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William E. Britton

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EQUITABLE LIENS—A TENTATIVE ANALYSIS OF THE PROBLEM

WILLIAM E. BRITTON*

An interesting case arising out of the receivership of the National Bank of Fayetteville, two years ago, and decided by the Circuit Court of Appeals last October, has presented again the problem as to when a creditor should be entitled to an equitable lien on chattels or choses in action in the possession of the debtor. The facts were as follows: The proceeds of a Cumberland County bond issue of \$1,109,951.25 were deposited in the Fayetteville bank on June 3, 1927, it then being contemplated by both parties that the bank would soon thereafter put up the bond required by state law to secure the repayment of the deposit. To provide security for the county in the interim the county treasurer agreed to accept notes belonging to the bank. This agreement was performed soon after the deposit, by the bank's taking notes due it, and placing them in a package by themselves, with the name of the county treasurer placed thereon. This package was kept in the regular note file, but the assistant cashier was instructed to let the treasurer have them at any time he might ask for them. The county treasurer saw the notes so placed but agreed that the notes might be kept in the bank, and that the bank should have the privilege of taking the notes from the package for payment or renewal upon condition that notes of equal value be replaced. On August third, the county treasurer attempted to withdraw \$380,000 but could get only \$200,000. The following day the county treasurer withdrew notes amounting to \$426,631.86 and four days later took \$40,189.79 in notes from this package. On August 8 the bank closed, the county's deposit then being \$341,000.24. The receiver of the bank brought this suit against the county treasurer to recover the notes. The judgment for defendant, the county treasurer, was affirmed. *Burrowes v. Nimocks*, 35 F. (2d) 152 (C. C. A. 4th, 1929).

The bank's contention was that the transfer on August 4th and 8th to the county treasurer was a preferential transfer made in contemplation of insolvency voidable under the National Banking Act, R. S. Sec. 5242. The court admits that the evidence of known insolvency

* Professor of Law, University of Illinois.

by the bank's officers at the time of the actual transfer of possession of the notes in August was probably sufficient to constitute the transfer prohibited by the federal statute, but they decided that the transfer was withdrawn from the operation of this act because of the existence of an antecedent equitable lien created on securities in the possession of the bank contemporaneously with the deposit of the county funds therein. That is, the facts created an equitable lien enforceable against the borrower and the receiver—the representative of general creditors.

The decision is amply supported by the authorities, the opinion of Mr. Justice Parker ably discussing many of the leading cases on the question. The purpose of this note, however, is to comment on some of the wider implications of the decisions in this branch of the law. As to the reason for the rule, through most of the cases runs the idea that one person may acquire rights with respect to another's property, real, personal or chose in action, when the parties so intend and the property is identified. That is, the two, apparently, indispensable factual elements are: intent of the parties to give and take security, and the identification of the property. The resulting so-called equitable lien may attach to land.¹ Application of the doctrine to the chattels, in possession of the lienor are common,² and

¹ A mother loaned money to her son to build a house, the son "pledging" the house as security. Held: son's trustee in bankruptcy takes subject to lender's equity. Possibly resulting trust, though court does not expressly so hold. *Parker v. Bates*, 203 Fed. 294 (S. D. Ga. 1913).

A guardian borrows from funds in his hands belonging to his ward's estate then "intending that his real estate should be held as security therefor," his wife also orally agreeing to waive dower therein. Held: Equitable lien created. Subsequent transfer of proceeds of sale of said land to ward's account non-preferential, therefore not subject to recovery by borrower's trustee in bankruptcy. No discussion of statute of frauds. *Crosby v. Packer*, 22 F. (2d) 611 (C. C. A. 1st, 1927).

Present loan on understanding that lender's security should be "the equity" in described real estate. Held: Equitable lien created. Subsequent transfer of certificates of stock in corporation which owned said property held, non-preferential. Intent to give security and identification clear. *In re Dier*, 296 Fed. 816 (C. C. A. 3rd, 1924), *Certiorari denied*, 265 U. S. 584. 44 Sup. Ct. 459, 68 L. ed. 1191 (1923).

² A note reciting that it was secured "by pledge of the following securities: Equity in iron in yard No. 48," the borrower's place of business, was enforceable against the borrower's trustee in bankruptcy. *Chattanooga Nat'l. Bank v. Rome Iron Co.*, 102 Fed. 755 (N. D. Ga. 1900).

Loan on agreement that shoes in course of manufacture constitute security therefor. Duplicates of production sheets and orders to be filled transferred to lender. Shoes tagged. Held: Equitable lien good as against borrower's trustee in bankruptcy. *Beacon Trust Co. v. Dolan*, 27 F. (2d) 247 (C. C. A. 1st, 1928).

just as frequently denied,³ upon the actual or ostensible ground that the evidence of the requisite intent or of identification or both is deemed too weak. The problem also appears in the defective execution cases. *A* intends to mortgage to *B*. The instrument is so defectively executed that it fails to operate as such under the controlling statute. The defective instrument may, and usually does create an equitable lien as between the parties.⁴ Its enforceability against judgment creditors of the mortgagor is probably dependent upon whether the recording act can be so interpreted as to make eligible for record defectively executed instruments of the type involved in the particular case. A common application of the doctrine is with respect to mortgages of after acquired chattels.⁵ Sometimes the agreement takes the form of one to give security in the future, and fails for this reason. The idea of future action destroys the evidence of the requisite present intent.⁶ But at other times the idea

³ Loan on oral agreement to secure by pledge of automobiles. Subsequent transfer of certificates of title held recoverable preference because of the absence of identification of cars at time of loan. *In re Goodhue Motor Co.*, 28 F. (2d) 402 (D. C. Md. 1928).

Same result, under virtually same situation in *In re Circle Trading Co.*, 26 F. (2d) 193 (C. C. A. 2nd, 1928). Where lender financed the purchase by borrower of a specified amount of goods. Lack of identification at time of loan prevents creation of an equitable lien. Subsequent identification and transfer by trust receipt a voidable preference.

Loan to discharge encumbrances on identified barges, the borrower "to transfer and assign" to lender "all its property" upon the happening of a specified subsequent event. *Held*: Subsequent transfer a voidable preference because no equitable lien arose at date of agreement. Intent clear except insofar as colored by the anticipation of a subsequent transfer of more formal character. Identification clear. No discussion of possibility of subrogation. *In re New York & Baltimore Inland Transportation Co.*, 276 Fed. 145 (D. C. Del. 1921).

⁴ *Bridgeport Ice Co. v. Meader*, 1895, 72 Fed. 115, agreement to give a mortgage. *Love v. Sierra Nevada Mining Co.*, 32 Cal. 639 (1867), defective execution; *Peckham v. Haddock* 36 Ill. 38 (1867), written agreement that a discharged mortgage should stand as a new mortgage for a new loan. *Russel v. Russel*, 1 Bro. C. C. 269, 128 Eng. Rep. 1121 (1783), deposit of title deeds in England.

⁵ Present mortgage covering after acquired chattels may constitute a present equitable lien, variously described as a present equitable assignment, or as a result flowing from right to specific performance of the agreement, viewed as a contract to mortgage. *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 4 L. ed. 577 (1905). Much conflict. Subject beyond scope of this note. *Cf.* *Williston* (1906) 19 HARV. L. REV. 557; *Stone* (1920) 20 COL. L. REV. 519; *Blair* (1926) 40 HARV. L. REV. 222, and notes; (1924) 24 COL. L. REV. 68; (1924) 24 COL. L. REV. 523.

⁶ "A mortgage or transfer of his property by an insolent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition." *In re Great Western Mfg. Co.*, 152 Fed. 123 (C. C. A. 8th, 1907).

of future action is deemed not inconsistent with an intent to give a present lien.⁷ The rule is applied to commercial specialties,⁸ as in the case under discussion. Application of the rule is denied when the evidence of the requisite intent or of identification is deemed wanting.⁹ The rule is applied to choses in action, such as book accounts,¹⁰ and of course denied¹¹ where the evidence of either of the required facts are deemed wanting.

The evidence of present intent to give and take security on property still in the possession of the borrower sometimes is less evident

⁷ Agreement to transfer definitely described bonds. Court held: "While the language 'verbally agreed to transfer' might be construed as constituting an executing agreement . . . we think a present equitable assignment was thereby created and the words 'agreed to transfer' clearly referred to an agreement to deliver the bonds whenever the same came to hand." Subsequent actual transfer non-preferential because in performance of an antecedent equitable lien. The rule apparently requiring identification here interpreted to mean "described." *Godwin v. Murchison Nat'l. Bank*, 145 N. C. 320, 59 S. E. 154 (1907).

⁸ Loan on securities in possession of borrower. Securities placed in package marked with lender's name and kept in safe deposit box. Substitutions were made by borrower. Held: Equitable lien created. Subsequent transfer to lender within four months of borrower's bankruptcy non-preferential. Intent to give security and identification clear. *Sexton & Kessler*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. ed. 995 (1912). Same result under substantially the same situation in *In re Hollins*, 215, Fed. 41 (C. C. A. 2nd, 1914), though, on the question of intent to give and take security, the evidence was much weaker. Possibly the intent can be implied in fact.

⁹ In *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 789 (1877). Where the borrower secured the loan by putting securities in a separate envelope, and substitutions were made, it was held that the evidence of intent to create a lien was not made out. Three justices dissent. No opinion. Cf. also *Equitable Trust Co. v. First Nat'l. Bank of Trinidad*, 275 U. S. 359, 48 Sup. Ct. 167, 72 L. ed. 313 (1927), where A requested B to arrange for the payment of a draft drawn by A upon a foreign bank and sent a draft to B for the amount which sum was deposited in the general account of B. B that day requesting the foreign bank to honor A's draft. A's draft on foreign bank dishonored. B bankrupt. Held: A had no equitable lien on assets of B. Cf. *Stone: Some legal problems involved in the transmission of funds* (1921). 21 COL. L. REV. 507, in which the ambiguities of such a transaction are analyzed out into four possibilities: (1) When B is a bailee; (2) B, a fiduciary with power to discharge A's duty to C or with a duty on B to pay C; (3) B an express trustee for C, and (4) B under a contract duty to A to pay C.

¹⁰ *Greey v. Dockendorff*, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. ed. 339 (1913).

¹¹ Assignment of book account, whether existing or future with no duty on assignor to account but with full power and privilege to collect assigned accounts and use proceeds, does not create an equitable lien. *Benedict v. Ratner*, 268 U. S. 353, 45 Sup. Ct. 566, 69 L. ed. 991 (1925). For the same reason, unfettered control, the assignment in *Chapman v. Emerson*, 8 F. (2d) 353 (C. C. A. 4th, 1925), was held to create no equitable lien. In *In re Imperial Textile Co.*, 255 Fed. 199 (N. D. N. Y. 1919), an oral agreement to assign accounts was held ineffective as such because the accounts were deemed not sufficiently identified. Cf. extensive discussions of the problem of assignments of accounts receivable: *Glenn* (1926), 26 COL. L. REV. 809; *Lauchheimer* (1926) 26 COL. L. REV. 128, and notes; (1923) 23 COL. L. REV. 279; (1918) 31 HARV. L. REV. 489; (1925) 39 HARV. L. REV. 253.

than in the cases heretofore noticed. A common situation arises where a buyer advances a part or all of the purchase price to the seller before delivery. In the event of bankruptcy of the seller before delivery to buyer, the question often raised is: was the advancement intended as a loan or was there an intent to create a present security. Many cases find an equitable lien in favor of the buyer.¹² Others do not.¹³

¹² Lessee under executory contract duty to mine and deliver coal to a buyer. Buyer pays in advance to keep lessee in business. Held: Equitable lien enforceable against lessee's trustee in bankruptcy. Court said the transaction "implies a purpose that the coal as mined should be delivered and is, from an equitable standpoint, to be considered as a pledge of the unmined coal to the extent of the advancement." Identification here means no more than described. Also the evidence of intent to give and take security is very meager, if not wholly wanting. *Hurley v. A. T. & S. F. R. Co.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. ed. 729 (1908).

Buyer of entire output of seller advanced the price. Held: Equitable lien, goods as against seller's trustee in bankruptcy, on all the product to an amount sufficient to secure advancements. Evidence of intent to give security weak. *Greif Bros. Cooperage Co. v. Mullinix*, 264 Fed. 396 (C. C. A. 8th, 1920).

Same situation in *In re Ozark Cooperage & Lbr. Co.*, 180 Fed. 105 (C. C. A. 8th, 1910), the court protecting the buyer who advanced purchase price to seller, bankrupt. But here the court instead of talking about equitable liens said that the marking and setting aside of the staves constituted delivery—perhaps meaning an appropriation so as to pass title under the law of sales. But no discussion of effect of retention of possession.

To the same effect are *Gage Lbr. Co. v. McEldowney*, 1913, 207 Fed. 255 (C. C. A. 6th, 1913), where buyer of lumber protected as against seller's trustee, the seller having, as agreed, "put the lumber on sticks" in seller's yard, and *Goodnough Mercantile & Stock Co. v. Galloway*, 156 Fed. 504, 171 Fed. 940 (D. C. Ore. 1909).

¹³ But cases like the above shade off into those where the court finds no lien, as in *In re Nat'l. Boat and Engine Co.*, 1912, 198 F. 407 (D. C. Me. 1912), and *In re Mattoon*, 279 Fed. 530 (C. C. A. 2d, 1922), both cases where a buyer of boats to be built by seller advanced a part of the purchase price, where it was held that the buyers acquired no lien on the boats in the possession of the bankrupt sellers because "it had not been so agreed." Identification, of course, complete. Intent element held missing. Query: Where is the dividing line? Again in *Donough v. Niles Timber & Lbr. Co.*, 10 A. B. R. (N. S.) 667 (1927). Where buyer advanced the price, held no lien because no lumber had been marked or specified.

Again, in *Penn. Lbr. Co. v. Wilson*, 26 F. (2d) 893 (C. C. A. 4th, 1928), where there were large advances by buyer to seller, court held no lien, because there "was no intention to give security and no specifically designated property," and because even if there were such lien it would not be enforceable against a trustee in bankruptcy in his position of a judgment creditor under §47(a) 2 of the Bankruptcy Act.

Where a concern in failing circumstances advertised a special price for certain plumbing fixtures if check was enclosed with order, and 240 such orders were received with 750 sets on hand, and seller is adjudicated before orders were filled, the court held there was no equitable lien in favor of the buyers. The court thought this case distinguishable from *Hurley v. A. T. & S. F. R. Co.*, *supra* note 12, and *Gage Lbr. Co. v. McEldowney*, *supra* note 12.

One is impressed by the reading of a series of cases on equitable liens, that both requirements for their creation, intent of the parties and identification of the property, practically disappear as realities. If, in a few cases, there is no evidence of any real intention of the parties or any real identification of property, it is of no consequence that these elements actually appear in the great majority of cases where the lienor, not in possession or with recorded encumbrance, is protected. The idea of identification certainly does not rise higher than that of "description." Even this idea is cut down by cases where the lien is found to exist on a mass of goods, and also by the cases where a *cestui que* trust is given an equitable lien upon the property of a misappropriating trustee into which has gone the product of the misappropriated trust res.¹⁴

In fact there are a number of types of cases where the lien is created by the law for the purpose of doing justice wherein there is no more evidence of intent than is found in quasi contract cases. For example, where is there evidence of any real intention, tested either subjectively or objectively in a case where a grantor of land, after delivery of the deed, is given an equitable lien on the land as against the grantee¹⁵ or where created in favor of a vendee of land who has paid a part of the purchase price and the contract has been repudiated by the vendor or rescinded?¹⁶ It does not aid matters to note that courts disagree. On the contrary disagreement emphasizes the existence of the deeper problems involved: i.e. what facts should operate to give rise to rights in rem by way of security as regards physical objects and claims against third parties which are still under the control of, or being used by the lienee? Courts are bound to disagree where so much depends upon the court's idea of what con-

¹⁴ *Knatchbull v. Hallett*, 13 Ch. D. 696 (1880). In *Smith v. Township of Au Gres*, 150 Fed. 257 (C. C. A. 6th, 1906) where the court held that a township was entitled to an equitable lien on the entire stock of goods of a bankrupt retail merchant who had as treasurer used the funds of the township in the purchase of goods which he mingled with goods bought with his own money.

¹⁵ Cf. 3 Pomeroy's Equity (4th. ed.) §1249. Showing that the states are about equally divided on the question. In jurisdictions which recognize the grantor's lien the rights of judgment creditors of the grantee are in conflict, Pomeroy adding that it "is not possible to reconcile their opposing views," he being of the opinion that the subsequent judgment creditor should be entitled to priority over the grantor.

¹⁶ *North v. Bunn*, 122 N. C. 766, 29 S. E. 776 (1898). *In re Peasley*, 137 Fed. 190 (D. C. N. H. 1905) where vendee from bankrupt vendor was given a lien to secure repayment of the price. *Contra*: *Davis v. William Rosensweig Realty Co.*, 192 N. Y. 128, 84 N. E. 943 (1908). Cf. Notes: (1908) 22 HARV. L. REV. 64; (1923) 36 HARV. L. REV. 891.

stitutes justice in the particular case. Again where is the evidence of intent to give a lien where a mortgagee orally agrees to insure the mortgaged property for the benefit of the mortgagee, but actually insures for his own benefit, and the mortgagee is given an equitable lien on the proceeds of the policy after loss?¹⁷ And where is the evidence of intent to give a lien to a surety on money paid by the owner to an assignee of the contractor?¹⁸ or in cases where equitable liens are given to lenders of funds for the purpose of discharging encumbrances?¹⁹ The problem is not solved by saying that these cases are cases of subrogation, any more than one solves a difficulty by saying, in a particular case that the claimant had "legal title." There is a surprising number of legal problems which can be solved in any way desired by the deciding authority if the appropriate nouns are selected to label the raw materials as presented by the abstract of the record—the process of solving legal problems at the source. From there on, of course, the machinery of logic can be trusted to grind out the result, satisfactory to the most ardent worshiper of legal determinism. But this process blinds the understanding of realities. On the whole it appears that the equitable lien rests upon a rather unstable basis. And the reason is because its grant or refusal turns on delicate appraisals of facts and upon the deciding authority's sense of justice. It would be vain to expect a high degree of predictability or of consistency in such a situation.

But the problem runs deeper than this because of the presence of a number of problems of almost identical composition, which because of the force of a different terminology, are not always considered in connection with the specific equitable lien problems. The most desirable solution cannot be found except by a comparative study and evaluation of the entire group. In the cases referred to the lienor is protected as against the lienee, his receiver, or trustee in bankruptcy by the armor of "the equitable lien." But sometimes the lienor goes forth to battle in the chain mail of the familiar pledge. Of course, delivery to the pledgee is "indispensably necessary" to the existence of a pledge, but that defect is purely linguistic. All that need be done to comply with the rule, in cases where de-

¹⁷ *Swearinger v. Insurance Co.*, 52 S. C. 315, 29 S. E. 723. *Wilder v. Watts*, 138 Fed. 426 (D. C. S. C. 1905). *In re Grandy & Son*, 146 Fed. 318 (D. C. S. C. 1906).

¹⁸ *In re McGarry & Son*, 240 Fed. 400 (C. C. A. 7th, 1917).

¹⁹ *Bell v. Bell*, 174 Ala. 446, 56 So. 926 (1911), and Note (1912) 37 L. R. A. (N. S.) 1203.

livery is subsequently made, is to resort to the fiction of "relation back." In fact, the case under discussion protects the lienor not only on the ground of equitable lien but also because the subsequent delivery of the securities "relates back to the contract and gives it validity." And in cases where no delivery is made at any time, all that need be done is to resort to that other fictional opiate, the "constructive delivery" or of delivery to the pledgor as agent for the pledgee.²⁰ Sometimes the fiction is too bald to be tolerated.²¹

Sometimes the lienor of chattels in possession of the lienee does not call upon either the "equitable lien," or the "pledge," idea but marches forth with the full armor of a glorious "legal title." As for example in the trust receipt cases, where *B* buys from *S*, and *S* ships under bills to seller's order, notify *B*, with bill of exchange drawn on a financing bank, to which are delivered the negotiable bills, the financing agent thus acquiring "legal title," and transferring possession to *B* on the latter's written promise to hold in trust for the financing agent. Courts have protected the financing agent, lienor because he had "legal title,"²² but other courts have held that

²⁰ Warehouse company leases space in borrower's place of business. Has exclusive possession to leased portion. Warehouse receipts issued on contents. Adequate notice by signs to public. Held: Pledgees of receipts protected. *Union Trust Co. v. Wilson* 198 U. S. 530, 25 Sup. Ct. 766, 49 L. ed. 1154 (1905). Substantially same facts and same result in *Mrs. & Traders Nat'l. Bank v. Gilman*, 7 F. (2d) 94 (C. C. A. 1st, 1925).

Pledges of genuine warehouse receipts for cotton not identified by bales and mixed with unpledged cotton held protected as against pledgor's trustee in bankruptcy. Identification takes on the meaning of description by kind and location. *Hopkins v. Nat'l. Shawmut Bank*, 293 Fed. 884 (C. C. A. 5th, 1923).

A case more doubtful is that of *Massachusetts Trust Co. v. McPherson*, 1 F. (2d) 769 (C. C. A. 1st, 1924). Certiorari denied, 267 U. S. 592, 45 Sup. Ct. 228, 69 L. ed. 803 (1925), where property was stored in a warehouse in same building as that of borrower, the warehouse company being controlled by same officers as controlled the borrower company. Holder of receipts protected against issuer's trustee. Cf. notes: (1924) 34 *YALE L. J.* 891, and (1925) 38 *HARV. L. REV.* 977.

²¹ Warehouse company leased space in borrower's place of business. Exclusive possession absent. Issued warehouse receipts for borrower's goods stored there. No notice to public. Held: So-called pledgees of warehouse receipts had no lien. The court said the transaction was a mere sham. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. ed. 1117 (1907). Similar facts and same result in *In re Spanish-American Cork Products Co.*, 2 F. (2d) 203 (C. C. A. 4th, 1924). Certiorari denied, 266 U. S. 634, 45 Sup. Ct. 225, 69 L. ed. 479, *Jordan v. Federal Trust Co.*, 296 Fed. 738 (D. C. Mass. 1924); and *Hamilton Ridge Lbr. Sales Co. v. Wilson*, 25 F. (2d) 592 (C. C. A. 4th, 1928) (where pledged goods were in possession of a dummy sales company).

²² *In re K. Marks & Co.*, 222 F. 52 (C. C. A. 2nd, 1915). The cases are collected and discussed exhaustively in Karl T. Frederick, *The Trust Receipt as Security*, (1922) 22 *COL. L. REV.* 395, 546; Malcolm H. Lauchheimer, *Prob-*

the transaction was essentially a security transaction and was a mortgage to or conditional sale by the financing agent and to be construed as such.²³

The problem reappears in the conditional sale setting. In jurisdictions having a recording or filing system the transaction is assimilated by the mortgage situation, and protection of the lienor, not in possession, is dependent upon its substitute, public record. In jurisdictions having no such system the protection of the lienor, conditional seller, is worked out with refinements of the estoppel doctrine. The cases are in conflict. Some protect the conditional seller because they say the facts do not estop him as against bona fide purchasers and judgment creditors of the conditional buyer.²⁴ Others evaluate the facts differently and hold that the conditional vendor is estopped.²⁵ The same results and same differences can be reproduced by working with ideas of fraud.

The main question is not whether certain facts spell out an equitable lien, equitable mortgage, equitable pledge, security title, estoppel, fraud, actual or constructive. The attempt to do so ignores the instability of the concepts behind the words and the personal equation involved in their formation and suggests a utility of the logical process not consistent with the facts. The question, in all these cases, is, under what facts will it be wise economic and legal policy to enforce a right with respect to property in the possession of the borrower subject to his control and use? The judgment is essentially an economic one but dressed in the garb of legal mandates. The force of the different terminology, blinds one to the prominence of the common element that runs through all, i.e. what facts should create a security interest, whether it be labeled legal title, security title, equitable title, pledgee's lien or what not?

How does it happen that we have security interests based on possession in the lienor or on public record, and also a number of classes of security interests based neither on possession nor on public

lems of Modern Collateral Banking, (1926) 26 COL. L. REV. 129; Winthrop Taylor, *Trust Receipts*, (1920) 6 CORN. L. Q., 168, and notes; (1915) 15 COL. L. REV. 433, (1925) 38 HARV. L. REV. 674, and (1923) 32 YALE L. J. 602.

²³ *Industrial Finance Corp. v. Copplemann*, 1922, 284 Fed. 8 (C. C. A. 4th, 1922); *In re Ford-Rennie Leather Co.*, 2 F. (2d) 750 (D. C. Del. 1924); *General Motors Acceptance Corp. v. Boddeker*, 274 S. W. 1016 (Tex. Civ. App. 1925); *In re Golden Cruller & Doughnut Co.*, 6 F. (2d) 1015 (D. C. N. J. 1925); *In re Fountain*, 282 Fed. 816 (C. C. A. 2nd, 1922).

²⁴ Williston; Sales, (1909) §324.

²⁵ Williston; Sales, (1909) §325.

record? How can this group be fitted into the general scheme? Or does this recognition tend to undermine the supposed indispensable requisites for the maintenance of security interests in the other two groups?

Historically a lienor's right with respect to property was dependent on his having possession. Delivery was also necessary to make a gift of chattels. Delivery was necessary to create ownership in the buyer of a chattel. The latter rule has, of course, long since disappeared. There was a certain consistency and wisdom in the requirement of delivery, in gifts, sales or pledges. Such requirement tended to prevent loss to third parties who might subsequently change their position in reliance upon an appearance of unincumbered ownership in the donor, seller or pledgor. Recording or filing came in as a substitute for possession, and while not so satisfactory, still the pressure for some form of security which would enable the borrower to remain in possession, if not necessary, was from a business standpoint, highly desirable. Of what value is a loan if the borrower must first give up all his tools? And so the chattel mortgage came in. The trouble is that these requirements, for possession in the lienor, or of record when possession is in the lienee have broken down under the pressure of the business interests of the lienor and lienee and of the public and private interest subserved by the splitting up and spread of the risks of doing business. The extension of the credit system has brought on new security devices, designed on the one hand to leave the borrower in control of the property, and on the other, to avoid the expense, the possible implication of financial weakness and undesirable publicity arising from the use of the chattel mortgage and other forms of recorded instruments. The recent extension of full negotiability to bills of lading and warehouse receipts evidences the same tendency. And so does the increasing use of the trust receipt in the import transaction and in the financing of sales of automobiles from manufacturer to dealer. The use of receipts of fictitious warehouses, the assignment of accounts receivable, chattel mortgages on changing stocks of merchandise, with power of sale in the mortgagor either accompanied or unaccompanied by a duty on the mortgagor to account for proceeds or to keep up the stock; all these and others are symptomatic of a tendency to develop devices which will enable a borrower to raise money on property while still embarked in his business.

What problems does this general situation present for solution? It will be noticed that with respect to all the security devices herein mentioned there is a conflict of judicial authority. In the conditional sale, in some states the seller, the lienor, is protected against the judgment creditor of the lienee, purchaser, in others the third party is protected, in others protection depends on record. There is considerable variation in the rights of the mortgagee of a changing stock of merchandise as against creditors and purchasers from the mortgagor. The same thing is true with respect to the trust receipt, fictitious warehouse cases, equitable lien cases and so on. In the latter groups of cases, the conflict is less apparent, because it is more or less concealed by the process of generalizing the facts, but the conflict is none the less real.

It is believed that the real basis for this conflict is not that of disagreement as to the law, but is a disagreement over the relative importance of the economic interests involved. The chief conflict of interest is between the lender, who claims some kind of security interest, and general and lien creditors of the borrower. The conflict between the lender and the bona fide purchaser of the borrower is of course important, but in the main there is not so much conflict, either in law or economic policy, here as there is between the creditors and the lien claimant. In general, it has been thought desirable to protect the bona fide purchaser as against a lienor not in possession. In fact the lienor, himself, as a rule is willing to take the risk that the goods on which he claims a lien may be sold to an innocent purchaser. In many cases he even expressly authorizes such sale. The lienor, not in possession, really desires his lien as a protection to him in the event of insolvency of the borrower, whether in formal bankruptcy, receivership or not. As long as the borrower remains solvent the collision of interests is not evident. Introduce insolvency and the clash of economic and legal interest is soon heard by the law judge, the chancellor, the receiver, referee and counsel without number. Only when the fires of insolvency threaten destruction of the borrower's sources of payment does the lender go into action.

The situation then is, that all the creditors of the borrower cannot be paid in full, and the question is, whose interests should be made to dominate the situation. The lien claimant says, "Mine do, because we agreed on a lien and because my help kept him in business." The general creditor replies that if no general credit had ever

been extended to the borrower, or if it had been suddenly stopped when the lien arose, he would never have been in business or his bankruptcy would have occurred long ago, and that, therefore, the bankrupt's continuance in business was, at least, as much due to the extension of unsecured credit as to the particular credit claimed to be secured by the lien. Moreover the general creditor charges that he had no opportunity of learning of the outstanding lien and though prior in time, its secrecy, caused reliance by general creditors on the appearances, resulted in an over extension of credit for which the secret lien holder was in part responsible.

Moreover this issue, primarily one of conflicting economic interests of two parties, should not be settled without considering the wider economic effect resulting from a settlement one way or the other. To settle it in favor of the secret lien holder enables a borrower to get a maximum of credit. This may be a good thing. It may not be. It may be a contributing cause of a widespread business collapse. Again it may be wise to encourage credit at some times and at others not, depending upon general financial and labor conditions of the country. To protect the secret lien holder may enable able men to engage in large scale business operations who without this aid would be forced out. The public has an interest in the individual as a producing unit in society. To deny him this kind of credit when the banks are willing to loan it removes capital from production when it ought to be employed. The answer is not an easy one. Nor is it intended even to suggest one but to urge that the most desirable solution cannot be reached without considering openly and intelligently its major economic aspects. These battles go on daily in the courts, the opinions conveying the impression that it is merely a battle over the purely local question, does the evidence in this case prove intent, or not? Does the evidence spell out an estoppel? Is this instrument a chattel mortgage, conditional sale, or is it something new? What law applies to it? The opinions read as though the question is simply one of weighing the similarities and differences between the case at bar and some other decisions and deciding accordingly.

But it is more than that. It is a question of the development of an economic justification for a series of situations where security interests not based on possession or record are enforced against third parties and the reconciliation of these results with a policy which

clashes fundamentally with it—the policy of enforcing security interests against third parties when based on possession or record. No amount of legalistic refinement can obscure the fact that we are pursuing contradictory policies. The discussion of the question as to whether this reconciliation should be brought about by the destruction of the equitable lien as against third parties, or whether it should be effected by finding an economic justification for the divergent policy, is beyond the scope of this note. The point sought to be here made is that this clash of policy is obscured in the cases. The subject is discussed as though it existed in separate compartments when in truth the partition walls are largely imaginary. The multiplicity of synonyms and the flexibility of language produces many a legal mirage. The habit of looking at law as comprising four or five hundred titles, obscures the tissue which binds them, first into great departments and finally into a unitary agency of social control.

We need a number of decisions which will call attention to the breadth of the problem. It is quite possible that it can be settled judicially though it is a matter that should also engage legislative consideration. The conditional sales phase of it is in a fair way to be settled by the gradual adoption of the Uniform Conditional Sales Acts and similar acts requiring public record. The trust receipt aspect may likewise be settled by the Uniform Trust Receipts Act when it is finally forthcoming. This proposal will doubtless require some kind of recording or filing. The mortgage on after-acquired chattels and of a changing stock of merchandise is taken care of, perhaps in as feasible a way as is possible by the proposed Uniform Chattel Mortgage Act. Record, of course, is necessary here. This leaves the so-called equitable lien on chattels and choses in action still untouched by proposed legislation. And the problem herein suggested is: What should be done with it, in view of the contradiction which its recognition as against third parties, involves?

Another matter should be mentioned. Emphasis has been thrown upon the larger issue, but this general question breaks up into a series of specific problems through all of which runs the common element but which involves differences of some consequence. And they are differences frequently ignored in the cases. It will be noted in the cases heretofore cited that the question often comes up in bankruptcy. A trustee in bankruptcy, by the amendment to Sec. 47 (a) in 1910, occupies the position of a judgment creditor of the bankrupt as and

from the date of the filing of the petition in bankruptcy. Hence in every case where an equitable lien in property in the possession of the bankrupt at the date of the filing of the petition, is enforced against the trustee, the enforcement is really against judgment creditors. Many of the cases cited do this. And often the local law on the status of an equitable lien as against judgment creditors of the lienee is not even examined.

The problem arises in another way. Where the lienor obtains possession within the four month's period and is sued by the trustee of the lienee to recover the property as a preferential transfer—assuming that all the other elements of a voidable preference are present—the transfer will be non-voidable if the defendant lienor can successfully assert that the transfer was made in satisfaction of an antecedent equitable lien on the property transferred, provided such equitable lien, if it arose within the four month's period, was contemporaneous with a corresponding increase in the assets of the bankrupt. If it arose before the four month's period under any circumstances the subsequent transfer is non-voidable.

Hence the question is not one but several. To enumerate further: (1) The question as to whether there should be a security interest in favor of the lienor as against the lienee; (2) the question of security interest of the lienor as against general creditors of the lienee, (a) those who became such before the security interest arose, (b) those who became such afterwards; (3) the question of security interest as against judgment or lien creditors of the lienee, (a) those who perfected their judgment liens before the security arose and (b) those whose judgment lien attached afterwards; (4) the question of the security interest as against innocent purchasers and encumbrancers from the lienee, (a) whose interests arose before the security interest involved was created, and (b) whose interests arose subsequent to the creation of the alleged security interest; (5) the security interest as against the heirs, personal representatives, encumbrancers with notice and volunteers from the lienee.

As between the parties, the cases show that the security interest, whatever it may be called, will be enforced whenever the parties so intend. While the element of intent, either express or implied in fact is strongly emphasized, the cases also show that a security interest will be decreed sometimes when there is no evidence of intent, except on the fiction of an intent implied in law. This shows either that

there are two independent reasons for the judicial recognition of security interests or that the assigned reason of intent of the parties is unnecessary. It is believed that the imposition of security interests on property in the possession of the lienee by operation of law, that is, judicially created, is sound policy, the boundary limits to be fixed by a process of judicial inclusion and exclusion, perhaps under the guiding influence of the court's judgment as to whether the parties named would have intended to create such security if their attention had been directed to the particular contingency which gave rise to the controversy.

The position of some third parties is no better than that of the lienee. They have not changed their position in reliance upon the apparent facts. The lien may well be enforced against them. But some creditors, both general and judgment creditors, may have changed their position. As between them and the lienor it is a race between a number of contestants. Some of them run from scratch and some from handicaps, an important fact often overlooked in the decisions. The state law is often obscure and conflicting as to the relative ranking of these opposing claimants. State statutes only partly cover the field and as a rule the language of the statute merely fixes the rank of the lien claimant as against "creditors"—no attempt being made to distinguish between prior and subsequent creditors, general or judgment creditors, tort and other non-contract creditors, or fixed or contingent creditors. Diversity in decision therefore results.

In short, if we are to develop a policy with reference to security interests on property in the possession of the lienee, that is reasonably consistent with the established policy of possession in the lienor or public record, the whole field needs reëxamination by courts and legislatures. Such reëxamination should be directed, in the first instance, to the fundamental economic question involved. The legal niceties that have been distilled from the unstable elements of "legal title," "equitable title," "equitable lien," "security title," "pledgee's lien," "delivery," "constructive delivery," "estoppel" and the like should be bottled up, or at least not used as the sole remedy. State statutes which deal with the rights of "creditors" as against secret lienors need clearing up. There should be a greater degree of equality among claimants, whose position is substantially the same, than now exists. And at this stage of our legal history in a commercial

topic such as this, there should be a greater degree of predictability of results. Litigation is heavy enough. That which results from uncertainty in the law where certainty is of prime interest, needs curtailment.²⁶

²⁶The subject of equitable liens is discussed in the following notes: (1924) 24 *COL. L. REV.* 68; (1915) 29 *HARV. L. REV.* 229; (1919) 32 *HARV. L. REV.* 728; (1920) 34 *HARV. L. REV.* 309; (1915) 14 *MICH. L. REV.* 339; (1916) 15 *MICH. L. REV.* 345; (1922) 31 *YALE L. J.* 662.