THE SECURED TRANSACTIONS ARTICLE OF THE COMMERCIAL CODE AND SECTION 60 OF THE BANKRUPTCY ACT

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The secured creditor enjoys several advantages over his unsecured brethren. If the debtor defaults on his obligation, the secured creditor is sometimes empowered to take matters in his own hands, sell the property covered by his security, and reimburse himself out of the proceeds without the time and expense of the lawsuit to which the unsecured creditor must resort. If the debtor disposes of all of his property, the secured creditor's claim, if properly perfected, follows the property into the hands of the transferee and may be satisfied therefrom without the necessity of litigation to establish that the transfer was a fraudulent conveyance. If unsecured creditors go after property of the debtor to satisfy their claims, the secured creditor's interest in the property covered by his security, if properly perfected, is immune from their levies. And if the debtor goes into bankruptcy, the secured creditor has first claim on the proceeds of the property covered by his security, after which he shares pro rata on any unpaid balance with the full claims of unsecured creditors in the remainder of the debtor's assets.

But, while the secured creditor realizes one of his greatest advantages in bankruptcy proceedings, he also faces greater hazards in bankruptcy. The bankruptcy trustee is empowered not only to set aside security transactions which other creditors could have avoided under the doctrine of fraudulent conveyance or otherwise at state law,[1] but also to avoid certain security transactions under Section 60 of the Bankruptcy Act as "preferences"—a risk to which the secured transaction is not subject outside of bankruptcy save under statutes of a few states. This risk created by Section 60 is the Bankruptcy Act's chief hazard to secured creditors and, for the past five years, has been the subject of their excruciating concern. That concern has manifested itself in an energetic campaign which culminated early this year in an amendment adding seven new paragraphs to Section 60. Although critics of earlier and simpler versions of this amendment labeled them unintelligible monstrosities which "would at once have astonished and delighted Gilbert and Sullivan,"[2] one of the amendment's leading proponents replies that "to anyone who reads the congressional committee reports and the minutes of the hearings, its purposes will be

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[1] Bankruptcy Act §70e. Section 67d also provides a federal equivalent of the Uniform Fraudulent Conveyance Act which the trustee may invoke without recourse to state law.

[2] Moore and Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 YALE L. J. 683, 690 (1948).

clear and its application free from doubt."[3] On another occasion, however, this same proponent confessed that "no lawyer who has not been through the turmoil of the last five years would be able to interpret [it]. One has to be able to understand the background to know what [it] contains."[4] Let us begin our attempt to understand the amendment, therefore, with a look at both the background and the legislative history.

The notion behind Section 60 is extremely simple and has remained fundamentally unchanged since the Bankruptcy Act was enacted in 1898. It is that an insolvent debtor contemplating bankruptcy should not be able to defeat the bankruptcy policy of equality in distribution by transferring his property to favored creditors shortly before the bankruptcy petition is filed. Accordingly, Section 60 has provided since 1898 that where an insolvent debtor at any time within four months of the filing of the bankruptcy petition transfers property in payment of or as security for an antecedent debt to a creditor who has reason to believe the debtor insolvent, and the effect of the transfer is to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class, the bankruptcy trustee may avoid the transfer.[5]

Since 1898, also, a preferential transfer has been, under Section 3 of the Bankruptcy Act, an act of bankruptcy which would support an involuntary petition filed within four months of the time of the transfer. And to preclude the possibility of preferential transfers being concealed from other creditors until the time for filing a petition had expired, Section 3b of the Act of 1898 provided that the four-month period should not begin to run until the transfer was recorded, if by law recording was required or permitted, or if not, until the transferee took possession of the property, unless the petitioning creditors had notice of the transfer.[6] But Section 60 had no similar "perfection clause." Hence, while an undisclosed preferential transfer would support a petition filed more than four months after it was made, the trustee could not set it aside in the bankruptcy proceeding.[7] There remained, therefore, a strong incentive for concealment.

In 1903 Congress acted to remove this incentive by adding a perfection clause to the definition of a preference in Section 60a, providing that the four month period in that section should not begin to run until the transfer was recorded, "if by law

[3] Kupfer, *The Recent Amendment of Section 60a of the Bankruptcy Act,* 24 J. N. A. REF. BANKR. 86, 87 (1950).

[4] Testimony of Milton P. Kupfer, *Hearings before the Subcommittee of the House Committee on the Judiciary on H. R. 272 and H. R. 6291,* 81st Cong., 1st Sess. 12 (1949).

[5] In its present form, §60 provides: "(a). A preference is a transfer . . . 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 . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. . . . (b). Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby . . . has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."

[6] 39 STAT. 546-547 (1898), as amended, 11 U. S. C. §21(b) (1946).

[7] Humphrey v. Tatman, 198 U. S. 91 (1905); Rogers v. Page, 140 Fed. 596 (6th Cir. 1905).

such recording is required."[8] But a number of courts concluded that recording was not "required" as against the bankruptcy trustee, who represented only unsecured creditors, where state recording acts rendered unrecorded transfers invalid only as against lien creditors and bona fide purchasers.[9] In 1910 a perfection clause which also applied only where recording was by law "required" was added to the specification of the trustee's invalidating power in Section 60b, and there was also added to Section 47(2) a "strong-arm" clause [now in Section 70c] which gave the bankruptcy trustee the status of a lien creditor as to all property in custody of the bankruptcy court.[10] But the trustee acquired the status of a lien creditor only as of the time the petition was filed, so that where a state recording act protected only lien creditors and/or purchasers who became such before recording, the "pocket lien" was still good against the trustee if it was recorded at any time prior to the filing of the petition.[11] A 1926 amendment which made the perfection clause in Section 60a applicable where recording was "required or permitted" but which left the clause in Section 60b to apply only where recording was "required"[12] was construed by some courts so as "not in any way [to] change the rule with reference to preferences that were voidable."[13]

In addition to their failure to reach all unrecorded transfers covered by state recording laws, the perfection clauses in Section 60 also failed to reach other types of undisclosed security devices for which no recording was prescribed. These were so-called "equitable liens" under which the debtor remained in possession of property which he agreed should stand charged to secure a creditor's claim, and which ripened into "legal liens" which "related back" to the date of the original agreement when the creditor finally took possession. By waiting more than four months to take possession, the creditor could retain his lien against the bankruptcy trustee although he had not asserted it until immediately before bankruptcy.[14]

The Chandler Act's extensive revision of the Bankruptcy Act in 1938 included a new perfection clause for Section 60 (incorporated also in Section 3b), drafted by

[8] 32 STAT. 799 (1903), as amended, 52 STAT. 869 (1938), 11 U. S. C. §96 (1946).

[9] *In re* Hunt, 139 Fed. 283 (N. D. N. Y. 1905); Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396 (5th Cir. 1905); *In re* McIntosh, 150 Fed. 546 (9th Cir. 1907), *cert. denied*, 207 U. S. 592 (1907); *In re* Boyd, 213 Fed. 774 (2d Cir. 1914), *cert. dismissed*, 241 U. S. 689 (1916).

[10] 36 STAT. 840, 842 (1910), as amended, 11 U. S. C. §§75, 96 (1946).

[11] Bailey v. Baker Ice Machine Co., 239 U. S. 268 (1915); Carey v. Donohue, 240 U. S. 430 (1916); Martin v. Commercial Nat. Bank, 245 U. S. 513 (1918).

[12] 44 STAT. 666 (1926), as amended, 11 U. S. C. §96 (1946).

[13] First National Bank v. Live Stock National Bank, 31 F. 2d 416 (8th Cir. 1929); *In re* Cunningham, 64 F. 2d 296 (4th Cir. 1933); Hirshfeld v. Nogle, 5 F. Supp. 234 (E. D. Ill. 1933), and cases cited.

[14] See Thompson v. Fairbanks, 196 U. S. 516 (1905); Sexton v. Kessler, 225 U. S. 90 (1912). Shortly after the 1926 amendment to §60, Professor James A. McLaughlin published an article pointing to the inadequacies of §60 and proposing an amendment calculated to eliminate the problem of determining when recording was "required" and to strike down the "equitable lien" which, "[a]s applied to some bankruptcy cases ... seems as well named as the Holy Roman Empire, for it is neither equitable nor a lien." McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 341, 377-391 (1927).

Profesor McLaughlin of Harvard and designed to overcome the shortcomings of previous perfection clauses. This one-sentence clause read as follows:

> 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 . . . it shall be deemed to have been made immediately before bankruptcy.[15]

The National Bankruptcy Conference, under whose auspices the Chandler Bill was drafted, advised Congress that the perfection test had been "restated . . . in clear, direct, and understandable language" and that "it includes a failure to record and any other ground which could be asserted by a bona fide purchaser or a creditor of the transferor, as against the transferee. . . . The purpose of the test is to strike down secret transfers, and thus the transfer is to be deemed made when it becomes known and not when it was actually made."[16] Professor McLaughlin told a House Committee that under the new perfection clause "a transfer is not regarded made until it is so far perfected as to be good as against a bona fide purchaser."[17]

The meaning of the new perfection clause came before the Supreme Court in 1943 in the *Klauder* case.[18] That case arose in Pennsylvania and involved loans made to a debtor and secured by contemporaneous assignments of accounts receivable. At common law, the effect of such assignments as against a subsequent assignee of the same accounts was governed by one of three rules applicable to assignments of contract rights generally: (1) The "English rule," whereby a subsequent assignee who first notified the account obligor of his assignment would prevail over the prior assignee.[19] (2) The "Massachusetts" or "four horsemen" rule, embodied in the *Restatement of Contracts,* whereby the first assignee prevails unless a subsequent assignee is first to obtain a judgment on the account, or payment of it, or a novation with the obligor, or possession of a document whose surrender is required to enforce the obligation.[20] (3) The "New York rule," whereby the first assignee, being prior in time, is also "prior in right" regardless of his own inaction or of any action taken by a subsequent assignee.[21] At the time *Klauder* arose, Pennsylvania followed the

[15] 52 STAT. 869-870 (1938), as amended, 11 U. S. C. §96a (1946).

[16] ANALYSIS OF H. R. 12889, HOUSE JUDICIARY COMMITTEE PRINT, 74th Cong., 2d Sess. 188 (1936). The Chandler Bill died in Committee in the 74th Congress and was reintroduced as H. R. 6439, 75th Cong., 1st Sess. (1937) and, in revised form but with no change in §60, as H. R. 8046, 75th Cong., 1st Sess. (1937), in which form it was finally passed in 1938.

[17] *Hearings before the House Judiciary Committee on H. R. 6439 and H. R. 8046,* 75th Cong., 1st Sess. 123 (1937). See also McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act,* 4 U. OF CHI. L. REV. 369, 392-394 (1937).

[18] Corn Exchange National Bank v. Klauder, 318 U. S. 434 (1943).

[19] Dearle v. Hall, 3 Russ. 1, 38 Eng. Rep. 475 (Ch. 1828).

[20] RESTATEMENT, CONTRACTS §173 (1932).

[21] Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895); Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 387 (1901); Superior Brassiere Co. v. Zimetbaum, 214 App. Div. 525, 208 N. Y. Supp. 944 (1st Dep't 1925); State Factors Corp. v. Sales Factors Corp., 257 App. Div. 101, 12 N. Y. S. 2d 12 (1st Dep't 1939).

"English rule" and the assignees in *Klauder* had not given notice of their assignments to the account obligors.

Since the bankruptcy petition in *Klauder* was filed three months after the assignments were made, it was not necessary to resort to the perfection clause to bring the transactions within the four-month period of Section 60. But there was another problem. Transfers given to secure contemporaneous advances—as were the assignments in *Klauder*—are not within Section 60, which applies only to transfers to creditors "for or on account of an antecedent debt."[22] It was the bankruptcy trustee's contention, however, that since under Pennsylvania law these assignments were never "so far perfected that no bona fide purchaser" (*i.e.*, a hypothetical subsequent assignee who first gave notice) could thereafter have acquired rights superior to the assignees, they must under the perfection clause "be deemed to have been made immediately before bankruptcy." So treated, they were made subsequent to the time of the loans, and became transfers "on account of an antecedent debt." The Supreme Court accepted this contention as a correct application not only of "a literal reading of the Act," but also of a reading of the Act in the light of a history which revealed that "for thirty-five years Congress has consistently reached out to strike down secret transfers, and the courts have with equal consistency found its efforts faulty or insufficient to that end."

Shortly after *Klauder* was decided, a District Court in the *Vardaman* case[23] reached the same result in dealing with an assignment of accounts receivable under the "Massachusetts rule," on the theory that a hypothetical subsequent assignee could prevail over the first assignee by taking one of the four steps contemplated by that rule, although there was nothing the first assignee could do to perfect his assignment against such an eventuality. Later, the Third Circuit in the similar case of *Rosen*[24] rejected this interpretation of the perfection clause of Section 60 because "the favored position acquired by the subsequent assignee [under the "Massachusetts rule"] . . . comes not from his status as a bona fide purchaser, but from his activities following his belated assignment."

The decision in *Klauder*, at least, was not surprising. Although the 1903 perfection clause in Section 60 provided only that the four month period should be computed from the date of perfection, bankruptcy trustees had argued under that clause that a transfer for a contemporaneous loan, where recording was required, was converted into a transfer for an antecedent debt by delay in recording, and in at least one instance a bankruptcy court had agreed.[25] The *Klauder* interpretation of the Chandler Act's express statement that the transfer should be "deemed to have been

[22] See note 5 *supra*.

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

[24] *In re* Rosen, 157 F. 2d 997 (3d Cir. 1946), *cert. denied*, 330 U. S. 835 (1947).

[25] *In re* Mission Fixture and Mantel Co., 180 Fed. 263 (W. D. Wash. 1910). *Contra: In re* Jackson Brick & Tile Co., 189 Fed. 636 (D. Mo. 1911), *rev'd on other grounds*, 195 Fed. 188 (8th Cir. 1912); Claridge v. Evans, 137 Wis. 218, 118 N. W. 198 (1908), *rehearing denied*, 118 N. W. 803 (1908). See also Brigman v. Covington, 219 Fed. 500 (4th Cir. 1915), decided under the 1910 perfection clause.

made" when perfected had been anticipated.[26] An attempt to obviate that result by another amendment to Section 60 had failed,[27] and a campaign for state legislation had yielded, before *Klauder* was decided, one statute protecting an assignee of accounts receivable whose assignment was preceded or accompanied by the filing of a notice of the debtor's intention to assign his accounts,[28] and two statutes protecting an assignee whose assignment was noted on the debtor's books of account.[29]

Since the *Klauder* decision, this campaign has gone forward with great success. By August, 1949, fifteen states had notice-filing statutes,[30] three had bookmarking statutes,[31] and fifteen had "validation" statutes adopting the "New York rule."[32] Of the fifteen states without statutes, the courts of Mississippi and Tennessee are committed to the "English rule" involved in the *Klauder* case,[33] the courts of New York adhere to the "New York rule"[34] and appear to be joined by the courts of five

[26] Hamilton, *The Effect of Section Sixty of the Bankruptcy Act Upon Assignments of Accounts Receivable,* 26 VA. L. REV. 168 (1939); Neuhoff, *Assignment of Accounts Receivable as Affected by the Chandler Act,* 34 ILL. L. REV. 538 (1940); Mulder, *Ambiguities in the Chandler Act,* 89 U. OF PA. L. REV. 10, 2526 (1940); 3 COLLIER ON BANKRUPTCY 910-916, 962-972 (14th ed. 1941). Professor McLaughlin, draftsman of this section of the Chandler Act, had also anticipated the possibility of the *Klauder* interpretation, but had dismissed it because the term "bona fide purchaser" as used in the Chandler Act "is commonly, though not necessarily, used to designate a person who makes a bona fide purchase and does nothing more." Therefore, he thought it would not be construed to include a hypothetical subsequent assignee who not only purchased an account, but also notified the account obligor of his purchase. McLaughlin, *Defining a Preference in Bankruptcy,* 60 HARV. L. REV. 233, 246-249 (1946). Professor Hanna had also urged this interpretation of §60 before the *Klauder* case reached the Supreme Court. Hanna, *Some Unsolved Problems Under Section 60A of the Bankruptcy Act,* 43 COL. L. REV. 58 (1943).

[27] S. 3554, 76th Cong., 3d Sess. (1940), which was introduced by Senator Davis of Pennsylvania and which died in Committee, would have amended §60 to provide that, "in the case of accounts receivable, choses in action, and other intangibles, a transfer shall be deemed to have been perfected within the meaning of this Act when it has been fully consummated between the debtor and his transferee."

[28] OHIO GEN. CODE ANN. §§8509-3 to 8509-6 (Supp. 1949).

[29] PA. STAT. ANN. c. 5, §§561 to 563 (Supp. 1949); GA. CODE ANN. §55-1803 (Supp. 1949).

[30] In addition to the Ohio statute cited in note 28 *supra:* Ala. Acts 1949, No. 338; CAL. CIV. CODE §§3017 to 3029 (1949); COLO. STAT. ANN. c. 12A, §§1 to 17 (Supp. 1949); FLA. STAT. ANN. §§524.01 to 524.06 (Supp. 1949); IDAHO CODE ANN. §§64-901 to 64-907 (1948); Kan. Laws 1949, c. 112; Mo. REV. STAT. ANN. §§3347.1 to 3347.6 (Supp. 1949); NEB. REV. STAT. §§69-901 to 69-921 (Supp. 1949); N. C. GEN. STAT. ANN. §§44-77 to 44-85 (Supp. 1949); OKLA. STAT. ANN. tit. 15, §§631 to 637 (Supp. 1949); S. C. CODE ANN. §398 (Supp. 1946); TEX. REV. CIV. STAT. art. 260-1 (1947); UTAH CODE ANN. §§81B-0-3 to 81B-0-7 (Supp. 1949); WASH. REV. STAT. §§2721-8 to 2721-12 (Supp. 1947).

[31] In addition to the Georgia and Pennsylvania statutes cited in note 29 *supra:* N. D. REV. CODE §29-1108 to 29-1109 (Supp. 1949).

[32] ARK. STAT. ANN. §68-805 (1947); CONN. GEN. STAT. §§6718 to 6726 (1949); ILL. STAT. ANN. c. 121 1/2, §§220 to 222 (Supp. 1949); IND. STAT. ANN. §§19-2101 to 19-2104 (1950); Me. Laws 1945, c. 100; MD. CODE ANN. art. 8, §1a (Supp. 1947); MASS. ANN. LAWS c. 107A, §§1 to 6 (1947); MICH. STAT. ANN. §§19.841 to 19.849 (Supp. 1949); MINN. STAT. ANN. §§521.01 to 521.07 (1947); N. H. Laws 1945, c. 19; ORE. COMP. LAWS §62a-101 (Supp. 1949); R. I. Laws 1945, c. 1345; S. D. Laws 1949, c. 213; VA. CODE ANN. §§11-5 to 11-7 (1950); WIS. STAT. §241.28 (1949).

[33] Canton Exchange Bank v. Yazoo County, 144 Miss. 579, 109 So. 1 (1926); Peters v. Goetz, 136 Tenn. 257, 188 S. W. 1144 (1916).

[34] See McKenzie v. Irving Trust Co., 266 App. Div. 599, 42 N. Y. S. 2d 551 (1st Dep't 1943), *aff'd on other grounds,* 292 N. Y. 347, 55 N. E. 2d 192 (1944), *aff'd,* 323 U. S. 365 (1945).

other states,[35] while no rule seems to be established in Arizona, Delaware, Louisiana, Nevada, New Mexico, Vermont,[36] and Wyoming.

This record of accomplishment in the state legislatures in no way abated the clamor for amendment of Section 60, which the representatives of secured lenders had set up after the *Klauder* decision. In 1945 the American Bar Association established a special committee on the revision of Section 60 consisting of Homer J. Levingston, Vice-President of the First National Bank of Chicago, Milton P. Kupfer, counsel for the National Conference of Commercial Receivables Companies, Inc., J. Francis Ireton, counsel for Commercial Credit Company, a national sales financing organization, Professor John Hanna of Columbia Law School, and Professor McLaughlin of Harvard.[37] By the latter part of 1946 this Committee, with Professor Hanna as chief draftsman, had evolved a bill to amend Section 60.

In a series of articles published by members of the A. B. A. committee in support of their bill, the interpretation of Section 60 in the *Klauder* and *Vardaman* decisions was invariably cited as demonstrating the need for amendment. But, save as these decisions evidenced a judicial tendency to give a "literal interpretation" to Section 60, they had little to do with what the advocates of amendment were worried about. Understandably, they were no longer concerned about the fate of assignments of accounts receivable under Section 60. Their alarm was now focused on three other horrible possibilities.[38]

First, under a variety of inventory financing devices—principally trust receipts, conditional sales for resale, factors' liens,[39] and chattel mortgages on a shifting stock

[35] Ottumwa Boiler Works v. O'Meara, 206 Iowa 577, 218 N. W. 920 (1928); Columbia Finance & Trust Co. v. First Nat. Bank, 116 Ky. 364, 76 S. W. 156 (1903); General Electric Co. v. Black, 19 Mont. 110, 47 Pac. 639 (1897); Moorestown Trust Co. v. Buzby, 109 N. J. Eq. 409, 157 Atl. 663 (1931); Tingle v. Fisher, 20 W. Va. 297 (1882). None of these courts has yet considered whether a subsequent assignee would be allowed to prevail under any or all of the four exceptions recognized in the "Massachusetts rule."

[36] In Ormsby & Farnham v. Fifield, 38 Vt. 143 (1865), the Vermont court applied the New York rule, but dictum in a later case states that, "The rule is that the assignment of a chose in action is not complete so as to vest the title as against the debtor, subsequent assignees, and attacking creditors, until notice thereof has been given to the debtor." Goodwin v. Barre Sav. Bank & Trust Co., 91 Vt. 228, 100 Atl. 34 (1917).

[37] Professor McLaughlin became a member of the committee in 1946, replacing W. Leslie Miller of the Detroit bar.

[38] Kupfer, *Progress in the Amendment of Section 60a of the Bankruptcy Act*, 13 LAW & CONTEMP. PROB. 624 (1948); Hanna, *Preferences in Bankruptcy*, 15 U. OF CHI. L. REV. 311 (1948); Ireton, *A Proposal to Amend §60a of the Bankruptcy Act*, A6, CORP. REORG. & AM. BANKR. REV. 257, 287 (1947); McLaughlin, *Defining a Preference in Bankruptcy*, 60 HARV. L. REV. 233 (1946); Kupfer and Livingston, *Corn Exchange National Bank & Trust Co. v. Klauder Revisited: The Aftermath of Its Implications*, 32 VA. L. REV. 910 (1946), 33 VA. L. REV. 1 (1947). [Irvin I. Livingston, co-author of the last cited article, was not a member of the A. B. A. Committee. He is counsel for the Midwest Conference of Accounts Receivable Companies.] See also, Livingston and Kearns, *Commercial Financing and the Relation between Secured and Unsecured Creditors in Bankruptcy*, 13 LAW & CONTEMP. PROB. 609 (1948) [Mr. Kearns is counsel for the First National Bank of Chicago].

[39] It is arguable that in the ordinary transaction involving a trust receipt or a conditional sale there is no "transfer" from the debtor to the conditional vendor within the meaning of the Bankruptcy Act, hence no possibility of invalidation under §60. Bailey v. Baker Ice Machine Co., 239 U. S. 268 (1915), held that a conditional sale to the debtor did not constitute such a transfer, but the definition of "transfer" [now contained in §1(30) of the Bankruptcy Act] has since been amended to include "every . . . mode . . . of fixing

of goods—the borrower is empowered to sell from stock in ordinary course of trade and the purchaser in ordinary course takes title which is good against the secured lender. Under a "literal interpretation" of Section 60, such a security device could never be "so far perfected that no bona fide purchaser from the debtor . . . could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein."[40] Second, there was the matter of security devices which by state law are required to be recorded before they are good against bona fide purchasers and/or creditors. Since it is not practicable to close all loans on the courthouse steps, there must invariably be some delay between the time of the loan and the time of recording the security. Under a "literal interpretation" of Section 60 all such transfers of security would be "deemed to have been made" at the time of recording, and would thus become transfers for antecedent debts because of unavoidable delay in recording. Third, there are certain types of liens which are by statute given priority over other liens.[41] Under a "literal interpretation" of Section 60, no security device could ever be so far perfected that a creditor acquiring one of these liens with statutory priority could not acquire rights in the debtor's property superior to those of the creditor with the secured claim.[42]

The A.B.A. bill to eliminate these possibilities was introduced in Congress in 1947 and was kept continuously before Congress for three years thereafter.[43] But Professor McLaughlin found himself in disagreement with the other members of the

a lien upon property, or upon an interest therein." 52 STAT. 842 (1938). Professor Hanna has suggested at various times and with various degrees of conviction that conditional sales are not "transfers" and that trust receipts and factors' liens are "statutory liens" within the meaning of §67b and exempted thereby from the application of §60. Hanna, *Some Unsolved Problems Under Section 60A of the Bankruptcy Act*, 43 COL. L. REV. 58, 67-69 (1943); Hanna, Foreword to Koessler, *Assignment of Accounts Receivable*, 33 CALIF. L. REV. 40, 44 (1945); Hanna, *Preferences in Bankruptcy*, 15 U. OF CHI. L. REV. 311, 317-320 (1948); Hanna, *Preference as Affected by Section 60c and Section 67b of the Bankruptcy Law*, 25 WASH. L. REV. 1, 12-15 (1950).

[40] Such an interpretation of §60a was rejected by Referee Paul R. Kach in an opinion approving a compromise between a trust receipt holder and the trustee in bankruptcy. *In re* Wallace, Bkcy No. 9974 (D. Md. 1948). Referee Kach thought that "any possible application of Section 60a is avoided . . . in this case by two principal considerations, *viz.*: (1) The existence of a valid recording [pursuant to the Uniform Trust Receipts Act] of which all persons are charged with notice, giving warning of the possible presence of merchandise not owned by the [debtor], however free his premises might be of physical evidence of such ownership and even though he be making continued sales therefrom. . . . (2) The clearly disclosed legislative intent of the Uniform Trust Receipts Act is to give those persons who comply therewith priority against all but an actual bona fide purchaser. These two purposes are accomplished—and can only be accomplished—by according [the entruster] priority over a subsequent bankruptcy trustee of [the debtor]."

[41] *E.g.*, the priority lien given to persons injured by automobiles under S. C. CODE ANN. §8792 (1942).

[42] Three students of this problem were so titillated by this parade of horribles that they concluded that the "logical implications" of the *Klauder* decision foreshadowed the probability of headlines in the Wall Street Journal proclaiming: "Supreme Court Voids All Security Devices as Bankruptcy Preferences." Keeffe, Kelly and Lewis, *Sick Sixty: A Proposed Revision of Section 60a of the Bankruptcy Act*, 33 CORN. L. Q. 99 (1947). Others were not similarly impressed. See Oglebay, *Proposed Revision of Section 60a of the Bankruptcy Act: Step Backward*, 51 COM. L. J. 263 (1946); Martin, *Substantive Regulation of Security Devices Under the Bankruptcy Power*, 48 COL. L. REV. 62 (1948); Moore and Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 YALE L. J. 683 (1948); *Comment*, 57 YALE L. J. 828 (1948).

[43] H. R. 2412 and S. 826, 80th Cong., 1st Sess. (1947); H. R. 272 and S. 88, 81st Cong., 1st Sess. (1949).

A.B.A. committee on one point—he wanted to add to the Bankruptcy Act a provision that an assignment of accounts receivable would not be valid against the bankruptcy trustee unless notice of the assignment was filed in the office of the clerk of the appropriate federal judicial district or unless an applicable state notice-filing statute had been complied with. Accordingly, he drafted a bill which incorporated this requirement, in addition to the amendment of Section 60, and this bill was endorsed by the National Bankruptcy Conference and introduced in Congress shortly after introduction of the A.B.A. bill.[44]

Hearings were held on these competing bills in 1948 and again in 1949.[45] In these hearings, proponents of amendment of Section 60 did not attempt to lead the members of the Congressional Committee through the intricacies of their fears about security transactions whose recording was unavoidably delayed[46] or about the threat of liens with special statutory priority—they concentrated on the argument that Section 60 would invalidate all known forms of inventory financing.[47] The A.B.A. bill was supported and Professor MacLachlan's[48] filing provision for assignments of accounts receivable was opposed by the American Finance Conference, representing some 350 sales finance companies,[49] the National Conference of Commercial Receivable Companies, Inc.,[50] the American Bankers Association,[51] the Midwest Conference of Accounts Receivable Companies,[52] the New York Factors' Legislative Committee,[53] several state associations of bankers and finance companies, and various individual banks and finance companies. The National Association of Credit Men, representing mostly unsecured creditors, approved the proposed amendment to Section 60 on condition that it be accompanied by passage of a federal filing

[44] H. R. 5834, 80th Cong., 2d Sess. (1948); H. R. 2691, 81st Cong., 1st Sess. (1949).

[45] *Hearings before a Subcommittee of the House Committee on the Judiciary on H. R. 2412 and H. R. 5834,* 80th Cong., 2d Sess. (1948) (hereinafter cited as 1948 *Hearings*); *Hearings before a Subcommittee of the House Committee on the Judiciary on H. R. 272* and *H. R. 2691,* 81st Cong., 1st Sess. (1949) (hereinafter cited as 1949 *Hearings*). The record of 1948 hearings before a Subcommittee of the Senate Judiciary Committee on S. 826 has not been printed.

[46] There is a brief reference to this problem in a written statement submitted by the American Bar Association. 1948 *Hearings, supra,* at 16.

[47] Some apprehension about other federal courts following the *Vardaman* decision on assignment of accounts receivable under the "Massachusetts rule" was also expressed, although by this time every state following that rule as to assignment of contract rights generally had adopted a statute prescribing a different rule for assignment of accounts receivable. Thus a written statement submitted by the A. B. A., after discussing *Vardaman,* concludes that "there is always the hazard of similar holdings as long as section 60a remains in its present form" (1948 *Hearings, supra,* at 17); a statement submitted by Benjamin Wham, Chairman of the ABA Section of Corporation, Banking and Mercantile Law, notes that a view contrary to *Vardaman* was taken in the *Rosen* case, but states "there are eight judicial circuits still to be heard from" (1948 *Hearings, supra,* at 148); and Milton P. Kupfer testified about "this conflict of authority between two circuits with 8 out of the 10 circuits still to be heard from" (1949 *Hearings, supra,* at 11).

[48] In 1948 Professor McLaughlin became Professor MacLachlan by order of a Massachusetts court, "correcting an error made in Scotland about 1835." 2 HANNA AND MACLACHLAN, CASES ON CREDITORS' RIGHTS viii n. 2 (4th ed. 1948).

[49] 1948 *Hearings, supra* note 45, at 22, 68-71; 1949 *Hearings, supra* note 45, at 39-41, 154-155.

[50] 1948 *Hearings, supra* note 45, at 22, 34.

[51] 1948 *Hearings, supra* note 45, at 81, 150; 1949 *Hearings, supra* note 45, at 132.

[52] 1948 *Hearings, supra,* at 116-121.

[53] 1948 *Hearings, supra,* at 103-109; 1949 *Hearings, supra,* at 61-70.

requirement for assignments of accounts receivable.[54] The Commercial Law League, also representing unsecured creditors, opposed both the A. B. A. bill and the Bankruptcy Conference bill[55]—its spokesman at the 1948 hearings proposed that, if amendment of Section 60 be deemed necessary to protect inventory financing arrangements and security devices whose recording was delayed, it could be accomplished by addition of a two-sentence proviso to Section 60a.[56] Borrowers were not represented in the hearings, but a number of the witnesses who appeared before the Committee testified that their chief concern about the threat to inventory financing arrangements posed by Section 60 was that it tended to clog the type of financing most commonly employed by small businessmen.[57]

The A. B. A. bill passed the Senate twice,[58] but the House Committee substituted a compromise bill[59] which was essentially the bill drafted by Professor MacLachlan

[54] 1948 *Hearings, supra,* at 47, 71-75, 97-103; 1949 *Hearings, supra,* at 83-98, 136.

[55] 1948 *Hearings, supra,* at 61-68; 1949 *Hearings, supra,* at 129-131.

[56] "*Provided, however,* That whereby or under the terms of a transfer the creditor retains or reserves title to the property transferred, or obtains a security interest therein, and the debtor is given or retains possesssion of the property with power to sell the same in the ordinary course of his business, such transfer, if valid under applicable Federal or State law against all persons except a bona fide purchaser in the ordinary course of business and if made for or on account of a new and contemporaneous consideration shall, to the extent of such consideration, be deemed to have been made at the time when it was actually made: *And provided further,* That where a transfer is required to be recorded by Federal or State law and is so recorded within the period fixed in such law, or within 30 days after the transfer was actually made, whichever first expires, or, if no period is fixed in such law, within 30 days after the transfer was actually made, then, in any such case, the transfer shall be deemed to have been made at the time when it was actually made." Statement of Jacob I. Weinstein, 1948 *Hearings, supra,* at 68.

In the 1949 hearings, additional proposals for brief amendments to §60 to eliminate fears about inventory financing arrangements and the threat of liens with statutory priority were proffered:

"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, *wherever the nature of the transfer permits,* 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. . . ." Statement of Professor James W. Moore, Yale University, 1949 *Hearings, supra,* at 124.

"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 *against whom the transfer could have been perfected* could thereafter have acquired any rights. . . ." Statement of Vern Countryman, 1949 *Hearings, supra,* at 134.

[57] Testimony of John W. Kearns, counsel for First National Bank of Chicago, 1948 *Hearings, supra,* at 53-54, 1949 *Hearings, supra,* at 79; testimony of Professor John Hanna, 1948 *Hearings, supra,* at 125; testimony of Clarence O. Holten, counsel for Minnesota Association of Sales Finance Companies, 1948 *Hearings, supra,* at 77, 1949 *Hearings, supra,* at 41-42; testimony of Thomas W. Rogers, Executive Vice-President, American Finance Conference, 1948 *Hearings, supra,* at 71, 1949 *Hearings, supra,* at 40. Similar concern was expressed in statements submitted by the American Bar Association, 1948 *Hearings, supra,* at 16, 1949 *Hearings, supra,* at 142.

[58] S. 826 passed the Senate in 1948. 94 CONG. REC. 7708 (1948). S. 88 passed the Senate in 1949. 95 Cong. Rec. 10419 (July 26, 1949). Committee reports on both bills informed the Senate that "the present language of the Act tends to impede and choke the flow of credit, principally to small business men, at a time when it should be promoted." The reports also advised that, "Although the Third Circuit . . . in the later case of . . . *Rosen* . . . expresses its disagreement with the theory of the *Vardaman* case, the law thus remains in conflict, and there are eight judicial circuits out of the ten which have not ruled on this question." S. REP. No. 1514, 80th Cong., 2d Sess. 1-2 (1948); S. REP. No. 72, 81st Cong., 1st Sess. 1-3 (1949).

[59] H. R. 5933, 81st Cong., 1st Sess. (1949). The House Committee also reported that "The present language of the Act tends to impede and choke the flow of credit, principally to small business men," and that after the *Vardaman* and *Rosen* decisions the law on assignments of accounts receivable "remains in conflict, and there are eight judicial circuits out of the ten which have not ruled on this question." H. R. REP. No. 1293, 81st Cong., 1st Sess. 4-5 (1949).

for the National Bankruptcy Conference with the filing requirement for assignments of accounts omitted.[60]

At this propitious stage of Congressional proceedings, the proponents of amendment of Section 60 acquired some support for their alarm about the future of inventory financing. A Referee in Bankruptcy held that a factor's lien, under which the lienor was empowered to sell to purchasers in ordinary course of trade, was imperfectible under Section 60 and therefore a transfer for an antecedent debt,[61] and a federal district court in the *Harvey* case reached the same conclusion about a trust receipt.[62] Shortly thereafter the compromise bill passed the House.[63] After the Chairman of the Senate Judiciary Committee had called the Senate's attention to the *Harvey* decision, the Senate accepted the House substitute[64] and the compromise bill became Public Law 461.[65]

Mr. Walter D. Malcolm, counsel for the First National Bank of Boston, testified in support of the Bankruptcy Conference bill with the federal filing requirement deleted, but admitted that he encountered some difficulty in determining how one paragraph [now paragraph (6) of Section 60a] affected the provisions of a previous paragraph [now paragraph (2) of Section 60a]: "I am free to confess that in this type of problem, I can go so far in a reasoning process, and then I reach what appears to be a completely blank wall. My mind will not bear it any further, and I cannot analyze what will happen in this situation, and I am not sure what is going to happen now."[66]

[60] Professor MacLachlan testified before the House Committee that it would be better to have the amendment of §60 without a filing requirement than to have no amendment at all. 1949 *Hearings, supra,* note 45, at 56, 60. This position was later endorsed by a majority of the National Bankruptcy Conference. See MacLachlan, *Preference Redefined,* 63 HARV. L. REV. 1390, 1396 (1950).

[61] Decisions of Referee Paul R. Kach in *In re* Baltimore Casting Corp., Bkcy No. 10,004 (D. Md. 1949) and *In re* Liberty Motors and Engineering Corp., Bkcy No. 10,012 (D. Md. 1949). In both of these cases the factor's lien agreements were recorded as required by the Maryland Factor's Lien Act. In each case Referee Kach noted that his opinion in In re *Wallace, supra,* note 40, "stated more fully some of the contentions that can be made against [the] decision in this case."

[62] *In re* Harvey Distributing Co., 88 F. Supp. 466 (E. D. Va. 1950). On appeal from this decision, the Court of Appeals for the Fourth Circuit vacated the District Court's order and remanded the case for consideration of the applicability of the 1950 amendment to §60. On October 26, 1950, the District Court concluded that the 1950 amendment was inapplicable. Letter from John O. Herrman, counsel for the trustee in bankruptcy, Nov. 3, 1950.

[63] 96 Cong. Rec. 1510 (Feb. 6, 1950).

[64] 96 Cong. Rec. 2693 (Mar. 7, 1950).

[65] Pub. Law 461, 81st Cong., 2d Sess. (1950).

[66] 1949 *Hearings, supra* note 45, at 116. Compare the statement of Alfred Heuston, counsel for Bankers Trust Company and The New York Trust Company: "People say, 'What are you fellows doing? You are making it so hard that every time I have to look in section 60 of the Bankruptcy Act, it will take me 2 days to figure out what this language means. . . .' But I think there is nothing for you to do now except to follow this terribly complicated thing that we have and go ahead with it. . . . If H. R. 272 or . . . H. R. 2691 is to be adopted, great care should be taken in writing the committee report, because the bills are made up of combinations of exceedingly complicated and difficult provisions which the average practitioner, who rarely has to consider section 60 problems, will have to struggle over prayerfully. He should have all the help which a report can give him in his hours of travail." 1949 *Hearings, supra,* at 71, 78. No such committee report as Mr. Heuston had in mind was ever submitted.

I am equally free to confess to a similar reaction. But mine is not confined to any two of the paragraphs added to Section 60a by Public Law 461. In defense of Mr. Malcolm and of myself, let me set out the new Section 60a in full:

a. (1) 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 initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

(3) The provisions of paragraph (2) shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred and whether or not there are or were persons who might have become bona fide purchasers of such real property.

(4) A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) is a lien arising in ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given a special priority over other liens which are prior in time.

(5) A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee or a purchase could create rights superior to the rights of a transferee within the meaning of paragraph (2), if such consequences would follow only from the lien or purchase itself, or from such lien or purchase followed by any step wholly within the control of the respective lien holder or purchaser, with or without the aid of ministerial action by public officials. Such a lien could not, however, become so superior and such a purchase could not create such superior rights for the purposes of paragraph (2) through any acts subsequent to the obtaining of such a lien or subsequent to such a purchase which require the agreement or concurrence of any third party or which require any further judicial action, or ruling.

(6) 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. If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2). Notwithstanding the first sentence of paragraph (2), it shall not suffice to perfect a transfer which creates an

equitable lien such as is described in the first sentence of paragraph (6), that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract: *Provided, however,* That where the debtor's own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: *And provided further,* That nothing in paragraph (6) shall be construed to be contrary to the provisions of paragraph (7).

(7) Any provisions of this subdivision a to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the rights of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

I. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition.

(8) If no such requirement of applicable law specified in paragraph (7) exists, a transfer wholly or in part, for or on account of a new and contemporaneous consideration shall, to the extent of such consideration and interest thereon and the other obligations of the transferor connected therewith, be deemed to be made or suffered at the time of the transfer. A transfer to secure a future loan, if such a loan is actually made, or a transfer which becomes security for a future loan, shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.[67]

This is indeed a wondrously complicated way of saying that transfers which are not made for or on account of antecedent debts shall not be treated as if they were so made simply because of unavoidable delay in recording or because a subsequent purchaser in ordinary course of trade or lien creditor with special statutory priority

[67] Public Law 461 does not alter the Chandler Act perfection clause in §3b; once again there may be some preferential transfers which constitute acts of bankruptcy but which cannot be avoided by the bankruptcy trustee. Public Law 461 does amend the "strong-arm" clause of §70c, which formerly gave the bankruptcy trustee the status of a lien creditor as to all property of the bankrupt in the custody of the bankruptcy court, so that the trustee now enjoys this status as to all property of the bankrupt "whether or not coming into the possession or control of the court." The Bankruptcy Conference, whose bill initiated this amendment, explained that in view of the lien creditor test set up by the amendment to §60, this amendment to §70c merely effected a "conforming change." 1948 *Hearings, supra,* at 49. But third parties who deal in good faith with property of the bankrupt which is not in the possession or control of the court may discover that the amendment does more than that.

would prevail over the transferee.[68] But, despite its fearsome proportions, Mr. Malcolm and I and others interested in bankruptcy must try to fathom this new Section 60. More specifically, for the purposes of this symposium, I must attempt to fathom Section 60 as it will apply to security transactions as governed by the proposed Uniform Commercial Code.[69]

And the Secured Transactions Article of the Code is no model of simplicity either. It sets out a comprehensive scheme for the regulation of security interests created by contract in personal property. Its requirements are based, not upon the particular security device involved, but upon the nature of the property in which the security interest is taken and/or, in some instances, upon the nature of the transaction in which the security interest arises.

For the purposes of the Secured Transactions Article, property is classified either as one of a variety of intangibles or as "goods."[70] And a security interest[71] in any such property which has not been perfected as required by the Code is subordinate to the interest of, among others, a creditor who acquires a lien on the property involved "by attachment, levy or the like" without knowledge of the security interest and before it is perfected.[72] Under paragraph (2) of the new Section 60 of the Bankruptcy Act, a transfer of property other than real property—and the Code does not deal with real property—need no longer be perfected against bona fide purchasers, but it must be perfected against a "lien . . . obtainable by legal or equitable proceedings on a simple contract." This lien is further defined in paragraph (4) of Section 60a to mean a judgment lien or a lien of attachment, garnishment, execution, or like process.[73] This definition seems broad enough to encompass the

[68] The House and the Senate Committee reports both list three "objectives" of the amendment to §60 which are taken directly from a statement submitted in House Committee hearings by the American Bar Association:

"(A) To retain unimpaired the basic object of the 1938 amendment, which eliminated the 'relation back' doctrine of *Sexton v. Kessler* and the 'pocket lien' doctrine of *Carey v. Donohue*. . . . [See text accompanying notes 11 and 14, *supra*.]

"(B) To eliminate the evil of allowing a trustee in bankruptcy to take the position of a potential and artificial bona fide purchaser, and to restore him to the position of a lien creditor, in harmony with his functions under the Bankruptcy Act; and

"(C) In effectuation of said policy, to provide that no transfer made in good faith, for a new present consideration, shall constitute a preference to the extent of such consideration actually advanced, if the provisions of applicable State law governing the perfection of such transfer are complied with, with an appropriately rigid time limitation (21 days) for such perfection if such limitation is not itself prescribed by the applicable State law." H. R. REP. No. 1293, 81st Cong., 1st Sess. 6 (1949); SEN. REP. No. 72, 81st Cong., 1st Sess. 3 (1949).

[69] UNIFORM COMMERCIAL CODE, PROPOSED FINAL DRAFT (Text and Comments Edition, Spring 1950), as revised September, 1950.

[70] "Goods" are defined in §9-105(f) to include "all things which are movable at the time the security interest attaches except money, documents of title, instruments, accounts, chattel paper, contract rights and other things in action."

[71] In the Spring, 1950, edition of the Code, §9-105(h) of the Secured Transaction Article provides: " 'Security interest' means an interest in property taken or retained by contract to secure payment or other performance of an obligation." The September, 1950, revision of the Secured Transactions Article omits this definition, but I am advised that it is to be included in the general definitions of Article 1.

[72] §9-301.

[73] The last sentence of paragraph (4) adequately disposes of the threat of judicial liens with special statutory priority.

sort of lien creditor contemplated by the draftsmen of the Code, so that any security interest which is not perfected as required by the Code will not be treated as perfected in bankruptcy. And one of the few matters which are perfectly clear under the new Section 60 is that in bankruptcy there need not actually be such a lienholder—vulnerability to a hypothetical lienholder is enough. Codifying a proposition which was never in doubt under the perfection clause of the Chandler Act, paragraph (3) of Section 60 provides that the perfection clause shall apply "whether or not there are or were creditors who might have obtained such liens."

What seems clear so far may become slightly cloudy upon a reading of paragraph (5) of Section 60, which provides that the new perfection clause does not include liens which otherwise fit the description contained in Section 60 if such liens will prevail over prior transfers only after the doing of some act which requires "the agreement or concurrence of any third party" or "any further judicial action, or ruling." If the perfection clause, in its application to personal property, still spoke in terms of vulnerability to subsequent purchasers, this paragraph would be comprehensible as a measure to overrule the *Vardaman* decision, and at one stage in the Congressional hearings Professor MacLachlan so explained it.[74] But *Vardaman* had been twice overruled already—once by the adoption of state statutes eliminating the "Massachusetts rule" on which it was based, and again by removal of the bona fide purchaser test from the perfection clause in paragraph (2) of Section 60. Paragraph (5) is, therefore, unnecessary for that purpose. At different stages in the Congressional hearings, however, Professor MacLachlan and others explained that paragraph (5) was added because he had found four cases "in which the holder of a lien by legal proceedings can better his position by actions subsequent to acquiring his lien."[75] Two of these cases are from Tennessee,[76] and they indicate that the lien of execution levy on land "may be lost, as against an intermediate innocent purchaser, by failure to file the papers . . . for [a judicial order of] condemnation in a reasonable time," and that "the proceedings of condemnation became a *lis pendens* from the date of such filing" as against one who buys the property *after* the condemnation papers are filed. Since the perfection clause of Section 60 deals only with the effectiveness of an execution lien on personal property as against a *prior* transfer, the relevance of these cases is not apparent. The third case is from Kentucky,[77] and reveals that under a statute of that state an execution lien on realty is not good as

[74] After reading to the Committee from H. R. 2691 the language which is now paragraph (5) of §60, Professor MacLachlan said: "In other words, the *Vardaman* case is not going to be followed under 2691. The *Vardaman* case said that if the hypothetical purchaser could get a payment, or hypothetically get a novation, or hypothetically ride with any of the 'four horsemen' under section 173 of the Restatement of Contracts . . . then he could prevail, and therefore the trustee in bankruptcy could prevail. . . . [T]o allow the rights of the trustee to depend upon what some hypothetical person could hypothetically do after he has acquired his desired status is fantastic, and that is what has aroused the business world, and that is why you have had all of this hullabaloo for amendment of section 60." 1949 *Hearings, supra* note 45, at 54.

[75] 1949 *Hearings, supra,* at 46; 1948 *Hearings, supra* note 45, at 19, 49.

[76] Mann v. Roberts, 79 Tenn. 57 (1883); Hammock v. Qualls, 139 Tenn. 388 (1917).

[77] Donocher v. Tafferty, 147 Ky. 337 (1912).

against a *subsequent* purchaser or encumbrancer unless a statutory notice of the execution is filed in the office of the court clerk. Even if this statute applied to personal property, which it does not, and even if the filing of the notice had anything to do with the lienholder's rights as against a *prior* transfer, which it does not, paragraph (5) of Section 60 would not exclude this lien from the operation of paragraph (2), since it does not exclude liens which are made to prevail over prior transfers by the lienholder following "any step wholly within the control of the lien holder . . . , with or without the aid of ministerial action by public officials." The fourth case is a New York ruling[78] that all judgments which are propertly docketed against a debtor at the time he acquires realty become liens of equal rank on the realty acquired, regardless of the order of docketing or of the order in which executions were issued and levied. What this case has to do with paragraph (5) of Section 60 I cannot imagine. Nor can I imagine any other case where paragraph (5) will affect the application of the perfection clause in paragraph (2) to transfers of personal property.

Thus far, then, it seems reasonably certain that any sort of security interest in personalty not perfected as required in the Commercial Code, and hence subordinate to the interest of a subsequent lien creditor, will be vulnerable to the bankruptcy trustee's attack under Section 60. But there is more to the new Section 60, and its additional provisions must be considered in the light of the Code's requirements for perfection of security interests.

These requirements vary with the nature of the property involved. A security interest in instruments[79] or documents[80] can be perfected "only by the lender taking possession of the collateral,"[81] and is perfected only from the time possession is taken,[82] except that it is perfected for twenty-one days from the time it attaches[83] without possession in the lender if it arises "by reason of an agreement signed by the debtor under which the lender makes an advance, releases a perfected security interest or incurs a new obligation." At the end of the twenty-one day period the security interest "becomes unperfected . . . unless . . . the collateral has come into possession of the lender."[84] The scheme of the Code seems clear. The holder of a

[78] Hulbert v. Hulbert, 216 N. Y. 430 (1916).

[79] "Instrument" is defined in §9-105(f) to include negotiable instruments, securities of the sort covered by the Article on Investment Securities, "or any other writing which evidences a right to the payment of money and which is of a type whose transfer customarily requires delivery. 'Instrument' does not include chattel paper," as to which see note 86 *infra*.

[80] Presumably this means "documents of title," which are defined in §1-201(14) to include bills of lading, dock warrants, dock receipts, warehouse receipts and "any other document which in the current course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover identified goods in the bailee's possession."

[81] §9-303(3).

[82] §9-305(1).

[83] "A security interest cannot attach until an agreement is made that it attach and value is given and the debtor has an interest in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching." §9-203.

[84] §9-304(1)(a).

security interest in instruments or documents not arising out of the specified type of signed agreement can perfect his interest against lien creditors only by taking immediate possession; if the taking of possession is delayed, perfection will not "relate back" to cut off intervening liens. But the security holder whose interest does arise out of the proper sort of signed agreement is treated more favorably. He has twenty-one days within which to take possession and perfect his security interest against intervening and subsequent lienholders. This differentiation will not be observed in bankruptcy, if paragraph (7) of Section 60 means what it seems to say.

That paragraph was born out of fears that the perfection clause of Section 60 as it previously read would be construed to invalidate any transfer for a contemporaneous loan not perfected at the very instant the loan was made. It would avoid this hazard by giving the lender twenty-one days to perfect his interest in all cases save those where state law specifies a "stated period of time" which is not more than twenty-one days. If the lender does perfect his interest within twenty-one days, or within the shorter period specified by state law, his transfer "shall be deemed to be made . . . at the time of the transfer." Under subparagraph I(A) of paragraph (7) the twenty-one day period specified by the Code for perfecting security interests in instruments or documents arising out of the proper sort of signed agreement will be observed, since "the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which . . . delivery . . . is required." But the holder of a security interest in instruments or documents not arising out of the specified type of signed agreement, who can perfect his interest against lien creditors under the Code only by taking immediate possession of the collateral, will also have twenty-one days to perfect his interest against the bankruptcy trustee. Subparagraph I(B) of paragraph (7) specifies such a twenty-one day perfection period to apply wherever "the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days." And here "the applicable law [the Code] specifies no . . . stated period of time." Moreover, if the holder of the security interest does perfect his interest within twenty-one days, the perfection will, under Section 60, "relate back"—the transfer will be "deemed to be made . . . at the time of the transfer."

A security interest in goods[85] or chattel paper[86] may also be perfected under the Code by delivery of possession to the lender, and is so perfected only from the time possession is taken,[87] except that where the interest in chattel paper arises out of a signed agreement under which the lender makes an advance, releases a perfected security interest or incurs a new obligation the lender again, as in the case of instruments or documents, has twenty-one days within which to take possession.[88] Here

[85] See note 70, *supra*.

[86] "Chattel paper" is defined in §9-105(b) as "a writing of a type whose transfer in ordinary course of business requires delivery and which evidences a security interest in or lease of goods. If the writing is of a type whose transfer in ordinary course of business does not customarily require delivery, the right is an account or contract right," as to which see note 89, *infra*.

[87] §9-305(1).

[88] §9-304(1)(a).

again, paragraph (7) of Section 60 would obliterate the distinction made by the Code. It would give all lenders twenty-one days within which to take possession and would "relate back" the perfection in all cases to the time of the original transfer.

An alternative method of perfection for security interests in goods or chattel paper, and the exclusive method of perfection for security interests in accounts and contract rights[89] is the filing of a financing statement containing the names and addresses of the debtor and the lender and a statement that the lender has or intends to acquire a security interest in described collateral.[90] If the statement is filed before the security interest attaches, the interest is perfected from the time it attaches; otherwise the interest is perfected from the date of filing.[91] To this policy of promptness in filing, there is one exception. A security interest in chattel paper arising under a signed agreemnent under which the lender makes an advance, releases a perfected security or incurs a new obligation is perfected from the time it attaches if filing is accomplished within twenty-one days from the time it attaches.[92] Here again, paragraph (7) of Section 60 would in all cases allow the lender twenty-one days to file, with "relation back" to the original date of transfer.

The Code also contains exceptions which relieve certain sorts of security interests of any perfection requirement. Two of these exceptions relate to purchase money security interests[93] in certain kinds of goods. Neither possession in the lender nor filing is required to perfect such a security interest in farm equipment[94] having a purchase price not in excess of $2500, unless the equipment is a fixture or a licensed motor vehicle,[95] nor in consumer goods,[96] unless they are fixtures or licensed motor vehicles.[97] Since Section 60 of the Bankruptcy Act imposes no perfection requirements of its own [see paragraph (8)], such security interests should survive in bankruptcy without any perfecting action.

The Code would change the law of many states as to assignments, not only of accounts receivable, but also of chattel paper and other contract rights. In this one

[89] "'Account' means a right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. Any right to payment not yet earned by performance is a 'contract right' but a right to wages, salary or other compensation of an employee or a right represented by a judgment or an instrument is neither a 'contract right' nor an 'account.'" §9-106.

[90] §§9-302, 9-403.

[91] §9-303(1).

[92] §9-304(1)(b).

[93] "A security [interest] is a 'purchase money security interest' to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire the collateral if such value is in fact so used; or

(c) taken by a person who for the purpose of enabling the debtor to pay for or acquire rights in collateral makes advances or incurs an obligation not more that ten days before or after the debtor receives the collateral even though the value given is not in fact used to pay the price." §9-107.

[94] "Goods are . . . 'equipment' if they are used primarily in business (including farming . . .) . . . . Equipment does not include goods which at the time a security interest attaches are being held or prepared for sale or to be furnished under a contract of service." §9-109(3).

[95] 9-302(c).

[96] "Goods are . . . 'consumer goods' if they are used for personal, family or household purposes." §9-109(1).

[97] §9-302(d).

respect, the Secured Transactions Article goes beyond the field of security transactions and covers transfers either as security or by way of sale.[98] "Validation" and book-marking statutes for assignments of accounts, and the "New York," "Massachusetts," and "English" rules for other assignments are to be replaced by the Code's general requirement that all assignments be perfected by a form of notice-filing similar to that now required by statute in fifteen states for assignments of accounts receivable.[99] Until so filed, the assignment would not be perfected against a lien creditor[100] and hence would be subject to attack under Section 60, although here again paragraph (7) of Section 60 would in all cases award a twenty-one day filing period with "relation back." But here again there are exceptions. Neither filing nor delivery of possession is necessary to perfect a further assignment by an assignee who "finances accounts, chattel paper or contract rights in the ordinary course of his business,"[101] nor an assignment "which either is not for the purpose of financing or does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts, chattel paper or contract rights of the assignor."[102] The Official Comment on the Code informs us that the assignments exempted "are the isolated assignment and the further assignment by a financing agency" and these two exceptions are understandable enough. But what of the third exception specified in the Code but not mentioned in the Comment—the assignment which "is not for the purpose of financing"? Excluding the isolated assignment, which is covered separately, when is an assignment as security or by way of sale not "for the purpose of financing"? Perhaps an assignment of bad debts to a collection agency is an assignment for the purpose of salvage rather than for the purpose of financing, and perhaps it would be considered indelicate to treat an assignment of a doctor's or lawyer's accounts as an assignment for the purpose of financing, but beyond that I cannot go. Here again, however, any transaction which can be brought within the Code's exceptions should survive in bankruptcy although no perfecting action has been taken.

In addition to the exceptions which allow a twenty-one day delay in delivery or filing for security interests in instruments, documents, and chattel paper, and the exceptions which relieve assignments and certain types of purchase money security interests of any perfection requirement, the Code contains another exception which gives protection to all purchase money security interests against some, but not all, third parties even though required perfection is delayed. If the lender files such an

[98] §9-102.

[99] In the case of chattel paper, if the assignment is for security, it could, in the alternative, be perfected by delivery of possession of the paper to the assignee. §9-303(b).

[100] Except for assignments of chattel paper for security where the security interest arises out of a signed agreement under which the lender makes an advance, releases a perfected security interest or incurs a new obligation. In such cases, the Code allows twenty-one days for perfection, either by delivery of possession or by filing. §9-304(1)(a)(b).

[101] §9-302(f).

[102] §9-302(e).

interest before or within ten days after he "gave value,"[103] his interest will prevail over an intervening transferee in bulk or lien creditor who becomes such between the time the security interest attached and the time of filing. But his interest will not prevail over an intervening secured lender[104] who becomes such without knowledge of the earlier interest and is first to perfect, nor will it prevail over a buyer "even though not a buyer in ordinary course of business" to the extent that the buyer receives delivery of the collateral before he receives knowledge of the security interest and before it is perfected.[105]

If there were no more to Section 60 than has so far been considered here, the fact that the purchase money security interest is good against an intervening lien creditor would be enough to protect it against the bankruptcy trustee. But Section 60 also contains paragraph (6), which states a policy against, and prescribes a test to enable the trustee to avoid, "equitable liens." Under this paragraph,

> If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition of its validity against third persons other than a buyer in ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2). Notwithstanding the first sentence of paragraph (2), it shall not suffice to perfect a transfer which creates an equitable lien such as is described in the first sentence of paragraph (6) that [the parties] . . . take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract.

This departure from the lien creditor test was drafted by Professor MacLachlan as an addition to the 1948 version of the Bankruptcy Conference bill after complaint was made that the lien creditor test would restore "the equitable lien, a most unsettling and vicious type of secret lien."[106] Professor MacLachlan, in the course of explaining the reason for the addition, adverted to *Sexton v. Kessler*[107] as typifying the "trouble prior to the Chandler Act," and added:

> In most jurisdictions, if a party has a valid equitable lien, no creditor obtaining by legal or equitable proceedings a lien on such property could acquire any rights in the property superior to the rights of the transferee. Therefore, the door is open through H. R. 272 to undoing the fruits of the Chandler Act. All the secured creditor with his secret lien has to do is to persuade the court to call it an equitable lien and he can prevail over the trustee, if the trustee is deprived of his right to require the transfer to be

[103] "Value" is defined in §9-108 as "satisfaction of or . . . security for a pre-existing claim" or "any consideration sufficient to support a simple contract."

[104] In the terminology of the Code, a "secured lender" is a person having a "security interest," which is created by contract, as distinguished from a "lien creditor" who acquires "a lien . . . by attachment, levy or the like." §§9-105(h), 9-301(3).

[105] §9-301(2).

[106] Statement of Jacob I. Weinstein, 1948 *Hearings, supra* note 45, at 66. See also Oglebay, *Proposed Revision of Section 60a of the Bankruptcy Act: Step Backward*, 21 J. N. A. REF. BANKR. 54, 58-59 (1947); Moore and Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 577 YALE L. J. 683, 697 (1948), reprinted in 1948 *Hearings, supra*, at 160-183; Comment, 57 YALE L. J. 828, 837-840 (1948).

[107] See text accompanying note 14, *supra*.

perfected against bona fide purchasers. . . . At first it seemed an unavoidable evil, by reason of the difficulties of drafting a provision to invalidate equitable liens without preserving the bona fide purchaser test of the Chandler Act. We now believe the difficulties of drafting have been mastered. . . .[108]

Does the interest which the Code gives to a purchase money lender who delays filing for ten days fall within the prohibition of paragraph (6)? Clearly, it fits two of the specifications contained in that paragraph. It is a transfer for security (A) for which the Code requires either delivery or filing "as a condition to its validity against third persons other than a buyer in ordinary course of trade" and (B) action sufficient to perfect it against all such persons has not been taken. But does it fit the third specification—is it "only an equitable lien"? What is an equitable lien"? Is the term confined to those "judge-made" liens which cannot be classified as common law possessory liens? Does it include consensual liens which a statute, like the Code in this instance, gives some but not full protection against third persons even though not accompanied by possession or filing? Does it extend to liens created by statute "the enforcement of which often comes within the equity jurisdiction"?[109] Or, in view of the draftsman's concern with "secret liens," should the term be construed to apply to all "security interests based neither on possession nor on public record"?[110] As Mr. Justice Erle remarked nearly a century ago, "the words 'equitable lien' are intensely undefined,"[111] and the draftsman of paragraph (6) of Section 60 was content to leave them that way. True, there is a reference in the third sentence of the paragraph to "an equitable lien such as is described in the first sentence." But the first sentence merely states a policy against "recognition of equitable liens where available means of perfecting legal liens have not been employed." A description which merely sets the undefined "equitable lien" in juxtaposition with a similarly undefined "legal lien" advances us nowhere.

I get no help on this problem from Professor MacLachlan's recent explanation of the meaning of paragraph (6): "Where a delivery, a recording, or the like is required by applicable law for the full validity of such a transfer against third persons other than a buyer in the ordinary course of trade, claiming through or under the trans-

[108] 1949 *Hearings, supra* note 45, at 47. The American Bar Association advised the House Committee that one of the purposes of its bill was "to retain unimpaired the basic object of the 1938 amendment, which eliminated the 'relation back' doctrine of *Sexton v. Kessler*. . . ." 1948 *Hearings, supra* note 45, at 18; 1949 *Hearings, supra*, at 139. And both the House and the Senate Committee borrowed this quoted language in their reports to state one of the "objectives" of the 1950 amendment. See note 68, *supra*. Professor Hanna did not approve of this policy against equitable liens for three reasons: (1) Such liens are not always "secret liens"—other creditors sometimes learn of them. (2) It is not the business of Congress "to attempt to alter state rules of property and contract in order to enlarge the interests of unsecured creditors." (3) "Since the bankruptcy court is a court of equity, the position of Congress in announcing a policy determination hostile to equitable liens is somewhat anomalous." Hanna, *Preferences as Affected by Section 60c and Section 67b of the Bankruptcy Law*, 25 WASH. L. REV. 1, 3-5 (1950).

[109] 4 POMEROY, EQUITY JURISPRUDENCE 784 (5th ed. 1941). Liens "created or recognized" by statute "in favor of employees, contractors, mechanics, landlords, or other classes of persons" are exempted from §60 of the Bankruptcy Act by §67b.

[110] Britton, *Equitable Liens—A Tentative Analysis of the Problem*, 8 N. C. L. REV. 388, 396 (1930).

[111] Brunsdon v. Allard, 2 El. & El. 19, 27, 121 Eng. Rep. 8 (Q. B. 1859).

feror, and where such overt action has not been taken, such a transfer is regarded as not perfected, whether or not it gives rise to an 'equitable lien.'"[112] He drafted the paragraph and he should know what he meant to say, but I cannot imagine how he disposes of the phrase, "and (C) such transfer results in the acquisition of only an equitable lien," nor can I imagine how a court is to be persuaded to dispose of it. About all that I can conclude, therefore, as to the fate in bankruptcy of a purchase money security interest whose filing is delayed is that if the bankruptcy trustee can persuade the court to call the interest as defined in the Code an equitable lien it will be invalidated under paragraph (6) of Section 60.[113]

Similar hazards under the "equitable lien" paragraph of Section 60 seem to confront any sort of security interest under the Code in several other types of property. Although such an interest in chattel paper can be perfected against lien creditors either by delivery of possession or filing—and in some cases may be perfected for twenty-one days before either sort of action is taken[114]—a subsequent assigneee for value who obtains delivery of the paper will prevail over an earlier assignee if he obtains delivery before he has notice of the earlier assignment and before the earlier interest was perfected by filing. And the subsequent assignee for value will also prevail, even though the earlier interest has been perfected by filing, if "the chattel paper has been created by the sale of inventory subject to a security interest and if in the ordinary course of his business the assignee buys the chattel paper or makes an advance on its security and . . . obtains delivery of the paper" before he learns of the earlier interest.[115] Although a security interest in negotiable instruments, investment securities, or negotiable documents can, in certain circumstances, be perfected against lien creditors for twenty-one days without delivery of possession,[116] a holder in due course of the instrument, a bona fide purchaser of the investment security, or a "holder to whom a negotiable document has been duly negotiated" will prevail over the earlier security interest.[117] Although a secured

[112] MacLachlan, *Preference Redefined*, 63 HARV. L. REV. 1390, 1394 (1950).

[113] My colleague, Professor Donnelly, has pointed out to me that more obscure terminology in the first proviso to paragraph (6) creates additional difficulty. According to that proviso, "where the debtor's interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character." Certainly, the debtor's interest as beneficiary of a trust is "only equitable." Is his "equity of redemption" in property in which he has already given one security interest also "only equitable"? However this question may be answered, what is meant by "any means appropriate fully to transfer an interest of that character"? The context in which the proviso occurs suggests that the reference is to any means sufficient to effect the transfer as between transferor and transferee. If so, does this proviso mean that one who takes a security interest in property held in trust for the debtor, or one who takes a second security interest in any property of the debtor, need take no steps to perfect his interest against third parties? This result may be avoided by invoking the second proviso of paragraph (6), which decrees that nothing in paragraph (6) shall be construed to be contrary to paragraph (7)—and paragraph (7) provides that failure to comply with applicable law for perfecting transfers of property for contemporaneous consideration against lien creditors will convert the transfer into one for antecedent debt. But if the second proviso to paragraph (6) so limits the first proviso, does the first proviso mean anything?

[114] See pp. 92-93, *supra*.

[115] §9-308.

[116] See pp. 90-92, *supra*.

[117] §9-309.

lender who has possession of negotiable instruments or documents, or investment securities, or chattel paper may return such collateral to the debtor for a twenty-one day period without risk of his security interest being subordinated to lien creditors,[118] it will be subordinated to a second assignee for value of the chattel paper who obtains delivery of the paper without notice of the prior interest,[119] or to a holder in due course of the instrument or document or a bona fide purchaser of the investment securities.[120] In all of these cases the secured lender, by failing to take or retain possession of his collateral, has failed to take the action necessary to give his security interest "full validity against third persons other than a buyer in the ordinary course of trade" as required by paragraph (6) of Section 60. If, therefore, a court either concludes that his interest is "only an equitable lien" or agrees with Professor MacLachlan that no such conclusion is necessary, the security interest will be lost in bankruptcy.

The Code also makes provision for security interests in property brought into the state after the security interest was created. "The interest continues perfected for a period of four months if already perfected under the law of the jurisdiction in which it was last located. Thereafter the security interest continues perfected if within the four-month period it is or becomes perfected under this Article." If protection in the manner required by the Code is not accomplished within four months, the security interest is subordinated to the interest of intervening lien creditors.[121] Is this not, then, a case where, in the language of paragraph (7) of Section 60, "applicable law requires a transfer . . . for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the rights of the transferee therein"? If it is, then it is also a case within subparagraph I(B) of paragraph (7) where the applicable law specifies a "stated period of time [which] is more than twenty-one days" after the transfer, in which event perfection must be accomplished within twenty-one days after the transfer or the transfer will be treated as one made for an antecedent debt. Obviously, this is to require the impossible in any case where the property involved is removed to another state or the secured lender learns of the removal more than twenty-one days after the security interest was created. It may be a sufficient answer to this interpretation of paragraph (7) to argue that its draftsmen obviously did not intend to require the impossible, but secured lenders cannot rest confidently on this assumption. The judges who decided the *Vardaman*[122] and *Harvey*[123] cases were not influenced by such arguments.

In view of the complicated intricacies of Section 60 in its present form, its application to security transactions, whether they are governed by the Secured Transactions Article of the Commercial Code or by existing laws which the Code would

[118] §9-304(2).
[119] §9-308.
[120] §9-309.
[121] §9-103(2).
[122] Note 23 *supra*.
[123] Note 62 *supra*.

replace,[124] may lead to other less foreseeable and perhaps more amazing results in bankruptcy than have been indicated here. But enough has been indicated to demonstrate the necessity for correlating revision either of the Code or of Section 60 of the Bankruptcy Act. And it is extremely unlikely that Congressional Committees which have labored for three sessions to produce the 1950 amendment to Section 60 will be very receptive to immediate proposals for further amendment. Hence, as the draftsmen of the Code realize,[125] the burden of accommodation now falls upon them.

The time for such correlation, of course, was before enactment of the amendment to Section 60—both the amendment and the Code have been in process since 1945—but apparently no serious effort in that direction was ever made. Professor MacLachlan tells us that in drafting the "equitable lien" provision of paragraph (6) of Section 60 late in 1948 or early in 1949, "it was thought advisable to consult with the draftsmen of the Proposed Commercial Code" and that "Professor Llewellyn made helpful suggestions, but expressed fear that such a provision might act harshly upon small businessmen acting without legal advice."[126] Without attempting to match that masterful understatement, I venture to suggest that businessmen of all sizes, with or without legal advice, may encounter some difficulty in attempting to accommodate their credit practices to a number of the new provisions of Section 60 of the Bankruptcy Act.

[124] Although this paper is confined to an analysis of the application of §60 to transactions covered by the Code, results similar to those pointed out here will ensue under existing laws. For instance, §8 of the Pennsylvania chattel mortgage law [PA. STAT. ANN. §940.8 (Supp. 1949)], which provides that the mortgage constitutes a lien good against third parties "when filed," embodies a very different policy than does §8 of the Uniform Trust Receipts Act, which provides that the entruster's security interest is valid against all creditors if he files notice of it within thirty days after delivery of the property to the debtor. But under paragraph (7) of §60 the secured lender will in both instances have twenty-one days to perfect his interest against the bankruptcy trustee. Again, under §9 of the Uniform Trust Receipts Act, even though the entruster files notice within thirty days, his interest in negotiable instruments and documents will be subordinated to a bona fide purchaser and his interest in goods will be subordinated to any bona fide purchaser, other than a transferee in bulk, who gives value and obtains delivery of the goods before filing. Hence, the trust receipt transaction may be in jeopardy under the "equitable lien" provision of paragraph (6) of §60. For other instances of confusion resulting from the application of new §60 to security transactions, under existing state law, see Coblens, *Assignment of Accounts Receivable as Security—The Situation in Oregon*, 29 ORE. L. REV. 214 (1950).

[125] See TRANSCRIPT OF DISCUSSION OF THE UNIFORM COMMERCIAL CODE, JOINT MEETING, THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 232 (May, 1950).

[126] MacLachlan, *Preference Redefined*, 63 HARV. L. REV. 1390, 1393 n. 12 (1950).