

Assignment of Accounts Receivable

CONFUSION OF THE PRESENT LAW, THE IMPACT OF THE BANKRUPTCY ACT, AND THE NEED FOR UNIFORM LEGISLATION

By *Maximilian Koessler*,*

with a Foreword by *John Hanna*†

FOREWORD

LAWYERS and law teachers interested in bankruptcy and security problems have been much concerned ever since the passage of the Chandler Act of 1938 with the application of Section 60 to existing security devices, especially assignments of accounts receivable. Differences of opinion as to desirable reforms have arisen, based both on theoretical and practical considerations, not wholly uninfluenced by thought of the effect of the present situation and of suggested changes on the competitive position of various business interests. It occurred to me that a useful contribution to this discussion might be made by a well-trained European lawyer with commercial experience whose foreign education had been supplemented by law study in the United States and who could approach the whole matter with a fresh viewpoint entirely without bias towards any particular interest. Dr. Maximilian Koessler was willing to undertake this task. Although I placed at his disposal my considerable file of correspondence with various lawyers and business men, it is unnecessary to add that I suggested no conclusions, and if I had, Dr. Koessler is a man of such independence that any ultimate opinions he expressed would be his own.

My basic position is that legislation should not interfere with the activities of business men unless there is a clear case of necessity in order to prevent harm. State intervention is rarely justified merely because it will aid some special group or interest. In financial matters

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I am particularly concerned that legal and administrative restrictions on the dishonest do not operate to place a disproportionate burden on the honest. Where a proposal involves an increase of governmental personnel, the burden should be emphatically upon those who favor such an increase to show its necessity. The chief utility of recording and filing statutes, with the possible exception of those concerning real estate, is not to prevent deception of creditors at the time they make loans or extend credit but to prevent fraudulent and preferential security interests being asserted after the debtor is insolvent. Original extension of credit is not based upon ostensible ownership but upon financial statements, business recommendations and personal inquiry. Recording is no solution of the problem of the man who is ready to deceive by fraudulent misrepresentation. If an extension of recording requirements is proposed, the legislators are entitled to know the nature and extent of the evil that is to be corrected by the suggested law. As Dr. Koessler points out, the confusion in respect to security law, particularly relating to assignments of accounts receivable, has occasioned recommendations for amendment of the Chandler Act, new recording statutes and amendments to the security law of various states.

In considering the possible amendment of the Bankruptcy Act in respect of security transfers it seems worth while to inquire at the outset as to the principle which should govern the provisions on this subject.

The fields of property, contracts and tort law are not among the matters over which Congress has any general constitutional authority. It seems obvious that the constitutional power of Congress to pass uniform laws on the subject of bankruptcies was not intended to confer such authority. The purpose of the bankruptcy power was rather to enable the federal courts to establish a method of distributing equitably the assets of an insolvent debtor. It may be conceded that it is a constitutional exercise of such power to modify to some extent the interests of parties as they appear under state law at the time when the jurisdiction of the federal court attaches. A characteristic exercise of such power is that of nullifying preferences in certain circumstances if they have occurred within reasonable proximity in time to the petition in bankruptcy. Preferences of course are inconsistent with the principle of equitable distribution. Likewise, there can be little question that the bankruptcy court can be given power

independent of state law to set aside fraudulent conveyances by the bankrupt. Whether Congress has the power as a part of the Bankruptcy Act to destroy property interests not available in any circumstances to creditors under state law is at best doubtful. It is certainly contrary to the theory which has heretofore prevailed in bankruptcy legislation. The notion that some interests can be defeated in bankruptcy merely by calling them secret liens is also intrinsically inconsistent with other provisions of the Act which specifically protect liens "created or recognized" by state statutes, irrespective of their notoriety.

If we agree that the Bankruptcy Act should provide for the distribution of the assets of a bankrupt which could have been reached by creditors under applicable state law, with reasonable rules for the avoiding of preferences and fraudulent conveyances, we can examine the present law with a view of ascertaining how far it conforms to such a principle. If we believe, on the contrary, that the Bankruptcy Act should establish general standards as to what property interests should be upheld, irrespective of state law, we face a different and far more difficult task. The following proposals assume that the latter alternative is rejected.

The Bankruptcy Act in Section 60b permits preferential transfers to 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.

Section 60a defines a preference as:

"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 a petition in bankruptcy . . . the effect of which will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class . . . a transfer shall be deemed to have been made at the time when it became 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."

By Section 1(30):

" 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property

or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise.”

Another relevant provision regarding preferences is found in Section 67b which reads in part as follows:

“The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy”

A study of the possible application of the foregoing sections to the common security interests is a necessary preliminary to proposals for amendments. The principal security devices, other than suretyship, are common law possessory liens, pledges, chattel mortgages, conditional sales, assignment of accounts receivable, trust receipts and real estate mortgages. In general, problems regarding these devices may be divided into those relating to the devices regularly and completely created, and those either imperfect to a degree or subject to defeat by certain persons in particular circumstances because of lack of public recordation or other notice of the security transfer. Certain security instruments, for example mortgages with after-acquired property or future advance clauses, may be perfected, executed and recorded, but have only a limited application in respect of certain persons. For example, in New York a chattel mortgage duly filed, with an after-acquired property clause, is good against a bona fide purchaser but not against an attaching creditor.

In some states a real estate mortgage, not properly acknowledged, and therefore not entitled to record, although it may in fact be recorded, will stand as against a judgment creditor but not against a bona fide purchaser. Indeed, in many states any unrecorded mortgage interest or even an equitable lien on land will have priority over a subsequent judgment lien, although these can be defeated by transfer to a bona fide purchaser.

Security interests are often good against all persons concerned with the transferor, in spite of imperfections in the transfer or lack

of record, because of knowledge on the part of those who might otherwise have attacked the security transfer. For example, in a small community a debtor may have given a mortgage to a creditor who has failed to record it. This fact in the jurisdiction may enable any judgment creditor without notice of the mortgage to obtain a prior interest. In the particular instance, however, the existence of the mortgage may be known to every other creditor before he obtains a judgment or even before he becomes a creditor. Such an unrecorded mortgage could also of course be defeated by transfer to a bona fide purchaser.

The confusion in respect to security interests which has been introduced by the Chandler Act has been chiefly emphasized in respect of assignments of book accounts, where in jurisdictions following the rule of *Dearle v. Hall*[‡] the rights of a hypothetical bona fide purchaser will enable creditors after bankruptcy to reach an assignee's interest otherwise unavailable to them. Another security interest endangered by the Act is that of the creditor secured by a trust receipt valid in the jurisdiction where issued either because of decision or because of filing under the Uniform Trust Receipts Act. Such trust receipts are generally not a protection against bona fide purchasers. While these trust receipt interests may not be transfers but a recognition of the lack of transfer, and hence valid under the Bankruptcy Act, it is not believed they are protected by Section 67b, because they are not related to the classes listed in the section and are not in fact created but rather recognized by state statute. Still another security interest in question under the Act is that of the mortgage on a stock of goods. Although such a mortgage is filed and generally good against attaching creditors, in some places it is not good against bona fide purchasers.

Without considering other possible opportunities for improving the Bankruptcy Act by amendment, but regarding only the problem of preferential transfers, it is submitted that if creditors were allotted such assets of the bankrupt's estate as they could have reached in the jurisdiction had they acquired the interests of a judgment creditor, within four months of bankruptcy, unsecured creditors will have no legitimate cause for complaint. The following tentative amendment to Section 60a is accordingly proposed for discussion:

[‡](1828) 3 Russ. 1, 48.

“For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no creditor of the debtor, if he had been entitled to all legal and equitable remedies available to judgment creditors, could thereafter have acquired an interest in the property so transferred superior to the interest of the creditor to whom the transfer has been made.”

In order to make certain that chattel mortgages and conditional sales are subject to the same rule as to preferential transfers, it is also suggested that Section 1(30) be amended to include in the category of transfers “record of any transfer”. As the law stands at present it is at least theoretically possible that if a conditional seller in a state having a filing or recordation statute took possession of a chattel within four months of a petition in bankruptcy, the conditional sale would be dated from that time in respect to the application of Section 60, although a different result would follow if the seller merely filed the chattel mortgage.

Since it is recognized that it is difficult to obtain amendment of the Bankruptcy Act at this time, even if there were general agreement as to the wording of amendments, the Committee on Uniform State Laws of the Association of the Bar of New York has proposed the following model uniform act relating to assignment of accounts receivable:

BE IT ENACTED (here insert remainder of appropriate enacting clause).

SECTION 1. (*Validity of the Assignment of Accounts Receivable, and the Rights of the Parties upon such Assignment.*) Every written assignment made in good faith and for value, whether in the nature of a sale, pledge or other transfer, of an account receivable (hereinafter called “account”), with or without the giving of notice of such assignment to the debtor, shall be valid, legal and complete at the time of the making of such assignment, and shall be deemed to have been fully perfected at that time. After the making of such assignment, no existing or future creditor of the assignor and no subsequent assignee or transferee of the assignor shall or can acquire, or shall be deemed to have acquired, any right, title, lien, or interest in or to such account, or in the proceeds thereof, or in any obligation substituted therefor, equal or superior to or in diminution of the rights of the assignee under such assignment. In any case where, acting without knowledge of such assignment, the debtor in good faith pays all or part of such account to the assignor, or to such

creditor, subsequent purchaser, or other assignee or transferee, such payment shall be acquittance to the debtor to the extent thereof, and such assignor, creditor, subsequent purchaser, or other assignee or transferee shall be a trustee of any sums so paid and shall be accountable and liable to the prior assignee therefor. "Value" means any consideration sufficient to support a simple contract, including an antecedent debt or liability where an account is taken in satisfaction therefor or as security therefor.

SECTION 2. (*Returned Property; Credits, allowances, or adjustments to the debtor.*) If, in the case of any assigned account, the merchandise sold, or any part thereof, is returned to or recovered by the assignor from the debtor and is thereafter dealt with by the assignor as his own property, or if the assignor grants credits, allowances or adjustments to the debtor, the assignee's right to or lien upon any balance remaining owing on such account and his right to or lien upon any other account assigned to him by the assignor shall not be invalidated, irrespective of whether the assignee shall have consented to, or acquiesced in, such acts of the assignor.

SECTION 3. (*Applicability.*) Notwithstanding the provisions of any general or special law, the provisions of this Act shall control, except as to transactions occurring before this Act takes effect, and except that this Act shall not be construed to alter or affect any existing law with respect to the transfer of negotiable instruments.

SECTION 4. (*Uniformity of Interpretation.*) This Act shall be so interpreted and construed as to effectuate the general purpose to make uniform the law of those states which enact it.

SECTION 5. (*Short Title.*) This Act may be cited as the Uniform Assignment of Accounts Receivable Act.

SECTION 6. (*Repeal.*) . . .

SECTION 7. (*Time of Taking Effect.*) . . .

John Hanna.

ASSIGNMENT OF ACCOUNTS RECEIVABLE

I. GENERAL SURVEY OF THE PROBLEM

The federal system of government in the United States leaves to a state, within the constitutional limits, the right to pursue a legal policy different from that of the other member states. One of the ultimate consequences of this system is the great diversity of law prevailing in the American jurisdictions with regard to the test for the priority of right among successive assignees of a chose in action. This is sometimes over-simplified by presenting it in the form of the alternative as to whether a given jurisdiction adheres to the so-called

rule in *Dearle v. Hall*,¹ or to an opposite doctrine. The difference between the two antagonistic rules is said to consist in whether priority of the date of the assignment itself or priority of the date of notification given to the debtor establishes the order of precedence between the competing assignees. However, as will be shown later, the existing authorities do not bear out such fool-proof statements. While it is true that the main issue concerns the question whether the rank between successive assignees of a chose in action is governed by the English rule (*Dearle v. Hall*) or by the American rule as sponsored by the Supreme Court of the United States in *Salem Trust Co. v. Manufacturers Finance Co.*² and by the American Law Institute in the *Restatement of the Law of Contracts*,³ it has been ably said that "both doctrines are variously applied" and that "there are leftists and rightists in both parties, for practical application of either rule."⁴

The unfortunate character, in a highly commercialized country, of the lack of uniformity just referred to, is stressed by the additional fact that neither theory nor practice could so far agree on a criterion determining the choice of the law which, in a conflicts case, should govern the validity of an assignment with regard to third persons.⁵ Even the *Restatement of the Law on Conflict of Laws*⁶ does not, or at least does not expressly, cover this special problem.

The great inconvenience, to say the least, inherent in the two phenomena just outlined, is spotlighted by a recent development of a mixed legislative and judicial nature. Its main phases are marked by the Chandler Act of 1938⁷ in that part of the Act which amended

¹The rule was laid down in the two simultaneously decided cases, *Dearle v. Hall* (1828) 3 Russ. 1, 48 and *Loveridge v. Cooper* (1828) 3 Russ. 1, 30, both in 38 Eng. Rep. 475.

²*Salem Trust Co. v. Manufacturers' Finance Co.* (1924) 264 U.S. 182

³RESTATEMENT, CONTRACTS (Am. L. Inst., 1932) §173. See also: RESTATEMENT, TRUSTS (Am. L. Inst. 1935) §163 and RESTATEMENT, RESTITUTION (Am. L. Inst. 1936) §126, comment f.

⁴Hamilton, *The Effect of Section Sixty of the Bankruptcy Act upon Assignments of Accounts Receivable* (1936) 26 VA. L. REV. 168, 173.

⁵Among others, see: 3 COLLIER, BANKRUPTCY (14th ed., 1941) 961, n. 2, and 963, n. 11; (1924) 31 A.L.R. 876, 883 and (1937) 110 A.L.R. 774, 778; (1937) 6 C.J.S. 1053 *et seq.*

⁶RESTATEMENT, CONFLICT OF LAWS (Am. L. Inst. 1934) §§353 and 354.

⁷The Chandler Act was the first comprehensive revision of the Bankruptcy Act of 1898. The latter had been altered in important particulars in 1903, 1906, 1917, 1922, 1926, 1933 and 1934. An annotated synopsis of the previous and recently amended texts of the Bankruptcy Act is contained in: HANNA and McLAUGHLIN, *THE BANKRUPTCY ACT OF 1898 AS AMENDED, INCLUDING THE CHANDLER ACT OF 1938* (1938).

Section 60(a) of the National Bankruptcy Act;⁸ the decision of the Supreme Court of the United States in the case of the *Corn Exchange Nat. Bank & Trust Co. v. Klauder*⁹ rejecting the ruling, by the Federal Court of Appeals for the Fifth Circuit, in *Adams v. City Bank & Trust Co. of Macon, Ga.*,¹⁰ and at the same time adopting the construction placed upon Section 60(a) by the Federal Court of Appeals for the Third Circuit in the case *In re Quaker City Sheet Metal Co., Appeal of Klauder*;¹¹ and finally the decision of the District Court, Eastern District, Missouri, in the case *In re Vardaman Shoe Co.*¹² carrying the same line of statutory construction an important step forward. The net result, with regard to non-notification assignments of accounts receivable, of the development thus sketched, may tentatively be stated in the following terms. Such an assignment, though really made for a palpably contemporaneous consideration, will, in the contingency of the assignor's bankruptcy, and insofar as the law of voidable preferences is concerned, be treated as if it had been made for antecedent value. According to the so far accepted interpretation of Section 60(a) of the amended Bankruptcy Act, the reality of an assignment for a present consideration is superseded by the artificial construction of an assignment for antecedent value. In the same connection, a distinguished writer, commenting upon the decision of the Third Circuit, made the following observations: "This is a pure fiction,"¹³ and: "The court has decided that black is white . . ."¹⁴ Similarly, the author of a law review note on the decision of the Supreme Court suggests:¹⁵

⁸ §60(a) of the Bankruptcy Act as amended by the Chandler Act of June 22, 1938, 52 Stat. 869 (1938), 11 U.S.C. §96 (1941).

⁹ *Corn Exchange Nat. Bank & Trust Co. v. Klauder* (1943) 318 U.S. 434; noted in: (1943) 21 *CHI-KENT REV.* 253; (1943) 29 *CORN. L. Q.* 105; (1944) 32 *ILL. B. J.* 210; (1943) 41 *MICH. L. REV.* 992; (1943) 22 *NEB. L. REV.* 134; (1943) 17 *TEMPLE L. Q.* 461; (1943) 91 *U. OF PA. L. REV.* 666; (1943) 29 *VA. L. REV.* 1067.

¹⁰ *Adams v. City Bank & Trust Co. of Macon, Ga.* (C.C.A. 5th, 1940) 115 F. (2d) 453, *cert. den.* (1941) 312 U.S. 699, noted in (1941) 29 *CALIF. L. REV.* 522; (1941) 41 *COL. L. REV.* 512; (1942) 36 *ILL. L. REV.* 783; (1941) 89 *U. OF PA. L. REV.* 510.

¹¹ *In re Quaker City Sheet Metal Co., Appeal of Klauder* (C.C.A. 3d, 1942) 129 F. (2d) 894, *cert. granted* (1942) 317 U.S. 617, *aff'd* by the Supreme Court of the United States under the style cited *supra* note 9.

¹² *In re Vardaman Shoe Co.* (E.D. Mo., 1943) 52 F. Supp. 562. The case was, after the decision of the District Court, settled between the parties and therefore not reviewed by a higher tribunal.

¹³ Wolfe, *Current Bankruptcy Controversies* (1942) 17 *TEMPLE L. Q.* 64, 65.

¹⁴ *Ibid.* at 67.

¹⁵ (1943) 29 *VA. L. REV.* 1067, 1069.

"The New Section Sixty has imposed . . . upon that rule an arbitrary provision whose operation to deplete the assets of the bankrupt's estate in the event of a failure to comply with its terms, is nakedly fictional, and only remotely similar to a business man's conception of what has taken place by such a transfer."

At any rate, Section 60(a) of the National Bankruptcy Act, as thus construed, eliminated an important legal factor with which extenders of credit on the basis of non-notification assignments of receivables could theretofore generally count. It destroyed the fact that such an assignment, even under the law of a jurisdiction which applied the rule of *Dearle v. Hall*, was good against the assignor himself, hence also against his creditor, standing in his shoes and, in further consequence, against his trustee in bankruptcy, too. No wonder that the new development caused alarm among the great number of people vitally interested in the preservation of non-notification financing of receivables as a workable method of credit accommodation.

It is a matter of common knowledge that this financing device, which for a long time played the role of a cinderella in our system of credits, has in recent years assumed proportions of large magnitude.¹⁶ Through its channels accommodation is provided to thousands of manufacturers and dealers, wholesalers and retailers, throughout the country, with an estimated annual volume totalling up to gigantic figures.¹⁷

Under the impact of Section 60(a), National Bankruptcy Act, this field assumed a strongly dynamic aspect. A vivid movement for legislative action was stirred up and is still in flux. Theoretically, there are of course two types of relief by statute possible in the given situation. One way would be to amend Section 60(a) of the National Bankruptcy Act so as to remove non-notification financing from its radius of action. This was the purpose of a bill which Senator Davis of Pennsylvania introduced in the Senate on March 11, 1940. Immediately referred to the Committee of the Judiciary,¹⁸ it never reap-

¹⁶ *Corn Exchange Nat. Bank & Trust Co. v. Klauder* (1943) 318 U.S. 434, 437.

¹⁷ Facts and figures are presented by: SAULNIER and JACOBY, *ACCOUNTS RECEIVABLE FINANCING* (National Bureau of Economic Research, 1943), *passim*. See also: PROCHNOW and FOULKE, *PRACTICAL BANK CREDIT* (1939) 428 *et seq.*

¹⁸ S. 3554, 76th Cong., 3d Sess. This Senate bill proposed the following clause to be added to the present wording of Section 60(a), Bankruptcy Act: "*Provided, That, in the case of accounts receivable, choses in action, and other intangibles, a transfer shall*

peared on the floor. Another method which has been used with more practical effect, amounts to legislative relief not on a nation-wide scale, but by sectional instalments, as it were. It consists in state statutes modifying in the respective jurisdictions the law concerning priority among successive assignees of choses in action, so as to render non-notification assignments made under such law not vulnerable by said Section 60(a). In addition to two enactments, one in *New York*¹⁹ and one in *New Hampshire*,²⁰ which probably do not belong to the present line-up, since they are destined to take care of a special complication in the field of financial factoring,²¹ statutes respectively enacted of late in ten different jurisdictions are the most conspicuous result of the unrest created by Section 60(a) of the amended Bankruptcy Act. It is interesting to note that these legislative products represent not less than three different types of statute and that completely uniformity has not been reached even among acts belonging to the same type. Two states, Pennsylvania²² and Georgia,²³ went on record with so-called book-marking statutes; three: Ohio,²⁴ California²⁵ and Missouri,²⁶ adopted recording acts; five, Rhode Island,²⁷ Maryland,²⁸ Connecticut,²⁹ Illinois,³⁰ and Virginia,³¹ committed themselves to so-called validation statutes. While the main features of this novel legislation will be studied in a subsequent part of the present paper, it may even at this juncture be submitted that this diversity of local statutes has added considerably to the "confusion" which,

be deemed to have been perfected within the meaning of this Act when it has been fully consummated between the debtor and his transferee."

¹⁹ N. Y. Laws 1943, c. 635, amending §45, N. Y. PERSONAL PROPERTY LAW, approved April 19, 1943.

²⁰ N. H. Laws 1943, c. 161, H. B. 310, approved May 5, 1943.

²¹ Elaboration is unnecessary for the purposes of this study.

²² Penn. Laws 1941, Act. No. 255, approved July 31, 1941.

²³ Georgia, Amendment to §85-1803 of the GA. CODE (1933), approved February 26, 1943.

²⁴ Ohio Laws 1941, §8509-3, approved June 5, 1941.

²⁵ Cal. Stats. 1943, c. 766, S. B. 136, approved May 26, 1943.

²⁶ Mo. Laws 1943, S. B. 86, approved July 1, 1943.

²⁷ R. I. Laws 1943, S. B. 179A (c. 1345), approved April 27, 1943.

²⁸ Md. Laws 1943, c. 728, S. B. 408, approved May 4, 1943.

²⁹ Conn. Laws 1943, c. 235a, H. B. 1277, approved May 18, 1943.

³⁰ Ill. Laws 1943, S. B. 536, approved July 22, 1943.

³¹ Virginia, S. B. 33, approved March 15, 1944.

according to a learned author, the Chandler Act "has introduced into the practice of the law of the assignment of accounts receivable."³²

It is manifest, indeed, that in order to accomplish their purpose such statutes should be uniform. However, attempts to reach this goal are beset with the great difficulty, among others, that even organizations of groups, equally dissatisfied with the impact of the Chandler Act upon the law of receivables financing, are far from united with regard to the preferable type of statute.

The two main trends are reflected in the tentative result reached by a Committee which has been charged, by the National Conference of Commissioners of Uniform State Laws, with the drafting of a Uniform Act on Assignment of Accounts Receivable.³³ Significantly, a pamphlet, recently published by this study group,³⁴ contains both a majority report, recommending a validation statute, and a dissenting report, sponsoring a recording act. The Conference itself has not yet taken any decision.³⁵

From the foregoing bird's eye view it will be seen, it is hoped, that the actual situation in the field of receivables financing, conjured up by Section 60(a) of the Amended Bankruptcy Act, involves several important problems. To present them in the form of a comprehensive yet not too lengthy account, is the purpose of this study the preparation of which has been greatly aided by the existence of numerous pertinent publications³⁶ and by valuable suggestions generously extended to the author from well informed persons.³⁷

³² Hanna, *Some Unsolved Problems under Section 60a of the Bankruptcy Act* (1943) 43 COL. L. REV. 58, 69.

³³ This Special Committee, with L. Barrett Jones, Jackson, Miss., as Chairman, is assigned to the Commercial Acts Section headed by Professor Llewellyn.

³⁴ National Conference of Commissioners on Uniform State Laws, Fifty-fourth Annual Conference, *Report of Special Committee on Uniform Act on Assignment of Accounts Receivable* (1944).

³⁵ According to letters of October 23, 1944 and December 6, 1944, which the writer had the benefit of receiving respectively from the Committee Chairman, Mr. Jones, and the Secretary of the Conference, Mr. Kuhns, both the majority and minority drafts were given overhauls, but the result of this revision has not yet been made available, the matter being a subject of further study by the Committee.

³⁶ See in addition to Hamilton, *supra* note 4, Hanna, *supra* note 32, and Wolfe, *supra* note 13, the following articles: Baty, *Security Problems Raised by the Chandler Act* (1943) 18 NOTRE DAME LAW. 370, 373 *et seq.*; Bennett, *Assignments of Accounts Receivable under the Chandler Act* (1939) 44 COM. L. J. 404; Cohen and Gerber, *Mortgages of Accounts Receivable* (1941) 29 GEO. L. J. 555; Crane, *Recent Statutory Changes in the Law of Chattel Security* (1942) 8 U. OF PITTSBURGH L. REV. 104; Douglas, *Assigned Accounts as Affected by Section 60a of the Bankruptcy Act and the Provisions of*

II. BUSINESS METHODS OF RECEIVABLES FINANCING

1. *Factoring*³⁸

The usual theoretical classification of the business methods of receivables financing is based upon the distinction between assign-

State Law with Reference Thereto (1944) 19 J.N.A.R.B. 11; *In re Accounts Receivable Financing* (1943) 108 AMERICAN BANKER 1; Johnson, *The New York Factor Act and the Chandler Act: A Study in Competing Equities* (1941) 10 BROOKLYN L. REV. 323; McKeehan, *Assignment of Choses in Action* (1941) 46 DICK. L. REV. 93; Miller, *An Assignment of Accounts Receivable as Security Device* (1937) 22 MARQUETTE L. REV. 28; Montgomery, *Review of Supreme Court Ruling on Assignment of Accounts Receivable* (1943) 17 J.N.A.R.B. 119; Mulder, *Ambiguities in the Chandler Act* (1940) 89 U. OF PA. L. REV. 10, 22; Neuhoﬀ, *Assignment of Accounts Receivable as Affected by the Chandler Act* (1940) 34 ILL. L. REV. 538; Salter, *Perfection of Title of a Lien or under Section 60 of the Bankruptcy Act* (1943) 48 COM. L. J. 242; Snedeker, *Security Devices as Preferences under the Bankruptcy Act* (1943) 8 MO. L. REV. 85; Wright, *Recording of the Assignment of Accounts Receivable to Avoid a Preference in Bankruptcy* (1944) 9 MO. L. REV. 167. The following treatises contain pertinent material: 3 COLLIER, BANKRUPTCY (14th ed., 1941) §60.39, p. 910 and §60.48, p. 968; GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES (rev. ed. 1940) §534, p. 925; 4 REMINGTON, BANKRUPTCY (5th ed., 1943) 179. Moreover see: Durfee's comment on the cases cited *supra* notes 10 and 11 in (1942) 41 MICH. L. REV. 473; the note *Secret Liens and the Chandler Act* in (1943) 10 U. OF CHI. L. REV. 220; the annotation in (1941) 134 A.L.R. 1218; Gerinan's note, *Bankruptcy: Effect of Section 60a of the Chandler Act on Transactions under the Uniform Trust Receipts Act* in (1941) 26 CORN. L. Q. 306; Newton's note, *Assignment of Accounts Receivable under the 1943 Amendment to the California Civil Code* (1944) 17 So. CALIF. L. REV. 303.

³⁷The writer has the privilege of thankfully acknowledging the furtherance of this study by: Professor John Hanna, Columbia University School of Law; Mr. Thomas B. Paton and Dr. De Witte Wyckoff, both from the Legal Department of the American Bankers' Association; Mr. Louis J. Asterita, from the same Association; Mr. Milton P. Kupfer, Counsel to the National Conference of Accounts Receivable Companies, Mr. W. Randolph Montgomery, Counsel of the National Association of Credit Men, and Mr. George P. Hatch, members of the New York Bar; Mr. Walter D. Yankauer, Chairman of the Legislative Committee of the New York Factors. Of course, none of them is responsible for any statement contained in this paper.

³⁸In addition to SAULNIER AND JACOBY, *op. cit. supra* note 17, PROCHNOW AND FOULKE, *op. cit. supra* note 17, and Johnson, *supra* note 36 at 324, see: Hillyer, *A Factor's View on Assignment* (1939) 41 CREDIT AND FINANCIAL MANAGEMENT 24; Steffen and Danziger, *The Rebirth of the Commercial Factor* (1936) 36 COL. L. REV. 745, 763; furthermore: N. Y. PERSONAL PROPERTY LAW §45 as added by L. 1911, c. 326, §1 and amended by L. 1931, c. 766, L. 1935, c. 690, L. 1943, c. 635, *supra* note 19, concerning "Notice of liens upon merchandise or the proceeds thereof to secure loans or advances" (*cf.* N. Y. FACTOR'S ACT, N. Y. PERSONAL PROPERTY LAW §43, derived from L. 1830, c. 179, §§3-6, amended by L. 1915, c. 273); the New Hampshire statute, *supra* note 20; moreover, among the cases decided before the latest amendment of N. Y. PERSONAL PROPERTY LAW §45; *Shoyer v. Wright-Ginsberg Co.* (1925) 250 N.Y. 223, 148 N.E. 328; *Lemnos Broad Silk Works, Inc. v. Spiegelberg* (1926) 127 Misc. 855, 217 N.Y. Supp. 595; *Bloch v. Mill Factors Corporation* (C.C.A. 2d, 1941) 119 F. (2d) 536.

ments on a notification basis, that is, with the notification of the debtor as a normal incident of the procedure, and non-notification assignments. From a realistic point of view, a more important bifurcation seems to be that between financial factoring on the one hand, and other ways of receivables financing on the other hand, a classification which is overlapping with the first mentioned since financial factoring implies as one of its main features the notification of the so-called customer, that is, the debtor of the so-called client. However, equally or even more characteristic of financial factoring is another of its essential features: that it implies a shifting of the risk in extending credit to the customer from the client to the factor; or, as it is sometimes said that the financial factor assumes his client's credit risks. It is, indeed, elementary that financial factoring is done "without recourse." The factor's purchase of the accounts receivable of his "client," far from being a matter of form as occurs frequently in the case of non-notification financing,³⁹ belongs to the very essence of factoring proper.

To the uninitiated, this picture becomes occasionally obscured by the existence of a twilight zone between factoring and non-notification financing. That is to say: some of the important factoring firms are, as a secondary line of their business, engaged in non-notification financing. In this case, of course, they act like others applying the same method, that is, they take the assignments with reservation of recourse against the client.⁴⁰

Moreover, the credit hazard assumed by the factor, or the scope of his waiver of recourse, includes only the risk of losses from bad debts. He is not burdened with other hazards involved in his "client's"

³⁹ Steffen and Danziger, *supra* note 38, at 772. Non-notification assignments are often garbed as purchases, even when they are employed as "collateral" or security in a loan transaction. Their real nature, however, is in such cases mostly disclosed by the express reservation of the right to take recourse against the assignor. At any rate, for legal purposes, as *e.g.*, the application of usury laws, such assignments are not treated according to their form, but with regard to their substance. See: GLENN, *op. cit. supra* note 36, at 908, 909; Hamilton, *supra* note 4, at 185, and Brierly v. Commercial Credit Co. (E.D. Pa., 1929) 43 F. (2d) 724, *aff'd* (C.C.A. 3d, 1930) 43 F. (2d) 730. The question may be of a certain importance in connection with the Chandler Act if it is true that, in view of the wording of Section 60(a) B.A., "the problem created by the revision of Section 60 . . . will apply to security transactions only . . ." (Words under quotation marks from Cohen and Gerber, *supra* note 36, at 578, note 78.)

⁴⁰ Such, *e.g.*, were the facts in: *In re Ace Fruit & Produce Co., Inc.* (S.D., N.Y., 1943) 49 F. Supp. 986. Concerning this so-called "D.R." or "department risk" business, see also: Hillyer, *supra* note 38,, at 24.

relation to the "customer," as, e.g., from adjustments in connection with returns of merchandise or allowances claimed and granted. In view of this zone of business risk still left with the "client," the usual factoring contract provides for retention by the factor of a certain quota of the prospective proceeds from the assigned invoices, the so-called "credit balance."⁴¹

Factoring is a long established method of financing, which originated in the textile field. While it finds its main application there, it is also largely employed in the furniture and shoe industries, and, to some extent, in others. The essential difference, functionally, of this special kind of "factor" or financial factor from the "factor" in the original meaning of the term, or commercial factor, is manifest. Whereas the old time selling agent, or one-time "factor" in the first place sold the goods of his principal and merely as a secondary service in certain cases assumed the *delcredere* for the purchaser, or even occasionally advanced the amount of the invoice before its maturity, the present day "factor" in the textile branch is not at all concerned with the selling of his client's merchandise. He is primarily a financing and credit insuring agent, with a function partly resembling of banking, partly of credit insurance, though not identical with either, rather of a character *sui generis*, not always fully recognized in judicial opinions.⁴²

Since the factor assumes his client's credit risks, and therefore no delivery to a "customer" may be made without his declared consent, it is his business to investigate the financial responsibility of the "customer." This is done through the instrumentality of well-organized credit departments, which are maintained by all factoring firms as an essential part of their office mechanism. To be relieved from this trouble of credit investigation is one of the advantages gained by the client from a factoring contract. Another important service which, in addition to his advance of money, the factor renders to his client, is the collection of the accounts receivable and the maintenance of records incidental thereto. Also this frees his client from an important burden normally involved in the conduct of a business.

Such special legal problems as are involved in financial factoring cannot be taken up within the ambit of the present study. But since the factor group belongs to those who have vigorously raised their

⁴¹ Steffen and Danziger, *supra* note 38, at 773 and note 163 *ibid*.

⁴² Steffen and Danziger, *supra* note 38, at 769, 770 and note 147, *ibid*.

voices in the discussion concerning the proper type of statute to govern assignment of receivables,⁴³ it should be briefly stated to what extent they are affected thereby. In the first place, it does not seem quite true that assignments on a notification basis are in no case vulnerable by the implications of Section 60(a) of the Bankruptcy Act. Notification of the assigned customer, even if in terms of business routine "immediately" done, may in terms of law fall short of being contemporaneous with the assignment, in which case its effect under the Chandler Act depends upon the questionable doctrine of a "continuous transaction."⁴⁴ Moreover, and more important, part of the legislation enacted in the wake of the Chandler Act can only be met by the factor through a substantial departure from his established business routine. In the third place, those firms which, in addition to factoring proper, indulge in non-notification financing of receivables, have in this respect the same interests regarding the Chandler Act, with the finance companies normally operating on a non-notification basis. While important factoring firms are members of the National Association of Credit Men, they constitute there a dissident group, opposing the trend of the majority toward a recording statute.

⁴³ Memoranda presenting the factor's viewpoint, that is, opposing book-marking or recording acts and recommending a validation statute, were submitted by Mr. Walter D. Yankauer, *supra* note 37, and other exponents of important factoring firms both to the National Association of Credit Men and to the Subcommittee of the Commissioners on Uniform State Laws. A memorandum in the same sense was also presented by the National Conference of Accounts Receivable Companies (finance companies) to the said Subcommittee. In addition, this view is sponsored by a widely circulated pamphlet entitled, *An Analysis of Legislation on Assignment of Accounts Receivable* (undated), published by the Commercial Credit Company, Baltimore. Moreover, according to the mimeographed Report of the Committee on Uniform State Laws of the Association of the Bar of the City of New York, covering the Association Year 1943-1944, this Committee, under the chairmanship of Frederick T. Kelsey, "unanimously disapproved the so-called recording statute and approved a statute drawn on the theory of validating the rule already prevailing in New York State through the decisions of its courts." The previously rendered Report of a Subcommittee of the same Bar, signed by Messers Kupfer, Montgomery and Yankauer, *supra* note 37, was unanimous only in rejecting both the notification and the bookmarking types of statute, but expressed a failure to reach an agreement concerning the alternative of a validation statute or a recording statute. See Foreword, *supra*.

⁴⁴ For this point, which it is not necessary to elaborate here, see COLLIER, *op. cit. supra* note 36, at 912, n. 41; Snedeker, *supra* note 36, at 90; the note, *supra* note 36, in (1943) 10 U. OF CHI. L. REV. 220, 223; the note, *supra* note 9, in (1943) 29 VA. L. REV. 1067; the note, *supra* note 10, in (1941) 89 U. OF PA. L. REV. 510.

2. *Non-notification Financing of Receivables*⁴⁵

Apart from the "Fourth Avenue Houses," as the factoring firms are sometimes popularly called,⁴⁶ two important professional groups are on a large scale engaged in financing of accounts receivable: finance companies and commercial banks. Subject to negligible exceptions, both of these groups are operating on a non-notification basis, that is, with the mutual understanding, between assignor and assignee, that save extraordinary contingencies as, e.g., the assignor's insolvency, the assigned debtor will not be notified of the assignment. Instead, the borrower himself is normally entrusted with the collection of the accounts assigned by him as collateral for the loan. He acts, in this respect, as agent for the lender, since collections must, of course, be remitted to the assignee promptly upon their receipt. At least in those jurisdictions which adhere to the "unfettered dominion" rule laid down by Mr. Justice Brandeis in the well known case of *Benedict v. Ratner*,⁴⁷ attention must be paid, in establishing the respective business routine, to the implications of that rule. It is in this connection that, irrespective of the existence of a so-called book-marking statute, commercial banks and finance companies normally require their assignors of receivables to set forth notations of the assignments in their ledgers or similar records. And the question has even been seriously raised as to whether such entries do not, at least under certain circumstances, without a statute amount to constructive notice of the assignment, tantamount in its effect upon sub-

⁴⁵ In addition to SAULNIER AND JACOBY, *op. cit. supra* note 17, and PROCHINOW AND FOULKE, *op. cit. supra* note 17, see with regard to the commercial practice of non-notification financing: BREWSTER, *LEGAL ASPECTS OF CREDIT* (1923) 397; 1 SELIGMAN, *THE ECONOMICS OF INSTALLMENT SELLING* (1927) 33; and the following articles: Baldwin, *Should Assignments Be Secret?* (1939) 41 *CREDIT AND FINANCIAL MANAGEMENT* 6; Brinck, *Accounts Receivable as Collateral* (1936) 11 *WASH. L. REV.* 134; Freeberg, *Pledging of Accounts Receivable* (1941) 43 *CREDIT AND FINANCIAL MANAGEMENT* 11; Hanna, *The Extension of Public Recordation* (1931) 31 *COL. L. REV.* 617, 623; Lauchheimer, *Some Problems of Modern Collateral Banking* (1926) 26 *COL. L. REV.* 129, 130. An interesting judicial description of the routine is contained in Referee Wilde's opinion in *Matter of Johnson-Maas Co., Inc.* (S.D. Ind., 1939) 45 *Am. B. R. (N.S.)* 32, 35.

⁴⁶ Since they are mostly located on Fourth Avenue, New York City.

⁴⁷ *Benedict v. Ratner* (1925) 268 U.S. 353, discussed among many others by: Comment, *Accounts Receivable as Collateral Security* in (1935) 44 *YALE L. J.* 639, 644; GLENN, *op. cit. supra* note 36, at §529, p. 914, §592, p. 1020, and §593, p. 1022; War Edition of *Credit Manual of Commercial Laws* (1944) 235; Brinck, *supra* note 45, at 138; Cohen and Gerber, *supra* note 36, at 559.

sequent assignees to actual notification of the assigned debtor.⁴⁸ It is not within the purpose of this study to expatiate upon the problems just referred to or upon any of those other numerous special questions which occasionally appear as sources of trouble in the world of receivables financing, as e.g.: the particular juristic complications involved in a "floating charge" or "revolving credit transaction"; the disputed assignability of accounts to arise in the future out of a given transaction or of accounts owed to the assignor, but not yet due; the often troublesome consequences of a return of merchandise; the applicability, to the pledge of receivables, of chattel mortgage statutes or other statutes which do not expressly provide for the recording of book accounts. Only one item from this legal jungle of receivables financing must at some length be discussed below, since it represents the *Achilles* heel that made this practice vulnerable to Section 60(a) of the amended Bankruptcy Act. It is the question mentioned in the beginning of this paper when reference was made to the distinction between the English rule (of *Dearle v. Hall*) and the American rule.

Turning back to our business analysis of non-notification financing, it seems unquestionable that a large amount of "moral hazard" is involved in the non-notification method. Collections may be retained by the assignor; his invoices presented for discount may be fraudulent; there is the danger of double assignments of the same account. Double assignments are a rare occurrence, and even without them there would still remain a great deal of moral hazard as inherent in non-notification financing. It seems, however, that the desire to remove the danger of double assignments, and even the temptation thereto, forms the principal ground for the American Bankers' Association's firm objection to validation statutes and its favoring recording acts instead.⁴⁹

⁴⁸ In *Matter of Johnson-Maas Co., Inc.* (S.D. Ind., 1939) 45 Am. B. R. (N.S.) 32, 40, 41, Referee Wilde suggested: "The evidence shows that the accounts, on the bankrupt's books, were so marked as to indicate the assignment. Certainly, in view of the wide-spread practice of securing indebtedness by assignment of accounts now prevailing, one who secured such assignment without examining the books of the assignor could not claim the status of a bona fide purchaser." While this was a dictum, *In re Leader Furniture Co.* (E.D. Pa., 1939) 36 F. Supp. 986, a holding in favor of the first assignee, without notification of the debtor, was reached on the basis that annotations in the books of the assignor should have put the second assignee upon inquiry as to the possibility of prior assignments of the same accounts. But cf. GLENN, *op. cit. supra* note 36, at 911.

⁴⁹ As early as September 27, 1918, the following Resolution was unanimously adopted by the General Convention of the American Bankers Association in Chicago: "Resolved,

The large amount of moral hazard involved, as already said, in the non-notification method may have been one of the reasons why commercial banks, now on a large scale active in the field, were until recent years loath to enter into competition with the finance companies which had previously established themselves in this credit-branch.⁵⁰

To what extent the rate of interest charged in connection with non-notification financing⁵¹ may be justified by the degree of moral hazard involved, is a question which cannot be answered here. The rates of the finance companies are said to be on the whole higher than those of the commercial banks. Moreover, the rates are progressively being lowered both by banks and finance companies, largely due to the low cost of money generally and, to some extent, to the natural operation of the forces of competition.

It has been said and also referred to by the Supreme Court of the United States that non-notification financing of receivables would be particularly used by "small and struggling borrowers."⁵² According to information the writer received from reliable experts, this may at one time have been the truth, but does not fully correspond to the present reality of things. While receivables financing is a credit source available to firms working with a small amount of their own capital,

that the American Bankers Association favor, and the Committee on State Legislation are authorized to draft and urge, through State organizations, the passage of a uniform statute to prevent fraud in the transfer of accounts receivable by secret transfers." The present position of the American Bankers Association is thus stated in an excerpt from the Report of the Committee on State Legislation for which as for the foregoing material the writer is indebted to Mr. De Witte Wyckoff, *supra* note 37: "An assignment of accounts receivable statute for practically every state seems mandatory for safe lending on a non-notification basis. After years of study the Committee on State Legislation at the 1944 spring meeting unanimously favored a filing of notice statute rather than a book-marking or a validation statute. This was unanimously reaffirmed at the 1944 September convention, which action was approved unanimously by the Administrative Committee and the Executive Council."

However, the writer is reliably informed that not all state bankers associations agree with the National Association's views concerning the preference to be given to a recording statute. He has been told, for example, that the Illinois Bankers Association sponsored the validation statute enacted in that state.

⁵⁰ The first specialized finance company, taking assignments of accounts receivable on a non-notification plan, was organized in Chicago in 1905 according to SELIGMAN, *op. cit. supra* note 45, at 35.

⁵¹ See the statements in *Corn Exchange Nat. Bank & Trust Co. v. Klauder, supra* note 9, at 440.

⁵² *Ibid.* at 437, 438.

especially if they are engaged in a kind of business and have experience, either of which warrants high potentialities of expansion, this method is to an important extent utilized also by very large concerns. According to the same experts it cannot be denied that occasionally receivables are assigned under the pressure of an unsecured creditor, who wishes to bolster up a previous loan, or that, again occasionally, firms in a precarious condition, but with a reasonable claim to and a substantial hope of survival obtain reorganization credit against assignments of their receivables. But such occurrences, it is maintained, are nowadays exceptions rather than the rule. It may be true that "frequently an assignment of an account is a prelude to bankruptcy."⁵³ But looking upon the average function of non-notification financing it would seem to be a gross exaggeration, to say the least, to consider it as a device mainly used for "last ditch" fighting.⁵⁴ As a normal proposition none of the agencies concerned, neither bank nor finance companies, would be anxious to get into business contact with a dying concern. It would not pay; would not last long enough; and would be dangerous. Normally, only a borrower whose solid conditions seem to warrant the prospect of a continuous credit relation, with a regularly revolving amount of receivables to be financed, is by them considered as a client eligible for this kind of credit.

Another objection, frequently raised, challenges the characteristic feature of this financing method; the failure of notification which, it is said, furthers the unsound phenomenon of "secret liens."

It is interesting to consider in this connection the several explanations which have been offered for the fact that, apart from the different conditions in the lines serviced by factors, even honest borrowers pledging their receivables do not like this to be disclosed to their customers. It would seem that only two of those alleged motives are substantially responsible for the described attitude of the borrowers. In the first place there appears to be a genuine apprehension among those concerned that their prestige and consequently their "goodwill" might be affected by any publicity given to the fact of their resorting to this method of credit accommodation. "Cashing sales", as it is sometimes called, is still deprecated in some quarters, though probably only in conservative remembrance of a period where

⁵³ COLLIER, *op. cit. supra* note 36, at 968, n. 40.

⁵⁴ A strong case against such allegations is presented by the note in (1943) 29 CORN. L. Q. 105.

this appraisal might have had some justification. Equally strong and determinative for the attitude of the borrower, seems to be the feeling that the interference of a third element, in the form of the assignee, with the originally bipartite relation and the resulting possibility of inconvenience for the customer might impair the borrower's potential business expansion, especially if sales talk on behalf of competitors calls attention to the vulnerable point. Other possible motives of the borrower which are sometimes referred to in the same connection, would seem to be negligible.⁵⁵ However, one of them should be singled out, that is the alleged desire of the borrower to conceal from potential extenders of personal credit the fact of his pledging receivables.⁵⁶ It is submitted that it seems by no means proved and even seems highly improbable that in the normal case such motive should be instrumental nowadays for the described attitude of borrowers on a non-notification basis.⁵⁷

This, of course, does not settle the question whether the possibility of "secret liens" afforded by the practice of non-notification financing does not in itself, and irrespective of a bad motive for the failure of notification, constitute a social evil to be eradicated. An answer in the affirmative would seem to be implied or perhaps even expressed in the opinion of the Supreme Court of the United States in the *Klauder* case.⁵⁸ The same position, quite natural with spokesmen of general creditors,⁵⁹ is occasionally shared by unbiased authors. But Professor Hanna, who some years ago persuasively presented the case against recordation requirements for security assignments of re-

⁵⁵ So the apprehension that the lender's collection service might unreasonably increase the charges on the loan. In this sense: Hanna, *supra* note 45, at 625; Brinck, *supra* note 45, at 134; Emory and Shattuck, *Assigned Conditional Sale Contracts and Accounts Receivable as Collateral in the State of Washington* (1936) 11 WASH. L. REV. 181, 191; Glenn, *Book Accounts as Collateral* (1926) 26 COL. L. REV. 309, 313. But it should be considered, it is respectfully submitted, whether a diminution of the moral hazard would not result in a reduction of the interest rate setting off the charge for the collection by the lender.

⁵⁶ *Corn Exchange Nat. Bank & Trust Co. v. Klauder*, *supra* note 9, at 440.

⁵⁷ See also Saulnier and Jacoby, *op. cit. supra* note 17, at 22.

⁵⁸ *Corn Exchange Nat. Bank & Trust Co. v. Klauder*, *supra* note 9, at 441.

⁵⁹ Emory and Shattuck, *supra* note 55, at 191, make this interesting statement: "There is evident a conflict between the needs of traders and the interests of their creditors, both current and prospective, in respect to the modus operandi of pledging or mortgaging receivables. This conflict is but one phase of a general warfare, evidence of which may be discerned whenever any security arrangement is examined. Probably no solution can be reached which would satisfy all parties."

ceivables,⁶⁰ has, in a recently published article, forcefully pointed out that "book accounts are not displayed in windows nor on store shelves" and that "most talk of secret liens seems to belong to a dream world."⁶¹

III. LIEN EFFECT OF NON-NOTIFICATION ASSIGNMENTS

From the fact of the moral hazard involved it follows that the lender against non-notification assignments of receivables must be careful in the selection of his borrowers. *Caveat emptor!* He was, however, before the Chandler Act, sure that for all practical purposes the assignment was good against the trustee in bankruptcy in the contingency of his assignor's insolvency. This is now different. Section 60(a) of the amended Bankruptcy Act as construed by the Supreme Court of the United States makes the effect of a non-notification assignment against the assignor's trustee in bankruptcy practically dependent upon a double hypothetical test. The criterion is: whether, before the assignor's bankruptcy, such assignment was good both against a bona fide purchaser from the assignor and against a creditor of the same.⁶² And this question, though preliminary to the

⁶⁰ Hanna, *supra* note 45, at 623, concluding at 630: "Viewing the problem as a whole it seems that the negligible advantages of recording book accounts would be more than outweighed by the serious disadvantages." Before Professor Hanna's publication, a contrary standpoint was indicated by Professor Llewellyn in his Explanatory Notes to his *Draft of a Uniform Chattel Mortgage Act* (2d ed., 1927) which substantially proposed to extend chattel mortgage recordation to book accounts. Said Professor Llewellyn in those notes, p. 44: "Transactions involving borrowing against book accounts have become so frequent as to require regulation. Under present laws, such mortgages have the disadvantages of being wholly secret from the creditor . . ."

⁶¹ Hanna, *supra* note 32, at 69.

⁶² Section 60(a) of the amended Bankruptcy Act, *supra* note 8, in part reads: "A preference is a transfer, as defined in this title, 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 a petition in bankruptcy . . . 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.

"*For the purposes of subdivisions a and b of this section*, a transfer shall be deemed to have been made at the time when it became 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, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy . . . it shall be *deemed to have been made immediately before bankruptcy.*" (Italics added.)

And the connected Section (b), (1938) 52 STAT. 870, 11 U.S.C. (1941) §96(b), in part reads: "Any such preference may be avoided by the trustee if the creditor receiving

decision of a federal bankruptcy court, must, at least pursuant to *Erie Railroad Co. v. Tompkins*,⁶³ be answered in accordance with the state law.⁶⁴ If this is so, Congress in the case of the Chandler Act, would seem to have abstained from making full use of the constitutional "power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States . . .,"⁶⁵ since the diversity of the law in the states concerning the effects of transfers against bona fide purchasers or creditors of the transferor is by Section 60(a) engrafted upon and forms part of the federal law of preferences in bankruptcy. Given the same facts, the result of a preference contest litigated in a national bankruptcy court will nevertheless not be uniform in all such cases, but, in so far as the test under Section 60(a) is concerned, in each case depend on the state law governing the particular effect of the transaction. And this in the absence of fixed Conflict of Law rules on the choice of the applicable law.⁶⁶

it or to be benefitted 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" (Italics added.)

⁶³ (1938) 304 U.S. 64.

⁶⁴ *Corn Exchange National Bank & Trust Co. v. Klauder*, *supra* note 9, Court's note 8. However, the academic possibility of a different position is alleged in a note on *In re Seim Const. Co.* (Md. 1941) 37 F. Supp. 855 in (1941) 27 VA. L. REV. 950, 951.

Compare also Mr. Justice Jackson's concurring opinion in *D' Oench, Duhme & Co. v. Federal Deposit Ins. Corporation* (1942) 315 U.S. 447, 465, substantially suggesting that the rule of the *Tompkins* case does not apply where the federal jurisdiction is not based upon diversity of citizenship. The majority opinion by Mr. Justice Douglas (*Ibid.* at 456) left the question open. On this possible limitation of the scope of *Erie Railroad Co. v. Tompkins*, see also: the notes in (1941) 41 COL. L. REV. 1403, 1405, n. 11, and (1944) 44 COL. L. REV. 925, 928, n. 16. The point is not mentioned by Mr. Justice Jackson in his opinion in the *Klauder* case, *supra*.

⁶⁵ U. S. CONST. Art. I, §8, cl. 4.

In *Hanover National Bank v. Moyses* (1902) 186 U.S. 181, 188, 189, 190, the Supreme Court of the United States, through Mr. Chief Justice Fuller, concerned with the problem as to whether the reference to exemptions under state laws destroyed the required geographical uniformity of the national bankruptcy act, denied this question by stating: "The general operation of the law is uniform although it may result in certain particulars differently in different states." However, this was, as appears from the preceding sentence of the opinion, predicated upon the proposition that "the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankruptcy law had not been passed." It would seem that the constitutional result might be different where, as in the case of Section 60(a) of the Bankruptcy Act, the trustee takes what would *not* be available to the creditors in the absence of the debtor's bankruptcy.

⁶⁶ See *supra* note 5.

1. *Dearle v. Hall and the American Rule*

It has never been doubted in any American jurisdiction that as between assignor and assignee, the assignment is good regardless of notification to the debtor. Again, it is recognized everywhere in this country that a debtor who, in ignorance of a certain assignment, pays to the assignor himself or another assignee will to the extent of such payment be discharged of his debt.⁶⁷ In an overwhelming majority of the American jurisdictions,⁶⁸ as well as in England,⁶⁹ it is held, that an assignment without notification of the debtor has nevertheless full effect against a judgment creditor or an attaching creditor or a garnishee of the assignor. A possible qualification of this majority rule⁷⁰ and the different law prevailing in a practically negligible minority of states⁷¹ need not be elaborated for the present purpose. The important thing, however, is that this character of practical uniformity and certainty of the law disappears, the moment the question is raised as to whether the title of an assignee of a chose in action remains good against another assignee if the assignment to the latter was the second in date, but the first notified to the debtor. This problem becomes even more embarrassing when it arises after the debtor, unaware of the existence of a competing assignee's claim, has discharged

⁶⁷ See among others: 2 WILLISTON, CONTRACTS (rev. ed., 1936) 1251; RESTATEMENT, CONTRACTS, *op. cit. supra* note 3, §170; (1937) 6 C. J. S. 1124; (1936) 4 AM. JUR. 301.

⁶⁸ 2 WILLISTON, *op. cit. supra* note 67, at 1255; RESTATEMENT, CONTRACTS, *op. cit. supra* note 3, §172; 1 BOGERT, TRUSTS AND TRUSTEES (1935) 558; 2 GLENN, *op. cit. supra* note 36, at 913; (1937) 6 C. J. S. 1149; (1936) 4 AM. JUR. 318; (1928) 52 A. L. R. 109.

Representative of this majority view, as applied in a jurisdiction adhering to the rule in *Dearle v. Hall* is *In re Phillips Estate*, No. 4 (1903) 205 Pa. 525, 55 Atl. 216.

⁶⁹ *Holt v. Heatherfield, Trust Ltd.* [1942] 2 K. B. 1, 2, 5, 6, where Atkinson, J., said: ". . . it seems beyond argument that the absence of notice does not affect the efficacy of the transaction as between assignor and assignee . . . a judgment creditor stands only in the shoes of his debtor and can take only that which the debtor can honestly deal with at the time the order nisi is served. Thus, he is not in such a good position as an assignee, who may defeat an earlier assignee by getting his notice in first. Notice is required only for the protection of the debtor or subsequent assignee."

⁷⁰ RESTATEMENT, CONTRACTS, *op. cit. supra* note 3, §172, in part reads: "If an obligor garnisheed for a debt due from him to the assignor neither knows nor has reason to know, *until after judgment has been rendered* charging him, of an assignment of the debt made prior to his garnishment, he is discharged from his duty to the assignee." (Italics added.)

⁷¹ Representative of this minority view is the law of Louisiana, as applied by the federal court in *Gordon v. Valee* (C. C. A. 5th, 1941) 119 F. (2d) 118, *cert. den.* (1941) 314 U. S. 644.

himself by payment to one of the assignees. The answer depends on whether, and if so, to what extent, a given jurisdiction adheres to the so-called rule in *Dearle v. Hall*.⁷²

At this point it is well to define what is usually, though not without challenge from distinguished authority,⁷³ understood by that phrase "rule in *Dearle v. Hall*." Originally applied in equity proceedings, or even more narrowly in trust cases,⁷⁴ but then in law too,⁷⁵ the rule in *Dearle v. Hall* means the judicial law according to which the date of the notification to the debtor, and not that of the assignment itself determines the rank between successive assignees of the same chose in action. Not too firmly rooted in its country of origin, rather acrimoniously criticized there by distinguished members of the Bench,⁷⁶ nevertheless not overruled, instead by the Law of Property Act of 1925⁷⁷ given an enlarged field of application, the "rule in *Dearle v. Hall*" was at a time applied in the majority of the American jurisdictions. But great as its rise was also its decline in the new world. It is now the law in only a small minority of states⁷⁸ and is known as the

⁷² See *supra* note 1.

⁷³ In *Salem Trust Co. v. Manufacturers Finance Co.*, *supra* note 2, at 187 and 194, Mr. Justice Butler pointed out that *Foster, et al., v. Cockerell* (1835) 3 Cl. & F. 456, 6 Eng. Rep. 1508, rather than *Dearle v. Hall* was the first case to lay down the principle nowadays understood as the "rule in *Dearle v. Hall*." In the facts of the latter case, where the second assignee had made inquiry of the trustee (debtor), "there was much more in favor of the assignee than mere priority of notice," the learned Justice stated.

⁷⁴ In the leading case *Ward v. Duncombe* [1893] A.C. 369, 373, 376, 383, Lord Hershell defined the rule as "the doctrine that where a fund is legally vested in trustees, an assignee or encumbrancer who gives notice to the trustees has a better title in equity, than an assignee or encumbrancer of earlier date who has not given such notice, . . ." See in this connection also HANBURY, *MODERN EQUITY* (2d ed., London, 1937) 433. However, as stated by Grower, *The Present Position of the Rule in Dearle v. Hall* (1935) 20 CONVEY. 137, 153 at 138, "the original equitable basis of the rule was soon lost sight of." Keasbey, *Notice of Assignments in Equity* (1910) 19 YALE L. J. 258, analyzes the American law from a similar angle.

⁷⁵ See however 1 BOGERT, *TRUSTS AND TRUSTEES* (1935) 551 and 1 SCOTT, *TRUSTS* (1939) 815, the latter pointing to the early case *Parks v. Innes* (1860) 33 Barb. (N.Y.) 37 for theories limiting the rationale of the rule to trust cases.

⁷⁶ So by Lord MacNaghten in *Ward v. Duncombe*, *supra* note 74, at 390, 391, and Eve, J., in *Hill v. Peters* [1918] 2 Ch. 273, 277, 279. See also Firth, *The Rule in Dearle v. Hall* (1895) 11 L. Q. REV. 337, 344.

⁷⁷ HANBURY, *supra* note 74, at 438.

⁷⁸ One of the latest alignments of American jurisdictions according to their adherence to the American or English rule respectively, War Edition of the *Credit Manual of Commercial Laws* (1944) 230, lists besides Virginia, in which state the law has meanwhile been changed by statute, *supra* note 31, the following jurisdictions as notification

English, as distinguished from the American, rule. The latter means that priority in the date of the assignment rather than priority in the date of the notification to the debtor determines the rank between successive assignees of a chose in action.⁷⁹ However, as already indicated, it is not exact to classify the jurisdictions simply according to whether they adhere to the one or the other rule. A realistic picture of the situation is bound to be more complex.

2. *Twilight Zone*

a. *Massachusetts rule*

Among those jurisdictions which purport to adhere to the American or the English rule respectively, there are some which strictly apply their leading principle, while others do it in a more or less loose form. The distinction is marked by the existence or non-existence of exceptions to the rule and by the number of those exceptions, if any. The most important illustration of this twilight zone is the law of Massachusetts which is definitely aligned with the American rule, but at the same time considerably different in its application from the law of New York representing it in its strictest form. This split between the two brands of the American rule, respectively known as the Massachusetts and the New York rule, is carried over into other jurisdictions not addicted to the rule in *Dearle v. Hall*.

states: Florida, Kansas, Maine, Mississippi, Nebraska, Oklahoma, Tennessee, Vermont, "and possibly also Arkansas, Delaware, Louisiana, New Hampshire, Wisconsin, North Carolina and Colorado, although," it is added, "in the latter states the matter has not been definitely settled."

An even more reduced list of jurisdictions following the English rule is bound to appear in the next edition of the above Credit Manual, due to statutory changes of the law in several jurisdictions by legislation in 1945. *California* was until recently a staunch adherent of *Dearle v. Hall* (Cases *infra* note 105). However, the recording statute, *supra* note 25, changed this situation prior to 1944. It should be noted that the usually cited lists of jurisdictions according to their respective adherence to either the American or English rule, as *e.g.* (1924) 31 A.L.R. 876 and (1937) 110 A.L.R. 774, are not and cannot be up to date in view of the continually changing picture of the law in this field.

⁷⁹ For general orientation on the two rules see among others: 1 BOGERT, *op. cit. supra* note 75, at 551; 2 GLENN, *op. cit. supra* note 68, at 911; 1 SCOTT, *op. cit. supra* note 75, at 812; 2 WILLISTON, *op. cit. supra* note 68, at 1258; COLLIER, *op. cit. supra* note 36, at 960; (1937) 6 C.J.S. 1145; (1936) 4 AM. JUR. 312; (1924) 31 A.L.R. 876; (1937) 110 A.L.R. 774. Concerning the pertinent English law: POLLOCK, CONTRACTS (10th ed., 1936) 216. For a tentative orientation on the respective position of the different civil law systems: Schumann, *Abtretung* in 2 SCHLEGELBERGER'S RECHTSVERGLEICHENDES HANDWOERTERBUCH (Berlin, 1929) 34, and WALKER, INTERNATIONALES PRIVATRECHT (5th ed., Vienna, Austria, 1934) 488. Roughly stated, the French law on the point corresponds to the English rule, the German law to the American rule.

Usually considered as representative of the Massachusetts rule is the Restatement of the Law of Contracts,⁸⁰ the position of which is substantially reiterated in the Restatement of the Law of Trusts⁸¹ and in the Restatement of the Law on Restitution.⁸² The first mentioned Restatement, obviously following the lead of an observation by Ames,⁸³ quoted in *Salem Trust Co. v. Manufacturers Finance Co.*,⁸⁴ sets forth:

"PRIORITIES BETWEEN SUCCESSIVE ASSIGNMENTS OF THE SAME RIGHT

Where the obligee or an assignor makes two or more successive assignments of the same right, each of which would have been effective if it were the only assignment, the respective rights of the several assignees are determined by the following rules:

(a) A subsequent assignee acquires a right against the obligor to the exclusion of a prior assignee if the prior assignment is revocable or voidable by the assignor; (b) Any assignee who purchases his assignment for value in good faith without notice of a prior assignment, and who obtains (i) payment or satisfaction of the obligor's duty, or (ii) judgment against the obligor, or (iii) a new contract with the obligor by means of a novation, or (iv) delivery of a tangible token or writing, surrender of which is required by the obligor's contract for its enforcement, can retain any performance so received and can enforce any judgment or novation so acquired, and, if he has obtained a token or writing as stated in subclause (iv), can enforce against the obligor the assigned right; (c) Except as stated in Clauses (a) and (b) a prior assignee is entitled to the exclusion of a subsequent assignee to the assigned right and its proceeds."⁸⁵

Among other things it appears from the foregoing that according to the Restatement, a second assignee who in good faith recovered from the debtor, is not bound to turn over the proceeds to the first assignee. There is authority in the judicial law of Massachusetts for this most important among the Restatement's exceptions to the application of the American rule,⁸⁶ while the New York courts seem definitely committed to the opposite result. They allow recovery by

⁸⁰ *Loc. cit. supra* note 3.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ AMES, *CASES ON TRUSTS* (2d ed., 1893) 328, note on *Dearle v. Hull*.

⁸⁴ *Salem Trust Co. v. Manufacturers Finance Co.*, *supra* note 2, Court's note 7.

⁸⁵ *Loc. cit. supra* note 3.

⁸⁶ *Rabinowitz v. Peoples National Bank* (1920) 235 Mass. 102, 126 N.E. 289.

the first assignee against the second one who in good faith collected from a debtor unaware of a competing assignee's claim.⁸⁷ There appears to be authority in Massachusetts also on at least part of the other exceptions laid down by the Restatement, as that under Section 173(b) (iv).⁸⁸ On the other hand, it is probably safe to expect that the New York courts, having declined even the main exception, will not allow the others.⁸⁹

The Restatement rule, it should be noted, is not identical with the "general law" laid down in *Salem Trust Co. v. Manufacturers Finance Co.*⁹⁰ The Supreme Court, while presenting a persuasive argument against the rule in *Dearle v. Hall*,⁹¹ was, it seems, not ready to go the full length the other way, rather, in the words of a law review note, "wavering between the two doctrines."⁹² In this and in the allowance for exceptions, the two positions, that is, that of the Supreme Court in the leading case and that of the Restatement are similar. However, there are also differences between them. To begin with, the Supreme Court, by its generally phrased *dictum*: "Facts and circumstances may create an equitable estoppel against the first

⁸⁷ *Superior Brassiere Co. v. Zimetbaum* (1925) 214 App. Div. 525, 212 N. Y. Supp. 473 (1st Dept.); *State Factors Corp. v. Sales Factors Corp.* (1939) 257 App. Div. 101, 12 N.Y.S. (2d) 12 (1st Dept.), noted in (1940) 25 CORN. L. Q. 283; *Central Foundry Co. v. First Nat. Bank of New Rochelle* (Supreme Court, Westchester County), N.Y.L.J. Dec. 21, 1942, p. 1719.

⁸⁸ *Herman v. Conn. Mutual Life Ins. Co.*, 218 Mass. 181, 105 N.E. 450 (1914), applying the principle of estoppel.

⁸⁹ RESTATEMENT, CONTRACTS (1932) N. Y. ANNOT. (1933) §173.

⁹⁰ *Supra* note 2. Noted in (1924) 24 COL. L. REV. 501; (1924) 37 HARV. L. REV. 1133; (1925) 13 CALIF. L. REV. 141; (1924) 33 YALE L. J. 767. The inajority (by Mr. Justice Butler) predicated their opinion on "general law" even though the result in the case could have been reached on the basis of the state law too. As a matter of fact, both Mr. Justice Holmes and Mr. Justice Brandeis concurred "on the ground that the rights of the parties are governed by the law of Massachusetts." 264 U.S. 182, 200.

⁹¹ This is part of the opinion: "In a case where, as here, the later assignee has made no inquiry of the debtor in advance of taking his assignment, there is no analogy between the giving of notice by the first assignee to the debtor and the taking of the possession of tangible personal property by a purchaser. It is impossible in any real sense to transfer possession of accounts receivable or the like, and, as to them, an assignee does not become clothed with the *indicia* of ownership as does one taking possession of tangible things. It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to or an element in the acquisition of title." 264 U.S. 182, 198, 199.

⁹² 13 CALIF. L. REV., *supra* note 90, at 146.

assignee . . . ,"⁹³ did not, in spite of the reference to Ames' proposition,⁹⁴ commit itself to such an inflexible list of exceptions as subsequently appeared in the Restatement. In the second place, the opinion of the Supreme Court, at variance with the Restatement, left an important loophole as will be seen immediately. The holding of the case under consideration did, of course, not extend beyond the particular facts; and they presented a situation where the second assignee had made no inquiry of the debtor and thus could not allege to have been misled in consequence of the failure of the prior assignee to give notice. Consequently a note-writer queries: "Suppose the second assignee does inquire of the debtor, and not learning of any prior assignment, purchases the chose?" He answers: "There is an intimation in the Supreme Court's opinion that a case of equitable estoppel would arise as against the prior assignee."⁹⁵ This is true, though in an earlier case, *Greey v. Dockendorff*,⁹⁶ the same Court, by Mr. Justice Holmes, had made the following point:

"It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors, *Williams v. Ingersoll*,^[97] and merely keeping silence to the latter, whether known or unknown, created no estoppel. *Wiser v. Lawler*, 189 U.S. 260, 270"^[98]

At any rate, the Restatement formula does not contain a qualification, express or implied, with regard to the case of the second assignee's inquiry of the debtor.

⁹³ *Salem Trust Co. v. Manufacturers Finance Co.*, *supra* note 2, at 270, citing *Herman v. Mutual Life Ins. Co.*, *supra* note 88 and *Rabinowitz v. Peoples National Bank*, *supra* note 86.

⁹⁴ *Supra* notes 83 and 84.

⁹⁵ Note, *The Assignment of Merchants' Book Accounts as Security* (1925) 1 *WASH. L. REV.* 47, 48.

⁹⁶ *Greey v. Dockendorff* (1913) 231 U.S. 513, 515, 516.

⁹⁷ *William v. Ingersoll* (1888) 89 N.Y. 508. (Writer's note.)

⁹⁸ *Wiser v. Lawler* (1903) 189 U.S. 260, 270. In this case, Mr. Justice Brown said: "To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force when the persons to whom notice should be given are unknown." And in *McGill v. Commercial Credit Co.* (Md. 1917) 243 Fed. 637, 642, Rose, D. J., suggested: "In the absence of a statute to the contrary, the purchaser of accounts is not required to notify the debtor Such a buyer is . . . under no legal obligation to tell any one he has bought an account, and, unless the circumstances are peculiar, it is not easy to argue that he is under any ethical call to do so." (Writer's note.)

In spite of the difference between the propositions of the Restatement and that in *Salem Trust Co. v. Manufacturers Finance Co.*, they have this in common: both positions represent that brand of the American rule which does not protect non-notification assignments from being vulnerable under Section 60(a) Bankruptcy Act, if this provision is construed in accordance with the decision in the *Vardaman* case.⁹⁹ This will be shown below.

b. *Equity exception in jurisdiction taking stand with English rule*

While the Massachusetts rule represents the law of a jurisdiction where the English rule, though defeated in the main battle, is still supported by snipers in the form of important exceptions, the reverse picture of a jurisdiction only loosely allied with the English rule is exemplified by a North Carolina case.¹⁰⁰ The opinion in this case states that, though the exact question has not been decided in the jurisdiction, "effect would be given to the fact of notice to and acceptance of assignment by the debtor." While thus declaring its adherence to the English rule, the court qualifies this confession of faith by the following reservation: "However, each case must be considered in the light of the facts upon which it is based, . . ." Though it reached a result in accordance with the English rule, the court did so in expressly holding the equity of the plaintiff superior to that of the competing assignee. The position of this jurisdiction in future cases is, of course, not safely predictable.¹⁰¹

c. *Equity exception in jurisdiction taking stand with American rule*

An interesting illustration of a similarly vague position, making for unpredictability of the law in the respective jurisdiction, is a South Dakota case.¹⁰² On first glance it would seem that the result there was reached upon the basis of the English rule and the case is occasionally cited to this effect. However, it appears from the opinion, that the court in terms predicated its decision upon the belief that "equities are not equal in this case," thus keeping itself free for the possibility of a different result in a future case.

⁹⁹ *Supra* note 12.

¹⁰⁰ *Bank of Northampton v. Town of Jackson and Maryland Casualty Co.* (1939) 214 N.C. 582, 586, 587, 200 S.E. 444, 447, 448.

¹⁰¹ It will be noted that the *Credit Manual of Commercial Laws*, *supra* note 78, lists North Carolina among the jurisdictions with a doubtful position.

¹⁰² *State ex rel. Crane Co. v. Stocke* (1937) 65 S.D. 207, 272 N.W. 811, 816, 817.

"We are convinced that the American doctrine has the support of the better reasons and we are content to adopt it as the law of this State, and give it application whenever the equities are equal . . ."

the court solemnly but also cautiously announced.¹⁰³

There are only a few American jurisdictions where, like in New York,¹⁰⁴ the authorities are definitely conclusive both concerning the main issue, *Dearle v. Hall vel non*¹⁰⁵ and regarding secondary problems, as especially the antagonism between the Massachusetts and the New York rule. In quite a few jurisdictions several factors make for uncertainty of either the present or the prospective law or of both.

¹⁰³ See also *Bridge v. Conn. Mutual Life Ins. Co.* (1890) 152 Mass. 343, 25 N.E. 612, a case where under the American rule in Massachusetts an assignee lost his priority through laches as against a subsequent assignee who has been injured by the negligence of the first.

¹⁰⁴ Important New York decisions approving the American rule are: *Fortunato v. Patten* (1895) 147 N.Y. 277, 41 N.E. 572 and *McKenzie v. Irving Trust Co.* (1943) 266 App. Div. 599 (1st Dept.). One of the federal cases referring to the law of New York as settled in this sense is *Rockmore v. Lehman* (C.C.A. 2d, 1942) 129 F. (2d) 892, 893. See also the New York cases *supra* note 87. However, *Muir v. Schenck* (N.Y. 1842) 3 Hill. 228, 231, and *William v. Ingersoll* (1888) 89 N.Y. 508, often cited to the same effect, are not squarely bearing upon the problem since in neither of them does there seem to have been an awareness of the difference between the question of priority between successive assignees from that of priority between a prior assignee and an attaching creditor.

¹⁰⁵ Among important judicial pronouncements in favor of the *American rule* are: *Columbia Finance & Trust Co. v. First Nat. Bank* (1903) 116 Ky. 364, 76 S.W. 156; *Putnam v. Story* (1882) 132 Mass. 205; *Moorestown Trust Co. v. Buzby* (1931) 109 N. J. Eq. 409, 157 Atl. 663, expressly overruling *Jenkinson v. New York Finance Co.* (1911) 79 N. J. Eq. 247, 82 Atl. 36; *Ottumwa Boiler Works v. O'Meara* (1928) 206 Iowa 577, 218 N.W. 920; *Hess v. Skinner Engineering Co. v. Turney* (1919) 110 Tex. 148, 216 S.W. 621. In the latter case *Greewood, J.*, defending the American rule, *inter alia* said: "The debtor is fully protected because he is not affected by the assignment until notified, and the subsequent assignee, in dealing with a chose in action, is charged with knowledge that he can get no better right than that of his assignor. It increases uncertainty in the law's administration to substitute the date of notice to the debtor as the test of priority for the date of assignment; . . ."

In so far as the *English* rule is concerned, the following are leading cases which, however, lost their practical effects due to statutory changes recently introduced in the respective jurisdictions: *Graham Paper Co. v. Pembroke* (1899) 124 Cal. 117, 56 Pac. 627; followed in *City of Los Angeles v. Knapp* (1936) 7 Cal. (2d) 168, 60 Pac. (2d) 127 and in later California cases; *Lambert v. Morgan* (1909) 110 Md. 1, 72 Atl. 407, referred to in *In re Seim Const. Co.* (Md. 1941) 37 F. Supp. 855; *Murdoch & Dickson v. Finney* (1856) 21 Mo. 138; *Houser v. Richardson* (1902) 90 Mo. App. 134; and *Klehba v. Struempf* (1930) 224 Mo. App. 193, 23 S.W. (2d) 205, all three referred to in the New York case, *Wishnick v. Preserves & Honey* (1934) 153 Misc. 596, 275 N.Y. Supp. 420, Kings County, where Missouri law was applied on Conflict of Laws grounds; *In re Phillips Estate, No. 3* (1903) 205 Pa. 515, 55 Atl. 210, relied upon in the *Klauder* case, *supra* notes 9 and 11.

There are states in which even the main issue has never been the subject of a judicial pronouncement, others in which it is covered only by *dicta*, still others in which the authority is of an obsolete or obsolescent character, a circumstance which should be carefully watched in the case of decisions dating from a period prior to the espousal of the American rule by the Supreme Court of the United States and the American Law Institute. There is, indeed, a powerful trend in this country in favor of the American rule, supported by the fact that it prevails in the majority of the states, including New York, the most highly developed commercially.

Even in a jurisdiction where *Dearle v. Hall* has not yet been overruled, nobody is sure whether the next case will not bring this revolution. In addition, in most of the jurisdictions with the American rule, other than Massachusetts and New York, there is no judicial authority on the extent to which exceptions will be recognized. Therefore, the traditional lists lining up the respective jurisdictions with one or the other rule would seem to have a "limited liability." Lord Coke's well known aphorism, "The most learned, doubteth most," is particularly true in this field. It appears indeed as one of the practical difficulties inherent in the application of Section 60(a) of the Bankruptcy Act that in its definition of one of the elements of a voidable preference, it refers to state law which in a number of cases, will prove of an evasive character.¹⁰⁶ In such a situation, the federal

¹⁰⁶ The following illustrations, taken at random, seem to support the proposition in the text.

(a) In his interesting article, *supra* note 4, at 173, 174, Hamilton refers to the fact that *Ohio* was generally considered as one of the jurisdictions with the English rule, a position also taken by the Ohio Annotations (1933) to Section 173 of the Restatement of Contracts. "Yet one will look in vain," he adds, "for an authoritative pronouncement of the Ohio Supreme Court definitely adopting this theory to the extent, attributed by the Annotation." Similarly, Douglas, *supra* note 36.

(b) The writer of an able note on the Klauder case, (1944) 32 ILL. B. J. 210, submits: "In *Illinois* the courts have held both ways on the question of notice. The early cases followed the English rule . . . However, the rule finally settled upon is that the first assignee prevails regardless of notice." In each of two footnotes (4, 5) accompanying this statement there is offered an array of cases respectively following the one or the other rule. However, upon perusal of those "authorities" it will be seen, it is submitted, that most of the decisions fail to contain a square holding, or even a dictum, on the question of priority among successive *voluntary* assignees of a chose in action. Of course, in both of the foregoing states, Ohio and Illinois, the law has meanwhile been settled by statutes, *supra* notes 24 and 30.

(c) THE NEBRASKA ANNOTATIONS (1933) to Section 173 of the RESTATEMENT OF CONTRACTS cite *Perkins v. Butler County* (1895) 44 Neb. 110, 62 N.W. 308 as authority

bankruptcy judge, while honestly believing that he is following the state law as the opinion in the *Klauder* case requires him to do, is very apt unconsciously to apply one of his own making. The *Vardaman* case,¹⁰⁷ to be discussed below, is a very apt illustration of this unfortunate process.

IV. JUDICIAL CONSTRUCTION OF SECTION 60(a) BANKRUPTCY ACT

Even a writer who enthusiastically asserts "that the Chandler Act is one of the most 'scientifically' created pieces of legislation ever penned by the hand of man" admits "various instances of faulty draftsmanship"¹⁰⁸ which went into its making. It is submitted that one of those shortcomings consists in the ambiguous wording of Section 60(a) as it stands now.¹⁰⁹ In this connection it is interesting to note, though of minor importance, that the apparently conjunctive phrase, "no bona-fide purchaser . . . and no creditor," must according to the almost unanimous opinion of writers and courts be read in the alternative sense, that is, as meaning "no bona-fide purchaser . . . or no creditor,"¹¹⁰ though it has been suggested in a learned article that literalism in the interpretation of that phrase might serve as an escape from such an application of Section 60(a) which had not been contemplated by the drafters or makers of the Chandler

for the proposition that according to *Nebraska* law priority of notice governs. However, the writer of a note on *Greeley County v. First National Bank of Cozad* (1934) 126 Neb. 872, 254 N.W. 502, in (1935) 13 NEB. L. BULL. 445, 446, 447, submits that in *Perkins v. Butler County*, *supra*, the suggestion of the court that the assignee first giving notice to the debtor prevails, "is mere dictum . . . and cannot be said to decide the Nebraska position." Also the above-mentioned case of 1934, reaching a result consistent with *Dearle v. Hall*, does not, he believes, settle the law in Nebraska, even though "the court seemed in favor of the English rule." For, he submits, "the facts are such as to justify a recovery by the defendant bank regardless of the view adopted," a genuine estoppel situation having been present in the circumstances of the case. As a matter of fact, the court, after a lengthy discussion of the problem, expressly said: "It is not necessary to decide which of the conflicting rules should be adopted in Nebraska, because under the circumstances of this case the second assignee is, in our judgment, entitled to the amount due by the application of well established equitable principles . . . Even in the states where the minority rule prevails it seems to us that the bank in this case would have to prevail." It is interesting to note, in this connection, that the *Credit Manual of Commercial Laws*, *supra* note 78, lists Nebraska among the jurisdictions adjudicated to the English rule, without submitting any qualification of this statement.

¹⁰⁷ *Supra* note 12.

¹⁰⁸ Mulder, *supra* note 36, at 10, 11, 13.

¹⁰⁹ *Supra* note 62.

¹¹⁰ In this sense: *In re Seim*, *supra* note 105, at 855, 859, with particular reference *inter alia* to WEINSTEIN, BANKRUPTCY LAW OF 1938 (CHANDLER ACT) (1938) 120.

Act and is perhaps not free from constitutional doubts.¹¹¹ More important than the ambiguity just mentioned is another one, namely that inherent in the phrase "for or on account of an antecedent debt." Does "antecedent" in this statutory context mean what it would normally indicate, that is, a debt existing prior to the time when the "transfer"¹¹² was completed as between transferor and transferee? Or must the word "antecedent" be understood in the light of the final paragraph of Section 60(a) and thus be given a meaning of a highly technical character? For it would then express the existence of the debt either (a) prior to the time when the transfer "became so far perfected that no bona-fide purchaser . . . and no creditor could thereafter have acquired any rights . . . superior to the rights of the transferee . . .," or (b) prior to "immediately before bankruptcy." The same problem can be posited in a different form. Does the sentence of Section 60(a) which constructively fixes the date of transfers "for the purposes of subdivisions a and b," in so far as it mentions subdivision a, refer only to the computation of the critical "four months" period, provided for in subdivision a, or does it refer to any part of subdivision a, including the determination of the conception "antecedent debt"? It will be seen that, following the version suggested above as highly technical, a transfer which according to common understanding has been made to secure a contemporaneous loan, must for the purposes of determining its voidability as a preference, by legal magic, as it were, be transmuted into a transfer for an antecedent debt.¹¹³

Among the cases in which the courts have dealt with this problem of statutory construction, four are of particular importance. They will be discussed in the following lines.

1. *Adams v. City Bank & Trust Co.*

The opinion of the Circuit Court, Fifth Circuit, in *Adams v. City Bank & Trust Co.*,¹¹⁴ with a square holding on the point under con-

¹¹¹ Hanna, *supra* note 32, at 59, 60. See also: Snedeker, *supra* note 36, at 92, n. 26, and Durfee, *supra* note 36, at 480.

¹¹² Transfer is defined in §1(30) of the Bankruptcy Act, 52 STAT. 842 (1938) 11 U.S.C. (1941) §1(30) as including, among other things "any . . . assignment, . . . pledge, mortgage, lien, encumbrance, . . . security"

¹¹³ See *supra* notes 13-15.

¹¹⁴ *Supra* note 10.

sideration, stimulated a vivid discussion, after previous pertinent decisions of other courts had not attracted much attention.¹¹⁵

The facts before the court were not complicated. Bills of sale of certain chattels had been executed in favor of a bank, both on June 24, 1939, and on September 15, 1939, in each instance as security for a concurrently extended loan. They remained unrecorded until December 18, 1939. On December 30, 1939, that is, less than a month after recordation of the bills of sale, adjudication in bankruptcy of the borrower followed. The trustee in bankruptcy claimed the voidability of the security since, pursuant to Section 60(a), it must be regarded as perfected only on December 18, 1939, that is, within the critical four months, and consequently also as given for an "antecedent debt," namely a debt antecedent to the perfection of the security. However, his position was rejected by the District Court and, upon appeal, by the Circuit Court. The latter, in part of its reasoning pointed out:

"The sole proposition is whether a transfer, which was in fact not a preference, is required to be treated as a preference by section 60 of the present bankruptcy act It is argued that the Chandler Act has changed the former rule This argument fails to give due weight to the first section of section 60, sub a of said act, which pro-

¹¹⁵ Apart from *Matter of Johnson Mass Co., Inc.* (S.D. Ind., 1939) 45 Am. B. R. (N.S.) 32, 39 in which opinion Referee Wilde, by way of a dictum, suggested a construction of Section 60(a) substantially identical with that later adopted in the *Klauder* case, *supra* notes 9 and 11, the following decisions prior to that of the Fifth Circuit, *supra* note 10, seem noteworthy:

(a) *In re E. H. Wehb Grocery Co.* (N.D. Tenn. 1940) 32 F. Supp. 3: Chattel mortgage, executed on September 15, 1938, registered September 16, 1939. Petition for adjudication in bankruptcy of mortgagor filed on January 16, 1939. Mortgage, against trustee's claim of voidability under Section 60(a), upheld by court, on two grounds. No security for "antecedent value" even if September 16, 1938 be considered as the decisive date. In addition, under doctrine of "continuous transaction," *supra* note 44, possibility of considering September 15, 1938 as the decisive date. First line of reasoning substantially anticipated that which was subsequently adopted by the Fifth Circuit, *supra* note 10.

(b) *In re Talbot Canning Corp.* (Md. 1940) 35 F. Supp. 680, noted in (1941) 40 MICH. L. REV. 105, a rather involved case concerning assignments both of present and future accounts receivable. The District Court, also anticipating the construction later announced by the Fifth Circuit, *supra* note 10, left no doubt that in its opinion the amended wording of Section 60(a), while effective to eliminate the rule of relation back with regard to the date of the transfer, could not change a transfer made for a contemporaneous consideration into one for an antecedent debt. In this part of its reasoning it was upheld by the Circuit Court which, on other grounds, reversed. Reported as: *Associated Seed Growers v. Geib* (C.C.A. 4th, 1942) 125 F. (2d) 683, 685.

vides . . . 'for or on account of an antecedent debt.' This refers to the whole transaction and not simply to the step to be taken to make it binding as to subsequent creditors and purchasers for a valuable consideration. The language is more direct and specific than that of the original act and prior amendment, but does not indicate a legislative intent to change the historic import of the word 'preference'. In the instant case the bills of sale were given for a present equivalent at the time the debts were incurred, and did not become preferences voidable in bankruptcy by reason of the subsequent filing for record, while the debtor was insolvent, less than four months before the date of bankruptcy."

In summing up the position of the Fifth Circuit, expressed in the foregoing quotation it may perhaps be said that in its view Section 60(a), as amended by the Chandler Act, regardless of its effect on the rule of relation back,¹¹⁶ did not require the courts to substitute for the reality of a contemporaneous consideration the fiction of an antecedent value. In several cases of secondary importance, de-

¹¹⁶ The rule of relation back, consisting in a judicial practice of looking to the execution rather than to the recordation or registration of a transfer in order to determine whether it was made within the critical four months before the transferor's bankruptcy, had been sanctioned in: *Bailey v. Baker Ice Machinery Co.* (1915) 239 U.S. 268; *Carey v. Donohue* (1916) 240 U.S. 430; *Martin v. Commercial National Bank* (1918) 245 U.S. 513. The drafters of the Chandler Act, by their alteration of the wording of Section 60(a), undoubtedly intended to finally abolish this judicial rule of relation back. It may, however, be debated whether in the legislative intent, that was the main reason or the only purpose of that change. It should be noted that, likewise with a view to extinguish that rule of relation back, Section 60(a) Bankruptcy Act had, even before the Chandler Act, been the subject of legislative tinkering in the form of successive amendments. By adding the word "permitted" to "required", Section 60(a) had, before the Chandler Act, been given a wording which in part reads:

" . . . Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted"

However, strangely enough, even then the courts, save a minority of them, believed that, particularly in view of the failure to correspondingly amend the language in Section 60(b), there was not sufficient expression of a legislative fiat to completely outlaw the rule of relation back. Therefore, a new amendment, as proposed by the Chandler Bill, became a necessity. See, in addition to *Hanna and McLaughlin*, *supra* note 7, at 58; the annotations (1933) 83 A.L.R. 1279 and (1941) 134 A.L.R. 1218; the special comment, *Voidability in Bankruptcy of Transfers Recorded within the Four Months Period* (1939) 44 YALE L. J. 109 and *Remington*, *supra* note 36, §1693, p. 179, the following articles: *McLaughlin, Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 341 and 583; *Bennett*, *supra* note 36 at 405; *Hanna*, *supra* note 32 at 70; *Neuhoff*, *supra* note 36 at 544; *Wolfe*, *supra* note 13 at 65; finally, *Durfee's comment*, *supra* note 36 at 478. Also *infra* note 127.

cided before the announcement of the Third Circuit in the *Klauder* case, various courts took substantially the same position.¹¹⁷

¹¹⁷ Among the cases decided after the decision of the Fifth Circuit, *supra* note 10, and before that of the Third Circuit, *supra* note 11, the following, either dealing with the point under consideration, or related ones, are noteworthy:

(a) *In re Markert* (Mass. 1942) 45 F. Supp. 661. Chattel mortgage on stock of merchandise to secure antecedent indebtedness given on July 1, 1939; duly recorded; but possession of after-acquired property taken by mortgagee on May 27, 1941, with adjudication in bankruptcy of the mortgagor following on May 29, 1941. Court's holding that mortgage void with regard to the said after-acquired property, concerns only doctrine of relation back, *supra* note 116. But from a dictum mentioning the cases, *Adams v. City Bank & Trust Co.*, *supra* note 10, and *In re E. H. Webb Grocery Co.*, *supra* note 115, sub a, and distinguishing them on the ground that they did not concern a transfer originally made for an antecedent loan, as in the present case, it clearly appears that the court approved the construction of Section 60(a) as adopted by the Fifth Circuit.

(b) *Girand v. Kimball Milling Co.* (C.C.A. 5th, 1941) 116 F. (2d) 999, 1001, concerning a factor's lien under the law of Virginia. In a rather loose connection to the facts of the case to be decided, the Circuit Court cited its opinion in *Adams v. City Bank & Trust Co.*, for the following proposition: "There was never an unsecured debt, and without that there could be no preference."

(c) *In re Seim Const. Co.*, *supra* note 105. Part of a fund, to arise in the future under an existing contract, was assigned on August 11, 1939, for a pre-existing debt of the assignor to the assignee; on April 11, 1940 assignor was declared bankrupt. Under the law of Maryland it was sure that an attaching creditor of the assignor, but doubtful whether a bona fide purchaser of the same, could, after December 22, 1939 (another date important under the facts of the case) have secured rights in the assigned property superior to that of the assignee. Mortgage held void since court interpreted the conjunctive phrase, "No bona-fide purchaser . . . and no creditor," as having an alternative meaning, *supra* note 110, so that vulnerability by attaching creditor sufficient for effect of Section 60(a) Bankruptcy Act.

Opinion, while definitely rejecting the further application of the rule of relation back, *supra* note 116, did not commit itself with regard to the "antecedent loan" clause, a question irrelevant in the case. Said the court: "After some little original doubt upon the subject, I conclude under the amended statute that the claimant's knowledge or that of his agent (*at least in this case where the assignment was made to secure a preexisting debt*), must be related to the time when the assignment was perfected, and is not limited to the time it was first executed." (Italics added.)

To make the picture complete, the following cases of secondary importance, decided after the decision of the Third Circuit, *supra* note 11, may be mentioned:

(A) *In re Greenberg* (Mass., 1942) 48 F. Supp. 3. Facts analogous to those of *In re Markert*, *supra* sub. a. Mortgage on automobile given on February 20, 1940, to secure loan made in December, 1939; not duly recorded; on December 4, 1940, mortgagee takes automobile into his possession; on December 5, 1940 mortgagor is adjudicated bankrupt. Mortgage held void. Reasoning cites and is on all fours with *In re Markert*.

(B) *In re Cox* (C.C.A. 7th, 1943) 132 F. (2d) 881, is in point only on the rule of relation back, *supra* note 116. Chattel mortgage (in Indiana) executed five days before mortgagor's adjudication in bankruptcy, but recorded only after that adjudication. Court held that not five days before bankruptcy, but "immediately before bankruptcy" (in the terms of Section 60(a) National Bankruptcy Act) was the critical day for the

2. The *Klauder* Case before the Third Circuit

The *Klauder* case reached the Federal Court of Appeals for the Third Circuit under the name *In re Quaker City Sheet Metal Co., Appeal of Klauder*.¹¹⁸ A brief summary of the facts follows.

The Quaker City Sheet Metal Company had become embarrassed for want of working capital. Creditors, representing a large percentage of the company's liabilities agreed to subordinate their respective claims to those which might be incurred for new working capital. They formed a committee. It took supervision of the company's business and in this capacity, in 1938, arranged with the Corn Exchange National Bank and Trust Company and with one Edward C. Dearden, Sr., to advance money for payroll and other needs. Security for these loans was given in the form of concurrently made assignments of accounts receivable. On April 18, 1940 an involuntary petition in bankruptcy was filed against the company, followed by adjudication on May 17, 1940. At that time the company was indebted to the bank in the sum of \$7,954.51 and to Dearden in the sum of \$1,550, in each case for loans secured, as above described, on contemporaneous assignments. Those to the bank had been made between January 19, 1940 and April 5, 1940, those to Dearden on April 12, 1940. The transactions took place in Pennsylvania, a jurisdiction with the English rule as to priority between successive assignees.¹¹⁹ The assignments were recorded on the company's books.¹²⁰ But the debtors, whose obligations formed the security, had no notice of them before the company's bankruptcy.

Trustee in bankruptcy claimed the voidability of the assignments which, he maintained, must according to Section 60(a) Bankruptcy

existence *vel non* (on the part of mortgagee) of a reasonable cause to believe that mortgagor was insolvent.

(C) *In re Hutcheson* (C.C.A. 7th, 1943) 133 F. (2d) 959, assignment of a judgment. Similar legal problem with *In re Cox*, *supra* sub B.

¹¹⁸ *Supra* note 11.

¹¹⁹ *In re Phillips Estate No. 3* (1903) 205 Pa. 515, 55 Atl. 210, *supra* note 105, was held conclusive to this effect both by the Third Circuit and by the Supreme Court of the United States. All the relevant facts in the case occurred before the statutory change of the law in Pennsylvania, *supra* note 22.

¹²⁰ Obviously, no importance was attributed to this point either by the Third Circuit or by the Supreme Court of the United States, But *cf. supra* note 48.

Act, be considered as perfected "immediately before bankruptcy,"¹²¹ hence at a date subsequent to that of the loans, consequently as made "for or on account of an antecedent debt." The Referee rejected this position of the trustee. His order was affirmed by the District Court, Eastern District, Pennsylvania, but upon appeal of the trustee reversed by a majority of the Circuit Court who held the assignments voidable as preferences.

In this opinion, Maris, C. J., writing for the majority, expressly disclaimed the position taken by the Fifth Circuit¹²² and among other things expounded:

"In determining whether a debt is antecedent to a transfer made on account of it, are we to apply the rule laid down in the second sentence [*scil.* of Section a] as to when a transfer is to be deemed as having been made? In other words, is a debt to be treated as antecedent to a transfer actually made contemporaneously but not perfected as against purchasers and creditors of the debtor until at a later time? We think that a fair construction of the statutory language requires an affirmative answer to this question. The rule which the second sentence of subdivision a lays down as to the time when a transfer is to be deemed to have been made is stated to be 'for the purposes of subdivision) a' *inter alia*. It is thus clear that the rule is intended to apply to the provisions of the first sentence of that subdivision insofar as they involve questions having to do with the time of making a transfer. There is no indication that its application to the first sentence is to be restricted to the mere determination whether a transfer is made while the debtor is insolvent and within four months of bankruptcy. On the contrary, it is obvious that the time of the making of a transfer is the essential element in determining whether a debt on account of which it is made was antecedent to it."

After thus dealing with the problem involved in a literal construction of Section 60(a), the majority opinion turned to the question of legislative intent. On this point the view was adopted "that the purpose of Section 60, sub a, as amended by the Chandler Act of 1938, was to strike down secret liens even though given for a present consideration."

¹²¹ Since, under the then law of Pennsylvania, at any time before the assignor's bankruptcy, a bona fide purchaser of the assignor could have acquired rights in the assigned account superior to that of the assignee.

¹²² *Supra* note 10.

An ingenious dissent by Jones, C. J., in part submitted:

"The construction [*scil.* of the majority of the court] . . . seems to me to deny the intended effect of the word 'antecedent' . . . and, at the same time, to give an effect to the provision with respect to the presumed time of transfer under certain specified conditions, contrary to the intent of that provision . . . according to the prevailing argument, the entire transaction of contemporaneous loan and transfer is split apart and the imperfect transfer is 'deemed to have been made immediately before bankruptcy,' as Section 60, sub a. provides, while the loan for which the transfer was contemporaneously made retains the original date of the actual transaction and thus becomes antecedent in relation to the time of the transfer, as statutorily presumed under the attending circumstances. To so hold seems to be a striking instance of lifting oneself by one's own bootstraps and terminates in a result which I do not think Section 60, sub a was intended to bring about. When the time of the transfer is brought to 'immediately before bankruptcy' by virtue of Section 60, sub a, . . . the fact as to whether the imperfect transfer was made for an antecedent debt or for a debt contemporaneously incurred is still to be reckoned with on the basis of actuality."

After thus showing that the language of Section 60(a) could be given a different reading from that of the majority of the Court, Judge Jones turned to considerations of policy and in this connection pointed out:

"A transfer . . . which does not reduce the value of a debtor's estate because he contemporaneously receives full value in exchange is not a preference Bankruptcy does not disapprove of an insolvent's debtor giving security, even down to the date of bankruptcy, for a present loan of full value. Such action may possibly sustain the breath of fiscal life in a gasping debtor until complete recovery to the ultimate benefit of creditors generally¹²³ Indeed, it was in furtherance of that hope that the subject loans in the instant case were given."

3. *The Klauder Case before the Supreme Court of the United States*

The conflict between the views on the "antecedent debt" clause of Section 60(a), respectively expressed by the Federal Court of Ap-

¹²³ See in this connection the following remark in the note on the Supreme Court's decision in the Klauder case, *supra* note 9, in (1944) 32 *ILL. B. J.* 210, at 211: "The National Bankruptcy Act does not forbid cash transactions even by an insolvent person. Instead, the policy always has been to give him every fair chance to stay in business and regain his financial standing" (Writer's note.)

peals for the Fifth Circuit, and by a majority of the Federal Court of Appeals for the Third Circuit was reflected in a similar divergence of opinions voiced by writers of articles and textbooks.¹²⁴ It finally reached the highest tribunal of the country.

Though only a year before, 1941, certiorari to the Court of Appeals for the Fifth Circuit had been denied, the Supreme Court of the United States, in 1942, granted certiorari to the Court of Appeals for the Third Circuit and then in its opinion reported as *Corn Exchange Nat. Bank & Trust Co. v. Klaunder*,¹²⁵ confirmed the Third Circuit's decision, thus overruling the construction suggested in *Adams v. City Bank & Trust Co.* The vote was not unanimous. Mr. Justice Roberts filed a brief dissent, in which he referred to Judge Jones' dissent in the Third Circuit and to the reasoning in the opinions of the Fifth Circuit and of other courts that had reached similar results with the latter.

The majority opinion, written by Mr. Justice Jackson, considered the interpretation of Section 60(a), adopted by the majority of the Third Circuit, as "undoubtedly" corresponding to "a literal reading of the Act."¹²⁶ The Court was aware that "such a construction is capable of harsh results" and it also realized that in the light of the particular facts the case was a hard one. But it believed that there was "nothing in Congressional policy which warrants taking this case out of the letter of the Act." Rather did the opinion express a strong feeling that vulnerability of non-notification assignments under the impact of Section 60(a) was well within the legislative intent to strike down secret liens.¹²⁷ The Court did not ignore the fact that to

¹²⁴ Most of the material listed *supra* note 36 was published at that date.

¹²⁵ *Supra* note 9.

¹²⁶ Compare, however, again the note (1944) 32 *ILL. B. J.* 210, 211. After making the statement quoted *supra* note 123, the writer submits: "It seems doubtful that Congress intended to outlaw such cash transactions merely by changing the date of imperfect transfers to a date 'immediately before bankruptcy.' If such were the intent of Congress, such *equivocal language* would probably not have been used. Rather, it seems apparent that the legislator did not mean to include assignments of a accounts receivable for a present consideration within the class of imperfect transfers to be deemed made immediately before bankruptcy."

¹²⁷ In this connection the court cited material apparently supporting its view on the sweeping scope of the legislative intent "to strike down secret liens." The most telling passages are herewith quoted:

(a) From H. R. Rep. No. 1409, 75th Cong., 1st Sess. (Mr. Chandler's report on behalf of the House Committee on the Judiciary) at page 30: "Section 60a as recast accomplishes this desirable result. The new test is more comprehensive and accords with

insist on notification was hardly an adequate means to enforce a policy of striking down secret liens, since notice given to the debtor might not reach creditors other than the assignee. It also saw that Section 60(a) was powerless against secret assignments under the law of a jurisdiction which did not require notification of the debtor for the effect of the assignment against a bona fide purchaser or a creditor of the assignor and that therefore a policy of striking down secret assignments will, if dependent on Section 60(a), be carried out in a way not quite in keeping with the ideal of equally treating equal things. Moreover, Mr. Justice Jackson expressly mentioned the Conflict of Laws problem to arise in the wake of the rule laid down by the majority of the Court. He emphasized "that conflicts and confusion may result where the transaction or location of the parties is of such a nature that doubt arises as to which of different state laws is applicable." However, he did not believe that such considerations were strong enough to change the result reached on the basis of the language of the statute and of what was declared to be the legislative intent.

Would the Supreme Court have decided otherwise than it did, had there not been before its eyes such a picture of the business atmosphere of non-notification financing which, in the words of a recent publication, was "altogether archaic"?¹²⁸ Again, would the Court

the contemplated purpose of striking down secret liens As thus drafted, it includes a failure to record or any other ground which could be asserted by a bona fide purchaser or a creditor of the transferor, as against the transferee. A provision also has been added which makes the test effective even though the transfer may never have actually become perfected."

(b) From McLaughlin's article, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, in (1937) 4 U. OF CHI. L. REV. 369, 393: "The phrasing is not limited to secret liens within the Recording Acts. It is broad enough to cover analogous cases such as those where a judge-made 'equitable lien' is invoked to save secret transfers invalid for failure to take the steps essential to a valid transfer at common law."

It should be noted that:

(c) Professor McLaughlin made a much narrower statement in his oral explanations before the House Committee, then focussing his attention on what he called "the three leading cases, *Bailey v. Baker Ice Machine Company*, *Carey v. Donolue*, and *Martin v. Bank*," *supra* note 116, and emphasizing the legislative purpose "to knock out these fictions of 'relation back' under State law which seem . . . to be in the teeth of the policy of the Bankruptcy Act." HEARINGS BEFORE HOUSE JUDICIARY COMMITTEE ON REVISION OF THE BANKRUPTCY ACT, 75th Cong. 1st Sess., at 129 and 124, respectively. See also *supra* note 116.

¹²⁸ *Loans on Accounts Receivable* (1944) 55 UNITED STATES INVESTOR 1985, 1986 adding: "These old-time conditions have given way, in the banks at least, to a business whose charges are not unreasonably high and whose assignments are not symptoms of

have reached another result upon realizing the impact which the approved construction of Section 60(a) might exercise upon the security of the rights warranted to the entruster in a transaction under the Uniform Trust Receipts Act.¹²⁹ The answer to such and similar questions, which have been raised by various writers, must be left to the reader's imagination.

4. *The Vardaman Case*

After the decision in the *Klauder* case, it was for a long time generally, though not universally understood both in business and legal quarters, that its scope or, more precisely, that of the construction approved therein, did not extend beyond non-notification assignments under the law of a jurisdiction with the rule in *Dearle v. Hall*. More specifically, it was, again generally, though not universally, believed, that non-notification assignments under a law which recognized the validity of the first assignment as against all the world, would not be vulnerable by that construction of the Chandler Act, because of the fact that, under the same law, a second bona fide assignee collecting the proceeds is not accountable to the first assignee.¹³⁰ To those who shared this view, including leading institutions in Massachusetts, *In re Vardaman Shoe Co.*,¹³¹ decided by the District Court for the Eastern District of Missouri, came as a shock.

Rarely will there be facts with so little opportunity for the application of a rule announced by the Court as were present in the

financial distress. Effective rates are frequently less than six per cent per annum on the money in use . . . One certainly does wish that the present day practice . . . might have been driven home to the minds of the court while it was considering the *Klauder* case. Would it then have lent its great influence to striking down a growing type of lending and one which can be very useful indeed in the post-war period?" At 2023, the same writer submits: "Far from being the almost censurable transaction which the Supreme Court seems to have thought it to be, and certainly far from being a 'symptom of financial distress,' this sort of loan has become the stepping stone on which a borrower can lift himself to a sounder position."

¹²⁹ On this interesting question, which cannot be taken up within the present ambit, see German, *Effect of Section 60a of the Chandler Act on Transactions under the Uniform Trust Receipts Act* (1941) 26 CORN. L. Q. 306 and also: *In re Accounts Receivable Financing* (108) (1943) AMERICAN BANKER 1, at 2; Baty, *supra* note 36, at 371; Snedeker, *supra* note 36, at 104.

¹³⁰ As under the Massachusetts, at variance with the New York rule, *supra*, III sub 2a.

¹³¹ *Supra* note 12. For a lengthy discussion of the Vardaman case see: Tillitt, *Two Illinois Assignee Banks Lose Accounts Receivable Case* (1943) 108 AMERICAN BANKER, No. 271, p. 1.

Vardaman case. The opinion was bound to go a long way to discover this opportunity. A Missouri corporation had, prior to its adjudication in bankruptcy, been financed by two Illinois banks on the basis of non-notification assignments of receivables. The trustee in bankruptcy claimed voidability of the assignments pursuant to Section 60(a) Bankruptcy Act, alleging that they were governed by the law of Missouri, a jurisdiction with the English rule,¹³² and therefore, since not perfected against all the world before the petition in bankruptcy of the assignor, to be considered as done "immediately before bankruptcy," hence for or on account of antecedent loans. The District Court upheld this claim with the startling reasoning that it made no difference for the result whether Missouri law (English rule) or Illinois law (American rule)¹³³ governed the assignments.

The decision was written by District Judge Moore who, after quoting from the opinion of the Supreme Court of the United States in the *Klauder* case, summarized the rule of the latter as follows:

"If the assignment is not so perfected . . . according to the state law as to be absolutely invulnerable to attack, it takes effect only as of the date on which the bankruptcy petition is filed, bankrupt's debt which is secured thereby is deemed to be an antecedent obligation and the assignment is a preference within the terms of Section 60 sub a."

He then broached upon the Conflict of Laws problem, involved in the case, without offering a definite solution thereof. Said he:

"While . . . the assignments specify that they are to be construed according to Illinois law, this is not necessarily binding on a stranger to the contract, and there appears to be evidence that at least some of them were actually executed in Missouri. Furthermore, the situs of the debts prior to assignment was at Missouri, at debtor's place of business."

After thus disclosing his doubts as to whether the law of Illinois governed the assignments rather than the law of Missouri, claimed by the trustee in bankruptcy, District Judge Moore came forth with the statement, substantially, that in his opinion the alternative was irrelevant to the decision since the assignments were vulnerable by Section 60(a), he believed, even if the choice of law was made in favor of that of Illinois. In this connection he reasoned:

¹³² *Supra* note 105.

¹³³ *Supra* note 106, at b.

“ . . . It appears to be the law of Illinois that a subsequent assignee cannot defeat a prior assignee simply by giving notice to the debtor. *Knight v. Griffey*, 161 Ill. 85, 88, 43 N.E. 727; *Siegel, etc. v. Liberty Bank*, 272 Ill. App. 43; *Sutherland v. Reeve*, 151 Ill. 384, 393, 38 N.E. 2d 130. However, in jurisdictions abiding by this rule, known as the Massachusetts rule . . . , exceptional situations are recognized in which a subsequent bona fide purchaser can obtain good title as against a prior assignee who has not given notice. The Restatement of Contracts, Section 173, sets out this rule and its exceptions, . . . *The Illinois courts have not had occasion to consider any of these exceptions to the rule, but they appear to be sound law, so it is likely that* even under the Illinois rule, these assignments were not so perfected prior to the filing of the bankruptcy petition that no bona fide purchaser from the debtor and no creditor could have acquired any rights in the property so transferred superior to the rights of the transferee. Therefore, *if* the Illinois courts make a declaration in accord with the general law as followed in other jurisdictions subscribing to the Massachusetts rule, the assignments to the banks were subject to defeat at the hands of a hypothetical bona-fide purchaser who obtained payment, judgment or novation.” (Italics added.)

The soundness of this reasoning is, of course, highly questionable insofar as it draws the inference that Illinois must be deemed to be a jurisdiction with the Massachusetts rather than the New York rule. It cannot be a matter of safe prediction whether the courts of Illinois, faced themselves with the problem, would make their choice in accordance or at variance with the law prevailing in the commercially highest developed state of this country. Could they not in their selection be motivated by the fact that the Massachusetts rule seems to stop half-way between allegiance to the orthodox English rule and full-fledged emancipation therefrom, whereas the position of the New York courts appears to carry the American rule to its logical consequence?

At any rate, this aspect of the *Vardaman* case is not the important one. The paramount thing is whether the Court was right in its holding or perhaps *dictum*¹³⁴ that under the Illinois law, if it follows the Massachusetts rule, non-notification assignments are of such a

¹³⁴ The opinion in the *Vardaman* case says: “. . . the question whether Missouri or Illinois law is applicable is moot, since under either rule, a bona-fide purchaser could have acquired rights superior to the rights of the assignees” Does this make the Court's conclusion on the vulnerability of the assignments, if they are governed by the law of Illinois, a holding or a dictum? The answer to this query is hardly of more than academic interest.

nature as to be vulnerable by Section 60(a) Bankruptcy Act. Or, raising the same question in a more general way: does it follow, as an implication from the statutory construction adopted in the *Klauder* case that in addition to the English rule also the Massachusetts brand of the American rule makes non-notification assignments vulnerable under that provision of the Bankruptcy Act?

It is submitted that the answer should be given in the negative. The decisive point, under Section 60(a) Bankruptcy Act is whether a bona-fide second assignee or creditor of the assignor could have acquired any rights *in the assigned receivable* ("property . . . transferred") superior to the rights of a first assignee. The Restatement exceptions to the American rule do not, it would seem, give the second assignee such a possibility of acquiring superior rights *in the assigned chose in action*, rather do they deny a recovery of the first against the second assignee after the assigned chose in action has ceased to exist in consequence of payment discharging the debtor or of novation or a quasi-novation (the merger effect of a judgment). This proposition is easily demonstrable in the case of a second assignee who has bona fide collected from the debtor. Admittedly he is, under the Massachusetts rule, not accountable to the first assignee. But this does not at all give him a title, far less a superior title, in the assigned chose in action. The latter, by hypothesis, does then not exist any longer, having been extinguished by payment of the debt. The question which remains is one of recovery in quasi-contract, that is, on the ground of undue enrichment, and not a title dispute. It is of course more consistent with the nature of the American rule to grant such recovery than to refuse it. But to deny it, does not imply that the second assignee is thereby given a title, leave alone a superior title, in the assigned chose in action. A similar analysis, though more technical, could be made, it is believed, with regard to the other Restatement exceptions. It would lead to the same conclusion.

However this may be, the foregoing proposition is not meant to suggest that an argument in support of the rule in the *Vardamen* case could not well be made. The point is, indeed, highly debatable, and must remain uncertain until a decision of the Supreme Court of the United States will have settled it in an authoritative way. For the time being, there is a strong trend in Massachusetts toward the enactment of a statute that would change the local law so as to make non-

notification assignments there immune against the construction of Section 60(a) suggested by the *Vardaman* case.¹³⁵

V. TEN STATUTES, TWO POLICIES

As mentioned in the first part of this study, statutes have been enacted in ten states¹³⁶ with a view to removing a cloud cast by Section 60(a) of the Bankruptcy Act upon the business of non-notification financing. Unfortunately, not all these novel statutes are free from problems of interpretation. These problems add to the regrettable uncertainties in the field. Moreover, the statutes, not identical in content, have considerably increased the diversity of law prevailing in the American jurisdictions on the test of priority among successive assignees of a chose in action. This, in turn, makes the lack of settled rules on the respective choice of law even more embarrassing than it was before.

As already stated, the ten statutes represent three different forms of legislative reaction to the same problem. While it cannot be the purpose of this study to go into all the details of each type of statute, it will be attempted to draw some of the main features of this novel body of law.

1. *Validation Statutes*

The so-called validation statutes substantially amount to a legislative codification of the American or non-notification rule. The first three validation statutes were silent on the question whether a second assignee collecting from the debtor would be accountable to the first assignee.¹³⁷ Each of the two later ones contains a passage expressly

¹³⁵ On this recent development see the apparently well informed article cited *supra* note 128.

¹³⁶ *Supra* notes 22-31.

¹³⁷ Statutes of Rhode Island, Maryland and Connecticut, *supra* notes 27, 28, 29 respectively. The substantial part of the Connecticut statute reads: "SECTION 1. All bona fide written assignments of choses in action, made for good and valuable considerations, shall be valid, legal and complete and shall transfer and convey the title to such choses in action to the assignee thereof, and shall take effect according to the terms of the written assignment instrument without the giving of notice to the debtor unless such notice is required by statute; and the transfer and conveyance of the title to such choses in action shall take effect and be valid against all persons as of the date of the execution and of the delivery of said written assignment, provided, in any case where written notice of said assignment is not given to the debtor and the debtor, acting without knowledge of said assignment and in good faith, pays or discharges in whole or in part his obligation to the original owner or any subsequent assignee of such choses in action, such

providing for recovery in this situation by the first assignee.¹³⁸ It is the general expectation among experts also that validation statutes of the first mentioned form will be judicially construed in the sense of the New York rule should it be settled that Section 60(a) Bankruptcy Act must be understood as laid down in the *Vardaman* case. Such forecast is in the first place based upon the manifest purpose of those statutes to introduce a rule in the respective jurisdiction which makes non-notification assignments invulnerable under Section 60(a) Bankruptcy Act. In addition, the peremptory wording of each of those statutes is said to support an interpretation in the sense of the New York rather than the Massachusetts rule.

Validation statutes are the type of legislation urged by spokesmen of the finance companies¹³⁹ and also by those articulate on behalf of the factors group.¹⁴⁰ The statutes enjoy the tentative support of a majority of the Special Committee of the Commissioners on Uniform State Laws¹⁴¹ and are warmly recommended by the Committee on Uniform State Laws of the Association of the Bar of the City of New York.¹⁴² But they are opposed by the American Bankers'

payment shall be sufficient acquittance to the debtor to the extent of such payment, and shall discharge the obligation of said debtor, in whole or in part, according to the amount of such payment."

¹³⁸ Statutes of Illinois and Virginia, *supra* notes 30 and 31 respectively. The substantial part of the Virginia statute reads: "Section 1. All written assignments made in good faith, whether in the nature of a sale, pledge or otherwise, of accounts receivable and amounts due or to become due on open accounts or contracts shall be valid, legal and complete, and shall be deemed to have been fully perfected, without notice to the debtor of such assignment. Such assignments shall take effect according to their terms and be valid and enforceable, as of the respective dates thereof, against all persons whomsoever and in any event. In any case where notice of an assignment is not given to the debtor, and, acting without knowledge of such assignment, the debtor pays or discharges in whole or in part the obligation to the original owner or a subsequent assignee of the owner of the same, in good faith, such payment shall be sufficient acquittance to the debtor in whole or pro tanto, as the case may be, *but the title, right and priority of the prior assignee shall not in any way be affected or diminished by such payments to the original owner or subsequent assignee, and such original owner or subsequent assignee shall be accountable to and liable to the prior assignee as trustee for the sums so paid to them by the debtor.*" (Italics added.)

¹³⁹ *Supra* note 43.

¹⁴⁰ *Ibid.*

¹⁴¹ *Supra* notes 33-35.

¹⁴² *Supra* note 43. The draft of a "Model Uniform Act Covering Assignments of Accounts Receivable" embodying the New York rule, was unanimously approved by the full Committee on Uniform State Laws of the Bar of the City of New York on November 27, 1944.

Association¹⁴³ and other groups.¹⁴⁴ These opponents believe that the required legislative action, in addition to its main object of removing a cloud from non-notification financing, should serve the collateral purpose of putting an end to the ill-famed secrecy of this method. However, even those groups which as part of their policy against "secret liens" are opposing validation acts do not believe that statutes codifying the English rule would be helpful. It is indeed, almost universally admitted, at present, that notification of the debtor, such notification being quite unnecessary for his own protection,¹⁴⁵ and generally distasteful to the assignor-borrower,¹⁴⁶ does not give effective publicity. Such notification does not perform the direct effect of giving notice to prospective other assignees or potential extenders of unsecured credit. Whether it may indirectly serve them as a channel of information, will depend on fortuitous circumstances, including the good will or interest of the notified debtor to make available any knowledge he may have. In an important textbook it is said that "notification will apprise the debtors on the accounts of the assignor's possible weakened position" and that "this information may permeate business channels and result in putting subsequent creditors of the assignor on guard, or cause existing creditors to consider moves for their own protection."¹⁴⁷ But these and similar statements, though advanced by distinguished men¹⁴⁸ do not, it is submitted, represent the modern trend in the field. Regardless of any merits which notification of the debtor may have, it is surely not fit to accomplish that leading object of recording acts which consists in providing "evidence of title, accessible to all, upon which one may rely in making a purchase when he has no knowledge of anything to put him on inquiry."¹⁴⁹

¹⁴³ *Supra* note 49.

¹⁴⁴ Probably including the majority of the members of the National Association of Credit Men.

¹⁴⁵ *Supra* III/1, at note 67.

¹⁴⁶ *Supra* II/2.

¹⁴⁷ 3 COLLIER, *op. cit. supra* note 36, §60.48, p. 968.

¹⁴⁸ 2 WILLISTON, *op. cit. supra* note 67, §435, at 1261. suggests: "If knowledge of the rule requiring notice could be widely diffused among the community, the English rule would have the same advantages in a lesser degree which a recording system for deeds and mortgages possesses." Similarly, BOGERT, *op. cit. supra* note 68, at 556, 557. *Contra*: note on Salem Trust Co. v. Manufacturers Finance Co., in (1924) 24 COL. L. REV. 501, demonstrating the error involved in an analogy between the publicity effect of recording statutes and notification of the assigned debtor.

¹⁴⁹ Ballantine, *Purchase for Value and Estoppel* (1922) 6 MINN. L. REV. 87, 91.

There may be a difference of opinion on the fundamental question whether public interest in publicity requires the depriving of assignments made without some kind of publicity of the protection of the law.¹⁵⁰ The tentative Majority Report of the Special Committee of the National Conference of Commissioners on Uniform State Laws, surely an unbiased source, lists six reasons in favor of a validation rather than a recording statute.¹⁵¹ On the other hand, those who raise objections against a "secret lien policy" also deserve a "day in court." Whatever final position one may take on this issue of secrecy versus publicity of receivables financing, he should be certain that, if publicity is the thing that is needed, notification of the debtor does not accomplish this purpose. As it is said in the aforementioned Majority Report:

"Obviously, in the modern day, notice to one who owes an original account will in no way give notice to any other person, certainly not to a creditor, a purchaser, or a subsequent assignee."

Consequently, the Committee considered the requirement of notification as "outmoded and ineffective."¹⁵²

As a concluding observation on that type of legislation which is presented by a validation statute, it is submitted that, while the soundness of the underlying policy may well be a matter for debate, such statute would seem to make non-notification assignments good against the trustee in bankruptcy of the assignor, especially if it is drawn in a cautious form, and with attention paid to the *Vardaman* case.¹⁵³ Other advantages which may be attributed to this form of

¹⁵⁰ Forcefully *contra* to such extension of the policy of recording statutes is *Hanna*, *supra* note 60.

¹⁵¹ Report *supra* note 34 at 7-9.

¹⁵² *Ibid.* at 9.

¹⁵³ From all discussions so far of §60(a) Bankruptcy Act, judicial as well as textual, it would seem to follow that non-notification assignments under the New York rule are not considered as vulnerable under the construction adopted in the *Klauder* case. See, e.g., *In re Ace Fruit and Produce Co.* (S.D.N.Y., 1943) 49 F. Supp. 986, a federal case involving assignments governed by the law of New York, and giving an interpretation of §60(a) National Bankruptcy Act, and *McKenzie v. Irving Trust Co.* (1944) 266 App. Div. 599 (1st Dept.). The second mentioned case involved an assignment of claims within the scope of the Federal Assignment of Claims Act as amended October 9, 1940, U. S. C., Title 31, §203. It was plaintiff's theory that, although the assignment had been made more than four months prior to the filing of the petition in bankruptcy against the assignor, it could under §60(a) Bankruptcy Act nevertheless be treated as a preference, because the filing of the assignment and the consent of the Federal Government had

occurred within the specified period. The Appellate Division, citing New York cases on the rule concerning the rank between successive assignees of a chose in action, held the assignment as sufficiently perfected at the date of its "delivery," that is before it had been filed pursuant to the aforementioned federal law. Said the opinion at 601: "It is our view that the assignment was not inoperative because of the delay either in obtaining the consent of the Secretary of War thereto or in the filing of the assignment with the various government departments The primary purpose of the Assignment of Claims Act . . . is to give protection to the government The only infirmity in the assignment pending the consent and filing was the impairment of recourse of defendant to the government. *Otherwise the assignment was fully perfected.* No other creditor of Graven-Quinn Corporation could have acquired rights in the property so transferred superior to the rights of the defendant by taking an assignment from the bankrupt after November 22, 1940, and by obtaining the War Department's consent to the assignment . . ." (Italics added.) At 602, the court added: "On the facts in this case, under the laws of this State, no purchaser in good faith could acquire on November 28, 1940, any right superior to that of the defendant. Hence, the payment of \$150,000 made by the bankrupt to defendant on November 28th was not a preferential one, . . ."

The decision of the Appellate Division in *McKenzie v. Irving Trust Co.*, *supra*, was, under the same name, affirmed by the New York Court of Appeals in (1944) 292 N.Y. 347, 55 N.E. (2d) 192, noted in (1944) 31 Va. L. Rev. 222, and in (Jan. 8, 1945) 89 L. ed. Adv. Op. 389. However, the New York Court of Appeals, though reaching the same result as the Appellate Division, based it on a different legal ground, and it is only with regard to the latter that the Supreme Court of the United States granted certiorari, and thereupon upheld the position of the New York Court of Appeals. The case had indeed an interesting second aspect. The \$150,000, which the trustee in bankruptcy of the assignor (Graves-Quinn Corporation) sought to recover from the assignee-bank, had come to the latter in the form of a check which the assignor, upon receiving from the Government a check representing a progress payment, had on November 27, 1940, endorsed and mailed to the assignee-bank. It was only on November 28, 1940 that the assignee-bank received it. This difference in date was of great import in the case. Since the petition in bankruptcy of the assignor was filed on March 28, 1941, November 27, 1940 was not yet within the critical four months period while November 28, 1940 was. The New York Court of Appeals held that the "transfer" of the check was "perfected" on the day of its being mailed by the assignor to the assignee rather than on the day of its being assigned to the assignee rather than on the day of its being received by the latter, and therefore did not consider it necessary to decide whether the assignment as such, executed on November 22, 1940, but not yet approved by the Secretary of War or even called to his notice on November 28, 1940, was nevertheless perfected before November 28, 1940 insofar as Section 60(a) of the Bankruptcy Act is concerned. Said Chief Justice Lehman, speaking *per curiam*: "The appellant . . . fails to point out any rule of law whereby a bona fide purchaser for value or a creditor could have any rights in the moneys which might become due under the contract before they were paid to the contractor or its assignee, except perhaps a lienor under the provisions of the Lien Law of this State. It is unnecessary to decide whether the word 'creditor' in the Bankruptcy Act was intended to include a lienor who complied with the statute or whether a purchaser for value or a creditor could have obtained any rights in the moneys until they were paid to the contractor and the check mailed to the defendant on November 27th. It seems clear that at least from that time the transfer was perfected. Certainly when the contractor received payment by check from the government on November 27th it was in good faith bound to deliver the check or its proceeds to the defendant in accordance with its agreement as evidenced by the executed assignment. The contractor had received a direction

statute are: the absence of technicalities and formalities hampering or delaying extension of credit; conformity with the long established law of the commercially highest developed state in this country; and a greater likelihood of achieving uniformity on the basis of such a model.¹⁵⁴

2. Book-marking Statutes

The first wave in the state-legislative flood following the Chandler Act was the Pennsylvania book-marking statute of 1941.¹⁵⁵ In 1943 Georgia enacted a similar, though not identical law.¹⁵⁶

Section 1 of the Pennsylvania statute in part reads:

"Whenever any person who sells, assigns, transfers or pledges accounts receivable, makes or causes to be made, *concurrently* with such sales, assignments, transfers or pledges, a record thereof upon the books of account or other records maintained by him, evidencing or showing such indebtedness, the name of the person to whom such accounts receivable have been sold, assigned, transferred or pledged, in such manner as will disclose upon an inspection of such books of account or other records the fact and the date of such sales, assign-

from the bank that the check should be mailed to it, and from the time that the check was deposited in the mail in accordance with that request, delivery of the moneys to the assignee was complete". *McKenzie v. Irving Trust Co.* (1944) 292 N.Y. 347, 358, 359.

The decision of the Supreme Court of the United States, confirming this position of the New York Court of Appeals, was not unanimous, Mr. Justice Black dissenting. Mr. Chief Justice Stone, delivering the opinion of the Court, said *inter alia*: "In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law . . . *Corn Exchange Bank v. Klaunder*, 318 U.S. 434, 436-7. See also *Benedict v. Ratner*, 268 U.S. 353, 359, and cases cited . . . Whether the transfer was perfected on mailing the check thus turns on a question of state law, to which the highest court of the state has here given an authoritative answer . . . The court also recognized that in this respect state law controlled decision. It found it unnecessary to consider whether a creditor or bona fide purchaser could have obtained rights in the \$150,000, prior to the endorsement and mailing of the government check on November 27, since it thought that the 'delivery of the moneys to the assignee was complete' at that time. The state court having applied the proper test under Section 60(a), we accept its conclusion that the transfer was made more than four months before bankruptcy . . ." 89 L. ed. Adv. Ops. 389, 392.

¹⁵⁴ According to the Report of the Special Committee of the Commissioners on Uniform State laws, *supra* note 34 at 8, 9, "a more or less thorough survey of the situation" made it evident "that a recording statute would not be acceptable to the legislatures of many of the states" and there was "in the Committee's judgment . . . a greater likelihood of uniformity resulting from the adoption of a statute which would not require recording or filing, or notification of the debtor."

¹⁵⁵ *Supra* note 22.

¹⁵⁶ *Supra* note 23.

ments, transfers or pledges, then such sales, assignments, transfers or pledges shall be *valid in law* as, and enforceable against all *subsequent* purchasers, assignees . . . notwithstanding the fact that notice of such sales, assignments, transfers or pledges has not been given Provided, that where a principal debtor, without notice or knowledge of any other outstanding sale, assignment, transfer or pledge constituting a prior legal claim upon him, makes full or partial payment of his debt in good faith to either his creditor or any vendee, transferee or pledgee of his creditor, his debt and his obligation shall be extinguished or reduced, as the case may be." (Italics added.)

Section 2 of the same statute in part provides:

"Notification to the principal debtor . . . shall be sufficient . . . notwithstanding the fact that a record . . . is not made."

The Georgia statute is much shorter. In its substantial part it sets forth that Section 85-1803 of the Code of the State of Georgia has been amended so as to read:¹⁵⁷

"All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable instruments subject to the equities existing between the assignor and the debtor at the time of the assignment, and until notice of the assignment is given to the person liable. *A notation on a page of the books of account of the assignor of an account receivable that the account or accounts receivable shown on such page have been assigned to an assignee named in the notation is notice to all persons, except the debtor or debtors of such accounts, that such account or accounts receivable have been assigned to the assignee named.*" (Italics added.)

It will be seen from the foregoing that according to both statutes, book-marking, as provided by the Act, does not affect the power of the debtor acting in good faith to secure a discharge by payment.¹⁵⁸ Incidentally, similar provisions, to be discussed later, are contained in all recording statutes. As a matter of fact, it is unanimously urged even by those who demand a statute requiring publicity of assignments that constructive notice, thereby imposed, should not be ex-

¹⁵⁷ That part of the Section which has been added by the statute is set forth in italics.

¹⁵⁸ Crane, *supra* note 36, at 106, writes: "In this detail the Act is similar to the rule that has been judicially adopted to the effect that a mortgagor is not bound to take notice of the recording of an assignment of the mortgage."

tended to a bona fide paying debtor. He should be fully protected as before.¹⁵⁹

Both of the above book-marking statutes are obviously based upon the same fundamental idea, that is, to provide a means whereby non-notification assignments under that law should become invulnerable against Section 60(a) Bankruptcy Act, without adopting the extreme of the American rule, and thus sanctioning "secret liens." Both seem to indulge in a compromise between the philosophy underlying validation statutes and the policy of recording acts. Though a writer, ably analyzing the Pennsylvania Act, considers it as "providing for a sort of private recording system,"¹⁶⁰ it should be noted that the private rather than official keeping of the records is not the only substantial difference between a book-marking and a real recording system. In the first place, a book-marking statute does not achieve full-fledged publicity of assignments, since under such a system the possibility of inspecting the records obviously depends upon the good will or interest or contractual duty of the assignor, as the case may be, to make his books or records available for inspection by an interested party.¹⁶¹ In the second place, it has been rightly observed that under the Pennsylvania statute "an assignee of an 'account' now has a double precaution to take before he parts with value. He *must* not only *inquire of the debtor* as to whether he has had notice of any prior assignment or attachment but he must also inspect the books of account of the creditor and see that no record of an assignment to another appears thereon."¹⁶²

¹⁵⁹ *Supra* III/1, at note 67.

¹⁶⁰ Crane, *supra* note 36, at 105.

¹⁶¹ In a speech delivered by R. S. Douglas, Assistant Counsel of the Cleveland Trust Company, before a Convention of Bankruptcy Referees in August 1944, the Pennsylvania statute was thus criticized: "The assignment may also be perfected by notice. Thus a party seeking information as to the assignment of receivables is subjected to the convenience of the party concerning whom the information is sought, and the borrower, if he complies with the request to examine his books, may be disclosing a list of customers whose names he would prefer not to disclose. The Pennsylvania statute goes only part way respecting publicity. The difference between a record on the borrower's books available to the inquirer at the borrower's convenience, and the record of borrowings in the office of a disinterested public official is obvious."

Other well informed sources point out that book-marking statutes "certainly do not assist the credit men, because no credit man is able to make a physical examination of the books of his customer before determining whether to extend credit." (Quotation from Factors' Memorandum submitted to the National Association of Credit Men.)

¹⁶² McKeehan, *supra* note 36, at 96.

There are some clear differences between the Pennsylvania and the Georgia statutes.¹⁶³ The existence of another possible difference, an important one, poses a problem of construction. The Pennsylvania statute makes book-marking an optional rather than the sole method of perfecting the assignment. Section 2 of the statute, as quoted *supra*, expressly provides that notification of the debtor remains sufficient. Therefore, under the Pennsylvania statute, as already mentioned, an examination of the books will not necessarily disclose whether or not the accounts have already been assigned. Whether notification of the debtor remains sufficient under the Georgia statute seems to be a matter for doubt among experts. It is submitted that an affirmative answer is the better construction,¹⁶⁴ in view of the wording of the statute, its obvious purpose of substantially following the Pennsylvania model, and the probable lack of intention on the part of the Georgia legislature to go further in a policy against "secret liens" than Congress went even under the construction of the Chandler Act adopted in the *Klauder* and *Vardaman* cases.

In addition to this special problem under the Georgia statute, there is, with regard to both of these book-marking acts, more than one doubt to be solved only by litigation or by amendment.¹⁶⁵ It is not within the scope of this paper to go into those further details.

However, whether or not book-marking under the Pennsylvania or Georgia statute makes non-notification assignments good as against a trustee in bankruptcy of the assignor, that is, invulnerable to attack under Section 60(a) Bankruptcy Act, must be briefly examined. With regard to the Pennsylvania statute, an answer in the affirmative has been suggested by a writer who thoroughly studied this act.¹⁶⁶ It would seem that the same is true also of the Georgia statute. However, neither of the two statutes expressly provides for the case of a

¹⁶³ *E.g.*: Under the Pennsylvania, at variance with the Georgia statute, the book-marking must be made "concurrently". This raises a difficult point discussed by Crane, *supra* note 36, at 107.

¹⁶⁴ This result is in line with opinions respectively communicated to the writer by Mr. Paton, Assistant General Counsel, American Bankers' Association, and Mr. Hatch, member of the New York Bar.

¹⁶⁵ In so far as the Pennsylvania statute is concerned, most of the pertinent difficulties are covered by Crane, *supra* note 36. For example, at 106 he refers to "some problems of priority" which, according to him, "the Act leaves unsolved."

¹⁶⁶ Crane, *ibid.* at 108 adopts this view on the basis of his belief that "where a statute as in this Act, makes a recorded assignment 'valid in law as, and enforceable against' a subsequest assignment, a duty to account for proceeds collected would follow."

second bona fide assignee collecting from the debtor. It is believed that for reasons similar to those outlined in V(1) above, also under the law of a state with a book-marking statute a collecting second assignee should be held accountable to the first assignee. This matter is of course important under the *Vardaman* case.

In so far as legislative policy is concerned the present trend seems unanimously opposed to book-marking statutes. Partisans of the two opposite policies, that is, for or against an interference with the "secret liens" involved in non-notification assignments, are united in their disfavor of book-marking statutes, which disfavor is shared by the Special Committee of the Commissioners on Uniform State Laws¹⁶⁷ and by the Committee on Uniform State Laws of the Association of the Bar of the City of New York.¹⁶⁸

On the one side of the fence it is substantially alleged that book-marking statutes are not sufficient since they do not afford an effective degree of publicity. Spokesmen for the other view consider such legislation not only unnecessary, but harmful in view of the delay and expense with which it burdens the availability of credit. In part the respective arguments are the same as those advanced *pro* or *con* recording acts. It may well be said, indeed, that in spite of the existence of ten different statutes representing three different types of pertinent legislation, in the eyes of those discussing the problem, the legislative problem under consideration is deducible to consideration of but two. The bone of contention is whether validation statutes or recording acts are the most adequate means to safeguard non-noti-

¹⁶⁷ Majority Report of the Special Committee, *supra* note 34, at 9, suggests "that book-marking, if required, would give but little notice generally, and would be impracticable."

¹⁶⁸ In the unanimous part of the Subcommittee's Report, *supra* note 43, the paramount grounds against a book-marking statute are thus summarized: "While we agree that book-marking is desirable and good practice, we do not favor a statutory requirement that books of account shall be marked in order to perfect the title of the assignee. Such a statute would impose upon a non-resident lender the burden and expense of policing the borrower's books of account. Such policing would not be feasible except through the employment of agents at the borrower's place of business, and would make the lender's title dependent upon an act to be performed by an assignor over whom he has no control . . ." The Factors' Memorandum, submitted to the Subcommittee of the Commissioners on Uniform State Laws, *supra* note 43, adds this special comment: ". . . in a good many cases, and especially is this true under factoring arrangements, the assignor has no permanent record books to mark. The average concern no longer carries the old fashioned type of ledger book but uses either a loose leaf book or a cabinet filing system, neither of which is adaptable to bookmarking."

fication financing against casualties under Section 60(a) Bankruptcy Act.

3. Recording Statutes

It is a startling fact, yet a fact that in this highly commercialized and industrialized country, where transactions are crossing state lines as never before, three jurisdictions with a legislatively expressed common preference for a recordation act to cover receivables¹⁶⁹ did not reach uniformity in their methods of realizing this policy. Ohio was the first state to come out with a recording statute.¹⁷⁰ This was in 1941. California¹⁷¹ and Missouri¹⁷² followed in 1943. Surely the phrasing of the Ohio act was not inviting enough, to say the least, to be literally reproduced in another jurisdiction. However, the California statute is well drafted. There must therefore have been a dislike of its merits which prevented the Missouri legislature from using the California statute as a model. The following attempt to describe the characteristic features of the three statutes will concentrate on showing their substantial differences.

To begin with: the California statute does not provide for actual notification of the debtor as an alternative, but prescribes recordation as an exclusive method of perfecting the assignment transaction.¹⁷³ Missouri in terms offers a choice between the two methods.¹⁷⁴

¹⁶⁹ For special kinds of assignment which, even before the Chandler Act, were occasionally subject to recordation in one or the other state, see Hanna, *supra* note 45, at 638.

¹⁷⁰ *Supra* note 24.

¹⁷¹ *Supra* note 25.

¹⁷² *Supra* note 26.

¹⁷³ Section 3019 of the California Civil Code provides: "No assignment of an account shall be valid as against present or future creditors of the assignor without notice of such assignment, or as against a subsequent purchaser or assignee of such account without notice of such assignment unless such assignment shall be in writing and shall be signed by the assignor, and unless there shall be on file in the office of the filing officer, at the time of the making of such assignment, a presently effective and uncanceled notice signed by the assignor and the assignee, containing:

"A designation of the assignor and the assignee, and of the residence or chief place of business of each within this State, if any, and if either of them has no residence or place of business within the State, a designation of his residence or chief place of business outside the State; and, either:

"(1) A statement that the assignor expects to assign an account or accounts then existing or thereafter arising, to the assignee, or

"(2) A statement that the assignor expects to assign certain accounts in which event the statement may contain:

The Ohio statute is not free from doubt in this respect. There is hardly language in it to the effect of establishing recordation as an exclusive method.¹⁷⁵ It is nevertheless, at least on the part of the experts, understood to provide by implication what the California statute expressly provides, that is, exclusiveness of the recordation method.¹⁷⁶

In another respect Missouri stands alone as against California and Ohio. The affidavit must in Missouri be filed with the Secretary

“(a) A list of the accounts so to be assigned, setting forth the amount of each such account and the names and addresses of the persons owing the same; and

“(b) If such accounts are to be assigned as collateral security for a specific obligation, a declaration to that effect, and a statement of the amount of such obligation.”

¹⁷⁴ Section 2 of the Missouri statute, *supra* note 26, reads: “All such assignments may be perfected in any one of the ways herein set forth and upon being so perfected shall be enforceable against and valid and binding upon all creditors of the assignor and all assignees and all purchasers who have not theretofore perfected their rights in one of said ways herein provided. The ways in which such assignments may be perfected as aforesaid are as follows: (a) by actual notice to the debtor owing the assigned account receivable, even though no notice be filed as permitted hereby; (b) by filing after such assignment a notice with the Secretary of State as herein provided, even though actual notice be not given to the debtor; or (c) by the taking of an assignment in writing within one year after notice has been filed with the Secretary of State as herein provided, which notice remains uncanceled at the time of the taking of such assignment, even though actual notice be not given to the debtor. Nothing herein contained shall give priority to an assignee who takes his assignment with actual knowledge of a prior assignment.”

¹⁷⁵ The imperative language of the initial sentence in Section 1 of the Ohio statute (*supra* note 24) is perhaps a slight indication of such a legislative intent. It reads: “Any person, hereinafter referred to as ‘transferee’, to whom an account receivable, hereinafter referred to as an ‘account’, may be assigned, whether such assignment be for the purpose of effecting a sale, except as hereinafter provided, pledge or other transfer thereof, shall, prior or contemporaneously therewith to any such assignment, file with the county recorder of the county wherein the person to whom such account is owing resides, such person being hereinafter referred to as ‘transferor’, (if the transferor is a corporation, firm, association, partnership or two or more persons having a joint or common interest, then with the county recorder of the county wherein such transferor has its or their principal place of business) an affidavit setting forth the name and address of the transferee and of the transferor at the time of the execution thereof, and stating that the transferor has arranged to assign to the transferee an account or accounts, which account or accounts need not be described in such affidavit in any manner.” (*Sic!*)

¹⁷⁶ The Report of the Special Committee of the Commissioners of Uniform State Laws, *supra* note 34, at 5, speaking about all the three recording statutes, attributes only to that of Missouri the effect of allowing notification of the debtor as an optional method. A similar statement is contained in a printed Memorandum submitted by Milton P. Kupfer to the National Conference of Accounts Receivable Companies, summarizing the pertinent state laws as of February 29, 1944.

of State, whereas in California as well as in Ohio record is made in the county recorder's office.¹⁷⁷

Another aspect contrasts Ohio and Missouri with California. The two first statutes substantially provide that a collecting junior assignee shall be accountable for the proceeds to the senior assignee.¹⁷⁸ The California Act is silent on this matter.¹⁷⁹

¹⁷⁷ Ohio, §1; California §3017/6; Missouri §1.

¹⁷⁸ Section 1 of the Ohio statute, in its last two sentences, reads: "Any person, including the transferor, who shall have received any payment on any account so assigned to the transferee or who shall have received the property, or any part thereof, if any, the sale of which gave rise thereto, other than subsequent purchasers in good faith and for value and mortgagees in good faith and for value, of such property not accepted by the obligor, shall be a trustee for and shall be accountable to such transferee for all moneys and other proceeds of any such payment or property so received. A bona fide sale for value of an account or accounts shall not be affected hereby." Section 4 of the Missouri statute in part provides: "An assignor or anyone claiming by, through or under him, who, after the filing of such notice, receives full or partial payment from the debtor or a return of any property which has been sold to the debtor, and which is embraced in any assigned account receivable, shall immediately pay over to the assignee, if the assignee has properly perfected his rights, all of the money and other property so received, and until such payment has been made to the assignee the assignor or anyone claiming by, through or under him, as the case may be, shall hold said money and property in trust for the assignee."

¹⁷⁹ Section 3018 of the California statute reads: "Subject to the provisions of Section 3019, an assignment of an account for value shall take precedence, and shall be entitled to priority, over any subsequent assignment of the same account. A debtor, irrespective of the provisions of Section 3019, until notified by his creditor or the assignee not to do so, may pay or otherwise deal in good faith with the assignor, his agent for collection or any person who has succeeded to the assignor's interest, and shall have as against the assignee any right of setoff, counterclaim or defense against such assignor or person existing in his favor at the time he is so notified."

No more enlightenment on the point considered is to be gained from Section 3025 of the California statute, setting forth: "The assignor of an account shall be a trustee of an assignee of the proceeds of the account and of any of the property sold which is returned to or recovered by the assignor. The right or lien of the assignee upon any balance remaining owing on such account receivable shall not be invalidated, irrespective of whether the assignee shall have consented to or acquiesced in such acts of the assignor, if merchandise sold, or any part thereof, is returned to or recovered by the assignor from the person owing the account receivable and he thereafter deals with it as his own property, or if the assignor grants credits, allowances or adjustments to the person owing an account receivable. The rights of a person who purchases or takes a lien upon property so held in trust in good faith and for value without notice of the trust are superior to the rights of the assignee."

Incidentally, the problem of returned merchandise, etc., is, apart from Section 3025 of the California statute, *supra*, and from the New York and New Hampshire statutes, *supra* notes 19 and 20, taken care of by a special section (5) of the Missouri statute and by a passage in Section 1 of the Ohio statute, *supra* note 178.

All the three statutes have in common that the statement to be placed on record need not reveal the amount or amounts to be borrowed by the assignors or prospective ones or the names of the debtors on the accounts already assigned or to be assigned.¹⁸⁰ To this limited extent the three statutes respect business secrets and "privacy."¹⁸¹ However, under each of them, the names of actual or prospective assignors and assignees must be recorded. This, of course, involves a certain possibility for lending institutions to discover the lists of their competitors' clients. Spokesmen of the finance companies, longer established in this field than the commercial banks,¹⁸² have occasionally alleged, indeed, that the real motive behind the bankers' general position against "secret liens" and for the policy of recording acts was the desire to be aided thereby in their solicitation of clients. There is, of course, as little force in this argument *ad hominem* as in the retaliatory allegation, occasionally advanced from the opposite side, that only fear of competition causes finance companies to oppose recording statutes.

While it would seem from the foregoing that the three statutes are similar in the way they attempt a "rational compromise between the business policy of secrecy and the public policy of notoriety,"¹⁸³ closer investigation reveals that even at this point they are parting ways. For they greatly differ in the kind and extent of their allowing third parties to acquire information entered on record, or behind a recorded statement. Among the three the most liberal in this respect is the California statute. It has two pertinent provisions. In the first

¹⁸⁰ Section 1, Ohio, *supra* note 175; Section 3019, California, *supra* note 173, *verbo* "may"; and Section 1, Missouri, in part reading: "The assignor and assignee may, but are not hereby required to . . . file such itemized and detailed information concerning the assigned accounts receivable as they may agree upon."

¹⁸¹ See the Majority Report of the Special Committee of the Commissioners on Uniform State Laws, *supra* note 34, at 7, 8, suggesting: "The Committee felt that the right of privacy would be unduly invaded by a requirement for recording of an assignment or intention to assign one's accounts. True, it was recognized that such privacy is interfered with where, as now, there is a requirement for recording where one transfers or mortgages real property or tangible personal property, but in those instances, without such recording there would be a misleading of one who deals with the apparent owner of such property due to his visible possession. In the case of accounts there is no visible possession, nor any holding out of possession. To the Committee a recording requirement, preventing a secret lien, seemed less important than the preservation of the right of privacy."

¹⁸² *Supra* II/2 at note 50.

¹⁸³ Newton, *Assignment of Accounts Receivable under the 1943 Amendment to the California Civil Code* (1944) 17 So. CALIF. L. REV. 303, 309.

place, "any person" may be issued a certificate showing that much as is on file;¹⁸⁴ in the second place, it is "the duty of any assignee who has filed a presently effective and uncanceled assignment to furnish to any person such information relative to assignments of accounts as the assignor may in writing direct."¹⁸⁵ Less articulate on the point under consideration is the Missouri statute which states only that:

"in the event . . . detailed information is not filed of record every assignor who shall join in executing a notice . . . shall, upon the written demand of a bona fide creditor of said assignor, supply to said creditor full information as to the transaction represented by said notice."¹⁸⁶

The Ohio statute is completely silent on this important matter.¹⁸⁷

As for the time of recordation, California requires the filing of a "notice . . . that the assignor expects to assign;" furthermore, "no assignment of an account shall be valid as against" specified persons "unless . . . there shall be on file . . . at the time of the making of such assignment, a presently effective and uncanceled notice . . ."¹⁸⁸ According to the Ohio statute, the "affidavit" must be filed "prior or contemporaneously" with the assignment.¹⁸⁹ Under the Missouri Act the "notice" may be filed after the assignment or before the assign-

¹⁸⁴ Section 3020, Cal. Civ. Code, in part provides: "For a fee of one dollar . . . the filing officer may issue a certificate to any person showing whether or not there is on file any presently effective uncanceled notice of assignment by any named assignor and if so setting forth therein the names and addresses of the assignee or assignees named therein."

¹⁸⁵ Section 3026, Cal. Civ. Code.

¹⁸⁶ Section 1, *in fine*, Missouri. It will be noted that the statute provides for information to "a bona fide creditor," that is, in a literal interpretation, one who is a creditor with exclusion of one who merely contemplates the extension of credit.

¹⁸⁷ It is submitted that Section 230-c, NEW YORK LIEN LAW, effective March 29, 1942, L. 1942, c. 216, §9 (McKinney, Cumulative Annual Pocket Part, 1944, pp. 53, 54), dealing with "Chattel mortgages by motor vehicle dealers; mortgage statements in lieu of filing mortgages; . . ." may serve to future legislation as a model concerning machinery to inform third persons.

¹⁸⁸ Section 3019, Cal. Civ. Code, *supra* note 173. Newton, *supra* note 183, at 309 points to the "many problems certain to arise" under the statute and in this connection states: "No adequate provision is made for the type of case where filing is not concurrent in point of time with the assignment transaction."

¹⁸⁹ §1, Ohio Laws 1941, *supra* note 175. Difficulties which this requirement may raise, are suggested in the pamphlet of the Commercial Credit Company, Baltimore, *supra* note 43, at 7 under (3).

ment in which latter case, the assignment must be made within one year after a "notice" uncanceled at the time of the assignment.¹⁹⁰

Both in Ohio and California the notice or affidavit once filed remains in force for three years. Again both statutes offer the possibility of refileing before the expiration of the original term, with slight differences in their respective provisions.¹⁹¹ Missouri has its own way with regard to the validity of the notice (one year) and does not provide the possibility of refileing.

The Ohio statute in the final passage of its Section 1 reads:

"A bona fide sale for value of an account or accounts shall not be affected hereby."

Though the meaning of that word "hereby" is somewhat obscure, it is generally referred to the whole Section 1 rather than to the next to the last sentence therein.¹⁹² This means that, contrasted with a sale of accounts simply, as mentioned in the initial phrase of Section 1,¹⁹³ a *bona fide* sale of accounts is exempted from recordation. But, to determine just what constitutes a "*bona fide*" sale of an account, within the terms of the statute, has puzzled lawyers since 1941. Is factoring proper under this exception, or will the courts decide otherwise in view of the limited recourse open to the factor?¹⁹⁴ Nobody can tell with any degree of certainty until there has been a judicial construction of the statute. At any rate, in so far as the Ohio statute exempts such sales from recordation, this seems to be a gap in its system of publicity.

Another point concerning the Ohio statute consists in the fact that by its regulation of priorities¹⁹⁵ it "may create a statutory mo-

¹⁹⁰ §2, Missouri, *supra* note 174. Wright, *supra* note 36, at 174, points out: "It would appear from the words of the statute that it would only be necessary to file one of these notices each year, and any number of assignments made within that year would be effective thereunder."

¹⁹¹ §2, Ohio Laws 1941, *supra* notes 24 and 178; §3022, CAL. CIV. CODE.

¹⁹² §1, Ohio Laws 1941, *supra* notes 24 and 178.

¹⁹³ *Supra* note 175.

¹⁹⁴ *Supra* II/1 at note 41.

¹⁹⁵ Section 1 of the Ohio statute substantially lays down the rule that the lender properly and timely filing the affidavit thereupon obtains a first and paramount lien on any accounts assigned prior to the expiration of the term of three years, or the date of cancellation of the notice. However, this main rule is subject to qualifications one of which seems, at least to a certain extent, to involve a statutory monopoly of the assignee who was the first to file notice. The respective passage in Section 1 in part reads: "Provided, however, that if prior to the expiration or cancellation of such affidavit one or

nopoly in the assignee who first has filed the general notice referred to in the statute."¹⁹⁶ This is of course not a desirable thing, and constitutes one of the shortcomings of the Ohio statute that are absent from the two other acts. It may, in general, be said that the technical imperfections of the Ohio statute have offered to the opponents of a policy of recording acts the welcome opportunity for arguments which, however, do not go to the core of the legislative problem involved. The fact that a given recording statute is not satisfactory, can indeed never prove that a good recording act would not fulfill a useful purpose.

Turning now to one of the main objects which recording statutes in this field are supposed to achieve, namely, a remedial function in connection with Section 60(a) Bankruptcy Act, no case dealing with the problem has so far been reported. In view of this lack of authority, it is not easy to determine with an appreciable degree of certainty whether the proper and timely filing of "notice" or "affidavit" under one of the recording acts will make assignments without notification of the debtor good against the assignor's trustee in bankruptcy, and thus neutralize the fateful effect of this section. But, it is the general feeling among experts that such assignments will hold as against the trustee. Moreover, with regard to the statutes of California and Missouri this view has been submitted by writers who elaborately analyzed the respective statutes.¹⁹⁷ It is believed in informed quarters that even if, on the basis of a more or less fanciful possibility not anticipated by the draftsmen of the statute involved, the literal requirements of Section 60(a) Bankruptcy Act should be deemed not to be satisfied by the language of one or the other of those recording acts, the courts would treat an assignment perfected under a state recording act as perfected within the meaning of Section 60(a). The decision in the *Klauder* case, it will be noted, was not solely

more other affidavits, each of which shall be hereinafter referred to an 'subsequent affidavit', naming the same transferor shall be filed of record the rights and interests of the transferee named in the affidavit first filed in and to any account or accounts then or thereafter assigned to such transferee by the transferor . . . shall be inferior to the rights and interests of such transferee therein or thereto, whether or not the subsequent transferee received his assignment prior in time to the assignment of the same account or accounts to the transferee named in the affidavit first filed." (*Sic*)

¹⁹⁶ Passage under quotation marks borrowed from the pamphlet of the Commercial Credit Company, Baltimore, *supra* note 43, at 7.

¹⁹⁷ Newton, *supra* note 183, at 306, concerning the California statute, and Wright, *supra* note 36, at 176, concerning the Missouri act.

based upon the wording of the Chandler Act, but upon a legislative purpose to strike down secret liens and a failure to see why secret assignments, by hypothesis offensive to such policy, should be taken out from the scope of statutory language apparently including them. It is highly improbable that a court will look in the same way upon assignments which cannot be branded as "secret liens" since they have been made public in compliance with a recording statute.

It would thus seem that recording acts, in so far as their remedial effect against Section 60(a) of the Bankruptcy Act is concerned, are on the whole not inferior to validation statutes. More intricate, however, is the problem whether, looking upon the matter from the standpoint of a more general policy, the first mentioned type of statute appears as preferable to the second. Most of the arguments *pro* and *con* concerning this heatedly debated question have been touched upon in discussing other types of statute. What still remains to be said on this fundamental issue will be presented in the concluding part of the present paper.

VI. CONCLUSIONS

In spite of the efforts of distinguished scholars all over the world, so far it has not been possible to achieve a generally accepted definition of law, that great ideal and source of order in the social life of human beings. It seems to be a too complex concept to be pressed into a simple formula.¹⁹⁸ There are several aspects to it and it is not too long ago that one of them, neglected theretofore, had been brought to the attention of legal thinkers by a famous Austrian scholar.¹⁹⁹

There are at least two elements which go into the making of the idea of law, one transcendental, the other realistic. One is the striving of man to reach the highest possible fairness in dealing with his fellow creatures. The other is the need to police "Mr. Hyde" lurking in "Dr. Jekyll." In so far as law attempts to maintain the social

¹⁹⁸ The noted exponent of a "monistic" analysis of law is Professor Hans Kelsen, now in this country. Contrary was the position of another Austrian scholar, Eugen Ehrlich, "one of the leaders in contemporary science of law," according to Pound, *An Appreciation of Eugen Ehrlich* (1922) 36 HARV. L. REV. 129, while Mr. Justice Holmes called "his *Grundlegung der Sociologie des Rechts* the best book on legal subjects by any living continental jurist . . ." 2 HOWE, HOLMES-POLLOCK LETTERS (1941) 34. An excellent summary of Ehrlich's life and work is Patterson's article in 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1937) 445, 446.

¹⁹⁹ Eugen Ehrlich who was teaching Roman law at the University of Austria in Czernowitz.

order, it should be certain and therefore foreseeable. It is perhaps in this sense that Mr. Justice Holmes characterized law as "the prophecies of what courts will do in fact . . ." ²⁰⁰

If law means the predicting of the future course of judicial action, and it cannot be denied that this is a substantial part of its function sociologically, ²⁰¹ then to be a lawyer is not always an easy task, and, especially not in the field of receivables financing. This field is packed with legal uncertainties, a situation which has been accentuated by the Chandler Act as construed in the *Klauder* case.

1. *Arguments for a Revision of the Ruling in the Klauder Case*

Was the Supreme Court of the United States by the legislative intent or the language of Section 60(a) Bankruptcy Act compelled to decide as it did? With deference it is submitted that there was in both respects a reasonable possibility of reaching an opposite result. An attempt to show this may be of more than academic interest. It belongs indeed to the great achievements in the practice of this country's highest tribunal that the Justices of the Supreme Court of the United States do not turn deaf ears to arguments that might induce them to an overruling of the Court's own precedent. ²⁰²

a. *The scope of the legislative intent to strike down secrets liens.*

There is not a scintilla of evidence, and it has never been alleged, either by the decision in the *Klauder* case, or in any pertinent discussion so far, that the drafters of the Chandler Act contemplated its possible effect upon non-notification assignments. ²⁰³ A private state-

²⁰⁰ Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457 at 461, reprinted in HOLMES, COLLECTED LEGAL PAPERS (1920) 167 at 173.

²⁰¹ Even Ehrlich did not deny this. In his Seminar for Living Law, which the present writer had the privilege of attending, he only warned against such a sociological analysis of law which would limit its function in society to that of a body of rules for the decision of controversies. Ehrlich emphasized the additional, that is peacefully organizing function of law. To state it in terms different from his own language: it is not only in the international world that there is a law of peace in addition to the law of war.

²⁰² In the tax case of *Helvering v. Hallock* (1939) 309 U.S. 106, 109, 121, Mr. Justice Frankfurter in a per curiam opinion said: "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction." The writer is not unmindful of the fact that this practice has of late been the subject of some criticism. See e.g. Grinnell, *The New Guesspotism* (1944) 30 A.B.A.J. 507.

²⁰³ Wolfe, *supra* note 13, at 66, submits: "It is safe to say that the effect of this definition [*scil.* in Section 60(a)] upon the transfer of accounts receivable and other intangibles was never considered."

ment by Professor McLaughlin, which the writer is authorized to publish, would seem to be of highest probative value to the contrary.²⁰⁴ This point is irrelevant, to be sure, if there is a sufficient degree of probability that non-notification assignments, not specifically contemplated by the legislators, do nevertheless fall within the scope of the demonstrable legislative intent. On this line of reasoning it has been argued and judicially accepted that Section 60(a), amended Bankruptcy Act, created for the purpose of striking down secret liens, could not fail to hit secret assignments too. Does this argument hold in view of the pertinent documentary evidence, including its supposedly most telling parts, quoted hereinabove?²⁰⁵

It is believed that to reach an answer in the affirmative it is necessary to relax the rules of construction on the basis of legislative history.²⁰⁶ Not too long ago Mr. Justice Frankfurter had this to say:

“One of the sources which may be used for extracting meaning from legislation is the deliberative commentary of legislators immediately in charge of a measure . . . But this rule of good sense does not mean that every loose phrase, even of the proponent of a measure, is to be given the authority of an encyclical”²⁰⁷

Applying this gauge to the documentary material in question it would seem that it does not prove an unqualified legislative intent to strike down secret liens, but a concretely limited intention in this regard. Metaphorically speaking, Section 60(a), as proposed by the Chandler Bill, was not forged as a weapon against secret liens in all battles that might develop, but with a view to a particular battle. At least when uttered on occasions which may properly be considered

²⁰⁴In a letter which Professor McLaughlin was kind enough to address to the writer on December 29, 1944, it is *inter alia* said: “I still know of no consideration by Congress of the application of section 60(a) to the assignment of accounts receivable and know of no official record from which a court could deduce or infer that this application was considered, other than the language of the statute itself which, in the absence of evidence to the contrary, must be given application to all particular cases, even though such cases were not particularly considered.” Professor McLaughlin adds: “My individual remarks on this subject are not, however, important, for they do not constitute part of the legislative history like my remarks recorded in the Committee hearings.”

²⁰⁵*Supra* note 127.

²⁰⁶For an analysis of the much debated conception of legislative intent, see among others: Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863; Landis, *A Note on 'Statutory Interpretation'*, *ibid.* 886; Powell, *Construction of Written Instruments* (1939) 14 IND. L. J. 199, 309, 397, at 312.

²⁰⁷*Baltimore & Ohio R. R. v. Kepner* (1941) 314 U.S. 44, 59, 60.

as part of the legislative history of the Chandler Act, the phrase, "striking down secret liens" and similar ones were never used in a comprehensive sense, but always in relation to the concrete goal of destroying the rule of relation back.²⁰⁸ In other words, the outlawing of the judicial practice of relation back, favoring secret liens, and not the general phenomenon of secret liens was in the minds of those who in pertinent documents loosely spoke of "striking down secret liens." This seems to appear from the respective contexts. More specifically, it is submitted that neither of the documents usually quoted in this connection bears out the proposition that the intent of the drafters of Section 60(a) Bankruptcy Act was to change the traditional and well settled concept of a preference in bankruptcy, particularly with regard to the definition of a contemporaneous consideration.

It has been contended that a construction of the Chandler Act as herein suggested would "effect almost a complete emasculation of the provision found in the last sentence of Section 60(a)."²⁰⁹ This statement, like a similar one,²¹⁰ is theoretically unsound²¹¹ and pragmatically contradicted by the fact that even up to this date the courts in several cases were by the new wording of Section 60(a) Bankruptcy Act prevented from applying the rule of relation back without a simultaneous opportunity of constructively treating a transfer for a contemporaneous consideration as one for antecedent value. In each of those cases the transfer had originally been made for antecedent value and the only effect of Section 60(a) was to change its date so as to place it within the critical four months period.²¹²

Moreover, it has been well said:

"If Congress intended to make any change in the old established policy of upholding transfers before bankruptcy, where actually made concurrent with the advances, it is hardly conceivable that it should have done so in such a partial, inadequate and unreasonable manner, and merely by way of a more or less casuistic inference to be drawn from a phrase in Section 60(a) (changing dates of imperfect trans-

²⁰⁸ *Supra* note 116.

²⁰⁹ 3 COLLIER, *supra* note 79, §60.39, pp. 912, 913.

²¹⁰ Baty, *supra* note 36, at 379.

²¹¹ Neuhoff, *supra* note 36, at 544, rightly observes: "Mr. Chandler's Report . . . refers to 'striking down secret liens', but this could have reference to a secret lien given for a truly 'antecedent' debt . . ."

²¹² *Supra* note 117, sub a, *In re Markert*, A, *In re Greenberg*, B, *In re Cox*, C, *In re Hutcheson*.

fers), which phrase in relation to the subject matter of the Act has a very extensive and salutary effect, without stretching its application to extraneous matters, apparently not in the minds of the legislators and not germane to the purpose of the Act."²¹³

b. *Dissident literal readings of Section 60(a)*

Legislative intent does not stand in the way of a statutory construction different from that adopted in the *Klauder* case. Nor does the language of Section 60(a) Bankruptcy Act necessarily lead to such a result. This is easily demonstrable. More than one divergent construction would be reconcilable with a literal meaning of the statutory text. In the first place, there is the opinion adopted by the Fifth Circuit, by Judge Jones in the Third Circuit and by Mr. Justice Roberts in the Supreme Court of the United States, discussed in a previous part of this paper.²¹⁴ It can hardly be denied that their view is at least tenable. Another argument relating to the conjunctive word "and" in a certain clause of Section 60(a) was likewise mentioned above.²¹⁵ There remains still a third way of not deviating from a literal reading of the legislative text, and yet achieving a construction different from the *Klauder* case. Under Section 60(a) the transfer is tested with reference to the "time when it became so far perfected that no bona fide purchaser from the debtor . . . could thereafter have acquired any rights in the property . . . superior to the rights of the transferee."²¹⁶ But *acquired* how? By the purchase or by any event, including a subsequent or a collateral fact? Only if the latter alternative corresponds to the meaning of the statute does the construction in the *Klauder* case stand firm. If, however, the other version controls, the *sequitur* would be that non-notification assignments are immune against Section 60(a) Bankruptcy Act, since it is only through the collateral fact of notification, subsequent to the purchase, rather than by the purchase itself that a bona fide second assignee can acquire rights superior to the first assignee.²¹⁷ Such an argument, it will perhaps be said, is legal quibble "fit to increase the layman's traditional contempt for the chicanery of the law."²¹⁸ This

²¹³ Neuhoff, *supra* note 36, at 548.

²¹⁴ *Supra* IV, sub 1, 2 and 3.

²¹⁵ *Supra* IV, at notes 110 and 111.

²¹⁶ *Supra* note 62.

²¹⁷ For a somewhat similar suggestion see Hamilton, *supra* note 4, at 178, 186.

²¹⁸ The words under quotation marks appear in another connection in 8 WIGMORE, EVIDENCE (3d ed., 1940) 833, 834.

may be true. But is the orthodox reading of Section 60(a), constructively changing into antecedent what is really a contemporaneous loan, more likely to satisfy a "man, unless, peradventure, it may have happened to him to have been stultified by legal science . . ."?"²¹⁹

2. *What Price Recording Acts?*

As already stated, ten different statutes have so far been enacted with a view to meeting the situation created in the field of receivables financing by the Chandler Act, but only two predominant legislative policies are nowadays at issue between the spokesmen of the interested groups. They are either for or against special recording acts.

In addition to the incidental statements concerning this matter, interspersed with the foregoing discussion, the following brief remarks may be submitted as a summary of the impression gained from interviewing distinguished experts on both sides of the controversy. Most important among the objections raised by opponents of a system extending public recordation to book accounts are the following: that such a system will be offensive to borrowers apprehending a diminution of their prestige from the "flash signal" given to the world that they are in a need of prematurely cashing their sales;²²⁰ that a recording statute, difficult to draw²²¹ and by its very nature more complicated than a validation act, carries in its wake new legal uncertainties and thereby imposes upon business another hurdle as

²¹⁹ Words under quotation marks borrowed from BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* as quoted by 2 WIGMORE, *EVIDENCE* (3d ed., 1940) 688. HERBERT, *UNCOMMON LAW* (1936) 83 sarcastically presents this fictional address of "The Lord Chancellor": "Mr. Sparrow appealed and it is now for your Lordships' House to say whether we are for common sense or for the Common Law."

²²⁰ The idea is, of course, that nothing is likely to remain a secret the moment any person knows it, especially if such knowledge reaches the credit information agencies to be spread by them in their "daily flash reports."

²²¹ Recording statutes concerning receivables present, as Mr. Hatch orally suggested to the writer, "the horns of a dilemma." Shall the assignee who has first filed his notice have priority over an assignee who was second in filing the notice, but was first in taking the assignment? Similarly, the majority of the Special Committee of the Commissioners on Uniform State Laws, *supra* note 34, at 8, points out that a recording statute "would . . . have to give statutory sanction to a practical monopoly by one entering into a contract with another for the assignment of such other's accounts. For, with such a contract recorded, no third person would take an assignment of an account from an assignor, since such an account might be covered by the instrument recorded. The only way the assignor would be free to assign his accounts to another would be to pay in full the original assignee and to cause to be released the instrument recorded." With regard to this problem under the Ohio statute, see *supra* V/3, at notes 195 and 196.

bad as that which it purports to remove;²²² that a recording statute inevitably stifles the availability of credit on the basis of assignments of receivables, contrary to the economic nature of this asset which according to the business world is, next to cash, the borrower's most liquid asset;²²³ that it obstructs the possibility of uniform legislation in the field since the consensus in some states is still strongly objecting to a bureaucratic machinery for publicly interfering with the privacy of business.

Most outstanding among the grounds advanced in favor of a recording policy are: the asserted need for adequate protection of the lender on the basis of receivables against the danger of being licked out of his rights acquired by the assignment in consequence of the undisclosed existence of a prior assignment of the same account;²²⁴ the asserted public interest in the protection of those who might extend unsecured credit to a businessman in contemplation of the amount in receivables which he is assumed to possess in view of the nature and the extent of his enterprise, only to discover in case of the borrower's bankruptcy the depletion of his assets by secret liens on accounts receivable.²²⁵

As for the immediately preceding argument, it seems to have lost most of its ground by the modern, scientifically developed methods in obtaining information from the borrower himself, whereby to obtain credit he must include in his sworn financial statement a detailed disclosure of his assignments of receivables, if any. In rebuttal of this reasoning it is said that such statements are not continuously

²²² See e.g. comment in the pamphlet of the Commercial Credit Company, *supra* note 43, at 3 subd. b.

²²³ It should be noted, in this connection, that, except in isolated instances, accounts are assigned under a continuing contractual relation pursuant to which the assignor expects to have his seasonal financial needs met immediately upon presenting his receivables to the lender. However, under the cumbersome system of inquiry necessary for the cautious financing institution under a recording system, the borrower, some sources allege, will often be unable to get the money advanced when he needs it.

²²⁴ In a communication to the writer by Thomas B. Paton, Assistant General Counsel, American Bankers Association, December 18, 1944, it is *inter alia* said: "If a prospective assignee finds a notice on file, he is put on his guard and does not run the risk of taking subject to a prior assignment of which he has no notice."

²²⁵ According to the Report of the Special Committee of Commissioners on Uniform State Laws, *supra* note 34, at 20, the dissenting Commissioner suggested that "a statute providing for filing of notice of intention to assign would preserve the policy against secret liens . . ." He also believed that such a statute would not "affect the fluidity of credit," since "compliance with a filing requirement is a simple matter . . ."

given, but only in more or less short intervals, and that the lender, extending a running credit, remains in the dark concerning changes that may occur between intervals. However, experience seems to show that this factor does not to an appreciable extent reduce the practical effectiveness of information gained by those periodical statements. As the writer has been assured from a most competent source, the average credit loss of those belonging to the National Association of Credit Men is normally between 0.10% and 1%, a tenuous figure indeed which, moreover, includes losses not caused by transactions involving assignments of receivables.²²⁶ In this connection an interesting statement by the majority of the Special Committee of the Commissioners on Uniform State Laws deserves attention. It reads:

At one time it was thought that the National Credit Men's Association favored such a recording statute covering assignment of accounts, but such Association declined to take such position, feeling perhaps that credit men would be sufficiently informed of the assignment of accounts by a debtor through the obtaining of a financial statement, which, if false or fraudulent, would be subject to further penalties provided by law.²²⁷

As for the first argument given above in favor of recording statutes, it carries the important vote of the American Bankers' Association. But there seem to be strong objections to its conclusiveness. To begin with, double assignments are a rare occurrence. Secondly, they are only part of the moral hazard which belongs to the essence of non-notification financing and must therefore be taken into account by those who voluntarily enter this field of business. *Caveat emptor*, in general a depreciated coin, retains its value in this particular connection.

3. *What Should Be Done?*

It is believed that a comparison of the benefits to be gained and the disadvantages to be incurred by a recordation statute of the kind in question results in a balance sheet adverse to a recordation policy.

There is not much prospect of a further amendment in the near future of Section 60(a), National Bankruptcy Act. Moreover, such

²²⁶ Oral information from Randolph Montgomery, Council of the National Association of Credit Men.

²²⁷ *Report, supra* note 34, at 8, n. 4.

an amendment, in view of the restricted scope of the section, would not eliminate the disturbing diversity of law in the American jurisdictions, concerning the test of priority among successive assignees of a chose in action.²²⁸ The only way out of this "confusion"²²⁹ seems to be uniform state legislation in the form of a validation act as tentatively suggested by the majority of the Special Committee of the Commissioners on Uniform State Laws and definitely recommended by the Committee on Uniform State Laws of the Association of the Bar of the City of New York. The Association's draft of such a statute²³⁰ is the latest achievement in this field and deserves the attention of all those who are interested in having an effective solution take the place of a congeries of complications in an important question of commercial law.²³¹

²²⁸ The Report of the Committee on Uniform State Laws of the Association of the Bar of the City of New York, *supra* note 43 poignantly points out: "Since, in many cases, the assignee of such an account resides in or is a citizen of one state, the assignor of another state, and the assignor's customer of a third state, and since many or most of the transactions involved in financing through assignment of receivables cross two and sometimes more state lines and are, therefore, predominantly interstate in character, it is frequently difficult or impossible to determine the law of which one of two or more states would be applicable in a given case."

²²⁹ Hanna, *supra* I, at note 32.

²³⁰ *Supra* note 142. The proposed uniform act is quoted in the Foreword, *supra*.

²³¹ See Addendum, *infra*, on statutory developments after this article had gone to print. They would seem to bear out that the validation principle represents the prevailing legislative trend.

ADDENDUM

STATUS OF LEGISLATION CONCERNING ASSIGNMENT
OF ACCOUNTS RECEIVABLE AS OF APRIL 10, 1945

[The following summary of the status of legislation concerning assignment of accounts receivable is based on a memorandum prepared by Milton P. Kupfer, member of the New York Bar and Counsel for the National Conference of Accounts Receivable Companies, as of March 15, 1945. Changes since that date which have come to our attention are enclosed in brackets. It will be noted that since the completion of the foregoing article seven additional states (Arkansas, Indiana, Maine, Massachusetts, New Hampshire, Oregon, and South Dakota) have enacted validation statutes, and that two additional states (North Carolina and Idaho) have enacted recording statutes.—Ed.]

Validation statutes have been enacted in the following twelve states: Arkansas 1945, Connecticut 1943, Illinois 1943, Indiana 1945, Maryland 1943, [Maine 1945, Massachusetts 1945], New Hampshire 1945, [Oregon 1945], Rhode Island 1943, South Dakota 1945, Virginia 1944.

Recording statutes have been enacted in the following five states: California 1943, [Idaho 1945], Missouri 1943, North Carolina 1945, Ohio 1941.

Recording bills passed both Houses in Utah and Washington, but the Washington bill was vetoed by the Governor.

Book-marking statutes have been enacted in the following states: Pennsylvania 1941, Georgia 1943.

No book-marking bills were introduced in 1945.

Legislation is pending in the following states:

Alabama—Both validation and recording bills have been introduced in the House and in the Senate.

Connecticut—Both the Massachusetts form of validation statute sponsored by the Connecticut Bankers Association, and a recording bill sponsored by certain local manufacturers and the Connecticut Manufacturers Association, have been introduced in the Assembly. A hearing was held on both bills before the Joint Judiciary Committee on March 6, 1945.

Delaware—A recording bill passed the Senate on March 1, 1945, but will either be amended or withdrawn.

Iowa—A validation bill has been introduced in the Senate and referred to Judiciary Committee on February 14th.

Kansas—Validation and recording bills have both been introduced.

Michigan—Validation bill, sponsored by the Michigan Bankers Association, passed Senate on March 5, 1945.

Minnesota—Validation bill, supported by banking interests, has been introduced in both Houses.

Nevada—Validation bill introduced.

New Jersey—Validation bill has been introduced in the Senate.

South Carolina—Both validation and recording bills have been introduced. The latter was reported favorably to the House on March 1, 1945.

Texas—Validation and recording bills have both been introduced. Latter was reported favorably in the House on March 7, 1945.

Vermont—Validation bill, in Massachusetts form, has been introduced in both Houses and has passed the Senate.

Wisconsin—Validation bill, in the form enacted in 1943 in Illinois, has been introduced; is supported by banking interests; and was reported favorably in the House on March 1, 1945.