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## Article 9: What It Does Not Do for the Future

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## ARTICLE 9: WHAT IT DOES NOT DO FOR THE FUTURE

*Grant Gilmore\**

On a purely formal level any system of law is complete. Answers will be provided for any questions that can be asked. On a more meaningful level, no system of law, codified or uncodified, is much more than what Justice Holmes, referring to the maritime law, once called “a limited body of customs and ordinances.”<sup>1</sup> The law deals with the real problems that real people have today — not with the problems our fathers had yesterday, not with the problems our children may have tomorrow. Law reflects what exists; it does not create, shape, or change. It is a mirror; what is not before the glass is not there. Thus it is nonsense to talk about a law of outer space, world peace through law, and things like that.

These reflections are familiar to any draftsman of statutes. On the strength of what you have learned from the past you must write down today something that will help solve tomorrow's problem. There is always a choice between loose or open-ended drafting and a style that is tight, detailed and precise. The tighter you make your statute — and the detail with which you enrich it can come only from what you see around you now — the more certain it is that in a very few years the statute will be out of date, outrun by changing circumstance, no longer relevant. The more open-ended, the less help it will be in solving real problems, deciding real cases.

If, as a draftsman of a commercial statute, you are dealing with a practice or transaction which is familiar, which has been going on for some time, which appears to be stable, then the job is fairly easy. I talked yesterday about the patterns and techniques of inventory and receivables financing which came into use between 1900 and 1950. In drafting article 9, there was no great problem in dealing with those transactions: all that had to be done was to simplify the legal framework so that businessmen and bankers could go on doing what they were already doing to everyone's satisfaction.

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1. Dissenting in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 220 (1916).

There comes a point at which the draftsmen of any statute must abandon problem-solving and rest content with a basic term which is left undefined.

Article 9, for example, provides that anything that is property can be made the subject-matter of a security interest. The article does not tell you what property is. Even for a lawyer, the "what is property?" problem presents no difficulty when you are dealing with goods, chattels, things: if you can see it, count, weigh and measure it, it exists; if you can't, it doesn't. But intangible claims are another matter entirely. Perhaps, "what is property?" is the wrong way of putting the question. We might put it this way: what types of claims or choses in action, although in some sense they do not yet exist, can be presently transferred, for security or otherwise, with the result that today's assignee will have priority over interests that attach to the fund after it has indisputably come into existence? Everyone seems to agree that money to be earned in the future under an existing contract can be so transferred: the assignee's claim to the money when it is earned will, it is said, "relate back" to the date of the assignment.<sup>2</sup> Beyond that point there is an immense confusion of case law. Respectable courts have held that there can be a presently effective transfer of, for example: the proceeds (if any) of pending litigation,<sup>3</sup> the expectancies of heirs,<sup>4</sup> the future royalties or profits of books not yet written,<sup>5</sup> songs not yet composed,<sup>6</sup> motion pictures not yet produced.<sup>7</sup> On the other hand, the New York Court of Appeals held in 1946 that a membership or seat on the New York Stock Exchange could not be effectively assigned until the Board of Governors of the Exchange sold the seat, thus converting it into money.<sup>8</sup> The decision saddened a large New York bank which had taken an assignment of the seat as security for a loan to a member of the Exchange who died insolvent owing both state and federal

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2. See *Rockmore v. Lehman*, 128 F.2d 564, *rev'd on rehearing*, 129 F.2d 892 (2d Cir. 1942).

3. See *Williams v. Ingersoll*, 89 N.Y. 508 (1882); *Fairbanks v. Sargeant*, 117 N.Y. 320, 22 N.E. 1039 (1889).

4. See, among the many cases that could be cited, *In re Barnett*, 124 F.2d 1005 (2d Cir. 1942). *Lena v. Yannell*, 78 N.J. Super. 257, 188 A.2d 310 (1963), collects a good many cases of this type.

5. *Ward, Lock & Co. v. Long*, [1906] 2 Ch. 550.

6. *Harms, etc. v. Stern*, 229 Fed. 42 (2d Cir. 1915).

7. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387 (1957).

8. *In re Gruner*, 295 N.Y. 510, 68 N.E.2d 514 (1946). The principle of the *Gruner* case was affirmed, and perhaps extended, in *In re City of New York v. Bedford Bar & Grill*, 2 N.Y.2d 429, 141 N.E.2d 575 (1959).

taxes. And the Second Circuit Court of Appeals dealt recently with the interesting case of the widow of the bandleader Glenn Miller, who assigned to Universal Films the right to make a picture about her late husband, featuring the "Glenn Miller Sound."<sup>9</sup> The picture was made, was highly successful, and Universal paid Mrs. Miller several hundred thousand dollars under the assignment — all, alas, within one taxable year. Said the Second Circuit: it is entirely clear that what Mrs. Miller sold Universal was not property; therefore, she must pay income tax at 90%, not capital gains tax at 25%. And we may inquire whether the future inventory and the future receivables of a business enterprise — which must necessarily come into existence so long as the enterprise goes on being an enterprise — are to be regarded as a presently existing aggregate or as individual bits and pieces of after-acquired property.

From a drafting point of view, it would have been easy enough to provide that a seat on the Stock Exchange, Mrs. Miller's interest in her late husband's life and sound, to say nothing of the future inventory and the future receivables, either are or are not property — or at all events that they can (or cannot) be presently transferred with priority over subsequently arising interests. The article 9 draftsmen chose not to do so.

Another of the basic terms is "security interest." For this term we do have a definition, or something that looks like a definition — indeed half of a page of it (§ 1-201(37)). The drafting style is that of a general statement followed by a number of specific instances or examples. The general statement is:

"'Security interest' means an interest in personal property . . . which secures payment or performance of an obligation."

The rest of the half-page is taken up with explanations of when such things as consignments and leases do or do not create security interests. There had been a good deal of pre-Code litigation of this sort about consignments and leases, so the draftsmen were on familiar ground.

But, when we move away from familiar ground, how are we to tell whether we have a security interest or not? The general statement, which I read to you, is not really a definition at all: it is an act of faith. There have been a couple of recent de-

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9. *Miller v. Commissioner of Internal Revenue*, 299 F.2d 706 (2d Cir. 1962), cert. denied, 370 U.S. 928 (1962).

velopments on the security interest front which you may find instructive.

Let us assume that *A* and *B* are both creditors of a common debtor, *X*. *A*, for whatever reason you want to imagine, subordinates his claim against *X* to *B* — that is, to take the simplest kind of subordination agreement, *X* is to make no payments to *A* until *B*'s claim has been fully satisfied. This is a common arrangement with which we have been familiar for a long time, although there is surprisingly little discussion of it in the cases. What case law there is deals with what happens when *X*, the common debtor, goes into bankruptcy. The cases uniformly hold that dividends in the bankruptcy liquidation will be paid out according to the subordination agreement — that is, *B* receives not only his own dividend but *A*'s too. So far there is no security interest problem: it is a matter of indifference to *X* or to his creditors whether the money is paid out to *A* or to *B*. But there is another side to the triangle — the *A-B* side. Let us assume that *A*, after having subordinated his claim to *B*, assigns the same claim to *C*. Or that *A*, instead of or as well as *X*, goes into bankruptcy. Does *B*, the beneficiary of the subordination, now have priority over *C*, the assignee, or over *A*'s trustee in bankruptcy? Should *X*, the debtor, make no payments on the debt he owes *A* until *B*'s claim has been satisfied or should he pay, or can he be compelled to pay, the assignee or the trustee in bankruptcy? On this leg of the subordination triangle there is, curiously, no case law at all; the issues have never been litigated.<sup>10</sup>

It is entirely possible to say, in the terms of the article 9 security interest definition, that the subordination agreement creates a security interest in the subordinated *A-X* claim in favor of *B* (the senior debt) to secure payment or performance of *B*'s own claim against *X*. That would mean, among other things, that *B* would have to perfect his interest, by filing or by

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10. Since the foregoing discussion was written, there has been a case which, at least arguably, does deal with the issue: *In re Wyse (Pioneer — Cafeteria Feeds, Ltd. v. Mack)*, 340 F.2d 719 (6th Cir. 1965). For discussion of subordination agreements, the *Wyse* case and article 9, see 2 GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* c. 37 (1965); Coogan, Kripke & Weiss, *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements*, 79 HARV. L. REV. 229 (1965). The pre-*Wyse* case-law on subordination agreements is collected in Calligar, *Subordination Agreements*, 70 YALE L.J. 376 (1961), which appears to have been the first discussion of the problem in the legal literature.

a pledge, under article 9 if he wanted to be protected against *A*'s trustee in bankruptcy or *C*, our hypothetical assignee. It is equally possible to say that the subordination agreement does not create an article 9 security interest and that *B*'s rights against *A*'s trustee in bankruptcy are not article 9 rights but lie, since there is no case law, somewhere in the limbo of un-created law.

Whether subordination agreements create security interests is presently the subject of a briskly boiling controversy among bank counsel and members of the corporate bar. If you happen to be on the right mailing lists, hardly a day goes by without still another letter coming in to say that: all subordination agreements create security interests; no subordination agreements create security interests; some do and other do not; article 9 should be amended to say that subordination agreements create security interests; article 9 should be amended to say that subordination agreements do not create security interests; article 9 should not be amended at all.

Let us turn from subordination agreements to negative covenants, under which a debtor covenants that he will not transfer, assign, mortgage or otherwise encumber his property (or a specified part of it) until his creditor has been paid. Like the subordination agreements, the negative covenants have been in common use for a long time, there is surprisingly little case law, and nobody really knows much about them.<sup>11</sup>

Thirty or forty years ago, there was a type of covenant which frequently appeared in corporate debentures. "Debenture" itself is a term of ambiguous reference: it has never been clear whether "debenture" means a secured or an unsecured obligation. The covenants, at all events, used to appear in two shapes or sizes. There was an affirmative form which provided that if the issuer should pledge or mortgage any of his assets, he would see that the debenture-holders were ratably secured with the pledgee or mortgagee. The negative form said that the issuer would not pledge or mortgage his assets but that, if he did, the

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11. For current discussion of negative covenants and article 9, see 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY c. 38 (1965), Coogan, Kripke & Weiss, *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements*, 79 HARV. L. REV. 229 (1965). The corporate debenture litigation referred to in the following paragraph is admirably reviewed and analyzed in Jacob, *The Effect of Provisions for Ratable Protection of Debenture Holders in case of Subsequent Mortgage*, 52 HARV. L. REV. 77 (1938).

debenture-holders were to be ratably secured. During the 1920's and 1930's, these covenants, both affirmative and negative, were extensively litigated. Much to the surprise of the corporate bar, the courts regularly held that the covenants, however they were phrased, meant exactly what they said. So these debentures turned out to be secured obligations after all. Such covenants, however, have not been heard of, at least in the case reports, for thirty years. We may dismiss them as ancient history.

An absolute negative covenant is one in which a borrower flatly promises that he will not transfer or encumber property until the loan is paid. Until quite recently I would have said to you: this one isn't worth a second thought. In the whole history of American jurisprudence, there have been only three cases which involved such covenants — one in West Virginia in the 1880's,<sup>12</sup> one in Oregon in the 1920's,<sup>13</sup> and one in Delaware in the 1950's.<sup>14</sup> All three of the cases held that the absolute covenant not to transfer created no property interest which the covenantee could enforce against an insolvency representative (the West Virginia case) or against a purchaser with notice (the Oregon case) or against an attaching creditor (the Delaware case). But now the California court has spoken, Justice Traynor has written an opinion — and these days when Justice Traynor speaks, no dog barks.

The California case — *Coast Bank v. Minderhout*<sup>15</sup> — is not directly relevant to our discussion since it involved not personal but real property. It appears that the California banks which make land or home improvement loans have been taking from the borrowers, instead of mortgages, covenants not to transfer the land. The loan agreement which contains the covenant is placed on file, presumably with the real estate records — at least that was done in the *Minderhout* case — so no question of secrecy is involved. The Coast Bank made such a loan to the Enrights who, without paying the bank loan and in violation of the covenant, sold the land to Minderhout, who conceded that he had actual as well as constructive notice of the covenant. *Held*, that the negative covenant gave the bank an "equitable

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12. *Knott v. Manufacturing Co.*, 30 W. Va. 790, 5 S.E. 266 (1888).

13. *Western States Finance Co. v. Ruff*, 108 Ore. 442, 215 Pac. 501 (1923); *rehearing denied, opinion modified*, 108 Ore. 445, 216 Pac. 1020 (1923).

14. *Fisher v. Safe Harbor Realty Co.*, 30 Del. Ch. 297, 150 A.2d 617 (Sup. Ct. 1959).

15. 38 Cal. Repr. 505, 392 P.2d 265 (1964).

mortgage" in the land and that a decree should issue foreclosing the mortgage on the land in Minderhout's hands.

Let us assume that banks in California or elsewhere start using negative covenants covering personal property — as indeed they do. Fresh from our study of the *Minderhout* case, are we to conclude that such a covenant does create an "interest in . . . property . . . which secures payment or performance of an obligation"? I can assure you that the article 9 draftsmen gave no thought whatever to the question whether their security interest definition did or did not catch negative covenants within its net. The state of law at the time the definition was drafted was that, except for the debenture cases which were perhaps *sui generis*, no case had ever held that a negative covenant created any sort of property interest against anyone. On the other hand, Justice Traynor is a man to be reckoned with. So where does that leave us?

I have given you two examples of trouble at the fringes of the known world. The draftsmen could of course have put in language to explain when or whether subordination agreements and negative covenants created security interests, as they did for the consignments and leases. There was no reason whatever why they should have done so. If we now amend the article to take care of the subordinations and covenants, next year or next decade there will be new types of fringe agreements, no more predictable than the two I have been discussing, which may or may not create property interests which secure obligations. The security interest definition can grow from half a page to a full page and then to two pages — but you will still be left with nothing more than an act of faith to keep you warm.

An unanticipated shift in practice, or even in the focus of litigation without a corresponding change of practice, can have odd results.

Recent field warehousing litigation presents an interesting example of a shift in the focus of litigation, for no apparent reason. From 1900 until approximately 1950, the only issue which was ever litigated was whether the warehouse had been properly run; if it was, the warehouse receipts were warehouse receipts and the pledgee was a pledgee; if it was not, the warehouse receipts were wastepaper and the pledgee was the recipi-

ent of a fraudulent conveyance.<sup>16</sup> The issue was essentially one of perfection of the security interest by possession of the goods through the warehouse receipts. The problem of perfecting a security interest in goods held in a field warehouse sparked a considerable controversy during the drafting of article 9. A proposal that filing should be required was bitterly resisted by the field warehouse people, who eventually carried the day. The filing requirement was dropped and a curious sentence was added to section 9-205, which contains the repealer of *Benedict v. Ratner* which we discussed yesterday. The curious sentence says that "this section does not relax the requirements of possession where perfection of a security interest depends on possession of the collateral by the secured party or a bailee." Perhaps that means that the rule of *Benedict v. Ratner* is not repealed with respect to field warehousing arrangements.

After 1950, the issue whether the warehouse was properly run suddenly disappeared from litigation<sup>17</sup> but, in its place, a host of new issues, which had never before been heard of, suddenly came to the surface. Assume that, despite the utmost diligence on the part of the field warehouse company, there are no goods in the warehouse on doomsday. This happens not infrequently. To whom is the warehouseman liable?<sup>18</sup> From whom may he recover?<sup>19</sup> If his employee, the custodian of the warehouse, was involved in the fraud, is the custodian's negligence, weakness, or criminality to be imputed to the Lawrence Warehouse Company?<sup>20</sup> If the warehouse company discovers that the

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16. Two excellent recent discussions of field warehousing are Skilton, *Field Warehousing as a Financing Device*, 1961 WIS. L. REV. 221, 403; Comment, *Financing Inventory Through Field Warehousing*, 69 YALE L.J. 663 (1960). See also 7 GILMER, SECURITY INTERESTS IN PERSONAL PROPERTY c. 6 (1965).

17. Or almost disappeared. For the few cases which attacked the "validity of the bailment," all unsuccessfully, between 1950 and 1960, see the Comment, 69 YALE L.J. 663, 675, 687. *In re United Wholesalers, Inc.*, 274 F.2d 316 (7th Cir. 1960), invalidated a field warehouse, apparently because of careless release procedures; the case is elaborately discussed by Skilton, *Field Warehousing as a Financing Device*, 1961 WIS. L. REV. 221, 403, 420-38. For a case which shows that anything can happen, see *Matter of Pine Grove Canning Co.*, 226 F. Supp. 872 (W.D. La. 1963).

18. See *First Nat'l Bank of Fleming v. Petzoldt*, 262 F.2d 540 (10th Cir. 1958); *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493 (8th Cir. 1955). Both cases held the field warehouseman liable to the "true owners" of goods wrongfully deposited in the warehouse.

19. The problem whether the field warehouseman can recover from guarantors or sureties of the borrower is discussed, from contrasting points of view, in *Owens v. Banks Warehouses, Inc.*, 202 F.2d 689 (5th Cir. 1953) and in *Lawrence Warehouse Co. v. Menary*, 143 F. Supp. 883 (S.D. Iowa 1956).

20. On this question, see the *Twohig* case, cited n.18 *supra*; the *Owens* and *Menary* cases, cited n.9 *supra*; *American Express Field Warehousing Corp. v.*

bank and the borrower are being careless about withdrawals and release practices, should it close the warehouse? If it does not, could it be held liable to the borrower's other creditors or his trustee in bankruptcy for having conspired to lend a false credit to the foundering enterprise?<sup>21</sup> A new picture of the field warehouseman is beginning to emerge from the recent cases: he is both more and less than a warehouseman; he is a sort of guarantor or surety. Of all these developments, article 9 says nothing. It is odd that none of these issues had drawn judicial attention before 1950 — but they had not. If the draftsmen had been clairvoyant, they might have seen that an area in which nothing much had happened for fifty years was about to become a lively center of litigation — perhaps for the next fifty. They were not clairvoyant.

The most difficult situation that a draftsman faces is what to do about what appears to be a major new development in the area which his statute covers. Yesterday we talked about two of the great mutations in security law during the past hundred years. What would you have done if you had been commissioned to draft a statute about inventory mortgages in 1870? Or a statute about non-notification accounts receivable financing in 1920? It is, I think, arguable that we are witnessing today a third mutation of comparable magnitude. The receivables which came into use as security after 1920 were the short-term receivables which arise when goods are sold or services are rendered. Except in the construction industry, security assignments of moneys to be earned in the future under relatively long-term contracts had never been much used until World War II. During the war, there was a great deal of financing of this type, but in an obviously abnormal situation. Since 1950 its growth has been as sensational as the growth of short-term receivables financing after World War I.<sup>22</sup>

The late Karl Llewellyn, who was the Chief Reporter for the Code, was an unusually imaginative and intuitive man. He seems to have sensed, as early as the 1940's, that something new

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First Nat'l Bank, 233 Ark. 666, 346 S.W.2d 518 (1961); *Nasif v. Lawrence Warehouse Co.*, 122 F. Supp. 562 (S.D. Miss. 1954).

21. See *Heekin Can Co. v. Kimbrough*, 196 F. Supp. 912 (W.D. Ark. 1961), which is perhaps the most interesting of the recent field warehousing cases.

22. For discussion of the problems reviewed in the following pages, see 2 GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* c. 41 (1965), which appeared in an earlier revision as *The Assignee of Contract Rights and his Precarious Security*, 74 YALE L.J. 217 (1964).

and important was happening. I mentioned yesterday that the original drafting scheme for article 9 included a separate part on long-term contract rights financing, which never in fact reached draft stage. It is unlikely that much good would have resulted from a full-dress treatment of the problem. A vaguely perceived shift in practice, which may or may not prove to be permanent, whose dimensions, if it is here to stay, can hardly be guessed at, is not the stuff from which good statutes can be fashioned.

A draftsman who unluckily finds himself at grips with such a monster should walk warily. His language should glint and shimmer with ambiguity. He should be heard faintly and from far away — like defunctive music under sea. I shall read to you the operative portion of the principal contribution which article 9 makes to the problems of security assignments of long-term contract rights and you can judge how well the draftsmen measured up to that prescription. Section 9-318(2) provides that when such rights are assigned

“any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract.”

That seems to say that, to some extent, without the assignee's consent, the two contracting parties can modify their contract or even substitute a new contract. The modification or the substitution is “effective” against the assignee, who, however, acquires “corresponding rights” under the new arrangement. To what extent can assignor and obligor “effectively do this? To the extent that they act “in good faith” and “in accordance with reasonable commercial standards.”

When New York adopted the Code, the solons of that great state amended the provision I have just read to you. Under the New York amendment, modifications or substitutions are effective against the assignee only if they do not “materially” and “adversely” affect his rights. The Editorial Board for the Code has disapproved the New York amendment on the ground that that is what the official text of section 9-318(2) means in any case, so that the amendment is unnecessary.<sup>23</sup>

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23. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, Report No. 2, p. 225 (1964).

I do not know what the New York amendment means. It has occurred to me to wonder whether a modification of a contract which decreases the amount of money which will become payable if the contract is performed but at the same time increases the probability that the contract will be performed is one which materially and adversely affects the assignee's rights. But I do not think that the Editorial Board was having one of its best days when it remarked that the official Code text and the New York text meant the same thing. I have, as a matter of fact, collected what case law there is on this obscure subject and it is surprising how many modifications of assigned contracts, which are quite evidently to the assignee's serious disadvantage, have been held effective against him.<sup>24</sup> The Code assignee under section 9-318(2) may indeed be better off than his common law predecessor since he receives "corresponding rights" under the new arrangement. What are "corresponding rights"? The pursuit of that fish would take us into waters a good deal too deep for comfort.

The illustrations which I have so far given you of what we may call the Code's open-endedness have all involved only the Code itself or the relationship between the Code and the non-Code or pre-Code law of the enacting state. But I have come more and more to feel that the professor's joy and the practitioner's grief over the next generation or so, in the field of security law and elsewhere, will be found at the intersection of state law with a body of overriding, inconsistent federal law.

The new general federal commercial law rose from its own ashes almost on the day that *Erie Railroad v. Tompkins*<sup>25</sup> was decided.<sup>26</sup> In a series of cases, that was at first little noticed, the Supreme Court began work on what has sometimes been called a doctrine of federal supremacy. There was really two sets of cases, running on parallel lines which will surely meet at infinity. One set of cases dealt with the nature of federal statutes. Like all other statutes, federal statutes are fragmentary, incomplete and gap-ridden. From the beginning of the Republic, the inarticulate assumption had been that gaps in a federal statute were to be filled in by reference to what Justice Holmes

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24. See note 22 *supra*.

25. 304 U.S. 64 (1938).

26. See Friendly, *In Praise of Erie— and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964). For documentation of the statements which follow, the reader is referred to Judge Friendly's excellent article.

called the "brooding omnipresence" of the common law — that is, by reference to state law. That was both a reasonable and a necessary assumption during the long period while the federal statutory product remained meagre and ill-nourished. During the 1940's, however, the Supreme Court began to suggest that gaps in a federal statute should be filled in by extrapolation from the statute itself: the underlying policy of the statute would itself provide a rule for decision in situations which lay within the statutory coverage but for which the statute made no express provision. The other set of cases involved transactions in which the United States itself, in one of its manifold capacities, was a party — as a buyer of goods, as a furnisher of equipment, as a drawer or indorser of a check, as a lender of money. The presence of the United States, the Court suggested, gave the transaction a sort of federal aura which made it appropriate that disputes should be resolved by a federal law of sales, negotiable instruments, security transactions or what not. Of course, there was no such law: you can summon spirits from the vasty deep, but will they answer? But this aspect of the developing federal supremacy doctrine made it possible for the federal courts to pick and choose from the richly heaped smorgasboard of majority rules, minority rules and better rules.

There are half a dozen federal statutes which deal with security transactions in such things as patents, copyrights, ships, aircraft and their spare parts, and railroad rolling stock. None of these statutes is in any sense complete or comprehensive. The Ship Mortgage Act of 1920 is the most detailed: it deals not only with the formal requisites of ship mortgages and their recording but with their foreclosure and with the relative priorities of preferred ship mortgages and other maritime liens. The Civil Aeronautics Act of 1948 not only establishes a national filing system for security interests in aircraft but has a few substantive provisions as well. The other statutes merely establish national filing systems, which are exclusive and mandatory under the patent and copyright acts; the filing system for security interests in railroad rolling stock is merely permissive — a non-mandatory alternative for perfection under state law. There is also a curious recent addition to the list — the Federal Motor Vehicle Lien Act of 1958 — which provides for nationwide perfection of security interests in certain types of trucks and buses used interstate on perfection under the law of a federally designated state.

Thus there is a federal component to security transactions in a great many kinds of transportation equipment.<sup>27</sup> So far patents and copyrights have been used almost not at all as security for loans, but it is a reasonable guess that bankers will not go on forever ignoring this interesting type of collateral.<sup>28</sup> Under the theory that federal statutes are capable of generating their own penumbra of supporting law, we may expect to see the contention made, and perhaps accepted, that federal law applies to all aspects of security transactions which involve aircraft, patents, copyrights and so on.

The United States does an immense money-lending business — either as the direct source of credit or as a guarantor. There seems to be quite a good chance that we will shortly discover that all mortgages or other security interests held or guaranteed by the United States or one of its agencies are governed by federal law — although of course no one knows what the federal law is or might be. There has been a series of cases in the past half-dozen years which involved federal mortgages on livestock. The mortgagors having sold the livestock through cattle auctions without authority, the United States, as mortgagee, brought conversion actions against the auctioneers. Whether an auctioneer who innocently sells stolen property is liable to the true owner as a converter has been a much debated question for a hundred years or more; no consensus has emerged from the cases. The only novelty of the recent cases is that several of the circuit courts of appeal have concluded that the presence of the United States as mortgagee requires that a federal rule be fashioned to determine the auctioneer's liability or non-liability.<sup>29</sup>

Like all governments that have ever existed, the United States collects with an iron hand all the debts that may be owing to it. Under the Internal Revenue Code, the United States

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27. On the several federal statutes which affect security transactions in transportation equipment, see Comment, *Mobile Equipment Financing: Federal Perfection of Carrier Liens*, 67 YALE L.J. 1024 (1958); 1 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY c. 13 (1965).

28. See Kaplan, *Literary and Artistic Property (Including Copyright) as Security*, 19 LAW & CONTEMP. PROB. 254 (1954); Note, *Copyright as Collateral in a Secured Transaction*, 39 ST. JOHN'S L. REV. 90 (1964).

29. See *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957); *United States v. Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir. 1962); *United States v. Sommerville*, 324 F.2d 712 (3d Cir. 1963), cert. denied, 376 U.S. 909 (1964). The Eighth Circuit seems to have denied the "federal mortgage — federal law" proposition in *United States v. Kramel*, 234 F.2d 577 (8th Cir. 1956).

has a lien for unpaid taxes;<sup>30</sup> for its non-tax claim it has what is called a priority under an old statute which is always referred to as Section 3466 of the Revised Statutes.<sup>31</sup> Until 1958 it was generally assumed that any type of consensual security interest — pledge, mortgage or what not — had priority over a subsequently accruing federal tax lien or priority claim. In 1958, the Supreme Court of the United States decided a case called *United States v. Ball Construction Co.*<sup>32</sup> in a peculiarly baffling per curiam decision. Nobody knew what the *Ball* per curiam meant, but one thing it could have meant was that all consensual security interests were subordinate to subsequently accruing federal tax liens and priority claims. In 1961, however, the court, in another per curiam decision, reversed the Seventh Circuit, which had so read the *Ball* case. It followed from the second case — *United States v. Crest Finance Co.*<sup>33</sup> — that there were some kinds of security interests which did have priority over the subsequent federal claims, but there was no way of telling which kinds of security interests had the priority and which did not. In 1963 the Court finally condescended to write an opinion, but what Justice White had to say in *United States v. Pioneer-American Ins. Co.*<sup>34</sup> did nothing to gladden the hearts of counsel for financing institutions.

It now appears to be firmly established — and this is an overriding rule of federal law — that any security interest, whether or not it is perfected under applicable state law, will be subordinated to the subsequent federal claim to the extent that it covers property acquired after the federal claim attached or represents advances made after that point. To prevail over the federal claim, the prior security interest must be, in the curious term which the Court has made fashionable, “choate” — and to be choate both the amount of the loan and the property subject to the security interest must be fixed and certain before the United States gets its lien or priority.

I seem to be one of the very few people in the world — in addition, naturally, to the nine Justices — who thinks that the

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30. 26 U.S.C. §§ 6321-23.

31. 31 U.S.C. § 191. On the tax lien and the § 3466 priority, see Kennedy, *The Relative Priority of the Government: The Pernicious Career of the Inchoate and general Lien*, 63 YALE L.J. 905 (1954); 2 GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY c. 40 (1965).

32. 355 U.S. 587 (1958).

33. 368 U.S. 347 (1961).

34. 374 U.S. 84 (1963).

Court has done quite well in this situation. Since 1958 the writers of law review articles and the speakers at bar association meetings have vehemently expressed their grief and anguish at the Court's outrageous behavior — but so far neither the Justices nor the Congress seem to have been moved by this all but universal condemnation.<sup>35</sup>

At the close of yesterday's lecture, I commented that a lender who took advantage of the article 9 floating lien provision would find himself outflanked and outwitted by the encroaching forces of the new federal law. The sequence of federal priority cases I have just discussed makes it entirely clear that, no matter what the state law may say, the only safe type of security arrangement is the old-fashioned mortgage, in a specified amount, on real estate painfully described by metes and bounds. The only sound advice to give any lawyer who is tempted to experiment with floating liens and the like is: Don't.

Most important of all is the impact of the Federal Bankruptcy Act on security transactions which are in any sense imperfect, novel or offbeat. It would take at least another whole lecture to say anything comprehensible about the intersection of security law, and particularly article 9, with the Bankruptcy Act. I shall therefore offer you only one thought about the Bankruptcy Act — but it is a large, king-sized thought. When the Bankruptcy Act of 1898 was drafted, a fundamental policy decision was that state, and not federal, law should determine the validity against the trustee in bankruptcy of property interests in the bankrupt's assets. Despite that decision there was always a federal law component to the resolution of property issues in a bankruptcy proceeding. In the beginning, the federal law component was weak and the state law component was strong. During the seven decades of life with the Bankruptcy Act, the federal law component has continually strengthened at the expense, naturally, of the state law component — partly through congressional amendment of the act, partly through the developing case law. And during the last two decades, the galloping growth of the doctrine of federal supremacy has done nothing to check this trend. Furthermore, in the administration of bankruptcy proceedings there is a built-in bias against the recognition of security interests. To any trustee in bankruptcy and to most ref-

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35. The American Bar Association proposed a draft statute in 1959, but to date there has been no congressional response. See Plumb, *Whatever Happened to the A.B.A. Federal Tax Lien Legislation?*, 18 BUS. LAW, 1103 (1963).

erees in bankruptcy — and at the level of the referee bankruptcy law, for all practical purposes, stops — the only good security interest is a dead security interest. Thus, no matter how tightly drafted your state security statute may be, no matter how biased in favor of financing institutions you may conceive it to be, you can depend on the Bankruptcy Act to keep the debate open-ended.

I have sketched for you today some of the many reasons why, despite the enactment of article 9 of the Code, there will still be work to keep our judges busy. It has sometimes seemed to me that twentieth century judges no longer make law with the gay and creative abandon of their nineteenth century predecessors. Our judges have, perhaps, become too respectful of the legislature, too deferential to the statutory command. Perhaps some of the matters we have discussed today will stimulate a throwback to the great days of judging. If that should happen, I think it would be a wonderful thing.

Most probably, however, we shall see the solution to these problems and to other problems as they arise pursued by amendments to the Code — perhaps by a federal enactment of the Code, thus, at long last and by a reverse twist, realizing Justice Story's dream. I think that the way in which the problem of amending the Code is handled will prove to be of crucial importance. I think that the amendment problem has been very badly handled until now:<sup>36</sup> let us hope that things will improve.

I shall close with a few words from a tribute which I wrote on the occasion of Karl Llewellyn's death three years ago. Karl Llewellyn was for fifteen years the Chief Reporter for the Code; he was also, as you know, one of the great figures in the jurisprudential thought of this century:

“Make no mistake: this Code was Llewellyn's Code; there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it. . . .

“It was, I believe, Karl's non-systematic, particularizing cast of mind and his case-law orientation which gave to the statutes he drafted, and particularly to the Code, their pro-

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36. I have set out my reasons for believing that the amendment problem has been badly handled in a review of COOGAN, HORAN & VOIGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, 73 YALE L.J. 1303 (1964).

found originality. He was a remarkable draftsman and took a never-failing interest in even the minutiae of the trade. His instinct appeared to be to draft in a loose, open-ended style; his preferred solutions turned on questions of fact (reasonableness, good faith, usage of trade) rather than on rules of law. He had clearly in mind the idea of a case-law Code: one that would furnish guide-lines for a fresh start, would accommodate itself to changing circumstances, would not so much contain the law as free it for a new growth. . . .

“We live in a world of yea-saying, a world in which whoever is not with us must be against us, a world in which whatever is not white must be black, a world in which, it may be, the true light shines. Karl Llewellyn was not a man for such a world. He was a man more given to questions than to answers, more taken with seeking than with finding. He loved beauty in all its many forms; he delighted in the infinite variety of things and people and ideas. He was not perfect; he was merely, in his many-faceted humanity, a strong and humble man, a man of great kindness and charity, a man of understanding, a man of wit—a man who came closer than most of us do, or will, to wisdom.”<sup>37</sup>

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37. *In Memoriam: Karl Llewellyn*, 71 *YALE L.J.* 813, 814-15 (1962).