. § 12A:9-312 (Supp. 1963). As long as § 9-312 contains a provision such as subsection (2), the reasonable conclusion seems to be that an interest in growing and future-growing crops would not come within the purview of subsection (4) of § 9-312, which provides for the priority of purchase-money interests in collateral other than inventory. See COATES, *op. cit. supra* note 96, at 37-38. For a discussion of purchase-money interests under the Code, see Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963). Professor Gilmore suggests that even if the Code did not contain a provision such as § 9-312(2), a crop could not become the subject matter of a purchase-money interest "since the secured party's loan does not go directly into the purchase price." *Id.* at 1385.

[103] U.C.C. § 9-312(5)(a). U.C.C. § 9-312(5)(b) provides that priority between conflicting security interests will be determined "in the order of perfection unless both are perfected by filing." Because a growing or future-growing crop would not be in the possession of a secured party under § 9-305, it could only be perfected by filing. Therefore, § 9-312(5)(b) cannot apply to crop interests. For a discussion of Code priority problems, see generally Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838, 855 (1959); Note, 68 YALE L.J. 751 (1959).

[104] See Coogan, *How to Create Security Interests Under the Code—and Why*, 49 CORNELL L.Q. 131, 142-43 (1963). The rule of priority set forth in § 9-312(5)(a) represents a change in pre-Code law only to the extent that now an unrecorded interest can be defeated by a subsequent purchaser with actual notice. For example, IOWA CODE § 556.3 (1962) provides that an unrecorded chattel mortgage is good as against subsequent purchasers with notice whether or not they later file. The general pre-Code rule has been that filing of a mortgage on growing or future-growing crops constituted constructive notice to subsequent purchasers. See, *e.g.*, Equitable Life Ins. Co. v. Brown, 220 Iowa 585, 262 N.W. 124 (1935); First Nat'l Bank v. Johnson, 221 Mo. App. 31, 297 S.W. 724 (1927); Thompson Yards, Inc. v. Richardson, 51 N.D. 241, 199 N.W. 863 (1924). *Contra*, American State Bank v. Keller, 112 Neb. 761, 200 N.W. 999 (1924).

[105] U.C.C. § 9-312(5)(c). This provision may be applicable in the case of conflicting interests based on security agreements executed while the crops were growing. However, where conflicting interests arise from security agreements as to future crops, subsection (c) would not be applicable because both interests would attach at the same time.

purchasers and creditors. Furthermore, if two conflicting security interests attach to the same mass as a result of commingling, section 9-315 would rank them "equally according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total . . . mass."[106] This section seems to be in accord with the pre-Code view that a debtor or his vendee can not defeat a security interest in crops simply by commingling them.[107]

Regardless of the fact that a crop security interest is susceptible to subordination in numerous priority conflicts, the Code affords the holder of a security interest in crops special protection. Section 9-307(1) provides that a buyer in the ordinary course of business, other than the purchaser of farm products from a farmer, "takes free of a security interest created by his seller even though the security interest is perfected and the buyer knows of its existence."[108] Thus, a purchaser who buys crops[109] from a farmer in the ordinary course of business may not take free of a security interest and the holder of a security interest in the crops is protected. Although the preference expressly given the holder of a crop security interest does not represent a change in non-Code law,[110] the rationale of this preferential

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[106] U.C.C. § 9-315(2).

[107] See, *e.g.*, Allis Chalmers Mfg. Co. v. Security Elevator Co., 140 Kan. 580, 38 P.2d 138 (1934) (wheat); Horne v. Hanson, 68 N.H. 201, 44 Atl. 292 (1895) (hay); Catlett v. Stokes, 33 S.D. 278, 145 N.W. 554 (1914) (wheat).

U.C.C. § 9-315 would appear to protect the secured party's interest in the mass even if he purposely caused the confusion of goods; but in such a case it can be argued that the principles of law and equity which would prohibit the secured party's interest from attaching to the mass, see 2 JONES § 483, have not been displaced by § 9-315. See U.C.C. § 1-103.

In the case of interests in crops to be grown in the future, problems may be raised in identifying the crops to which the security interest originally attached. See International Harvester Co. v. McFerson, 95 Colo. 482, 37 P.2d 390 (1934). In the *McFerson* case the court found there could be no original separation where a mortgage covered only ten of the mortgagor's forty acres of growing sugar beets. Because there could be no original separation, the mortgagee's interest did not attach to the mass. Nevertheless, a mortgagor under pre-Code law could not defeat the interest of his mortgagee simply by planting more crops than described in a future crop mortgage. See Colley v. H.L. Edwards & Co., 258 S.W. 191 (Tex. Civ. App. 1924).

[108] It should be noted that if the buyer knows that the sale was unauthorized, he does not come within the Code definition of a buyer in the ordinary course of business. See U.C.C. § 1-201(9). Therefore a buyer with knowledge that the sale was unauthorized could not defeat a prior Code security interest.

[109] The Code defines farm products as "crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states . . . and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations." U.C.C. § 9-109(3).

[110] With the exception of certain statutory provisions and the possible application of equitable doctrines such as the doctrine of estoppel, the non-Code rule has been that a buyer in ordinary course of business could not take free of a perfected security interest. See BROWN, PERSONAL PROPERTY § 67 (2d ed. 1955); VOLD, SALES §§ 73, 78 (2d ed. 1959). The Code changes this rule by providing that buyers in ordinary course of business, except purchasers of farm products, may take free

treatment is not clear, particularly in light of the fact that section 9-307(1) encompasses not only retail sales but also wholesale transactions. Perhaps buyers from those engaged in farming operations were excluded from the protection of section 9-307(1) as a means of encouraging farm financing secured with crops as collateral. However, this rationale seems inconsistent with other Code provisions which tend to limit the effectiveness of crop security interests.[111] At any rate, the result of section 9-307(1) is that the farmer who, without checking the chattel index, buys a load of corn from his neighbor takes the risk of purchasing subject to a security interest.[112] Additionally, and perhaps more importantly, under section 9-307(1) a second purchaser in ordinary course of business who buys from the initial purchaser of farm products can not take free of a security interest created by the farmer.[113] Although the exclusion of protection for buyers of farm products seems somewhat questionable,[114] all of the adopting states have enacted the exclusion as recommended.

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of perfected Code security interests. Hence, § 9-307(1) does not represent a change in non-Code law as to the purchaser of farm products.

[111] See the discussion of § 9-204(4)(a) accompanying note 37 *supra* and the discussion of § 9-312(2) accompanying note 101 *supra*.

[112] Professor Coogan has hypothesized an even more curious result. "If the exception pertaining to the buying of farm products is to be taken literally, one who purchases a bunch of carrots or bushel of apples from a farmer's roadside stand takes these farm products subject to somebody else's security interest." Coogan, *Public Notice Under the Uniform Commercial Code and Other Recent Chattel Security Laws, Including "Notice Filing,"* 47 IOWA L. REV. 289, 301 (1962).

[113] This result may be implicit in § 9-307(1) for "perhaps most purchases of farm products are 'transfers in bulk' so as to preclude the purchasers from qualifying as 'buyers in ordinary course of business.'" Coogan, *supra* note 112, at 301 n.42. U.C.C. § 1-201(9) excludes transfers in bulk from the Code definition of "buying in ordinary course of business." Even if it is assumed that a purchaser of farm products falls within the class of buyers in ordinary course of business, a second purchaser could not take free of a security interest in crops created by a farmer. U.C.C. § 9-307(1) provides that a buyer, except a purchaser of farm products, takes free of a security interest *created by his seller*. Therefore, if a farmer sells a mortgaged crop of oats to an elevator in the ordinary course of business, the elevator does not take free of the mortgage. Subsequently, if the elevator sells the oats to a milling company in the ordinary course of business, the milling company will not take free of the security interest created by the farmer.

[114] Arguably, U.C.C. § 9-307(1) seems to say that a buyer of farm products in the ordinary course of business may not take free of a perfected or unperfected security interest. However, under § 9-301(1)(c) it appears that a buyer of farm products *not* in the ordinary course of business may take free of an unperfected interest if he has no knowledge of the security interest. Such an interpretation seems anomalous because traditionally protection has been sought for the buyer in the ordinary course of business. See 2 JONES §§ 381, 422. A better interpretation seems to be that § 9-301(1)(c) applies by implication to the buyer in the ordinary course of business. Under such an interpretation the buyer of farm products in the ordinary course of business could take free of an unperfected security interest.

IV. DEFAULT

The rights of the parties with respect to the collateral upon default is the essence of any security transaction.[115] Since the Code makes no special provisions concerning crops in the event of delinquency, the default provisions of article 9 as they relate to secured crop interests will be considered. Normally, the security agreement will define when default occurs. However, upon default such as failure to make a payment or removal of the crop, unless otherwise agreed, the secured party has the right to take possession of crops to which his security interest has attached.[116] In taking possession, the secured party may proceed without judicial process if this can be done without breach of the peace;[117] otherwise he may resort to available judicial procedures.[118] In order to preserve an interest in crops the right to take possession may include the right to enter upon the land where the crops subject to the secured interest are growing and if they are immature to raise them and later to harvest them.[119] Should such action tend to cause a breach of the peace or should the secured party simply choose to proceed by judicial process, it seems a court could, in accordance with pre-Code foreclosure proceedings, appoint a receiver to care for and harvest the crops.[120] Having gained possession of the crops, the secured party may retain the crops in satisfaction of

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[115] For a discussion of the secured parties' rights to collateral under the *Uniform Commercial Code*, see Hogan, *The Secured Party and Default Proceedings Under the UCC*, 47 MINN. L. REV. 205 (1962).

[116] U.C.C. § 9-503. The provision that a secured party has a right to take possession without judicial process upon default may affect a change in the pre-Code law of a number of states operating under a lien theory with respect to chattel mortgages. Courts in these states have held that in absence of the mortgagor's consent the mortgagee may obtain possession only by foreclosure proceedings. See, *e.g.*, McLeod-Nash Motors, Inc. v. Commercial Credit Trust, 187 Minn. 452, 246 N.W. 17 (1932); Parks v. Yakima Valley Prod. Credit Ass'n, 194 Wash. 380, 78 P.2d 162 (1938); Rumary v. Livestock Mortgage Credit Corp., 234 Wis. 145, 290 N.W. 611 (1940). For a discussion of the Iowa position with respect to foreclosure, see Note, 20 IOWA L. REV. 800 (1935).

[117] U.C.C. § 9-503.

[118] U.C.C. § 9-501(1).

[119] Although no cases have been decided under the Code on this point, the Kansas court, operating under a statute similar to § 9-503, upheld a junior mortgagee's entrance upon the land of the mortgagor and his recovery of expenses for harvesting, threshing and marketing mortgaged crops. The court indicated that his entry and harvesting of the crops was the practical thing to do when the mortgagor refused to perform these duties. Exchange State Bank v. Farmers' State Bank, 119 Kan. 70, 237 Pac. 936 (1925); *cf.* State Bank v. Dixon, 214 Minn. 39, 7 N.W.2 d 351 (1943) (entry under the terms of a mortgage). Before making such an entry, however, the secured party should weigh the possibility of tort liability. See Hogan, *supra* note 115, at 211-13.

[120] Farmers Trust & Sav. Bank v. Miller, 203 Iowa 1380, 214 N.W. 546 (1927). See Chatham Chem. Co. v. Vidalia Chem. Co., 163 Ga. 276, 136 S.E. 62 (1926); Equitable Life Ins. Co. v. Read, 215 Iowa 700, 246 N.W. 779 (1933). However, the secured party may be required to show that the crop is in danger of being lost before the court will appoint a receiver. See Burton v. Pepper, 116 Miss. 139, 76 So. 762 (1917); Amason v. Harrigan, 288 S.W. 566 (Tex. Civ. App. 1926).

the debtor's obligation[121] or he may sell or otherwise dispose of any or all of the crops. However, the secured party must account to the debtor for any surplus and, unless otherwise agreed, the debtor is liable for any deficiency. The sale of the crops could be made by either public or private proceedings, and the crops could be sold as a unit or in parcels. The principal restrictions on such a sale are that the debtor must be notified and the sale must be *commercially reasonable.*[122] Notwithstanding prior disposal or retention of the crops by the secured party, the debtor has a right to redeem the crop at any time by fulfilling all obligations secured by the crop plus reasonable expenses incurred by the secured party in gaining possession.[123]

V. Conclusion

There is no question but that the *Uniform Commercial* Code clarifies much of the pre-Code law concerning secured interests in crops. As indicated, the adoption of the Code does not, however, substantially change the law of most states with respect to the possibility of creating an interest in growing or future-growing crops in the form of chattel mortgages but may do so in the case of secured interests created by means of a contract for sale. An element of certainty has been retained with respect to security interests in crops since the purchaser of farm products in due course is not protected. Nevertheless, unless the crop security interest falls within one of the Code's stated exceptions, it will only attach to crops which come into existence within one year after the security agreement is executed. Similarly, the fact that a crop interest, even though perfected, may be subject to subordination to certain liens, bailments, and crop-production loans tends to restrict its effectiveness as a security device. In addition, an unfiled interest in crops is of limited value to the extent that the Code's rules of priority abolish the concept that a subsequent purchaser cannot defeat an unfiled security interest of which he has actual notice. In many cases, the extent of these restrictions will depend on the non-Code law of the various adopting jurisdictions.

While the Code has generally made valuable changes in the law of secured transactions, it appears that the Code has done little to enhance the practical value of the inherently uncertain interest in growing and future growing crops. Although many of the Code restrictions on the use of this security interest appear desirable and should not be changed by adopting states, it seems that a state could rationally elect to increase the effectiveness of this financing device by lengthening the one-year time limitation.

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[121] U.C.C. § 9-505(2). In order to retain possession of the collateral in satisfaction of the obligation the secured party must notify the debtor of his intent to do so. After notification, the debtor has thirty days in which to object. If the debtor does object, the secured party must dispose of the collateral.

[122] U.C.C. § 9-504.

[123] U.C.C. § 9-506.