defendant.[28] In the face of these inconveniences, there is no strong reason for allowing extrastate enforcement of criminal judgments or causes of action; extradition procedures usually make it possible for persons accused or convicted of crimes to be brought back to the prosecuting state for trial or punishment.[29]

There is no reason, however, to deny full faith and credit to any civil judgment or cause of action based upon a foreign "penal" law. The expense to the forum state of the necessary judicial proceedings is no greater than the expense in cases involving non-penal laws. Moreover, extradition is unavailable in civil cases; if the defendant has no property in the state where the action originated or the judgment sued on was rendered, denial of extrastate enforcement may leave the civil plaintiff without remedy.[30] The necessities of enforcement and the absence of objection on grounds of convenience combine to indicate that the penal exception to full faith and credit should be discarded in all civil cases.

[28] A criminal defendant must under certain circumstances be provided with counsel, a jury, a copy of the trial transcript, and so on.

[29] U.S. Const. Art. 4, § 2, provides: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." In addition thirty-five states have adopted the Uniform Extradition Act, § 2 of which provides: "[I]t is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state." Handbook on Interstate Crime Control 10 (Rev. ed., 1949).

For a comprehensive treatment of the interstate criminal problem and of legislation dealing with it, see the note in 31 Minn. L. Rev. 699 (1947).

[30] A defendant against whom a civil judgment has been rendered cannot be held until he satisfies it, since the practice of imprisonment for debt has been abolished in most states. See Limitations on State Legislation Imposed by Constitutional Guaranties against Imprisonment for Debt, 41 Harv. L. Rev. 786 (1928); Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24 (1926). Even if a defendant were imprisoned for not satisfying a non-criminal judgment, it would only be for the purpose of coercing payment and would not constitute a means of working off the obligation.

PRIMARY JURISDICTION: A REAPPRAISAL

The doctrine of primary jurisdiction in administrative law was conceived as a maxim to determine whether an issue should be submitted initially to the agency or to the courts when concurrent jurisdiction existed in both. Fifty years of constant litigation have failed to formulate the doctrine in a manner which enables litigants to choose the proper forum with a reasonable degree of certainty. In practice this uncertainty has subjected litigants to the delay and expense of double proceedings; it may well be asked whether this is too heavy a price to pay for any advantages the doctrine may have.

The doctrine has been most frequently applied in disputes over railroad tariffs. The Interstate Commerce Act specifically provides that "any person . . . claiming to be damaged by any common carrier . . . may either make complaint

to the Commission . . . or may bring suit . . . in any district or circuit court of the United States of competent jurisdiction."[1] In the face of this language and another provision of the Act disclaiming intention to alter any existing common-law remedies,[2] the United States Supreme Court, in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*,[3] dismissed a shipper's suit for freight overcharges on the ground that it should have been brought before the Commission.

In the *Abilene* case, the shipper charged that the tariff for cotton seed was "unreasonable." The Supreme Court, reasoning that the ICC alone was empowered by the Interstate Commerce Act to determine tariff rates, held the statutory purpose of uniformity could only be achieved if that body had exclusive review of their reasonableness. The Court argued that disregard of the express statutory language was necessary to effectuate the statutory purpose of uniform rate regulation since original jurisdiction in the courts, with divergent jury decisions, would perpetuate discriminations and preferences.[4]

The rule of the *Abilene* case was extended in *Texas & Pac. Ry. Co. v. American Tie & Timber Co.*,[5] where the issue turned on the disputed interpretation of the published "lumber tariff" and whether it included "oak railway crossties." The Court held that the case should have been brought before the Commission, on the ground that a determination of the scope of this tariff necessarily involved the question of reasonableness. To support the reference to the Commission of questions involving reasonableness, the Court relied not only on the uniformity argument of the *Abilene* case, but also on the argument that such questions are within the peculiar competence of the Commission.

Decisions in the field began to emphasize this "expertness" argument.[6]

[1] 24 Stat. 382 (1887), 49 U.S.C.A. § 9 (1929).

[2] Section 22 provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute. . . ." 24 Stat. 387 (1887), 49 U.S.C.A. § 22 (1951).

[3] 204 U.S. 426 (1907).

[4] "This follows, because . . . if it be that the standard of rates . . . could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable . . . , it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced." Even if the issue of reasonableness were within the competency of courts "it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts." Id., at 440.

[5] 234 U.S. 138 (1914).

[6] In Mitchell Coal Co. v. Penna. R. Co., 230 U.S. 247 (1913), the Court confessed to a lack of "expertness" necessary to decide a question involving alleged damages from "lateral allowances." Cf. Ill. Cent. R. Co. v. ICC, 206 U.S. 441 (1907) ("experience"). Where discriminatory car-distribution rules were alleged, the complaints were held to be within the "expertness" and "administrative competency of the Interstate Commerce Commission." Baltimore & O. R. Co. v. Pitcairn Coal Co., 215 U.S. 481, 493 (1910); Morrisdale Coal Co. v. Penna. R. Co., 230 U.S. 304 (1913). A claim for the cost of installing needed bulkheads in grain cars was a

Where the tariff was attacked as unreasonable or discriminatory, it was held that the Commission's expertness or "administrative discretion" was required to determine the issue;[7] where application of the tariff was attacked as discriminatory, the courts felt competent to resolve the issue themselves as a "question of law."[8] However, while the cases seemed to fall within this verbal pattern,[9] it was never clear when a fact situation presented "peculiarly administrative problems" or a "question of law." The only certainty that could be expected would result from a mechanical reliance on the labels which the plaintiff chose to use in his pleadings.

In *Great Northern Ry. Co. v. Merchants Elevator Co.*,[10] the Court attempted to formulate a more meaningful statement of the primary jurisdiction doctrine. In this case a shipper sought to recover payments made under a regulation fixing a charge for car reconsignment which specifically excluded cars of grain "held . . . for inspection and disposition orders incident thereto."[11] The validity of the charges rested on the interpretation of "disposition orders" as applied to grain which the plaintiff had sent into Minnesota for inspection and forwarding to its final destination. In sustaining court jurisdiction, Justice Brandeis, for a unanimous Court, equated "questions of law" with the construction of "words of a written instrument . . . used in their ordinary meaning,"[12] and questions of "administrative discretion" with interpretation of "technical words or phrases" having a "peculiar meaning."[13] Aside from a passing reference to the

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"peculiarly administrative" problem involving "intricate facts of transportation." Loomis v. Lehigh Valley R. Co., 240 U.S. 43, 50 (1916). Yet, the departure from published rates created a cause of action which a court could decide by "apply[ing] the fixed law to the established fact." Penna. R. Co. v. International Coal Co., 230 U.S. 184, 197 (1913). Nor was prior resort required when car-distribution rules were discriminatively applied because "no administrative question" was involved but only the factual question of unequal application of the rule. Penna. R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 134 (1915); cf. Ill. Cent. R. Co. v. Mulberry Coal Co., 238 U.S. 275 (1915).

[7] Baltimore & O. R. Co. v. Pitcairn Coal Co., 215 U.S. 481 (1910); Robinson v. Baltimore & O. R. Co., 222 U.S. 506 (1912); Morrisdale Coal Co. v. Penna. R. Co., 230 U.S. 304 (1913); Pennsylvania R. Co. v. Clark Bros. Coal Mining Co., 238 U.S. 456 (1915); Loomis v. Lehigh Valley R. Co., 240 U.S. 43 (1916); Northern Pac. Ry. Co. v. Solum, 247 U.S. 477 (1918); Director General of Railroads v. Viscose Co., 254 U.S. 498 (1921).

[8] Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915); Eastern Ry. Co. v. Littlefield, 237 U.S. 140 (1915); Ill. Cent. R. Co. v. Mulberry Hill Coal Co., 238 U.S. 275 (1915); Pennsylvania R. Co. v. Sonman Shaft Coal Co., 242 U.S. 120 (1916); Hite v. Central R. Co. of N.J., 171 Fed. 370 (C.A. 3d, 1909); National Pole Co. v. Chicago & N. W. Ry. Co., 211 Fed. 65 (C.A. 7th, 1914); National Elevator Co. v. Chicago, M. & St. P. Ry. Co., 246 Fed. 588 (C.A. 8th, 1917).

[9] "In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgement . . . in the Commission. . . . But if the carrier's rule, fair on its face, has been unequally applied . . . , there is no administrative question involved, the courts being called on to decide a mere question of fact. . . ." Penna. R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 131–32 (1915).

[10] 259 U.S. 285 (1922).

[11] Id., at 289.

[12] Id., at 291.

[13] Id., at 291–92.

uniformity argument, the Court relied solely on the expertness argument as a justification for this distinction between "ordinary" and "peculiar" words.[14] The application of a "reconsignment" tariff to the "disposition orders" in this case was for Justice Brandeis merely a question of the ordinary meaning of words.

However, rather than resulting in uniform application, the distinction proved to be deceptively elusive for the courts. Subsequent decisions were preoccupied with the terminology of *Great Northern* and not responsive to its intent. The interpretation of Commission regulations where words of "ordinary meaning" appeared remained a function of the courts.[15] But the courts were not adverse to accepting problems of construction involving intricate technical investigations,[16] nor did they refrain from selecting the appropriate rate where two or more appeared applicable to the item shipped,[17] or where the nature of the item was contested.[18] These were all held to be plainly questions of construction: "The language used is not technical. The meaning of the words is clear. There is no

[14] Justice Brandeis had no difficulty in adapting the precedents to the rationale of this standard. The American Tie case was "obviously not one of construction" but rather an instance where the dispute turned on the "peculiar sense" of words in the tariff, as the volume of conflicting evidence ably demonstrated. Thus the scope of the tariff was a question of fact which must be decided by the Commission. Similarly, Loomis v. Lehigh Valley R. Co., 240 U.S. 43 (1916), where the issue involved a decision of what car-fittings the carrier was obliged to furnish, presented a question for the Commission which "involved the exercise of administrative judgment . . . 'to define services covered' " by the tariff. The rate-making implications of these cases were tacitly merged into the "peculiar meaning" label and were thus referred to the administrative action which that label invoked. These cases were in sharp contrast to the "case at bar . . . [where] no fact, evidential or ultimate, is in controversy; . . . the task . . . is to determine the meaning of words . . . used in their ordinary sense and to apply that meaning to the undisputed facts." Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 294 (1922).

[15] Kansas City So. Ry. Co. v. Wolf, 261 U.S. 133 (1923); Payne v. Rogers, 4 F.2d 827 (C.A. 6th, 1925); Armour & Co. v. Chicago, M., St. P. & Pac. R. Co., 188 F.2d 603 (C.A. 7th, 1951); J. C. Francesconi & Co. v. Baltimore & O. R. Co., 274 Fed. 687 (S.D. N.Y., 1921); Collins Co. v. Davis, 283 Fed. 837 (D. Conn., 1922).

[16] Brown & Sons Lumber Co. v. Louisville & N. R. Co., 299 U.S. 393 (1937); Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U.S. 266 (1926); Burris Mill & Elevator Co. v. Chicago R. I. & P. R. Co., 131 F.2d 532 (C.A. 10th, 1942). The reasoning of these cases, which permitted the courts to determine questions of fact preparatory to the conclusion of law, is in direct conflict with the rationale whereby Justice Brandeis molded American Tie (where questions of fact were intermingled with questions of law) to the Great Northern standards. See note 22 supra. E.g., Brown & Sons Lumber Co. v. Louisville & N. R. Co., supra, an action to recover damages for alleged overcharges, involved an examination of the local tariffs to determine the correct application of the "Combination Rule" which, in the absence of a through-rate, would control the charges due. The Court held itself to be competent to make such an examination.

[17] United States v. Gulf Refining Co., 268 U.S. 542 (1925); Bernstein Bros. Pipe & M. Co. v. Denver & R. G. W. R. Co., 193 F.2d 441 (C.A. 10th, 1951); Union Pac. R. Co. v. United States, 111 F.Supp. 266 (Ct. Cl., 1953); Motor Cargo, Inc. v. United States, 129 Ct.Cl. 493 (1954); Union Pac. R. Co. v. United States, 117 Ct.Cl. 757 (1950); Union Pac. R. Co. v. United States, 117 Ct.Cl. 534 (1950).

[18] Macon, D. & S. R. Co. v. General Reduction Co., 44 F.2d 499 (C.A. 5th, 1930); Lakewood Engineering Co. v. New York C. R. Co., 259 Fed. 61 (C.A. 6th, 1919).

ambiguity."[19] Similar fact situations are found, however, in the cases where "peculiar meanings" were held to make administrative discretion an essential prerequisite. A direct attack upon the reasonableness of a rate or practice remained an issue for the Commission,[20] as did an "arbitrary" change in classification by a carrier.[21] Prior resort to the Commission was also required where the extent of services included in a tariff was contested[22] or, on occasion, where an appropriate rate was to be selected.[23] These decisions relied on *Great Northern* as controlling.

This apparent confusion provoked the latest attempt to clarify the primary jurisdiction doctrine. In *United States v. Western Pacific R. Co.*,[24] the substantive issue was whether "steel aerial bomb cases filed with napalm gel" but without bursters were subject to the tariff for "incendiary bombs" or the tariff for "gasoline in steel drums." The Court held this issue to be within the primary jurisdiction of the Commission. The parties had argued the case in terms of two issues: whether the bomb tariff applied, and whether such an application would be reasonable. The lower court treated the issues as separable, and gave judgment for the carrier on the ground that the bomb tariff did apply. The court conceded that the issue of reasonableness was solely for the Commission to decide, but held that the primary jurisdiction defense was barred by the period of limitations applicable to Commission proceedings. In reversing, the Supreme Court, on its own motion,[25] questioned the separability of these issues, arguing

[19] Brown & Sons Lumber Co. v. Louisville & N. R. Co., 299 U.S. 393, 397 (1937).

[20] Western & A. R. R. v. Georgia Pub. Serv. Comm'n, 267 U.S. 493 (1925); Midland Valley R. Co. v. Barkley, 276 U.S. 482 (1928); Brashear v. Louisville & N. R. Co., 32 F.2d 373 (E.D. Ky., 1929); Louisville & N. R. Co. v. Cory, 54 F.2d 8 (C.A. 8th, 1931); Penna. R. Co. v. Chesapeake & O. C. & C. Co., 297 Fed. 249 (S.D. N.Y., 1923).

[21] Director General of Railroads v. Viscose Co., 254 U.S. 498 (1921). This suit to enjoin the cancellation of the existing tariff classification for artificial silk was held to be within the primary jurisdiction of the Commission because "[c]lassification in carrier rate-making practice is grouping—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, . . . may justly and conveniently be given similar rates." Id., at 503. The issue of reasonableness, then, is not basically different from that involved in a choice between two applicable rates. See, e.g., cases cited note 31 infra. But some cases have reached the opposite result. See, e.g., cases cited note 17 supra.

[22] Armour & Co. v. Alton R. Co., 312 U.S. 195 (1941); St. Louis, B. & M. Ry. Co. v. Brownsville Navigation District, 304 U.S. 295 (1938). In Armour & Co. v. Alton R. Co., supra, where breach of contract was alleged for failure to deliver cattle as demanded, the Court held that "many questions relating to complex transportation problems" must initially be solved by the Commission. Id., at 200. For cases holding the courts competent to resolve questions of fact where intermingled with questions of law, see note 24 infra.

[23] Norge Corp. v. Long Island R. Co., 77 F.2d 312 (C.A. 2d, 1935); Great Northern Ry. Co. v. Ry-Krisp Co., 4 F.Supp. 358 (D. Minn., 1933). For cases holding this same issue of selecting the appropriate rate a function of the courts, see note 25 infra.

[24] 352 U.S. 59 (1956).

[25] Although construing the tariff to include the articles, the Court of Claims had recognized that the reasonableness of the tariff as construed was an issue within the initial competence of the ICC but had held the government's right to such a referral was cut off by the period of

that where the question of construction involves a knowledge of the cost allocation factors behind the original tariff—factors also involved in a determination of reasonableness—the issue is one for the expert knowledge of the Commission.[26] The Court felt that this knowledge was necessary to determine whether the high rate for incendiary bombs was due to the danger of explosion and was thus not applicable to napalm gel bombs which, without their fuses, presented no such danger.[27]

Western Pacific represents the Court's first clear exposition of the primary jurisdiction doctrine in the tariff regulation area. Yet the Court itself recognized that its distinction between construction which involves knowledge of cost-allocation factors, and construction which does not, fails to remove the necessity for a "decision based on the particular facts of each case."[28] Moreover, in a companion case to *Western Pacific* the Court virtually eliminated the possibility that the expense of a mistaken choice of forum might be minimized by a trial court dismissal on the pleadings. In *United States v. Chesapeake & Ohio Ry. Co.*,[29] the Court remanded, holding that the parties had to make a more adequate record simply in order to decide whether the court had jurisdiction to decide the case.[30]

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limitations. Certiorari had been granted because of the "alleged conflict among the lower courts on the issue of limitations." United States v. Western Pac. R. Co., 352 U.S. 59, 62 (1956). The Supreme Court could have avoided the broader question of correct application of the doctrine by restricting itself to the issue of limitations but, instead, devoted the major portion of its attention to the question of primary jurisdiction before disposing of the limitations issue on which certiorari was granted.

The Court held that the two year period of limitations provided by the Interstate Commerce Act could not be construed to bar reference to the Commission of questions "raised by way of defense and within the Commission's primary jurisdiction." Id., at 74.

[26] "A tariff is not an abstraction. . . . Complex and technical cost-allocation and accounting problems must be solved. . . . Courts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without the knowledge of such factors . . . is tantamount to engaging in judicial guesswork." United States v. Western Pacific R. Co., 352 U.S. 59, 66, 68 (1956).

[27] Justice Douglas filed a short dissenting opinion in which he viewed the principles of Great Northern as excluding any reference to the ICC of this question which, inferably, he considered as another instance of construction of "ordinary" words and the application of their meaning to the undisputed facts. This contrasted with the majority's recognition that Justice Brandeis' interpretation of American Tie in the Great Northern case (see note 15 supra) was on "all fours" with the present case and justified a conclusion that the issue should be referred to the Commission. This division of the Court not only exemplifies the contradictory decisions that body had reached in the various earlier cases (see notes 23–31 supra) but also demonstrates the inefficacy of the Great Northern terminology—the same words that Douglas considers "ordinary" are patently "peculiar" in meaning when viewed by the majority.

[28] United States v. Western Pacific R. Co., 352 U.S. 59, 69 (1956).

[29] 352 U.S. 77 (1956) (dispute as to the rate applicable to shipments of vehicle parts).

[30] The effect of this decision upon possible early rulings on the question of primary jurisdiction was evident in Porto Transport, Inc. v. Consolidated Diesel Electric Corp., 20 F.R.D. 1

Uncertainty of result seems inherent in the primary jurisdiction doctrine as applied to the field of rate regulation. The fact situations are extremely diverse and are non-comparable when analyzed in terms of the elastic standards of uniformity and expertness. It may well be questioned whether the doctrine has sufficient advantages to warrant the delay and expense to the litigant which this inherent uncertainty engenders.

The two principal rationales underlying the doctrine are the achievement of uniformity in rate regulation and the utilization of the Commission's accumulated technical expertise. Uniformity was originally propounded as an element of the statutory purpose which warranted overturning clear statutory language preserving judicial remedies; the Court feared that divergent decisions of courts and juries would serve only to resurrect the preferences and discriminations which the Act was designed to eliminate.[31] This rationale virtually disappeared in the subsequent decisions, a trend for which ample justification may be found. In the tariff regulation cases involving primary jurisdiction, conflicting decisions have not been found regarding the tariff applicable to competitive items. Moreover, any conflict which did arise could be confined to the particular shipments for which suit had been brought; future conflicts regarding the same tariff could be resolved in Commission proceedings, instituted by the affected shippers or by the Commission itself. If the Commission were freed from the burden of deciding cases referred to it by operation of the primary jurisdiction doctrine, it would have more time to apply its expert knowledge to the question of when Commission proceedings are necessary to insure uniformity of rate regulation.

The "expertness" argument has little more to offer as a rationale for primary jurisdiction in the field of ICC tariff regulation. As Professor Jaffe has pointed out,

> [i]f 'expertise' be a relevant datum implied in the statutory scheme it is yet no more relevant than the statute . . . makes it. It is undoubtedly an implied aspect of the statutory purpose that a specialized administrative tribunal has been created to

(S.D.N.Y., 1956). The plaintiff's motion to strike for legal insufficiency the defense that jurisdiction lay in the ICC was not granted because the court was "of the opinion that the question of primary jurisdiction can best be resolved at the trial of this case, at which time all the facts will be before the Court." Id., at 2.

[31] Justice Brandeis showed more confidence in the ability of courts to achieve uniform results: "It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 290–91 (1922).

deal with problems in a certain area of conflict; statutes setting up agencies may be assumed to focus the solution of the problem in terms of the development of special competence. But a grant of power implies a limit. The simultaneous grant of jurisdiction to the courts or a failure to abolish jurisdiction potentially conflicting may imply such a limit.[32]

If it is conceded that the statutory purpose of uniformity is not substantially furthered by primary jurisdiction, it would seem that the "expertness" argument should not be used as a rationale for disregarding statutory language preserving judicial remedies.

[32] Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577 (1954).

VALIDITY OF CLAUSES PROHIBITING ASSIGNMENT OF ACCOUNTS AND CONTRACT RIGHTS

Without question a contracting party may, by an express provision, prohibit an assignment by an obligor of a contractual duty to provide services or deliver goods.[1] However, the ability to prohibit an assignment by an obligee of an account or contract right[2] is less clear. Although a century ago choses in action were not assignable under any circumstances, there is now support for the position that, in some situations, their assignment cannot be prevented.[3] This latter position has been embodied in the Uniform Commercial Code.[4]

Section 9-318(4) of the Code provides that "[a] term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective." According to the draftsmen, this section is desirable since it makes it always possible for a contracting party to attempt to secure financing through an assignment of his accounts receivable.[5] Also, it is stated that Section 9-318(4) sets out a rule of law "widely

[1] 2 Williston, Contracts § 422 (Rev. ed., 1936).

[2] " 'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. 'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel papers." Uniform Commercial Code § 9-106 (Official Edition, 1957).

[3] 4 Corbin, Contracts § 873 (1951).

[4] § 9-318(4) (Official Edition, 1957). See also §§ 2-210(3), 5-116.

[5] "[A]s accounts and contract rights have become the collateral which secures an ever increasing number of financing transactions, it has been necessary to reshape the law so that these intangibles, like negotiable instruments and negotiable documents of title, can be freely assigned." Uniform Commercial Code § 9-318(4), Comment p. 786 (Official Draft, 1952).

The volume of accounts receivable financing has increased from an estimated $2 billion in 1940, Saulnier and Jacoby, Accounts Receivable Financing 4 (1943), and $4½ billion in 1946, Burman, Practical Aspects of Inventory and Receivables Financing, 13 Law & Contemp. Prob. 555, 556 (1948), to an estimated $10 billion in 1956, Kupfer, Accounts Receivable Financing, 2 The Practical Lawyer 50 (1956).

Generally, this type of financing takes one of two forms. Factoring is one arrangement,