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The Uniform Commercial Code v. the Bankruptcy Act

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The Uniform Commercial Code v. the Bankruptcy Act

OR

SAY, JOHN,¹ BOB,² PETE,³ VERN,⁴ LEON,⁵ HAL,⁶ NAHUM,⁷ WILLIAM,⁸ RAY,⁹ RUSS,¹⁰ BILL,¹¹ FRANK,¹² LARRY,¹³ HARRY,¹⁴ BERNIE,¹⁵ AND MAX¹⁶

WHAT'S ALL THE SHOOTING ABOUT?
NOW WE KNOW—

In re Portland Newspaper Publishing Co., Inc.¹⁷

BY ROBERT M. VILES* 

I. PROPOSITION

It is high time for those of us who teach, preach, scribble, or perish to pay more attention to the people we teach to than the peers we preach to. If we must scribble to teach, why not teach by, of, and for our scribbling? Therefore and forthwith a return to First Principles, Fundamental Truths, and Piercing Insights.¹⁸


(Continued on next page)
II. ALLEGORY

Mrs. Coolidge, in the White House sitting room:

"Calvin, what was the minister's sermon about today?"

President Coolidge, just returned from church: "Sin."

Mrs. C: "Well, what'd he have to say about it?"

C: "He's against it."¹⁰

Something of the same colloquy might well take place between a puzzled creditor's rights student and his instructor: "What are sections 60, 67, and 70 of the Bankruptcy Act all about?" Instructor: "Fraud." Student: "Well, whadda they say about fraud?" Instructor: "They're agin' it." This response avoids the issue—and

(Footnote continued from preceding page)

⁹ Henson, Ray, Proceeds Under the Uniform Commercial Code, 65 Col. L. Rev. 233 (1965); Section 9-108 of the Uniform Commercial Code and Section 60(a) of the Bankruptcy Act Reconciled, 21 BUS. LAW. 371 (1966).
¹⁵ Reimer, Bernard, Bankruptcy—Preference—Conflict Between Section 9-108 of the Uniform Commercial Code and Section 60(a) of Bankruptcy Act, 70 COM. L.J. 63 (1965); The After-Acquired Property Clause Revisited, 70 COM. L.J. 334 (1965).
¹⁷ 8 UCC REP. 194 (1966).
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¹⁹ Translation: This monograph began as a handout to the author's students in creditors' rights course in the spring semester of 1966. It was an attempt to aid them in understanding the basic relationship, or lack of relationship, between the Uniform Commercial Code and the Bankruptcy Act and in grasping the nature of some of the problems that have arisen. With the appearance of the Portland Newspaper decision and the opportunity for some second thoughts and further investigation the handout has been substantially altered and rewritten. Most of what is proclaimed below is not in any way original, although it is the product of original thinking. Somewhat to his disappointment, the author has found that he has been both anticipated and excelled by such authors as Professor Frank Kennedy, op. cit. supra note 12. To them he offers his sincere respect and gratitude. However, the monograph retains the original purpose and spirit without dilution.
²⁰ Reprinted without permission from an old copy of Reader's Digest.
the endless perorations in answer to it—in the same way that
taciturn Cal's answer effectively precluded any extended rehearing
of the minister's sermon. However, the setting-aside provisions of
the Act fly as much under the banner of "fraud" as a clergyman's
preoccupation with social ethics comes under the rubric of "sin."
Certain types of conduct are proscribed by the Rightthinking side
of almost everybody, whether commercial men dealing in business
and financial transactions or church-goers concerned with their
own (and others') ways of life.

It is impracticable, however, for most persons to engage very
much time in Rightthinking, and divisions of labor have de-
veloped whereby an organized corps of Rightthinkers has arisen
to prosecute the interests of Rightthinking on behalf of everybody
else, who is relieved to pass on this responsibility. Thus our
society supports ministers and trustees in bankruptcy, and heaven-
ly and earthly referees, and courts of appeal.

In an excess of professional zeal, Rightthinking can be carried
to such an extreme that ordinary, everyday-accepted conduct comes
under attack and proscription as sinful or fraudulent. The in-
terests of nice, innocent people—their liquor stores or accounts
receivable financing—are endangered though their hearts are no
deeper gray than the hearts of average, reasonable, and reverent
men. If life is to continue as it has previously been known and
unquestioned, something has to be done about these upsets.

There are two alternative ways to set things aright: either the
tainted conduct must be changed and thus purged of sinful or
fraudulent implications, or the doctrine of sin or fraud must be
redefined and restructured. Both conversions can be accomplished
only by clever men, who effectively represent their clients' inter-
est without bringing down the wrath of the Holy Men and raising
the hackles of Rightthinking as it lies dormant in the hearts of
those not immediately affected by the excesses of professional
righteousness.

It is unquestionable that the reconciliators of sin and virtue
are far more sophisticated than their counterparts in the world of
commercial fraud and fair dealing. After all, the theologians have
had many centuries of continuous advancement in building up
great erudition in distinctions by class, sinfulness by degree, hier-
archies by level, and purgation by successive steps. Some mortal
acts are void for the immorality of their very nature; others are merely voidable for contravention of earthly rules of man's own manufacture. And there is always a Way Out.

In the province of business and commerce the present state of affairs is not far removed from the not-so-long-ago of open fights between agents of the devil-creditor and the angels—eh, sheriffs—of the law. Discharge-in-bankruptcy and the rest of the heavenly hereafter for death-by-insolvency was discovered only a hundred or so years ago, and the waystations of commercial purgatory are yet being mapped. The priesthood, however, has secured its position quickly and well, aided by frequent bulls from courts of appeal and periodic recompilations of the Holy Word by councils of lawgivers. The compass of fraud has spread over a vast range of conduct—far beyond the most righteous contemplation of at least some commercial communicants, and dark tales of the persecution of the innocent have continually sounded.

It is a harmless overstatement to say that the commercial community has been rent into two camps, each attended by a complement of pharisees and sadducees. One, whom for lack of a better label we shall call the Unsecured Creditors, has basked in the protection of the holyword and its interpreters, discovering and enjoying the profits of the sin—eh, fraud—of the opposing camp, the Secured Creditors. These bad men—bad in the eyes of the Holy Men and the interpreters of scripture—have been struck down for their fraudulent acts and, on the day of final accounting, have been deprived of the fruits thereof. They have lost battle after battle, winning only occasionally, and then only after enduring the heavy costs of battle-by-trial.

Realizing they were hopelessly outmatched by the arrayed forces of the opposition, the Secured Creditors have sought to purify their fraud-tainted conduct in the ways possible: 1) by redefining fraud and 2) by removing the taint. Because their devilish reputation has made it difficult to secure a favorable reconstruction of the Book of Scripture, they have seized upon a giant loophole in that composite document. It is declared that in certain situations the Word shall be subordinate to or dependent on the otherwise profane litany expounded by certain curious law-giving subdivisions called States.

As everyone knows, righteousness has never gained hold as
much among the State oracles as it has on the high Federal level. The Secured Creditors found that State law-givers could be persuaded to provide ways by which the taint of fraud could be banished from their activities. The efforts were not wholly successful, however; it seems, according to the grand high court, that although some deference is given to State law, it certainly will not be allowed to upset substantive provisions of the higher law. In some skirmishes it turned out that the higher law would preclude any State efforts to aid the Secured Creditors. In others the state scripture was subjected to interpretations by the federal oracles adverse to the interests of the Secured Creditors. The road was not easy and led uphill all the way.

Then came the Nine Articles—a veritable State David to battle the Federal Goliath. Promoted as the greatest Conciliator of all time, its proposals swept the state Law-givers and became almost universal state scripture. At the same time, signaled by these events, the gladiators of the law review arena took up their pens and waged mighty wars with ink and paper. Some took the side of the Secured Creditors and the New Purity; others espoused the Unsecured Creditors and championed the cause of the old righteousness. The one claimed that the conciliation was complete—that the new state Code really did not hide fraud at all but cleansed the transactions of Secured Creditors of its taint. The other argued stoutly that fraud was fraud by any name and that the Code's attempts to twist the meaning of the High Scripture were doomed to failure. Soon all spectators left this arena of paper spectres to pursue their commercial activities in the new peace, and the gladiators were left happily displaying their prowess one to another.20

III Dogma

The provisions of the Bankruptcy Act which permit a trustee to set aside a completed transaction between the debtor and other parties (§§ 60, 67 and 70) seem designed to carry out, in conjunction with the rest of the Act, three purposes or functions:

1) The nullification of fraudulent transactions by which the debtor's estate has been depleted to the disadvantage of (other) creditors;

20 See supra notes 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.
2) The avoidance of the efforts of creditors to obtain preference over other creditors by securing payment from the debtor or secured interests in his property during the latter's insolvency preceding bankruptcy;

3) The equalization of the recovery of creditors from the debtor's bankrupt estate when it is inadequate to pay all their claims in full.

Only a few critics of the Act voice any argument against the achievement of any of these goals. They do, however, argue strenuously over whether certain types of secured transactions should be held "fraudulent" or "preferential" and thus voidable by the trustee in bankruptcy under appropriate provisions of the Bankruptcy Act. Many of these transactions are financing arrangements, such as the "floating lien" varieties, that are commonly used in the more sophisticated lines of commerce by lenders who do not wish to loan money or advance credit unless they can gain a security interest in the borrower's property that is protected from successful attack by his other creditors, including any trustee in bankruptcy that should come into the picture in the future.

The protagonists in the fights over the status in bankruptcy proceedings of these types of transactions are of course the Secured Creditors, who argue that the security interest is good against the trustee, and the Unsecured Creditors, who argue that it should be invalidated. It is worth remembering that the bottoming reason for these arguments, and the court cases in which they culminate, is the curious way in which the Founders of Bankruptcy translated into terms of specific rights the third goal stated above: "the equalization of the recovery of creditors from the debtor's bankrupt estate when it is inadequate to pay all their claims in full." We know that in bankruptcy "equality is equity" (and perhaps also "equity is equality") and that therefore, some classes of creditors are better than others, i.e., some claims are paid in toto before others receive one penny. Notwithstanding this semantic contretemps, we also know that there are good and sufficient reasons for the policy and rule of preferring secured

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21 But see note 38 infra.

22 For use of this catchy phrase as a foil for minor skirmishes in the law review arena, see Henson, 'Proceeds Under the Uniform Commercial Code, 65 Col. L. Rev. 232, 252 (1965); Kennedy, Statutory Liens in Bankruptcy, 39 Minn. L. Rev. 697 (1955).
creditors to priority creditors to unsecured creditors in divvying up the property in the bankrupt's estate.

The recognition of security interests in bankruptcy and elsewhere encourages credit, which stimulates enterprise, which is the backbone of the economy, which makes us a strong nation, and so on, and which may conceivably also have the result of permitting or encouraging the borrower to over-extend himself right into bankruptcy court. (Of course, the Bankruptcy Act protects against this last kind of result.) Among secured creditors, equality is naturally not the rule. In the competitiveness of capitalism, the race to specific property belongs to the creditor who has already proved his swiftness by first perfecting a security interest in it according to the canons of state law.

The recognition of priority claims acknowledges that some unsecured creditors render vital services to the bankrupt, without which he (and perhaps they) could not live. Thus the landlord, the employee, the local government, the state government, and the federal government—and the officials and attorneys who run the bankruptcy proceeding—have the second opportunity, after the secured creditors. (It is obvious that they should not get the first opportunity, since that would tend to force out the secured creditors, to whom, unlike the bankrupt, the priority claimants have not rendered vital services.) Among priority creditors equality is certainly not the rule. Although all priority creditors are better than all ordinary unsecured creditors, some priority creditors, such as bankruptcy administrators, are inherently better than other priority creditors.

The last-place unsecured creditors, on the other hand, enjoy the fullest equality in the satisfaction of their claims from the bankrupt's estate. It is hardly necessary for the Bankruptcy Act to provide for this outcome because, as in the instances of other references of the word "equality," the only place it is sure to be found is where there is nothing of significance likely to be shared.

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23 "Need cash to pay those bills? Then see Honest John, your friendly loan broker." Is Honest John inviting his potential customers who are in financial distress to defraud their creditors? Will Honest John be entitled to whatever security he takes for the loans as against the borrower's trustee in bankruptcy? Corker, Hazards of Doing Business with an Insolvent, 1 STAN. L. REV. 189 (1949). COUNTRYMAN, CASES ON DEBTOR AND CREDITOR 523 (1964). Cf. text at note 117 infra.

Thus, in order to do equity for this creditor and to do equity for that creditor, the maxim “equality for all creditors” is ventilated with many exceptions and qualifications. Even the simple order of secured creditors first, priority creditors second, and unsecured creditors last is not firmament. Some secured interests, such as tax liens, are relegated by the Bankruptcy Act to the status of priority claims. The line between a statutory “lien” and a statutory “priority” is very malleable. And, of course, some priority creditors, like wage earners and landlords, find that if they claim too much, the excess is entered as a plain unsecured claim. Greed is not looked upon with favor.

In reality, bankruptcy distribution is the fulfillment of a complicated hierarchy of precedence and priority. A creditor is not as much concerned with the number of creditors with whom he will have to share liquidation proceeds ratably, as he is with inserting himself as far up the scale as possible. To be a first-in-line secured creditor is the quintessence of bankruptcy insurance; to be a general unsecured creditor is tantamount to total loss in bankruptcy court. The election cannot occur, however, on the eve of bankruptcy, or the Act will unhinge the transaction. Nor can it be tainted with conduct fraudulent under the Act. As a result it is imperative when he becomes a creditor to obtain a perfected security interest which will survive in bankruptcy. We return to the battle of the Secured versus the Unsecured Creditors.

IV. Reality

Some types of transactions seem actually to be fraudulent, difficult as it may be to identify the tracks of fraud in a bankruptcy proceeding. Section 67 (d) (2) of the Bankruptcy Act, modeled upon the Uniform Fraudulent Conveyances Act, voids transactions motivated by an actual intent to defraud creditors or, easier to prove, transactions for less than fair consideration which result in insolvency or near-insolvency for the debtor-transferor.
Section 67 (d) (3), codifying Dean v. Davis, strikes at transactions made by insolvent-debtors contemplating liquidation and intending to prefer a certain creditor or creditors, provided that the other party to the transaction knows the debtor intends a preference. These are neither the transactions nor the Bankruptcy Act provisions over which there is all the shooting; therefore, we can put them aside.

The Bankruptcy Act also vitiates all transfers which are avoidable, for fraud or other reasons, under non-bankruptcy law, "by any creditor of the debtor, having a claim provable under this Act." The Act in this way accommodates state enactments of the Uniform Fraudulent Conveyances Act and equivalent legislation, thereby accomplishing nearly the same purposes as § 67 (d) (2). Again, there is no dispute over the correctness or justice of such avoiding power.

On the other hand, we can observe in the hallowed Moore v. Bay the effect of § 70 (e) where the applicable state law does not invalidate out-and-out fraud but merely holds that a security interest will not prevail against an ordinary unsecured creditor extending credit to the transferor between the time the security interest arises and its perfection by filing. The transfer is "deemed" to be fraudulent as to such intervening creditors—regardless of the commercial reasonableness of the delay or the absence of actual fraud, express or implicit. This is the fraud of the "secret lien," and this is where the secured creditor begins to hold the opinion that the righteousness of the bankruptcy courts runneth over and that surely the meek, unsecured creditors inherit more of the earth than they deserve. In states which have made any security arrangement vulnerable to creditors intervening before perfection by filing, situations like the following are said to have arisen in order to maximize the security of the secured creditor:

Dozens of corporate officers of the borrower, lenders and bond indenture trustees and their counsel were assembled in

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29 242 U.S. 438 (1917).
30 This provision also was inserted in the Bankruptcy Act in 1938. It was amended in 1952 to better conform to the law of Dean v. Davis, 242 U.S. 438 (1917). See H.R. Rep. No. 2320, 82d Cong., 2d Sess. (1952).
31 For a recitation of cases arising under § 67(d) (3), see Hahn, Voidable Secured Loans to an Insolvent Debtor, 21 L.J. 219 (1966).
33 284 U.S. 4 (1931).
a New York hotel on a Sunday night in the fall of 1954 to close a large deal involving real estate and chattel accessories in many states. They were marshalled at midnight to execute documents at 12:01 A.M., so the documents could be flown by special messenger to recording officers over the United States the same day.\textsuperscript{34}

Constance v. Harvey\textsuperscript{35} was the high-water mark of the vulnerability of apparently secured transactions to defeat in bankruptcy court. It gave the trustee under § 70 (c) the status of a hypothetical intervening creditor whereas § 70 (c) accords only the standing of an actual intervening creditor existing at the date of bankruptcy. The decision was a major victory for unsecured creditors in their continuing cold war against secured creditors. The cure for the latter’s lame position lay in two directions: first, to obtain the reinterpretation of § 70 (c) which was accomplished in Lewis v. Manufacturers National Bank\textsuperscript{36} in which the Supreme Court limited the trustee’s standing to that of a hypothetical judicial lien creditor as of the date of bankruptcy; and, secondly, change state law under § 70 (e) to permit a reasonable time for perfecting a secured interest by a filing which would relate back to the date the security agreement was executed and the security interest attached. This has been accomplished, it is thought, by the U.C.C., as we shall see shortly.

However, under § 70 (e) there has been another, greater cause for distress among the ranks of secured creditors. Not only have they protested the aggrandizement of “secret lien” fraud in bankruptcy court, but they have been indignant over the Supreme Court’s holy decree in Moore v. Bay that § 70 (e) permits the setting aside of an entire security interest, no matter how large, if there existed an intervening creditor having a claim no matter how small. The spectre of an intervening $10 creditor upsetting a $100,000 secured creditor—a magnification of the “deemed” fraud 10,000 times as a result of the “equity” construction of the remedial power under § 70 (e)—has been brought to life in several cases.\textsuperscript{37}

\textsuperscript{34} MacLachlan, Bankruptcy 834 (1956).
\textsuperscript{35} 215 F.2d 571 (2d Cir. 1954), cert. denied, 348 U.S. 913 (1955).
\textsuperscript{36} 364 U.S. 603 (1961).
\textsuperscript{37} $10 creditor upset $2,300 mortgage, In re Plonta, 311 F.2d 44 (6th Cir. 1962); $8,900 creditor upset $82,500 mortgage, Miller v. Sulmeyer, 263 F.2d 513 (Continued on next page)
The Moore decision, unlike Constance, has never been overturned by the Supreme Court or congressional amendment of the Bankruptcy Act.\textsuperscript{38} To avoid its impact the drafters of the Uniform Commercial Code have taken advantage of the Great Loophole—that the Bankruptcy Act defers to state law in some situations by doing away with the avoiding power of "gap" creditors under state law. First, the Code states that "a security agreement is effective . . . against creditors"\textsuperscript{39} except lien creditors (including the bankruptcy trustee), creditors who perfect a security interest in the same collateral, and the transferees of intangibles without notice and for value.\textsuperscript{40} Perfection of the security interest removes the exceptions. Second, when perfection can be achieved only by notice-filing, the Code permits filing before giving value under a security interest, so that at the time value is given the security interest automatically becomes perfected.\textsuperscript{41}

(Footnote continued from preceding page)

(9th Cir. 1959), cert. denied, 361 U.S. 838 (1959); $4.64 creditor upset $1,678 mortgagee, Mercantile Trust Co. v. Kahn, 203 F.2d 449 (8th Cir. 1953); "One small creditor" upset $65,000 mortgagee, Zamore v. Goldblatt, 194 F.2d 933 (2d Cir. 1952), cert. denied, 343 U.S. 979 (1952). CouTHYMAN, CASES ON DEBTOR AND CREDitor 505-06 (1964). This was the spectre that haunted the midnight financiers, according to Professor MacLachlan. See note 23 supra. "Only Moore v. Bay would suggest such an extravagant interference with the routine of high priced men. . . . There is reason to believe that the economic cost of fighting the spectres conjured up by Moore v. Bay greatly exceeds the total collections under section 70(e)." MACLACHLAN, BANKRUPTCY 334 (1956).

\textsuperscript{38} In spite of such sharp criticism as the late Professor Hanna (half of the Hanna and MacLachlan Bankruptcy Act) has delivered:

The rule of Moore v. Bay as now applied to cases under Section 70(c) and (e) is an instance of confiscation of security. Here was a case not properly presented to the Supreme Court, where the Court seemed confused on the facts, made no clear definition of the issues, and gave a Delphic decision. The real issue, upon which the circuits, contrary to what the Court said, were divided, was whether all creditors should share in what was recovered by the trustee when his recovery was based on rights of particular creditors. No one questions that the Court’s decision that all creditors should share, is correct. If the Court actually meant to hold that the mortgage in question was void entirely it was wrong both as to state and bankruptcy law. The fantastic notion that because under applicable law, usually state law, some creditor has a particular advantage against a security, the security is totally void, has no sound basis in the law of fraudulent conveyances, security, bankruptcy, nor in common sense and justice. So strong is the influence of representatives of unsecured creditors that it is doubtful if a bare majority of the National Bankruptcy Conference is now in favor of reversing Moore v. Bay. See Schwartz, Moore v. Bay—Should Its Rule be Repealed?, 60 COM. L.J. 67 (1955); 29 REF. J. 67 (1955). In some quarters a proposal to abolish all security in bankruptcy would have strong support. HANNA, CASES ON SECURITY 11 (3d ed. 1959).

\textsuperscript{39} Uniform Commercial Code § 9-201.

\textsuperscript{40} Uniform Commercial Code § 9-301.

\textsuperscript{41} Uniform Commercial Code § 9-303(1).
Third, the party holding a purchase money security interest also has ten days after the buyer gains possession of the collateral to perfect his interest by filing; an intervening lien creditor does not outrank him. In this way the applicability of § 70 (e) and Moore v. Bay is reduced to transfers covered by extra-Code law provisions, such as state fraudulent conveyances laws.

The consequences of failure (or inability) to achieve timely perfection and thus to avoid defeat by intervening creditors have not been the major obstacles to complete recognition of security interest in bankruptcy proceedings. The doctrine of the fraudulent taint of the "secret lien" has had a greater impact on security arrangements which, in spite of conformity with the requirements of availing state law, have been reduced by the bankruptcy courts to the status of unsecured transactions. In some situations the trouble has come because the state law itself did not provide adequate protection against the powers wielded by the bankruptcy trustee standing in the shoes of a lien creditor under §§ 70 (c) and (e), as noted in the preceding part of this article. In other situations the bankruptcy courts, by their interpretation of state law, especially as it may be overridden by federal bankruptcy law, have thrown out security devices as fraudulent or preferential under the Bankruptcy Act.

The Uniform Commercial Code, as the Great Conciliator of the interests of the Secured Creditors and the Unsecured Creditors, has sought to destroy the "secret lien" and its upsetting impact as a fraud on the bankruptcy court. For the benefit of the Unsecured Creditors, it has established a system for perfecting security interests against subsequent creditors (and the trustee)...

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42 Uniform Commercial Code § 9-301(2). The ten day "relation-back" is protected under § 60(a) (7) of the Bankruptcy Act.

43 The provisions of the Code: deal a shattering blow to the doctrine of Moore v. Bay, because they appear to make it impossible for a simple creditor to prevail over an unperfected security interest. It has been observed that typically Moore v. Bay has operated in situations under which state law gives the simple creditor priority over an unperfected security holder, even though the latter subsequently perfects his interest. This law is now changed by the Commercial Code, and Moore v. Bay is largely swept away in its wake.

that is fairly rigorous in its requirements of public notice. In
general, in order for an interest to be perfected, the secured party
must possess the collateral (as in the case of negotiable instru-
m ents) or make timely filing of a financing statement evidencing
the security interest. For the Secured Creditor the filing require-
ments have been streamlined, simplified, unified, and clarified.\textsuperscript{44}
In this way (it is thought that) righteousness has been made to
prevail, at least where it is commercially justified.

The Grand Conciliation may not be without its pitfalls, how-
ever. It is one thing to remove the taint of fraud by adopting a
thorough system of filing to publicize non-possessory security
interests. It is another thing to proclaim flatly that certain com-
mmercial conduct held by the bankruptcy courts to be fatally
"fraudulent" or "preferential" is no longer fraudulent or pre-
ferential. Let us examine two cases which especially anguished
Secured Creditors, the commercial situations from which they
arose, and the Code attempts to set the law aright.

First, \textit{Benedict v. Ratner}\textsuperscript{45} and "debtor dominion." One cannot
be sure exactly what the Supreme Court found wrong with
the security arrangement in \textit{Benedict}. The creditor had obtained
agreement for a security interest in accounts receivable without
taking possession of them or making any public filing or other
third-party notice evidencing his security interest; furthermore,
he had permitted the debtor to collect the accounts and to keep
the proceeds in his business without regular accounting to his
lendor, subject to demand for an accounting or for payment at
any time. Mr. Justice Brandeis, speaking for the Court, certainly
found a taint of fraud. He grounded the decision by holding the
transaction to be a fraudulent conveyance under state law. It is
not clear whether conformity with any extant state law permitting
perfection by public filing would have saved the security interest.
At any rate, creditor Ratner was not able to obtain proceeds col-
lected by the bankrupt that had passed into the hands of the
trustee.\textsuperscript{46}

The Code attempts expressly to cure the defect in state law

\textsuperscript{44}But there are hidden traps, which are sprung in bankruptcy court. See
Hiller, note 10 \textit{supra}.

\textsuperscript{45}268 U.S. 353 (1925).

\textsuperscript{46}Cases succeeding \textit{Benedict} compounded the confusion and bemused the
law review gladiators. See note 1 \textit{supra}.
(which had previously been removed in some states after Benedict, with regard to some kinds of "dominion" transactions):

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral (including returned or repossessed goods) or to collect or compromise accounts, contract rights or chattel paper, or to accept the return of goods or make repossessions, or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession where perfection of a security interest depends upon possession of the collateral by the secured party or by a bailee.47

It is easy to see the Great Conciliator at work here: not only are public notice requirements made applicable to this type of transaction (removing the fraud), but care seems to be taken to wipe away any suspicion of hanky-panky which might linger on from some of Justice Brandeis's dicta in the Benedict opinion.

Second, Corn Exchange National Bank & Trust Co. v. Klauder48 and the "floating lien." The holding of the Supreme Court of the United States in this case added an element to the legal context that did not exist in the Benedict case. In Klauder the petitioning creditors were able to show that they had followed a widely used commercial practice.49 Nevertheless, the Court, by the words of Justice Jackson, found that the arrangement violated

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47 Uniform Commercial Code § 9-205.

This Section . . . repeals the rule of Benedict v. Ratner . . . and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral. . . . While this Section replaces Benedict in matters of form, the filing requirements (Section 9-302) give other creditors the opportunity to ascertain from public sources whether property of their debtor or prospective debtor is subject to secured claims, and to provisions about proceeds (Section 9-306(4)) enable creditors to claim collections which were made by the debtor more than 10 days before insolvency proceedings and commingled or deposited in a bank account before institution of the insolvency proceedings. Uniform Commercial Code § 9-205, Comments 1 and 3.

48 318 U.S. 434 (1943).

Petitioners cite and rely upon Saulnier and Jacoby, Accounts Receivable Financing (National Bureau of Economic Research, 1943), for an estimate that in 1941 commercial finance companies advanced $536,000,000 on this basis; and commercial banks, $952,000,000. Of the borrowers, it was estimated that 63% had total (not net) assets less than $200,000; and 31%, less than $50,000. Their borrowing was estimated, however, to amount to less than 19% of the total. Id. at 17, 32, 64. 318 U.S. 494, 498 (1943).
the letter of § 60 (a) of the Bankruptcy Act and the policy of Congress against recognizing "secret liens."

It seems that older creditors of the bankrupt company had agreed to subordinate their claims to the petitioners, who were willing to provide fresh working capital in return for assignment of accounts receivable. At the time, the law of Pennsylvania, where these events occurred, provided that the interest of the assignee of accounts receivable first to notify the account debtors would prevail.\(^5\) The new creditors did not notify the account debtors—presumably to hide the fact that the company had been forced to hypothecate one of its most liquid assets. When the company folded in bankruptcy, the new creditors sought the benefit of their collateral—and lost.

The Supreme Court, in a spirit of regretful sternness, said to the new creditors that it was sorry about what it had to do, but the law is the law, and § 60 (a) says that a transfer for an antecedent debt is voidable by the trustee as a preference (provided the other requirements of § 60 are met). And, to get to the crux of the opinion, the assignment of the accounts receivable, though contemporaneous with the giving of value by the lendor, was not effective as a "transfer" under § 60 until at least the debtor had notified the account debtors. Why? Because in the wisdom of the Chandler Act revisers, a transfer does not occur until it becomes "so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein." A B.F.P. or creditor, i.e., a subsequent assignee of the account, clearly could prevail over the "secret lien" of the petitioning creditors if he notified the account debtors first. Congress wished to stamp out "secret liens" regardless of their commercial acceptability, and that policy as incorporated into § 60 (a), required a decision against the petitioning creditors.

One can be sure that this decision raised a great flurry in commercial acceptability, and that policy as incorporated into § 60 (a), cudgels in a series of campaigns that culminated in the adoption by Congress in 1950 of the present § 60 (a), which replaces the bona-fide purchaser standard with a lien creditor test.\(^6\)

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\(^5\) The civilized "English rule" for perfecting interests in assigned accounts.

\(^6\) Professor Countryman has reported in glorious detail the aftermath of Klauder. Countryman, note 4 supra.
However, neither the correction of state law in the Benedict decision nor the change of the Klauder outcome by amendment of the Bankruptcy Act was broad enough to cover one important folkway in modern commercial financing. Curing the legal defects in a security interest which allows the secured party's lien to float over much of the debtor's property, over which he has control, takes care only of static arrangements. It does not deal with the same arrangements through time. As the debtor sells, liquidates, or replaces some of the floating collateral, the secured creditor demands both that his security interest shall attach to the new property and that the transfer shall be perfected automatically. Thus, the creditor is relieved of the economic nuisance of creating a new transaction by which he gives new value for the new security. Unfortunately, § 60 (a) of the Bankruptcy Act, even after the 1950 amendment, avoids transfers of property interests made within four months of bankruptcy which preferentially benefit an antecedent creditor.

In face of these conditions, the draftsmen of the Code boldly stated that as a matter of (state) law:

Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given. (Emphasis added.)

It is clear that this is not the kind of change which the draftsmen undertook in Code § 9-205 to reverse the Benedict decision. That decision purported to rest on state law, and the Code merely changes state law. In the after-acquired property situation, on the other hand, the draftsmen are trying to put the shoe on the other foot by adopting an old trick of the High Priests of the Bankruptcy Act. Whereas formerly the Holy Men “deemed” certain security arrangements of creditors to be fraudulent and thus void as against the trustee in bankruptcy, the draftsmen in effect are

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saying that certain transactions shall not be "deemed" fraudulent (that is, "preferential," in the language of § 60 (a)), i.e., shall not be construed as transfers for antecedent debts, which § 60 (a) makes preferential.

Should the draftsmen of the Code and the creditors operating under it get away with turning the tables? From the conceptual point of view, it appears the argument can go either way, as is usually the case with conceptual points of view, especially after they have been bruited and bruised in the law review arena. Mr. Bernard Reimer strikes the blows for the Unsecured Creditors and against Code § 9-108 in dealing with the situation where the after-acquired property comes into the debtor's possession within four months prior to the date of his bankruptcy:

It is assumed that the transfer in issue was made in a state which had adopted the Uniform Commercial Code and at a time when the Code was in effect. We therefore look to the Code to determine when, under its provisions, a security interest in after-acquired inventory becomes so far perfected that no subsequent lien creditor can obtain rights in such property superior to those of the secured party.

Section 9-204(1) of the Code provides:

"A security interest cannot attach until there is agreement (subsection (3) of Section 1-201) that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching."

Section 9-303(1) of the Code provides:

"A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in sections 9-302, 9-304, 9-305, and 9-306. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches."

The last sentence of this section is further explained in the Comment to the Code as follows:

"If the steps for perfection have been taken in advance (as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral), then the interest is perfected automatically when it attaches."

Under the Code, the creditors security interest in after-acquired collateral can be perfected no earlier than the time
when the debtor obtains rights in such collateral. Obviously, a secured party cannot perfect a security interest in his debtor's goods before the debtor has himself acquired such goods or rights in them. This is made clear in Comment 4 to section 9-204 which states:

"A security agreement may be executed and value given before the debtor acquires rights: the security interest will then attach under subsection (1), as to after-acquired property, when he does."

Application of the foregoing principles to the postulated facts leads to the conclusion that the transfer, which consisted of the creation of a security interest in after-acquired collateral, was perfected (under the Code) at the time when the debtor acquired such collateral, and was therefore made (under section 60(a)(2) of the Bankruptcy Act) at such time, which was within the period of four months before the filing of the bankruptcy petition.53

Mr. Harold Friedman, relying on a clutch of cases under pre-Code statutory law, urges that § 9-108 is unnecessary to validate a security interest in after-acquired property and, for good measure, adds that the legislative history of § 60 is not repugnant to recognition of that provision of the Code:

If the Roche and Comet cases mean anything, they mean that there can be inventory and accounts receivable financing free from attacks of the trustee in bankruptcy under a financing device that is, for purposes of discussion here, similar to that of article 9 of the Code. Since the New York and New Hampshire Factors Lien Acts, then, have met with success in avoiding the preference pitfall, there would seem to be need for section 9-108. Roche found its rationale in the fact that there was a continuing res and the lien attached to the res. Comet did not even demand the construction of a res. It turned solely upon the fact that the statute had provided for an automatically perfected lien and that the after-acquired goods become subject to this continuing lien once

53 Reimer, Bankruptcy-Preference-Conflict Between Section 9-108 of Uniform Commercial Code and Section 60(a) of Bankruptcy Act, 70 Com. L.J. 63, 64-65 (1965) (Author's footnotes omitted). Later in 1965 Mr. Reimer found it necessary to Revisit the After-Acquired Property Clause because of a late-appearing decision of the Supreme Court of Kansas, decided under the "Massachusetts rule." Although he "feels some doubt as to the analytical correctness of the [Kansas] court's reasoning and conclusion on the preference issue," Mr. Reimer does note that all but three of the fifty states now adhere to the automatic perfection rule adopted by the Code and not to the Massachusetts rule. Reimer, The After-Acquired Property Clause Revisited, 70 Com. L.J. 394, 399 (1965).
the original agreement was perfected. This last analysis, particularly, is essentially no different than the construction of the chattel mortgage acts represented in the Alabama Braid, Claussen and Hayes cases; in states with the automatic perfection rule security interests in after-acquired property have escaped preference avoidance even in the absence of specific statutory provision establishing a continuing lien. It is submitted that a court made cognizant of the nature of the Code's continuing and floating legal lien—perfected at the execution and filing of the financing instrument—should not be able to hold that a preferential transfer has been effected. To find a preference the court would have to take authority either from the legislative history of the 1938 and 1960 amendments or from the present language of section 60. Neither, however, appears to support such a construction.54

Mr. Friedman recommends that § 9-108 be amended to accord with the conceptualizations of the cases on which he relies, thus removing a superfluous roadblock in the Secured Creditor's path.55

V. CONFLICT

We come now to In re Portland Newspaper Publishing Co., Inc.,56 a 1966 bankruptcy case decided by Referee Snedecor on February 9, 1966, and now before the United States District Court of Oregon for review.57 The unusual circumstances of the case do not make an ideal context for a landmark decision setting down Fairness and Justice in the Land of Creditors, Secured and Unsecured. Union members in Portland, Oregon, struck the two

55 Id. at 222-24.
56 3 UCC REP. 194 (1966); BANKER. L. REP. ¶ 61,722 (1966); CCH INSTALLMENT CREDIT GUIDE ¶ 98,483 (D. Ore. 1966). The “pertinent part of the opinion” is reproduced in Referee Snedecor Rules that Provisions of Uniform Commercial Code which Conflict with the Bankruptcy Act are Void Against a Trustee in Bankruptcy, 40 Ref. J. 48 (1966). The case is cited hereinafter as Portland Newspaper.
57 The law review arena has not been silent. The case is discussed in King, note 13 supra; Levit, Oregon Referee in Bankruptcy Holds Uniform Commercial Code in Conflict with Bankruptcy Act, 71 COM. L. REV. 139 (1966); Note, 8 B.C. IND. & COM. L. REV. 101 (1966); Note, 44 TEXAS L. REV. 1369 (1966).
daily papers, which then combined forces to publish a single paper during the strike. Several unions joined together to publish their own daily Reporter for the under-journalized Portlanders. A corporation was formed and stock sold to the public. The unions provided plant and equipment to the corporation at cost.

Whatever its journalistic success, the Reporter did not prosper financially. Crises were averted by cash contributions from labor unions and from "public spirited citizens"; the presses continued to run for four years. Finally, in the face of falling circulation, inadequate advertising revenue, and mounting deficits, the directors of the newspaper decided to stop operations and wind-up the corporation. Shortly thereafter, wage claimants forced it into involuntary bankruptcy. The trustee liquidated the bankrupt's assets to form a fund of 121,000 dollars, of which 107,000 dollars came from the collection of accounts receivable. Priority claims totaled 54,000 dollars (43,000 for wages and 11,000 for taxes), while other unsecured claims amounted to about 80,000 dollars. In addition, six creditors entered claims amounting to 122,000 dollars, plus interest, which they asserted were secured by accounts receivable.58

Referee Snedecor had little difficulty in disposing of two of the six purportedly secured claims. Oregon's adoption of the Uniform Commercial Code, effective September 1, 1963, aided his task; the would-be secured creditors had fumbled the transition, and the old law coated their transactions in the grease of fraud.59 However, the claim of Rose City Development Co., Inc. (hereinafter referred to as Rose City), a corporation formed by eighty-eight local unions to acquire and lease premises to the Reporter, raised squarely the loudly-trumpeted conflict between the floating-lien, debtor-dominion leniency of Article Nine of the Uniform Commercial Code and the hard language of § 60 of the Bankruptcy Act. 60 At last the battles of the law review arena were duplicated in the flesh: in Portland, Oregon, a large and diverse assortment of creditors, whose claims totaled 256,000 dollars, were fighting over a bankrupt's estate of 107,000 dollars, and if the pot

58 The facts are stated in Portland Newspaper 196-200.
59 Id. at 200-09.
60 The remaining three claims asserting security interests in the bankrupt's accounts receivable were by agreement subordinate to the claim of Rose City. Id. at 200.
were to be distributed, the respective language and purposes of Code § 9-108 and Bankruptcy Act § 60 had to be reconciled.

Pursuant to a security agreement with the bankrupt, Rose City filed a financing statement on November 26, 1963. The agreement, which used a standard Code form, asserted as collateral "all accounts receivable of the debtor now existing or hereafter arising." The policing requirements stated on the form—deposit of the proceeds from the accounts receivables in a cash collateral account in the secured party's name—were crossed out. The borrowing percentage was fixed at seventy-five per cent of the value of the collateral, and repayment was scheduled at $653.36 monthly. That was all. There is no record that Rose City ever exercised any control over its shifting collateral or, apparently, knew at any time what, how much, or what quality it was until less than a month before bankruptcy. On September 29, 1964, Rose City and two of the other security claimants demanded in writing that their collateral accounts be collected and held in trust for them.

According to the trustee, "substantially all" of the accounts receivable outstanding on the date of bankruptcy arose within four months before the bankruptcy petition was filed on October 15, 1964. The referee concluded that the bankrupt was insolvent throughout the four months. Thus, the stage for the conflict between Code and Act was set; the facts were on all fours with any case that might be constructed for a paper and pen battle.

In his opinion, Referee Snedecor displays the diligence of a true apostle of righteousness. Recounting many of the battles of the law review arena, he discusses in some detail the thrusts and parries of seven of the gladiators. He even rules clearly in favor of some gladiators over others and incorporates the works of the

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61 Id. at 209.
62 Id. at 210.
63 Id. at 210. The two creditors whose asserted security interests were rejected on the basis of Oregon law alone had made minimal attempts to identify their collateral. Id. at 201, 206.
64 Id. at 199. The stated date of "February 29, 1964," in line 4 is apparently erroneous; cf. id. at 210.
65 Id. at 210.
66 Id. at 224. The referee also concluded that "The claimants either knew or had reasonable cause to believe that the bankrupt was insolvent during said period," thus satisfying the additional requirement of § 60(b) of the Bankruptcy Act for setting aside a preferential transfer. Ibid.
67 Id. at 214-23.
winners into the justification for his decision against Rose City as a secured creditor in the distribution of the bankrupt's assets. Notwithstanding the referee's Solomon-like judgment of the gladiators, did he reach the right result in the actual controversy before him? It is submitted that his decision is correct on the law; that Righteousness and Justice could not support a contrary outcome; and that a thorough reading of his perceptive opinion reveals he came to the right conclusion on full consideration of the policies of the Bankruptcy Act.

Three distinctive goals have been suggested as the policy behind the trustee's powers over the bankrupt's property and transactions: nullification of fraud, avoidance of preference, and equity of distribution. The retroactivity of the nullification of fraudulent transactions and transfers extends for fraudulent transfers to four months before the bankruptcy petition was filed or one year before the same date or, further, if the state law of fraudulent transfers and the existence of a defrauded creditor permit. The trustee may avoid preferential transfers made up to four months before the date of bankruptcy. Over other transfers of interests in the debtor's property, he has the status of a lien creditor under non-bankruptcy law.

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69 The court has had the benefit of extensive briefs and many excellent articles on this important problem now awaiting a judicial solution. The wide divergence of opinion gives one pause as to the correct solution. We have been impressed by the line of reasoning in the articles by Kennedy and Riemer and by Nahum Gordon, Chap 11 Coogan, Hogan & Vagts, Secured Transactions Under the UCC. These writers appear to have considered the problem more in the light of the policy of the Bankruptcy Act than have some of the apologists for the Uniform Commercial Code. In order that this opinion may not be unduly extended, the above three articles are cited in support of the supremacy of the bankruptcy law over state law in determining the existence of a voidable preference. Id. at 223.

69 Cf. Note, 44 Texas L. Rev. 1369 (1966), "Section 60 of the Bankruptcy Act was never intended to invalidate the floating lien recognized by section 9-108 of the UCC." Id. at 1377.

70 Cf. Note, 8 B.C. Ind. & Com. L. Rev. 10 (1966), "[T]he result in Portland Newspaper perhaps sacrifices Code objectives for the sake of form. . . ." Id. at 110.

71 Cf. Note, 44 Texas L. Rev. 1369 (1966), "[I]n terms of policy the instant decision is unwise. . . . Such a result is blatantly contrary to the purpose of the Bankruptcy Act. . . ." Id. at 1377.

72 See text at note 21 supra.


75 Bankruptcy Act § 70(e), 11 U.S.C. § 110(e) (1952).


77 Bankruptcy Act § 70(e), 11 U.S.C. § 110(e) (1952). Other transfers, out-
The bankruptcy referee and trustee do not, therefore, have a roving commission to range through the chronicle of the bankrupt's past, overriding this transaction and approving that one. Although the Bankruptcy Act has a constitutionally-based supremacy over state law, the Act itself expressly defers to state law in many instances. Under the Erie doctrine, federal courts, including bankruptcy courts, must rely upon state construction and interpretation.

The factual perimeters of the Portland Newspaper case limit our inquiry in four ways. First, the case does not involve fraudulent conduct, i.e., the transactions in it do not come within the Bankruptcy Act's nullification of transactions motivated by fraudulent intention or amounting constructively to fraudulent transfers of the debtor's property. Second, only transactions secured under Article Nine of the Uniform Commercial Code are involved. There are other kinds of transactions, such as consignment sales and "cash" sales, which raise problems of the proper relationship between the Bankruptcy Act and the Code.

Third, the particular transaction at issue, Rose City's security interest in the bankrupt's accounts receivables, was properly perfected under Code requirements. Section 9-301 of the Code states by negative inference that a perfected security interest is superior to a subsequent lien creditor's interest, and "lien creditor" is defined expressly to include the bankruptcy trustee. Hence § 70 (c) of the Bankruptcy Act, which limits the trustee's standing as a lien creditor to a lien creditor "upon the date of bankruptcy,"

(Footnote continued from preceding page)

side the topic of this monograph, are also void or voidable. Liens obtained against a person by legal or equitable processes within four months prior to the initiation of bankruptcy proceedings are void if, at the time, the person was insolvent or the lien was obtained in fraud of the Bankruptcy Act. Bankruptcy Act § 67(a), 11 U.S.C. § 107(a) (1952). For the importance of this provision in effecting Bankruptcy Act policy, see Wolfe, The Correlation of Liens and Priorities, 27 Temp. L.Q. 268-70 (1953). Statutory liens which are not effective until the debtor's insolvency or have not become effective until the debtor's insolvency or have not achieved, before the date of bankruptcy, a prescribed degree of perfection or enforcement are invalid against the trustee. Bankruptcy Act § 67(c), 11 U.S.C. § 107(c) (1952). See note 148 infra.

78 Congress is empowered "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

79 But see note 140 infra.

80 See Shanker, Bankruptcy and Article 2 of the Uniform Commercial Code, 40 Ref. J. 97 (1968), and the material cited therein. Professor Shanker also discusses the jousting in the law review arena over § 2-702 of the Code and a seller's right to reclaim in bankruptcy court goods sold to an insolvent debtor before his bankruptcy.
prevents the trustee from prevailing generally over the previously perfected security interest. The Code has minimized the bankruptcy referee's task of determining who, including the bankruptcy trustee, can under state law attack a security interest perfected under state law. The Code not only clarifies the requirements for perfection, but also specifies against whom the perfection is good. Where the party asserting a security interest has not met the perfection requirements of the Code, the outcome is easily reached without any conflict between the Code and the Bankruptcy Act.

Fourth, the transactions are debts incurred by the bankrupt and secured (by the parties' intentions), in part, by property acquired by the bankrupt after the debt was incurred. That the property was intangible accounts receivable and not tangible inventory is not significant here. There is perhaps a momentary temptation to conclude, after a hasty reading of such holy cases as Benedict and Klauder, that the bankruptcy trustee does have a roving commission to upset any secured interests in after-acquired property, especially after-acquired property over which the creditor has permitted the debtor absolute or nearly absolute dominion. As this article has already emphasized, such is no longer the truth—even the debatable truth—because the Code has successfully removed the taint of fraud from, and cast the glow of legitimacy on, both the practice of allowing debtor dominion over collateral and the argument that after-acquired property should rank, for priority purposes, from the date the security interest was originally perfected, not from the date the debtor acquired it.

"Successfully" is a word that in this context requires some clarification. The Code may not be a success by standards of internal consistency and coherence, as the law review gladiators have extensively disputed, but it is a success in establishing state law to which decision-makers in bankruptcy must defer, both for the letter of the statutory sections and for the reconciliation of their

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82 See Referee Snedecor's discussion of the claim of Robert J. Davis, who, like Rose City, had asserted a security interest in the bankrupt's accounts receivable. The referee found the claim fatally defective under the Code. Portland Newspaper, at 205-09.
83 Cf. text at note 115 infra.
84 See text at notes 102-04 supra.
85 See text at notes 105-08 supra.
86 \textit{UNIFORM COMMERCIAL CODE} § 9-205.
87 \textit{UNIFORM COMMERCIAL CODE} § 9-108.
differences. In his opinion in Portland Newspaper, Referee Snedecor appropriately notes that the much-publicized bankruptcy case of In re Newkirk Mining Co. \(^{88}\) did not present a conflict between the Bankruptcy Act and the Code because, although it involved a Code security interest in after-acquired property, the entire transaction occurred outside the limits of the power of avoidance of the bankruptcy trustee and within the dominion of state law. \(^{89}\)

In Portland Newspaper, on the other hand, the transaction secured under Article Nine, or at least part of it, did occur within the scope of the trustee's power to carry out the Bankruptcy Act's goal of avoiding preferential transfers. Most of the accounts receivable which came into the trustee's hands on the date of bankruptcy "arose" \(^{90}\) within four months prior to the date the petition was filed. When the accounts arose, a security interest was automatically "transferred" to the creditor, Rose City, under its security agreement with the bankrupt. The debt secured by the accounts receivable had come into existence "antecedent" to the transfer of a security interest in them. \(^{91}\) The bankrupt was insolvent throughout the four months prior to the filing of the bankruptcy petition. In short, the facts seem squarely to fit §
60 (a) (1)’s definition of a preferential transfer,\(^{92}\) which the trustee may avoid under § 60 (b).\(^{93}\) The facts seem equally well to fit within the scope of § 9-108 of the Code, which states squarely that “after-acquired property shall be deemed to be taken for new value and not as security for an antecedent debt.”\(^{94}\)

At last reaching the issue in the case, it is tempting to the decision-maker or commentator to haul down the federal-law-is-supreme-over-state-law grundnorm, to search through the legislative history and case precedents for interpreting § 60 (a) (1), and then to dispose of the case on the answer to the question of whether “transfer for an antecedent” debt can be construed to accommodate state law which would relate a transfer back to the time the debt was incurred and value given.\(^{95}\) Such a procedure confuses the question “How can I get out of this case by matching it with what the law says?” with the different question “What is

\(^{92}\) The Bankruptcy Act § 60(a)(2), 11 U.S.C. § 96(a)(2) reads as follows: [A] transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on simple contract could become superior to the rights of the transferee.

Bankruptcy Act § 60(a)(1), 11 U.S.C. § 96(a)(1) reads:
A preference is a transfer... of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

The rest of § 60(a), subsections (3) through (8), define “so far perfected” as that no subsequent lien upon such property, obtainable by legal or equitable proceedings, could become superior to the rights of the transferee.

\(^{93}\) § 60(b) prescribes an additional requirement for avoiding a preference: Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.

Portland Newspaper does not raise a factual question under this section. See text at notes 36-37 infra.

\(^{94}\) Uniform Commercial Code § 9-108 reads:
Where a secured party makes an advance, incurs an obligation, releases a perfected security interest, or otherwise gives new value which is to be secured in whole or in part by after-acquired property his security interest in the after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in such collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given.

\(^{95}\) In the author’s opinion there can be only one answer to this question: § 60(a) of the Bankruptcy Act cannot accommodate Code § 9-108. See note 132 infra.
the right and just (and righteous) result for this case?" Referee Snedecor did not confuse the questions. Although he responded properly to the first question, he devoted more of his opinion in Portland Newspaper to the second question.96

Considerations of rightness and justice return us, as they did Referee Snedecor, to the twin goals of avoidance of preference and equity of distribution. The purpose of avoiding preferential transfers is manifestly to provide for a more equitable distribution among all creditors and, secondarily, to discourage creditors from prolonging (by action or inaction with their powers over the debtor) the period of insolvency before bankruptcy. The strong connection between the two policy goals for preference and distribution makes it unreasonable to attempt to achieve fairness and justice in a § 60(a) case without weighty deliberation on the decision's effect on the equity of allocation of assets in the bankrupt's estate.97

To recapitulate a previous section of this article,98 the Bankruptcy Act's ordering of precedence and priority in the distribution of the bankrupt's assets is basically tripartite: first, the satisfaction of perfected security interests in, and liens on, specific property to the extent of the value of the property and in the priority set by non-bankruptcy law; second, the satisfaction of claims awarded "priority" standing by § 64 of the Bankruptcy Act, in the rank specified in that section; and third, the satisfaction of all other claims, including, in the case of a business entity, the claims of equity owners and creditor entrepreneurs. This order has existed without basic change for a century. The Bankruptcy Act of 1867 introduced it, and the Act of 1898 carried it forward.99

Referee Snedecor seems to assume, in agreement with the law review authors whom he cites favorably, that there is no difficulty on the basis of legislative intention in holding that § 60(a) does not require deference to Code § 9-108.97 The connection is underscored in Portland Newspaper. See note 123 infra.

See text at notes 21-27 supra.

Although "the status of secured creditors in their debtor's bankruptcy is a problem of fundamental importance," 3 Collier, Bankruptcy ¶ 57.20 at 297 (14th ed. 1966), "the Bankruptcy Act does not exhaustively regulate the legal situation of a secured creditor." Id. at 158. "Exhaustively regulate," indeed. The secured creditor has three options: surrender his security and enter bankruptcy court as a totally unsecured creditor; claim his security and claim as an unsecured creditor the difference between the value of the security and the amount of the debt asserted; or take his security and not make any claim. If he takes the first option, he will be treated like any other unsecured creditor. If he elects the (Continued on next page)
The Chandler Act amendments of 1938 thoroughly rewrote the second order of precedence, i.e., the § 64 priorities, but made only a few significant substantive changes. The first order has been tinkered with from time to time in recent decades to affect the status of state and federal tax liens, and the alternatives to straight bankruptcy, with their substituted distribution schemes, were strengthened by the Chandler Act.

The distribution order is necessarily archaic (or only coincidentally modern) insofar as it traces back to 1867. The commercial methods of that era have metamorphasized through several stages to the present highly developed devices of business finance. To almost the same extent, the changes in the order introduced in second, the valuation of his security will be subject to scrutiny under the express mandate of § 57(h) of the Bankruptcy Act to bankruptcy courts. "The value of securities held by secured creditors shall be determined . . . under the supervision and control of the court." Suppose, however, that the secured creditor chooses only to take his security, without making any claim. "In that case . . .", there is no room for the application of Section 57(h)." Id. at 301. If the bankruptcy trustee obtains possession of the collateral, the secured creditor must intervene in the proceeding by moving to reclaim the specific property in which he has a security interest. Suppose the worth of the property far exceeds the amount of the claim. Can the bankruptcy court do anything about it, especially if there are no other assets in the estate? Unless the bankruptcy court can invoke §§ 60, 67 or 70 the authority for reducing the secured creditor's recoupment is virtually nonexistent. See 2 COLLIER, BANKRUPTCY ¶ 23.11 (14th ed. 1966); 4 COLLIER, BANKRUPTCY ¶ 70.89 (14th ed. 1966).

The most important changes were (a) consolidation of all administrative expenses of the bankruptcy proceeding into a single first priority class; (b) advancement of wage claims from behind creditors' claims for expenses incurred in resisting a confirmation or discharge to a second priority; (c) abolition of all state priorities except claims for rent. For a word-for-word comparison between the 1898 and the 1938 versions of § 64, see 3 COLLIER, BANKRUPTCY ¶ 64.01 at 2049-50 (14th ed. 1968). The modifications represented special interests which had been urged on the Chandler Act revisers and not any compromised preference for a radical alteration of the substance of § 64. See H.R. REP. No. 1409, 75th Cong., 1st Sess. § 15 (1937); HEARINGS ON H.R. DOC. NO. 6439, 75th Cong., 1st Sess. § 64, 158-60 (1937). Section 64 has been altered in small ways since 1938. For a contemporary paean of the plight of the unsecured creditor, see note infra. See 3 COLLIER, BANKRUPTCY ¶ 64.01 at 2055-58 (14th ed. 1966).

Compositions were brought into American bankruptcy law by an 1874 amendment to the Bankruptcy Act of 1867. Section 12 of the Act of 1898 continued the composition as a device available in bankruptcy proceedings to both corporate and non-corporate debtors. New provisions for compositions and extensions available to non-corporate debtors were contained in § 74, added in 1933. At the same time, § 77 was added to provide for reorganization of railroads, and in 1934 Congress added § 77B to provide for reorganization of other corporations.

All of these sections except § 77 were repealed by the Chandler Act and replaced with Chap. X (Corporate Reorganization), Chap. XI (Arrangements), Chap. XII (Real Property Arrangements by Persons Other Than Corporations), and Chap. XIII (Wage Earners Plans).
1898 are out-of-date. Even the minor Chandler Act modernization occurred before the full development of secured financing as represented by the Uniform Commercial Code. The first growth of modern business financing, in the nineteenth century, produced the non-possessory chattel mortgage (and other devices), which facilitated the hypothecation of the most durable and tangible assets of a business—its manufacturing machinery, service equipment, and stock-in-trade. Working capital, however, came from business entrepreneurs themselves, investors' capital, and unsecured bank credit. By and large, accounts receivable and other similar intangibles were not used as secured credit collateral, although they have long been otherwise important in commercial financing, especially in some trades. When a

103 Gilmore, op. cit. supra note 90, § 2.1, 24-25. “The story of how the equipment and the rolling stock and the stock in trade came to be available as collateral is essentially the story of personal property security law in the nineteenth century.” Id. at 25.

104 We are talking about small businesses, corporate and non-corporate, as they existed in the nineteenth century and as they exist today, and not about the large corporate enterprises that have evolved during the same time.

The financial characteristics of large and small manufacturing corporations differ . . . with respect to various operating and balance sheet relationships. The small enterprise relies more heavily upon short-term funds for its financing than the large corporation; in relation to total assets the smaller company has less funded debt and less net worth than the large company, and more accounts payable and more notes payable. In addition, the general credit position of the small corporation appears to be not quite so strong as that of the large enterprise. For example, the small company has a lower ratio of current assets to current liabilities, a higher proportion of total debt represented by current items.

These comparisons indicate that small manufacturing corporations are more susceptible to failure than large enterprises. The latter, since they have a stronger liquidity position, can ‘live on their surplus’ for a longer time, and thus during period of business strain they are more able to continue their former policies, both financial and economic. Furthermore, the ownership structure of large companies—with a great many persons directly dependent upon the enterprise—is such that a reorganization to forestall general liquidation is usually arranged before the threat of insolvency becomes immediate. (Footnotes omitted.) MERWIN, FINANCING SMALL CORPORATIONS 11 (1942).

105 Id. at 18:

Accounts receivable financing is not a new development. The open account has long been recognized as one of the preferred assets of business concerns; a good deal of the attention of the banker has always been centered on the amount and quality of these accounts and on their relation to other quantities in the corporate balance sheet. Beyond this, the account receivable has been, for centuries, the specific basis of short-term financing in the textile trades by individuals and concerns known as ‘factors.’

Accounts receivable financing, as a technique for supplying funds to business enterprises, evolved many years ago out of business demands that went far beyond the need for advances of funds. As early as the fourteenth century, manufacturers and merchants in both foreign and

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business went bankrupt, the secured creditors enforced their interests in collateral, but second-order priority and general creditors shared according to rank in at least the odds and ends of the business, which the bankruptcy trustee liquidated in the windup of the bankrupt's affairs.\footnote{106}

The second growth of modern business financing began in the early twentieth century with the increased need for credit brought on by expanding technology and the costliness of the equipment it produced.\footnote{107} Stimulated in 1930's by the capital drain of the Depression,\footnote{108} the second growth signified the development and expanded volume of accounts receivable,\footnote{109} field warehousing,\footnote{110} and conditional sales financing.\footnote{111}

(Footnote continued from preceding page)

domestic trade felt the need for some specialized agency to perform a selling and merchandising service for them (not unlike that offered by the commission merchant in more recent times). Since sales were generally made on credit terms of 30 days or longer, it proved to be convenient for the agency responsible for making sales also to advise on the wisdom of extending credit to any given buyer. Finally, this agent (the "factor") undertook in some instances to absorb losses arising out of credit sales by buying the open accounts so originated without recourse on the seller (the factor's "client"). In effect, the seller or manufacturer was placed in the position of making all sales for cash.

\footnote{106} Cf. note 114 \textit{infra}.

\footnote{107} \textsc{Saulnier \\& Jacoby, Financing Equipment for Commercial and Industrial Enterprise} 15 (1944): Technological progress and business competition have been the basic conditions promoting the growth of installment equipment credit. \ldots

Technological change has been operative over an increasingly wide area, greatly increasing the market for both equipment and the financing services frequently required for its acquisition. In the retailing and service trades as well as in manufacturing industries, machinery and equipment has [sic] become more and more essential to the successful operation of business.

While large as well as small companies in all industries are affected by the trend toward mechanization of production facilities it is notable that concerns in the retail and service trades, where equipment financing facilities are widely used, are typically \textit{small}.

\footnote{108} \textsc{Jacoby \\& Saulnier, Financing Inventory on Field Warehouse Receipts} 9 (1944):

Although \ldots [the] credit devices [of term lending, accounts receivable financing, installment financing of commercial and industrial equipment and field warehousing] emerged prior to the depression of 1929-32 \ldots, it is clear that each of them expanded in both absolute and relative significance under the depression and recovery conditions of the 1930's.

\footnote{109} Non-notification receivables financing "developed much later than old-line factoring, not being practiced on any considerable scale until after 1908." \textsc{Saulnier \\& Jacoby, op. cit. supra} note 105, at 21.

\footnote{110} "The business of field warehousing appears to have developed in the United States after the turn of the twentieth century." \textsc{Jacoby \\& Saulnier, op. cit. supra} note 108, at 12.

\footnote{111} See note 107 \textit{supra}. The second growth has been signified by the ap-
The disparity between the economic model for distribution of assets under the Bankruptcy Act and the changing realities of commercial financing was mitigated for years—perhaps, for some trends of financing, as long as a half century—by the failure of state law to keep fully abreast of change. The law for perfecting security interests tended to be either too cumbersome and unsettled for compliance when applied to the most recent business methods or inadequate to prevent the trustee in bankruptcy, in his status of lien creditor or bona fide purchaser, from overcoming the otherwise secured creditor on the date of bankruptcy.\textsuperscript{112} Article Nine of the Uniform Commercial Code not only has brought uniformity among the states but also has moved state law into fullest accommodation with the ways of modern financers for achieving maximum credit security. The "secret lien," the "pocket lien," and the "gap creditor" are banished; "total security," "bankruptcy ownership," and the "disadvantaged creditor" blossom under a nearly impervious legal umbrella.

The twentieth century law of "total security" obfuscates a just and fair distribution of a bankrupt's estate under the Bankruptcy Act's nineteenth-century order of distribution in three ways. First, there is little property which a debtor has at one time or can acquire in the future in which a creditor cannot obtain a perfected security interest by a single agreement.\textsuperscript{113} Full

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\textsuperscript{112} See text at notes 105-08 supra.

use of the security interest power can radically change the established goals of bankruptcy distribution.114 For example, suppose that a creditor or group of creditors organizes a business which requires only a small investment to begin operations.115 They provide the initial operating cash or persuade a "proprietor" to provide it. They take a security interest in all of the property of the business including inventory and receivables.116 If further operating capital is needed, they advance it under the terms of their security agreement. When the business is well established, they permit the unsecured debts owed to suppliers and employees to accumulate until the business is insolvent, i.e., until the debts exceed the net worth of the business.117 Eventually the proprietor or unsecured creditors initiate bankruptcy proceedings. The secured creditors now own the business,118 the proprietor has lost whatever he put into it,119 and the priority and unsecured creditors have been liquidated out of the balance sheet.120 The original se-

114 See note 124 infra. In terms only of who gets how much in the distribution money, the change can not be radical. "In liquidation cases, the unsecured creditor recovers almost nothing from a bankrupt debtor. In the fiscal year ending June 30, 1965, for example, the courts disposed of 145,655 straight bankruptcy cases. Of these, 18,513 were "asset" cases, with an average payment to creditors of $5,527 per case. An additional 19,008 cases were "nominal asset" cases, in which assets of the estate were consumed by administrative costs, and in the remaining 108,134 cases there were no assets available after exemptions. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics, Fiscal Year Ending June 30, 1965, Comments, pp. 1-7.

"In the relatively few asset cases, secured creditors were paid 60.7% of their claims, and unsecured creditors received 7.5%. Id. at Table F.6. An examination of these statistics for the last twenty years indicates that when an unsecured creditor is fortunate enough to find some assets in the debtor's estate, on the average he is not likely to recover more than eight or nine cents on the dollar." Note, 8 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 101, 112 n.71 (1966).

115 Or take over an established business that promises growth but is undercapitalized.

116 "[Article 9] provides in substance that anything that is property, tangible or intangible, can be the subject matter of a security interest." (Footnote omitted). 2 GILMORE, op. cit. supra note 90, at § 45.5, p. 1305. Is Article Nine "property" coextensive with Bankruptcy Act "property?" See Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1952). The answer would seem to be yes, at least in typical business circumstances. See note 117 infra.

117 In our hypothetical of a continuing business the valuation of its property for purposes of determining insolvency must be calculated on the basis of a going concern, with a realistic estimate of the goodwill that a bankruptcy business can have, and not on the basis of of the aggregate values of separate items of property. See 1 COLLIER, BANKRUPTCY ¶ 1.19 at 119-21 (14th ed. 1966).

118 See note 123 infra.

119 The proprietor would of course not be a creditor.

secured creditors are free to set their already-established business back in motion again, debt free and capital gained.\footnote{Inasmuch as some debts, such as tax and wage liabilities, survive discharge in bankruptcy, Bankruptcy Act § 17, 11 U.S.C. § 35 (1966), it is necessary that the bankrupt business be the person of a corporation which disappears upon bankruptcy.}

\footnote{Suppose the business as an ongoing concern is worth $20,000, as conservatively estimated as the condition of bankruptcy justifies. The secured creditors hold a security interest in the entire business, valid against attack under §§ 60, 67, or 70 of the Bankruptcy Act. They have advanced to the bankrupt a total of $14,000 which remains unrepaid. Unsecured claims total $11,000. The secured creditors do not file as creditors of the bankrupt, but instead institute a reclamation proceeding for the entire business. Do they obtain all the property and in fact become owners-by-bankruptcy, getting $6,000 in increased value and shutting out unsecured creditors? See supra, note 99.}

The Uniform Commercial Code itself should prevent such a manifestly unjust result. Article 9, Part 5 ("Default")—an unholy scriptural quagmire—authorizes secured creditors to take possession of collateral on default, § 9-505, and permits them to dispose of it in any commercially reasonable way. Section 9-504(1). However, the secured parties must account to the debtor for any surplus from the sale. Section 9-504(2). (It should be noted that there are special rules for enforcing a sale of accounts on default. Sections 9-502, 9-504(2).) If the secured creditors who have obtained possession of the property in which they have held a security interest prefer to keep the property in full satisfaction of the debt, as they would in our example, § 9-505(2) of the Code requires that they give written notice to the debtor (and to any other party secured by the same collateral) and allows the noticed party thirty days from receipt of the notification in which to object. If the party objects, the secured creditors must dispose of the collateral according to the rules of § 9-504, which include paying over any surplus. Because under § 70(a)(3) of the Bankruptcy Act the bankrupt's trustee is vested with his powers for personal benefit, the trustee would have the right of objection after the secured creditors had reclaimed the property.

Of course, the disposition of the collateral under the secured parties' direction permits, as it always has permitted, a good deal of self-serving manipulation, even under the Code's standard of commercial reasonableness and the other protective provisions of Part 5 of Article 9. The requirement of a public sale, which would apply in our example, § 9-504(3), is a notoriously weak guarantee of righteous conduct. "The concourse of bidders at the typical foreclosure sale, be it ever so 'public,' is apt to be about as lively as a group of mourners at a funeral." 2 Gilmore, op. cit. supra note 90, at § 44.6, p. 1242. Moreover, in accord with previous law, the secured party is not prohibited from purchasing at his own sale. Section 9-504(3). Although the separately-stated provisions in § 9-507 for reviewing in court the secured party's failure to comply with all of Part 5's requirements do not very well ventilate the miasma of foreclosure, the Code's vulnerability to corruption should be overcome in bankruptcy court by the charge to bankruptcy decision-makers to do equity.

Suppose, however, that the secured creditors have taken possession of the collateral and have given notice of intention not to dispose of the property and that the debtor (and anyone else noticed) has failed to respond within 30 days. Suppose further that the debtor is not plunged into bankruptcy until after these events have occurred. Do the secured creditors become bankruptcy owners of all of the collateral, without obligation to return surplus and free from the claims of unsecured creditors? The demands of the Code have been met; it is too late for the trustee, in the shoes of the debtor, to take advantage of any Code provisions except, possibly, § 9-507, if the secured creditors' conduct can be assailed. However, §§ 60, 67(d)(2), or 67(d)(3) of the Bankruptcy Act may apply, if there has been a preferential or fraudulent "transfer" of the debtor's property within four months §§ 60 and 67(d)(3) or 1 year (§ 67(d)(2)). Was the debtor's failure to object to the secured party's retention of the collateral without... (Continued on next page)
Portland Newspaper is not such an extreme case, and such economic malevolency cannot, on the facts, be attributed to the creditors asserting security interests in the newspaper's accounts receivables. Nevertheless, Referee Snedecor recognized the tendency toward total security and its unfair effect on the bankruptcy distribution:

The old-fashioned method of operating a business on the strength of equity capital and unsecured bank credit based upon the financial integrity of the debtor seems to be giving away to the modern trend of financing business operations in reliance upon a floating lien on current assets with little or no regard for equity capital. Added to this is the more recent development of leasing, instead of owning, plant and equipment. These methods leave the daily suppliers and employees in a perilous position. The instant case furnishes a dramatic illustration in which the priority labor claims amount to nearly $43,000. Employees furnished the labor to publish and deliver the newspapers that gave rise to the receivables in controversy. The moneys advanced by the creditors claiming security long since had been dissipated in operating losses. If these floating liens are valid, the wage claimants may receive not more than fifteen per cent on their claims out of the free assets.123

The second assault on fair distribution in bankruptcy arises from Article Nine's notice-filing provision. Section 9-402 states that:

A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest can be obtained, gives a mailing address of the debtor and con-

(Footnote continued from preceding page)
disposition by sale a "transfer" under these provisions? The answer would seem to be yes, because the secured creditors certainly gained more 'property' by the debtor's failure to object than they previously held by a security interest in the collateral for a debt of a significantly smaller value. See infra note 32. After all, a transfer is a transfer is a transfer. Cf. supra note 90.

Even if the Code's rules or bankruptcy's equity prevails against secured creditors where collateral exceeds debt, the exchange of (1) a security interest in the property (for a debt of $14,000) plus a payment of $6,000 for (2) a debt-free business valued at $20,000 in bankruptcy may not be such a bad bargain, especially after the stigma of insolvency has been worn away from the business.123 See Hogan, Future Goods, Floating Liens, and Foolish Creditors, 17 Stan. L. Rev. 822, 840 (1965), quoted by Referee Snedecor in Portland Newspaper at 214.
tains a statement indicating the types, or describing the items, of collateral.\textsuperscript{124}

*To whom* is the statement sufficient? Inasmuch as the New Righteousness of the secured creditor rests heavily on the Code’s system of notice-filing, which purports to overcome the fraud of secret liens, this is an especially pertinent question. Is it adequate warning to a potential bankrupt’s employees, small-time suppliers, and casual vendors? Can any kind of filed notice justify omitting them entirely or almost entirely from the bankruptcy distribution?\textsuperscript{125} As total security becomes widespread the logical alternatives to taking the risk will reduce to one alternative: ceasing altogether to be a small-time supplier, an employee, or a casual vendor. The notion that employees, like the wage-earners in *Port-

\textsuperscript{124} Id. at 213:
There is no requirement that . . . [the filing statement] contain any information concerning the limit of the credit to be extended, the amounts advanced or to be advanced or the terms of payment. All such information must be obtained from the secured party. The desired information may vary from day to day according to advances made. So that the information obtained one day may not serve as a criterion for credit a few days or weeks later. There seems to be no requirement that the secured party furnish the desired information in writing. Oral information would be of little value to an inquiring creditor who may have in contemplation the extension of credit to the debtor on a secured basis.

In *National Cash Register Co. v. Firestone & Co., Inc.*, 191 N.E.2d 471 (Mass. 1963), a conditional seller sued a finance company in tort for conversion of a cash register sold to the proprietor of the Kozy Kitchen. Before the cash register was delivered to the buyer and before the seller had perfected its interest in it, the finance company, in consideration of a contemporaneous loan of $1,911, perfected a security interest in the following goods, chattels, and automobiles, namely: The business located at and numbered 574 Washington Street, Canton, Mass. together with all its good-will, fixtures, equipment and merchandise. The fixtures specifically consist of the following: All contents of luncheonette including equipment such as: booths and tables; stand and counter; tables; chairs; booths; steam tables; salad unit; potato peeler; U. S. Slicer; range; case; fryer; compressor; hobtail; milk dispenser; silex; 100 Class air conditioner; signs; pastry case; mixer; dishes; silversware; tables; hot judge; Haven Ex.; 2 door stationwagon 1957 Ford No. A57-R107215 together with all property and articles now, and which may hereafter be used or mixed with, added or attached to, and/or substituted for, any of the foregoing described property. (quoting from the security agreement). *Id.* at 472.

In its financing statement the finance company indicated its collateral only as “All contents of luncheonette.” *Id.* at 475. Shortly thereafter the proprietor defaulted on both the security agreement and the sales contract. The finance company took possession of the cash register and promptly sold it. The conversion suit followed. The court held for the defendant finance company, concluding that under the Code the seller had a prior perfected security interest in the cash register.

\textsuperscript{125} The origins of notice-filing in the law of real property transactions hardly supports justification-by-analogy.
land Newspaper, have any realistic option is of course preposterous under almost any conditions. The likeliest party to benefit under the Code notice requirements is the security-conscious financer who needs to know whether another financer has already taken a (maximum) security interest in the property of a proposed debtor.

The third distortion of equitable distribution is the Code’s permission for any secured creditor to allow the debtor unfettered control of all collateral (except where perfection depends on possession). The secured creditor is relieved from the commercial nuisance of taking possession of, segregating, marking, or in any other way identifying his interest in the collateral. He is also placed in the advantageous position of hearing no evil, seeing no evil, and speaking no evil. If an anxious supplier does check the files for financing statements and does make inquiries of a secured party whose address is shown, the secured party is in a legally strong position to respond that, yes, he believes the business is sound and, no, he does not presently know of any reason prematurely to enforce his security interest because of weakness in the debtor's financial condition.

More importantly, the Code’s permissiveness may have the effect of promoting bankruptcy, both its occurrence and the severity of the losses which it imposes. The secured creditor, especially the totally secured creditor, is in the strongest position to influence the conduct and course of his debtor’s business. He can possess the economically and legally effective tools for forcing the debtor to remain within the bounds of financial safety, to improve the management of his business, and to take a more realistic view of its future. By the Code’s relief from any mandatory requirement that the creditor exercise his power in order to save his security, the opportunity to prevent bankruptcy or lessen its impact may be lost, as it seems to have been lost in Portland Newspaper.

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126 Uniform Commercial Code § 9-205.
127 Cf. Bankruptcy Act § 60(b); See text at note 136 infra.
128 The Code does not of course prohibit or hinder the secured creditor’s control over the debtor’s business. See, e.g., Uniform Commercial Code § 9-205, Comment 5 (1962).
129 Portland Newspaper at 211: Admittedly if Rose City had retained in its agreement the policing provisions of Section 2.5 of the printed form and had insisted upon their observance, it might have avoided the preference challenge. Require-
The underlying conflict between the Bankruptcy Act and the Uniform Commercial Code arises from the difference between the models of business transactions which the two codifications postulate. Although Portland Newspaper does not raise all of the section-against-section incongruities and conflicts between the Act and the Code, it does strike at the heart of the dislocation between two systems of law which should be interrelated harmoniously. Throughout the history of present and prior bankruptcy acts, the policy of equity and equality for the distribution of a bankrupt's assets has been practiced through an order of precedence and priority which, when applied in cases governed by the Code's economic model, may not result in the realization of the policy at all.

This is what the shooting is about. This is the conflict that must be resolved to halt the anguish on the battleground of flesh and blood cases. It is not primarily a question of internal consistency in the Code, of adequacy of notice to unsecured creditors, of the supremacy of federal law over state law, of the need to change the Code to accord with the Bankruptcy Act, of the failure of bankruptcy referees properly to apply Code provisions, or of the necessity of always protecting the secured creditor.\textsuperscript{130} Although these questions may have significance as independent and secondary problems, they do not go to the heart of the conflict and their answers will not resolve the conflict.

\textsuperscript{130} Among partisans of the secured creditors there is an unseemly weakness for elevating the threat of the secured creditors' reduction and withdrawal of credit to the order of ghoulies and ghosties and longleggedy beasts and things that go bump in the night. Statements, such as "the instant decision \textit{in Portland Newspaper} is unwise, . . . because the debtor will not be able to secure long-term loans on future inventory or receivables," Note, \textit{44 Texas L. Rev.} 1369,

\textsuperscript{Footnote continued from preceding page}
VI. Resolution

"Portland Newspaper" is an easy case. The claims of two of the creditors asserting security interests in the bankrupt's accounts receivable can be relegated to the status of unsecured claims without reaching any conflict between the Bankruptcy Act and the Uniform Commercial Code. The claims of a third creditor do raise the conflict, but the narrow issue for decision, whether § 9-108 of the Code can prevail over the trustee's power under § 60 of the Act, allows the referee simultaneously to apply the letter of the law and to effectuate the policy of a just distribution. The legislative history of § 60 (1) of the Act clearly supports the decision that § 9-108 cannot prevail, because Congress has consistently intended to banish the doctrine of relation-back, on

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1377 (1966), are too facile. It is better to investigate underlying economic realities and not to underestimate the ability of lenders to rise above the spectre of defeat in bankruptcy court.

131 *Portland Newspaper* at 200-09.

132 Although an exhaustive study of the legislative history of § 60(a) would take the investigator back to 1898, when the present Bankruptcy Act was originally passed by Congress, it is necessary only to revert to the Chandler Act of 1938. In amending § 60(a) it sought to strengthen the bankruptcy trustee's power to avoid preferential transfers. Professor James A. McLaughlin, on behalf of the National Bankruptcy Conference, shepherded the explanation of the Chandler bill (which the Conference had prepared) through the June 1937 hearings before the House Committee on the Judiciary. *House Hearings on H.R. 6499, 75th Cong., 1st Sess.* 120-25 (1937). When the Committee reached § 60 the following exchanges took place:

Professor McLaughlin:
We are trying to strike down the special advantages that those who are in peculiarly friendly relations with the bankrupt, either in a family way or in a business way, are able to get; or the advantages that those who are in a peculiarly strong economic position with reference to the bankrupt are able to get. *Id.* at 120.

[When it comes to the question of setting aside a transfer that has already been made, which discriminates unfairly in favor of a given creditor, there is where the bankruptcy power is the only adequate power in this country. *Id.* at 120-21.

(The Professor recited the case of Thompson v. Fairbanks, 196 U.S. 516 (1905), in which the Court applied state law permitting relation-back to uphold a mortgage on horses acquired within four months of bankruptcy.)

Now, the Chandler bill provides that the time that you look at, in considering the elements of preference, is the time when this transfer is perfected, insofar as it may be.

Mr. Michener. Regardless of what you call the fiction of State law?

Mr. James A. McLaughlin. Yes.

Mr. Celler. Where is that language?

Mr. James A. McLaughlin. Would you like to have it in the committee print?

Mr. Celler. Yes. *Id.* at 123.

(Professor McLaughlin then read into the record the bill's proposed § 60(a), (Continued on next page)
which the section depends for legitimacy. The outcome against § 9-108 and against Rose City’s claim of a Code-perfected security

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the exact language of which, except for details not here relevant, was subsequently enacted by Congress.)

Now, there has been very little difference of opinion in the bankruptcy conference about the essential desirability of strengthening the law of preference. To my mind, it is the heart of the whole business. We have had very few people that would in any way defend these cases.

There would be the possibility of cutting down the trustees’ status from that of a bona-fide purchaser to the status that he has under the 1910 amendment to section 47, of a lien holder. That would be less radical and would still knock out these fictions of “relation back” under State law which seem to me to be in the teeth of the policy of the Bankruptcy Act.

The precise compromise that we agreed upon—not by reason of a clash of conflicting interests but just as a bunch of intelligent gentlemen talking this thing over, in view of what would seem to be a reasonable balance—we decided to draw the line somewhere in between keeping the status of the trustee where it is under the act of 1898 and carrying out the full intention, or the full apparent intention, of the amendment of 1926, which would have given the trustee a right to attack that transfer, even if there was no particular class of persons as to whom it was required to be recorded. We limit to cases where it does have to be recorded in order to bind a bona fide purchaser.

Mr. Celler. You speak for the conference; there is no dissenting voice heard in that connection?

Mr. J. A. McLaughlin. My friends tell me not. Id. at 124-25.

In 1950 Congress amended § 60(a) again, primarily to replace the compromise bona fide purchaser standard with a lien creditor test (see note 54 supra) and to recognize state laws permitting a brief period (up to 21 days) for perfecting security interests without vulnerability to intervening creditors. In its report, the House Committee on the Judiciary states initially a third objective, however: “(A) To retain unimpaired the basic object of the 1938 amendment, which eliminated the “relation back” doctrine of Sexton v. Kessler...” H. R. REP. No. 1293. 81st Cong., 1st Sess. 6 (1949).

Sexton v. Kessler, 225 U.S. 90 (1912), is the famous case in which Mr. Justice Holmes, writing for a unanimous Court, upheld a creditor’s right to securities transferred to it within four months of the bankruptcy of its debtor, whom it knew to be insolvent. Several years previously the debtor had agreed to maintain a certain amount of negotiable securities in escrow deposit for the creditor’s protection against the debtor’s drawings. The creditor authorized the debtor to substitute the securities in escrow, which, with notification to the creditor, it did from time to time. When the debtor became insolvent during the panic of 1907, the creditor took possession of the securities. Shortly thereafter the debtor was adjudicated a bankrupt.

Justice Holmes stated: “The bankruptcy law by itself does not avoid the transaction. . . . A trustee in bankruptcy does not stand like an attaching creditor; he gets no lien by the mere fact of his appointment.” 225 U.S. at 97. In the loose law-making of pre-Erie days, the Justice decided that the parties had not violated any state or other law which would prevent holding that the creditor had obtained an equitable right in the securities from the date of the original agreement, as the parties had intended. In the course of his opinion he also noted: “Whether enough has been done to give a right of any kind in certain property is a question of more or less.” 225 U.S. at 98, and concluded that the parties, acting in good faith and without benefit of lawyers, had done enough. At no place does Holmes reveal any concern for other creditors of the bankrupt or attribute any particular significance to the fact that the debtor, Kessler & Co. of New York, was “intimately connected,” 225 U.S. at 95, with the creditor, Kessler & Co. of Manchester, England.

133 See text at note 90 supra.
interest results in a fund sufficient to satisfy the second-order priority claims for administrative expenses and back wages before the creditors who did nothing to police their shifting collateral or to forestall the severity of the bankrupt's insolvency.\textsuperscript{134} 

Portland Newspaper is, at the same time, a hard case because it may make bad law, i.e., it may promote confusion and uncertainty. By Referee Snedecor's own report, it is the first case to raise "the precise question . . . in a court of bankruptcy."\textsuperscript{135} The limits of the "precise question," however, are very narrow. The case is neither the first nor the last one to raise the underlying conflict between the Bankruptcy Act and the Uniform Commercial Code.

The decision may be construed as a signal precedent against the interests of secured creditors or as a strong precedent favoring unsecured creditors. Secured creditors are sure to cry that, at the very least, it creates uncertainty concerning the strength of their Code-protected transactions in bankruptcy court, even in cases which involve established patterns of financing in established kinds of business which are neither as commercially atypical nor as much in the interest of the general public as the publishing venture involved in Portland Newspaper. Moreover, the next case raising precisely the same question may be even further removed from the ultimates of "total security" and "bankruptcy ownership"; it may involve, for example, security interests in solely after-acquired inventory held by creditors adhering to the most conservative financing practices.

There are three responses to these apprehensions, in addition to the straw of court reversal of Referee Snedcor's decision and judicial reconstruction of § 60 (a) in the Code's favor. First, the creditor can keep his conduct within the protection of § 60 (b) of the Act, which permits a preference to be avoided only if the creditor gaining by it "has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent." The standard set by this requirement\textsuperscript{136} grants considerable latitude to

\textsuperscript{134} See text at notes 58, 123 supra.

\textsuperscript{135} Portland Newspaper 223; Rosenberg v. Rudnick, 262 F. Supp 635 (D. Mass. 1967), reported since this article was written, decides the same question, with a lightly reasoned opinion, contra Portland Publishing.

\textsuperscript{136} Security-First Nat'l Bank v. Quittner, 176 F.2d 997, 998-99 (9th Cir. 1949): The creditor cannot be charged with knowledge, or its equivalent, where a mere ground for suspicion exists. Grant v. National Bank, 97 (Continued on next page)
the bankruptcy decision-maker to allow property acquired by the debtor within the four months' insolvency period to pass to the creditor of the antecedent debt, if the creditor has been dealing at arm's length with the debtor and has not defaulted on any equitable obligation to take charge of a debtor whom he ought to know is, or is about to become, insolvent.\textsuperscript{137} Notwithstanding the attraction of doing justice in individual cases, extensive use of § 60 to defeat secured creditors would destroy the reliability and uniformity of the Code, so important to the financier's economic serenity. Second, the creditor can forego the operational advantages of § 9-205 and police his collateral so that he does not have security in "after-acquired" property.\textsuperscript{138} As unattractive as this alternative may be, its cost (when used selectively, according to the risk of a transaction) in the long run may prove to be (a) passable to the debtor or (b) less than losses in bankruptcy court.\textsuperscript{139} Third, secured creditors can press for a Congressional amendment to the Bankruptcy Act which will better accommodate their business methods.

Unsecured creditors, in their relatively unorganized and ill-represented state, are likely to continue their lament about the iniquity of the Code. The precision of the question in \textit{Portland Newspaper} so restricts the utility of the case as an on-all-fours precedent that it is not likely to affect in the unsecured creditors' favor the greatbulk of Code-dominated bankruptcy cases. In his concern for a just distribution, Referee Snedecor's considerations ranged far beyond the limits of his power over Code transactions. If all of the secured creditors' transactions had been properly perfected under the Code and all security had attached prior to the four months' insolvency time (or the preferred creditors had not had "reasonable cause to believe" the debtor's insolvency), the

\textsuperscript{137} The \textsc{Uniform Commercial Code} § 9-301 protects the creditor with a perfected security interest from the avoiding power of the bankruptcy trustee under § 70(c) of the Bankruptcy Act. See text at note 81 \textit{supra}.

\textsuperscript{138} See notes 128, 129 \textit{supra}.

\textsuperscript{139} See note 130 \textit{supra}. 
referee's efforts would have been ineffective, and the Bankruptcy Act's deference to state law would have impregnable. The trustee could not have set aside any of the asserted security interests, and the distribution of the bankrupt's assets would have been inequitable and unjust under the policy of the Act.

Assuming that Portland Newspaper is upheld on appeal and that in like cases the Bankruptcy Act prevails over the Code, there are perhaps only two other balms for the unsecured and priority creditors' lament. The first is to urge bankruptcy decision-makers increasingly to use the power of "equitable subordination" that inheres in bankruptcy as a proceeding in equity. The power has lurked in the shadows, in spite of strong endorsement by the Supreme Court, and generally has been invoked in only certain lines of cases. Any bankruptcy decision that contradicts the provisions of the Uniform Commercial Code without express authority of one of the avoiding powers enumerated in §§ 60, 67, and 70 of the Act especially risks the wrath of the Secured Creditors and their Protectors. Although to the author's knowledge the power of equitable subordination has not been used against the Code, it is possible that the constitutional supremacy of the Bankruptcy Act and its mandate to do equity could uphold such a decision, especially where a contrary outcome would result in extreme injustice to priority and other unsecured creditors.

140 Prudence Corp. v. Geist, 816 U.S. 89, 95 (1942): Nothing decided in Erie R. Co. v. Tompkins, 304 U.S. 64, requires a court of bankruptcy to apply . . . a local rule governing the liquidation of insolvent estates. The bankruptcy act prescribes its own criteria for distribution to creditors. In the interpretation and application of federal statutes, federal not local law applies. [Citations omitted] The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, Securities & Exchange Commission v. U. S. Realty Co., 310 U.S. 434, 455-457, and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class.

141 See Herzog & Zweibel, The Equitable Subordination of Claims in Bankruptcy, 15 VAND. L. REV. 93 (1961). The authors classify the grounds for subordination in the following categories: Agreement (consensual subordination), debt or proprietary interest ("capital contribution"), fraud, illegality, fiduciary relationship, and instrumentality ("alter ego"). Id. at 90-112.

142 See note 140 supra.

Of course, if the secured creditor files a claim in the bankruptcy proceeding, he submits himself to the power of the bankruptcy court under § 57(h) of the Bankruptcy Act to determine the value of the security held by the secured creditor. See note 99 supra.
The second solution is more realistic as law and less obtainable in fact. The Unsecured Creditors, regrouping and rehabilitating their Champions from the steamrollering of the Code sweep, could attempt to obtain from Congress a thorough revision of the Bankruptcy Act’s century-old distribution order which would reflect, on a par with the Code, today’s methods of business finance. There is precedent for altering the distribution order, especially in the piecemeal adjustment of the status of state and federal tax liens.¹⁴³

¹⁴³ The status of state and federal statutory liens, among which tax liens now predominate, has been changed by amendments to the Bankruptcy Act in 1938, 1952, and 1966. There is little authoritative legislative history which explains the 1938 and 1952 changes. In 1938, concern focused on the statutory lien of landlords. See, e.g., House Hearings on H.R. 6439, 75th Cong., 1st Sess. 159-60 (1937); H.R. REP. No. 1409, 75th Cong., 1st Sess. 15-16, 94 (1937). In 1952 the Congressional reports accompanying the amending bill did not clarify the reasons for or the import of the change. See 4 COLLIER, BANKRUPTCY ¶ 67.281 note 1, at 310. The following explanation, whose author was then Chairman of the National Bankruptcy Conference and had been a member of the Conference during the period when the Chandler Act was drafted, is probably the best comment:

It is proposed to amend § 67c in several respects, of which only one goes to substance. You will recall that in the overhauling of the Bankruptcy Act of 1898, one of the objectives of the Chandler Act of 1938 was to build up, as far as feasible and equitable, the residual fund for distribution among the general unsecured creditors. To achieve this, in part, § 64 was amended by deleting therefrom the priority given to a multiplicity of priorities created or recognized by State laws, and, in a complete revision of § 67, a new subdivision c was inserted, implementing some of the changes in § 64a by subordinating, in the circumstances specified, statutory liens to the priorities for administration expenses under clause (1) and for wages under clause (2) of § 64a. However, the new subdivision c of § 67 did not parallel in its scope the above noted deleted provision for State priorities. It is, therefore, proposed to amend § 67c, within the pattern of its scheme by providing that statutory liens created or recognized by State laws for debts owing to any person, including any State or subdivision thereof, on personal property not accompanied by possession of, or by levy upon or sequestration of, such property, shall not be valid against a trustee in bankruptcy. This proposed change, it is believed, will measurably carry out the objective above indicated and should effectively check the growing trend in State statutes of labeling as “liens” what essentially are “priorities” and thereby seek to evade the scheme of priorities as set up in § 64a. Weinstein, Amendments to the Bankruptcy Act As Proposed and Pending Before the Congress, 24 REP. J. 28, 32 (1950).

Even this statement does not fully explain why it was believed necessary in the late 1940’s and early 1950’s to further strengthen § 67(c) of the Bankruptcy Act. The root of the necessity seems to have been the conversion of the state “priorities” abolished by the Chandler Act into “liens” merely by changing the label in the statutes. For an example of one state’s conduct, see Louisville Title Mort. Co. v. Commonwealth, 290 Ky. 224, 225-26, 184 S.W.2d 963, 964 (1945). § 67(c) (1) did not attack such liens as thoroughly as amended § 64 attacked state priorities; the insertion of subsection (2) into § 67(c) in 1952 was designed to close the loophole.

(Continued on next page)
The content of such a new law is beyond the scope of this monograph and speculation. Several guidelines for its creation can be suggested, however: first, that the revision be based on as thorough an economic study of the effect of maximal use of Code devices on Bankruptcy distributions as time and resources permit;\(^ {144} \) second, that some hard philosophizing be directed toward

(Footnote continued from preceding page)

Unfortunately, the effect of the new § 67(c) was obscure; it created a notorious problem of circularity of liens which different courts resolved in different, conflicting ways. The 1966 amendment successfully replaced the obscurity with specific, more detailed language for § 67(c) (and § 67(b)); obviated circularity of liens under the section; and generally brought it up to date.

In addition, Congress in 1966 amended the Int. Rev. Code of 1954, §§ 6322, 6323 to protect secured creditors from federal tax liens by requiring notice-filing for the government to take priority and amended § 70(c) of the Bankruptcy Act expressly to make the bankruptcy trustee's interest superior to an unrecorded tax lien and thus to incorporate into statute the decision of the Supreme Court in United States v. Speers, 382 U.S. 266 (1965).

Whose fight has the successful agitation for subordination of tax liens been—the secured creditor's or the unsecured creditor's? On the basis of events in recent years it seems to have been more a compromise between the secured creditors and the Treasury Department than any creditor-to-creditor match. See Plumb, The New Federal Tax Lien Law, 53 A.B.A.J. 66 (1967). However, in pre-Code days the cudgels of the unsecured creditors were waved, at least in the law review arena:

While asserting that the humane and beneficent Bankruptcy Law in liberating the unfortunate debtor from the burden of his debts is a matter of public concern, let us also give heed to the mournful plaint of the great class of creditors who extend liberal credit to the bankrupt, on an unsecured basis. Let not the primary purpose of this law—to distribute the debtor's assets among his creditors, be an idle gesture comparable with the lip service of the hypocritical Pharisee. Veritably as we note under § 64 of the Bankruptcy Act, the order of payment of debt and distribution of the bankrupt's assets, the unsecured creditor as "the forgotten man" deserves our sympathy, sufficient to arouse the apathetic merchant groups throughout our country to the end that the Congress should immediately enact appropriate legislation to relieve bankrupt estates of the onerous burdens of tax claims and to permit, on an equitable basis, the unsecured creditor to receive, in a more substantial manner, a greater distributive share of the assets. The welfare of the merchant, the unsecured creditor, is also a matter of grave public concern! Duberstein, Tax Claims As Bankruptcy Problem, 44 Comm. L.J. 411, 415 (1939).

\(^ {144} \) Perhaps the current Brookings Institution study of bankruptcy problems is considering the distribution order. A spokesman for the Institution has proclaimed:

The Brookings study is a fresh look at the goals, the assumptions, the impact, the methods, the organization structure of the bankruptcy system. . . . [W]e are interested in questions of solvency or insolvency before and after straight bankruptcy. . . . [W]e shall give some study to conditions that go before formal proceedings and to the results of the proceedings for the discharged individual or the reorganized corporation. We are interested also in evaluating possible feasible alternatives to present ways of doing business. Stanley, The Brookings Institution Study of Bankruptcy, 40 Ref. J. 4, 5 (1966).
modern economics and its notions of business equity; third, that the possibility of elaborate provisions tailored to a number of basic, recurring bankruptcy-situations not be summarily rejected because of an ingrained abhorrence of statutory complexity.

This proposal is not for the Milquetoast Champion of Unsecured Creditors who prefers the heavenly illusions of angels to the sweaty reality of horned beasts. Notwithstanding the encamped presence of the Code in almost every jurisdiction, the advocate should take courage from the words of Mr. Justice Sutherland, reflecting on the extensions of bankruptcy legislation in the United States during the nineteenth century:

The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.}

Some questions: Who should bear the brunt of losses caused by business failure? By what criteria shall this question be answered? For example, on the basis of business negligence or culpable intentions? Or on ability to absorb the loss, either against profits or by passing it on? More broadly: what should be the role of bankruptcy in business failure?

See e.g., Pub. L. No. 719, 89th Cong., 2d Sess. § 101 (Oct. 13, 1966). which amended §§ 6322 and 6323 of the Internal Revenue Code, 26 U.S.C. §§ 6322, 6323 (1954). The full danger of complexity must be recognized, however. Section 60(a) of the Bankruptcy Act, as redrafted in 1950, is an earlier example of the art nouveau in statutory composition. Professor John E. Kennedy, with remarkable diligence, has subjected § 60(a) to the rigors of logical analysis. Considering only the "property other than real" provisions, Kennedy found fifty-six logical sentence-statements in § 60 which when strung together in proper logical interconnection, occupy five single-spaced typewritten pages.

The present section 60(a) is, by anyone's standards, highly verbose and repetitious. It is, as Professor Laube says, "representative of a somewhat windblown and redundant style of draftsmanship," and as Professor Moore characterizes, of a kind "which at once would have astonished and delighted Gilbert and Sullivan. . . . The [1950] amendment was the work product of new blood on the National Bankruptcy Conference which felt that the expanded language was necessary to promote clarity in dealing with complex concepts." Kennedy, Section 60(a) of the Bankruptcy Act: An Attempt at Systematic Redrafting (unpublished paper in Professor Kennedy's Office, College of Law, University of Kentucky, Lexington, Kentucky).

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