

Reflections of a Drafter: Peter Coogan*

Soia says that she got into the Code by accident. I got into the Code by double accident. It just happened that during the 1940's I was presented with the question of understanding and modifying a system of getting security for loans to motion picture companies to satisfy some eastern banks. For years motion pictures, however bad, never lost money. All the producer did under the block booking system was to continue to show the picture at some price along with some picture that had some appeal to the public. If you did that long enough, you were sure to get your money back. Then came a change in the antitrust laws, and there also came a change in technical development, a little thing called TV, which made it possible for people who wished to be just slightly asphyxiated for a modest period of time to sit in front of a little screen in their homes instead of sitting in front of a big screen in the theater. This had great repercussions on the motion picture industry and great repercussions on its financing. It now became necessary to be a little selective as to what movies would be made and also to build up some sort of security on the assumption that occasionally, even with the best regulated companies, there would be some picture that flopped.

I was very much involved with a group of banks, headed up by Boston banks, in beefing up a chattel security system for motion picture loans. I was very disappointed to find that there was nothing in the chattel mortgage law, there was nothing in the law of pledge, there was nothing in the law of conditional sales, and almost nothing in the law of assignment which told me how I could get a security interest in, say, a producer's right to compel a famous actress either to work for his studio or not to work at all. There was nothing that told me how I would get a security interest in performance rights or literary property rights, and very little that told me how I would get a security interest even in copyrights that were subject to the copyright statute.

When I heard about this new wonderful Article 9, I got a copy of it from Walter Malcolm,¹ who was in the drafting group on Article 4. I took it to bed with me one night saying at last I have my answer. I read through Article 9, and I couldn't see any way to get any security interest in any kind of intangibles other than accounts. I read it again. It was getting pretty late. I thought maybe I was slipping—I was missing something. I wrote to Karl Llewellyn the letter that Soia referred to.² Karl called me up the morning after I wrote him saying, "The reason you can't find what you are looking for is

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1. Walter Malcolm (1904-1979) was a partner in Bingham, Dana & Gould, New York City at the time when the Code was drafted and a member of the Permanent Editorial Board of the UCC.

2. *Reflections of a Drafter: Soia Mentschikoff*, 43 OHIO ST. L.J. 537, 544 (1982).

that it isn't there. I would like you to meet me in New York on Saturday. I will get Homer Kripke to join us, and the three of us will fix this up."

In the space of about an hour and a half, Karl, Homer, and I drafted what is now general intangibles. As Soia said, I got hooked on Article 9 and I never got out of it from that day to this.

My second venture was related to something that Soia has told you, which was that when Pennsylvania adopted the Code, it adopted it lock, stock, and barrel, with no debate and no studies. When we presented the Code to the Massachusetts legislature, the only state that had adopted it was Pennsylvania. The chairman of the House Committee asked us what kind of studies Pennsylvania had made.

When we had to tell him that they had made no studies, he said, "I'm not going to take one minute of my committee's time on this idea of yours unless you can get a group of Massachusetts lawyers to go through the new Code and tell me in writing just how this changes the present law of Massachusetts." Somehow I was put on that study group: I had the charge of the investigation of the old law and the new law of Article 9. I had a number of able associates, but it took us one hell of a long time to find what the old law was. It wasn't too hard to find what the new law would be, but the other part was really a time consumer.

We published the report. The chairman of the House Committee was satisfied that he now could take the time of his committee to consider the UCC.

We then went to the chairman of the Senate Committee; he said, "I want to understand this fully. How do you suggest that you teach me what this new Code will do?" Walter Malcolm and I gave him private lessons. He was most interested in Article 9.

Walter was host at a series of dinner meetings at which we gave a series of one-man seminars over a period of several months' time. About two-thirds of this time was spent on Article 9; that fell into my bailiwick. In the course of that study I did find a few things in Article 9 that I couldn't quite explain. When the bill was actually presented to the legislature of Massachusetts, we had committed the heinous crime of making a limited number of nonuniform amendments. Mr. Schnader³ was very much bothered by that, but Karl Llewellyn had no trouble with our changes. They agreed that the easy way to handle this would be to make the Massachusetts' version the uniform version, so that a number of things appeared in the Code as it was adopted by Massachusetts—Pennsylvania eventually followed Massachusetts (they being the only two states that had the Code). Well, that's how I got into this mess, and, I say, I never got out. Maybe some day I will.

What I want to talk about, though, principally, is whether or not the Code has worked—and I'm going to confine this pretty much to Article 9, because I

3. William A. Schnader was a member of the original Drafting Commission for the Uniform Commercial Code. On behalf of the Commissioners, he largely directed the campaign for adoption of the UCC by the states.

don't pretend to be an authority on very much other than Article 9 of the UCC. I find keeping up with the cases on Article 9 just about a full-time job without reading any more of the non-Article 9 cases except those that also, incidentally, involve Article 9, which is a fairly considerable number at that.

I think maybe I can best illustrate my principal point by a very recent experience. In November just before Thanksgiving, I participated in an ALI-ABA seminar of a rather unusual type, because it was held not in New York or Philadelphia, but in Zurich, Switzerland. Why? Because we held a symposium on international leasing of equipment in New York City on May 7 and 8, 1981,⁴ at which a number of the members of the faculty and a number of the members of the audience were Europeans. Some Europeans in the audience asked, "Why should we have to come over to America to hear about this? Why don't you come over to Europe? We have a group in Paris that will finance the program, we have another group in Switzerland that will finance it, and we will arrange between ourselves as to which place it's going to be." Ronald DeKoven⁵ and I agreed to help the Europeans repeat our program. I think Paul Wolkin⁶ almost had kittens in the process of trying to adjust the aims of a nonprofit organization like the ALI-ABA to the leasing organizations that were doing some of the sponsoring, but within a week before the program was to be put on, Paul let us know that the ALI-ABA would pay our air fare to Zurich and the Europeans would give us room and board.

Now, what was this project? I go back to 1977, when I got a call out of the blue from the State Department, asking me if I would represent the State Department in an international conference to be held in Rome for the development of a series of rules through which a lessor in, say, Germany or France or the United States could lease equipment with some fair degree of safety to lessees in countries that had a less developed chattel security system than the one we know and thus could not furnish anything in the way of security.

I said yes, I would be glad to learn something about the French chattel security system and the Italian system and some of the others that would be involved in this conference. Thus, in recent years I have spent a bit of time participating in drafting and explaining a set of rules for the international leasing of equipment.

4. For a very useful collection of materials relating to attempts to unify commercial law, including chattel security law on an international basis, see the ALI-ABA symposium materials put out by that body in connection with the symposium given in New York City on May 7 and 8, 1981, entitled "Unification of Law Governing International Leasing of Equipment—No. 3599—Appendix."

The quotation to which I referred in my discussion occurs at page 526 of that compilation. This in turn is page 122 of a report of the United Nations Commission on International Trade Law, Tenth Session, Vienna, May 23, 1977. International Payments Study on Security Interest Report of the Secretary General. This report was prepared originally by Professor Ulrich Drobnig of the Max Planck Institute at Hamburg, Germany.

5. Ronald M. DeKoven of the New York City bar is chairman of the subcommittee on Secured Transactions of the ABA's Uniform Commercial Code Committee of the Corporation, Banking, and Business Law Section.

6. Paul A. Wolkin was Assistant Director of the American Law Institute from 1947 until 1977 and currently serves as Secretary and Executive Vice President. In addition, he has been and is secretary to the permanent Editorial Board for the UCC.

The starting point was a statute which the French had passed in 1966 and '67 called Credit Bail; credit bailment.⁷ They wanted to utilize the concept of the personal property lease, but they were reluctant to use a non-French word. This lease law was tailored to meet the deficiencies of the French chattel security system, particularly the lack of anything like our conditional sale. With the help of Roy Goode⁸ of the University of London, I got the French delegates to explain to me a little bit about the chattel security system of France.

From the French participants and others I learned that France had not one system, but nine different systems. Since that time the French have added something comparable to our conditional sales law, so that makes ten, and if we applied the Article 9 tests to the credit bail, we would say that it also produces a conditional sale, so there you have eleven.

One of these is a method by which one could get a security interest in the good will of a hotel, and that is a statute separate by itself. Then there's another one that is useful with respect to agricultural products, but there's nothing by which one could get a security interest in a mixed bag of collateral. This is the kind of system that so many countries of the world are having to use in modern commercial transactions.

In 1975 the legal arm of the United Nations asked Professor Drobnig at the Max Planck Institute in Hamburg, Germany, to make a survey of the chattel security laws of the world.⁹ He stopped short of all of the world. In the original report he did not include the socialist countries as of that time. This big book contains his report of some 150 pages, in which he reviews the chattel security systems of most of the countries, including many of the undeveloped countries, as well as the developed countries. The upshot of it is that one cannot find a single country—not excluding Germany, not excluding France, not excluding England—one cannot find a single country which has a chattel security system that would approach the chattel security system which the Code replaced, to say nothing of Article 9.¹⁰ Because of the disparity in

7. The French Credit-Bail statute is Law No. 66-455 of July 2, 1966. See Parks, *Tax Characterization of International Leases: The Contours of Ownership*, 67 CORNELL L. REV. 103, 115-18 (1981).

Only licensed financial institutions may engage in *crédit-bail*. These institutions must have their statutory seat in France. Because "in-bound" trans-border leasing is not possible, strictly speaking, a foreign financier either must establish a French subsidiary and meet special requirements or conclude an arrangement with a French institution.

The legal and tax aspects of *crédit-bail* are summarized in Gavaldà, *Credit-bail Mobilier: Operation et domaine, Regime juridique, financier et fiscal*, JURISCLASSEUR BANQUE, Fascicule 58 E.I. *Id.* at 115, n.61. See also *id.* at 106, n.15.

8. Professor Royston Miles Goode teaches law at St. Mary's College, University of London. He is affiliated with the British Institute of International law.

9. See note 4 *supra*.

10. At another point, I have referred to the Canadian attempts to adopt and adapt the provisions of Article 9 to Canadian chattel security law. One of the moving spirits from the beginning of this movement has been Professor Jacob Ziegel, now of the Law School at the University of Toronto. In the 1981-82 Canadian Business Law Journal, beginning at page 107, Professor Ziegel covers the Canadian problem in an article entitled *The Scope of the Ontario Personal Property Security Act—Recent Developments*. I believe I referred to the latest of the Canadian acts, namely, that of Saskatchewan. See the sources cited in footnote 18 of the Ziegel article.

the laws of the different countries, the appropriate Commission of the United Nations—UNCITRAL¹¹ for short—finally decided only last year that probably the time was not yet ripe for the adoption of an international statute comparable to Article 9. Another organization, also interested in development of international private law, UNIDROIT,¹² is working on a narrow segment of the problems under its rules on international leasing.

In the review that was made by Professor Drobnig, he says at page 126 of his report that "The American regime [namely Article 9] may indeed be considered as the most modernized, rational, and comprehensive system of security interests in the present world. It is true that the language of the Code would have to be denationalized and a few provisions of the Code may require a revision in favor of the debtor's unsecured creditors."¹³ I could go on with the rest of the summary, but that gives you the general tone.

At the same time that this study was made by this arm of the United Nations, the French also had started their own research project on the subject,¹⁴ and they too came to the conclusion that if there were to be some system which could be worldwide in its application, it would be an adaptation of Article 9.

Before we come back a little bit closer to home I will go far away to India. An Indian commission—not our Indians but the Indians in the Far East—made a study of chattel security systems with the aim of recommending something for their own country, and that commission—Paul Wolkin has given me a copy, but I don't remember the date; I'll say about ten years ago—that commission in India came up with a report of the same kind: namely, that the best model for them to use would be Article 9.¹⁵

So far, I'm talking about people who said it was a good idea. In 1968, the McGill University faculty had an international group of students of chattel security law to explore in Montreal the question which they put as this: Is the UCC exportable? We had people there from Germany, Professor Drobnig being one of them, Roy Goode from England, several from France, and a number of other countries. The late Grant Gilmore,¹⁶ the late Bob Braucher,¹⁷ and I were among the participants. A big question being asked and discussed was whether or not this peculiar American institution, Article 9, was so peculiar to America that it could not be made use of anywhere else. The general

11. UNCITRAL is the acronym for the United Nations Commission on International Trade Law.

12. UNIDROIT is the acronym for the International Institute for the Unification of Private Law.

13. See Drobnig report, note 4 *supra*.

14. A third is J. ZIEGEL & W. FOSTER, *ASPECTS OF COMPARATIVE COMMERCIAL LAW* (1969), printed in connection with a conference at McGill University, September 3-5, 1968. The McGill University publication speaks for itself.

15. See note 4 *supra*.

16. For several years before his death, Grant Gilmore was professor of law at Vermont Law School. See *In Memoriam: Judge Robert Braucher and Grant S. Gilmore*, 43 OHIO ST. L.J. ____ (1982).

17. Among other positions, Robert Braucher served as a professor of law at Harvard Law School from 1946 until 1971, was Reporter for the American Law Institute's Restatement of Contracts from 1960 to 1971 and for the 1971 revision to Article 9 of the Uniform Commercial Code, and served as Associate Justice of the Massachusetts Supreme Judicial Court from 1971 until his death in 1981.

feeling was that Article 9 served as a basis which could be made use of anywhere. Ultimately, the Crowther Commission, established in 1968 to review English consumer credit practices, agreed.

In the meantime, the province of Ontario in about 1966 or 1967 had enacted its own version of Article 9, which is a very interesting document. The Canadian problems are a bit different because of different factors, including the fact that some of the security law is law of the provinces and some of it is law of the Dominion. Getting a security interest in what we might call an SEC security, as distinguished from the UCC security, is subject to Dominion law. Should Canada operate under the national law or replace it with what they call the Personal Property Security Acts of the different provinces, now effective in Ontario, Manitoba, and Saskatchewan?¹⁸ This dominion aspect gives them great problems, which they're still struggling with. The latest province to adopt its own version of Article 9 is Saskatchewan, which adopted a Personal Property Security Act effective on July 17, 1980.¹⁹

The Saskatchewan Act makes a number of very interesting changes, which I think some day should be canvassed by the UCC Permanent Editorial Board. For one thing, Saskatchewan abolishes the separate concept of farm products (my recollection is that other provinces did the same). The Canadians could not see any particular need for treating the inventory of a farmer in a way that was different from the inventory of other business people.

The Saskatchewan Act, which is the latest—the intermediate one being Manitoba—has a number of other interesting features. We struggle with the idea of whether or not a lease with certain attributes is a “true lease” or whether it is really a disguised security interest. We have loads of cases that just cannot be reconciled. The Saskatchewan drafters decided that this was nonsense, so they say that a security interest includes not only the interest of a buyer in the sale of accounts, as we cover in 9-102, but also the interest of a consignor, and also the interest of a lessor under a lease for a period of more than a year. Saskatchewan's treatment of leases is going to highlight some very interesting problems which someday we will have to face.

I had a good letter from the drafters of the Saskatchewan Act just a week ago in response to a summary of this Act which appeared in the latest revision of my treatise on Article 9, where I pointed out that I could not see how what I will call the Article 9 remedies could possibly apply to a true lease.

When I got a copy of this bill in 1974 (it might have been 1977—the Canadians keep me supplied, as you see) the Act said specifically that they would treat leases in the way that we treat the sale of accounts; namely, that every long term lease is subject to the statute of frauds provisions, it's subject

18. The Personal Property Security Act as adopted by Ontario can be found at ONT. REV. STAT. ch. 375 (1980). In Manitoba, the Act can be found at MAN. STAT. ch. 5 (1973). In Saskatchewan, the Act can be found at SASK. STAT. ch. 6.1 (1980).

19. See note 10 *supra*.

to the attachment provisions, it's subject to priority provisions, but it's not subject to the most important remedy provisions. Saskatchewan said the same thing with respect to leases.

Then the Act was changed at some point before it was enacted in 1980, and somebody made a change to meet a different problem without remembering that they were excluding the true lease from the remedy provisions of their equivalent of Article 9. I don't know how that's going to work. My Canadian friends say that they haven't figured it out either. It was just a slip that occurred, and it's going to lead to some very interesting discussions as to what they do based on that score.

To summarize, I think we can say that certainly there must have been something right about a statute that has been accepted in principle by countries as far apart as India and Canada and England. The Crowther Commission in England said a few years back that this would be wonderful if we could get it adopted in England, but England has not made any progress. England has a very mixed system. Some kinds of security interests require public notice, other kinds do not. They have their statutory hire-purchase, which is a form of conditional sale, but they also have some hire-purchase contracts which are under the common law, and then some conditional sales which are under a different statute. English students of chattel security law look with great envy at a country that has managed to wrap all of these into one package and generally to make pretty good sense out of that package.

I must stop at this point. Thank you.

Addendum

February 18, 1982

It would have been interesting if we could have heard Grant Gilmore's comments on Homer Kripke's comments that some of the progress made by the draftsmen of Article 9 has been diluted by other factors, including particularly the new Bankruptcy Code. It would have been equally interesting to have heard Homer's comments on Grant Gilmore's comments that perhaps the draftsmen of Article 9 had gone too far in protecting the secured party.

Unfortunately Professor Gilmore was not able to be present at the Philadelphia meeting. It is, therefore, fortunate that within the year Grant had given us some of his recent thinking in an article in *The Georgia Law Review*,²⁰ The title of the article does not indicate that it covers some of the same territory that was covered by Professor Kripke in his remarks. Grant's title was "The Good Faith Purchase Idea and the Uniform Commercial Code:

20. Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605 (1981).

Confessions of a Repentant Draftsman.” Grant is careful to point out that the Brownie points were given to the secured party not by those draftsmen and advisers who typically represented secured parties, but by the academics, including himself. In short, Professor Gilmore questions whether the academic draftsmen of Article 9 (including, of course, himself) went too far in making it possible for a secured party to get security in too much of a debtor’s assets. I won’t attempt even to summarize his views as only Gilmore’s language completely conveys his thoughts. What is of interest is that while Grant wonders whether we made it too easy for the secured party, Homer wonders whether developments since that day in other law have partially nullified the success of the Article 9 draftsmen in doing what they did. It is also interesting to note that the one question in the United Nations Commissioner’s Report, which I referred to in my remarks, expressing the Commission’s concern that Article 9 may go too far, is the same as Grant’s question—was enough attention paid to rights of unsecured creditors? I think it is healthy that two persons, each of whom made great contributions to the development of Article 9 should now take slightly different viewpoints regarding the extent to which the project succeeded, and whether it should have succeeded.

Homer also is mildly critical of the work of two other professors who also have made great contributions to debtor-creditor law in this generation—Professors Frank Kennedy²¹ and Vern Countrymen.²² Again, I think it is very healthy that persons who started with different viewpoints should have contributed to the overall development of debtor-creditor law in their different ways. Homer’s mild criticism of two mutual friends probably refers to articles that Kennedy and Countrymen wrote in the early days of Article 9 expressing doubts about whether certain Article 9 provisions would fall before the Bankruptcy Act and about their influence on these points, if any, in the drafting of what ultimately became the Bankruptcy Code of 1978.

I think that most of us would agree, and I include Homer, that *Dubay v. Williams*²³ was not a sound solution to the preference question to which the *Portland Newspaper*²⁴ case was addressed. It simply did not take into consideration the specific provisions of Article 9 that dealt with the time of attachment of a security interest. All five of the persons mentioned above participated in the deliberations of the so-called Gilmore Committee appointed by the National Bankruptcy Conference to suggest to Congress a modification of the Bankruptcy Act that would reconcile the different concepts and the

21. Frank R. Kennedy is the Thomas M. Cooley Professor of Law at the University of Michigan Law School. He has been executive director of the Commission on Bankruptcy Laws, Reporter for the Advisory Committee on Bankruptcy Rules for the Judicial Conference of the United States and, a member of the American Law Institute and the National Bankruptcy Conference.

22. Vern Countryman, the Royall Professor at Harvard Law School, has been a member of the American Law Institute, National Bankruptcy Conference; consultant to the Committee on the Bankruptcy Laws of the United States; and Associate Reporter, Advisory Committee on Bankruptcy Rules.

23. 417 F.2d 1277 (9th Cir. 1969), *aff g In re Portland Newspaper Publishing Co.*, 271 F. Supp. 395 (D. Ore. 1967).

24. 271 F. Supp. 395 (D. Ore. 1967).

different language of two important bits of legislation—the UCC and the Bankruptcy Act. Each made his contribution to the draft that Congress later enacted, although with substantial changes. I, too, participated in most of those discussions (live creditor-debtor problems limited my time). I found it very refreshing that in those discussions it was frequently impossible to tag the drafting suggestions of any member of that group who was known to have been associated during the discussions predominantly with either the secured party's side or the other side to the interests he often represented. With minimal exceptions, all acted *pro bona publico*.

Homer speaks of the necessity of a discussion participant's disclosure of the hat that he wears at the time that he makes a particular suggestion about what a bit of legislation ought to say. In all of the discussions going over a period of years about what Article 9 ought to say, or what the Bankruptcy Act ought to say, I can recall a very few instances (but only a few) in which that kind of disclosure was called for. It is a tribute to the legal profession that by and large lawyers as advocates can leave their advocacy aside when it comes to the analysis of a problem and a determination in what direction the law ought to go. It is, of course, true that one's value judgments on such things may be influenced by one's own particular experience.

There are, of course, situations in which a lawyer must be an advocate for a particular view, including one which may not be his own. In commercial law, I believe that such situations are the exception rather than the rule. Finding the facts and the issues may be difficult; once each party understands the needs of the other, the process of mutual adjustment generally takes over.

Like Homer, my practice tended to cause me to represent secured creditors. But in a large law office there are always debtors to be represented, as well as secured parties, and there are suppliers of unsecured credit as well as secured credit to be represented. Where all the parties are financially healthy, the borrowing-lending process may be almost mechanical. But even where the borrower is not financially healthy, I have found it surprisingly frequent that a lawyer goes through the same mental processes whether he represents the secured or the unsecured creditor or the debtor. What does the total situation demand to keep the entity alive? If the parties cannot devise a way to keep the debtor afloat, everyone is in trouble. Sometimes it was necessary for each to raise the flag of his client; thereafter, the lawyers on each side regarded themselves primarily as analysts rather than as advocates, at least at that stage of the negotiations. It is probably the unusual user of secured credit who can operate without unsecured credit, and vice versa. Each source of credit performs a function of its own, and continued performance of that function is critical to a supplier of the opposite form of credit.

Perhaps Grant and his academic colleagues in drafting Article 9 merely recognized commercial changes that had already occurred. Since accounts, inventory, and other shifting property interests were already being used as collateral, the first job of the draftsmen was to improve the mechanics by which that was done. Referee Snedecker may have been right in *Portland*

Newspaper in lamenting the passage of the good old days when an entrepreneur financed his own operations, but lamentations do not change commercial mores. Perhaps it is wiser to accept the change, but improve its mechanics.

Somewhere Homer has made the remark that an interesting development of this generation is the development of a debtor-creditor bar—members of the profession who are interested in the problems of debtors and of creditors where there is need of some kind of financial restructuring, sometimes representing one class, sometimes the other. This is a development which we have seen grow in the present economic conditions where one large law firm after another has taken in, often as a partner, a so-called bankruptcy lawyer because the other members of the firm recognize the need for someone to help analyze the rights of the parties, whichever side of the bench they may be sitting on. In their perceptive article in the *Yale Law Journal*,²⁵ after Chapters X and XI were enacted, Messrs. Cutler and Rostow referred to the grubby business of bankruptcy. Unfortunately in recent years it has been not only the grubby element who have been forced to look to bankruptcy laws for protection. Even clients of the major law firms may need to call for help.

It still remains to be seen whether the present Bankruptcy Code strikes the right balance between the contract rights of the secured party and, on the one hand, the needs of the debtor to continue in business and, on the other hand, of unsecured creditors to rely on the cash flow in such a manner that all creditors and hopefully the debtors may come out eventually with something better than they could get in a liquidation forced by creditors jumping in to exercise their contract rights too soon. The Bankruptcy Code's balancing of the stay provisions of section 362 and the need of affording "adequate protection" to the secured party will be interesting to watch. The secured party may not be able to enforce his contract when he wants to; but the debtor can continue to use the collateral only if he can give the secured party "adequate protection." The courts seem to be taking "adequate protection" seriously. The Bankruptcy Code seems to be saying to the secured party, "We won't let you enforce your rights at this moment, but if others cannot show a prospect of an effective reorganization, come back again."

It should not be surprising if some adjustments in the Bankruptcy Code here and there are necessary. Conversations with persons who have observed the working of the amended preference section, section 547, would indicate to me that we have not yet found the answer to avoiding legal preferences that are not economic preferences. The two-point measuring stick of 547(c) (5), to which both Professors Gilmore and Kripke contributed, should help. We do not know whether the forty-five day provision of (c) (2) will still catch too many transactions that ought not to be caught, nor do we know whether or not there should be a requirement that the secured party or the other transferee

25. Cutler and Rostow, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 *YALE L.J.* 1334 (1939).

have "reasonable cause to believe" that the debtor is insolvent at the time he accepts the transfer before the trustee can avoid the transfer. We now realize that the necessity of the trustee's proving "cause to believe" threw an umbrella over a multitude of transfers in ordinary course dealings that ought not to be voidable. The incorporation into the Bankruptcy Code of provisions that were largely developed through the former Bankruptcy Rules and that may slow down the secured creditor would seem to be working reasonably well in the commercial area. Both Professor Gilmore and Professor Kripke recognize that the Bankruptcy Code has taken away some of the things that Article 9 had given. This is not necessarily a bad thing. It may be that in the absence of the consequences that lead to an actual bankruptcy proceeding, Article 9 has not gone too far in making it possible for one creditor to get too large a grasp on the assets of his debtor. It may well be that if the situation gets so bad that some form of relief under the Bankruptcy Code is necessary, it will be desirable to govern the time at which a secured party may exercise a right that Article 9 has given. Debtor-creditor problems are not simple. I hope that we continue to have the differing views of the Gilmores, the Kripkes, the Countrymens, and the Kennedys. We need them all. Few developments would be more harmful to real progress than a view that once such august bodies as the American Law Institute, the Conference of Commissioners on Uniform Laws, the various sections of the Bankruptcy Act have spoken on a problem, further analysis and comment should stop.

