beyond the limit set by the *Cannelton* case. But the phrase may mean only that the taxpayer may include in his depletion base certain processes which are supplemental to the listed processes, but which are not further along toward the end product. This interpretation would not permit expansion of the depletion base. Unless the courts give the new phrase the latter, restrictive interpretation, the Commissioner may find his efforts frustrated. The struggle is not yet over.

SECURED LENDING AND SECTON 60(a) OF THE BANKRUPTCY ACT: THE NEED FOR A UNIFORM TEST OF PERFECTION

In any appraisal of transactions giving rise to security interests in personal property, two fundamental elements must be considered. First, the device used must confer upon the secured creditor a priority interest in certain property against the risk of the debtor's insolvency or bankruptcy. Second, it must provide notice of the existence of the security interest to general creditors, either through transfer of possession of the collateral to the secured party or by some other feasible means.

Existing security devices, looked at against the background of the Bankruptcy Act, and particularly section 60 of that act,[1] are fulfilling neither of these aims effectively. Using accounts receivable financing as an example, this comment will discuss some typical problems that arise, and it will suggest that the most effective solution to the problem would be federal legislation in the form of an amendment to the Bankruptcy Act.

To understand the problems in this area it is essential to have some appreciation of the haphazard character of the growth of the various security devices, which has resulted in differences among them in rules, formalities, and requirements for perfection.[2] The oldest security device, dating back at least to Roman law, is the pledge. The essential element of a pledge is possession by the lender to secure payment of the obligation. Three currently used devices which represent a development of the pledge concept are the security interest of the carrier or warehouseman obtained by possession of a bill of lading or warehouse receipt; the pledge of stock certificates, bonds or debentures; and the field warehousing device.

But in many situations it is not possible or convenient to transfer possession of the collateral to the secured party so as to create a valid pledge. The chattel mortgage was developed to meet this situation. Naturally, where possession of the property remained with the debtor, some other means

[1] 30 Stat. 562 (1898), as amended, 11 U.S.C. § 96 (1958).

[2] The brief discussion in the text of the history of security devices is adapted from Gilmore & Axelrod, *Chattel Security: I*, 57 YALE L.J. 517 (1948), and Gilmore, *Chattel Security: II*, 57 YALE L.J. 761 (1948).

was required to give notice of the security interest to competing creditors. A system of recording was developed to meet this need. Because of the considerable history of the chattel mortgage, and the fact that it was adapted from the much older real estate mortagage, its execution requires a number of formalities and quite specific identification of the mortgaged property. In cases where property is difficult or impossible to identify, as, for example, goods in the manufacturing process, the chattel mortgage is of little use. The conditional sale contract was developed after the chattel mortgage to secure to the seller the unpaid purchase price of goods. It too must meet rigid formal requirements in many states and in some states it must be recorded.[3]

The trust receipt was developed at common law in about 1880. It was designed to give a security interest of relatively short duration while goods were actively moving through channels of trade. The Uniform Trusts Receipts Act, adopted by many states in the 1930's, provided for a new type of filing which involved a simple statement specifying the name of the secured party, the name of the debtor, and the type of property covered. More recently, "factors' lien" acts[4] have been enacted to confer a security interest in raw materials and goods in process, and in the resulting accounts, upon the filing of a statement similar to that used for trust receipts.

Finally, in the last thirty years, financing by loans on the security of accounts receivable has developed. This device will be used in this comment to illustrate the problem of secured lenders in attempting to perfect their security against a trustee in bankruptcy, and the problem of protecting the interests of general creditors against secret liens. Both of these problems are present to varying degrees in all types of security devices, but because of the arbitrary nature of the present distinctions in rules and formalities for the various devices, results in the bankruptcy situation may depend on which device is used.

Accounts receivable financing,[5] in the relatively short time it has been used as a security device, has grown rapidly into a business involving many billions of dollars annually.[6] The practicality of using accounts receivable

[3] *Cf.* UNIFORM CONDITIONAL SALES ACT.

[4] See, *e.g.*, NEW YORK PERS. PROP. LAW § 45.

[5] Accounts receivable financing, as used in this comment, means borrowing against book accounts arising in the ordinary course of the borrower's business by pledging or selling them. The normal use of accounts receivable is to finance the mercantile sale from wholesaler to retailer. Accounts receivable are considered to be good security because, unlike inventory, they are free of the hazards of merchandising and are subject only to the risk of collection. In addition, the lender has something that resembles two-name paper, with both the borrower and the account debtor liable to him. For a general discussion, see SAULNIER & JACOBY, ACCOUNTS RECEIVABLE FINANCING (1943).

[6] Kripke, Address Before the Association of the Bar of the City of New York, April 14, 1952. At the end of 1945 the total outstanding consumer installment credit held by financial institutions was $1,776,000,000; at the end of 1959 the amount was $34,003,000,000. FEDERAL RESERVE BULLETIN, March, 1960.

as security and thereby maximizing the use of the assets of a business was quickly recognized in the commercial world when, after the depression of the 1930's, lenders were no longer satisfied with just a surety.[7] But the new type of transaction, involving secret assignment of accounts, proved particularly susceptible to fraud, thus posing a difficult problem for courts and legislatures.[8]

An assignment of accounts as security is specifically enforceable in equity, resulting in an equitable lien against the debtor's assets. Before the Chandler Act[9] was passed, a creditor with such a lien could realize his claim against the assigned accounts ahead of all other creditors.[10] General creditors had little if any notice of this disposition of assets of the debtor since the equitable lien was not a device subject to recording acts and there was no change of possession as in the case of a pledge. Thus a sharp conflict in policy arose between protection of unsecured creditors against secret liens and the enforcement of the security rights of lenders holding unpublicized assignments. A review of the legislation dealing with this problem since the Chandler Act, which virtually abolished all secret liens, demonstrates that neither of the underlying policies is being effectively implemented. This comment will suggest that, in view of the hazards of business fluctuations and ordinary notions of fairness, it is difficult to defend specifically enforceable liens resulting from unpublicized security arrangements.

[7] Open accounts were not assignable at common law. Anderson v. Lewis & Co., 10 Ark. 304 (1850). Early obstacles to the assignment of contract rights included the difficulty of seeing intangibles handed over, the idea that champerty promoted litigation, and the fact that contracts once had a personal aspect—the "hard" creditor and debtor's prison. Accounts could be assigned in equity, however, to vest a beneficial interest in the assignee. Hofferberth v. Duckett, 175 App. Div. 480, 162 N.Y. Supp. 167 (1916).

[8] Various explanations have been advanced for the borrowers' insistence on secrecy. *Compare* Kripke, *supra* note 6 ("Receivables financing is still a relatively new form of business arrangement and some opprobrium is still deemed to be attached to it in some circles, and some persons do not want it known that they resort to that kind of financing") *with* Corn Exch. Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434, 439–41 (1942): "Receivables often are assigned only when credit in a similar amount is unavailable through other channels. Interest and other charges are high, and an assignment often is correctly understood as a symptom of financial distress. The borrower does not wish his customers to learn of his borrowing arrangement for the reason, among others, that customers, particularly in placing orders for future delivery, prefer to rely on solvent suppliers. And often the borrower desires to conceal the fact that he is being financed by this method, lest knowledge lead to a withdrawal of further credit or a refusal of new credit. The borrower and the lender on assigned accounts receivable thus have a mutual interest in not making the transaction known. . . . Secrecy has the effect of inducing others to go along with the borrower in ignorance, where they would not do so if informed."

[9] 52 Stat. 869 (1938), 11 U.S.C. § 96(a) (1946).

[10] Unless an assignment is subject to attack under the rules of fraudulent conveyances or unless there has been a failure to comply with applicable recording acts designed for the protection of creditors, an assignee under a valid assignment generally takes priority over subsequent creditors of the assignor who had no lien on the subject matter of the assignment at the time when it was made. *In re* Hawley Down-Draft Furnace Co., 238 Fed. 122 (3d Cir. 1916).

I. Legislative History of Accounts Receivable Financing

The Chandler Act amendment to the Bankruptcy Act[11] was passed in 1938. One of its major purposes was the striking down of secret liens in order to secure equal distribution among creditors of the same class.[12] The act went far to abolish the equities of persons who had taken assignments of simple contract rights as security for loans. The old act,[13] in section 60(a), had defined a preference as a transfer of property by an insolvent debtor for an antecedent debt, thereby enabling a creditor to recover a greater percentage of his debt than could other creditors of the same class. The trustee was given power under section 60(b) to avoid any such transfer made within four months of bankruptcy if the creditor had reasonable cause to believe that it was a preference. However, up to the time of the Chandler Act, there had been no clear indication of when a transfer would be deemed to have been made. For example, a mortgagee who withheld his interest from the record until the eve of bankruptcy might still escape the preference section if the mortgage itself was executed before the four month period began to run. Meanwhile, of course, third parties might have been misled by the apparently sound credit of the mortgagor.[14] The Chandler Act provided an effective test of perfection. Under that amendment, a transfer was deemed 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."[15] In other words, the trustee in bankruptcy was accorded the rights of a hypothetical bona fide purchaser or creditor.

Interpreting the Chandler Act, the Supreme Court in *Corn Exchange Nat'l Bank v. Klauder*[16] held that transfers not perfected under state law against a bona fide purchaser were deemed to have been made immediately prior to bankruptcy and hence constituted preferences voidable by the trustee.[17] In that case, the lender had failed to notify the account debtors of the assignment as required by Pennsylvania law and had thus lost his security interest.

Since determination of what constitutes a perfected transfer depends on state law,[18] the effect of the Chandler Act on security devices can be

[11] 52 Stat. 869 (1938), 11 U.S.C. § 96(a) (1946).

[12] See H.R. Rep. No. 1409, 75th Cong., 1st Sess. 30 (1938).

[13] 30 Stat. 562 (1898).

[14] See Friedman, *The Bankruptcy Preference Challenge to After-Acquired Property Clauses Under the Code*, 108 U. Pa. L. Rev. 194, 201 (1959).

[15] 52 Stat. 869 (1938), 11 U.S.C. § 96(a) (1946).

[16] 318 U.S. 434 (1943).

[17] At common law the debtor had the right to prefer one or more of his creditors over another. Siegel v. Liberty Sav. Bank, 272 Ill. App. 43 (1933). This right has been virtually nullified by statutes, including the Bankruptcy Act.

[18] 3 Collier, Bankruptcy § 60.48 (14th ed. 1941).

understood only by examining the common law of the states as it stood in 1938 with regard to the perfection of an assignment against a bona fide purchaser from the same assignor. There were ten states which followed the so-called English rule of notification.[19] In these states, as between successive assignees of contract rights, the one who first notified the account debtor was protected against the bona fide purchaser. The so-called American rule which holds that an assignment is binding when made, no notification being necessary, was followed in eleven states[20] but there were certain equitable exceptions to this rule which came to be known as the Massachusetts rule[21] or the "four horsemen." Under the Massachusetts rule, the first assignee prevails unless the second assignee is a bona fide purchaser for value and is first to obtain (1) payment or satisfaction, (2) a judgment, (3) a novation, or (4) a tangible token or writing the surrender of which is required to enforce the obligation.[22] In the American rule states there was always the danger that courts would invoke the Massachusetts rule as a set of exceptions, and that, as a result, the lender's security would become vulnerable to attack by the trustee in bankruptcy under the Chandler Act. In other jurisdictions the law was uncertain. Under the Chandler Act test, then, a non-notifying assignee could be assured of prevailing against a subsequent bona fide purchaser only in the eleven American rule states—with the danger that even there the "four horsemen" rule might be applied.[23]

[19] California, Connecticut, Louisiana, Maryland, Missouri, Mississippi, Oklahoma. Pennsylvania, Tennessee and Vermont. See Graham Paper Co. v. Pembroke, 124 Cal, 117, 56 Pac. 627 (1899); City Bank of New Haven v. Thorp, 79 Conn. 194, 64 Atl. 205 (1906); Geisenberger v. Cotton, 116 La. 651, 40 So. 929 (1906); Lambert v. Morgan, 110 Md. 1, 72 Atl. 407 (1909); Klebba v. Struempf, 224 Mo. App. 193, 23 S.W.2d 205 (1930); Mathews v. Hamblin, 28 Miss. 611 (1855); Jack v. Nat'l Bank, 17 Okla. 430, 89 Pac. 219 (1906); *In re* Phillips' Estate, 205 Pa. 515, 525, 55 Atl. 213, 216 (1903); Clodfelter v. Cox, 33 Tenn. (1 Sneed) 330 (1853); Nichols v. Hooper, 61 Vt. 295, 17 Atl. 134 (1889).

[20] Arkansas, Iowa, Kentucky, New Jersey, New York, Oregon, Texas, Washington, West Virginia, Minnesota and South Carolina. See Moore & Moore v. Robinson, 35 Ark. 293 (1880); Ottumwa Boiler Works v. M. J. O'Meara & Son, 206 Iowa 577, 218 N.W. 920 (1928); Columbia Fin. and Trust Co. v. First Nat'l Bank, 116 Ky. 364, 76 S.W. 156 (1903); Moorestown Trust Co. v. Buzby, 109 N.J. Eq. 409, 157 Atl. 663 (Ch. 1931); Superior Brassiere Co. v. Zimetbaum, 214 App. Div. 525, 212 N.Y. Supp. 473 (1925); Meier v. Hess, 23 Ore. 599, 32 Pac. 755 (1893); Employers' Cas. Co. v. Rockwall County, 120 Tex. 441, 35 S.W.2d 690 (1931); Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153 (1896); Clarke v. Hogeman, 13 W. Va. 718 (1878); Burton v. Gage, 85 Minn. 355, 88 N.W 997 (1902); National Loan & Exch. Bank v. Gustafson, 157 S.C. 221, 154 S.E. 167 (1930).

But note that the New York Factors' Lien Act changes the rule with respect to accounts that come within its provisions, and requires notice filing for perfection. NEW YORK PERS. PROP. LAW § 45.

[21] Rabinowitz v. People's Nat'l Bank, 235 Mass. 102, 126 N.E. 289 (1920). Illinois (see *In re* Vardaman Shoe Co., 52 F. Supp. 562 (E.D. Mo. 1943)) and Indiana are also considered to have been Massachusetts rule states, although reported cases do not clearly indicate that they were following this rule. See Conwill & Ellis, *Much Ado About Nothing: The Real Effect of Amended* 60(*a*) *on Accounts Receivable Financing*, 64 HARV. L. REV. 62, 66 n.20 (1950).

[22] The rule is stated in RESTATEMENT, CONTRACTS § 173.

[23] See *In re* Vardaman Shoe Co., 52 F. Supp. 562 (E.D. Mo. 1943).

Parenthetically, it should be noted that the literal language of the act invalidated trust receipts, as well as any other device that gives the trustee a power of sale, entirely as security. Under this interpretation, since the purchaser in ordinary course of business always takes free of the "entruster's" lien, such an interest could never be perfected under the act. And in the one decision directly in point, a district court in Virginia so applied the statute.[24]

The *Klauder* case, with its implications for most kinds of inventory and accounts financing, caused alarm among borrowers and lenders engaged in accounts receivable financing.[25] It was followed by a wave of legislation in most states defining when and how an assignment of accounts receivable could be perfected. There is a complete lack of uniformity among the states, but the statutes fall into three general categories: those providing for validation, those providing for notice filing, and those providing for book marking.

The fourteen states with validation statutes[26] have, in effect, enacted the American rule of non-notification.[27] They provide that an assignment is valid either from its making, according to its terms, as of date or as of delivery. It is obvious that the attendant lack of publicity fosters secret liens and that it frustrated the policy of the Chandler Act. The notice filing statutes in twenty-nine jurisidictions,[28] including the Uniform Commercial Code states,[29] represent an attempt to compromise between the business desire for secrecy and the public desire for notoriety. These statutes provide for some form of publicity such as filing with the appropriate public officer a notice of the assignment designating the assignor and the assignee. But few of these statutes, with the

[24] *In re* Harvey Distrib. Co., 88 F. Supp. 466 (E.D. Va. 1950).

[25] See Conwill & Ellis, *supra* note 21, at 68.

[26] See Ark. Stat. § 68-805 (1947); Del. Code Ann. tit. 6, §§ 1801–1807 (Cum. Supp. 1958); Ill. Rev. Stat. ch. 121½, §§ 220–22 (1959); Ind. Ann. Stat. §§ 19-2102—19-2104 (Burns 1950); Me. Rev. Stat. Ann. ch. 113, § 171 (1954); Md. Ann. Code art. 8, § 1 (1957); Mich. Comp. Laws §§ 19.841–19.849 (1948); Minn. Stat. §§ 521.01-521.07 (1957); N.H. Rev. Stat. Ann. ch. 333 (1955); Ore. Rev. Stat. ch. 80 (1953); R.I. Gen. Laws Ann. §§ 6-15-1—6-15-2 (1956); S.D. Code §§ 51.0802–51.0803 (Supp. 1952); Va. Code Ann. §§ 11-5—11-7 (1950); Wis. Stat. § 241.28 (1957).

[27] See text at note 20 *supra*.

[28] See Ala. Code tit. 39, §§ 207–14 (1958); Ariz. Rev. Stat. Ann. §§ 44-801—44-808 (1956); Cal. Civ. Code §§ 3017–29; Colo. Rev. Stat. Ann. ch. 11, art. 2 (1953); Fla. Stat. §§ 524.01–524.06 (1959); Ga. Code §§ 85-1806—85-1813 (1933); Hawaii Rev. Laws ch. 187 (1955); Idaho Code Ann. §§ 64-901—64-907 (1949); Iowa Code §§ 539.7–539.15 (Cum. Supp. 1959); Kan. Gen. Stat. Ann. §§ 58-801—58-807 (1949); La. Rev. Stat. §§ 9:3101-9:3110 (Supp. 1952); Mo. Rev. Stat. ch. 410 (1949); Neb. Rev. Stat. §§ 69-601—69-621 (1943); Nev. Rev. Stat. §§ 100.070–100.170 (1957); Miss. Code Ann. §§ 243.01–243.10 (Cum. Supp. 1958); N.C. Gen. Stat. §§ 44-77—44-85 (1950); Ohio Rev. Code Ann. ch. 1325 (Baldwin 1959); Okla. Stat. tit. 15, §§ 631–37 (1951); S.C. Code, §§ 45-201—45-211 (1952); Tenn. Code Ann. §§ 47-1801—47-1804 (Cum. Supp. 1959); Tex. Rev. Civ. Stat. art. 260-1 (1948); Utah Code Ann. §§ 9-3-1—9-3-6 (1953); Wash. Rev. Code § 63.16 (1957); Wyo. Comp. Stat. Ann. §§ 34-272—34-287 (1945).

[29] Kentucky, Massachusetts, Connecticut, Pennsylvania and West Virginia have adopted the Uniform Commercial Code.

exception of those based on the Code, exclude other methods of perfecting,[30] so that a person desiring information as to assignment of accounts cannot rely solely on the fact that there is no notice on file as to a particular assignor. If the assignee has chosen an alternate method of perfection, such as notice to the account debtor, it will not be a matter of public record. In North Dakota, a notation on the assignor's books of account, showing the fact of the assignment, is sufficient.[31] There, notice will depend on the assignor's willingness to permit inspection of his books. The metamorphosis of the state law of perfection following the Chandler Act and the *Klauder* case leaves at present fourteen validation states,[32] twenty-nine notice filing states,[33] one book marking state,[34] two American rule jurisdictions,[35] one English rule jurisdiction,[36] and three uncertain.[37]

After state law had been thus transformed by commercial lending interests, the 1950 amendment to Section 60 was enacted.[38] The bona fide purchaser test was replaced with a lien-creditor test of perfection for all personal property transfers. By this amendment the trustee is deprived of the rights of a hypothetical bona fide purchaser, and a security interest is deemed perfected when "no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."[39]

On its face, the change would seem to improve the value of security in goods held for resale and in accounts receivable. However, the recent Seventh Circuit decision in *In re Crosstown Motors*[40] indicates that certain trust receipt transactions may still be invalidated. The court there applied a definition of "new value" under the Bankruptcy Act which invalidated transfers probably good under the definition of section 1 of the Uniform Trusts Receipts Act. So far as accounts receivable are concerned, by the time the amendment was passed most states had already prescribed methods of perfecting assignments which were independent of the distinction between a bona fide purchaser

[30] The Missouri and North Carolina statutes expressly authorize perfection either by filing or notice to the account debtor. Mo. Rev. Stat. § 410.020 (1949); N.C. Gen. Stat. § 44-80(1)(c) (Cum. Supp. 1949).

[31] N.D. Rev. Code § 9-1109 (Supp. 1957).

[32] See note 26 *supra*.

[33] See notes 28 & 29 *supra*.

[34] See note 31 *supra*.

[35] New Jersey and New York, except so far as New York law is modified by the Factor's Lien Act. See note 20 *supra*.

[36] Vermont. See note 19 *supra*.

[37] New Mexico, Montana and Alaska.

[38] 64 Stat. 24 (1950), 11 U.S.C. § 60(a) (1958).

[39] *Ibid.*

[40] 272 F.2d 224 (1959).

and a creditor who could have obtained a superior lien by legal or equitable proceedings. Only in Mississippi was the distinction still meaningful with regard to the perfection of an assignment. Since the requirements for perfection still depend on state law, the effect of the amendment on accounts receivable financing was negligible.[41]

II. Multistate Problems

Collectively, the various state statutes, together with the extant common law rules, present complex mechanical difficulties to large concerns with customers in many states who seek credit secured by liens on assigned accounts. There seems to be no sure way of predetermining what state law governs a multistate transaction.[42] Nor is it clear which jurisdiction should be the appropriate site of filing, if filing is required in any of the states involved.

Theoretically, there are at least six places to which courts might look to find the proper law in determining the effectiveness of the assignment: the place of assignment, the lender's domicile or place of business, the account debtor's domicile or place of business, the borrower's domicile or place of business, the place of performance of the account debtor's contract, or the place of performance of the borrower's contract. If one of the parties has more than one place of business, the problem becomes even more complex. In fact, however, many of these sites will be in the same jurisdiction. Characteristic of the problem situation is *In re Rosen*.[43] In that case the assignor, a resident of New Jersey, and the assignee, a resident of Pennsylvania, agreed to terms on which credit was to be extended in a contract which provided that Pennsylvania law should govern the transaction. The assignor and his customers, the account debtors, did business in New Jersey. Accounts were payable at the assignor's place of business, and the assignor then deposited the money in a New Jersey bank for the assignee. On these facts, Judge Goodrich, a recognized authority on conflict of laws, held that, despite the efforts of the parties to stipulate the controlling law, New Jersey law applied. He based his decision on "the usual conflict of laws rule, that the law of the place of assignment controls."[44] There is some additional authority to the effect that the place of assignment controls[45] but other cases hold that the borrower's domicile

[41] Conwill & Ellis, *supra* note 21, at 78.

[42] This problem was recognized by the Supreme Court as a possible result of its decision in the *Klauder* case: "So also is it true 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. But the fact that the remedy may fall short in these respects does not justify denying it all effect." Corn Exch. Nat'l Bank v. Klauder, 318 U.S. 434, 441 (1943).

[43] 157 F.2d 997 (3rd Cir. 1946), *affirming* 66 F. Supp. 174 (1946).

[44] *Id.* at 999.

[45] See Monarch Discount Co. v. Chesapeake & O.R.R., 285 Ill. 233, 120 N.E. 743 (1918); Couret v. Connor, 118 Miss. 374, 79 So. 230 (1918); Appeal of Colburn, 74 Conn. 463, 51 Atl. 139 (1902).

is decisive.[46] It should be noted that both these sites were in New Jersey in the *Rosen* case. As one writer put it, "there is no definite and authoritative answer, the choice is between general rules of thumb or not operating at all."[47] A bank officer who appeared as a witness before a House subcommittee hearing on the proposed amendment of 60(a) of the Bankruptcy Act testified that the "situation had come to such a pass that his institution was compelled to regard all such types of transactions as unsecured loans and to rule on them . . . accordingly."[48] State legislation protecting bona fide purchasers and lien and general creditors by notice filing, followed by new strategies of borrowers and lenders, has resulted in complex conflict of laws problems, creating a "confusing legal mosaic, rather than a unified picture."[49] Meanwhile, the laws have neither made accounts receivable financing safe for the lenders nor provided adequate protection for the interests of general creditors in bankruptcy.

It has been suggested that a uniform law, such as the notice filing provisions of the Uniform Commerical Code may be the answer to the problem of determining what state law governs a multistate transaction.[50] The Code provides a solution to the conflict of laws problem in section 9-103 (1). Under this section, if the office where the assignor of accounts or contract rights keeps his records concerning them is in the Code State, the validity and perfection of the security interest is governed by the Code; otherwise it is determined by the law (including the conflict of laws rules) of the jurisdiction where such office is located. When the assignor keeps his records in more than one state, the assignee, to be perfectly safe, can file in all such states.[51] However, until the Code is in force in all of the major commercial states there will still be conflicts problems.

III. Benedict v. Ratner

Concern about secret assignments of accounts receivable is also reflected in the doctrine of *Benedict v. Ratner*,[52] which conclusively imputed fraud of creditors to transactions in which the assignor retained full dominion over the proceeds from collection of accounts. Even when the assignor turns

[46] Union Trust Co. v. Bulkeley, 150 Fed. 510 (6th Cir. 1907); Woodward v. Brooks, 128 Ill. 222, 20 N.E. 685 (1889).

[47] Malcolm, *Conflicts of Law—Accounts Receivable*, 30 Mass. L.Q. 38, 40 (1945).

[48] Sen. Rep. No. 72, 81st Cong., 2d Sess. 1 (1949).

[49] Koessler, *New Legislation Affecting Non-notification Financing of Accounts Receivable*, 44 Mich. L. Rev. 563, 604 (1946).

[50] Comment, *Multistate Accounts Receivable Financing: Conflicts in Context*, 67 Yale L.J. 412, 415 (1958).

[51] See Uniform Commercial Code § 9-103, comment. A similar test is found in Restatement (Second), Conflict of Laws § 354 (Tent. Draft No. 6, 1960): "in the case of accounts receivable of a business enterprise, questions of priority are determined by the local law of the state where the books evidencing the accounts are kept."

[52] 268 U.S. 353 (1924).

over the proceeds immediately to the assignee, the practice of indirect collection by the assignor has proved to have great susceptibility to fraud. Although the bulk of accounts receivable financing is part of the normal credit pattern, when credit sellers who are on their last legs financially indulge in receivables financing, the lending institution frequently finds fake receivables or receivables the collection of which has not been accounted for.[53]

In *Benedict*, an assignment of existing and future accounts as security for a loan authorized the assignor to collect the accounts, but did not require him to account to the assignee for proceeds until demand was made. The Court, speaking through Mr. Justice Brandeis, held that under New York law the assignment was void as against creditors because there was no requirement of an accounting for proceeds. The "dominion" rule emanating from that case provides that a lien on receivables is invalid if the lender permits the borrower to exert unfettered dominion over the cash proceeds. In the Second Circuit that rule has been broadened by taking the negative inference to mean that the creditor loses his lien unless he exerts complete dominion over the proceeds, leaving no dominion to the borrower.[54] In that important circuit, the legal hazards surrounding accounts receivable financing are therefore particularly great. In *Lee v. State Bank and Trust Co.*[55] the assignee of accounts lost his lien on the accounts because the assignor had power to deal with returned goods. If the lender, having failed to police his loan, nevertheless receives some payments of proceeds, he may find that such payments, if received within four months of bankruptcy, constitute a preference and therefore are recoverable by the trustee in bankruptcy.[56]

The dominion rule of *Benedict v. Ratner* is, however, by no means universally applied. Many state statutes have avoided it, and the Uniform Commercial Code, in section 9-205, has rejected the doctrine of dominion by stating that the assignor can freely use the proceeds as they are collected.[57] His failure to account for proceeds immediately will not jeopardize the assignee's security interest under this section. The *Benedict* rule has been considerably relaxed in the Fifth Circuit in contrast to its strict application in the Second Circuit. In *Lindsay v. Rickenbacker*[58] the assignee was to deposit collections

[53] Kripke, Address, *supra* note 6.

[54] *Ibid.* See also Brown v. Leo, 12 F.2d 350 (2d Cir. 1926); Lee v. State Bank & Trust Co., 54 F.2d 518 (2d Cir. 1931).

[55] 54 F.2d 518 (2d Cir. 1931).

[56] Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588, 593 (1949).

[57] See Comment, *supra* note 50. *But see* In the Matter of the New Haven Clock and Watch Co., 253 F.2d 577 (2d Cir. 1958), where it was argued, unsuccessfully, that *Benedict v. Ratner* was a national rule. If this argument were accepted and upheld by the Supreme Court, state variatons of the *Benedict* rule would be nullified.

[58] 116 F.2d 29 (5th Cir. 1940).

in a special account for the assignor and hold them until demand for payment was made. The assignee later gave the assignor a power of attorney to draw on the special account for money to be used in the assignor's business, with the understanding that no withdrawals should be made until accounts of substantially the same amount were assigned to the assignee. The court held that a valid lien existed and that *Benedict* was not applicable to these facts, although there is little doubt that the case would have been decided otherwise in the Second Circuit. A later Fifth Circuit decision, *Second Nat'l Bank v. Phillips*,[59] suggests that the Texas filing statute, by removing the vice of secrecy, reduces the importance of adherence to *Benedict*.

Thus a conflict in policy similar to that in the state legislation relating to accounts receivable can be discerned in the application of the dominion rule. In the Fifth Circuit, the courts seem more concerned with the protection of the lender; in the Second Circuit with the general creditor. Similarly, some statutes promote secrecy while others favor notoriety. The interplay between the dominion rule and the statutes, as indicated in *Second Nat'l Bank v. Phillips*, raises new questions. What should be the effect of a notice filing statute on the dominion rule? If there is a validation statute in the jurisdiction, does the dominion rule become more important because of the secrecy involved? The Fifth Circuit, at least, seems to feel that the dominion rule can be dispensed with so long as there is notice that accounts receivable financing is being undertaken.[60]

IV. Conclusion

The foregoing survey of the law governing accounts receivable financing illustrates that attempts to protect lending interests by validation statutes, and general creditors by notice filing statutes, have resulted in a chaotic body of law which gives adequate protection to neither. The lender, even in a validation state, faces a double risk: that of the dominion rule of *Benedict v. Ratner*, and that of a conflict of laws problem in a multistate transaction.[61] On the other hand, amended section 60(a) of the Bankruptcy Act and the state validation statutes present a serious problem of fairness among creditors in bankruptcy. Unless it is possible to work out a system of notice filing by which lenders and general creditors can protect themselves, it would seem that ultimately a choice must be made protecting one or the other.

It is submitted that business reasons for secrecy are not compelling enough to justify equitable liens in bankruptcy based upon assignments of accounts receivable. Furthermore, secrecy may be self-defeating since the lender takes

[59] 189 F.2d 115, 118 (5th Cir. 1951).

[60] Second Nat'l Bank v. Phillips, *supra* note 59.

[61] See Comment, 67 Yale L.J. 847, 892 (1958), where the author, after asserting that contract rights should be readily available as a source of security, warns that "whatever the jurisdiction, care must be taken to conform to the manifold technical requirements, necessary for a valid creation and maintenance of a secured interest."

the risk of the borrower's dishonesty in case there is a prior lien. It has been argued that such liens can be justified on the ground that the estate of the bankrupt has been enriched by a credit advance on its book accounts. It is, however, clear that general creditors too have enriched the estate. They may even have been actively misled if they advanced credit, relying upon a profitable future contract, only to find the debtor had assigned the money to become due under it.[62] Since a valid secured interest in the property of the bankrupt is no part of the bankrupt estate, it outranks even the wage earner's priorities which are among those entitled to be paid first out of the estate. Thus, under an equitable lien theory, the holder of an unpublicized assignment of accounts would be entitled to come in ahead of wage earners, and of unsecured creditors who may have relied on the debtor's future assets.

Legislative efforts to resolve the conflicting interests of lenders and general creditors have been described in the progression from the Chandler Act, which attempted to wipe out secret liens entirely; to validation statutes which made the Chandler Act ineffective; and notice filing statutes which effected a compromise. When the lending interests finally obtained an amendment to the Chandler Act, a majority of the states had declared for notice. Attempts by the states to deal with the problem themselves have resulted not in a single rule but in new problems arising out of a conflict of rules. At present, neither the lender nor the general creditor is adequately protected, and there is a hopeless lack of uniformity in the law governing assignment of accounts.

These problems are not confined to accounts receivable financing. It is clear that a lender is secured only to the extent that his interest is "perfected." This being true, the safety of any security device in the bankruptcy situation may be questionable. State law by itself cannot adequately cope with either of the fundamental elements of security—conferring a priority position upon a particular creditor, and giving notice to competing creditors. State law is inadequate not only because of conflicts problems, but also because of the fact that an amendment to the Bankruptcy Act could always wipe out whatever tests of perfection the states had devised.

The solution, once a policy is chosen, would seem to lie in a uniform law of national scope. It has been suggested that Congress under the commerce clause has the power to enact uniform commercial rules.[63] At any rate, Congress can do much through its power to settle all bankruptcies by a uni-

[62] See Sharp, Book Review, 61 YALE L.J. 1119, 1130 (1950).

[63] Koessler, *supra* note 49, at 614. In the light of the present Supreme Court trend toward interpreting the concept of "affecting interstate commerce" broadly (see Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Sullivan, 332 U.S. 689 (1948)), it would seem that the movement of chattel paper from retailer to financial institutions with offices in every principal city in the country could be regarded as interstate commerce. See also the work of Professor Crosskey which suggests that the commerce clause was never intended to have an interstate limitation. 1 CROSSKEY, POLITICS AND THE CONSTITUTION (1950).

form federal law.[64] It could provide a uniform test of perfection and could settle multistate conflicts of law.[65] The choice of a test will depend on the attitude taken toward secured lending, which in turn depends upon a judgment about the effect of a severe economic downturn on our credit economy. The adoption of notice filing provisions such as those of the Uniform Commercial Code would appear to merit serious consideration. In making a judgment as to the extent to which secured lending should be protected, the great amount of credit extended on all of the security devices cannot be ignored. Since the last depression, accounts receivable have moved from last ditch to normal financing. With this great reliance on secured lending, a rash of bankruptcies could snowball into an economic crisis. In such a situation the faults of our present system of security devices, resulting from reliance upon encumbered assets and from inequalities among creditors, would appear too late.

[64] U.S. CONST. art. I, § 8: "The Congress shall have Power... to establish... Uniform Laws on the subject of Bankruptcies throughout the United States."

[65] Koessler, *supra* note 49, at 614.

COLLATERAL ESTOPPEL IN CRIMINAL CASES

A judgment settles certain issues between the parties to an action. The issues so settled are those which must have been settled in order to reach the judgment. According to the doctrine of collateral estoppel, such issues are conclusively determined and cannot be raised again in a different action between the same parties.[1] The doctrine of collateral estoppel has received most attention in civil cases. Various courts, including the United States Supreme Court, have, however, stated that the doctrine applies also to criminal cases.[2]

The recent case of *Hoag v. New Jersey*[3] furnishes a classic example of the kind of criminal case in which the doctrine of collateral estoppel may become important.[4] In this respect, *Hoag* sets the stage for a discussion of the prob-

[1] Commissioner v. Sunnen, 333 U.S. 591 (1948); United States v. Moser, 266 U.S. 236 (1924); Crowell v. County of Sac, 94 U.S. 351 (1876); see RESTATEMENT, JUDGMENTS § 45, comment c (1942).

[2] Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916); United States v. Kenny, 236 F.2d 128 (3d Cir. 1956), *cert. denied*, 352 U.S. 894 (1956); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1954); Harris v. State, 193 Ga. 109, 17 S.E.2d 728 (1941); State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941); State v. Heaton, 56 N.D. 357, 217 N.W. 531 (1927).

[3] 356 U.S. 464 (1958), *affirming* 21 N.J. 496, 122 A.2d 628 (1956).

[4] There are at least two types of situations in which participation in a given transaction may bring prosecution for more than one crime and more than one trial. In the first type, represented by Hoag v. New Jersey, 356 U.S. 464 (1958), the perpetration of the same act against two or more people at the same time violates the same criminal statute several times. The second type is represented by the case where a given transaction violates two different