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Secured Transactions -- Revolution or Evolution

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SECURED TRANSACTIONS—REVOLUTION OR EVOLUTION

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Before anyone delves into the innermost recesses of article 9 of the Uniform Commercial Code on secured transactions, he might do well to pause and contemplate the state of the law before the Code was adopted. Much has been written concerning the bewildering complexity of our law of pledge, conditional sale, chattel mortgage, consignment sale, trust receipt, equipment trust, factors lien, field warehouse, bailment-lease, assignment of accounts receivable and other more esoteric devices. The purpose of this brief essay is not to recultivate that ancient vineyard. The contemplation here suggested is, rather, to reflect upon what our chattel security law was trying to achieve, what policy it was trying to serve, and to what extent has the achievement of this purpose been fostered or hindered by vestigial remnants of outmoded policies and concepts.

When the author was in law school, far too long in the past, emphasis was still being placed on the growth of the law from "status to contract."[1] The whole thrust of this analysis was that sound public policy required that the parties to any transaction be allowed to write their own law. The function of our judicial system, then, was to ascertain what the parties intended, and to enforce that intent. Only vaguely realized by many, but understood by the few, was the inherent premise that, in such a system justice was well served if, and only if, there was equality of bargaining power between the parties, or, at the least, that the party with the lesser bargaining strength had a free choice of other alternatives. Growing awareness of the lack of both equality of bargaining power and of a viable alternative choice led, in many situations, to a growing resort to rules of law, statutory or judicially evolved, to right the balance.[2]

Throughout, the emphasis was transactional and the concept of bargaining within limits imposed by positive rules of law remained. Hence the emphasis in chattel security law remained largely that of concern with a tangible piece of property held for a single debt. The law was based almost entirely on the form of the transaction, conditional-sale, mortgage, pledge, agency, or trust.

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1. SIR HENRY MAINE, ANCIENT LAW 170 (1st ed. 1861).

2. *E.g.*, automobile installment sales legislation, court discussion of "contracts of adhesion," the slowly developing doctrine of unconscionability.

Then, too, we must not overlook the effect on the growth of law of the inherent conservatism of lawyers. In a precedent-enshrined judicial system, the apparent need is to couch each inventive advance in the garb of a mere application of hoary prior law, whether it be the law of possession, of agency, of trust, or the like.

Of more recent origin than the concept of a growth from status to contract, is the very substantial growth from "cash to credit." A good case can be made to the effect that the growth of the American economy is largely the story of easy availability of credit. It is probably still true, in a very substantial sense, that credit oils the wheels of business, and prosperous businesses make for a prosperous nation.

This is not to say that business must prosper at the expense of the people's wants and needs. In the long range, business only truly prospers when it serves those wants and needs. However, the point to be made is that economic growth is, and always has been, a desirable end; that credit fosters economic growth; and that a policy fostering the easy availability of credit is, therefore, a policy fostering economic growth. It is only to the extent that a law of chattel security fosters the use of credit, then, that such law serves the national interest and promotes economic growth.

Not only must a modern chattel security law take into account the ingrained feeling that progress from status to contract is good, as well as that progress from cash to credit is a fact of life, it must also take into account another tremendous shift in our economy, the shift of wealth from the tangible to the intangible, and the consequent ease with which wealth can now be hidden. It is not just the much publicized Swiss bank account represented by a number that is involved. Today, with our ease of communication, a Miami, Florida resident can with but little inconvenience operate his wealth, in street name, from an Ottawa, Canada brokerage firm.[3] He can have bank accounts in Miami in assumed names. He can hold land in "straw" names.

Much of our law is far too obsessed with outmoded concepts of tangible wealth. Assume that a loan is not repaid. In most states once a creditor has obtained a judgment, his recourse lies only in a physical seizure of the tangible wealth of his debtor by a court officer, or, in a

3. Actually he need not go so far. A creditor in any metropolitan area can often spend many frustrating hours trying to locate a wily debtor's real bank accounts and the location of his securities. Add to this the special protection often given to property in the joint names of husband and wife against the business debts of the husband. Then contemplate the disappearing corporation, where assets are sold and put into intangible wealth which moves from subsidiary to subsidiary leaving the creditor to guess under which shell his pea may be resting.

Indeed, it is this ease of transfer of wealth from tangible to intangible that is the modern justification for the Bulk Sales Article of the Code. It isn't just the creditor who sells for cash, pockets the proceeds, and disappears who creates the bulk sales risk. Also involved is the creditor who receives negotiable paper and places it beyond the reach of his creditors under our antinquated law for the collection of money judgments.

similar process, the serving of a notice on one owing money to the debtor to pay the court officer instead. With all of the ways in which intangible wealth can be hidden today, every lawyer is familiar with so-called "judgment-proof" debtors who live "high on the hog" at the expense of their creditors. Hence much of the great growth in our economy is a growth in secured credit so that, in the day of trouble, the creditor will have a realizable asset which he can use either to secure a continuation of payments through the threat of repossession, or, through the sale in the open market of a realized asset, obtain a sum sufficient to pay his debt.

Perhaps we belabor the obvious again, but the point must also be made that, as life becomes more complex, greater and greater capital expenditures are required to start or to acquire any business enterprise. As our tax structure and ever present long-term inflation render it increasingly impossible to accumulate capital of any size by the sweat of one's own labors, credit becomes a necessity if there is to be increase in the gross national product.[4]

Thus, logically, we must now reflect on the judicial attitude, and hence the attitude in law, toward the purveyor of credit, the money-lender. Too many people's idea of a money-lender's approach to his customers is that of a Fagin like creature singing, as in the musical "Oliver:"

> Whene'er I meet a man that's rich
> Both me thumbs begin to twitch
> If only to find
> Some peace of mind
> I've got to pick a pocket or two boys,
> I've got to pick a pocket or two.

Then too, there are those law students whose entire concept of the law of real estate mortgages is based on the theory, from which they can not be disabused, that the mortgagee takes a mortgage for the sole and nefarious purpose of subsequently acquiring the house at a bargain price.

More seriously, however, the attitude toward lenders was also influenced by vestigial remnants of the long outmoded prohibition of early ecclesiastical law, against the charging of interest for a loan of money.[5] And this, in turn, has shown its strongest remaining foot-hold in the apparent hostility of the bankruptcy-bar to the secured creditor, and in the

4. Adding to the thrust toward greater and greater use of *secured* credit is the fact that the applicable lending limits of banks often do not apply to secured loans, thus enabling the secured lender to make the larger loans our exploding technology now requires.

5. Even modern usury laws tend to ignore that there is a market for money, just as there is for tomatoes or wheat, or any other commodity. With modern ease of communication and wire transfer of money, lendable funds flow, in times of high rates, to where the best rate is offered, and the community whose usury law has imposed too low a rate is by-passed. *See* Shanks, *Practical Problems in The Application of Archaic Usury Statutes*, 53 Va. L. Rev. 327 (1967).

ingenuity used in finding, through one technicality after another, ways of reducing a secured creditor to an unsecured status. Ostensibly, the theory behind all of the zeal to divest the secured creditor of his collateral is the need to outlaw the "secret lien." The concept is that the unsecured creditor who advanced simple, and hence more worthy credit on the faith of the "apparent ownership of the debtor," needs to be protected, and that "equality" is equity. Hence, so the theory goes, all creditors should receive an equal portion of their debt in the eventual liquidation of those businesses that are not successful. A good security device disrupts this equality, and so is to be abhorred.[6]

Now what does all of this signify with respect to article 9 of the Uniform Commercial Code? It is a creature spawned at the very beginning of the second half of the twentieth century, a lusty teenager, if you will, now adopted by every state save Louisiana. The provisions of the article must be considered in the light of the background existing when it was drafted, of the need to foster economic growth, or at the least, not to have a rule of law that hinders economic growth, and of the need for a judicial interpretive attitude toward secured credit that gives weight to a policy of fostering growth in business by simplifying the obtaining of secured credit and making it less expensive, and so available at less cost to the smaller business.

Our pre-Code chattel security law evolved, as it had to, in an atmosphere of a simpler and more rural economy in which, perhaps, the doctrines of apparent ownership, and of retention of possession after sale being fraudulent, made more sense than they do today. The wholesaler probably extended credit on his itinerant salesman's estimate of the tangible wealth of the purchasing storekeeper. The local banker personally knew his customer and extended credit, in all probability, on the faith of the borrower's integrity. Indeed in the very early part of the nineteenth century and the latter part of the eighteenth, the law had not developed, in the chattel area, any device having any certainty of being workable when needed, whereby a borrower could work goods purchased on credit so as to provide the wherewithal to pay the purchase price.[7] Case law, then and down through the following years, evidences the pressure of the needs of business and trade for a means of giving a creditor a right against the goods if all does not go well, yet allowing the debtor to work the goods, or, even more outrageous to the judicial attitude of the times, to sell at retail the goods purchased at wholesale, in order to provide the funds with which to pay the price and create profit for the debtor. Obviously, for

6. It might also be pointed out that the fees of bankruptcy lawyers can be increased in almost direct ratio to the value of the secured interests they invalidate.

7. Generally speaking, the pledge or pawn was the only well-sustained credit device for personalty. Where land, cattle, and crops were the principal sources of wealth, the realty mortgage laws, and the ease of creating a possessory lien on fattening cattle, probably sufficed for the times.

such a need, some way must be found to separate the bundle of rights into those of the money-lender and those of the owner-debtor.

Against a rural small town background it is not hard to find justification for a policy that, at first, held in favor of transfers or reservations of rights that accompanied an open and notorious transfer of possession, and that transfers of rights not occurring simultaneously with an open and notorious transfer of possession would be deemed fraudulent. In the small community of the late 1700's and early 1800's reliance on the community memory of when and how Sadie got the spinnet, and whether or not the vendor reserved a lien, may well have made sense.

At any rate, the concept, in chattel security law and in other aspects of chattel law, of sustaining rights and reservations arising simultaneously with an open and notorious change of possession served the law professors admirably as a touchstone to use in explaining why the bailor's interest in a true leasing situation was sustained, why at common law, at least in many jurisdictions, the consignment sale, conditional sale, and that Pennsylvania anomaly the bailment-lease, were sustained, and yet the chattel mortgage, or even the conditional bill of sale from one who never had possession, was struck down.

Times, however, changed. The country grew more populous, the towns changed to cities, grew still more and became metropolitan areas. The concept of notice arising from an open and notorious change of possession became a mere shibboleth. Neighbors and especially neighboring businesses no longer knew each other well. If you have ever tried to convince a skeptical and intelligent law student that a man using a car, or a plough treats it differently when he buys on conditional sale with seller-financing than he does when he buys it with money borrowed from his bank and secured by a chattel mortgage, you will soon discover that, at least in this day and age, there is not any outward difference in apparent ownership in the two cases. Thus, in many areas in the late 1800's and early 1900's, if there was no contrary precedent, the conditional sale, at common law, suffered the fate of the chattel mortgage.

Resort was then had to the legislatures, and there erupted a welter of statutory validations of conditional sales and chattel mortgages. An appropriate substitute for the long assumed notoriety of the open change of possession was found in creating for chattels what had long existed in real estate, a recording system with a grantor-grantee index.

The concept of recording was, however, ill-suited to the chattel field, and even more ill-suited to a rapidly moving and developing economy. By analogy to real estate practice, a detailed description specifically identifying the object which was to be collateral was required, as well as meticulous observance of every statutory formality.[8] The earlier label of fraud,

8. *See e.g.*, Bell v. Sage, 60 Cal. App. 149, 212 P. 404 (1922).

attached to a retention of possession when all or part of the "title" was transferred, died slowly and painfuly. Many a chattel mortgage statute required, in addition to a recording, the filing of an affidavit of good faith, *i.e.*, a sworn statement before a notary public, that fraud, in fact, was absent. The judicial attitude was that these fraudulent fellows must strictly comply with the letter of this ill-conceived statute to get away with a chattel mortgage. One jurisdiction required that the debtor's signature be witnessed and that his signature be notarially acknowledged. A duly filed and acknowledged chattel mortgage was held to confer no lien when the signature of the mortgagor was not also witnessed.[9]

Even so, one wonders why the convenient analogy of the realty recording laws was not more often used for other security devices and, when suggested, was so often opposed by debtors and secured lenders. The answer, perhaps, is found in two places. First, a recording concept required making public the entire terms and conditions of the deal. Second, at least in the early years, was the general horror of having to admit being in debt on the security of personal property where, due to the relatively smaller amounts of capital then involved in business and trade and the lack of graduated income tax, purchasing on secured credit was not as widespread as it later became. The aversion to disclosure rooted in the inherited mores of an earlier generation lasted longer than the reason for the dislike, and as we shall later see, the battle had to be fought all over again in the accounts receivable context.

The concept of a transactional recording relating to one usable and seldom sold asset did work well in two areas. These were: first, in the sale of machinery and equipment that clearly did not become a fixture, and second, in the sale of consumer hard goods where unit costs were high enough to make the added cost of the paper work and the filing fees not unduly prohibitive. But the concept of itemized security in specific objects used by the borrower and not frequently sold or traded was not suitable for financing a manufacturer's product, or the inventory of a retail establishment. Yet, if the economic growth of the country is a good thing, both the manufacturer and the retailer must have access to easy credit. Pressures for adaptation grew and the emphasis shifted to other forms of security device.

Along with the growth in population, and the change from rural, to town, to metropolitan living, went, almost unnoticed by the law, a change in the manner of extending unsecured credit. No longer does the wholesaler (if indeed he exists at all in the distribution pattern) or the manufacturer distributing his own product, extend credit based on "apparent ownership." The credit department now works on submitted balance sheets, other financial reports, and on the record of payment on other debts ob-

9. Arcady Farms Milling Co. v. Sedler, 367 Pa. 314, 80 A.2d 845 (1951).

tained from a credit bureau. Often the borrower on unsecured credit must submit a series of financial statements audited by a firm of certified public accountants. Such financial statements disclose, as they must under generally accepted accounting principles and practices, all liens on the assets and all liabilities uncovered in the course of the audit. Credit extension moved from apparent ownership to an "enterprise" theory of credit.

But the rules of law continued, unchanged; even though arising in part out of a hostility to secured credit, or perhaps, to lender-credit as opposed to seller-credit (which was regarded as particularly pure if extended on an unsecured basis). The rules also continued to plague businessmen. Particularly irking was the extended application of the rule of *Benedict v. Ratner*,[10] invalidating duly recorded liens because the freedom of action allowed the debtor was held to be inconsistent with a concept of lien. That rule, together with the hostility toward the free-handed mortgage on a shifting stock of goods, made it initially well-nigh impossible, or at least quite expensive in "policing" and "paying down and re-advancing" procedures, to adapt in many fields an "enterprise" theory of lending to secured financing, even though credit was being extended on the earning power of the enterprise.

Meanwhile, in other contexts the peculiar inventive genius of lawyers —the ability to adapt ancient concepts and precedent to new uses—was encountering similar problems. In the burgeoning field of automobile finance, as in the financing of the jobbing importer, the analogy of trust law was chosen, for as everyone knew, the trustee's individual creditors had no right to participate in the trust res, no matter how "apparent" was the trustee's ownership and possession—well, *almost* no matter how apparent. And so was born the "trust receipt" type of financing. The "field warehousing" type of financing was another thrust against the strict doctrine of possession.

The pressures of those representing the unsecured creditors again resulted in the statutory modification of the pure common law aspect of trust receipt financing. But with the statutory codification of the trust receipt[11] came a new and helpful concept, more in keeping with modern credit procedures involving balance sheet analysis. The concept came to be called "notice filing," as perhaps to be distinguished from the previous "transactional recording." Under the Uniform Trust Receipts Act it was no longer necessary to file publicly and describe each bale of cotton or each automobile. The trust receipt itself must, of course (but why "of course?") continue to do this.[12] All that was required for filing was a

10. 268 U.S. 353 (1925).

11. *See* the Uniform Trust Receipts Act, 9C U.L.A. 220, drafted by the late chief reporter for the Code, the distinguished Karl N. Llewellyn.

12. This is still not to be taken as decrying all specificity of description. Despite U.C.C. 9-110 providing that a description is sufficient "if it reasonably identifies what is described,"

"Statement of Trust Receipt Financing." This at least was a public document indicating to those who chose to become aware of it that lender and borrower were dealing on a secured basis.

The field warehouse, with its expense of separated inventory and specific releases of definite quantities of inventory (either in raw material form or as finished product), was in a sense the father of the many Factor's Lien Acts.[13] These acts also required a filing, and in some cases the posting of a sign, to permit the financing of a balance-sheet asset without attaching a lien to particularly identified tangible pieces of property.

Finally, a conceptual battle was fought in the field of accounts receivable financing. What, from a credit man's point of view, should have been a most liquid form of collateral was and still is, insofar as secured financing is concerned, a "Johnny-come-lately." Also it was the first large scale excursion of secured financing into the field of intangible assets not represented by a tangible piece of paper such as a draft or document of title.

Yet, note how form so often controls substance. Where goods are sold an obligation to pay arises. If the obligation is represented by a note or draft it has long been a prime species of collateral. A note or draft, however, is no better than the general credit of the maker and indorser. Even if the obligation is not represented by paper, the credit of the account debtor and the assignor is still the same, and in fact is often a more liquid obligation. This is so because the term is usually shorter and the obligor is normally one with whom the seller is willing to deal without requiring that the debt be evidenced by a note. Of course a note to a great extent precludes double financing of the obligation to pay by the seller since he has only the one note to discount.[14] Hence where the seller's honesty may not be fully accepted, debtor notification by the first financing agency can often reduce that risk, at least to the first financing agency.

The problem in this field of secured financing was to determine what steps had to be taken to perfect the assignment against the attack of the trustee in bankruptcy, since there obviously could be no open and notorious change of possession. *Corn Exchange National Bank & Trust Co. v. Klauder*[15] jolted the financing community by spotlighting the dangers in all rules governing the transfer of intangibles. These were rules worked out in litigated cases where the judges and litigants, obsessed with

the lawyer must ask "for what purpose" is it to be reasonably identified? He must consider identification from the point of view of determining the assets to be repossessed, identification to a sheriff's deputy ordered to effect a levy, and identification sufficient to support a reclamation petition in bankruptcy.

13. Many of which also attempted to eliminate some phases of the *Benedict v. Ratner* rules.

14. He can still assign the account, and usually document its existence if he is willing to be fraudulent.

15. 318 U.S. 434 (1943).

the particular case before them, often confused the general picture by choosing a rationale merely because it worked justice in that particular instance.

The rash of statutes that broke out after *Klauder* divided into two lines: the "validation" statutes and the "notice-filing" statutes.[16] Some of these also took a side swipe at the doctrine of *Benedict v. Ratner*,[17] attempting to repeal the full vigor of the rule, especially in its applications where the debtor's control over returned goods was used to invalidate the assignment of the accounts.

The advocates of the unsecured creditor, supposedly misled by apparent ownership of the accounts, supported the notice filing type of statute. Here they received support from some of the secured lenders who worried about double financing and wanted a record from which it could be determined whether the accounts had theretofore been assigned elsewhere and, more importantly, who came first.

It is difficult to grasp the concept of apparent ownership of accounts since they are not a visible asset. Agreement as to the amount thereof is necessary, and this is usually accomplished by requiring financial statements on which prior assignments are required to be shown in order to prevent falsity.[18]

One further business thrust against rules of law previously referred to should be developed, and that is the "enterprise theory" of financing. Perhaps first felt in railroad financing, later in industrial financing, and more recently in the financing of apartment houses and hotels, the thrust is really present wherever relatively large aggregates of borrowed capital are needed. Credit was being extended against the projected results of operating the business. The lender wanted to be in a position to take over and operate the business without too much hindrance from others. If all did not go as forecast under the debtor's management, it could, perhaps, be made to do so under the creditor's control. But a business enterprise is a conglomerate of real and personal property, tangible and intangible. How could a creditor or group of creditors, represented by a trustee for bondholders, obtain a security interest in this conglomerate of assets?

Curiously enough, it was in conservative Pennsylvania where perhaps

16. See the excellent summary on this point in Comment, *Multistate Accounts Receivable Financing: Conflicts in Context*, 67 YALE L.J. 402, 409-417 (1958). The former Pennsylvania "book'marking" statute was scarcely helpful. It is too easy to "cook the books." It is doubtful if ink age-detection can tell whether the stamp was applied to the ledger before or after the four month period.

17. 268 U.S. 353 (1925).

18. In addition to the bulk sales legislation referred to in note 3 *supra*, the stringent rules and statutes relating to the giving of false financial statements to obtain credit reflect the business aspect that credit is extended on the faith of the financial statement, and that in view of the extent of intangible assets, a financial statement is a better credit yardstick than "apparent ownership."

unwittingly, the enterprise theory was launched. Disturbed by the disparity in the results of a levy in execution on a mill as compared with a levy on a farm, and by the disruption to business when a mill's real estate descended to the heir but the machinery went to the personal representative, Chief Justice Gibson in *Voorhis v. Freeman*[19] classified all machinery ("whether fast or loose") necessary to operate the mill as real estate, thus opening the way for enterprise financing of manufacturing establishments.[20] Statutes relating to railroads permitted the general mortgage to include rolling stock and the like. New Jersey developed its institutional theory.

Those lending to apartment house and hotel enterprise had a more difficult row to hoe. Bewildering was the resulting mass of papers. Realty mortgages, chattel mortgages and detailed equipment lists had to be filed with serial numbers carefully checked and periodic refiling tickler files established. Even more complex and bewildering was the paper work required to have a shifting stock of goods, *i.e.*, a merchant's inventory, serve as collateral for a loan. But a revolving credit, with paydowns, reloans, policing of proceeds, releases and substitutions of collateral was possible. It was often too expensive for the smaller borrowers to use. It completely disregarded the business sense of the transaction in which credit is advanced on the strength of an average balance sheet value of inventory as an asset capable of relatively prompt liquidation into dollars.

Loose equipment, however, wears out, and for the original financier the problem of securing a lien on after-acquired equipment arose. Not too many decades ago came the battle as to whether the after-acquired property clause created a legal lien or was a mere promise to create a lien requiring a subsequent supplemental mortgage for full perfection. In one way or another it became possible to create an effective security interest in after-acquired property.

The success so achieved raised one more problem. Equipment wears out and replacement is needed. The old mortgage may or may not have a proviso for "Bondable Additions" under which a subsequent series of bonds may be sold for property additions. Compared to the deal available by following the additional bond issue procedure, a better deal can often be found elsewhere at the time when new equipment is needed. Hence the case law had, with one or two aberrations, pretty well worked out a purchase money priority for the financing of new acquisitions and the replacement of obsolete equipment, especially where the obsolete or worn out character of the old equipment was clear.[21] This area, of course, is the one

19. Voorhis v. Freeman, 2 W. & S. 116 (Pa. 1841).

20. The origins of the Pennsylvania Industrial Mortgage doctrine and its application are developed in Leary, *Financing New Machinery for Mortgaged Pennsylvania Industrial Plants*, 4 VILLANOVA L. REV. 498 (1959).

21. The courts seem to have mixed up the mortgagee's action for damages for waste, with the problem of the priority of the purchase-money interest in the new equipment.

requiring an accommodation, or a *modus vivendi*, to be worked out between the prior or subsequent realty financier and the financier of the new equipment, which may become real estate for some purposes when installed. Thus arose the embittered embattled fixture financing problem, perhaps not yet fully solved to the satisfaction of commentators.[22]

In all fields of secured financing there is one possibilty to be feared. In view of the care with which the bankruptcy act has been drawn and amended, one should refer to a probability in that area. This is the case of the preferred creditor, who didn't really start out as a secured creditor, but who *mirable dictu* is found to be one on the day of bankruptcy.

If everyone were honest, and if only truth were spoken from witness stands, we would have no problem. The bankruptcy act requires proof that the creditor had reason to believe in the insolvency of a debtor at the time the security is acquired within the four month period in order to set aside a preferential transfer. However, it then leaves to state law the matter of determining the point of time when a transfer has become far enough perfected. Perhaps it can be said that state law is more aware of the facts of life, and while, as you may have gathered, the author believes that the creditor's reliance on apparent ownership has been vastly overrated, particularly in this day and age of intangible and untraceable wealth, the filing statutes can be considered as serving another useful purpose. Public records are *dated* records, and because public, are less susceptible to backdating than are private records.

Therefore, just as in the early smaller-community-economy, the notoriety of an open transfer of possession was relied upon as being sufficiently provable, so can the existence of a dated public record supply the outward manifestation of the inward and spiritual grace of the transaction or series of transactions. A secured financing transaction was obviously intended to occur at the time, or a series of them was intended to be initiated when, or shortly after, the filing occurred; thus corroborating the parties' testimony that such transaction or transactions did in fact occur.

On this analysis it can be urged, and perhaps with some justification,

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Actually, as long as the value of debtor's interest in the new equipment is at least equal to the value of the obsolete equipment thus replaced, there has been no waste, and no damage to the mortgagee. Obviously, if the new equipment represents a new line of business, and the old is also continued, the prior mortgagee has no complaint unless his mortgage contract gives him a veto over the taking on of new lines of business. In such a case, his remedy is for inducing breach of contract, not a right to invalidate the purchase money lien.

22. Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964); Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962); Dreier, *The Uniform Commercial Code and the Law of Fixtures*, 86 N.J.L.J. 61 (1963); Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 B.C. IND. & COM. L. REV. 61 (1964-65); Coogan, *Fixture-Uniformity in Words or in Fact?*, 113 U. PA. L. REV. 1186 (1965); Macey, *Bringing Your Fixtures Up-to-date*, 70 COM. L.J. 225 (1965); *Fixtures in the Landlord-Tenant Relationship*, 34 U. CHI. L. REV. 617 (1967).

that a pledge of instruments or investment securities (*i.e.*, promissory notes, stocks and bonds) can be back-dated, and that therefore there should be a filing. The rationale of not requiring a filing is that the converse of apparent ownership dogma has considerable remaining force, and absent a showing of possession in the debtor or an induced belief in continuing possession, the overriding need for the negotiability of these classes of paper requires that there be no filing. If it be asserted that a favorite member of the family has advanced money and that a transfer to him took place contemporaneously with the advance or prior to the fatal four month period, the burden is on the attacking creditor to prove otherwise.

To what result does our reflection upon the pre-Code state of the law of secured financing bring us? The author suggests that the Code provisions might be examined to see how well or how ill they meet the desires of the business community for legitimate financing, for economic growth and for ability to finance upon the security of balance-sheet assets, rather than tangible property. The relevant factors and a few of the underlying causes that have been discussed heretofore may be summarized as follows:

1. Whether or not there ever was a Uniform Commercial Code, the increasing importance of intangible wealth, and the apparent inability to adjust our judgment collection processes to an effective levy and realization process in respect of intangible wealth, has ineluctably led creditors into dealing on a secured basis. Likewise, the ever-increasing delay in securing judgments in courts of our metropolitan areas[23] has induced creditors to deal on a secured basis where they are more in control of the timing of a realization and of the realization process.

2. Secured credit is now necessary if our economy is to develop and grow as people and politicians apparently desire. Credit made expensive by the need to observe detailed and complex legal procedures is credit that is available primarily in the larger transactions where the added cost is not a prohibitive percentage of the amount involved. Rules of law which add costs, unnecessarily, in situations where the risk rate for money is also high, have a doubly depressing effect.

3. Under the urging of business interests for a form of "enterprise-wide" security to match the business enterprise credit theory (which regards the enterprise as an entity for credit purposes), legal ingenuity, through adaptations of the doctrines of agency, trust, and contract, reached the desired result, but in an unnecessarily complex and expensive manner. Let others talk of the "floating lien", the author prefers the "enterprise concept"; the idea of a going concern or a flow of goods, or a balance-sheet asset, even if fluctuating, as security for a debt.

23. A delay of six and one-half years has now been reached in Philadelphia County, Pennsylvania.

4. Business pressures for means to expand and for credit to overcome obsolescence, compel that priority be given to the new equipment or new inventory financier over the dead hand of the prior financier. Conceptually this can be accomplished by having the property come into the debtor's hands already encumbered by the purchase money lien so that the after-acquired clause only attached to the debtor's equity; but what is the *real* difference between the seller-financed situation and the third party lender?

5. The principal pre-Code means for overcoming the twin fears of the general creditor being misled by apparent ownership and the preferential granting of security to a favored creditor just before going bankrupt were either the transfer of possession or the filing of a public notice of an intention to engage in secured financing with respect to particular classes of collateral. The more advanced and sophisticated forms of financing had already adopted the concept of notice filing. Let the balance sheet, the audit report or direct inquiry of the prior creditor supply the details. Possession by the creditor, or a public, dated notice of intention are the code tools.

Thus viewed, article 9 of the Uniform Commercial Code is not a revolution. It marks but the culminating step of an evolution in which techniques developed in the more modern and sophisticated forms of financing are applied to their older and more backward cousins. It is an evolution in which substance triumphs over form, and business needs overcome the conceptual niceties of syllogistic logic, as they have always done in the past.