

# MERCANTILE COLLATERAL LAW—PRESENT-DAY CHANGES

GARRARD GLENN\*

The merchant's world, and that of his consort, the banker, have undergone changes that are not all due to the war. Of course the latter has exerted a tremendous influence in the diversion of goods from their markets, and the merchant nowadays has a creditor, in the shape of the government, that never previously appeared in such magnificent proportions.<sup>1</sup> But certain problems which originated in pre-war sources are only now being faced. They trace to the Bankruptcy Act of 1938, with its new provision about preferences. Some security devices are not affected, but others are; and the object of this paper is to sort them out, in the light of recent decisions. In that connection, also, legislation, actual and proposed, which bears upon these problems, will be examined.

This article, however, is not limited to the bankruptcy legislation that is above mentioned. Other problems as to mercantile collateral have also figured in late cases, and they, too, will be mentioned.

First of all, then, let us look at bankruptcy legislation.

\* A.B., 1899, University of Georgia; LL.B., 1903, Columbia University. Professor of Law, University of Virginia since 1928, prior to which practiced at the New York Bar, and was also Associate Professor of Law at Columbia. Was a member of the Council of the American Law Institute, an adviser in its Restatement of Security, and an advisory member of the National Bankruptcy Conference. Member of American Bar Association, Association of the Bar of the City of New York, and Virginia Bar Association. Before and during first part of this war served on the War Department's Tax Amortization Board. Author of: CREDITORS' RIGHTS (1915); FRAUDULENT CONVEYANCES (1931), now in second edition as FRAUDULENT CONVEYANCES AND PREFERENCES (1940); GLENN ON LIQUIDATION (1935); GLENN ON MORTGAGES (1943); GLENN'S CASES ON CREDITORS' RIGHTS (1940). Contributor to various law reviews and other periodicals.

<sup>1</sup> Taxes are not within the purview of this paper, but I cannot pass the matter without mentioning a recent case which arose under a general assignment in Virginia. The debtor had conducted a cafe, which was liquidated by the general assignee to the net amount of \$1400, and this sum was specifically claimed by three parties; general creditors having nothing to say. One claimant was the United States, as a prior creditor for over \$1500 with interest, "representing," to use the Supreme Court's words, "certain federal unemployed compensation taxes and a debt arising out of a Federal Housing Administration transaction." Another claimant was the City of Danville—also for taxes. The third claimant was the landlord of the leased premises where the *ci-devant* cafe had flourished, and he asserted a landlord's lien for the entire fund, by virtue of six months' rent in arrear and yet to accrue. If he had a valid lien under State law, this landlord should have won, for the debts due the United States had not been reduced to lien by levy previously to the landlord's petition and in any event his lien, as recognized in Virginia, had existed prior to his petition. The State court decided in favor of the landlord, but the Supreme Court reversed, although Jackson, J., who dissented, thought that the Virginia court's decision, as to the landlord's lien under Virginia law, should have controlled. *United States v. Waddill, Holland & Flinn*, 323 U. S. 353, 65 Sup. Ct. 304, 89 L. Ed. — (1945), reversing s.c., 182 Va. 351, 28 S. E. (2d) 741 (1944). The case can only be justified on grounds of policy, but that is not part of my

## EFFECT OF THE PRESENT BANKRUPTCY ACT

The Bankruptcy Act of 1938 (commonly called the Chandler Act) makes no such fundamental changes in the law of fraudulent conveyances and reputed ownership as to require discussion here; when it comes to preferences, however, this Act has a provision that bears heavily upon some security devices but not upon others. The dividing line is between the security that requires no further act for its perfection and the one that needs a further act, such as recording, delivery or notice. Whether a further act is prescribed is a matter of state law, but if by that law something more is required, then the transaction which perfects the security will be preferential if it takes place within four months prior to a bankruptcy petition; and, accordingly, the transaction can be set aside by the trustee in bankruptcy. That is the effect of the section which governs preferences, as rewritten by the present Act, in its Section 60. Two sentences of this section define the elements of a preference, as outlined by our courts under previous statutes regardless of the language they employed.<sup>2</sup> But the section also contains a sentence<sup>3</sup> that is wholly new and is somewhat confusing on first glance; fortunately it has received judicial interpretation at the hands of our Supreme Court. It was intended to strike down the doctrine of "relation back," by virtue of which the creditor at the last moment, could perfect his position, by taking possession under an "equitable pledge" or (under an unrecorded lien) by taking possession or recording the document, or (under an assignment of accounts receivable) by giving notice to the obligor, when by local law such notice is required. Under the older Bankruptcy Act, this perfection of one's position was not preferential, although it occurred within four months of the bankruptcy, with the debtor insolvent to the lienor's knowledge. The reason was that the delivery, recording, or whatever other act was necessary, related back to the date of the loan as originally made, and so there was no preference.<sup>4</sup> The

subject. I mention it only to show how today a bankrupt estate can be literally "a body of assets entirely surrounded by taxes." Woods, *Developments in Bankruptcy Law* (1944) 18 JOUR. NAT. ASSN. REFEREES IN BANKRUPTCY 99.

<sup>2</sup> Bankruptcy Act of 1938, §§60a, 60b. This language, for our purposes, may be arranged as follows. Section 60a: "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under chapters X, XI, XII, or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other class." [Then follows a sentence, omitted for the moment.] Section 60b: "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent." As to this language, and its soundness, see GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* (rev. ed. 1940) §§396-402, 414-421.

<sup>3</sup> It appears in Section 60a, as quoted in the last footnote, in the place there indicated by brackets; and it reads thus: "For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no *bona fide* purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under chapters X, XI, XII or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy."

<sup>4</sup> The cases are legion, but it is sufficient to quote Mr. Justice Holmes: "As the supreme court of Massachusetts says that taking possession under the mortgage within four months would be valid as

new statute's intent is to repeal this rule of "relation back"<sup>5</sup> but necessarily it has a limit, and the sort of case that falls within the statute has now been defined.

The test is whether, prior to the act that perfects the position of mortgagee or pledgee, an attaching or levying creditor or a *bona fide* purchaser would prevail; there is no further or other criterion.

Two recent decisions of the Supreme Court have made this clear. In one of them a debtor endorsed a third party's check to the order of his creditor and mailed it to the latter. The debtor was insolvent and the creditor knew it, but the day when the check was mailed was not within four months prior to bankruptcy. To be exact, this anterior period began with November 28th, and the endorsed check was mailed on November 27th. On November 28th, indeed, the creditor received the check in due course of mail, but this was not preferential, because the paper passed out of the debtor's control when it was mailed, and thenceforth no creditor of his could seize it, nor would he be able to transfer it to a *bona fide* purchaser. That was local law, as decided below, and the ruling was followed by the Supreme Court.<sup>6</sup> In abstract theory, of course, the creditor could have refused payment and returned the paper; but it is inconceivable that he would,<sup>7</sup> and both courts, therefore, took a common sense view of the situation. The other case presented the account receivable, where notice of the assignment had not been given to the debtor. Under the law of the state where the transaction arose, the assignee of an account receivable would not prevail over a subsequent assignee who purchased it in ignorance of the prior assignment. In other words, it was the case where a *bona fide* purchaser will prevail over the lienor unless meanwhile he had perfected his position by notice to the obligor. If he does that within the four months' period, the trustee in bankruptcy will prevail under Section 60a of our Bankruptcy Act as above discussed; *a fortiori* will the trustee prevail if notice is not given at all. Such was the decision, local law governed, and under that law the lienor's position was subject to an infirmity which had not been cured at a date anterior to the four-month period which is defined by Section 60a.<sup>8</sup>

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against the trustee in bankruptcy but for supposed peculiarities of the present bankruptcy law, and as *Thompson v. Fairbanks*, 196 U. S. 516, although distinguishable from the present case, decides that it is valid under the present bankruptcy law if good by the laws of the state, it follows that the mortgagee was entitled to keep his goods, and that the judgment against him was wrong." *Humphrey v. Tatman*, 198 U. S. 91, 95, 25 Sup. Ct. 567, 49 L. Ed. 956 (1905).

<sup>5</sup> But not retroactively, and a transaction that occurred prior to Sept. 20, 1938, the date when the present Bankruptcy Act went into effect, is not governed by it. *Sokol v. Fidelity Union Trust Co.*, 41 A. (2d) 324 (N. J. Ch. 1945).

<sup>6</sup> *McKenzie v. Irving Trust Co.*, 323 U. S. 365, 65 Sup. Ct. 405, 89 L. Ed. 389 (1944), *affg. s.c.* 292 N. Y. 347, 55 N. E. (2d) 192 (1944), noted (1944) 31 VA. L. REV. 222.

<sup>7</sup> Thus it has recently been held that a bank customer who puts his deposit item in a "night depository service" (drop slit) maintained by his bank, has not by that act made a deposit. It is not a deposit until the bank opens the box the next morning, finds the item there, and credits the customer's account. Until then the case is one of bailment only, with the resulting problem as to who should bear the loss, the customer or bank, if the place is burglarized later in the evening. *Bernstein v. Northwestern Nat. Bank in Philadelphia*, 41 A. (2d) 440 (Pa. 1945).

<sup>8</sup> *Corn Exchange Bank v. Klauder*, 318 U. S. 434, 63 Sup. Ct. 679, 87 L. Ed. 884, 144 A. L. R. 1189 (1943). This case was noted as follows: (1943) 29 CORN. L. Q. 105; (1944) 32 ILL. B. J. 210;

These two decisions of the Supreme Court are valuable because they clear the air and apply a simple test to the transaction that comes within the purview of our Bankruptcy Act. That test, once more to repeat, is whether, under local law, something more remained to be done; and, until it is done, an intervening third party, attaching creditor or *bona fide* purchaser, would prevail over the lender. If so, then the act necessary to complete the transaction so as to cut off this danger of intervening third party right can be preferential if it is performed within four months of a bankruptcy petition.<sup>9</sup> By following this simple line, we will avoid many headaches that seemed possible upon a first reading of the preference provisions of the present statute.<sup>10</sup>

To illustrate this, let us turn to a security device that was involved in one of the cases above mentioned and is also the subject of legislation and discussion.

#### ACCOUNTS RECEIVABLE AS COLLATERAL

"Borrowing on one's accounts receivable" was viewed with disfavor by the banks for many years, and also by the great commission houses. I can well remember, from the days of my own practice, the form of credit statement that was required of a merchant, wherein a question was to this effect, "Are you borrowing on your accounts receivable?" But, despite this prejudice,<sup>11</sup> the practice has always gone on; the only result being that the merchant procures his loan from a financing company instead of his bank. It is, in other words, a legitimate transaction, and in normal times the annual volume of these loans is tremendous.<sup>12</sup>

Now, into this field of security, the new Bankruptcy Act made a violent and dangerous raid. To get the point of it, let us recall that there are two rules as to what is necessary when an account is assigned, and that this conflict persisted without regard to Restatements, or a rule of "general commercial law" which the Supreme Court adopted in the days when it felt free to do such a thing.<sup>13</sup> In many

(1943) 41 MICH. L. REV. 992; (1943) 29 VA. L. REV. 1067. It was discussed, together with remedial statutes, at two learned meetings held in 1944. (1944) 19 JOUR. NAT. ASSN. REFEREES IN BANKRUPTCY, 11; AMER. BAR ASSN., REPORT OF PROCEEDINGS OF SECTION OF CORPORATION, BANKING AND MERCANTILE LAW (1944) 15 ff.

<sup>9</sup> McKenzie v. Irving Trust Co., *supra* n. 6; Corn Exchange Bank v. Klauder, *supra* n. 8.

<sup>10</sup> A very sound discussion is Hanna, *Some Unsolved Problems Under Section 60a of the Bankruptcy Act* (1943) 43 COL. L. REV. 58. There were other intelligent discussions as well of earlier date; and the latest are afforded by the two meetings cited *supra* n. 8. For a recent treatment, see Koessler, *Assignment of Accounts Receivable* (March, 1945) 33 CALIF. L. REV. 40 (introduction by Professor Hanna). Another excellent summary will be found in Montgomery, *Review of Assignments of Accounts Receivable* (1943) 17 A.B.A.J. 119.

<sup>11</sup> Personally, I thought that it subconsciously influenced the decision in *Benedict v. Ratner*, 268 U. S. 353, 45 Sup. Ct. 566, 69 L. Ed. 991 (1925), hereinafter discussed. See Glenn, *op. cit. supra* n. 2, at §594.

<sup>12</sup> As to the propriety of this business, see the remarks of Prof. Karl Llewellyn at a meeting that is above cited; and as to its volume, see the figures mentioned by Mr. Milton P. Kupfer, on the same occasion. AMER. BAR ASSN., *supra* n. 8, at 15 ff.

<sup>13</sup> The Restatements of Contracts (§173), and of Trusts (§163), favored one of these rules and so did the Supreme Court. *Salem Trust Co. v. Manufacturers Finance Co.*, 264 U. S. 182, 44 Sup. Ct. 266, 68 L. Ed. 628, 31 A. L. R. 867 (1927). Local law, of course, now governs. *Corn Exchange Bank v. Klauder*, *supra* n. 8; *McKenzie v. Irving Trust Co.*, *supra* n. 6.

states the rule prevails that the assignee of an account must notify the debtor thereon under penalty of losing out to a subsequent *bona fide* purchaser of the account, and hence this sort of assignee is hit by the preference provisions of our present Bankruptcy Act.<sup>14</sup> But in states where a contrary rule obtains, the assignee is not endangered by the Bankruptcy Act, for by his local law the assignment is complete when made, and requires no further act. A second assignee, although a *bona fide* purchaser, takes only what his assignor can give; and thus the first assignee's title will prevail, without further act on his part, over a second assignee and also over attaching creditors of the assignor.<sup>15</sup> It follows that in a state where this rule prevails, the assignee of an account receivable is not endangered by the bankruptcy of the assignor. But many states, and important ones at that, are not in this class;<sup>16</sup> and in that sort of jurisdiction, local law, as applied under the Bankruptcy Act, bears down upon the lender who belatedly gives notice to the debtors on the assigned accounts instead of notifying them on the spot as part of the loan transaction. That, indeed, was the decision in one of the two Supreme Court decisions that have been mentioned.<sup>17</sup>

To save the situation in states of this class, legislation is necessary to perfect the assignment on the spot, so as to leave nothing further for the lender to do in order to perfect his rights as against *bona fide* purchaser or attaching creditor. Being safe against them, the lender will also be safe under the Bankruptcy Act as the Supreme Court has defined it.<sup>18</sup> There are several possibilities in the way of legislation; but before we get to that, let us ask, why legislation?

That question is pertinent in view of the fact that in a state of this class the assignee has the remedy in his own hands if he chooses to use it, for, as above stated, all he has to do is to notify the account-debtors on the spot and then he will be fully protected. But that is exactly what the lender does not want to do, and the borrower also is opposed to the idea. The reasons are practical as well as theoretical: (a) it is not needed so far as the obligor is concerned, for if he pays his original creditor without notice of an assignment he will be protected; (b) actually it affords little, if any, notice to the assignor's creditors or any subsequent assignee; and (c) the resulting gossip of the market place, that X is assigning his accounts, will not be helpful.<sup>19</sup> Hence no statute that involves notifying the debtor, even at a deferred date, is acceptable.

<sup>14</sup> *Corn Exchange Bank v. Klauder*, *supra* n. 8. This was predicted in Hamilton, *The Effect of Section Sixty of the Bankruptcy Act Upon Assignments of Accounts Receivable* (1939) 26 VA. L. REV. 168, and by various bar groups.

<sup>15</sup> Leading cases are: *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314, 62 N. E. 387 (1901); *Ottumwa Boiler Works v. M. J. O'Meara & Son*, 206 Iowa 577, 218 N. W. 920 (1928); *Moorestown Trust Co. v. Buzby*, 109 N. J. Eq. 409, 157 Atl. 663 (1932). This is the view that was taken by the Restatements and by *Salem Trust Co. v. Mfrs. Finance Co.*, *supra* n. 13.

<sup>16</sup> Classification of the states, according to one or the other of these rules, will be found in *Salem Trust Co. v. Mfrs. Finance Co.*, *supra* n. 13, and in Hamilton, *op. cit. supra* n. 14.

<sup>17</sup> *Corn Exchange Bank v. Klauder*, *supra* n. 8.

<sup>18</sup> Cases *supra*, notes 6 and 8.

<sup>19</sup> See discussions at the meetings cited *supra* n. 8. During the present period of uncertainty, however, assignments often are made "on a notification basis"; that is, the assignee is authorized to notify

Legislation, therefore, has so far taken other lines. One type of statute simply abolishes the requirement of notice to account-debtor, and pronounces the assignment complete when made, without further act on the part of anyone. Illinois did that, after a Federal court had decided that her law required notice to the account-debtor.<sup>20</sup> Thereupon Illinois "passed a statute validating the written assignment of accounts receivable upon the execution of such an assignment and dispensing with the requirement of notice, if any such ever existed under the decisions in Illinois."<sup>21</sup> Virginia also made such a change at the last session of her legislature.<sup>22</sup>

So much, then, for the "validation" statute, which seems the easiest way out. Another method, "book marking," is favored by two other states at least, Georgia and Pennsylvania.<sup>23</sup> Here the statute perfects the assignee's right if a memorandum of the assignment is made on the assignor's books of account. This method does not seem to be favored by experts who have considered the subject,<sup>24</sup> and I am inclined to agree, for when it comes to books there is always the possibility of doubt, if not of fraud.

The third proposed method is to require these assignments to be recorded, but the objection is practical. The average account is of short life, and it is only a running agreement, of which we find examples in the books,<sup>25</sup> that would be feasible for a recording act. Taking it by and large, therefore, a "validation law" of the type above described, seems the best solution, except for one thing.

These "validation acts," as I look at it, should take into account the case of returned goods which often arises when accounts are hypothecated. That, as we will see, presents an "equitable pledge," which is one of the things at which our present Bankruptcy Act strikes directly. This situation, together with such alleviation as is afforded by a certain part of the Uniform Trust Receipts Act, will be later discussed, but meanwhile I suggest that a "validation act" should expressly protect the case that arises when goods are returned.

One form of validation act that I have lately seen mentions returned goods, but does not take the line I have suggested. The New York Bar Association has offered, through its Committee on Uniform Laws, a validation law that mentions, in its second section, the case of goods that have been returned to the assignor or recovered by him from the debtor. But the case it then proceeds to cover does not include the delivery of these goods to the banker. Instead, it contemplates the

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the debtors if he so pleases. That sort of agreement is useful when there is doubt as to the situs of the assignment, as between states that require notification and those that do not. An example is afforded by *N. Y. Credit Mens' Ass'n v. Mfrs. Discount Corp.*, 147 F. (2d) 885 (C. C. A. 2d, 1945).

<sup>20</sup> *In re Vardaman Shoe Co.*, 52 F. Supp. 562 (E. D. Mo., 1943).

<sup>21</sup> Remarks of Mr. Milton P. Kupfer, at meeting of Am. Bar Assn. Section, *supra* n. 8.

<sup>22</sup> VA. CODE OF 1942 (Supp. 1944) §5767a. Similar laws have been enacted in Connecticut, Rhode Island, and Maryland. See remarks of Mr. Kupfer, AMER. BAR ASSN., *supra* n. 8, at 26. Massachusetts, I am informed, expects to follow suit.

<sup>23</sup> See *Corn Exchange Bank v. Klaunder*, *supra* n. 8, where this method is mentioned, although the actual case had arisen previously.

<sup>24</sup> Again I refer to the Bar Assn. meeting, *supra* n. 8.

<sup>25</sup> See *Greycy v. Dockendorff*, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339 (1913); *Jamestown Veneer & Plywood Corp. v. Andrews*, 93 F. (2d) 989 (C. C. A. 3rd, 1938).

assignor reselling the goods to someone else and then assigning the new account receivable, thus arising, to the banker.<sup>25a</sup> The latter's lien on the new account shall be valid, as I read the proposed act; but I would suggest, for safety's sake, that the statute should also protect the case where the goods themselves are actually delivered to the banker.

Before passing from the account receivable as an asset for borrowing purposes, let us note two elementary points that are restated by late decisions. The first is that there really must be an assignment, duly executed by the owner of the chose in action, running in favor of the party who brings the action and not a stranger.<sup>26</sup> That point speaks for itself, but the other is of more interest in view of the previous discussion of recording acts as proposed for the assignment of accounts receivable. Now, a state like New York has several statutes that require recording of certain contracts that involve accounts, but only in connection with broader purpose. Of that class are the law that requires recording of pledge of securities when the pledgor is to retain possession for servicing purposes, and the law that requires record of a factor's agreement when the factor does not have possession.<sup>27</sup> Obviously, neither statute covers the ordinary assignment of accounts that has been the subject of our discussion so far. A recording act, in other words, is of no use in a particular transaction unless it was plainly intended to apply in that case, as is illustrated by a recent decision that dealt with still another of these special statutes.<sup>28</sup>

PLEDGE AND "EQUITABLE PLEDGE"—EFFECT OF BANKRUPTCY ACT UPON "RETURNED GOODS"; ALSO OF OTHER STATUTES, AND OF THE PLEDGE ITSELF

The present Bankruptcy Act, in its preference provisions above quoted, particularly struck at the "equitable pledge"—a misnomer, of course, but still an institution with us. The case is that I borrow from you on the security of specified property which I do not deliver on the spot. Later, I make delivery, just ahead of an attachment on the part of one of my creditors, or just ahead of a bankruptcy petition which is about to be filed against me; you then knowing that I am insolvent. Can you keep this item? Yes, so ran the law until the present Bankruptcy Act came along. It was never a fraudulent conveyance,<sup>29</sup> and under the Bankruptcy Act of 1898, the transaction was not a preference, because it was saved by the doctrine of "relation back" that was mentioned above.<sup>30</sup> But the present Bankruptcy Act

<sup>25a</sup> This proposed act is given in full in Professor Hanna's foreword to Koessler, *op. cit. supra* n. 10.

<sup>26</sup> Plotkin v. Danakos, 41 A. (2d) 470 (R. I. 1945): corporate assignment, executed in the company's name by one calling himself the treasurer, but with no corporate seal annexed nor with any evidence that the signer was treasurer or that the assignment was authorized.

<sup>27</sup> As to the pledge of securities, the statute is N. Y. LIEN LAW §230, discussed in Sammet v. Mayer, 108 F. (2d) 337 (C. C. A. 2d, 1939). As to the factor out of possession, see N. Y. PERS. PROP. LAW §45, discussed in Irving Trust Co. v. B. Lindner & Bro., 264 N. Y. 165, 190 N. E. 332 (1934); Irving Trust Co. v. Commercial Factors Corp., 68 F. (2d) 864 (C. C. A. 2d, 1934).

<sup>28</sup> The statute requires the recording of every assignment of a construction contract or of material or money due thereunder. N. Y. LIEN LAW §15. Held this does not govern an assignment of rents, although this assignment is given as security for the contractor's note. Gins v. Mauser Plumbing Supply Co., 53 F. Supp. 151 (S. D. N. Y. 1943), *rev'd* on another point, 148 F. (2d) 974 (C. C. A. 2d, 1945).

<sup>29</sup> See GLENN, *op. cit. supra* n. 2, at §§292-292b, 349.

<sup>30</sup> *Supra* n. 4.

makes a preference out of the transaction, for one of the chief purposes of Section 60a of the Act was to strike down the "equitable pledge."<sup>31</sup>

This brings us back to the assignment of accounts receivable. Here we must distinguish between the rights that attach to the pledge of an account, and those that arise when the account no longer exists because the very goods are returned which, when they were sold by borrower to obligor, gave rise to the obligation itself. Return of the goods to the vendor destroys the account. That is the present case; and, in the absence of an agreement as to this contingency, the returned goods are free of lien, to the corresponding benefit of the borrower's creditors.<sup>32</sup> So it is customary to provide that the goods shall take the place of the account as substitute collateral for the loan. Such a provision is valid as an "equitable pledge," and so the lender will prevail if he obtains possession prior to levy or attachment. And he also prevailed under the bankruptcy law as it stood prior to 1938, because the transfer of possession, under the rule then prevailing, related back to the date of the loan agreement, and thus it was not a preference.<sup>33</sup> That, of course, would not be true under the present Bankruptcy Act if the borrower was insolvent to the lender's knowledge when he surrendered the goods, because then the transfer would be a preference. Nor would the transaction be saved, under state law, by any of the sanctions that are now under discussion as supplementing the assignment of accounts receivable, for those sanctions relate only to the account itself and not to its destruction by virtue of the purchaser's having returned the goods.

Of course this case can be covered by an act as to assigned accounts receivable, which will validate, incidentally, the banker's lien upon goods that may have been returned, and this seems to be the best way out.<sup>33a</sup> There is protection, however, for a brief period after the goods are returned, if the state has adopted the Uniform Trust Receipts Act. This statute later to be mentioned in more detail, has a provision that protects the "equitable pledge," although it is not made as part of a trust receipt transaction. The words of the Uniform Act are plainly to that intent;<sup>34</sup> and its application to all cases of "equitable pledge" is supported by dicta as well as authoritative opinion.<sup>35</sup> But the brief breathing space of ten days is not

<sup>31</sup> GLENN, *op. cit. supra* n. 2 at §§480-489; *Sammet v. Mayer*, *supra* n. 27.

<sup>32</sup> *In re Vanity Fair Slippers*, 4 F. Supp. 83 (S. D. N. Y. 1933).

<sup>33</sup> *Goldstein v. Rusch*, 56 F. (2d) 10 (C. C. A. 2d, 1932); *Lee v. State Bank & T. Co.*, 54 F. (2d) 518, 85 A. L. R. 216 (C. C. A. 2d, 1931).

<sup>33a</sup> See discussion of the proposed act that is set forth by Hanna, *op. cit. supra* n. 10.

<sup>34</sup> "1. An attempted pledge or agreement to pledge not accompanied by delivery of possession, which does not fulfill the requirements of a trust receipt transaction, shall be valid as against creditors of the pledgor only as follows: . . .

"(b) to the extent that the value given by the pledgee is not new value, and in the case of new value after the lapse of ten days from the giving thereof, the pledge shall have validity as against lien creditors without notice, who become such as prescribed in Section 8, only as of the time the pledgee takes possession, and without relation back. . . .

"3. Where, under circumstances not constituting a trust receipt transaction, a person, for temporary and limited purpose, delivers goods, documents, or instruments, in which he holds a pledgee's or other security interest, to the person holding the beneficial interest therein, the transaction has like effect with a purported pledge for new value under this section." UNIFORM TRUST RECEIPTS ACT §3.

<sup>35</sup> Clark, I., in *Sammet v. Mayer*, *supra* n. 27; see also *Gins v. Manser Plumbing Supply Co.*, *supra* n. 29; Bogert, *The Effect of the Trust Receipts Act* (1935) 3 U. OF CHI. L. REV. 26; Bacon, *A Trust Receipt Transaction* (1936) 5 FORDHAM L. REV. 17, 240, 253, 268-9.



full protection for the banker; for, even if he is diligent in following up collection of the accounts assigned to him, that will not put him on the track of goods that have been returned within ten days under an account that had sixty to run. His protection is in an act which, although applying primarily to the assignment of the account, will also take care of returned goods and confirm his lien, thereon from the moment they come back into the borrower's hands. Of course, if this is a recording act, the banker who fails to comply with it cannot save himself by invoking the "equitable pledge" provision of the Trust Receipts Act;<sup>36</sup> but that is only right, inasmuch as the recording act itself will afford complete protection if complied with.

Thus the "equitable pledge" is still a lively subject, as one can see; but the true pledge itself has lately been re-examined. That is surprising, in view of the simple character of the pledge as a security device. But, as the subject has arisen in two recent cases, they will be mentioned, if only to illustrate well-settled ideas.

In the first of these cases, a pledgee held as collateral the notes of X, a third party, and, these notes going into default, the pledgee entered judgment by confession. Later the pledge debt was paid, and thereupon the judgment debtor set up the astonishing claim that the judgment "thereby became a nullity." Apparently X had never heard of substitute collateral. The fact remained, as the court held, that the notes of X were merged in the judgment, which he was bound to pay regardless of whether the debt was paid for which the judgment stood as collateral. The only question was, whom should he pay, pledgor or pledgee, but that was quite different from the question whether he should pay at all, for he certainly was bound to pay somebody. This debtor also raised the point whether judgments are assignable, but he got nowhere with that doubt either.<sup>37</sup>

In the other case an equally plain question was presented, but obfuscation was introduced because of a modern statute. In this case there were two pledges, one on top of the other, but the pledgee had retained possession all the time. In other words, the bankrupt pledged goods to A and pledged them again to B, but A remained in possession. On the eve of the pledgor's bankruptcy, however, the second pledgee, B, paid the A loan and took over the collateral. It was held, very properly, that B held a valid pledge, and the transaction did not require the aid of that provision of the Uniform Trust Receipts Act which protects a pledge without possession for a period of not exceeding ten days.<sup>38</sup> In short, statutory aid was unnecessary to support the present transaction, because it had ample sanction at common law.

The propriety of a pledgee's sale on default also arose in the case last cited, and

<sup>36</sup> *Tobin v. Kampe*, 132 F. (2d) 64, 145 A. L. R. 366 (C. C. A. 8th, 1942).

<sup>37</sup> *Stombaugh v. Morey*, 388 Ill. 392, 58 N. E. (2d) 545 (1944).

<sup>38</sup> *Gins v. Manser Plumbing Supply Co.*, 148 F. (2d) 974 (C. C. A. 2d, 1945). For the general proposition that both pledges were valid because "possession was being withheld for payment of both debts" (footnote 5), Clark, J., cites ample authority; nor does he overlook the suggestion "that the first pledgee be given notice" of the second pledge. That requirement, he observes, had also been met. 148 F. (2d), at p. 978.

constituted the ground for reversal of the lower court. While generally speaking, it is unwise to interfere with the pledgee's power of sale, nevertheless the court held that a foreclosure sale should not be upheld which disregards the fact that the pledgee is "a form of fiduciary and his conduct must stand the scrutiny of a court of equity." Hence a sale that is secret, with no effort to draw in outside bidders or otherwise obtain a fair price, and of the entire collateral when a portion only might have fetched a price sufficient to pay off the loan, is improper, because it amounts "to no more than assumption of dominion for the amount of the debt, *i.e.*, a strict foreclosure by self help."<sup>39</sup> This strikes me as an excellent description of the kind of "foreclosure sale" that some pledgees seem to think is in order; and equally appropriate is the relief that was granted. The proper idea, here applied, was that the sale was not necessarily a conversion, thus forcing the injured pledgor into one line of action only. On the contrary, inasmuch as the property was still in the pledgee's hands, his wrongful sale to himself was voidable by the pledgor, and thus the latter's trustee in bankruptcy was entitled to disregard the transaction and redeem the pledge.<sup>39a</sup> This case is timely, because the foreclosure sale of a pledgee, unlike that of a mortgagee where land is the subject matter, is only too apt to be conducted without regard to the fact that a pledge is a security device, and thus the borrower's rights persist after default and can be cut off by a proper foreclosure only.

#### FIELD WAREHOUSING

This device, by which a producer or manufacturer obtains a loan on his materials while still nearby, has been used during the war, as Mr. Daniel M. Friedman points out in an essay on the subject.<sup>39b</sup> The object, of course, is to provide bankable paper in the shape of a warehouse receipt. The difficulty is to make it effectual, because a man cannot pledge his own goods and yet remain in possession, except for the short period that is provided by the Uniform Trust Receipts Act, discussed elsewhere in this paper. Hence there must be a separate warehouseman, and how that can be done is the subject of Mr. Friedman's paper. As I have nothing to add to his discussion, I will leave the matter with a reference to his article.

#### CHATTEL MORTGAGE AND CONDITIONAL SALE

These are both security devices, because they represent a debt secured by goods, with foreclosure in case of default; but the lender is not in possession, as he would be in the case of a pledge. Recording is required in order to protect against *bona fide* purchasers, and it is also required, generally, to protect against creditors of the borrower in possession. As to creditors, that is true today of the conditional sale (certainly where the Uniform Conditional Sale Act is of force, for by virtue of it the conditional sale has been transformed into a security)<sup>40</sup> and it was uni-

<sup>39</sup> *Gins v. Manser Plumbing Supply Co.*, *supra* n. 38.

<sup>39a</sup> *Gins v. Manser Plumbing Supply Co.*, *supra* n. 38; in support are the cases cited in a note, (1938) 38 COL. L. REV. at p. 925.

<sup>39b</sup> Friedman, *Field Warehousing* (1942) 42 COL. L. REV. 991 (1942). It cites all previous literature on the subject, and contains an excellent description of the present law, as found in cases and statutes.

<sup>40</sup> See GLENN, *op. cit. supra* n. 2, at §§506-519.

formly true as to the chattel mortgage until Georgia chose to make an exception by her own legislation. In 1931 her legislature said that the effect of a failure to record a mortgage, bill of sale or deed to secure a debt "shall be the same as is the effect of a failure to record a deed of bargain and sale."<sup>41</sup> As the recording acts of Georgia with respect to ordinary deeds of bargain and sale, protect innocent purchasers against an unrecorded deed but not creditors, it follows that an unrecorded chattel mortgage or "trust deed" to the same effect, will be valid against creditors of the mortgagor even though they are armed with judgment. In other words, to quote the latest expression of Georgia's highest court, this act of 1931 "so changes the previous law with reference to those securities as to render such instruments, even though unrecorded, superior in rank to subsequent liens created by law."<sup>42</sup> The wholesomeness of this departure will be a matter of dispute, but credit men, certainly, should take notice of this Georgia law.

One should realize, however, that Georgia's statute will not necessarily preserve an unrecorded chattel mortgage against a trustee in bankruptcy under Section 60a of our present Bankruptcy Act as above discussed. This Act, as we have seen, can turn an unperfected transaction into a preference if, while it remains unperfected, it will not prevail over (a) an attaching creditor or (b) a *bona fide* purchaser. Now under the Georgia law, an unrecorded mortgage, although protected as to attaching creditors, nevertheless will not prevail over a *bona fide* purchaser. Hence it is possible for the mortgagor's trustee in bankruptcy to prevail over the mortgagee; and thus Georgia's statute, as lately construed by her courts, is not so wholly effective in the mortgagee's behalf, as its framers thought it would be when they drafted it in 1931.

Turning to the broader field that is elsewhere afforded by laws that require the recording of a chattel mortgage as to creditors as well as purchasers, we find, in recent cases, a development along one line, together with run of the mine cases on other points. The latter may be disposed of first, for it would not do to overlook them wholly.

Thus, first of all, there is the requirement that the instrument plainly state the debt it secures. If, then, the mention is of thirteen notes, but the amount of the first twelve only is stated; it seems pretty clear that the document, as recorded, will not afford notice of the thirteenth note, and the result as to creditors or purchasers is also apparent.<sup>43</sup> On the same line is the statutory requirement, to be found in a number of states, that an "affidavit of consideration" must be attached to the mort-

<sup>41</sup> GA. CODE OF 1933, §§67-109, 67-1305.

<sup>42</sup> *Mackler v. Lahman*, 196 Ga. 535, 27 S. E. (2d) 35 (1943). The mortgage took the form of a freehanded "security deed," to a trustee in trust for the lender, covering a stock of goods and accounts receivable representing sales. It was attacked by a judgment creditor of the borrower. Until 1931, the Georgia statute required a chattel mortgage to be recorded within thirty days after execution, else it would be void against creditors as well as purchasers, and this applied to freehanded mortgages, as well as those of the ordinary variety. *Merchants & Mechanics Bank v. Beard*, 162 Ga. 446, 137 S. E. 107 (1926). The amendment of 1931, as the principal case holds, did away with all requirements as to recording, so far as creditors were concerned.

<sup>43</sup> *Tobin v. Kampe*, *supra* n. 36.

gage and filed with it. If this affidavit is not truthful, the instrument remains as though it had never been recorded, with all the consequences that attach in favor of creditors and purchasers; hence to omit mention of a "financing charge" that the mortgagor has paid as the price of his loan is to violate a statute of this sort, as found in New Jersey.<sup>44</sup> On the same line is the requirement that the whole mortgage (or conditional sale contract, as the case may be) must be filed, and that includes such specifications as happen to be annexed to the document so as to afford a more perfect description of the goods that are covered—which is quite in line with the general rule that, if one stands upon the record of an instrument, the whole of the latter must be recorded, with no part omitted, however much it may go into detail.<sup>45</sup> This is especially important, as the court notes on the side, in view of a recent amendment of the New York law which requires even further details as to the conditional sale contract.<sup>46</sup> *A fortiori* the instrument, to be properly of record, must be duly acknowledged according to the law of the state; this is a well-settled rule generally, but it has remained for Indiana to incorporate it, by a late decision, within her own body of law.<sup>47</sup> Nor should the creditor overlook the necessity of "refiling" his document at the expiration of a year from the date of original filing, when that is required by local law, because his failure in this regard deprives the paper of all validity, from that time forward, as an instrument duly of record.<sup>48</sup>

But in spite of all this precision as to the filing of a chattel mortgage, an aspect is still in dispute, and we are indebted to a recent Wisconsin case for calling our attention to the fact. If a chattel mortgage is not of record (nor is the mortgagee in possession) does its lien affect one who purchases from the mortgagor with full notice of the mortgage? A recent Wisconsin case says no; the purchaser is protected regardless of his knowledge or notice.<sup>49</sup> This is in accord with previous Wisconsin decisions and with cases in some other states; but the majority view is otherwise.<sup>50</sup> The Wisconsin view, however, strikes me as logical in view of the history of our chattel mortgage. As to third parties, it is a statutory substitute for

<sup>44</sup> *In re Incandescence, Inc.*, 143 F. (2d) 241 (C. C. A. 2d, 1944).

<sup>45</sup> After citing a number of cases to this effect, Clark, J., says (*In re Incandescence, Inc.*, *supra* n. 44) that he finds only one which throws doubt upon the proposition, and in that case there was a strong dissent. *Diamond Iron Works v. Werley*, 135 Wash. 228, 237 Pac. 313 (1925).

<sup>46</sup> "Recently, in 1941, a new statute was passed in New York, PERS. PROP. LAW, §64a, making extensive requirements as to conditional sales contracts for \$1,500 or less, with greatly detailed provisions as to the form, even the size of type, of the agreement, as well as its substance, including, *inter alia*, 'the name of the seller and the buyer,' the seller's place of business and the buyer's residence, 'the date of sale,' 'a description of the goods sold,' and so on for some eight subdivisions, with a penalty recoverable by the buyer of an amount equal to the credit service charge, or if equal to the credit service charge, or if none was specified, then 10 per centum of the cash price. Whether this late statute is designed to affect the earlier Uniform Act on this point need not be considered here." *In re Incandescence, Inc.*, *supra* n. 44, footnote 3.

<sup>47</sup> *Universal Discount Corp. v. Brooks*, 58 N. E. (2d) 369 (Ind. App. 1944).

<sup>48</sup> *In re Brown Bomber Baking Co.*, 293 N. Y. 141, 56 N. E. (2d) 85 (1944), noted (1944) 31 VA. L. REV. 203.

<sup>49</sup> *C. I. T. Corp. v. Wallerman*, 242 Wis. 287, 7 N. W. (2d) 884 (1943).

<sup>50</sup> An alignment of the decisions will be found in Note (1944) 28 MARQ. L. REV. 44, which features the Wisconsin decision *supra* n. 49.

the pledge, and cannot live without the statute that relates to it, so long as the mortgagee has not perfected his pledge by taking possession.<sup>51</sup> Hence the mortgagee's rights, so long as he has not recorded the instrument, or secured a common law pledge by taking possession, should amount to nothing as against the title of an intervening purchaser, and it should be immaterial that the latter had notice of the unrecorded mortgage.<sup>52</sup>

#### THE FREE-HANDED MORTGAGE OF GOODS AND ACCOUNTS

By this term I venture to describe<sup>53</sup> a mortgage that permits the mortgagor to sell the goods but does not require him to turn the net proceeds over to the mortgagee in reduction of the loan. If such a requirement appears in the mortgage, it is valid by the rule that generally prevails, because then the mortgagor is simply acting as the mortgagee's agent; the security is turned into money by this agent's efforts, and the money goes to his principal, who applies it to the debt, as he should. This hurts nobody, and the arrangement is valid by the view that generally prevails.<sup>54</sup> In fact, one of the few states that denied this proposition has come into line by means of a statute which has lately been construed as conforming to "the rule that seems to prevail in other jurisdictions, where consent to the sale is given by the mortgagee on the condition that the property be sold in the name of the mortgagee and the proceeds applied upon the mortgage debt."<sup>55</sup> This language is inexact so far as it refers to the mortgagor's selling "in the name of the mortgagee," for it is quite proper for the mortgagor to sell in his own name. The real question is what shall be done with the proceeds of sale; and the answer is that they are dedicated to payment on account of the mortgage; in short, the proceeds are a trust fund for that purpose, as is shown by the recent case mentioned.<sup>56</sup>

A pledge of accounts receivable is governed by the same rule, and here we find

<sup>51</sup> I have ventured to express this view in connection with creditors' rights. GLENN, *op. cit. supra* n. 2, at §§491-5. That the device is "in derogation of the common law" has been often stated even in late days. *McKesson-Fuller-Morrison Co. v. Chapell Ice Cream Co.*, 285 Ill. App. 472, 2 N. E. (2d) 561 (1936); *Universal Discount Co. v. Brooks*, *supra* n. 47.

<sup>52</sup> *C. I. T. Corp. v. Wallerman*, *supra* n. 49. *Acc.*: *Hayden v. Russell*, 119 Me. 38, 109 Atl. 485 (1920); *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925), and other cases cited in Note (1944) 28 MARQ. L. REV. 44. *Contra* is a larger number of cases cited in the same publication, among which may be noted *Wertheimer & Degen v. Shultice*, 202 Iowa 1140, 211 N. W. 568 (1927); *Eaton v. Tuson*, 145 Mass. 218, 13 N. E. 488 (1887); *Button v. Rathbone*, 118 N. Y. 666, 23 N. E. 122 (1889).

<sup>53</sup> See GLENN, *op. cit. supra* n. 2, §§582-594.

<sup>54</sup> *Id.* at §582.

<sup>55</sup> *Sperry v. Renner*, 149 P. (2d) 781 (Okla. 1944). Interestingly enough, the Federal courts gave this statute the same interpretation ten years previously. *Midwest Production Co. v. Doerner*, 70 F. (2d) 194 (C. C. A. 10th, 1934).

<sup>56</sup> *Sperry v. Renner*, *supra* n. 55. There a mortgagor of hogs sold them, and his general creditors attempted to garnish the purchase money. The court held that the money could not be attached, inasmuch as it constituted a trust fund for the benefit of the mortgagee. The mortgage provided for such a sale, the proceeds to be turned over to the mortgagee; and the statute said that a mortgagor "who, with the consent of the mortgagee, or his assignee, shall sell such mortgaged property, or any part thereof, while the mortgage remains in force and unsatisfied, shall be deemed and conclusively held to be the trustee of the funds received upon the sale thereof, for the benefit of such mortgagee, or assignee, to the extent of the indebtedness secured thereby or any balance due thereof."

no dissent. In our country it was never fraudulent to allow the pledgor to collect the account in his own name provided he did so as the pledgee's agent and thus was bound to turn over the proceeds to the pledgee toward payment of the loan;<sup>57</sup> and in recent years the same result has been reached in England, despite her rule that the assignee must notify the account debtor if he wants to avoid the danger of the account being subsequently sold to a *bona fide* purchaser.<sup>58</sup>

It is a different thing, however, if the pledgor of an account is free to turn over the proceeds or not as he pleases. When an assignor is lawfully left with power to collect the account, it means that he is the assignor's agent, and thus he should duly account for the proceeds of collection. If, on the other hand, the assignee allows the assignor to use the money as his own, mixing it with his other funds, that assignee will forfeit his security in case of the assignor's bankruptcy.<sup>59</sup>

Yet that is exactly the sort of arrangement some people want, with respect to a running loan on goods and accounts. The borrower, they feel, should be free to put the proceeds of sale or collection into new goods, provided they, and accounts representing the sale of them, shall in turn be subject to the lien that secures the loan. That is a freehanded mortgage, and with respect to it various views are entertained. I cannot follow all the ramifications in this article—I essayed that task elsewhere, and it required a number of pages<sup>60</sup>—but recent cases can fairly be mentioned to remind us of several rules at least. One of them traces to a Georgia statute, pioneer of its kind, “which declares that a mortgage may cover a stock of goods, or other things in bulk, but changing in specifics.”<sup>61</sup> Another refers to the rule, exactly opposite, that such a mortgage is fraudulent as to creditors, who will prevail through attachment or bankruptcy regardless of whether the mortgagee has meanwhile taken possession.<sup>62</sup> And then there is a third rule, which protects the freehanded mortgage if it is a purchase money mortgage. The argument there is quite persuasive. It is cogently said that, unless this purchase money mortgage is upheld, it would be impossible for a merchant to sell his business as a going con-

<sup>57</sup> *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568 (1875); *Hickok v. Cowperthwait*, 210 N. Y. 137, 103 N. E. 1111, Am. Cas. 1915 B 1002 (1913); *Bundy v. Commercial Credit Co.*, 202 N. C. 604, 163 S. E. 676 (1932); *In re Leterman, Becher & Co.*, 260 Fed. 543 (C. C. A. 2d, 1919).

<sup>58</sup> *Olds Discount Co. v. John Playfair Ltd.*, 159 L. T. Rep. 332 (C. A. 1938). The origin of the rule that requires notification of the account-debtor is discussed in *GLENN, op. cit. supra* n. 2, §528.

<sup>59</sup> *Markovitz v. Taylor*, 94 F. (2d) 782 (C. C. A. 3rd, 1938), and *Union Securities v. Merchants' Trust Co.*, 205 Ind. 127, 185 N. E. 150 (1933), are typical of this well-settled rule.

<sup>60</sup> *GLENN, op. cit. supra* n. 2, at §§582-594.

<sup>61</sup> *Mackler v. Lahman*, 196 Ga. 535, 27 S. E. (2d) 35 (1943). The reference is the Ga. Code of 1933, §§67-103; as to which, and other states that follow the same line (wholly or with modifications), see *GLENN, op. cit. supra* n. 2, at §§586-7, 574. The Uniform Chattel Mortgage Act, it should be noted, expressly sanctions this type of mortgage.

<sup>62</sup> *Sperry v. Renner*, 149 P. (2d) 781 (Okla. 1944). There, as said above, the mortgage at bar was legalized by statute although it conferred upon the mortgagor a power of sale. But the reasoning implied that the mortgage would have been fraudulent if it had not bound the mortgagor to remit the proceeds of sale to the mortgagee. In other words, the rule remains in Oklahoma that a freehanded mortgage is fraudulent on its face. *Turk v. Kramer*, 138 Okla. 35, 280 Pac. 266, 73 A. L. R. 229 (1929). Cases of this class are also represented by *Zartman v. First Nat. Bank*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083 (1907). The prohibition applies to pledge agreements as well as mortgages. *Irving Trust Co. v. Commercial Factors Corp.*, 68 F. (2d) 864 (C. C. A. 2d, 1934).

cern, unless he sells wholly for cash.<sup>63</sup> Nevertheless, this argument has failed of acceptance in other quarters.<sup>64</sup> The fourth rule is of more interest here, because it brings us back to the preference provisions of the present Bankruptcy Act, with which this paper started. The various ideas so far discussed turn on the question, not whether the agreement is preferential, but whether it is a fraud upon creditors, or (as the Supreme Court held in the case of a freehanded mortgage of accounts) whether it is really a mortgage at all.<sup>65</sup> But Massachusetts supports the view that this sort of mortgage creates an "equitable pledge" of the sort discussed above. Hence, prior to the present Bankruptcy Act, the mortgagee prevailed if he took possession prior to a bankruptcy petition, for that could not possibly be preferential.<sup>66</sup>

This latter rule, of course, is now upset by the present Bankruptcy Act, for reasons previously discussed; and therefore a state which has thus far supported the notion of "equitable pledge" in this sort of case, must legislate the device into safety if the thing is deemed worth keeping. That is a matter of local needs, of course, but it leads to the reflection that those states were wise in their own time who, like Georgia, validated the freehanded mortgage by statute at the outset.

#### THE TRUST RECEIPT

One is reminded of this subject by a point that presented itself while we were on the freehanded mortgage. Today the trust receipt, as a security transaction, points directly to the Uniform Trust Receipts Act, in course of adoption at an accelerated rate.<sup>67</sup> Its application may be judged by three recent cases, each involving an automobile, this article being nowadays the prevailing subject of the trust receipt.<sup>68</sup> The case is that the car is delivered to a dealer on a trust receipt that authorizes him to sell the article but requires him to turn over the proceeds of sale to the entruster. The typical controversy that then arises does not involve the man who purchased from the dealer, for a sale is contemplated under this device, just as it is with the resale provisions that are now sanctioned by the Uniform Conditional Sales Act. The purchaser there is protected even if the conditional sale contract is duly recorded,<sup>69</sup> and so is one who purchases from a dealer acting under

<sup>63</sup> *Brett v. Carter*, 2 Low. 458, Fed. Case No. 1844 (D. Mass., 1875); *Adkins v. Bynum*, 109 Ala. 281, 19 So. 400 (1907).

<sup>64</sup> *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790 (1906); *Gilbert v. Peppers*, 65 W. Va. 355, 64 S. E. 361, 36 L. R. A. (N. S.) 1181 (1909).

<sup>65</sup> As representative of the view that it is fraudulent, see *Zartman v. First Nat. Bank*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083 (1907). As to the idea that it is no mortgage at all, see *Benedict v. Ratner*, 268 U. S. 353, 45 Sup. Ct. 566, 69 L. Ed. 991 (1925).

<sup>66</sup> *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956 (1905); *Johnson v. Burke Manor Bldg. Corp.*, 48 F. (2d) 1031 (C. C. A. 7th, 1931); *Bancroft Steel Co. v. Kuniholm Mfg. Co.*, 301 Mass. 91, 16 N. E. (2d) 78, 117 A. L. R. 678 (1938).

<sup>67</sup> In 1942 the Virginia Law Review said that thirteen states had adopted this Act. Note (1942) 29 VA. L. REV. 650. As of August, 1943, fifteen commonwealths were in this class. HANDBOOK, COMMISSIONERS OF UNIFORM STATE LAWS (1943) 310.

<sup>68</sup> The reader might compare *Charavay & Bodoine v. York Silk Mfg. Co.*, 170 Fed. 819 (S. D. N. Y., 1909), now a classic as to definition of the device, the case involving an importation of raw silk, with *In re James, Inc.*, 30 F. (2d) 555 (C. C. A. 2d, 1929), covering the delivery of cars to a local dealer.

<sup>69</sup> *De Cozen Motor Co. v. Kaufman*, 113 N. J. L. 343, 174 Atl. 893 (1934); *Winakur v. Sapourn*, 156 Md. 662, 145 Atl. 342 (1929).

a trust receipt. The real trouble arises between rival bankers and manufacturers, each having advanced cash or credit to the dealer with respect to the same car. If one of them stands upon a conditional sale contract, he will lose unless it was recorded, without need of further argument,<sup>70</sup> and the same thing used to happen, in some jurisdictions at least, when the transaction took the form of a trust receipt, with a finance company owning the cars, and delivering them to the dealer. In the absence of the Uniform Trust Receipts Act, the finance company will lose to a *bona fide* pledgee on the ground of estoppel today, whatever may have been the rule formerly.<sup>71</sup> But in a state which has adopted the Uniform Trust Receipts Act, the entruster will prevail if he has duly recorded his instrument.<sup>72</sup>

That brings me back to something that was said about assignments of accounts and the freehanded mortgage. It was there pointed out that while it was all right for the assignor to do the collecting, still the assignee must not forget that these collections are for his own account, and he will lose his position if he does not keep some sort of eye upon his agent, the assignor.<sup>73</sup> Here was a real difficulty with the trust receipt before it acquired statutory sanction under the Uniform Act. In those days the bank or finance company, the "entruster" as it is now called, was prone to look more to the dealer's note than to his sales and collections. It was inconsistent, therefore, for the entruster to claim that he was secured when his previous attitude had been quite different. Hence it is no wonder that by 1930 the trust receipt showed itself in dire need of a statute that would sanction the device as well as regulate the practice.<sup>74</sup>

#### LIENS AND TRANSFERS AS TO AUTOMOBILES—WHAT RECORD IS NECESSARY?

At an early date in the history of the automobile, state laws required registration of titles and liens. Such a law establishes a central bureau at the capital city, and out of that office issues the ownership certificate which is called for in case of accident or other untoward circumstances. But since the state also has laws which

<sup>70</sup> *State Savings Bank v. Universal Credit Co.*, 233 Iowa 247, 8 N. W. (2d) 719 (1943); *Same v. Same*, 12 N. W. (2d) 890 (Iowa 1944).

<sup>71</sup> *General Credit, Inc. v. Universal Credit Co.*, 74 App. D. C. 80, 99 F. (2d) 115 (1938); *C. I. T. Corp. v. Seavey*, 53 Ariz. 72, 85 P. (2d) 713 (1938). *Cf. In re James*, *supra* n. 68, and the statement that since 1930 the trend of decision has been against the trust receipt when unprotected by statute. *HANDBOOK, COMMISSIONERS ON UNIFORM STATE LAWS* (1933) 246.

<sup>72</sup> *C. I. T. Corp. v. Commercial Bank of Patterson*, 64 Cal. App. 722, 149 P. (2d) 439 (1944). The nature of the transaction, when conducted under the statute, is thus described in an earlier case: "This method enables the retail dealer to obtain advances from a financing company to pay the purchase price to the distributor and at the same time receive possession of the automobile for the purpose of placing it on the salesroom floor for exhibition and sale to a prospective customer. Title is transferred directly from the distributor to the finance company, which retains such title under the trust receipt until the amount advanced as the purchase price is repaid. The validity of such trust receipts as title retention documents has been established by the courts. Subsequent to the events hereinabove related and in 1935, *STATS.* 1935, p. 1930, the legislature recognized the common practice and adopted the Uniform Trust Receipts Law, which comprises sections 3012 to 2016.16 of the Civil Code." *Commercial Credit Co. v. Barney Motor Co.*, 10 Cal. (2d) 718, 76 P. (2d) 1181 (1938).

<sup>73</sup> *Supra* n. 59.

<sup>74</sup> See note 71 *supra*, as to the situation in 1930. The suggestion above made appeared in *GLENN, op. cit. supra* n. 2, at §558.



require local registration of chattel mortgages and conditional sales, the question is whether a purchaser or creditor can safely be guided by the central registry, without looking at the local record of liens. Here we have three rules, two framed by the courts, and the third in course of new legislation.

The older rule is that "registration of an automobile in the name of a particular person is not conclusive of the question of ownership or title."<sup>75</sup> The object of these laws was to serve the convenience of the police, sometimes to help in the search for taxable objects, and also to give an injured person the name of a responsible defendant.<sup>76</sup> A more forward view, however, would give central registration full weight as to ownership of the car, but not as to liens; for as to the latter, the purchaser or creditor must still look at the local records.<sup>77</sup>

Recently, however, Pennsylvania has so legislated as to make the central record afford protection as to liens as well as with respect to title.<sup>78</sup> This law, as amplified by decisions of Pennsylvania courts (although as yet I have seen nothing from her Supreme Court) was recently applied in bankruptcy, and the lienor who had been noted on the ownership certificate prevailed over the owner's creditors.<sup>79</sup>

This Pennsylvania law will mark, perhaps, the beginning of a new idea with regard to a central registry for motors, and the disappearance of local recording. In line with the tendency is the statute, now to be found in some states, that requires registration of foreign cars that enter the state as a matter of routine and with some degree of regularity—so many entries a month, say. Here the central registry plays the part of a true recording act, and the failure of a lienor to comply with it will leave him defenseless against an attaching creditor.<sup>80</sup>

This recalls a pertinent observation that was made ten years ago, in the pages of the present review. The automobile, it was there said, is a movable of the type that requires a central registry for all matters of lien as well as title.<sup>81</sup> The prototype was afforded, long ago, by the statute that covers the conditional sale of railway rolling stock, thus protecting the vendor from the underlying mortgage. This statute provides for central registry, and it has worked so well that nowadays the

<sup>75</sup> *In re Cook*, 58 F. Supp. 361 (W. D. Ky., 1945), following the law of Kentucky; *Taplinger v. Northwestern Nat. Bank*, 101 F. (2d) 274 (C. C. A. 3rd, 1938), under the previous law of Pennsylvania; *Carolina Discount Corp. v. Landis Motor Co.*, 190 N. C. 157, 129 S. E. 414 (1925).

<sup>76</sup> "It might well be that these recordation provisions are mandatory as to sales of motor vehicles in that they are designed for three very definite purposes: (1) to suppress automobile thefts; (2) to provide the state with a convenient and accessible record of title for tax purposes; (3) to provide a convenient and accessible method of identifying the ownership of an automobile for police purposes in connection with its operation on highways of the state." *Janney v. Bell*, 111 F. (2d) 103 (C. C. A. 4th, 1940).

<sup>77</sup> *Janney v. Bell*, *supra* n. 76.

<sup>78</sup> "The certificate of title, when issued by the secretary showing a lien or encumbrance, shall be adequate notice to the Commonwealth, creditors, and purchasers that a lien against the motor vehicle, trailer, or semi-trailer exists, and failure to transfer possession of the vehicle, trailer, or semi-trailer shall not invalidate said lien or encumbrance." PA., PURDON'S STAT. ANN. (perm. ed. Supp. 1944) §33.

<sup>79</sup> *In re Berlin*, 147 F. (2d) 491 (C. C. A. 3rd, 1945).

<sup>80</sup> *C. I. T. Corp. v. W. J. Crosby & Co.*, 175 Va. 16, 7 S. E. (2d) 107 (1940), noted (1940) 26 VA. L. REV. 1074.

<sup>81</sup> Adelson, *The Mechanics of the Instalment Credit Sale* (1935) 2 LAW AND CONTEMP. PROB. 218, at 243.

vendor's reserved title is regarded as a commonplace. The airplane, too, may present a problem of a similar nature, but this subject will have to be left to the future; certainly it has not been noticed as yet.<sup>82</sup>

#### THE CONDITIONAL SALE AND USURY LAWS

Lately the conditional sale has been considered in the light of usury. Some courts have held that this device cannot fall within the ordinary usury law because technically there is no loan, but rather a sale on deferred payments. Even if the vendor chooses to itemize the price he charges, and therein one finds an item of "handling charges" running up to a rate of twelve percent a year, that cannot be usury unless, indeed, the form of a conditional sale was intended to conceal an actual loan.<sup>83</sup> The same principle, of course, would govern the "hire purchase" plan that prevails in England, and still remains of possible use in Pennsylvania.

But of recent years there has been a statutory tendency to protect the small purchaser. England legislated to this effect by her last great statute prior to the outburst of World War II. Thus her Hire-Purchase Act of 1938 strikes at oppressive bargains in connection with installment sales, and it also requires, incidentally, that a copy of the contract be furnished to the purchaser.<sup>84</sup> Prior to that, however, our states had begun to consider a Retail Installment Sales Act. It has been adopted in several commonwealths, limited to automobiles by one state, and made generally applicable by others. A recent Maryland decision, in applying this statute, also informs us as to the states which have thus lined up so far.<sup>85</sup> The dealer who sells a car in a state of this class must do two things for his own protection. It is not enough that he made a fair bargain and that he filed his contract in public office, but it must also appear that he delivered to the buyer an exact copy of the contract, as signed by the parties, and if he defaults in this respect the purchaser may cancel the agreement and demand a refund of all payments and deposits made on account thereof.<sup>86</sup>

#### CONDITIONAL SALE OF FIXTURE OR ACCESSORY

Speaking of automobiles, I am reminded that the problem of reserving title to an article which is intended to become a part of something else not only appears in connection with real estate, but is also possible in the case of tires for a car. Thus

<sup>82</sup> In its number of March, 1945, the Virginia Law Review has a symposium on "aviation law." (1945) 31 VA. L. REV. 565 *et seq.* No article, however, discusses the registration of titles and liens.

<sup>83</sup> *Hafer v. Spaeth*, 156 P. (2d) 408 (Wash. 1945), citing cases in accord.

<sup>84</sup> 1 & 2 GEO. VI, c. 53. The text of the Act, together with an analysis, is discussed by Littler, *Objects and Scope of Hire-Purchase Act*, 1938, 186 L. T. 239 (1939).

<sup>85</sup> The Maryland statute, enacted in 1941, was preceded by a Research Report which (as of September, 1940) "reviews regulation in other jurisdictions, especially recent legislation, generally similar but differing in details, in Indiana, Wisconsin, Massachusetts, Michigan and England. Indiana, Retail Installment Sales Act, Acts of 1935, ch. 231; Burns, Indiana Statutes Annotated, Title 58, ch. 9, §§58-901 *et seq.*; Wisconsin, Acts of 1935, ch. 474, Wisconsin Statutes (1941) 218.01; Massachusetts St. 1939, c. 509, Annotated Laws of Massachusetts, c. 255, §§11-13H; Michigan Motor Vehicle Retail Instalment Sales Contracts, Act 305, 1939, Michigan Statutes Annotated, §§19.415(1) to 19.415(14)." *Stride v. Martin*, 41 A. (2d) 480, 491 (Md. 1945).

<sup>86</sup> *Stride v. Martin*, *supra* n. 85, holding the Act applicable to a car which the purchaser had delivered as part of the bargain.

the subject of annexation can swim into the ken of the merchant as well as that of the electrician or dealer in plumbers' supplies.

The first situation is well known in the field of mortgage law. Here the Uniform Conditional Sales Act protects a conditional vendor of fixtures if he records his contract in the book of real estate transfers. How far he can be protected is still a question in the case of fixtures that become irretrievably a part of the realty once they are installed;<sup>87</sup> but in any event the vendor who does not record will lose.

But now we should observe that the present Bankruptcy Act has made a distinct change. As the Uniform Act penalized a non-recording vendor only as against purchasers, it followed that creditors could not claim the same benefit, and thus a trustee in bankruptcy could not attack an unrecorded conditional sale of fixtures.<sup>88</sup> But a trustee under the present Bankruptcy Act has the right, as we have seen, to bring within its preference provisions any transaction that remains incomplete for lack of record or otherwise, if a *bona fide* purchaser could have acquired rights in similar circumstances. It follows that the conditional vendor who has failed to record his instrument may lose out if the purchaser goes into bankruptcy, and to that effect is a recent decision of compelling authority.<sup>89</sup>

A more troublesome question is presented when tires are sold under conditional sale, not to a dealer but to the owner of a car or truck for annexation thereto. On its face, the transaction yields to a severe logic that will preserve the conditional vendor's title not only in the face of the vendee's creditors, but also against a previous chattel mortgage that covers the car.<sup>90</sup> But opposed to that theory is an argument that the conditional sale, in pristine form, was adaptable only to articles that were of a durable nature. This rule persists as to things that are acquired for use as distinct from resale;<sup>91</sup> and thus the question is whether a tire is so "durable" that it can be the subject of a conditional sale at all. If not, a transaction of this sort may be valid as a bailment of some sort, but it does not amount to a conditional sale; hence it is not injured by failure to file the agreement as one of conditional sale.<sup>92</sup>

I have not run across any cases more recent than the last two cited, but the reason is obvious, in view of what happened to the tire business after Pearl Harbor. But when the subject becomes fresh again, one might question the wisdom of upholding sub-liens on a thing like an automobile. As the common purchaser is not apt to think of them, and so he can easily be misled by surface appearance, I suggest that the tire, once it is mounted on the wheel of a car, should be regarded as an accession, at least with respect to subsequent transactions that involve the car

<sup>87</sup> See 2 GLENN, MORTGAGES (1943) §§350, 358.

<sup>88</sup> *In re* St. Mark's Hospital of New York City, 59 F. (2d) 1001 (C. C. A. 2d, 1932).

<sup>89</sup> *Empire State Chair Co. v. Beldock*, 140 F. (2d) 587 (C. C. A. 2d, 1944). See Judge Clark's footnote 2.

<sup>90</sup> *Goodrich Silvertown Stores v. F. M. Rugg Motor Sales Co.*, 137 Ohio St. 66, 27 N. E. (2d) 936 (1940), and cases there cited.

<sup>91</sup> See GLENN, *op. cit. supra* n. 2, at §507.

<sup>92</sup> *In re* Tompkins Bus Corp., 22 F. Supp. 332 (E. D. N. Y. 1938).

as it stands. In some of the cases cited,<sup>93</sup> learned judges spoke of the tire as "easily removable." A youthful judge may be of that opinion, and the like notion may appeal to the judge who can afford a chauffeur (if he can get one) but a person like myself would reject the proposition, as a matter of judicial notice, that a puncture or blowout can be healed at the roadside by just anybody. Many people, on the contrary, will not even attempt the task; instead, they will seek the nearest filling station. I submit, therefore, that the rule that sanctions the separate lien on a tire which is mounted on the wheel of a car, is not realistic.

#### CONCLUSION

This paper ends on the homely note that is struck by a tire puncture at the roadside. The peroration is not unsuitable, however, in view of my object that was mentioned at the outset. Mercantile collateral, as a subject for discussion, always presents a view of everyday life. That is the field of the merchant who hopes to conduct an ordinary business with a fair degree of safety, and correspondingly, it is also the field of the banker who finances him. Even in wartime that is so, and our law recognizes the fact.

<sup>93</sup> GLENN, *op. cit. supra* n. 2, at §507.