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LIEN OR PRIORITY UNDER SECTION 10, UNIFORM TRUST RECEIPTS ACT

RICHARD W. DUESENBERG*

I

It is in the context of insolvency that the fitness of any security device must be judged. Even a borrower's dishonesty is not likely to be damaging to a creditor, unless the infidelity is either the cause, consequence or concomitant of financial collapse. If the security is inventory, it is intelligent to devise a method to shift the protection on sale of the chattel security, as sale is the objective of inventory, and the creditor's overriding concern is security up to the moment of payment. Cash is the medium of the inventory creditor's payment, and it is cash that ultimately stands in the place of sold inventory, the cash having been received either directly from the consumer or from another financing agency advancing money to make possible the retail sale. Inasmuch as cash proceeds are easily commingled, tracing is often impossible. Once identity is lost, no substituted property remains to which the secured position of the inventory creditor can be attached. Aside from assets already encumbered, the only other property to which the once secured creditor can look is the general assets of the estate.

The common law demurred to transferring security to general assets, though traceable proceeds were often encumbered. However, the Uniform Trust Receipts Act¹ provided for a "priority," in favor of the entruster, to any proceeds or other value, whether identifiable or not. To the inventory financier whose credit expectations have been disappointed, this right may be important, and the paucity of cases litigated thereon is probably no gauge of its significance.²

Those familiar with secured commercial transactions will know of the difficulty successfully encountered by this statutorily created right in the *Harpeth*³ decision of 1955. The "priority" appeared to conflict with certain provisions of the Federal Bankruptcy Act⁴ declaring invalid all state-created priorities other than an irrelevant priority in favor of landlords. The trust receipt security impressed

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¹ § 10b.

² This comment is not concerned with the entruster's rights in traceable proceeds (UTRA § 10c), or with the effect of UTRA § 9 on the entruster's rights.

³ In re Harpeth Motors, Inc., 135 F. Supp. 863 (M.D. Tenn. 1955).

⁴ 52 Stat. 874 (1938), as amended, 11 U.S.C. § 104 (1952).

against the general assets of the bankrupt trustee passed muster as valid on the grounds of being a lien rather than a priority. Creditors were happy, as were commentators.⁵

Judicial authority became evenly split, however, with the recent case of *In re Crosstown Motors*,⁶ and it is the reasoning of this case which is here compared to *Harpeth*.⁷

Both opinions are thought through in a lawyer-like fashion—logical, consistent, analytical. But they are markedly different in approach, as can be seen from the respective courts' initial remarks on the primary issue, namely the conflict between the Trust Receipts Act and the Bankruptcy Act. The *Crosstown* reasoning begins:

"The Uniform Trust Receipts Act was drafted long prior to 1938. It was adopted by the Illinois legislature in 1935. At that time § 64 of the Bankruptcy Act specifically recognized state-created priorities. Thus the object to be attained by § 10 of the Illinois Trust Receipts Act was to give to the entruster a priority ahead of general creditors upon insolvency of the trustee. Nothing more was necessary. Nothing more was contemplated. The legislative intent was crystal clear."⁸

In contrast the *Harpeth* decision of several years earlier emphasized the purpose of the trust receipt, took not so certain a disposition of the clarity of legislative intent, and put the two together for a protection of the security interest. The interpretation of UTRA Section 10(b) as recorded in *Crosstown* was by the *Harpeth* court regarded as too confining, as ignoring that provision of Section 10 which states that the priority runs to unidentifiable proceeds "to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee." In the words of the court:

"The right to receive the 'value' derived from the sale or disposition of entrusted goods necessarily contemplates payment of such value out of the general assets of the trustee.

⁵ 34 Chi.-Kent L. Rev. 294 (1956), 69 Harv. L. Rev. 1343 (1956).

⁶ 272 F.2d 224 (7th Cir. 1959), cert. den., 363 U.S. 811 (1960), commented on in 35 N.Y.U.L. Rev. 948 (1960).

⁷ A third case on the problem of the Harpeth doctrine was recently in the Fifth Circuit Court of Appeals. The court specifically avoided ruling on the question of priority versus lien, and reversed on the ground that since it appeared that proceeds were received from the out-of-trust sale long before the crucial ten-day period of § 10b, no rights under that section would be available, notwithstanding what might be the court's opinion on whether § 10b created a lien or priority. *English v. Universal CIT Corp.*, 278 F.2d 750 (5th Cir. 1960).

⁸ *In re Crosstown Motors, Inc.*, supra note 6, at 226.

It thus constitutes a charge against the trustee's property and being, by the express terms of the statute, valid and enforceable against and having priority over both general and subsequent lien creditors as well as subsequent purchasers other than purchasers in the ordinary course of trade, it is practically and legally indistinguishable from a technical lien."⁹

Basic to the *Crosstown* decision is the accuracy of its evaluation of legislative intent, for it is this evaluation which clothes the word "priority" with a meaning necessary to the logic of the court's reasoning. One can hardly quarrel with the court's observation that the UTRA preceded the 1938 amendment of the Bankruptcy Act, which before then specifically recognized state-created priorities, and that "priority," not "lien," was the word used in the UTRA. That is naked fact. What is vulnerable is its giving to "priority" the status of a term of art, the consequence of which is to bring it within the condemnation of Section 64 of the Bankruptcy Act. Neither the word "lien" nor "priority" is so well defined that use of either ought alone to be operative to fit it into the well defined bankruptcy consequences which follow.¹⁰ Furthermore, the emphasis which the *Crosstown* court gave to the chronology of the pertinent legislative material weakens its persuasiveness for a similar case in a jurisdiction where adoption of the UTRA came after the 1938 amendment to the Bankruptcy Act. There are a good number of such states, all of which have retained the word "priority" in Section 10b, but obviously not for the reason assigned by the *Crosstown* decision.

It is, of course, true that *Crosstown* dealt with a jurisdiction in which the priority of statutory adoption put the Trust Receipts Act first, and some may on that account deem the preceding remark irrelevant. Yet, there is no absolutely compelling reason to agree with the court's argument that because state-created priorities were pro-

⁹ In re Harpeth Motors, Inc., supra note 3, at 868.

¹⁰ "Considerable confusion exists in bankruptcy administration because of a failure to distinguish clearly between a valid lien and a right to prior payment from unencumbered assets. The former entails a right to enforcement independent of bankruptcy; it may be created by agreement or statute, or by judgment of a court. The latter is a narrow right to payment at a certain relative point in the distribution of a bankrupt debtor's property, naked of any power of levy or attachment; it is a creature of the Bankruptcy Act. Quite different consequences in bankruptcy are appended to each. A valid lien, subject to the qualifications and restrictions previously stated, is a charge against assets which must be met before distribution to unsecured creditors begins. A right to priority accords an unsecured claim a particular precedence over other claims in the distribution of the bankrupt's remaining assets." 3 Collier, Bankruptcy ¶ 64.02, at 2055 (14th ed. 1941).

tected in bankruptcy administration at the time the UTRA was enacted in Illinois, it necessarily followed that "priority," in the bankruptcy sense, and nothing more, was intended.¹¹ Nor is it true, as one writer has suggested,¹² that creation of a lien makes superfluous provision for a priority, for entitling a debt claim to priority could become valuable if for some reason a lien securing that debt failed to arise for want of perfecting a requisite.¹³ It could be that is what the drafters of the UTRA (and legislatures adopting it) had in mind. That may never be known; but bear in mind that the overriding terminology of the UTRA, in referring to the device it codified and embellished for certain types of creditors, is not "priority", but "security interest." This is the term used in Section 10, which adds that the entruster's rights to unidentifiable proceeds shall be "to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee." There is no question, as the *Harpeth* case pointed out, that the right in the entrusted goods at the time of their sale is a lien,¹⁴ and when Section 10b adds the clause containing the word "priority," it uses the conjunctive "and".

There is much in the UTRA which is unclear, not least of which is Section 10. The comments of the uniform commissioners are not of much help, and a search for legislative intent is like pursuing a will-o'-the-wisp. Had a case on these facts arisen prior to 1938, something authoritative on what the courts would have done with this troublesome word might have been available; but there was no such case. In any event, it is hard to go along with the *Crosstown* view that "the reason for the absence of the word 'lien' and the use of the word 'priority' is pellucid,"¹⁵ or with the view that if the word "priority" were a deliberate artistic choice, it necessarily ruled out the concurrent existence of a lien.¹⁶

The lack of coordination between existing commercial statutes, in this case between the Bankruptcy Act and the UTRA, presents problems which for solution merit more than a chronological alignment to point the way to a proper statutory interpretation. Subsequent legislation is a legitimate consideration for a potential adjustment of

¹¹ Comment, 35 N.Y.U.L. Rev. 948, 951 (1960).

¹² *Ibid.*

¹³ 3 Collier, op. cit. supra note 10, ¶ 64.02 at 2056.

¹⁴ Other cases also have held the entruster to have a lien on identifiable proceeds, e.g., *Universal Credit Co. v. Citizens State Bank*, 224 Ind. 1, 64 N.E.2d 28 (1945).

¹⁵ *In re Crosstown Motors, Inc.*, supra note 6, at 227.

¹⁶ In this connection, it might be noted that the reasons for establishing a lien before the 1938 Bankruptcy Act amendment would have been less compelling, especially if assets enough to satisfy the priority were available from the general estate.

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former rules, if such shifting can be made without doing violence to the words of a given statute. The amendment to Section 64 of the Bankruptcy Act, which gave rise to the problem of these cases, was designed primarily to protect those general creditors who were stripped of their participation in an insolvent estate for being too far down the line of priorities set forth under the many state insolvency laws. For while application of state insolvency laws was deemed suspended, their priorities continued to be recognized under the Bankruptcy Act, Section 64(b).¹⁷ This was true of an assignment or state receivership and of statutes concerning certain classes of debts.¹⁸ Innumerable statutes of these types not only operated to cut off some creditors entirely, but also made for highly disparate bankruptcy administrations among the states.

Neither before nor after the 1938 amendment were liens affected by Section 64. To a statutory lien, Section 67 of the Act applies. A chattel mortgagee or conditional vendor, so long as he was not amiss as to Section 60, had first to be satisfied before payment of administration costs or other creditors was made. As between these two categories, the trust receipt fits more the former. For a trust receipt is a chattel security built on a common law history of its own, and given an expanded vitality under a statute which, with all its imperfections, was designed to assure inventory financiers maximum security for the risks assumed in their commercially important function. The central inquiry ought therefore to be what substance did the framers of the UTRA intend to give to this "security interest" which the act created, and to fit this into the dichotomous terminology of the Bankruptcy Act as it reads today, not as it read before 1938. Commercial lawyers are familiar with this interpretive technique, for again and again it has been a necessary means by which to reconcile the welter of commercial legislation which is at once confusing, conflicting, and overlapping.¹⁹ What the court in *Crosstown* called an obvious historical statutory interpretation, and what at least one commentator has said is required from a "common sense" interpretation,²⁰ becomes less obvious and perhaps somewhat senseless if it is clear that the UTRA was intended to give to creditors a security interest designed to be worthy of the name, designed to hold up at the most significant time, in bankruptcy. In this context, the view of the *Harpeth* opinion

¹⁷ In re Western Implement Co., 166 Fed. 576 (D. Minn. 1909).

¹⁸ See Comment, Effect of Priorities Allowed by State Statutes in Bankruptcy Proceedings, 42 Yale L.J. 412 (1933).

¹⁹ Coin Machine Accept Corp. v. O'Donnell, 192 F.2d 773 (4th Cir. 1951) (a case coordinating the UTRA with § 60a(2) of the Bankruptcy Act) is an example.

²⁰ Comment, 35 N.Y.U.L. Rev. 948, 951 (1960).

that the right created by Section 10b of the UTRA is the "legal and practical equivalent to a lien" is meaningful.

II

Resolving the lien versus priority problem of Section 10b in favor of a security interest disposes of one problem as it advances to others. In order for a creditor to claim the rights set forth in Section 10b, one or a combination of the conditions of that section must take place. Within ten days of the receipt of proceeds of the out-of-trust sale, there must follow either a judicial insolvency proceeding, appointment of a receiver, filing of a petition in bankruptcy, or a demand made upon the trustee for an accounting. Three of these conditions could take place before four months from the filing of a petition in bankruptcy; the fourth always will be within the four-month preference period of Section 60 of the Bankruptcy Act.²¹ Two questions arise: first, if the events of the ten-day period occur within four months of a filing of a petition in bankruptcy, is there a preference, and second, if there is no preference; whether because of the occurrence of the conditions before the four-month period or for some other reason, would the security established under UTRA Section 10b be jeopardized because of the rule of *Constance v. Harvey*?²²

Here again there is the problem of coordinating the UTRA and the Bankruptcy Act. By Section 60 of the latter act, a transfer made on a given date will be deemed to have taken place on some other date, if such other date is the time at which it has been so far perfected that it would have been effective against a creditor acquiring a lien by equitable or legal proceedings on a simple contract.²³ It should be beyond argument that from the time of the trust receipt transaction until the date of the out-of-trust sale, the entruster has no interest in the other assets of the trustee. He has affixed his security interest to the chattel subject to the trust receipt contract, and all other assets of the trustee not already encumbered under some other security agreement may become security for another's claim by contract or by legal or equitable proceedings. That being the case, it follows that if receipt of unidentifiable proceeds from the out-of-trust sale took place within four months of a filing of a petition in bankruptcy against

²¹ A preference set forth in § 60a(1) of the Bankruptcy Act is a transfer of the bankrupt's property made or suffered by the bankrupt while insolvent and within four months of the filing of the petition in bankruptcy, to a creditor, for or on account of an antecedent debt.

²² 215 F.2d 571 (2nd Cir. 1954), cert. den., 348 U.S. 913 (1954).

²³ Bankruptcy Act § 60a(2), 30 Stat. 562 (1898), as amended, 11 U.S.C. § 96a(2) (1952).

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the trustee, shifting the security to general assets would, other things being equal, be preferential.

Notice that this result is not made to depend on a reading of Section 10b which views the events enumerated therein as conditions precedent to the rights given to the entruster. It considers the out-of-trust sale with receipt of proceeds as a condition to rights arising in favor of the entruster against the general assets of the estate, but not the requirement of a demand, assignment, or judicial insolvency proceeding. This leaves open the admittedly microscopic possibility that an entruster would be protected where acquisition of receipts preceded the four-month period before the date of filing a petition in bankruptcy, but the demand for an accounting occurred within it. Protection of the entruster in this latter instance might be achieved by considering the right of Section 10b as a continuing right, rather than one made to depend on the occurrence of one of the conditions stipulated in that section. This might be splitting hairs, and in any event it is open to question. For if the general assets of the trustee may be encumbered before the out-of-trust sale, why can they not be after the sale? Perhaps they can be; but if so, it makes no sense to limit the period for encumbering the assets to the time between the getting of receipts and the date on which the demand or other condition of UTRA Section 10b occurs.²⁴ There is nothing public about the demand required by Section 10b, and therefore, there is nothing about such an act which conceivably can be regarded as putting a subsequent lien creditor on notice of the Section 10b claim of an entruster. The only thing of public record is the notice filed at some anterior time, and it might be argued that this puts a subsequent attaching creditor on notice that if the subject of a trust receipt transaction has been sold, the security will have transferred automatically to the general assets for at least a ten-day period. This is a right, it can be argued, which the UTRA gave, and which the parties to the trust receipt transaction contemplated, and about which all others dealing with another engaged as a trustee in trust receipt financing may be said to be aware.²⁵

Search for authority on the nature of the Section 10b right, that is, whether it might be preferential or not, has been without result.

²⁴ Comment, 35 N.Y.U.L. Rev. 948, 954 (1960).

²⁵ A similar approach of "continuous" or "automatic" security to defeat a subsequent creditor even where the out-of-trust sale takes place within the four-month period should be rejected. While it is true that the trust receipt notice has been on record, it is also true that while the entrusted chattel remains unsold, the entruster looks primarily to it for security, and the UTRA gives no rights to the general assets during this time.

The *Harpeth* case referred to the right of Section 10b as "continuing," but the case did not involve any problem of a preference. Any analogy to an entruster's rights in identifiable proceeds (UTRA Section 10c) is, as with the case of the floating charge of a chattel mortgage or factor's lien, imperfect because it is substantively distinguishable. By viewing the after-acquired property clause as an effective present transfer of a future interest, the subsequently acquired property is received encumbered, so that no time exists in which a lien creditor could intervene.²⁶ There the security interest may be deemed perfected at the time of entering and promptly filing or recording the contract, which describes the type of encumbered property with the precision called for by the pertinent statute. The UTRA is not intended to create a floating security in the same sense as does a factor's lien statute, and it would seem to avail the entruster of nought to argue in terms of an inchoate or equitable lien, for another provision of the Bankruptcy Act addresses itself as follows:²⁷

"The recognition of equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this section."

Characterization as preferential where receipt of proceeds is within four months of a filing seems highly probable, if not inevitable.

Destruction of the entruster's lien security under the preference section of the bankruptcy law does not mean that the effort to get his security denominated a lien is much ado about nothing. For the preference problem may be avoided where the bankruptcy takes place more than four months after the demand for an accounting is made. In a fact pattern free from the issue of a preference, two additional problems emerge: first, *Constance v. Harvey*,²⁸ and second, the question of whether due diligence must follow demand.

In some states, the *Constance v. Harvey* doctrine might be a problem.²⁹ Not all jurisdictions follow the rule that a trustee in bankruptcy, through his status as an ideal hypothetical creditor, has the rights of a creditor, though nonexistent, who intervened between

²⁶ This is well presented in Weeks, *Floating Liens In Inventory Financing*, 1956 Ill. L. Forum 557, 576-78 (1956).

²⁷ Bankruptcy Act § 60a(6).

²⁸ *Supra* note 21.

²⁹ The rule of *Constance v. Harvey* has been roundly criticized, e.g., Weintraub, *The Strong Arm Strikes The Belated Chattel Mortgage*, 25 Fordham L. Rev. 261 (1956); *In re Gondola Assoc.*, 132 F. Supp. 205 (E.D. N.Y. 1955); and rejected, *In re Alikasovich*, 275 F.2d 454 (6th Cir. 1960). For a favorable analysis, see Kleinberg and Masterson, *Constance v. Harvey-A Defense*, 62 Comm. L.J. 124 (1957).

the date of entering a chattel mortgage and its delayed filing. Since the rule grew out of a delayed filing situation in a jurisdiction where delay made a chattel mortgage invalid as to all existing creditors or creditors becoming such before filing, it is generally thought to apply to trust receipts only where the filing of the notice of trust receipt financing is subsequent to the filing of the petition in bankruptcy,³⁰ in which case the security of the entruster is destroyed independent of *Constance v. Harvey*. It is interesting to conjecture as to how this doctrine might be applied to the security asserted by the entruster not against the entrusted chattel or traceable proceeds, but as to unidentifiable assets. In this context it is useful to talk in terms of Section 10b being a continuing or automatic interest subject to extinguishment by failure of one of the conditions of Section 10b. Since the UTRA does not say that the entruster's Section 10b claim against general assets is invalid as against simple contract creditors becoming such before the occurrence of one of its conditions,³¹ and since the application of the *Constance v. Harvey* doctrine depended on the existence of the rule that a chattel mortgage was invalid as to all creditors existing or becoming such before a delayed recordation, the conclusion should be that the doctrine is not applicable in the context of UTRA Section 10b.

Following up the demand for an accounting with a diligent pursuit of the remedies available to the entruster is another matter. Should a trust receipt creditor, who knows that entrusted chattels have been sold, be permitted to make demand for an accounting, do nothing further, and then be allowed to assert a security interest in a bankruptcy proceeding which comes up four or more months thereafter? Nothing in the UTRA conditions the entruster's lien, either on identifiable or unidentifiable proceeds, on any action taken subsequent to a failure of the trustee to comply with the demand. Nor are there cases which have considered this point with regard to trust receipts, though conditional vendors have been permitted to enforce their security interest in spite of an apathy in enforcement.³² There is, however, an argument for dissolving the entruster's security in unidentifiable proceeds if there is not a prompt implementation of the

³⁰ Marsh, The "Strong Arm Clause" Re-Evaluated, 43 Calif. L. Rev. 65, 70 (1955).

³¹ Also, as to the entrusted chattel, only the creditor who levies attachment or execution prior to actual filing can defeat the security, regardless of the delay in filing. UTRA §§ 8(1) and (2).

³² Mendelsohn v. Horan, 349 Ill. App. 91, 110 N.E.2d 75 (1952). Contra, Haines v. Doss, 269 Ill. App. 179 (1933). Where a specific identifiable chattel is the security, the problem is appreciably different.

demand.³³ The underlying principle of *Benedict v. Ratner*³⁴ is extant, though the precise holding of that decision has been abrogated in many states. One comment has been that "[s]ince a creditor knows that cash proceeds are easily dissipated in the course of business, the entruster who permits a dealer to continue business without promptly enforcing his lien depends, just as any unsecured creditor, on the dealer's honesty and continued solvency rather than on his collateral."³⁵ Against this, it may be argued that bringing suit for the proceeds may precipitate the final collapse which everyone hoped to avoid.³⁶ The best judgment may be to string along with the debtor's money headaches, which would not be possible if the passage of time in itself should be deemed to dissolve the lien.

If inaction by the entruster for a period substantially beyond the ten-day limit of Section 10b should impair the lien, it means that almost all cases of a Section 10b claim will fail, if for no other reason, either for want of diligence or as constituting a preference. The conclusion of these speculations is that the priority or lien question of Section 10b is only the beginning of the entruster's trouble, and that very likely there is no way of giving to the dealer's most significant creditor the security he ought to have short of an amendment to the UTRA, the Bankruptcy Act, or both.³⁷

³³ The question obviously does not arise where the occurring event of § 10b is bankruptcy.

³⁴ 268 U.S. 353 (1925). This is the case, it will be recalled, which condemned an accounts receivable security which permitted the assignor to use the proceeds in his discretion. Seeming ownership because of possession retained, or the reservation of dominion inconsistent with an attempted effective disposition of title or creation of a lien, have often resulted in the imputation of fraud and the resultant invalidation of the security. This as a problem should cease under the UCC, since the Code expressly rejects the *Benedict v. Ratner* rule. UCC § 9-205.

³⁵ Note, 66 Yale L.J. 922, 933 (1957).

³⁶ The strength of this objection fades when it is recognized that most of these cases will probably arise where bankruptcy is imminent and inevitable.

³⁷ Still another argument directed at the vitality of a UTRA § 10b claim in bankruptcy is that it comes within the provisions of § 67 of the Bankruptcy Act, as a statutory lien. All three cases, *supra* notes 3, 6 and 7, involving the Harpeth problem made reference to § 67, but only Harpeth specifically rejected the application of UTRA § 10b to the Bankruptcy Act rules on statutory liens. The unreported lower court decision in the Crosstown case stated by way of dictum that the lien of UTRA § 10b is statutory and therefore invalid under Bankruptcy Act § 67. In so stating, the court overlooked the fact that a reduction of the lien to possession, even if done within the four months of filing a petition in bankruptcy, takes even a statutory lien act out of § 67. 2 Bankr. L. Rep. ¶ 59479 (N.D. Ill. 1959), 33 Ref. J. 58 (1959). See also, *White v. Kiefer*, 127 F.2d 119 (8th Cir. 1942). The generally approved view that the right under UTRA § 10b is not a statutory lien is well expressed in the following: "It is suggested, however, that the lien created or recognized by statute within the meaning of § 67 arises primarily from an economic relationship defined by the legislature and not from the terms of a contract providing for security. . . . By this test the security

III

Whether the creditor is appreciably better off under the sounder statutory basis of the Uniform Commercial Code is a bit problematical. There is no sure basis for less pessimism about the fate in bankruptcy of the Code-created right analogous to that of UTRA Section 10b. Benefit of the *Harpeth* decision and its highlighting the problem of priority or lien was not available for the 1952 draft, but steps were taken to shift from the terminology of "priority" to "perfected security interest" in the 1957 revision of the Code.³⁸ It provides that:

The security interest in proceeds is a continuously perfected interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

- (a) a filed financing statement covering the original collateral also covers proceeds; or
- (b) the security interest in the proceeds is perfected before the expiration of the ten day period.

With regard to non-identifiable cash proceeds, the secured party's continuing security is in the debtor's cash and bank accounts in an amount equal to the cash proceeds received and commingled or deposited within ten days before the institution of insolvency proceedings, less the amount of cash proceeds paid by the debtor during that ten-day period.³⁹

While the Code purports to elevate the interest to that of a continuing perfected security, it is not clear that such results will follow, for though state law defines perfection,⁴⁰ irreconcilable conflicts must be resolved in favor of the Bankruptcy Act.⁴¹ For instance, would the argument of an antecedent debt, in the past successfully used against the after-acquired property clause, be available in a bankruptcy administration to defeat the asserted security in the debtor's cash and bank accounts? Though the Code designation of the Section 9-306(4) right as continuous might be deemed arbitrary, the better view would be that since the claim to the cash funds and

of a trust receipt, a mortgage on shifting stock of merchandise, a factor's lien, or a secured transaction within Article 9 of the Uniform Commercial Code is contractual rather than statutory. . . ." 4 Collier, op. cit. supra note 10, ¶ 67.20 at 184.

³⁸ UCC §§ 9-306(3) (Final Draft 1952), 9-306(3) (Supp. No. 1, 1955), 9-306(3) (Official Text, 1958).

³⁹ UCC § 9-306(4)(d)(ii). This is a change from existing law.

⁴⁰ *Corn Exchange Nat'l Bank v. Klauder*, 318 U.S. 434 (1943).

⁴¹ *Moore v. Bay*, 284 U.S. 4 (1931).

bank accounts is limited to the value of the cash received it is substitutionary, and not a transfer for an antecedent debt, notwithstanding that the interest provided for is intended to attach to assets, whether or not they were themselves proceeds of the disposed collateral.⁴²

Still another potential roadblock to the Code-created right to unidentifiable cash proceeds is its apparent hostility to the Bankruptcy Act's condemnation of equitable liens.⁴³ Here, whether or not a present consideration is deemed to have been given, the transfer may fail if all available means to protect the security interest against all third parties, buyers in the ordinary course excluded, have not been taken, and the interest is "only an equitable lien."⁴⁴ Except for the Bankruptcy Act's failure to define "only an equitable lien" and the Code's characterization of the Section 9-306(4) interest as "perfected", reconciliation of the two statutes would be troublesome, particularly in view of the right of all recipients for value of the encumbered funds to take free of the secured party's claim.⁴⁵ Especially would this be true if the group of takers here protected is considered as greater than the category "buyers in the ordinary course of trade",⁴⁶ notwithstanding the Code comment that the protection runs only to "payments and transfers in ordinary course."⁴⁷ That the drafters of the Code did not regard Section 9-306 as creating an equitable lien in the bankruptcy sense is clearer than whether or not this will be given judicial implementation.⁴⁸

⁴² Or, it might be argued that the release of the chattel security through the sale constitutes the giving of new value. Cf. UCC § 9-108. Though this is not the approach of UCC § 9-306, it would seem more easily accepted than under § 9-108 in reference to after acquired property clauses, where often the subsequently acquired goods greatly exceed the value of the released collateral, thus raising the possibility of a voidable preference at least to the extent of the value differential.

⁴³ See text at note 27, *supra*.

⁴⁴ Bankruptcy Act § 60a(6)(C).

⁴⁵ Comment (c) to UCC § 9-306 reads: "Where cash proceeds are covered into the debtor's checking account and paid out in the operation of the debtor's business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds . . ."

⁴⁶ Bankruptcy Act § 60(a)(6)(A).

⁴⁷ UCC § 9-306 comment (c).

⁴⁸ Any argument that the potential existence of a banker's lien by way of set-off under UCC § 9-306 impairing the validity of the creditor's claim in bankruptcy for want of perfection should be rejected. Perfection for purposes of ascertaining the time of transfer is tested by a successful intervention of a lien "obtainable by legal or equitable proceedings on a simple contract." The banker's lien is essentially statutory, not primarily the product of contract. See Comment, 49 Mich. L. Rev. 243 (1950).