ESSAYS

Common Law Judging in an Age of Statutes

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INTRODUCTION

Well into the twentieth century, a justice on the Supreme Court was a common law judge. Before the rise of the regulatory state and *Erie Railroad Co v Tompkins*'s[1] rejection of general federal common law, a master of the warp and woof of the common law such as Justice Oliver Wendell Holmes Jr was securely in his element.[2] The modern federal judge, by contrast, is a master of federal statutes and regulations. But the common law still matters as it remains the foundation on which federal statutes are written.

A clear grasp on how common law principles undergird federal statutes is one of many virtues on display in Judge Diane Wood's many opinions from her first quarter century on the bench. This Essay focuses on one such opinion. The dispute seems at first to confront an ordinary problem of statutory construction, but in fact it requires linking the federal statute to foundational principles of the common law. This case shows how then–Chief Judge Wood is singularly adept at this modern challenge even when the legal landscape is especially obscure and the advocates before her particularly inept.

I. PREFERENCES AND ORDINARY STATUTORY INTERPRETATION

The quotidian case of *In re Mississippi Valley Livestock, Inc*[3] requires positioning federal statutory law—in this case § 547 of

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1 304 US 64 (1938).

2 Consider Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* ch 6 (Norton 2019).

3 745 F3d 299 (7th Cir 2014).

the Bankruptcy Code[4]—against the first principles of the common law. At common law, creditors are left to their own devices. If a debtor refuses to pay, each creditor must exercise its own powers of persuasion or seek legal remedies on its own.[5] The creditor best able to cajole or threaten prevails. The race is to the swift. Bankruptcy law is a federal procedure that displaces ordinary creditor remedies when the debtor encounters financial distress, and the race among its creditors becomes self-defeating.[6] Bankruptcy calls off the ability of creditors to pursue their individual remedies and forces them to sit down and divide the debtor's assets among themselves in a sensible fashion.

Bankruptcy proceedings, however, are usually triggered only after the writing is on the wall, and a debtor's descent into insolvency is often slow and easy to anticipate. For this reason, the Bankruptcy Code includes provisions that require creditors to give back assets that they acquire on the eve of bankruptcy.[7] Because the bankruptcy trustee can avoid payments that prefer some creditors over others, creditors are less inclined to jump the gun in the first place.

Preference law has long been part of bankruptcy law, but its precise shape has changed over time.[8] Hence, understanding how current law operates in any given case must begin with the relevant provision of the Bankruptcy Code.[9] Preference cases regularly come to the courts of appeals, and are no strangers to the Supreme Court's docket either.[10] Many cases present straightforward questions of statutory interpretation, such as what it means for a debt to be incurred "in the ordinary course."[11] The more interesting cases, such as *Mississippi Valley*, however, require understanding how the preference section of the Bankruptcy Code

4 11 USC § 547.

5 See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L J 857, 862 (1982).

6 Id at 864.

7 See 11 USC § 547.

8 In the first instance, it was a judge-made doctrine. See, for example, *Harman v Fishar*, 98 Eng Rep 998, 1001–02 (KB 1774). Preference law has been refashioned whenever Congress has reformed federal bankruptcy law. Its modern form took shape with the Bankruptcy Code in 1978. For a discussion of the history of preference law, see generally Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 Stan L Rev 3 (1986).

9 See 11 USC § 547.

10 See generally, for example, *Barnhill v Johnson*, 503 US 393 (1992); *Union Bank v Wolas*, 502 US 151 (1991).

11 See, for example, *In re Bayonne Medical Center*, 429 Bankr 152, 185–92 (Bankr D NJ 2010); *In re Accessair*, 314 Bankr 386, 392–95 (BAP 8th Cir 2004).

interacts with the substantive rights the competing parties already enjoy under nonbankruptcy law.

Mississippi Valley Livestock and J&R Farms were both in the business of buying and selling fatted cattle. Both of them had regularly sold cattle to Swift Con-Agra.[12] At some point, however, J&R and Swift had a falling-out. In order to keep doing business with Swift, J&R asked Mississippi Valley, with whom it had long done business, for a favor.[13] J&R would give its cattle to Mississippi Valley, and Mississippi Valley would present them to Swift as if they were its own. Mississippi Valley would then remit all the proceeds back to J&R.[14] In this fashion, J&R would keep an important, albeit unwilling, customer, and Swift would be none the wiser. Mississippi Valley would not enjoy any profit from the transaction, but it would earn the thanks of J&R and the ability to call upon it for a favor in the future.[15]

When Mississippi Valley encountered financial distress, however, it began to drag its heels in turning over the proceeds it received from Swift to J&R.[16] J&R grew impatient, and its proprietor pressed for payment: "I don't want to hear *excuses*. . . . Fed Ex or wire to me tomorrow. This is getting old, the lies and waiting for it."[17] The jawboning worked, and Mississippi Valley sent J&R seven checks totaling more than $800,000.[18] Shortly thereafter, other creditors of Mississippi Valley put it into bankruptcy.[19] The trustee demanded that J&R return the money on the ground that each of the checks was a non-ordinary course payment that triggered his ability to demand that J&R give back what it had received.[20]

Applying the preference provisions of the Bankruptcy Code is usually straightforward. They are emphatically rules rather than standards. The purpose of preference law is to recover from creditors who grab assets in anticipation of bankruptcy, but § 547 does not make any inquiry into any particular creditor's state of

12 *Mississippi Valley*, 745 F3d at 301.
13 Id.
14 Id.
15 Id.
16 *Mississippi Valley*, 745 F3d at 301.
17 Id (emphasis in original).
18 Id at 302.
19 Id.
20 *Mississippi Valley*, 745 F3d at 302.

mind.[21] As long as a creditor receives a transfer outside the ordinary course, that transfer of the debtor's property on account of an antecedent debt is subject to preference attack as long as it was made within ninety days of bankruptcy, the debtor was insolvent at the time, and the creditor was made better off as a result.[22] Even if the creditor was utterly unaware of the debtor's financial distress and made no special effort to obtain payment, the transfer is still a preference.

Like all rules, these rules are over- and underbroad. A creditor who sees that the debtor is losing money and is ultimately going to fail can seize assets with impunity as long as at the time it seizes assets the debtor still has enough to pay its debts. What matters is whether the debtor's assets exceed its liabilities at the time payment is extracted.[23] Moreover, rather than require the judge to decide whether bankruptcy was in the offing when the payment was made, the Bankruptcy Code fixes the preference window. A transfer made eighty-nine days before bankruptcy is suspect, but the identical transfer made ninety-one days before is not.[24] Section 547 sets out somewhat arbitrary lines, and the job of the judge is to determine whether they have been crossed.

At first blush, it might seem that applying § 547 to Mississippi Valley's payment to J&R is easy. Mississippi Valley had written the seven checks to J&R within the preference window while it was hopelessly insolvent.[25] There was no doubt that the payments were to a creditor on account of an antecedent debt. (Mississippi Valley was obliged to pay J&R an amount equal to whatever it received from Swift for J&R's cattle.)[26] And J&R's arm-twisting doomed any effort to argue that the checks were given in the ordinary course.[27]

J&R argued, however, that one of the elements of a preference was missing. Section 547(b) applies only to a "transfer of an interest of the debtor in property."[28] Mississippi Valley sold J&R's cattle, not its own. When Mississippi Valley received cash for the

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21 See Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan L Rev 725, 757–59 (1984).

22 See 11 USC § 547(b).

23 See 11 USC § 547(b)(3).

24 See 11 USC § 547(b)(4).

25 *Mississippi Valley*, 745 F3d at 301–02.

26 Id at 301.

27 There is an exception to the trustee's preference power for transfers made in the ordinary course. See 11 USC § 547(c)(2).

28 11 USC § 547(b).

cattle, it was acting on behalf of J&R. When Mississippi Valley turned this cash over to J&R, it was giving J&R something that already belonged to it.[29] An essential element of a preference was missing. There was not a transfer of an interest of *the debtor* in property.

To assess the merits of this argument, Chief Judge Wood first had to establish what the Bankruptcy Code means when it says that a particular transfer must be "of an interest of the debtor in property" in order for the transfer to be a preference. Doing this requires connecting the Bankruptcy Code's preference rules to other parts of the Bankruptcy Code. This requires going beyond interpreting the text itself, but on its face is still a self-contained problem of statutory interpretation.

The Bankruptcy Code makes last-minute preferences voidable because they have the effect of depriving the creditors of something that they would otherwise receive. Hence, the most sensible interpretation of the "interest of the debtor in property" in § 547 is one that ensures that the debtor is not able to deprive creditors of property that would otherwise be available to them to satisfy their claims.[30] Once one interprets the words of the statute in this fashion, the preference inquiry resolves itself: the question becomes whether the money that was given to J&R was something that the creditors would have been able to reach if the debtor had not transferred it.

Another circuit court had faced such a question a number of years before this case came to Chief Judge Wood. In that case, *In re Omegas Group*,[31] a buyer wanted to acquire a computer from a particular manufacturer.[32] The buyer discovered it could buy the computer more cheaply if it used the debtor as its intermediary. It gave the debtor cash that was supposed to be used to buy the computer.[33] Bankruptcy intervened while the cash was still in the debtor's hands.[34] *Omegas Group* did not involve a preference. Instead, it confronted directly the question needed to discover

[29] *Mississippi Valley*, 745 F3d at 302.

[30] See *In re Bullion Reserve of North America*, 836 F2d 1214, 1217 (9th Cir 1988) ("[P]roperty belongs to the debtor for purposes of § 547 if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors.").

[31] 16 F3d 1443 (6th Cir 1994).

[32] Id at 1445.

[33] Id.

[34] Id at 1446.

whether there had been a transfer of "interests of the debtor in property."[35]

The court in *Omegas Group* ruled that assets held in constructive trust had to be shared among creditors as a group.[36] Once in bankruptcy, the underlying bankruptcy policy of pro rata distribution required that the buyer and the other creditors share pro rata. Hence, money in the debtor's hands was an asset that had to be distributed pro rata among the creditors.[37]

Chief Judge Wood rejected this analysis. For her, the court in *Omegas Group* ignored the critical inquiry into the relationship between federal bankruptcy law and the common law it displaced.[38] In her view, deciding whether the party that had provided the cash (in *Omegas Group*) or the cattle (in *Mississippi Valley*) should share pro rata with the general creditors of the debtor required understanding exactly what rights the third party held under nonbankruptcy law. Only if the creditors could reach the relevant asset in the face of these rights outside of bankruptcy should they be able to enjoy it inside.[39] Vague assertions about the virtue of pro rata sharing among creditors are not helpful.

II. *NEMO DAT*, CREDITORS, AND GOOD FAITH PURCHASERS

In *Mississippi Valley*, Chief Judge Wood started with a simple observation and then a question: Someone who leaves her car in a parking garage prevails over any creditors of the parking garage. How exactly is J&R in a position that is any different?[40] J&R began as the owner of the cattle. It only empowered Mississippi Valley to sell the cattle on its behalf. It never gave Mississippi Valley any rights to the cattle.[41] How can the creditors of Mississippi Valley assert any rights in the cattle if Mississippi Valley itself could not?

In Chief Judge Wood's view, the Bankruptcy Code is built on the idea that the trustee should reach only those assets that a general creditor of the debtor could reach if she sued and reduced her claim to judgment.[42] This idea that creditors can enjoy only what their debtor has follows from the concept of *nemo dat*, the

35 *Omegas Group*, 16 F3d at 1448, quoting 11 USC § 541(a)(1).
36 Id at 1451.
37 Id.
38 *Mississippi Valley*, 745 F3d at 306.
39 Id at 306–07.
40 Id at 304.
41 Id at 301.
42 See 11 USC § 544(a)(1).

first principle of the Anglo-American law of personal property.[43] If a garage does not own the cars parked there, its creditors cannot levy on them. Creditors of a livestock operation can reach only assets that the livestock operation owns, not those that belong to others. There are exceptions, but *nemo dat* provides the relevant starting place. Because *Omegas Group* ignored this idea, its approach had to be rejected.[44]

This principle of *nemo dat* is so deeply rooted that it is rarely questioned or justified. Of course, one does not have to organize a system of personal property in this fashion.[45] But it is the way our legal system is organized. Hence, the creditors of the garage or the livestock operator must explain why they are entitled to the cars or the cattle given that *nemo dat* provides the starting place. They must identify some exception to *nemo dat*.

J&R, like those who park their cars in a garage, parted with possession of its cattle. This alone does not give any rights to those to whom they entrusted the cattle. When someone is entrusted with the property of another, the original owner is entitled to demand the property's return.[46] To be sure, the person to whom the goods have been entrusted sometimes has the power to convey good title to others. In particular, by entrusting the cattle to someone known to deal in goods of the kind, J&R put itself at the risk that this person would sell them to a third party.[47] J&R

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[43] See Steven L. Schwarcz & Joanna Benjamin, *Intermediary Risk in the Indirect Holding System for Securities*, 12 Duke J Comp & Intl L 309, 317 (2002) (discussing "the universally recognized principle of *nemo dat*"). The full Latin expression is "*nemo dat quod non habet*": no one can give that which she does not have. The common law starts with the presumption that neither creditors nor anyone else can assert rights in property unless they can trace their title back to that of the original owner. Someone with a thief in their chain of title loses. Likewise, if you acquire the rights of someone who owns half an oil well, you will become the owner of only half the well.

[44] *Mississippi Valley*, 745 F3d at 306–07.

[45] One might, for example, provide that buyers in an open market who cut square corners acquired good title, even if there was a thief at some earlier point in time. The law merchant's rule of the market overt is an example of such a legal regime. See Alan Schwartz and Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 Colum L Rev 1332, 1334 (2011) ("Under Market Overt, good faith purchasers from a merchant-dealer prevail over owners of stolen goods, notwithstanding an owner's diligent efforts to prevent the theft and to recover the goods once the theft has occurred.").

[46] See *Mississippi Valley*, 745 F3d at 302–03 (discussing the properties of a bailment).

[47] The ability of the bona fide purchaser for value to prevail against an original owner came on the scene relatively late. It emerged in the nineteenth century and then only in fits and starts. It became clear only with the widespread adoption of the Uniform Commercial Code (UCC), and not with respect to all good faith purchasers for value, but only buyers in the ordinary course. See UCC § 2-403(2) (ALI 1995). For a critical view of this

would have no ability to recover the cattle from Swift once Mississippi Valley sold to them, even though Mississippi Valley itself had no rights in them. J&R voluntarily entered into the marketplace and, in the marketplace, one is at risk against the arrival of a good faith purchaser for value.

But the contest here is not between an original owner and a bona fide purchaser. The transaction between J&R and Mississippi Valley is a bailment, and the contest is between the bailor and the creditors of the bailee.[48] In the absence of some exception to *nemo dat*, general creditors cannot reach property in the debtor's hands that still belongs to someone else:

> It has been over and over again decided that the judgment creditor can acquire no better right to the estate than the debtor himself has when the judgment is recovered. . . . The creditor is in no sense a purchaser; [she] has no equity whatsoever beyond what justly belongs to [her] debtor; [her] claim is to subject to [her] lien such estate as the former owns, and no more.
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> These principles have been time and time again announced by the courts of England, by this court, and by the [S]upreme [C]ourt of the United States, and by the courts of many other states of the Union.[49]

Together these two ideas—the starting place of *nemo dat* and the sharp distinction between purchasers and creditors—set the backdrop for *Mississippi Valley*.

Chief Judge Wood used these common law principles as the starting place for analyzing the rights of the trustee.[50] The trustee

development, see generally Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 Ga L Rev 605 (1981).

48 *Mississippi Valley*, 745 F3d at 304.

49 *Floyd v Harding*, 69 Va (28 Gratt) 401, 407–08 (1877). See also Restatement (Third) of Restitution and Unjust Enrichment § 60 (2011):

> [A] right to restitution from identifiable property is superior to the competing rights of a creditor of the recipient who is not a bona fide purchaser or payee of the property in question. Acquisition of a judicial lien (by attachment, garnishment, judgment, execution, or the like) does not make the lien creditor a purchaser of the property subject to lien.

50 Chief Judge Wood, of course, was not invoking common law principles in the abstract. She turned to the common law of the jurisdiction whose law governs. In *Mississippi Valley*, Illinois law governed the rights of the creditors. Hence, Chief Judge Wood looked to the law of Illinois to assess the rights of creditors to assets that a debtor holds on behalf of someone else. See *Mississippi Valley*, 745 F3d at 302. Unsurprisingly, Illinois follows the traditional rule. See *Sparrow v Wilcox*, 112 NE 296, 298 (Ill 1916) ("[N]o reason has

starts with whatever rights the general creditors enjoyed outside of bankruptcy if they had sued and reduced their claim to judgment.[51] Creditors should enjoy in bankruptcy assets only the rights they could enjoy outside. Outside of bankruptcy, general creditors have only the ability to sue, reduce their claim to judgment, and levy on the *debtor's* property. As Chief Judge Wood explained, invoking Justice Hugo Black, "[T]he Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors."[52]

What matters for the modern judge is how the federal statute works against the backdrop of other law. In this case, the Bankruptcy Code provides a clear and sensible benchmark. The responsibility of the judge is to identify the relevant benchmarks and insist that the parties apply them. The inquiry that the Bankruptcy Code directs the judge to make does not ask the judge to engage in any special inquiry or do any special balancing between the goals of bankruptcy and the goals of other law.[53]

Chief Judge Wood begins with the idea that the Bankruptcy Code accepts the common law and the principle of *nemo dat*. But this is not enough to resolve the dispute in *Mississippi Valley*. First, there is a wrinkle in the facts themselves. We need to ask whether it made any difference that Mississippi Valley sold the cattle and held the cash proceeds instead of the cattle.[54] This requires recourse to another common law principle: someone who holds cash on behalf of another stands in the same position as someone who holds goods on behalf of another.[55] Hence, if the

been given, nor does any occur to us, why a judgment creditor . . . should be given any greater rights in the property of a judgment debtor than the judgment debtor [herself] has."). Chief Judge Wood might have decided the case differently if Kentucky law governed, as it may be that lien creditors in that jurisdiction do prevail with respect to assets that their debtor holds in constructive trust. See, for example, *Commonwealth Cabinet for Human Resources v Security of America Life Insurance Co*, 834 SW2d 176, 180–81 (Ky App 1992).

51 See 11 USC § 544(a)(1).

52 *Mississippi Valley*, 745 F3d at 305 (quotation marks omitted), quoting *Pearlman v Reliance Insurance Co*, 371 US 132, 135–36 (1962).

53 This particular benchmark is a sensible one, as it ensures that creditors enjoy in bankruptcy what they might have enjoyed outside of bankruptcy and no more. But Congress, of course, has the power to put a different benchmark in place if it chooses. With respect to real property, for example, there is an equally clear, but somewhat less sensible benchmark: the trustee enjoys the powers of a bona fide purchaser for value. This can sometimes give the general creditors in bankruptcy more than they could have received outside of bankruptcy. See, for example, *Belisle v Plunkett*, 877 F2d 512, 515 (7th Cir 1989).

54 See *Mississippi Valley*, 745 F3d at 304.

55 See *Frederickson v Blumenthal*, 648 NE2d 1060, 1062 (Ill App 1995).

general creditors could not reach J&R's cattle in Mississippi Valley's hands, then they have no ability to reach the proceeds from their sale either. As long as Mississippi Valley holds either the cattle or proceeds from their sale, the common law deems them to be held in constructive trust. Like property held in an ordinary trust, property in a constructive trust is not available to the creditors of the trustee.[56]

But everything turned on whether Mississippi Valley in fact gave J&R the proceeds it actually received from Swift. If Mississippi Valley merely paid J&R the amount of money Swift paid for the cattle, J&R would be out of luck: were Mississippi Valley to have used its own money to pay J&R, it would have made a preferential transfer.[57] J&R, of course, was entitled to be paid, but if it had received the debtor's money, J&R would be in the same position as anyone else to whom Mississippi Valley owed money. A preference action lies unless Mississippi Valley transferred J&R's property, whether the cattle or the cash received for the cattle, rather than its own.[58]

Constructive trust cases most commonly arise when a debtor engages in fraud and repays some of her victims within the ninety-day preference window. The victims can keep the repayment only if they were paid with their own money.[59] Assume that the debtor keeps the money of each fraud victim in a separate envelope. Anyone who was defrauded who could track down the envelope that contained her money would be entitled to get it back. The debtor holds the money in constructive trust, and her general creditors cannot levy on it and prime the rights of the investor while it is still in the debtor's hands. And if the debtor returned the money in the envelope that held the victim's money, she would be returning the victim's property. Hence, if her creditors later put her into bankruptcy, the trustee could not bring a preference action against the fraud victim who was repaid. Because the money the victim received was never money that the general creditors could have touched even if the debtor still had it, it was never "an interest of the debtor in property."

But we have a different outcome if the fraudster pays off the first victims with money she raises from new investors. (In the classic Ponzi scheme, fraudsters do this in order to perpetuate the

56 See *Mississippi Valley*, 745 F3d at 305.

57 See id at 307–08.

58 Id.

59 Id.

illusion of the fraud.) In this case, the first investors did not receive back their own money. They were receiving money to which they had no better claim than any of the general creditors. With respect to this money, a general creditor could reduce its claim to judgment and levy on it.[60] The trustee can recover any of this new money given to victims on the eve of the bankruptcy.

The Supreme Court confronted precisely this question when Charles Ponzi's trustee tried to recover from those who received money from him before he was thrown into bankruptcy.[61] It held that the old investors could keep the money they received only if the money itself could be traced back to their original investment.[62]

The typical debtor, of course, does not keep the money she raises in envelopes, but rather in a bank account. The Bankruptcy Code says nothing about what to do when money held in constructive trust is put into a bank account that contains the debtor's own money. The problem of sorting out rights when assets have been commingled, however, is one that courts have long confronted.[63] A variety of tracing rules have emerged to solve the problem that exists when money or other fungible property belonging to a third party is commingled with property that belongs to the debtor. In the face of statutory silence on the question of how to trace commingled funds, the judge must again look to the legal backdrop.

One approach to identifying the relevant legal backdrop is to start with the familiar idea that the federal bankruptcy regime simply takes nonbankruptcy law as it finds it.[64] Under this view, the question of whether Mississippi Valley gave J&R its own money is a question of nonbankruptcy law. Whether state law would find that the money in question was J&R's turns on the tracing rule that the relevant jurisdiction adopts. The one that Illinois adopts is the lowest-intermediate-balance test.[65]

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60 See *Mississippi Valley*, 745 F3d at 307–08.

61 See *Cunningham v Brown*, 265 US 1, 7–9 (1924).

62 Id at 11.

63 For an early English example, see *In re Hallett's Estate*, 13 Ch D 696, 697–98 (C A 1879).

64 As the Supreme Court has explained, "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v United States*, 440 US 48, 55 (1979).

65 See *C.O. Funk & Sons, Inc v Sullivan Equipment, Inc*, 431 NE2d 370, 372 (Ill 1982). Illinois law applies this test to assets held in constructive trust. See *In re Commissioner of Banks and Real Estate*, 764 NE2d 66, 100 (Ill App 2001) ("An individual with an interest in a trust fund is accorded priority over the general creditors of the wrongdoer

Under this test, J&R received its own money provided that Mississippi Valley took the money from Swift, placed it in its bank account, and then paid J&R out of that same account, as long as the amount of money in the account never dipped below the amount that came from Swift. This tracing rule presumes that if Mississippi Valley took any money out of the account before it turned over money to J&R, it would take out its own money to the extent that it could. It also assumes that if the money from Swift were still in the account, then it would give that money to J&R to the extent that it could.[66] This tracing rule, like any tracing rule, is arbitrary, but there needs to be some rule and this one seems as sensible as any.

One can argue that whether a particular transfer is "an interest of the debtor in property" for purposes of determining the reach of the trustee's voidable preference power involves filling in a gap in a federal statute. The rule for identifying such property and determining whether it is property that the creditors would otherwise be able to reach should be the province of federal law. The Supreme Court applied federal law when it sorted out the rights of Charles Ponzi's victims.[67]

It likely makes no difference, however, whether a court looks to federal or state law. The common law still fills the gap even if it is a matter of federal law, and the lowest-intermediate-balance test is found not simply in Illinois, but in common law jurisdictions more generally. Long before *Erie*, federal courts invoked the lowest-intermediate-balance test.[68] More to the point, modern federal common law looks to state law unless some federal policy requires changing it.[69] Because there is no particular magic to any given tracing rule, there is no reason for the federal common law to depart from state law. Hence, in *Mississippi Valley*, Chief Judge Wood properly found that the bankruptcy court should adopt the tracing rule of the jurisdiction whose law governs the nonbankruptcy rights of the parties (in this case, Illinois) even if federal common law provided the legal backdrop.[70]

who has commingled the funds so long as the commingled fund remains intact and the individual is able to trace his funds to the commingled fund.").

66 *Mississippi Valley*, 745 F3d at 308.

67 *Cunningham*, 265 US at 11.

68 See, for example, *National Bank v Insurance Co*, 104 US 54, 68 (1881).

69 See *United States v Kimbell Foods, Inc*, 440 US 715, 740 (1979) ("[P]rudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.").

70 See *Mississippi Valley*, 745 F3d at 308.

This does not end the inquiry, however. Tracing funds is straightforward enough, but neither party introduced any evidence on this point.[71] The absence of evidence arose from the way that each of the parties saw the case. The lawyers for J&R thought that the case was over once it established that it never conveyed an interest in the cattle to Mississippi Valley, while the lawyers for the trustee thought that Mississippi Valley could not be a bailee of money held in an ordinary bank account.[72] Neither one did anything to trace the funds in the account. In the absence of any evidence, it might seem that the party that bore the burden of tracing should lose. Indeed, virtually all of the questioning during the oral argument focused on the question of which of the two parties bore the burden of proof.[73]

Cunningham v Brown[74] would suggest that the creditor bore this burden, but it was applying the Bankruptcy Act of 1898[75] and its preference provisions.[76] Under today's Bankruptcy Code there is a different preference rule: it explicitly puts the burden on the trustee to show that property that was transferred was an "interest of the debtor in property."[77]

But there is a counterargument. If the transfer had not been made, J&R would have had to bring an action against the debtor in order to regain its property, whether it was the cattle or the proceeds from the sale. In bringing such an action, J&R would have the burden of proof. J&R should not have an easier row to hoe than it would have had if the transfer had never been made. A sensible interpretation of "interest of the debtor in property" in § 547 should ensure that J&R has the same rights had the transfer not been made, no more and no less. Because J&R would bear this burden if the transfer had not been made, it should still bear it.

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71 Id at 308–09.

72 The lawyers for the trustee relied on cases holding that banks are not bailees of funds deposited with them. See Reply Brief of Plaintiff-Appellant, Stephen G. Balsley, *In re Mississippi Valley Livestock, Inc*, No 13-1377, *3 (7th Cir filed May 28, 2013) (available on Westlaw at 2013 WL 2474866), citing *Durkee v Franklin Savings Association*, 309 NE2d 118, 120 (Ill App 1974) (finding that only in the case of a special deposit account does a bank have a duty to maintain a segregated sum for a depositor).

73 For a recording of the oral argument, see https://perma.cc/XP3J-MJE3.

74 265 US 1 (1924).

75 Pub L No 55-171, ch 451, 30 Stat 554 (1898), repealed prospectively, effective Oct 1, 1979, Bankruptcy Reform Act of 1978, Pub L No 95-598, 92 Stat 2549, codified as Title 11.

76 See *Cunningham*, 265 US at 11 ("[T]o succeed [the victims who received payments] must trace the money and therein they have failed.").

77 11 USC § 547(g).

It might seem, therefore, that Chief Judge Wood could have simply weighed these two arguments against each other and decided the case accordingly. Chief Judge Wood resisted this temptation, however. Judges typically resolve cases on the burden-of-proof grounds when confronting messy facts that are hard to pin down. Not so here. It was easy enough to look at the relevant bank records and determine whether J&R received its own money.

For Chief Judge Wood, it made little sense to resolve the case against the party who bore the burden of producing bank records when neither party understood why they were relevant. Better to remand and have the case resolved on the merits. When opposing lawyers lose their way, judges should not decide the case on the basis of which one made the last wrong turn.

This course was all the more sensible, given that neither party understood that their dispute turned on their nonbankruptcy rights, and neither spent time exploring them. Quite apart from the risk that the property ends up in the hands of a bona fide purchaser, the common law imposes some duties on original owners of property that they entrust to others. Chief Judge Wood remanded to explore whether any such duties existed and whether J&R had satisfied them.[78] Chief Judge Wood took no position on the question. As she explained, it was not for the appellate court to "explore every nook and cranny in the complex area of constructive trust in bankruptcy."[79] The parties must do it themselves. Before sending the parties on their way, however, Chief Judge Wood did give them a road map and told them what to look for.

III. THE OSTENSIBLE OWNERSHIP PROBLEM

After J&R turned over its cattle to Mississippi Valley, Mississippi Valley possessed many more cattle than it owned. As a result, its creditors might be lulled into thinking that Mississippi Valley was doing better than it in fact was. Chief Judge Wood recognized that this raised a red flag. False appearances of ownership give rise to exceptions to the general principle that creditors can reach only those assets that their debtor owns. For

78 *Mississippi Valley*, 745 F3d at 307–09.

79 Id at 307.

example, courts have long treated with suspicion transactions in which a debtor sells property, but retains possession of it.[80]

Similarly ineffective at common law were transactions in which creditors took collateral, but allowed their debtors to remain in possession.[81] Nonpossessory security interests became possible only when legislatures passed statutes written against this common law backdrop. More generally, whenever there is a problem of ostensible ownership, general creditors often enjoy special protections.[82]

The common law's concern with ostensible ownership suggests that a closer look at J&R's assertion that it prevailed over the creditors of Mississippi Valley is necessary. At first blush, bailments appear distinguishable from these other transactions. In a bailment, the debtor never owns the asset in the first place. There is a conceptual difference between a debtor remaining the owner of an asset after transferring ownership and a debtor that never acquired rights in the asset at all. Nevertheless, one should be alert to the possibility that the common law of a particular jurisdiction has limited the rights of a bailor because of the ostensible ownership problem. Quoting an Illinois Supreme Court opinion from the nineteenth century, Chief Judge Wood observed:

> Where one party, by means of contract, but without notice to the world, suffers the real ownership of chattels to be in himself, and the ostensible ownership to be in another, the law will postpone the rights of the former to those of the execution or attachment creditors of the latter.[83]

She remanded the case and gave the trustee a second chance to find if there is a way to invoke this principle.

As noted, Chief Judge Wood offered the parties no more than a road map. It was up to the parties to see the effect of the

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80 See *Twyne's Case*, 76 Eng Rep 809 (Star Chamber 1602). *Twyne's Case* is the source of both modern preference and fraudulent conveyance law. For the definitive account of the case and the circumstances that gave rise to it, see generally Emily Kadens, *New Light on* Twyne's Case, 94 Am Bankr L J 1 (2020). *Twyne's Case* itself applied a statute, see Fraudulent Conveyances Act 1571, 13 Eliz c 5, but the principles of fraudulent conveyance law (as this principle came to be known) were folded into the common law in this country. See, for example, *Shapiro v Wilgus*, 287 US 348, 354 (1932).

81 See, for example, *Clow v Woods*, 5 Serg & Rawle 275, 278 (Pa 1819).

82 See Douglas G. Baird and Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 Stan L Rev 175, 183 (1983) (discussing filing requirements for parties wishing to take nonpossessory property interests).

83 *Mississippi Valley*, 745 F3d at 307 (alterations and quotation marks omitted), quoting *Chickering v Bastress*, 22 NE 542, 543 (Ill 1889).

ostensible ownership problem on J&R's claim that its rights to the cattle and the proceeds were superior to those of the creditors of Mississippi Valley. As it happens, if the trustee followed Chief Judge Wood's hint on remand, he would likely prevail against J&R.

Over the course of the last century, state legislatures have increased the protection of creditors against the problem of ostensible ownership even as against mere bailors. Under Illinois law as it existed at the time of this transaction, J&R likely had an obligation to make a public filing if it wished to protect itself against the creditors of Mississippi Valley.[84] A review of the briefing and the record below suggests that both parties appear to have been thrown off course by the somewhat unusual structure of the transaction.

Mississippi Valley was simply doing J&R a favor. It was not being paid anything to convey its cattle to Swift. It was not the typical transaction in which a supplier ships goods to a buyer on consignment, and the buyer has the option of selling the goods at a profit or returning them unsold to the supplier. J&R never gave Mississippi Valley any right to the cattle. Mississippi Valley had to turn the cattle over to Swift and give J&R everything it received.[85] Mississippi Valley was in no sense a "buyer" of J&R's cattle.

As a general matter, those who consign goods to others for resale have a duty to cure the ostensible ownership problem that the transaction causes. A consignor, as far as appearances are concerned, is indistinguishable from a seller who sells on credit and retains a security interest in the goods sold.[86] Neither party might have thought about this rule, but if they did, they must have thought it did not apply as it was not a traditional consignment.

Nevertheless, the arrangement between J&R and Mississippi Valley was likely a "consignment" within the meaning of the relevant state law. A new version of Article 9 of the UCC had just gone into effect a few years before this transaction.[87] Under it, the

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84 For an excellent and incisive discussion of this aspect of *Mississippi Valley*, see generally Bruce A. Markell, *Trust Me: Restitution, Constructive Trusts and* Mississippi Valley Livestock, 34 Bankr L Let 1 (May 2014).

85 *Mississippi Valley, Inc v J&R Farms*, 2013 WL 256948, *1 (ND Ill 2013).

86 Article 9 of the UCC treats consignors as secured creditors. See UCC § 1-201(b)(35). And J&R is very likely a "consignor" within the meaning of UCC § 9-102(a)(21), as it delivered goods to a merchant for purposes of sale. When consignors fail to file, creditors of the consignee can reach the goods in the same fashion as any other goods of the consignee. UCC § 9-319(a). The failure to file with respect to the goods is similarly fatal with respect to any proceeds generated from their sale. UCC § 9-315(c).

87 The parties were completely silent on the question of whether the transaction was a "consignment." The district court in its opinion, however, did invoke a case with similar

filing obligation is triggered when someone "delivers goods to a merchant for the purpose of sale."[88] There is no requirement that the purchaser receiving the goods be a "buyer" as had been the case under prior law.[89]

The mistake of the sort J&R made in *Mississippi Valley*—failing to file a proper financing statement—is not particularly unusual. Parties who have a duty to make a proper UCC filing often fail to do so. For example, with surprising regularity, a secured creditor will fail to spell out a debtor's name exactly as it is done on the corporate charter, and it is not infrequent that no one will notice. If the parties do not notice such a misstep, judges do not probe further. In an adversary system, judges rule on the arguments parties present. They do not find such arguments on their own. Whether J&R failed to satisfy a filing requirement was unsurprisingly a question on which Chief Judge Wood offered no view. Indeed, it was a question in which she had no interest, given her view of the federal judge's responsibilities when it comes to connecting federal statutes to other law. In her view, the judge can give the parties a road map, but whether they use it is entirely up to them.

CONCLUSION

When the modern federal judge interprets a federal statute, she necessarily draws on the common law tradition. But this task

facts that explicitly discussed the question of whether there was a filing obligation when cattle were sold on behalf of another when no fee was involved and concluded that there was not. See *Mississippi Valley*, 2013 WL 256948 at *4–5, citing *In re Zwagerman*, 115 Bankr 540, 559 (Bankr WD Mich 1990). It is possible that this case threw the parties off. The *Zwagerman* court, however, was construing the earlier version of the UCC, and it had a different definition of "consignment." *Zwagerman*, 115 Bankr at 548. That definition required the consignee to be a "buyer." Id. In *Zwagerman*, the court found that the debtor was not a "buyer," and therefore held the transaction was not a consignment. Id at 548–49. The current version of the UCC no longer uses this language. Everything now turns on whether the goods were turned over to a third party "for the purpose of sale." UCC § 9-102(a)(20). Consistent with the ostensible ownership principle, the nature of the legal rights that the third party holds in goods entrusted to her is no longer relevant.

88 UCC § 9-102(a)(20).

89 Of course, J&R might have been able to argue that it never gave the cattle to Mississippi Valley "for the purpose of sale." It, rather than Mississippi Valley, was the one doing the selling. Mississippi Valley was simply acting as its courier. Asking it to convey the cattle to Swift was different from delivering the cattle to Mississippi Valley for purposes of sale. One can doubt whether such an argument would have succeeded, however, given that Swift thought that it was buying from Mississippi Valley. It would be odd if someone in J&R's position could escape an obligation to cure an ostensible ownership problem by deliberately hiding its role in a transaction. By deliberately concealing its ownership of the cattle, it was making the ostensible ownership problem worse, not better.

does not require her to identify particulars of the law when the parties fail to do so. For this reason, opinions like *Mississippi Valley* do not provide the practical guidance some lawyers might expect. Nothing in the opinion suggests that a more attentive trustee would have saved everyone a lot of trouble by pointing the bankruptcy judge to the relevant provision of Article 9.

For the rest of us, however, the failure of advocacy in *Mississippi Valley* is a happy accident. Had the parties focused on the narrow question of J&R's filing obligation, Chief Judge Wood would never have had a chance to write an opinion that has become an iconic exposition of the relationship between bankruptcy law and the backdrop against which it operates. Few other opinions lay bare so clearly the fundamental principle that the bankruptcy trustee should be able to bring into the estate all those assets—but only those assets—that the creditors could reach outside of bankruptcy. In the vast majority of cases, judges are simply resolving a narrow question that has been so distilled that the larger point is lost. These opinions focus on discrete issues without articulating the core idea. Opinions like *Mississippi Valley* give us a chance to see and understand the larger picture.