THE GOOD FAITH PURCHASE IDEA AND THE UNIFORM COMMERCIAL CODE: CONFESSIONS OF A REPENTANT DRAFTSMAN

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At the end of World War II, I gratefully accepted an invitation to join the faculty of the Yale Law School. When I reported for duty in New Haven, Dean Wesley Sturges said to me: "You will teach Sales." I said: "Yes, sir." That is how I became a commercial lawyer. I do not know how such matters are handled today.

In a despairing attempt to find out something about what I was supposed to be teaching, I turned to the work of Karl Llewellyn. Somewhat later, Professor Llewellyn, who had become the Chief Reporter for the Uniform Commercial Code, invited me to join the drafting staff and for half a dozen years work on the Code became my principal preoccupation. Thus I came under Llewellyn's influence both through his writings and through the impact of his dramatic personality.

One of the ideas I took from Llewellyn's bounteous store was that the good faith purchaser is always right and that the story of his triumph was not only one of the most fascinating episodes in our nineteenth-century legal history (which it was), but was also one of continuing relevance for our own time (which, I have belatedly come to believe, it is not). That attitude, which was shared by almost all — perhaps all — the people who became involved in the Code's drafting, explains a great deal about the Code's treatment of third-party rights. What I propose to do in this article is to review the ideas that we accepted and to explain why (as I now think) we were in large part (although not entirely) mistaken. I shall trace some of the ways in which the good faith purchase idea found its way into the Code's various articles. By way of conclusion, I shall indulge myself in some speculations about what courts should — or will — do with a mid-twentieth-century codification

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of a mid-nineteenth-century idea whose time has long since gone.

More than twenty-five years ago, I wrote a lengthy article which I called "The Commercial Doctrine of Good Faith Purchase."[1] The article summarized, quite accurately, what we all then believed to be the truth of the matter as we had learned the truth from Karl Llewellyn. Rereading the article today, my thought is that it contained a great many elegant descriptions of the trees; what it missed was the forest.

I seem to have been using Karl Llewellyn as a whipping boy. To avoid misunderstanding, let me add that I have now, as I had then, the highest admiration for Llewellyn. He was a man of extraordinary intelligence and of remarkable insights. He was always willing — indeed eager — to rethink his own earlier formulations. It is not, as he once wrote, the function of the law teacher to let the true light shine.[2] To Llewellyn the ultimate absurdity would have been not to be able to improve on what you — or he — had written twenty-five years earlier.

We assumed that the good faith purchase idea had arisen in the wake of the eighteenth-century industrial revolution. At all earlier times the common law had jealously protected rights of ownership: the true owner of property could not be despoiled or plundered or ousted by anyone under any circumstances.[3] Indeed, where land was concerned, that was true between the parties to mortgage and sale transactions, even without the complicating presence of a third party. Consider the obstacles that the courts, having invented the mortgagor's equity of redemption early in the seventeenth century,[4] placed in the way of the mortgagee who wanted to foreclose his mortgage on default.[5] Moreover, the peppercorn theory of consideration never made any headway when the subject-matter of a sale was Blackacre.

The growth of the common law during the late eighteenth century and early nineteenth century was marked by confusion and rapid change.[6] There had never been a comparable period in En-

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[1] Gilmore, *The Commercial Doctrine of Good Faith Purchase,* 63 YALE L.J. 1057 (1954).

[2] K. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES xvii (1930).

[3] Gilmore, *supra* note 1, at 1057.

[4] *See, e.g.,* Emmanuel College v. Evans, 1 Ch. Rep. 18 (1625).

[5] For a discussion of pre-U.C.C. default patterns, including the mortgagor's equity of redemption, see 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 43.2 (1965).

[6] G. GILMORE, THE AGES OF AMERICAN LAW 3-67 (1977).

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glish law before. There has never been anything like it since — with the possible exception of the past fifty years of our own century.[7] The eighteenth-century judges began questioning the previously unquestioned assumptions of property law, particularly where personal property was concerned. Personal property became an increasingly significant repository of wealth and power: the new-style entrepreneur might take his ease on his country estate but his wealth was locked up in factories, mills, railroads, and share certificates. The law for the new age became a law of contract, which assumes exchange, not a law of property, which assumes stability.

The new contract-oriented law quickly transformed the law of negotiable instruments. There had never been much negotiable-instruments law before the late eighteenth century: what there had been was mostly concerned with which kinds of mercantile specialties were freely transferable "according to the custom of merchants."[8] The good faith purchaser of bills and notes — who was renamed "holder in due course" a hundred years later[9] — arrived with Lord Mansfield and his colleagues. In an incredibly short time, as such things go in the law, it was established that the purchaser of a bill or note who had given value in good faith and without notice in the ordinary course of his business held the instrument free of any outstanding equities of ownership as well as of defenses, such as lack of consideration or fraud, that might have tainted the original transaction. The purchaser was put under no duty of inquiry as to the previous history of the bill or note that came into his hands.[10]

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[7] *See generally id.* at 68-98.

[8] *See, e.g.*, Clarke v. Martin, 92 Eng. Rep. 6, 6-7 (K.B. 1704), and Buller v. Crips, 6 Modern Rep. 30, 30-31 (K.B. 1704), in which Chief Judge Holt refused to equate promissory notes with mercantile bills of exchange. Later in the same year, however, Parliament enacted the Statute of Anne, 1704, 3 & 4 Anne, c. 9, which accorded equal legal status to notes. The history of the law of negotiable instruments is discussed in more detail in Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979).

[9] This renaming took place in the English Bills of Exchange Act of 1882, and the "holder in due course" terminology was retained by the American Negotiable Instruments Law of 1896.

[10] The English courts of the 1820's measured the "good faith" of a purchaser by an objective standard. *See, e.g.*, Gill v. Cubitt, 107 Eng. Rep. 806, 806 (K.B. 1824). Later, however, this objective standard was replaced by a subjective one, both in England and in the United States. *See* Goodman v. Simonds, 61 U.S. 343, 371 (1857); Goodman v. Harvey, 111 Eng. Rep. 1011, 1013 (K.B. 1836) (overruling *Gill v. Cubitt*). *See also* Littlefield, *Good Faith*

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In Anglo-American law, there never had been a law of the sale of goods before the nineteenth century. Indeed, the opinions in the early sales cases typically cited no authority whatever.[11] The judges announced their decisions as if they were hurling thunderbolts from Olympus. A scholarly judge might clothe his nakedness with learned references to the civil law treatises — in particular, Pothier's *Traité de Vente.*[12] Why there should have been a *Traité de Vente* in France before there was a law of sales in England or the United States, I am not equipped to say.[13] There had been a highly developed law of sales in third-century Roman jurisprudence, transmitted to us, as through a glass darkly, by the sixth-century Digest of Justinian. The French and the Germans, who took the Roman-law origins of their legal systems seriously, may thus have been alerted to the fact that they ought to have a law of sales even if they did not, so they wrote treatises about it anyway. Pothier, however, had not the slightest influence on the development of Anglo-American sales law. The judges were making a fresh start.

The good faith purchase problem first showed up in our rapidly improvised law of sales in connection with the distribution of goods from manufacturer to ultimate user. The conduit through which the goods traveled was the selling agent, or factor, who took goods on consignment, resold them, and (if he was honest) remitted the proceeds, less his commission, to the manufacturer.[14] With

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Purchase of Commercial Paper: The Failure of the Subjective Test, 39 S. CAL. L. REV. 48 (1966).

[11] *See, e.g.,* Kimball v. Cunningham, 4 Mass. 502 (1808); Tarling v. Baxter, 6 B. & C. 360, 108 Eng. Rep. 484 (K.B. 1827).

[12] R. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS (2d ed. D. Evans trans. 1839).

[13] The first English and American treatises on the law of sales appeared in 1847. The English offering was C. BLACKBURN, A TREATISE ON THE EFFECT OF THE CONTRACT OF SALE, ON THE LEGAL RIGHTS OF PROPERTY AND POSSESSION IN GOODS, WARES AND MERCHANDIZE (1847). The first American treatment of sales was W. STORY, A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY (1847).

[14] The term "factor," having undergone a change in meaning during the last century, is now used (in a general sense) to denote a person who lends money on the security of merchandise inventory, accounts receivable, or both, but who is not in any way connected with their sale — that is to say, he is a banker. *See generally* 1 G. GILMORE, *supra* note 5, § 5.1; Steffen & Danziger, *The Rebirth of the Commercial Factor,* 36 COLUM. L. REV. 744 (1936). A contemporary discussion of the nineteenth-century "factor" can be found in W. STORY, *supra* note 13, at 91-107.

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the building of the rail network and the replacement of sail by steam in shipping, the geographical extent of the market constantly expanded. The selling factors became more and more independent of their principals, particularly because the technology of long-distance communications lagged a generation or two behind the technology of long-distance transportation.[15] Not all factors were honest. Some absconded with the proceeds instead of remitting them; some pledged the consigned goods for their own account; some sold on credit when they were authorized to sell only for cash.[16] When their frauds were discovered, who was to bear the loss? The true owner of the goods — that is, the manufacturer? Or the good faith purchaser for value who had bought the goods from the factor (or had taken them as security for a loan) in reliance on his possession and without notice of his intended wrongdoing?

The good faith purchaser won out, which seems odd in the light of what we think we know about the economic and political clout of large manufacturers. In England and in the Eastern seaboard states in this country, Parliament and the state legislatures had to intervene on behalf of the good faith purchaser under so-called Factor's Acts.[17] The midwestern and western states never bothered with Factor's Acts, presumably because the courts, as commerce and industry crossed the mountains, knew what was expected of them.

The theoretical explanation for the result in the factors' cases — apart from the fact that the legislatures had so decreed — came to be that the manufacturer had voluntarily entrusted the goods to the factor. Thus the factor, being lawfully in possession with power of sale, must have some kind of title upon which third parties were entitled to rely.[18] The courts hit on the expression "voidable title," which meant that the "true owner" could get the goods back if he reclaimed them before the factor had resold (or pledged) them but could not pursue them in the hands of good faith buyers (or pledg-

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[15] *Cf.* Steffen & Danziger, *supra* note 14, at 745-46 (demise of the factor caused by progress in communcations).

[16] *See generally* Gilmore, *supra* note 1, at 1057-58.

[17] The First English Factor's Act, 4 Geo. 4, c. 83 (1824), was passed in 1824 and was subsequently amended several times to overrule restrictive judicial constructions. Maine, Maryland, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island, and Tennessee enacted similar laws. *See generally* Gilmore, *supra* note 1, at 1057-58.

[18] Gilmore, *supra* note 1, at 1058-59.

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ees).[19] The theoretical explanation broadened the range of situations in which purchasers from fraudulent middlemen could be protected against true owners. The owner who "entrusted" his property to someone else, at least in a commercial setting, thereby conferred on the "trustee" an effective power of disposition — *jus disponendi,* as it was elegantly put.

The entrusting theory was put to use, without any statutory compulsion, as new types of commercial property — share certificates, bonds, bills of lading, warehouse receipts — came into use and found a market during the nineteenth century. These securities and title documents came to be referred to as "quasi-negotiable."[20] The turn-of-the-century codifying statutes promoted them to fully negotiable status — that is, the requirement of an initial "entrusting" by the owner was eliminated.[21]

The good faith purchase idea never got off the ground during the nineteenth century with respect to what the common law called choses in action — contract rights or, more broadly, present or future money claims not represented by negotiable instruments. The common law of assignment was a thing of bits and pieces which never succeeded in getting itself organized.[22] There were, for example, competing rules on priorities between successive assignees of the same chose — the English rule, the New York rule, the Massa-

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[19] *See, e.g.,* Hickey v. McDonald Bros., 151 Ala. 497, 44 So. 201 (1907); Union Stock-Yard & Transit Co. v. Mallory, Son & Zimmerman Co., 157 Ill. 554, 41 N.E. 888 (1895); Sleeper v. Davis, 64 N.H. 59, 6 A. 201 (1886). Under the Uniform Sales Act,

> [w]here the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

UNIFORM SALES ACT § 24 (1906). There was no definition of "voidable title" in the Act. *See also* Annot., 62 A.L.R.2d 537 (1958).

[20] Although most courts were eager to concede the negotiability of these kinds of commercial paper, the common-law position did not confer upon them all the attributes of negotiability. *See, e.g.,* Junction Ry. v. Cleneay, 13 Ind. 161 (1859); Carr v. LeFevre, 27 Pa. 413 (1856). The key concept of the "quasi-negotiable" status was that of "entrusting." The true owner of the securities would prevail against any good faith purchaser from an intervening fraudulent actor unless the owner himself had voluntarily "entrusted" the security to the perfidious intermediary. *See* Scollans v. Rollins, 179 Mass. 346, 60 N.E. 983 (1901) (Holmes, J.) (illustrative statement of the entrusting rule).

[21] First, bonds were held to be within the coverage of the N.I.L. *See, e.g.,* Hibbs v. Brown, 190 N.Y. 167, 82 N.E. 1108 (1907). *See generally* Gilmore, *supra* note 1, at 1088 n.96. The Uniform Stock Transfer Act (USTA), promulgated by the Commissioners on Uniform State Laws in 1909, conferred the status of full negotiability upon share certificates.

[22] *See generally* 1 G. GILMORE, *supra* note 5, §§ 7.1-7.5; 2 *id.* § 25.6.

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chusetts rule, and so on.[23]

In this country, in most states no one knew, or cared, what the rule was. It was believed that the common law had, for centuries, prohibited the assignment of choses in action.[24] It was doubted that the assignee acquired a legal interest in the assigned claim — at most he got an equitable interest, whatever that was. It was clear that whatever interest the assignee got was subject not only to all contract defenses but also to various kinds of non-contract-related claims and set-offs which the obligor could have asserted against the assignor: the assignee, as it was said, stood in the assignor's shoes. There was universal agreement that the obligor could, in any case, by an appropriate clause in the contract, effectively prohibit the assignment of any claims against him.[25]

That was the historical reconstruction that we accepted in the 1930's and 1940's. From our premises we deduced a number of conclusions about why what had happened had happened as well as about what was going to — or ought to — happen next.

The moral of the story, as we saw it, was that whenever any kind of property came into the market — that is, became the subject of a large volume of transactions either of outright sale or of transfer for security — then that kind of property sooner or later acquired some or all of the attributes of negotiability: commercial property must be freely transferable — no restraints on alienation can be tolerated; the good faith purchaser for value, at least from the time the property comes into his possession, holds it free both of equities of ownership and of contract defenses; no adverse claims can prevail over the title acquired by good faith purchase.[26] We believed that the process was irreversible: the attributes of negotia-

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[23] The English rule, which can be traced back to the case of Dearle v. Hall, 3 Russ. 1, 38 Eng. Rep. 475 (1828), protected the assignee who was the first to notify the obligor of the assignment to him. Under the New York rule — first in time is first in right — the first assignee was accorded unqualified protection against all subsequent claims. The Massachusetts rule (adopted in RESTATEMENT OF CONTRACTS § 173 (1932)) gave priority to a later over an earlier assignee in four situations: where the later assignee had given value without notice of the earlier assignment and had first obtained either (i) payment or satisfaction of the obligor's duty, (ii) judgment against the obligor, (iii) a new contract with the obligor by means of novation, or (iv) delivery of a tangible token or writing, surrender of which is required by the obligor's contract for its enforcement.

[24] For the historical background, see 1 G. GILMORE, *supra* note 5, §§ 7.3-7.4.

[25] *See id.* §§ 7.6-7.9.

[26] Gilmore, *supra* note 1, at 1063-68.

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bility, once acquired, could never be lost. Our explanation of the fact that good faith purchase had never gotten off the ground in the common law of assignment was that transactions in intangibles had never been of the slightest commercial importance.[27] By the 1940's, accounts-receivable financing had become, in the short space of ten or fifteen years, very big business indeed and was evidently going to go on getting bigger and bigger.[28] As draftsmen of the first codifying statute to regulate receivables financing, it was our duty to give the historical process a helping hand.[29] We brought to the performance of our duty the last full measure of devotion.

Let me suggest some quite different conclusions that we could have deduced from our premises. In a society that recognizes property as something more than theft, you do not go around lightly destroying property rights; you must have a compelling reason for awarding *A*'s property to *C*. Even in a contract-oriented law, you do not go around lightly telling people who have been tricked, cheated, and defrauded that they must nevertheless pay up in full; you must have a compelling reason for doing that, too. So, what could the compelling reasons have been which led the courts to reach, the better part of two hundred years ago, these extraordinary conclusions? Are those reasons equally compelling today?

In the case of the negotiable instrument construct, the answers appear to be clear. In the late eighteenth century, mercantile bills of exchange and bank notes, a sort of unofficial currency which the merchants and bankers had invented, served as an indispensable supplement to the official currencies, which were in short supply.[30] Without these bills and notes, the primitive banking system could not possibly have coped with the enormously increased number of transactions that followed the industrial revolution. This commercial paper typically passed from hand to hand in a long series of transfers, ending up in the hands of strangers who knew nothing

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[27] *Id.* at 1063.

[28] *See id.* at 1118-22.

[29] For example, U.C.C. § 9-318(4) gives to commercial accounts the free assignability that is a basic element of negotiability by rendering ineffective contractual terms prohibiting assignment of an account. Other illustrations are given as the discussion proceeds.

[30] Gilmore, *supra* note 8, at 447. The modern-day check is, in form, a bill of exchange drawn on a bank, payable on demand. U.C.C. § 3-104 provides the current statutory definitions.

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about the original transaction or about earlier transfers of the bill or note and had no way of finding out about them.[31] The need to protect the strangers who bought the paper in the market, even at the cost of doing harm to the obligors and earlier holders, was the compelling reason that led the courts to elaborate the good faith purchaser, or holder in due course, idea in negotiable instruments law.[32]

After the middle of the nineteenth century, currency reforms and modern uses of bank credit made this mercantile currency unnecessary and obsolete. Mercantile paper, to the extent that it remained in use, no longer circulated in anything that could be described as a market; the strangers who had once bought the paper had by 1900 become an extinct species.[33] There are clear indications in the late nineteenth-century case law that the courts — responding to the new situation, as courts, for reasons that escape us, always do — had set about dismantling the structure of the pre-1850 law of negotiable instruments.[34] That discernible trend was interrupted by the codification of the pre-1850 law in the Negotiable Instruments Law (N.I.L.),[35] which was strongly supported by the bankers and their allies and was enacted within the space of a few years throughout the country.[36]

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[31] Gilmore, *supra* note 8, at 448. One of the leading contemporary cases on the indorsement mechanism, Peacock v. Rhodes, 99 Eng. Rep. 402 (K.B. 1781), furnishes an excellent example: "William Ingham, to whom the bill was payable indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher received it from John Daltry; and it was stolen from Joseph Fisher at York (without any indorsement or transfer by him) . . . before the plaintiff took it in payment . . . ." *Id.* at 402. The nascent case law required that all indorsements be written on the reverse side of the instrument. Because bills often were transferred many times and no further space was left for subsequent indorsements, the practice emerged of making the indorsements on a piece of paper (an allonge) which was physically attached to the original bill. The use of the allonge was preserved in U.C.C. § 3-202(2).

[32] *See* notes 9-10 and accompanying text *supra*. *See also* Gilmore, *supra* note 8, at 448-50.

[33] Gilmore, *supra* note 8, at 452.

[34] *Id.* at 452-56.

[35] NEGOTIABLE INSTRUMENTS LAW (1896).

[36] For a discussion of the N.I.L., see Gilmore, *supra* note 8, at 457-61. The N.I.L. had an interesting history in that the drafting was carried out in almost total secrecy. Even Dean Ames of Harvard, the leading academic authority on negotiable instruments law, had never heard of the project until the N.I.L. had been enacted in several states. For Ames' expression of his discontent, see Ames, *The Negotiable Instruments Law — Necessary Amendments*, 16 HARV. L. REV. 255 (1903); Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241 (1900). The N.I.L. was defended in Brewster, *The Negotiable Instruments Law — A Rejoinder to Dean Ames*, 15 HARV. L. REV. 26 (1901); Brewster, *A Defense of the Negoti-*

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On the sales side, the story is less clear-cut. The key to the triumph of the good faith purchase idea in sales law was, I think, the selling factor.[37] In this country, after the Civil War, manufacturers began to distribute their goods through franchised dealers whose operations they were in a position to control — and did control — much more effectively than they had ever been able to control the independent factors. The factor, who quickly disappeared from the hornbooks and treatises, succeeded in maintaining himself only in a few isolated pockets of the economy — mainly in the distribution of agricultural products.[38] With the disappearance of the factor, the principal reason for the protection of good faith purchasers of goods against defrauded owners also disappeared. The courts promptly began dismantling the good faith purchase idea in its sales version.[39] Sales law, like negotiable instruments law, was codified at the turn of the century. However, the Uniform Sales Act,[40] unlike the N.I.L., was open-ended on the good faith purchase issue. Section 23 saved the old Factors' Acts (in the few states that had them) from repeal,[41] and section 24 provided that a buyer with voidable title could convey good title to a subsequent

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able Instruments Law, 10 YALE L.J. 84 (1901). This debate prompted commentary from others. *See, e.g.*, McKeehan, *The Negotiable Instruments Law: A Review of the Ames-Brewster Controversy*, 41 AM. L. REV. 437, 499, 561 (1902).

[37] *See* notes 14-17 and accompanying text *supra*.

[38] Gilmore, *supra* note 1, at 1058.

[39] *See, e.g.*, Fawcett, Isham & Co. v. Osburn, Adams & Co., 32 Ill. 411, 425 (1863) ("The general rule of law, sanctioned by common sense, is that no man can, by his sale, transfer to another the right of ownership in a thing wherein he himself had not the right of property."); Levi v. Booth, 58 Md. 305, 315 (1882) (purchaser is required to ascertain validity of transferor's title).

[40] The Uniform Sales Act was approved by the National Conference of Commissioners on Uniform State Laws in 1906.

[41] UNIFORM SALES ACT § 23 (1906) provides:

> (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.
>
> (2) Nothing in this act, however, shall affect:
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> (a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.
>
> (b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

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good faith buyer but made no attempt to explain what "voidable title" was or how it was acquired.[42] I have no idea whether this open-endedness was the result of inadvertence or of deliberate design on the part of the draftsman, Professor Williston.[43] At all events, the courts in Sales Act states had no difficulty in getting on with their dismantling job, which was done by discovering or inventing more and more situations in which the fraudulent middleman who had somehow acquired possession of goods from the true owner was found to have acquired no title at all so that he had nothing to convey to anyone who took from him.[44]

If, in the 1940's, we had paid any attention to what the courts had been doing for fifty or seventy-five years past, we might have come up with something like this: the good faith purchase idea was an intuitive judicial response to economic conditions that ceased to exist after 1850 or thereabouts. During the second half of the nineteenth century, the courts, losing their enthusiasm for the good faith purchase idea, began cutting back instead of further expanding it.[45]

We were all "legal realists" and, as good realists, were committed to the propositions that legal rules have little or no predictive value and that what the courts do is infinitely more important than what the courts say. In this instance, however, we paid no attention to our precepts. The law review literature of the 1920's and 1930's is bursting at the seams with learned articles and

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[42] For the text of *Uniform Sales Act* § 24 (1906), see note 19 *supra*.

[43] Sections 23 and 24 of the Uniform Sales Act were copied almost verbatim from sections 21 and 23, respectively, of the English Sale of Goods Act, 56 & 57 Vict., c.71 (1893). The only appreciable difference in the two acts is the insertion of the words "for value" in section 24 of the Uniform Sales Act. *See* note 19 *supra*.

[44] *See, e.g.*, Henderson Baker Lumber Co. v. Headley, 247 Ala. 681, 20 So. 2d 81 (1946); Drain v. LaGrange State Bank, 303 Ill. 330, 135 N.E. 780 (1922); Coolidge v. Old Colony Trust Co., 259 Mass. 515, 156 N.E. 701 (1927); Schumann v. California Bank, 114 Or. 336, 233 P. 860, 37 A.L.R. 1531 (1925).

[45] *See, e.g.*, Hart v. Carpenter, 24 Conn. 427 (1856) (buyer was not justified in believing that the seller owned a cow merely because he had possession of it); Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332 (1882) (innocent purchaser for value acquired no title to diamond ring entrusted to itinerant jeweler by true owner); McNeil v. Tenth Nat'l Bank, 46 N.Y. 325 (1871) (court held for innocent purchaser due to particular circumstances but announced general rule of protecting true owner as against a good faith purchaser); Ballard v. Burgett, 40 N.Y. 314 (1869) (true owner prevails against good faith purchaser of oxen from an intermediary who held under contract of sale which provided that oxen were to remain property of original owner until paid for).

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faculty-inspired student notes deploring the short-sightedness and narrow-mindedness of the courts in failing to appreciate the beauty of what came to be called the "mercantile approach."[46] The bulk of the literature was directed to what the courts had been doing to the N.I.L., which had indeed been intended to freeze the old law into place but upon which the courts had been committing a continuing mayhem.[47] The sales cases also came in for a certain amount of attention. The courts were roundly condemned for holding (as they regularly did) that buyers who had obtained possession of goods by paying for them with bad checks had not thereby acquired the "voidable title" that would protect the people (usually second-hand dealers) to whom they immediately resold the goods.[48] The Tennessee Supreme Court was made to wear the dunce's cap because of a case in which it had failed, in the full light of the twentieth century, to give an "expansive" reading to the old Factors' Act.[49]

Let us turn to the Code.

In article 2, the heart of the matter is section 2-403, captioned "Power to Transfer; Good Faith Purchase of Goods; 'Entrusting.' "[50] The first subsection starts off as if it was merely going to

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[46] For a mere sampling of the period, see Ballantine, *Purchase for Value and Estoppel*, 6 MINN. L. REV. 87 (1922); Waite, *Caveat Emptor and the Judicial Process*, 25 COLUM. L. REV. 129 (1925); 14 CORNELL L. Q. 370 (1929); 15 MINN. L. REV. 837 (1931).

[47] *See, e.g.*, Beutel, *The Negotiable Instruments Act Should Not Be Amended*, 80 U. PA. L. REV. 368 (1932); Steffen & Russell, *The Negotiability of Corporate Bonds*, 41 YALE L.J. 799 (1932); Note, *Negotiability of Corporate Bonds*, 7 ST. JOHN'S L. REV. 306 (1933); 3 S. CAL. L. REV. 59 (1929). For an excellent bibliography of the law review literature, see R. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER (3rd ed. 1964).

[48] For one example of this, see 14 MINN. L. REV. 696 (1930) (criticizing the result in Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 P. 915 (1930)).

[49] The case was Gazzola v. Lacy Bros. & Kimball, 156 Tenn. 229, 299 S.W. 1039 (1927) (involving the substitution of a warehouse receipt for the original bill of lading). *See also* 12 MINN. L. REV. 633 (1928).

[50] U.C.C. § 2-403 provides:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> (a) the transferor was deceived as to the identity of the purchaser, or
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be a "cash sale", or
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

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restate the "voidable title" provision of the Sales Act:[51] "A person with voidable title has power to transfer a good title to a good faith purchaser for value."[52] That formulation is already broader than the Sales Act formulation in that it protects all subsequent "purchasers" from the voidable-title man instead of merely subsequent "buyers"; "purchaser," as defined in the Code, includes any security transferee.[53] However, the Code does not, as the Sales Act had done, stop there. The following sentence tells us that anyone to whom goods have been delivered "under a transaction of purchase" has the power to convey good title

> even though
> (a) the transferor [*i.e.*, the original seller] was deceived as to the identify of the purchaser [*i.e.*, the fraudulent middleman], or
> (b) the delivery was in exchange for a check which is later dishonored, or
> (c) it was agreed that the transaction was to be a "cash sale", or
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.[54]

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(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).

See generally Note, U.C.C. SECTION 2-403: A REFORM IN NEED OF REFORM, 20 WM. & MARY L. REV. 513 (1979).

[51] The text of UNIFORM SALES ACT § 24 is set forth at note 19 *supra*.

[52] U.C.C. § 2-403 (1).

[53] Sections 1-201(32) and (33) of the Code define a "purchaser" as anyone who obtains an interest in property by a "voluntary transaction" (including mortgages and gifts). Thus the scope of § 2-403(1) extends beyond the law of sales.

[54] The insertion of this third sentence in subsection (1) of section 2-403 occurred in the 1956 revision of the Code and was the result of suggestions by the New York Law Revision Commission. *See* AMERICAN LAW INSTITUTE, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERICAL CODE 52-53 (1956); REPORT OF THE NEW YORK LAW REVISION COMMISSION RELATING TO THE UNIFORM COMMERCIAL CODE app. IV (Excerpts from

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What are we to make of this a-b-c-d list? The official comment observes that, under the sentence just quoted, "subsection (1) provides specifically for the protection of the good faith purchaser for value in a number of specific situations which have been troublesome under prior law."[55] For "situations which have been troublesome" read "situations in which the courts have been protecting the original transferor by refusing to expand the 'voidable title' concept."[56] All the courts that had failed to appreciate the "mercantile approach" were being put in their places. At least as a matter of drafting, "troublesome" was a stroke of genius.

The section 2-403 draftsman was not content to rest from his labors at that point. The next two subsections resurrect nineteenth-century "entrusting" theory[57] — which Williston had not found it necessary to mention in the Sales Act — and put it to some unsuspected uses. Subsection (3) defines "entrusting" as including everything short of armed robbery (larceny is expressly approved).[58] When goods have been so entrusted to "a merchant who deals in goods of that kind," the merchant has power to transfer the entruster's title to "a buyer in ordinary course of business."[59] (For some reason, the security transferees who were protected in the voidable title subsection by the use of the term "purchaser" do not qualify for protection under the entrusting subsection. I have no idea why the draftsman chose thus to narrow the protected class).[60] The upshot of all this is that if you leave your watch to be

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the Proceedings of the Commission), at 355-485 (1956).

[55] U.C.C. § 2-403, Official Comment.

[56] *See* note 44 and accompanying text *supra.*

[57] Lord Ellenborough enunciated the theory of entrusting as follows:

> If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, *it must be intended that the commodity was sent thither for the purpose of sale.* . . . Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.

Pickering v. Busk, 15 East 38, 43, 104 Eng. Rep. 758, 760-61 (K.B. 1812) (emphasis supplied).

[58] U.C.C. § 2-403(3). *See* note 50 *supra.*

[59] U.C.C. § 2-403(2). For the Code's definition of "buyer in ordinary course of business," see U.C.C. § 1-201(9). *See also* Note, *The Good Faith Purchase of Goods and "Entrusting" to a Merchant Under the Uniform Commercial Code: Section 2-403,* 38 IND. L. J. 675 (1963).

[60] A suggested rationale for the differing treatment is set forth in Note, *supra* note 50, at 553-57.

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repaired by a jeweler who not only repairs but sells watches, you lose the watch if the jeweler chooses to sell it. Goods, it is tempting to say, have at long last become fully negotiable — well, almost fully negotiable.

The final subsection of section 2-403 is a literally incomprehensible cross-reference to other articles of the Code (including article 9) which, it is suggested, may, with respect to some types of "purchasers" and to "lien creditors," contain provisions that supersede section 2-403. I do not believe that the cross-reference was meant to be incomprehensible. The drafting became terribly botched and no one ever got around to cleaning it up. The dividing line, however, between article 2 good faith purchasers and article 9 good faith purchasers is not an easy one to draw.[61]

I shall not go into any detail about article 3 of the Code, which deals with negotiable instruments, renamed commercial paper. I once commented that article 3 is the N.I.L. doubled in spades — negotiability *in excelsis* — and went on to say that the article gravely reviews each of the pressure points that had emerged in the N.I.L. case law and resolves the issue in favor of negotiability and the holder in due course.[62] The most outrageous thing about article 3, a statute drafted in the 1940's, is that there is no reference, in text or comment, to the then rapidly developing body of case law holding that finance companies and banks to which consumer notes were negotiated could not hold the notes free of the consumer's contract defenses because of their close connection with the dealer-sellers.[63] That omission has been remedied by an intricate network of state and federal statutes and regulations,[64] but it should never have been tolerated in the first place.[65]

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[61] Some have attempted to draw that line. *See* Dolan, *Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the U.C.C.*, 30 HASTINGS L.J. 1 (1978); Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978). *See also* McDonnell, *The Floating Lienor As Good Faith Purchaser*, 50 S. CAL. L. REV. 429 (1977).

[62] Gilmore, *supra* note 8, at 461.

[63] Commercial Credit Co. v. Childs, 199 Ark. 1073, 137 S.W.2d 260 (1940), was one of the first "leading cases" in this area.

[64] *E.g.*, Truth-In-Lending Act, 15 U.S.C. § 1601 (1976); UNIFORM CONSUMER CREDIT CODE (1974).

[65] For an excellent review of these matters, see Rohner, *Holder in Due Course in Consumer Transactions: Requiem, Revival, or Reformation?*, 60 CORNELL L. REV. 503 (1975).

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In article 9, most of the problems the draftsmen had to deal with had been worked out, more or less satisfactorily, in a hundred years of case-law trial and error.[66] Accepting, as we did, the solutions that had been worked out in the law of chattel mortgages, conditional sales, trust receipts, and so on, all that had to be done was to restate those solutions in the terminology that the article 9 draftsmen had invented.[67] Our naif hope was that by introducing the concept of the unitary article 9 security interest — bringing, as we used to say, all the pre-Code security devices under one roof — and by replacing the congeries of existing filing systems with a single filing system, we could achieve simplicity in a field of law that long had been plagued with progressive fragmentation and growing complexity. Pre-Code personal property security law may be described as closely resembling that obscure wood in which Dante discovered the gates of hell. We thought that, with a little pruning and clearing, we could turn the obscure wood into a peoples park where widows and orphans and country bankers could enjoy their innocent pleasures, safe from the attack of ravening wild beasts and trustees in bankruptcy. The sad truth is that personal property security law is well on the way to becoming quite as fragmented and quite as complex as it ever was in the bad old days before the Code. But that would be another story.[68]

The great mutation in security law that the article 9 draftsmen had to deal with without guidance from the past was the development, during the 1930's and 1940's, of financing on the security of accounts receivable, contract rights, and other intangibles.[69] We had our ready-made solution: as a new species of commercial property that had found its market, all our new intangibles should be

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[66] Article 9's acceptance of the verdict of history is considered in 1 G. GILMORE, *supra* note 5, §§ 9.1-9.2; Gilmore, *Article 9: What It Does For the Past*, 26 LA. L. REV. 285 (1966).

[67] The choice of the new terminology was deliberate. The official comment to § 9-105 (the basic definitional section of article 9) remarks that:

> [T]he selection of the set of terms applicable to any one of the existing forms (e.g., mortgagor and mortgagee) might carry to some extent the implication that the existing law referable to that form was to be used for the construction and interpretation of this Article. Since it is desired to avoid any such implication, a set of terms has been chosen which have no common law or statutory roots tying them to a particular form.

U.C.C. § 9-105, Official Comment.

[68] *See* Coogan, *Article 9 — An Agenda for the Next Decade*, 87 YALE L.J. 1012 (1978).

[69] *See generally* 1 G. GILMORE, *supra* note 5, § 8.1.

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tricked out in the fancy dress of negotiability.[70] What we failed to see was that the appearance of these new types of commercial collateral had already created a profound disturbance in the case law.

In 1925, the Supreme Court of the United States, without dissent, decided an apparently trivial case captioned *Benedict v. Ratner*[71] — a case that must have seemed as uninteresting to the justices as it did to the learned editors of the law reviews, who paid no attention to it.[72] The case, which came up from New York,[73] involved an amateurish arrangement under which Ratner had made advances to the Hub Carpet Company (a "family corporation" of which Ratner's son was vice-president), taking as security the company's present and future accounts receivable. A list of the assigned receivables was delivered to Ratner each month but Ratner allowed the carpet company to collect the receivables and to use the proceeds, without accounting to Ratner for them, in the ordinary course of its business. The debtors who owed the accounts were not notified of the assignment to Ratner. The carpet company collapsed into bankruptcy. In the bankruptcy proceedings the trustee challenged Ratner's security arrangement. In the district court and before the Second Circuit the trustee got nowhere: under New York law, Ratner's arrangement gave him what we would call a perfected security interest in all the outstanding accounts.[74] In the Supreme Court,[75] Justice Brandeis, a Massachusetts lawyer, wrote an opinion that stigmatized Ratner's arrangement as being, under New York law, a fraudulent conveyance, void against the trustee.[76] Justice Brandeis, like the judges in the lower courts, assumed that the only issue in the case was whether the assignment was good under New York law; if it was, nothing in the Bankruptcy Act invalidated it.

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[70] The drafting history of article 9 is discussed in 1 G. GILMORE, *supra* note 5, § 9.2.

[71] 268 U.S. 353 (1925). *See generally* 1 G. GILMORE, *supra* note 5, at 250-86.

[72] The Court's opinion in *Benedict* was noted in 39 HARV. L. REV. 253 (1925) with qualified approval.

[73] The style of the case below was *In re* Hub Carpet Co., 282 F. 12 (2d Cir. 1922). The following statement of facts is derived from the Second Circuit's statement of the case and from Justice Brandeis' opinion, 268 U.S. 353 (1925).

[74] 282 F. at 17.

[75] Benedict v. Ratner, 268 U.S. 353 (1925).

[76] "Under the law of New York a transfer of property which reserves to the transferor the right to dispose of the same, or to apply the proceeds thereof, for his own uses is, as to creditors, fraudulent in law and void." *Id.* at 360.

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On a how-to-read-cases level, the New York federal judges were right and Justice Brandeis was wrong. Under the New York case law (no statutes were involved), assignees of intangible claims, presently existing or to arise in the future, were protected from the date of assignment against purchasers and lien creditors (and, consequently, against trustees in bankruptcy). The mistake that Justice Brandeis made was that, instead of looking to the New York assignment cases (which were directly in point), he looked to the New York cases on inventory (or "stock-in-trade") chattel mortgages (which were not in point at all).[77] Under the chattel mortgage cases, a mortgagee who allowed the mortgagor to sell his inventory and keep the proceeds without accounting for them to the mortgagee had nothing more than a fraudulent conveyance.[78] The chattel mortgage rule, said Justice Brandeis, applied to assignments of receivables (none of the New York assignment cases was cited in the opinion). Consequently, as Justice Brandeis put it in a phrase that became celebrated, assignees, like mortgagees, must exercise "dominion and control" over their security: they must require a strict accounting for every penny of proceeds collected by their assignors. Because Ratner had not required such an accounting, his assignment was a fraudulent conveyance.

The reason *Benedict* was, at the time it was decided, a case of no interest to anyone was that no institutionalized practice existed of lending against the security of receivables under arrangements like the one Ratner had with the carpet company. However, beginning around 1930, financing institutions, led by the sales finance companies (which had previously specialized in financing installment sales of automobiles and other expensive hard goods to consumers), decided to go into industrial accounts receivable financing — and did so with great success and profit. They also decided to structure their receivables-financing arrangements along the lines of Ratner's arrangement with the carpet company — that is, to allow the assignors to collect the accounts without notification to the account debtors that the accounts had been assigned. That was

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[77] Judge Mayer, for the Second Circuit, had remarked that the stock in trade mortgage cases rested on the "doctrine of reputed or ostensible ownership," which did not apply to intangibles. 282 F. at 16. Justice Brandeis refused to adopt this approach. 268 U.S. at 362-63.

[78] *See, e.g.*, Russell v. Winne, 37 N.Y. 591 (1868); Edgell v. Hart, 9 N.Y. 213 (1853); Griswold v. Sheldon, 4 N.Y. 580 (1851).

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why *Benedict* became a crucial case. The new receivables financers had to — and did — invent techniques for complying with "the rule in *Benedict*" under which they would appear to be exercising "dominion and control" over the assigned receivables, the absence of which had been fatal in Ratner's case.[79]

It would be much too easy to dismiss Justice Brandeis' *Benedict* opinion as a simple "mistake" on the part of a jurist who happened not to be familiar with some esoteric nineteenth-century New York case law. The Brandeis "mistake" was enthusiastically accepted, not only in the Second Circuit[80] but in the New York Court of Appeals,[81] and decisively influenced New York assignment law until the enactment of the Code.[82] The "mistake" consisted of looking to the New York chattel mortgage cases instead of the New York assignment cases. The result was to make life harder and harder for assignees during the period when, for the first time, assignments of intangibles had become of prime commercial importance.[83]

Under New York chattel mortgage law, the claim of a mortgagee to after-acquired property could be defeated by a subsequent lien creditor (and therefore by a trustee in bankruptcy) unless the mortgagee had, before the creditor acquired his lien, filed a supplemental mortgage covering the after-acquired property.[84] In the context of receivables financing, the undertaking of some act that might be regarded as the equivalent of the filing of a supplemental mortgage was a factual impossibility: dozens or hundreds or thousands of new accounts arose every day.

In 1942, a panel of the Second Circuit decided a case captioned *Rockmore v. Lehman.*[85] Surf Advertising Corporation, bankrupt,

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[79] There was a period of approximately twenty years from the date of the *Benedict* opinion (1925) until the general enactment of state statutes concerning the assignments of accounts receivable. The case law during this period is discussed in 1 G. GILMORE, *supra* note 5, § 8.5.

[80] Two cases in the Second Circuit marked the high tide of the *Benedict* theory. *See* Lee v. State Bank & Trust Co., 38 F.2d 45 (2d Cir. 1930), *second appeal,* 54 F.2d 318 (2d Cir. 1931); Brown v. Leo, 12 F.2d 350 (2d Cir. 1926).

[81] *See* note 88 and accompanying text *infra.*

[82] The New York version was enacted in 1962. *See* N.Y. U.C.C. (McKinney 1964).

[83] *See generally* 1 G. GILMORE, *supra* note 5, at 250-86.

[84] *See, e.g.,* Rochester Distilling Co. v. Rasey, 142 N.Y. 570, 37 N.E. 632 (1894). For a discussion of the chattel mortgage and the after-acquired property clause, see 1 G. GILMORE, *supra* note 5, §§ 2.1-2.4.

[85] 128 F.2d 564 (2d Cir.), *rev'd on rehearing,* 129 F.2d 892 (2d Cir. 1942).

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had assigned the proceeds of executory contracts as security for advances. Surf, while insolvent and known by the assignees to be insolvent, had continued to perform the contracts, thus creating a fund available for distribution. Judge Augustus Hand, widely regarded as the best commercial-law judge of the period, held, relying on the chattel mortgage after-acquired property cases, that the assignments of proceeds were void against Surf's trustee in bankruptcy.[86] The decision created a scandal in New York financial circles. On a motion for rehearing, the most prestigious New York law firms filed briefs as *amici curiae,* urging reversal of the decision. Judge Hand, reversing himself, switched from the chattel mortgage cases to the assignment cases and held the assignments good.[87] The only thing that can be said in support of Judge Hand's first opinion in *Rockmore v. Lehman* is that, on grounds of policy, it was undoubtedly right.

The Brandeis "mistake" — or insight — soon entrenched itself in the New York Court of Appeals. In cases decided in the late 1940's and early 1950's, the majority of that court seemed to be saying — relying, once again, on the chattel mortgage after-acquired property cases — that, with respect to intangible property claims as to whose realization there was the slightest degree of futurity or contingency, no security transfer could ever be perfected against subsequent liens or trustees in bankruptcy.[88] During this period, the court also had occasion to reconsider the common-law rule that contract obligors can effectively prohibit the assignment of claims against them; the majority reaffirmed the common-law rule in a holding that went beyond anything that had previously been seen in New York jurisprudence.[89] In all these cases the court

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[86] Judge Hand concluded that "the assignments . . . created no lien good at law against the future instalments which might become payable by Calvert . . . but at best only created an equitable lien which would arise when the payments became due from Calvert." 128 F.2d at 566.

[87] 129 F.2d 892 (2d Cir. 1942).

[88] *See, e.g., In re* City of New York v. Bedford Bar & Grill, 2 N.Y.2d 429, 141 N.E.2d 575, 161 N.Y.S.2d 67 (1957); *In re* Gruner, 295 N.Y. 510, 68 N.E.2d 514 (1946). *But see* Stathos v. Murphy, 26 App. Div. 2d 500, 276 N.Y.S.2d 727 (1966), *aff'd,* 19 N.Y.2d 883, 227 N.E.2d 880, 281 N.Y.S.2d 81 (1967) (can be seen as a reversal of this earlier trend). The Second Circuit followed *Stathos* in Law Research Serv., Inc. v. Martin Lutz Appellate Printers, Inc., 498 F.2d 836, 837-38 (1974) (the assignment of an existing right creates an immediate lien in favor of the assignee that is valid against later lien creditors of the assignor).

[89] Allhusen v. Caristo Constr. Corp., 303 N.Y. 446, 103 N.E.2d 891 (1952). *But see* Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498

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was bitterly divided and last month's triumphant majority could easily become this month's protesting minority. Evidently a confused struggle was going on inside the court about the extent to which the novel types of security arrangements in novel types of property that kept coming up should be recognized as valid.

The article 9 draftsmen paid not the slightest attention to what the courts — not only in New York, I assure you — were doing. We had our nineteenth-century solution down pat. *One:* Repeal the rule of *Benedict v. Ratner.*[90] *Two:* Give the security transferee — the article 9 secured party — an automatically perfected security interest in all kinds of after-acquired property (including future intangibles), dating from the execution of a security agreement and the filing of a financing statement.[91] *Three:* Repeal the common-law rule that purported to allow an obligor to prohibit assignment of claims against him.[92] *Four:* Except in consumer transactions, make it possible for the financing assignee to hold all assigned claims free of underlying contract defenses between assignor and obligor.[93] *Five:* Give the first-filing secured party an overriding priority not only for present but for future advances.[94] *Six:* Give the secured party who has complied with the perfection requirements a paramount claim not only to the original collateral but also to any proceeds received when the debtor, with or without the secured party's authorization, disposes of the collateral.[95] All these things were done, as well as a good many others.

I have been describing the principal components of the article 9 floating lien, under which the secured party can lock up all the property that his debtor now owns or ever will acquire, sit back and do nothing until bankruptcy day, and then (if article 9 contains the truth, the whole truth, and nothing but the truth) walk off with everything. Some years ago one of my students, having contemplated this awesome structure through the several weeks of a course in secured transactions, was moved to compose a Secured Creditor's Psalm:

(1957).

[90] U.C.C. § 9-205.

[91] U.C.C. § 9-204.

[92] U.C.C. § 9-318(4).

[93] U.C.C. § 9-206.

[94] U.C.C. § 9-312(7).

[95] U.C.C. § 9-306.

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> Thou settest a table for me in the presence of mine enemies.
> Thy § 9-204 and thy § 9-306, they comfort me.
> Yea, though I walk in the shadow of the valley of Preference,
> Surely I need fear no trustee.

The finance companies and banks were effectively represented in the drafting of article 9. It may be tempting to conclude that article 9 was a sell-out to these predatory interests. So far as my own memory goes, nothing of the sort took place. The six-point program was put forward by the academics on the drafting staff, lost in their nineteenth-century dream. The twentieth-century hired guns — all of them competent, most of them honest — were uninterested. They might have summed up their attitude this way: Why, Professor Llewellyn, if you want to repeal the rule in *Benedict v. Ratner,* God bless you, go right ahead; we don't care, one way or the other.

Historical evidence more solid than my fallible memory suggests that the professionals really did not want the rule in *Benedict* repealed. In 1943, the Supreme Court of the United States decided the case of *Corn Exchange National Bank & Trust Co. v. Klauder,*[96] which may be taken as another example of the profound disturbance in the case law. *Klauder* held in effect that nonnotification accounts receivable financing arrangements were void in bankruptcy in all states that did not have a rule of absolute priority protecting the assignee who was first in time. So far as anyone knew, New York was the only state that had such a rule.[97] It was therefore necessary, if nonnotification financing was to continue, for all the other states in which such financing was important to adopt the New York rule by statute. That was done in the space of a few years.[98] The finance companies played a major role in the campaign for enactment of the accounts receivable statutes and were in a position to get what they wanted from the state legislatures. Not a single statute repealed *Benedict*; the finance companies were content to live with it.[99]

The basic flaw in our analysis was our failure to perceive that the twentieth-century financing assignee was not in the least like

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[96] 318 U.S. 434 (1943).

[97] *See* note 23 and accompanying text *supra.*

[98] *See* 1 G. GILMORE, *supra* note 5, § 8.7.

[99] *Cf. id.* § 8.8 (several statutes carried limited repealers).

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the stranger who, one hundred and fifty years earlier, had bought goods, commercial paper, and other property in an open market without being able to find out about the prior history of whatever he bought. The financing assignee, who serves a useful function in providing working-capital loans, is not an ignorant stranger. He is in a position to find out — and, before putting up his money, does find out — all there is to know about the operations of his borrowers. He has a close and continuing relationship with them. He can, if he chooses, require the strictest accounting from them. He does not need to be insulated, as a matter of law, from the risks of the transactions in which they engage. Because he can investigate, supervise, and control, he should be encouraged to do so and penalized if he has not done so.

If we had listened to what the courts were trying to tell us, we might have come closer to the mark. Surely, the substance of the rule in *Benedict* should have been preserved, even if the formal aspects of the rule had been discarded.[100] We could have learned from Judge Hand's first opinion in *Rockmore v. Lehman*:[101] why on earth should the fruits of a known insolvent's labors feed the assignee while all the other creditors starve? Furthermore, there was something worth thinking about in the limitations that the nineteenth-century courts had placed on the mortgagee's claim to after-acquired property: does it make any sense to award everything to a secured party who stands idly by while a doomed enterprise goes down the slippery slope into bankruptcy?

We shall be living with our nineteenth-century Code for quite a while yet. Perhaps next century we will have a twentieth-century Code which, like our own Code, will be out of date by the time it is enacted. Meanwhile, how are we to make do?

With respect to some of the article 9 excesses, relief is already at hand. Just as, in nineteenth-century melodramas, the United States Cavalry always arrived in the nick of time, so the new Federal Bankruptcy Code[102] has come galloping to the rescue. The Bankruptcy Code greatly increases the power of the bankruptcy courts to control the distribution or reorganization of insolvent es-

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[100] *See* notes 72-84 and accompanying text *supra*.

[101] 128 F.2d 564 (2d Cir.), *rev'd on rehearing*, 129 F.2d 892 (2d Cir. 1942). *See* notes 86-88 and accompanying text *supra*.

[102] 11 U.S.C. §§ 101-151326 (Supp. III 1979).

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tates. In particular, the new section on voidable preferences — section 547[103] — significantly cuts back the rights of article 9 secured parties. Claims to after-acquired property are now voidable in bankruptcy unless they are expressly saved by some provision of section 547. The policy reflected in Judge Hand's first opinion in *Rockmore v. Lehman* may have been reinstated: the section 547 language is obscure but, at the least, the "rule in *Rockmore v. Lehman*" (that is, Judge Hand's second opinion) is open for reconsideration.[104] There is a touch of irony in the story of the drafting of section 547. Several of the people — including myself — who worked on early drafts of the new preference section were the same people who, a generation earlier, had put article 9 together. It cannot often have happened in the history of codification that draftsmen have received a second chance to clean up the mistakes that they made the first time around.[105]

Within the confines of the Uniform Commercial Code itself, there is, fortunately, a good deal of room for maneuver. One of the sad truths about the Code is that its several articles were never coordinated as they should have been. The lack of coordination between article 2 on sales and article 9 on secured transactions is glaringly evident.[106] There is a broad range of transactions involving both security transfers and sales. Frequently, article 2 points firmly in one direction while article 9 points firmly in the opposite direction — the choice of which article to apply is by no means a simple one. I have the impression that some awareness of the fact that article 2 and article 9 often suggest contradictory results on identical facts is beginning to penetrate the legal consciousness.[107]

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[103] 11 U.S.C. § 547 (Supp. III 1979).

[104] *See* notes 86-88 and accompanying text *supra*.

[105] The "early drafts" of section 547 referred to in the text were prepared by a committee of the National Bankruptcy Conference, upon which I served as chairman from 1967 until 1970. The people who participated in the committee's work who had also participated in the drafting of article 9 (as well as the 1972 revision of article 9) included Justice Robert Braucher, Peter Coogan, Esq., Professor Homer Kripke, and myself. The committee's final draft, having been approved by the Conference, was adopted in substance by the Bankruptcy Commission. The language of the draft was then rewritten extensively by the relevant House committee. The congressional rewriting job was not, so far as I am aware, intended to make any substantive changes in the drafts adopted by the Conference and the Commission.

[106] *See* Jackson & Peters, *supra* note 61.

[107] *See, e.g., In re* Samuels, 526 F.2d 1238 (5th Cir. 1976) (en banc) (holding, under the U.C.C., that a perfected security interest in goods is superior to the interest of an unpaid

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Nor should we neglect the fact that the Code elevates into overriding principles such concepts as good faith, unconscionability, and commercial reasonableness.[108] In Anglo-American law, we have not, in the past, been inclined to make as much use of overriding principles as the European civil-law systems have done. There is a good deal of recent English case law suggesting that, even without the benefit of a statutory formulation, the English courts have been making remarkable progress.[109] There is no reason for our own courts to lag behind. Karl Llewellyn's best legacy to us may have been that, against powerful opposition, he succeeded in keeping his Code open-ended. Good faith and the like are words to conjure with, whenever we feel like conjuring.

Finally, we may take heart in the fact that statutes, even if they are called codes, age even more rapidly than human beings do.[110] The Code dates from the 1940's; it already qualifies for senior citizen status. Let us treat it with respect — even with a nostalgic affection — but there is no need, and with each passing year there will be less need, for us to be overborne by its quaint, old-fashioned ways.

There may yet be a way out of the nineteenth century.

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cash seller in the same goods already delivered to a buyer). In *Samuels*, the Fifth Circuit en banc reversed an earlier decision by the majority of a three-judge panel. The judges who had been in the majority on the panel dissented from the en banc holding. The result in *Samuels* (with regard to meat-packing) was overturned by both state and federal legislation. *See also* Tanbro Fabrics Corp. v. Deering Milliken, Inc., 39 N.Y.2d 632, 350 N.E.2d 590, 385 N.Y.S.2d 260 (1976) (a buyer of goods may be a buyer in the ordinary course of business under § 9-307 even though he knows that his seller does not have possession of the goods which are held by a pledgee under a contract which does not permit the seller to order the goods out unless the secured party agrees). If the court had looked to article 2 instead of article 9, it would have come to the opposite conclusion. *See* U.C.C. § 2-403, discussed at pp. 616-19 *supra*. For an enlightening discussion of *Tanbro*, see Kripke, *Should Section 9-307(1) of the Uniform Commercial Code Apply Against a Secured Party in Possession?*, 33 BUS. LAW. 153 (1977).

[108] For an interesting discussion, see Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976).

[109] *See, e.g.*, Macaulay v. Schroeder Music Publishing Co., [1974] 1 W.L.R. 1308 (H.L.); Clifford Davis v. WEA Records, [1975] 1 All E.R. 237 (C.A.); Lloyds Bank v. Bundy, [1974] 3 All E.R. 757 (C.A.).

[110] On statutory obsolescence, see G. GILMORE, *supra* note 6, at 95-98; Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979); Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979); Gilmore, *Putting Senator Davies in Context*, 4 VT. L. REV. 233 (1979).

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