The controversy over the desirability of notice-filing legislation applicable to assignments of accounts receivable is not merely a product of the decision in Corn Exchange Bank v. Klauder. Not even the much-maligned Chandler Act amendment to Section 60a of the Bankruptcy Act is solely to blame. The controversy is really a quite ordinary part of the age-long conflict between a commercial interest (among potential borrowers and lenders) in achieving workable security devices and a more general interest (among potential creditors and bona fide purchasers) in avoiding secret transfers and secret liens. Section 60a became, in 1938, a culmination of one phase of that conflict—a culmination which attempted to dictate that the policy against secrecy would prevail with respect to that one phase—but it left room for state legislation to provide workable security devices within its limitations. But previous amendments of that and other sections of the Act had similarly attempted to dictate a predominance in their respective spheres of the policy against secret liens, usually with unhappy results when choices of interpretation were left open to the courts.

When the Klauder case "decided" that Section 60a now meant what it said it meant, it merely threw a spotlight on the inadequacy of state law to provide a workable security device in the field of assignments of accounts receivable.

It is the aim of this article to review the main features of the current controversy in the light of that larger conflict of which it is a part. In view of the plethora of

---

* Associate Professor of Law, Duke University.
1 318 U. S. 343 (1943).
3 Section 60a's peculiar phase of that conflict is, of course, that relating to the effect of secrecy on the success of an attempt to prefer. The draftsmen of the 1938 amendment were necessarily preoccupied with two lines of earlier cases, dealing respectively with unrecorded security interests and the so-called "equitable liens" and permitting secret transfers of that type to survive bankruptcy despite perfection within the four-month preference period. But the draftsmen apparently rejected an alternative proposal designed to remedy those specific failures of the earlier Section 60 in favor of the more sweeping "bona fide purchaser" provision designed to test all the elements of a preference as of the date on which the veil of secrecy was lifted to whatever extent state law might require to defeat subsequent bona fide purchasers. See McLaughlin, Defining a Preference in Bankruptcy, 60 Harv. L. Rev. 233, 245 (1946); with which compare McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 341, 379 (1927). And see the testimony of W. Randolph Montgomery before the New York Law Revision Commission on September 21, 1945, reported in State of New York, Legislative Document, No. 65(K) 299-300 (1946). Of course, even under the present Section 60 a secret transfer will survive bankruptcy if, under state law, it will survive both subsequent creditor action and subsequent bona fide purchases.

4 See McLaughlin, Defining a Preference in Bankruptcy, 60 Harv. L. Rev. 233, 236-245 (1946).
5 But see note 22 infra.
comment in law and trade journals already devoted to the dispute,\(^6\) it would be impossible to claim that this paper will add much that is new. Even the attempt to bring a relatively unbiased observer in to make a fresh study of the matter has been tried before.\(^7\) The later date of this study permits an excursion into the terms of the many statutes already enacted, as well as of those which have been proposed, to see how they add fuel to the flames of the dispute or, alternatively, how they meet specific objections raised by the disputants. But the real reason for this writing is that a summary of the events underlying the controversy, the interests involved in it, and the issues upon which the disputants have divided, seems necessary to the present symposium, whether it achieves anything more than a summary or not.

The inadequacy of state law in this one field, as of the date of the *Klauder* decision, is readily understandable in view of the considerable novelty of receivables financing to many parts of the commercial world. Although the decline of the trade acceptance, with its ready adaptability to the financial needs of sellers, left a void that might have called for financing on the acceptance's widely used substitute, the open book account,\(^8\) for a long time only the factors\(^9\) and the more newly organized commercial finance companies\(^10\) did any considerable amount of receivables financing. Their volume of business was large,\(^11\) but it did not begin to cover the field that now appears to be opening up for receivables financing. Apparently it took the lean years of the 1930's, with their shortage of borrowers eligible for ordinary, unsecured commercial loans, to bring the banks into receivables financing. Until that time very little urgency was felt for modernizing the law applicable to assignments of receivables. Some states clung to the old English rule, with respect to the priority of successive, innocent assignees of the same intangible

---


\(^7\) See Hanna and Koessler, supra note 6; Koessler, supra note 6.


\(^10\) See Burman, *Practical Aspects of Inventory and Receivables Financing*, supra.

\(^11\) See SAULNIER AND JACOBY, op. cit. supra note 8, at 3-4, 32-38.
right, which protected the first assignee to notify the obligor or trustee. Some followed the lead of New York, which simply protected the first to receive an assignment. The Restatement of Contracts gave authority to the Massachusetts "four-horsemen" rule, which, like the New York law, protected the first assignee in point of time, but with exceptions in favor of the first to collect, reduce to judgment, obtain a novation, or obtain an indispensable instrument evidencing the intangible. Perhaps in a majority of the states it was at least doubtful which of these rules would govern. But with respect to the rights of creditors of the assignor, it was probably clear that, short of a prior garnishment or other legal step to "fasten upon the property for the payment of their debts," the present assignment of a present right would prevail, unless the law relating to fraudulent conveyances could be invoked against it. In this connection, the rule of Benedict v. Ratner played a prominent role in requiring the assignee to "police his accounts" at the peril of being subordinated to subsequently garnishing creditors and, in their right, a trustee in bankruptcy. With respect to the rights of obligors (account debtors), it seemed clear that prior to actual notice of the assignment they might pay to or make a settlement with their immediate obligees or known assignees, and would be protected in defenses and set-offs arising in their favor against such obligees.

In this setting the factors found little need for greater legal protection. Their known specialization, most notably in the textiles field, made it unlikely that one of their customers could find an alternative market for his receivables without the competing assignee's first making a thorough investigation of the prior dealings which would necessarily warn the factor of the existence of this competition. Furthermore, since factors generally did business on a notification, non-recourse basis, they were well protected against successive assignments in the English-rule states and had good practical protection against a potential subsequent assignee in a Massachusetts-rule state. The finance companies, which dealt considerably with assignments taken on a non-notification basis and with recourse against the assignor, simply relied on a very thorough and continuous vigilance to protect

---

12 Dearle v. Hall, 3 Russ. 1, 38 Eng. Rep. 475 (1828), involved the rights of successive assignees of a beneficiary's interest in a trust, but its rule based upon notification of the trustee was extended to apply to successive assignments of contract right involving one or more assignees who had notified the obligor. Its name is widely given to this English rule even in its more frequent application to assignments of contract rights.


14 Restatement, Contracts §173 (1932).

15 The expression is Judge R. P. Spalding's, used by him in Wilson v. Leslie, 20 Ohio 161, 166 (1851).


17 268 U. S. 353 (1925).

18 See Silverman, Legal and Economic Aspects of Factoring, supra.

19 See Burman, Practical Aspects of Inventory and Receivables Financing, supra.
themselves against successive assignments of the same account.  
Creditors of factors’ clients were also protected by the wide knowledge of the factors’ specialization in limited fields. And while creditors of finance-company clients may have been frequently surprised to find that their debtor’s most liquid asset (next to cash) was encumbered, the proportion of firms that became finance-company clients remained relatively small and their creditors relied mostly on the law of fraudulent conveyances to defeat the unknown prior encumbrances.

The events of the late Thirties changed this rather easy adaptation of modern commerce to ancient laws. A new urgency about the state of the law arose from three sources. In the first place, a large group of potential entrants into the field of lending on receivables—the banks—was not prepared to do business on the high-cost basis which the finance companies’ vigilant self-protection entailed, and could not, of course, quickly attain the established position of the factors in any group of receivables clients and, with it, the protection enjoyed by the factors. Moreover, their entry on the high-cost level of the finance companies would have given them no competitive advantage with which to “break into” the field, and a general high-cost level would have severely limited the total amount of receivables financing that could be done.

In the second place, a perhaps greater urgency was felt by unsecured creditors generally because of the increasing prevalence of receivables borrowing on the part of their debtors. Of course, in the usual situation in which receivables financing is employed to permit prompt payment of suppliers (often in order to obtain cash discounts) and other general creditors, such creditors were not hindered but helped by the borrowing. But this happy circumstance was no consolation in the rarer situation where poor management used receivables financing to over-expand or where badly pressed debtors used it to keep the wolf from the door while they sank deeper into hopeless insolvency. Nor was the incidence of fraud on general creditors so small as to be negligible. Protection against the substantial risks which these admittedly rarer possibilities entailed, they felt, required that they be allowed the same access to information about the encumbering (or selling) of receivables which the law in most commercial states provides with respect to the encumbering of any tangible asset. That information is not provided by the English rule requiring notification of account debtors (especially because it cannot be invoked by a mere creditor); a fortiori it is not provided by the Massachusetts and New York rules.

The third source of urgency about modernization of the law applicable to receivables financing arose out of the Chandler Act’s amendment of Section 60a of the Bankruptcy Act, and the Klauder case’s “interpretation” of it. The Chandler Act’s “bona fide purchaser” rule meant that an assignee’s protection against potential subsequent assignees had to be good of its own force, as a matter of law, to be safe.

---


21 See note 38, infra.
against the trustee's ability to reach back four months and set aside preferences. It was no longer enough that the assignee's ways of doing business afforded practical protection against successive assignments; the potential bona fide purchaser became a purely legal risk, although he was not an actual one. In the New York-rule states an assignment for a present advance was sufficiently good of its own force; no further perfection was necessary for protection against creditors or bona fide purchasers. Apparently at least one of the participants in the National Bankruptcy Conference's drafting of the proposed amendments which became the Chandler Act thought that such assignments should be good of their own force in the English-rule states, and it is unlikely that anyone anticipated difficulties for them in a Massachusetts-rule state. However, the Klauder case confirmed the apprehension of many that non-notification financing in an English-rule state was insecure, and one district court decision subsequently surprised even the most apprehensive by reaching the same result in what the court assumed to be a Massachusetts-rule jurisdiction. This chain of events made modernization of state law applicable to receivables financing urgent even for those already engaged in the field and adjusted to it.

But the different sources of this urgency led to quite different demands as to the form which modernization should take. The amendment to Section 6oa, as a source of that urgency, would be satisfied with enactment of the New York rule in other states; under that rule the first person to take an assignment would be protected against bona fide purchasers and creditors from the time he took it, and thus protected against the preference provisions of the Bankruptcy Act. Hence the firms already established in the field were inclined to favor the enactment of so-called "validation" statutes—statutes simply declaring that a written assignment of accounts receivable (sometimes required to be for value) shall be valid against creditors and subsequent assignees from the time it is made. Some sought to achieve the collateral objective of relaxing harsher extensions of the New York rule of Benedict v. Ratner by including in their proposed validation statutes an adoption of the 1943 amendment to Section 45 of the New York Personal Property Law, to the effect that an assignor's dealing with returned goods as his own, or granting credits, allowances, or adjustments to account debtors—with or without the acquiescence or consent of the assignee—will not invalidate the assignment. These validation statutes have become law in fifteen states, with or without such variations.

24 268 U. S. 353 (1925). The doctrine of this case had been extended in Lee v. State Bank & Trust Co., 38 F. 2d 45 (C.C.A. 2d 1930), modified on second appeal, 54 F. 2d 518 (C.C.A. 2d 1931), cert. denied, 285 U. S. 547 (1932), to invalidate an assignment where the assignor had been allowed to deal with returned goods as his own.
as that dealing with the *Benedict v. Ratner* rule.\(^2\) One of them, the Connecticut act,\(^2\) contains a collateral provision requiring "any person who prepares any financial statement of any debtor" to "include in such statement an itemized list of all assigned accounts of which he has knowledge with the names of the assignees," on penalty of fine and imprisonment.

But the urgency felt by banks, which were not already established in the field, and by credit men, who most often found themselves or their clients in the position of unsecured creditors, arose out of the other considerations mentioned as much as it did out of the amendment to Section 6oa.\(^2\) Although two states passed "bookmarking" statutes\(^2\) to meet these sources of urgency, the banking and creditor groups generally rallied behind proposals for "notice-filing" legislation, and such statutes have been enacted in twelve states.\(^2\) Patterned on the filing provisions of

---

\(^2\) Arkansas: Ark. Laws 1945, No. 118
Maine: Me. Laws 1945, c. 100
Maryland: Md. Ann. Code art. 8, §1A (Supp. 1943)
New Hampshire: N. H. Laws 1945, c. 19
Rhode Island: R. I. Laws 1945, c. 1345
South Dakota: S. D. Laws 1945, c. 213
Wisconsin: Wis. Stats. §241.28 (1945).

The Michigan statute is included in this list, rather than in the list of notice-filing statutes, although it contains some notice-filing provisions. These require that publicity be given to assignments made for an antecedent debt, but to no others. Obviously such provisions do not meet the demand for legal protection against successive assignments, nor do they fully meet the need that general creditors feel for a check on the accuracy of financial statements. Even less do they meet the need of protecting general creditors against the fabrication of evidence of security as of the date advances were made to conceal the fact that security has actually been given for an antecedent debt. See note 38, *infra*.


\(^2\) This abbreviated statement of the history of the controversy tends to over-categorize the interests which have taken a stand on one side or the other. Not all banks, by any means, now consider themselves "newcomers" to the field of receivables financing, and bankers are divided as to their preference for notice-filing over validation. Although they are probably not representative of the views of the American Bankers Association, the State Bankers Associations of California, Massachusetts, Michigan, Minnesota, New Jersey, and New York appear to have taken positions in favor of validation statutes and inconsistent with the "newcomer's" feeling of urgency I here describe. Similarly, although the National Association of Credit Men has been one of the foremost advocates of notice-filing legislation, the Association of Credit Men of the City of New York appears to have taken a position inconsistent with that of the parent body. On the other side, too, some representatives of the factors seem to be at least lukewarm to the anti-notice-filing position which I have put in their mouths.


Colorado: Colo. Laws 1947, c. 120
Florida: Fla. Laws 1947, c. 24397
Idaho: Idaho Laws 1945, c. 172
the Uniform Trust Receipts Act and of several of the factors’ lien acts, this legislation requires as a condition to an assignment’s validity against creditors and subsequent assignees (1) a written instrument of assignment, and (2) a notice of intention to assign, filed in a specified public place, naming the assignee and assignor and giving their addresses, although not specifying the individual assignments nor itemizing the accounts assigned. Although opponents of these statutes misname them “recording acts,” it is important to note that, unlike recording acts, they do not require a record of each assignment but are satisfied by the filing of this single, simple notice of intention to assign, which will protect any number of assignments made during the period it is in force. To obtain exact information as to which accounts have been assigned and for what obligations, the inquirer is compelled to seek out the named assignee or assignor. Needless to say, the simpler notice-filing requirement permits a flexibility and informality in financing arrangements that could not be achieved under a recording act. In addition, it withholds detailed information concerning the financial arrangements from all but those who can persuade one of the parties that their interest in the information is legitimate.

The rest of the general pattern of the notice-filing statutes is as follows: The statute will define the priority that successive assignees of the same account will enjoy, according priority either to the first to file a notice or to the first to do the two acts concurrently required for protection: (1) the taking of a written assignment and (2) the filing of a notice. Fulfillment of the requirements for such priority, of course, qualifies the assignee for protection against the “bona fide purchaser” test of Section 60a. The statute will usually provide a time limit to the effectiveness of the filed notice, with provisions for renewal without interruption of the protection afforded. It will usually provide for the filing of a cancellation notice terminating the effectiveness of the original notice so that protection may be given to a new assignee upon his qualifying. Provision is usually made excepting the account debtors from any constructive-notice effect of the filing and protecting them in their payments to, settlements with, and defenses and set-offs arising against the account creditor (the assignor) prior to actual notice of the assignment. Like the validation statutes, these notice-filing statutes frequently contain collateral provisions, one modifying the extensions of the rule in Benedict v. Ratner in the manner of Section 45 of the New York Personal Property Law being the most common.

The sometimes quite bitter controversy between the proponents of these two alternative efforts to modernize the law relating to assignments of accounts receivable continues to turn up a great number of individual issues of division between them. Since the controversy continues to rage over the enactment of one or the other of these two types of legislation in states which have not yet spoken, over a federal

South Carolina: S. C. Laws 1946, No. 433
Utah: Utah Code Ann. §§81B-0-1-81B-0-7 (Supp. 1945)

**See Silverman, Legal and Economic Aspects of Factoring, supra.**
notice-filing proposal for amendment of the Bankruptcy Act, and over the pertinent provisions of the proposed Uniform Commercial Code, there is point to an inquiry into its fundamental elements. I suggest that the essential difference between the two opposing camps relates to the choice between two interests competing for predominance: the interest of borrowers (and of the lenders who seek the business of those borrowers) in a certain amount of secrecy attendant upon their methods of financing, and the interest of certain outsiders in full information respecting these same methods of financing. On behalf of the borrowers there is no assertion of a desire for complete secrecy; the legitimate interest of existing and potential creditors in complete knowledge of their debtors' financial arrangements is acknowledged. But the borrowers deeply fear a notoriety that will escape these limits and let customers, and perhaps their own employees, know that they are "hocking their receivables." On the other hand, the "outsiders" do not assert that every member of the public is legitimately interested in the financial arrangements of a borrower. They agree that the legitimately interested include only those who are creditors of the borrower, present or potential, including such as propose also to extend credit on the security of an assignment of accounts receivable. But they do not agree that the borrowers can assure them that this limited group will obtain the information to which it is entitled, otherwise than by publicizing it in the manner which the borrowers abhor. Clearly, there are risks that information which need not be publicized generally will be kept secret from even those who are legitimately interested. Equally clearly, there are risks that information concerning a part of a business's financial arrangements, if publicized, will be misused or misconstrued, to the detriment of that business. The essential difference between these two groups concerns the questions, which of these risks is the more serious, and which interest should be preserved.

The interest of borrowers in secrecy in these transactions is one which is peculiar to the subject of receivables financing. Long-standing prejudices associate the "hocking of receivables" with financial shakiness in a way in which ordinary mortgages and pledges of tangible assets are not associated. Interestingly enough, this taint may have some basis in the very obsolescence of the law that was applicable to receivables financing prior to 1941. It stems from a notion that because this financing was costly and because it was insecure (and, of course, it was costly be-

81 A bill, H.R. 5834, introduced by Representative Hobbs into the Eightieth Congress, second session, contained in its Section 2 an amendment to Section 70 of the Bankruptcy Act, which would have added a subsection (i) requiring, for the validity of an assignment against the trustee of an assignor, the filing of a notice of intention to assign with the clerk of the proper federal district court, unless the comparable provisions of an applicable state notice-filing statute had been complied with. The bill was not enacted by the Eightieth Congress.

82 Article VII, Part III (Tentative Draft No. 1) of the proposed Uniform Commercial Code, being drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, provides for an "inventory lien" on tangibles and accounts receivable which form a part of the inventory of a business. A condition precedent to the validity of the inventory lien against third parties would be the filing of a "financing statement" indicating that a named "financer" has or expects to have a lien on inventory of a type described in the statement belonging to a named "borrower."

83 But see SAULNIER AND JACOBY, op. cit. supra note 8, at 22.
cause it was insecure) no borrower would seek it unless he were really hard up and no lender would take receivables as security unless he were already in too deep to get out in any better way. Although extra-legal hazards—frauds of all types—were also responsible, this high cost to the borrower and this inherent insecurity to the lender were both due in some measure to the legal hazards.

If customers accept information concerning a business’s receivables financing as evidence of financial distress, they may be driven to place their orders elsewhere; hence this particular interest of borrowers in secrecy is closely associated with business success during the period of credit extension and, hence, with ability to repay. Thus, put in their strongest terms, the assertions on behalf of this interest picture an assignment of accounts receivable under legislation requiring publicity as something less than a workable security device, for the publicity will interfere with the borrower’s ability to repay as well as his ability to prosper with the aid of the credit extended to him. In such terms, the present dispute turns on issues identical with those of all of the long series of earlier conflicts between the desire for workable security devices and the desire to avoid secret liens. The present dispute is notable for the fact that the part of the secrecy-seeking borrower is taken by his lenders—the finance companies and the factors—who have frequently espoused publicity requirements for other security devices and, in doing so, have helped to resolve the basic conflict by accomplishing, in legislative provisions for workable security devices, the avoidance of secret liens.

The opponents of notice-filing legislation make many points other than this basic one. Related to the basic point is the argument, of which they make much, that they (the finance companies and the factors) are espousing the cause of small business, for it is the “smalls” who require receivables financing to obtain necessary working capital, since they cannot obtain it on their unsecured obligations. Moreover, it is the “smalls” who will lose customers to the “bigs” if word of their receivables borrowing is allowed to create an assumption that they are in unusual financial straits and are unlikely to be able to fill their customers’ orders and to fulfill their obligations. Not only do these lenders seek, by this argument, to enlist one’s sympathy for the underdog; through it they also seek to establish a socially useful role for modern receivables financing which, in part, contradicts the old prejudice which associates such financing with distress measures, upon which the argument for secrecy is based. This paradox is no accident; the finance companies and the factors are, of course, quick to assert the social usefulness inherent in the type of financing which they have done so much to build. But that receivables financing is widespread, respectable, socially useful, and desirable in no way contradicts the fact—so they assert—that a good many people are unaware of how widespread and respectable it is, and continue to harbor the ancient prejudice. What is more, it may be impossible, in terms of the foreseeable future, so to educate the public as to erase that prejudice.

Not only do the proponents of notice-filing legislation underestimate the risk,
the opponents contend; they also overemphasize the usefulness of and the need for publicity as an aid to those outsiders who are legitimately interested in the affairs of the receivables borrower. On the score of usefulness, they point out that a creditor who sought to obtain information concerning the status of a debtor's receivables through the public files would bear a cross of untold weight. He must first decide which state's (or states') law is applicable to his debtor's assignments, and in which of the possibly several filing places within a state notices regarding that debtor's assignments would have to be filed. Doubts on these scores would have to be covered by multiple inquiry. Should he find the right office and learn that no notice had been filed, he would still know only that up to that time no protected assignment had been made. A notice filed at any time thereafter would still protect an assignment which would have priority over his unsecured claim. And if he should find, on the other hand, that a notice was on file, he still would have learned no details but would simply be directed to do what he should have done in the first place—make direct inquiry of the debtor himself both as to what accounts he has assigned and as to what assignments he intends to make during the future period in which this creditor will be interested in him. The argument makes the creditor who would rely on the public files look ridiculous; yet it is impossible to label it with a more generous word than "camouflage." No proponent of notice-filing legislation asserts that the information which would be supplied should serve as a substitute for a thorough credit investigation which, among other things, should require the debtor himself to supply every relevant and available detail. The only argument advanced in support of notice filing, on this score, is that the information it would supply is necessary as a supplement to such a credit investigation—an independent check on the word of the debtor.

But on the score of need the argument advanced by the opponents is not so inherently weak. They contend that a creditor who does follow the prudent course of making a thorough credit investigation, aided as he is by the severe legal penalties attaching to fraudulent misrepresentations for the purpose of procuring credit, and also aided by such independent information as is supplied by the credit-reporting agencies, does not really need the aid of notice-filing publicity to insure that he will learn of a prior encumbrance or sale of receivables. Suppliers can and customarily do insist upon financial statements on forms which, in addition to calling for full details, require an answer to a question such as: "Have you assigned, or do you intend to assign, any accounts receivable?" (And, according to the testimony of an attorney experienced in this field, such statements are customarily returned with that one question left unanswered.) Of course, a potential second assignee will have inquired about prior assignments before extending credit. The incidence of fraud is almost negligible, according to the lender-opponents, and, of course, they

---

85 See the testimony of W. Randolph Montgomery before the New York Law Revision Commission on September 21, 1945, reported in STATE OF NEW YORK, LEGISLATIVE DOCUMENT No. 65(K) 270 (1946).
are in a peculiarly good position to cite their own experience in support of the assertion, at least as it relates to fraud on competing assignees. However, their own experience has also been coupled with many conditions well designed to reduce the incidence of fraud, as the previous discussion of their adjustment to the obsolete legal situation prior to 1941 has pointed out. A terrific expense designed explicitly to eliminate fraud (on them) might have been expected to keep the incidence of fraud, within the experience of the finance companies, at a minimum. A fairly notorious specialization in the financing of certain industries might similarly have been expected to reduce the amount of fraud, in the form of duplicate assignments, committed on the factors. Nor are the factors noted for laxity in the policing of their accounts. Although these older hands at the game have gotten along well without a requirement of notoriety regarding assignments of receivables to protect them, there is evidence that others, newer to the game, have put existing notice-filing systems to use and that they believe that in so doing they are securing protection at a lower cost.

But at least as important as the fraud—with respect to which the experience of the older hands is peculiar—are the injuries which secrecy may lead a borrower to inflict on his general creditors. To the extent that the finance companies assert

Factors appropriately add that their experience is unusually broad, for, as purchasers of receivables, they have become the largest single group of all the unsecured creditors. But their specialization tends also to keep their unsecured obligations grouped in the industries which are known to depend on factoring, and at the end of the line of the firms in such an industry the last factoring client sells the unsecured obligations of retailers who, normally, do no receivables financing at all.

A questionnaire directed to bankers in California and Missouri, published with the answers in mimeographed form by the Legal Department of the American Bankers Association in January, 1947, tends to support a conclusion that the limited experience of bankers under the notice-filing legislation of those two states has been happier than the more experienced finance-company officers would have predicted.

Of course, it is true that there are many opportunities for fraud on assignees of receivables which are not touched by notice-filing. Mr. Zinner lists the following as representative of the frauds against which expensive vigilance is necessary: duplicate assignments, use of remittances without accounting therefor, failure to credit returned merchandise or to show exceptional discounts, fake shipments and bills of lading, checks exchanged for purposes of misrepresentation, consigned merchandise, diversion of merchandise in transit, collusion of all types between the buyer and the seller, falsified books. Zinner, Judging Credits in Loans on Accounts Receivable, Robert Morris Associates Bulletin, January, 1940, p. 218.

But distinguishing the frauds which notice-filing will not curb does not serve to establish that the remaining ones are less real in the receivables field than they are in the fields of financing on the security of tangibles.

The unsecured-creditor interests which favor notice-filing legislation hope for the prevention of two types of injury. The more obvious hope is that the publicity requirement will eliminate unwitting, but not non-diligent, reliance on the availability of receivables for the satisfaction of unsecured claims, or, stated otherwise, that receivables will not be secretly encumbered with the proceeds going into unproductive use. Less obviously they are concerned with the possibility of a type of fraud the extent of which can never be measured: the successful fabrication of evidence of security as of an earlier date than that on which the intention to give security was actually formed. If the date of the assignment is the date as of which the elements of a preference are to be tested under Section 60a of the Bankruptcy Act, the evidence of that date will consist largely of documents solely within the control of the parties. But if
that a danger of this sort of injury does not exist, they contradict all the experience that has gone into the requirements of notoriety attendant upon other transactions by a debtor in his property—the possession of the pledgee, the recording of mortgages and conditional sales, the notice to creditors in bulk sales, the filing of notice of intention to do trust-receipts or factors'-lien financing—and all of that part of the law of fraudulent conveyances which deals with fraudulent retention of possession. They may be right and the ancients wrong; notoriety may be a very clumsy way to insure protection against this type of injury, and quite unnecessary. But at least on this score the argument cannot assert that it pits one small group's experience against everyman's ignorance.

At this point the opponent is reminded of another of his complaints against notice-filing legislation, or rather two of them. The fallacy of this notice-filing proposal is betrayed, he asserts, by the sort of comparison to mortgages, pledges, etc. that has just been made. The fact is that those are transactions involving tangibles, while receivables are an entirely different species of property: they are intangibles. Hence there can be no "ostensible ownership" of receivables, and the need of a notorious act to remedy the false appearance created by possession does not exist here. Second, since the assignment of receivables creates a security interest only in intangibles, it is peculiarly unfair to the parties doing this type of financing to single it out for a requirement of publicity, without similarly requiring publicity for borrowings on the discount of commercial paper or on an unsecured basis. Even unsecured borrowing, "if it be unbalanced in amount, may adversely affect his credit quite as much as, if not more than, a reasonable amount of secured borrowing."39

These two arguments rest on the premise that there is a greater similarity between receivables financing and unsecured borrowing than there is between receivables financing and financing on the security of tangibles. The reference in the second argument to the discounting of commercial paper seems wholly to ignore the similarity of the legal treatment of dealings in commercial paper with the requirements for a pledge of tangible chattels. There is an inference of ownership of commercial paper associated with possession that is in accord with the tenor of the paper, but the evil of ostensible ownership is sought to be remedied by the requirement of a transfer of possession. Hence there has been assumed to be no more need for additional requirements of notoriety for a pledge or discount of commercial paper than there is for a pledge of tangible chattels. Again, the ancients may be wrong in their reliance on possession as an effective guide to ownership, but they have clearly put their reliance on a workable protection for innocent dealings

---

with a debtor; dealings in commercial paper do not constitute a *casus omissus* in the legal context in which the current proposal is made.

The assumption of similarity between receivables financing and unsecured borrowing seems extremely difficult to justify. It is based on the proposition that there can be no ostensible ownership of an open account, that innocent parties dealing with the account creditor will not justifiably rely on his assertions of ownership as they would upon similar assertions with respect to tangibles in his possession. But if a firm is known to do business with its customers on a credit basis—a fact that can be ascertained independently of the borrower's own assertions—why should its creditor not expect to find receivables among its assets? And if the creditor knows that fact and has a financial statement detailing the accounts and asserting ownership in them, in what respect has he done less than one who relies on the debtor's possession of tangible assets and his assertion of ownership in them? Why does he need additional legal protection in one case and not in the other?

These questions are not intended to contradict the proposition that a debtor may injure his creditors by over-borrowing on his unsecured credit. Perhaps he should not be privileged, as he now is, to avoid notoriety concerning his unsecured financing. But it is hard to see that a law which fails to require such notoriety unfairly discriminates in distinguishing his secured borrowing from his unsecured, and requiring that it be notorious. On the contrary, it might be more legitimate to object that the validation statutes discriminate unfairly in their especially lenient treatment of this one form of secured financing.

An attempt to set forth the basic issues in dispute cannot afford to ignore what the parties say of each other as to the "real" motives underlying their supplications to the legislators. In their respective arsenals, these disputants do have certain *ad hominem* arguments which, valid or not, seem to color the positions they take. On the one hand, the opponents of notice filing assert that the banks, the newcomers to this field, really seek the publicity requirement only in order to enable themselves to learn the identity of and to raid the present customers of the finance companies; and they assert that the real motive of the credit men is the creation of a new legal obstacle to the perfection of a security—preferably a complicated, unpredictable obstacle which will haphazardly throw any number of legitimately secured creditors into the limbo of the unsecured in the event of bankruptcy or other liquidation. On the other hand, the proponents of notice filing assert that it is the opponents—especially the finance companies—whose motives are impure. These interests oppose notice-filing legislation, it is asserted, in the hope of keeping competition out of the field—in the fear that with the legislation many banks will venture into the field with lower rates. Although there has been some effort to appraise at least one of these claims, a studied appraisal of them seems beyond the reach of an outsider.

The American Bankers Association questionnaire inquired whether, as an effect of the California and Missouri notice-filing statutes upon competition among financing agencies, there had been any "pirating" of customers. The answers denied that there had been "pirating," but indicated that the statutes had put the banks in a better competitive position *vis à vis* the finance companies and had won the banks some of the finance companies' customers. See note 37 supra.
The opponents of notice-filing legislation make their most telling points, however, when they turn to criticism of the provisions of existing legislation of that kind. Their quite valid criticisms are directed at features which may be categorized as follows: (1) provisions defining the point at which "perfection" occurs and determining the priorities among successive assignees, (2) provisions specifying the place of filing and affecting the question of what law is to govern an individual transaction, and (3) collateral features.

1. The provisions specifying when "perfection" occurs fill the need for certainty as to the application of Section 6oa to an assignment of receivables. Invariably they require the assignee to accomplish both the taking of a written assignment and the filing of a notice to achieve "perfection." But the priority among successive assignees of the same accounts, when each has taken both of the steps necessary to perfection of his assignment, is determined differently under different statutes. One type of provision awards priority to the assignee who is first to do both—to take an assignment and to file a notice. Under such a statute a lender willing to finance under a continuous, "revolving-credit" arrangement will find himself hampered by the necessity of a re-search of the files preliminary to the taking of each new assignment. Although there is already an effective notice on file, a competing assignee, by filing a subsequent notice, will become entitled to priority thereafter in all accounts which are first assigned to him. Actually, a lender on receivables is no worse off under this first-to-do-both priority than are his brothers in the validation-statute states; should he neglect to re-search the files before taking each assignment he will assume the same risk that this brother assumes in every assignment he takes—the risk that someone else will have taken a prior assignment of the same accounts. But the provision is hardly an ideal one for the lender; it meets only inadequately the need felt by the banks for legal protection against successive assignments.

However, an attempt to meet this objection by changing to a "first-to-file" priority—i.e., a provision that the first to file a notice takes a prior right in every assignment made under that notice—may only give the critics a chance to say, "Heads I win, tails you lose." The first-to-file priority, adopted in several of the existing statutes, is subjected to the even more severe criticism that it tends to give one lender a "monopoly" on the receivables financing of each assignor with respect to whom he has filed. During the statutory period of effectiveness of his notice (usually one or three years) no competing lender can be wholly comfortable in taking an assignment of receivables from the same assignor. This objection is met to the extent that the notice-filing statute effectively (1) requires that the assignee bind himself on the request of the assignor by a statement to any specified person detailing the accounts then held by him, and (2) either (a) protects later-filing assignees against first-filing ones who take with actual knowledge of a prior out-

41 The California, Idaho, Missouri, Utah, and Washington statutes are of this type.
standing interest, or (b) provides for effective cancellation of an existing notice. But seven states make no express provision imposing a duty on the filing assignee to disclose the details of his position on request. Thus in most of the states which provide a first-to-file priority, a later-filing assignee will be forced to rely wholly on his assignor's good faith, or on the speculative protection of an estoppel by silence, if he wishes to compete with an uncooperative first-filing assignee.

But even if a later-filing assignee has reliable information as to what accounts have been assigned to his first-filing competitor, he will require assurance that the accounts he thereupon proceeds to accept cannot be subsequently assigned to the higher-priority competitor. Three of the statutes adopt the provisions of the American Bankers Association draft subjecting a first-filing assignee to prior assignments of which he has written notice; Missouri subjects him to those of which he has "actual notice"; but the rest are silent as to the effect of actual notice. More effective protection against this risk is the objective of the few statutes which require the assignee to cancel his filed notice upon demand and satisfaction of outstanding balances, but only one of these, California's, imposes sanctions compelling performance of this duty. The North Carolina statute permits the assignor to file a "notice of discontinuance" if he also serves it on his assignee; but this device leaves protected any accounts which may have been previously assigned, and compels the competing lender to rely upon the effectiveness of the unsanctioned statutory duty of the first-filing assignee to disclose the accounts he holds for assurance against the possibility that he is not taking some of those still-protected, previously assigned accounts. The rest of the states, of course, permit the assignee to file a notice of cancellation, but seem to rely on the ability of the borrower to compel its production by conditioning his tender of repayment on it, as he might compel the cancellation or release of a mortgage—a somewhat ineffective compulsion in a self-liquidating financing arrangement which authorizes the lender to notify account debtors and collect from them on his own behalf. Thus, although the first-to-file priority affords the most workable protection to a continuing financing arrangement, the

Florida, Idaho, Ohio, Oklahoma, South Carolina, Texas, and Utah. The list includes two first-to-do-both states, in which the need for such a provision is less acute.

Colorado, Florida, and Oklahoma.

But California's duty of the assignee to execute a discharge, and the penalties for non-performance, are available only if the original notice listed the specific accounts assigned and specified the obligation which they secured.

The North Carolina statute strangely gives the "cancellation" of a notice by the assignee this same effect of leaving protected previously assigned accounts, so that a subsequent assignee would have to know that his accounts could not have been previously assigned to know that he is getting the highest right in them. Since the "cancellation" would not have to be given until the first-filing assignee had been satisfied, the need for this qualification on its effect, which feeds the "monopoly" argument, is difficult to perceive.

Mr. McGowan opposes interpretation of the Uniform Trust Receipts Act as granting "first-filing" priority on policy grounds which do not apply to notice-filing for assignments of receivables. See George B. McGowan, Trust Receipts 124, n. 24 (1947). The only decision under the Act, up to the time of his publication, had denied first-filing priority, but one commentator had taken a position in favor of it. McGowan's criticism is that it would "encourage carelessness, if not outright bad faith, on the part of the first who filed." The policy of the Trust Receipts Act, to encourage trust receipts financing of the acquisition of inventory rather than financing secured by inventory already on hand,
position of the protected assignee under most of the statutes which now provide first-to-file priority is unduly embarrassing to potential competition.

But if the first-to-file priority and the first-to-do-both are alike short of perfection, at least neither of them falls quite so far short of the underlying aims of the notice-filing proposal as do the Missouri and North Carolina statutes. Under them perfection of a written assignment may be attained either by filing a notice or by notification of the account debtors. Within these provisions for alternative ways of perfection, Missouri accords priorities among successive assignees on a first-to-do-both basis (so that a first-filing assignee could be defeated by an assignee who had taken an earlier assignment and then either filed or notified account debtors), while North Carolina accords a first-to-file priority (so that a first-filing assignee, if he were not already, perhaps unknowingly, subordinated to a prior assignment which had been perfected by notification of account debtors, would be fully protected in all assignments he took under his filing). In Missouri, therefore, a lender will not even be assured by a re-search of the files before taking each assignment, and in neither state will general creditors find in the files any satisfactory check on a debtor's financial statements.47 Of course, it is at least a slight added convenience to factors and others who do business on a notification basis to be relieved of the necessity of filing in these two states; but even such a financer, in North Carolina, were he not in a position to rely completely on the good faith of his customer, would be obliged to re-search the files prior to taking each new assignment unless he were himself to file.

A remaining observation might be made with regard to the provisions determining when "perfection" occurs. Only one of the existing statutes requires an assignee who takes his assignment before filing his notice to file within a limited time: Washington requires the notice to be filed within ten days after the assignment. California goes farther in the protection of creditors against non-publicized, later-perfected encumbrances; it protects the assignment only if the notice is filed first. The rest of the notice-filing states rely solely on the assignee's fear of Section 6oa and of a subsequent assignment of the same accounts to induce prompt filing of a notice, and hence fulfillment of the general creditor's interest in the notice-

makes his point applicable only to that Act. An entruster financing the acquisition of inventory may legitimately rely on the apparently obvious fact that no other creditor of his trustee will have a prior lien on the inventory which is only just being acquired; it might not occur to him to search the trust receipts files before extending credit on such security. But if first-filing priority obtains, a prior-filing entruster of that trustee might carelessly or in bad faith take a subsequent security interest in that same inventory by trust receipt (at least in Indiana, Illinois, and Connecticut—see id. at 52), and because of his prior filing take precedence over the prior entruster. For that reason McGowan advocates interpretation of the Trust Receipts Act as protecting the first entruster to advance new value, if he files within the thirty-day period. Such considerations do not apply to accounts receivable financing; there is neither any policy favoring acquisition financing of receivables (because such financing does not exist), nor is there any danger that a lender on receivables will be lulled into a false sense of security arising from a belief that, in the nature of things, his must be the first interest that could have been created in that security by that borrower.

47 Missouri and North Carolina creditors will get some assurance from the lack of a notice on file against a debtor whose business is such that he would not be likely to turn to notification financing.
filing requirement. While this inducement is probably quite adequate to accomplish prompt filing, and while the California provision is probably too rigid, the Washington provision does have this advantage: for purposes of the application of Section 60a's definition of a preference, it supplies a standard to aid an interpretation of that definition that will not cause a reasonable interval between the making of an assignment and the perfection of it to convert what was a transfer as security for a present advance into a preferential security for an antecedent debt.48

2. The differing provisions governing the place of filing raise the collateral dispute as to the preferability of central over local filing. Six states of the twelve accept the central-filing answer, using the office of the Secretary of State.49 Although (to the extent that local creditors rather than distant suppliers and well-equipped credit-reporting agencies are the primary beneficiaries of the notice-filing requirement) the county-filing statutes fill a need which central filing cannot touch, the six statutes which require county filing give some ammunition to one of the more effective arguments that is made by opponents of this legislation. To require a lender to determine, at the peril of losing his security, what law governs and what is the proper filing place for an assignment from a borrower whose business sprawls over several counties in several states, both for the purpose of deciding where to file and for that of deciding where to look for prior filings, is to impose new risks on transactions that may involve tremendous sums. Of course, multiple filing and multiple searches provide a somewhat annoying but otherwise satisfactory solution whenever the transaction involves amounts large enough to justify the slight additional expense. Still, the central-filing statutes greatly simplify the assignee's decisions. And the suggestion of the American Bankers Association, adopted in the Florida and Colorado central-filing statutes, that the filing provisions extend only to assignors whose "main executive office in the United States is in fact located in this State," appear to provide at least a rule of exclusion, if not one of inclusion, for settling choice-of-law uncertainties. If these statutes may be interpreted as providing a rule for the choice of law, both of exclusion and of inclusion, the rule would seem to be ideal. The interest of Florida is in protecting parties dealing with Florida assignors, rather than in extraneous considerations as to where the account may be "located," or where the assignment was made. Similarly, lenders and general creditors are concerned to know what law governs a particular debtor's dealings in his receivables rather than what various laws govern his various individual accounts or individual assignments by him.

By contrast, the North Carolina statute's explicit provision governing the choice of law results in a much less satisfactory rule. The statute provides that an account

48 Compare the provisions of the proposed amendment to Section 6oa contained in H.R. 2412, H.R. 3834, and S. 826, 80th Cong., 2d Sess. (1948), which would impose a thirty-day limit, unless applicable state law imposes a shorter one, on the delay with which a transferee may perfect his transfer without converting a transfer for present consideration into one for an antecedent debt. See the discussion of the proposed amendment in Kupfer, Progress in the Amendment of Section 6oa of the Bankruptcy Act, supra p. 624.

“shall be deemed located in this state” if the transaction out of which it arose occurred there, if it is to be paid there, if its place of payment has been transferred to that state, or if “under general rules of law” it is deemed located there. Consider the remoteness of the possibility that a New York lender to a New York firm would think of filing a notice in North Carolina (in what county would he file?) because some of the accounts assigned arose out of sales “made” in North Carolina by a traveling representative.

In general, the county-filing statutes, though they do not contain explicit choice of law provisions, appear to create much more uncertainty in this respect than the central-filing ones do. Most strikingly, California does this by indicating in its requirements respecting the contents of a notice that it contemplates that an assignor who has neither a residence nor a place of business within the state might be expected to file under its statute, and yet making no provision respecting the county in which such as assignor’s notice should be filed. Texas and Oklahoma specify a single county in which such an assignor’s notice should be filed.

3. The collateral provisions in notice-filing statutes deal most frequently with the rule and extensions of Benedict v. Ratner, the rights of a protected assignee in proceeds, and the rights of account debtors.

In providing a new hurdle in the way of perfection of assignments of receivables, most notice-filing statutes have also sought to eliminate or narrow an old one. Benedict v. Ratner held invalid as against a trustee in bankruptcy an assignment which, as interpreted by the parties’ conduct, did not require the assignor to account to the assignee for the proceeds collected by him but permitted him to use them in the conduct of his business. This case provided unsecured creditors with a weapon for striking down poorly managed arrangements which, when its force was avoided by good management, did them very little real good. It did fasten upon one type of objective conduct tending to prove that the intention to give security was really formed at the time of the credit extension and that the documents evidencing security were not sham. But it gave no notoriety to the assignment. And, though the case purported to apply only New York law, it has been followed and extended both in New York and elsewhere to an extent that leaves the status of the rule, or at least the outer limits of it, uncertain in a great many places. It remains a sword of Damocles hanging over many legitimate security devices. To the extent that notice filing provides a substitute type of objective conduct to evidence the actual existence of an intention to give security at the time of which security is claimed, this function of Benedict v. Ratner is no longer needed.

Most of the statutes, following the lead of the American Bankers Association draft, have adopted the 1943 amendment to Section 45 of the New York Personal Property Law, which protects the assignee despite his consent to the assignor’s dealing with returned goods as his own or granting credits, allowances, or adjust-

51 See note 38 supra.
ments to account debtors. This cuts down extensions of the rule but does not touch
the holding in *Benedict v. Ratner* itself, presumably in the belief that it remains
desirable to continue to penalize the central "sin" of allowing the assignor more
or less unlimited use of proceeds in the conduct of his business. But since the
decisional law on this subject in many states, unlike New York, is still uncertain,
it would seem wiser to have spelled that purpose out. But an even better way of
achieving that purpose is suggested in the first tentative draft of the Commercial
Code's provisions dealing with Inventory Financing: to penalize indifference to
the assignor's accounting for proceeds by taking away only the proceeds themselves,
rather than all of the assets subject to the lien.

Several states go farther than this and excuse "any act or thing done or omitted
to be done" by the assignor, so far as the validity of the assignment as against third
parties is concerned. However, Ohio may have botched this effort by failing to
state expressly, as Washington and North and South Carolina have done, that the
assignee's consent to or acquiescence in the assignor's conduct will not affect the
assignment's validity. Perhaps Ohio intended to distinguish the assignee's consent
or acquiescence from mere unwitting indulgence, but either way Ohio's statute is,
on this point, less than clear.

Of course, the lender on receivables is usually as vitally interested in the pro-
cceeds as he is in the accounts assigned, and his assignment will itself as a rule
cover proceeds in the form of cash, commercial paper, and returned goods. Many
notice-filing statutes have undertaken to define the lender's rights in proceeds
for him, lest he be less than usually careful in defining them himself (or lest con-
fllicting interests of third parties deprive him of rights he reserved). Many of them
make his assignor a "trustee" or "agent" for him in receiving proceeds in any form,
and some of them extend the trust to cover the proceeds in the hands of any trans-
feree of or successor in interest to the assignor. In so doing they seem unnecessarily
to supply ammunition for the opponents of notice-filing legislation. Of course,
statutes which follow the American Bankers Association draft in excepting from
the rights of the assignee persons who "have acquired . . . title [to proceeds] in
good faith and for value" are beyond objection. But an outsider might hesitate to
have dealings with a firm known to be assigning receivables in Utah or Oklahoma,
where no such exception for bona fide purchasers of proceeds (including returned
goods) is expressed.62 And Ohio's protection to bona fide purchasers extends only
to those who purchase, or take mortgages of, returned goods; I suppose, however,
it would be a violent misapplication of rules of construction to interpret that statute
as repealing Ohio's Negotiable Instruments Law. Of course, it may be too much
to expect in these statutes, which are primarily concerned only with notice filing,
the careful draftsmanship that has gone into the corresponding provisions of the
first Tentative Draft of the Commercial Code; but the legitimate objections of
those who fear the consequences of informing a borrower's customers of his re-

ceivables financing might have been mitigated by leaving the matter of rights in proceeds to the provisions of the assignment, as limited by common law.

Perhaps even more objectionable, in view of the borrower's fear of losing customers, are some of the defective provisions governing the rights of account debtors. Here again, the common law of any state could probably have been relied on to give adequate protection in the absence of statutory provision. However, a desire to insure that the constructive-notice effect of notice filing would not be extended in any way against account debtors led most of the states to include provisions designed to negative any such effect. Typically, California's statute does what its common law would probably have done in the absence of a notice-filing statute: it provides that

A debtor, irrespective of the provisions of [the notice-filing section], until notified by his creditor or the assignee not to do so, may pay or otherwise deal in good faith with the assignor, his agent for collection or any person who has succeeded to the assignor's interest, and shall have as against the assignee any right of set-off, counterclaim or defense against such assignor or person existing in his favor at the time he is so notified.53

The American Bankers Association draft, adopted in this respect in Florida and Colorado, goes farther and requires that notice to the account debtor be in writing before it may affect his rights. Only the drafters of the Commercial Code thought it was necessary to give the account debtor further protection.54

These provisions, some of which go even farther than the common law, eliminate a substantial portion of the grounds upon which it could be assumed that customers would leave a firm known to be assigning its accounts. But six states feed this argument against notice filing by making express but inadequate provision governing the rights of account debtors. Missouri, North and South Carolina, and Texas simply fail to mention the debtor's set-offs and defenses, except the defense of good-faith payment to or adjustment with the assignor or his successor in interest. Perhaps interpretation will supply the defect in those states. Idaho is more explicit; although granting the other usual protections, it expressly denies the account debtor "any right of set-off, counterclaim or recoupment against any claim of the protected assignee because of any claim of any nature which the debtor shall have acquired.

53 CAL. CIV. CODE §3018 (Supp. 1945).
54 The Commercial Code, Art. VII, Part III (Tentative Draft No. 1) §32(2) provides that the right of a financer holding a lien "on the proceeds of a contract made by the borrower is subject to . . . (c) any adjustment made in good faith between the borrower and obligor with respect to any claimed breach of the contract by the borrower even though the obligor prior to the adjustment had knowledge of the financer's interest." In view of the deep concern on the part of the opponents of notice-filing legislation with the fact that knowledge of an assignment of receivables might cause an assignor's customers to take their business elsewhere, it is surprising to find this provision, which is designed to relieve one of those causes, criticized by one of the leading opponents. Perhaps it is possible to go too far in this direction, although one would expect spokesmen for the small-businessman-borrower to desire every assurance to the assignor's customers that the assignment would leave them in exactly the same position they would have enjoyed but for it. The criticism to which I refer, that of Mr. Kupfer in a Memorandum on Tentative Draft No. 1 of Part III of Article VII of the Commercial Code, published by him in mimeographed form, indicates a belief that this provision does go too far, and would encourage "collusion of a most undesirable sort."
after the protected assignee shall have received\textsuperscript{55} his assignment,” except that a claim for damages occurring after the assignment but arising out of a “guarantee or warranty expressed or implied made prior thereto” may be set off.\textsuperscript{56} Utah similarly denies such rights of set-off and does so without the Idaho exception. One wonders who had the ear of the Idaho and Utah legislators, the proponents or the opponents of notice-filing legislation.

**Conclusion**

My own study of this controversy has left me convinced that the arguments directed against the defects of draftsmanship in existing notice-filing statutes are the most substantial of the arguments made by the opponents of such legislation; in fact, I have been appalled to find how substantial they really are. But the law teacher's dictum that such defects can be avoided by careful work\textsuperscript{57} is beautifully demonstrated by the fact that the first Tentative Draft of the Inventory Financing part of the Commercial Code meets substantially all of the specific criticisms that have been outlined in the preceding pages. Its “inventory lien,” which covers both tangibles and accounts receivable, is protected by notice-filing provisions which accord first-to-file priority, but with adequate provisions for unseating a monopolistic first-filing financer.\textsuperscript{58} However, it requires that the filing be done within one month after the advance of new value which its lien is intended to secure, if it has not been done before. It provides for central filing—of course, in avoiding the objections to local filing it could scarcely avoid also those made against central filing—and makes the location of the “head office” of the borrower determinative of the state in which the notice should be filed.\textsuperscript{59} It abolishes Benedict v. Ratner, but limits rights in proceeds in accordance with the defined diligence of the financer in taking them after they arise. It adequately provides for the rights of innocent third parties in proceeds, while otherwise leaving the rights of the financer in proceeds to the arrangement made by the parties. It fully protects the account debtor from being adversely affected by the interest of the financer. None of this is meant to suggest that the drafters of the Inventory Lien part of Article VII of the Commercial Code have already done their job; they are no doubt acutely conscious of

\textsuperscript{55} “Shall have received his assignment,” not “shall have protected” it!

\textsuperscript{56} Idaho Laws Ann. 1945, c. 172, §6.

\textsuperscript{57} I have in mind Prof. W. Barton Leach's “Anything can be done . . . [pause] . . . within reason.”

\textsuperscript{58} But the Code provisions have been subjected to a new “monopoly” argument to the effect that their provision for sweeping almost all of a firm's current assets under a single floating charge, protected by a single notice on file, will tend to enable the first-filing financer to exclude others from lending on the security of particular assets which he is unwilling to accept. In particular, the objection goes to the inclusion of receivables under the floating charge. An outsider who was willing to lend on receivables when the first-filing financer was not, would have difficulty breaking into the first-filer's all-inclusive protection short of paying off all of the outstanding obligations held by him. Kupfer, Memorandum on Tentative Draft No. 1 of Part III of Article VII of the Commercial Code, cited in note 52 supra.

\textsuperscript{59} “. . . unless such . . . state does not provide for central filing with respect to inventory liens,” in which case the statute would call for filing “in the office of the Secretary of State . . . of this state.” Commercial Code Art. VII, Part III, §11 (Tent. Draft No. 1).
the criticisms that have been made of their proposed innovations, and their standards of perfection are high. For instance, the basic issue of whether or not to assimilate receivables financing (which is usually done on a basis of specific assignments of new accounts as they arise) to the proposed floating charge on inventory generally, as the present draft has done, appears to be undergoing reconsideration.

But taken as an answer to the drafting defects in existing notice-filing legislation, the Commercial Code's provisions demonstrate that the real dispute between the proponents and the opponents concerns other issues. These defects have merely provided fuel to add to the flames of the basic controversy. That controversy, I repeat, turns simply upon the relative weight to be given to the interest of the borrower (and of the lender who seeks his business) in secrecy in this one field of his financing, and to the interest of third parties who deal with the borrower in an objective source of information concerning it. It is very difficult for an outsider to judge the relative commercial importance of those two interests. Still, it is unavoidable that one should entertain doubts as to the wisdom of predicking a piece of long-range commercial legislation on the assumption that it will always be dangerous for a firm to let it be known that it is engaged in a form of financing which, to those who understand it best, is socially useful, worthy of encouragement, and may be evidence that expert financiers are interested in the firm and are taking careful pains to insure its future success. But one hesitates to predicate his own conclusions on doubts as to the permanency of the much-summerized taint that attaches to the hocking of receivables, in the face of the argument that it is the smaller business concerns that will be hurt by the interim adjustment to the publicizing of the present extent of receivables financing.

On the side of the other interest—the third-party interest in notoriety—it is certainly observable that filing offices tend to collect a good deal of dust between the visits of creditors seeking information. Credit-reporting agencies give fuller information, give it in one place, and are more heavily relied upon. Yet the function of notice filing, unlike that of real estate recording, is to supply not the basic information but a check on it. Perhaps the reporting agencies, rather than the individual creditors, are the only logical ones to be expected to use that check. If they do not yet make full use of it, perhaps the spread of receivables financing into relatively untried fields, among untried firms, carries implications respecting the need for such use in the future.

What is hard to get away from is how a need for such a check can be felt in respect to the financing of tangibles and yet be absolutely denied in the field of receivables. Perhaps it is unnecessary to both. But if the assertions are true that

---

60 Most of the criticisms do not concern aspects central to this controversy, except, of course, that some of them dispute the desirability of any publicity requirements at all for receivables financing. The Kupfer memorandum, cited in notes 52 and 58 supra, makes a great many more important points than those to which I have referred.

61 Tentative Draft No. 2 of Article VII, Part III of the Code (August 6, 1948) makes separate provision for assignments of accounts and for liens on (other) inventory.

62 But see the American Bankers Association questionnaire cited in note 37 supra.
the provision of a check here will bring lower-cost lenders into the field, perhaps
the small-businessman-borrower has an interest on both sides of this controversy.
Perhaps, however, a special notice-filing statute for receivables is not the best way
to provide the check.

Assuming that all such doubts leave the balance between the publicity of a
well-drafted notice-filing statute and the secrecy of a well-drafted validation statute
roughly equal, the biggest doubt of all centers on whether a quite new approach
could not upset that impasse. The interesting feature of Article VII, Part III, of
the Commercial Code is not that it gives publicity to receivables financing, not that
it avoids the draftsmanship pitfalls of existing notice-filing statutes, but that it
attempts to abandon the isolated treatment of chattel mortgages, conditional sales,
trust receipts, bailment leases, consignments, factors' liens, and assignments of re-
ceivables in favor of a coordinated plan for commercial financing on inventory.
If relatively few bother to search a filing office for notices of receivables financing,
might not more do so if all the information regarding security interests in a certain
firm's inventory were also to be found in that office? If borrowers hesitate to
publicize the fact that they are assigning receivables, might they be less hesitant to
acknowledge that they are engaged in "inventory" financing? Perhaps unfettered
public access to all the information which the filing statement contains will not be
necessary to achieve the purpose of providing a check.\textsuperscript{66} And finally, if the serious
criticisms of the existing notice-filing statutes carry a moral, it is that carefully
prepared uniform legislation designed to protect the legitimate interests both of
the immediate parties and of interested third parties is far preferable to the hap-
hazard, pressure-group-inspired, state-by-state legislation, rammed through to meet
an urgently felt immediate need, of which this rash of notice-filing, bookmarking,
and validation statutes\textsuperscript{64} is only an instance.

For instance, a borrower's authorization, which could be made effective for a future period suffi-
ciently long to protect creditors during the period of the credit exclusion, might be made requisite to
learning more than whether or not he had filed any inventory financing statements, how many, and
with what financers: specifically, to learning whether the statement covered receivables.

Those interested in them even find defects in some of the simple validation statutes. Consider, for
instance, the Connecticut provision cited in note 26 \textit{supra}. 

\textsuperscript{66}For instance, a borrower's authorization, which could be made effective for a future period suffi-
ciently long to protect creditors during the period of the credit exclusion, might be made requisite to
learning more than whether or not he had filed any inventory financing statements, how many, and
with what financers: specifically, to learning whether the statement covered receivables.

\textsuperscript{64}Those interested in them even find defects in some of the simple validation statutes. Consider, for
instance, the Connecticut provision cited in note 26 \textit{supra}.