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THE REVIEW announces the resignation of Jacob M. Snyder from the Board of Editors.

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LEGISLATION

Liens and Fraudulent Transfers Under the Chandler Act

The 1938 revision of the National Bankruptcy Law [1] effects considerable change in Section 67,[2] which deals with liens and fraudulent transfers. Most of the provisions of the section are new to the Act, and much of the old section no longer appears in its former form.[3] The present pro-

1. 11 U. S. C. A. (Supp. 1938) § 1 *et seq.*
2. *Id.* § 107.
3. Subdivision (a), which dealt with claims that were invalid from want of record or for other reasons, is now covered by § 60 (a), (b), dealing with preferential transfers, and § 70 (e), dealing with fraudulent transfers under state law. Subdivision (b), dealing with subrogation of the trustee to the rights of the creditor, is also covered by § 60 (b). Subdivision (d), dealing with bona fide purchaser, is covered by §§ 67 (a) (3), 60 (b), 67 (d) (6), and 70 (d). Subdivisions (c) and (f) have been combined to form part of § 67 (a).

visions deal with the acquisition of liens against the debtor's estate through judicial proceedings, the status of statutory liens, the relative rights to payment of statutory liens and costs of administration and wage claims, fraudulent conveyances, and the determination of jurisdiction of courts for summary or plenary proceedings. The major points of change or addition will be noted with an endeavor to point out the reasons therefore and the significance thereof with due consideration of the efficacy of the provisions as now enacted.

Liens Through Judicial Proceedings

The consequences that follow when liens are acquired through judicial proceedings form the substance of Section 67(a) of the new Act.[4] The general provisions void such liens if obtained within four months of the filing of the petition, provided that the debtor was then insolvent, or that a fraud on the Act was contemplated.[5] Provision also is made for the vari-

4. This subdivision is derived from the former subdivisions (c) and (f), which largely duplicated or conflicted with each other: 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1583; McLaughlin, *Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 583, 594; Lashly, *The Chandler Bill* (1936) 11 J. N. A. REF. BANKR. 27, 31. Subdivision (f) controlled over (c) in case of conflict: *In re* Rhoads, 98 Fed. 399 (W. D. Pa. 1899); *In re* Tune, 115 Fed. 906 (N. D. Ala. 1902).

The wording is improved. The former (f) read "All levies, judgments, attachments, or other liens . . .", thus referring to judgments that might not constitute a lien. The revised language limits the effect to liens: "Every lien . . . obtained by attachment, judgment, levy. . . ."

Another clarifying change makes liens obtained through legal or equitable proceedings void, in contrast to the phrase "through legal proceedings" which appeared in the former (f). The former section was construed to include equitable proceedings: see Blair v. Braley, 221 Fed. 1, 4 (C. C. A. 5th, 1915); Garrison v. Johnson, 66 F. (2d) 227, 229 (C. C. A. 10th, 1933). *Cf. In re* Emslie, 102 Fed. 291, 293 (C. C. A. 2d, 1900).

A further improvement appears in the fact that whereas the former section did not by its terms affect liens where bankruptcy was voluntary, the new section includes both voluntary and involuntary proceedings. However, the former section was construed to include voluntary proceedings also. *In re* Southern Arizona Smelting Co., 231 Fed. 87 (C. C. A. 9th, 1916); Mencke v. Rosenberg, 202 Pa. 131, 51 Atl. 767 (1902); see Pue v. Wheeler, 78 Mont. 516, 523, 255 Pac. 1043, 1046 (1927). *Contra: In re* O'Connor, 95 Fed. 943 (E. D. N. Y. 1899).

The date when the lien is voided under the new section represents a change in method. It was formerly made void only upon adjudication. Now it is voided upon petition, though this can be gathered only by implication. The Act provides: "Every lien . . . obtained . . . within four months before the filing of a petition in bankruptcy . . . shall be deemed null and void . . . *Provided, however,* That if such person is not finally adjudged a bankrupt . . . such lien shall be deemed reinstated. . . ." Logically this must mean that the lien becomes void upon the filing of the petition. The change is made in order to make the procedure correspond with that in cases of corporate reorganization, arrangements, and wage earners' plans, where there is no adjudication, covered by 11 U. S. C. A. (Supp. 1938) § 501 *et seq.*; § 701 *et seq.*; § 801 *et seq.*; § 1001 *et seq.*

5. § 67 (a) (1). It is said by the committee that drafted the new section that the clause "in fraud of the provisions of the act" was retained in order to cover the situation of Dean v. Davis, 242 U. S. 438 (1917), where debtor within four months of bankruptcy mortgaged his property to *A* for a present consideration, which he then used to give *B* a preference. The court held the mortgage to *A* void as a fraudulent conveyance. It is hard to see how this transaction can be duplicated by means of a lien through legal proceedings, since it involves a conveyance made voluntarily by the debtor, and this part of subdivision (a) purports to relate only to liens obtained through judicial proceedings. The situation might be analogous if debtor borrowed money from *A* and gave a judgment note, on which *A* immediately entered judgment. However, the clause would seem to apply if debtor permits *A* to obtain a lien during solvency when the parties know that insolvency will soon follow. But in any event, retention of the phrase to cover the *Dean v. Davis* situation is a needless duplication of § 67 (d) (3), which is framed to provide for that case, and which is broad enough to include the clause under discussion. § 67 (d) (3) speaks of "Every transfer". § 1 (30) defines

ous situations that arise where a lien that would have become void upon the filing of a petition is dissolved before that time by the furnishing of a bond, the surety on which has been indemnified by the transfer to him of property of the debtor or by the creation of a lien upon the debtor's property.[6] Also provided for is the protection of the title of the bona fide purchaser of property against which a lien has been declared void.[7] Finally, the bankruptcy courts are given summary jurisdiction to determine controversies arising from the creation of a judicial lien and its nullification by bankruptcy.[8]

Voidable lien dissolved by bond: Several different parts of section 67(a) govern the relationship of the parties where a voidable lien is dissolved by the furnishing of a surety bond, the surety on which has been indemnified by the transfer of property of the debtor to him, or by the creation of a lien upon the debtor's property.[9] To some extent these represent a change in the law. When such transaction first occurred, the transfer of property or the creation of a lien was not voidable as against the surety, who gave a present consideration, and the creditor was thereby effectively preferred.[10] A subsequent amendment to the Act made void the transfer to or the lien in favor of the surety, and at the same time also voided the bond that had been given to dissolve the original lien obtained by the creditor.[11] The new Act merely lessens the liability of the surety on the bond, to the extent of the value of the property recovered from him. As to any balance, the bond remains in full force and effect. It evidently was thought that if the property were recovered for the benefit of the estate, and the surety protected by a proportionate release, that was sufficient. But it is not clear why it is a function of the bankruptcy law to aid a creditor to get more than other creditors (even though not at their expense, it is true). And it is doubtful whether the change is of practical importance, for two reasons. The situation designed to be met is infrequent.[12] Also it seems probable that in most cases the surety will have required indemnifying property equal in value to the extent of his liability. Nor will the property ordinarily have depreciated substantially in the short period of time intervening. It seems, therefore, that this change is not among the outstanding contributions to the law that are effected by the new Act.

By a further provision relating to this same situation, the surety obtains the option of retaining the indemnifying property in the event that its value, as determined by the court, is less than the amount for which the property is indemnity, upon payment of the value to the trustee.[13] The practical situation in contemplation is this. Assume that the releasing bond is in the sum of $1000. The value of the indemnifying property may be fixed by the court at only $500. If it is turned over to the trustee, the result is that the surety's liability is reduced by $500,[14] but he remains

transfer as including fixing a lien on property, voluntarily or involuntarily, by or without judicial proceedings.

6. § 67 (a) (2), (4), (5).

7. § 67 (a) (3).

8. § 67 (a) (4).

9. *Supra* note 6.

10. The rule is set forth in *In re* Federal Biscuit Co., 214 Fed. 221 (C. C. A. 2d, 1914). Bankruptcy had no effect upon the bond, Brown v. Four-in-one Coal Co., 286 Fed. 512 (C. C. A. 6th, 1923). Voiding the bond under the 1934 amendment to the former § 67 (f), *In re* Club New Yorker, 14 F. Supp. 694 (S. D. Cal. 1936).

11. 48 STAT. 924 (1934), 11 U. S. C. A. § 107 (f).

12. At least, only a few cases deal with the point.

13. § 67 (a) (4).

14. § 67 (a) (5).

liable for the other $500. But if he pays $500 to the trustee, thereby reducing liability on the bond by that amount, and retains the property, it may possibly be worth $1000 to him, in which event he would lose nothing. The thought is that the indemnifying property may not be marketable, hence of little value to the trustee, yet potentially valuable. Such a provision is desirable, for it can cost the estate nothing. The distinction making the provision applicable only where the value of the indemnifying property is less than the amount for which the property is indemnity is self-explanatory. If the value of the indemnifying property is equal to the amount for which the property is indemnity, the surety is completely discharged on the bond.

Bona fide purchaser: Another change in the provisions governing the effect of bankruptcy upon liens obtained through judicial proceedings appears in that part of Section 67(a) which saves the interest of the bona fide purchaser of property that would otherwise pass to the trustee because the lien was voided.[15] The new Act, like the old, protects the interests of the bona fide purchaser only to the extent of present consideration paid. But the new law further enacts that where such title is acquired at a judicial sale held to enforce the lien, it is validated completely, regardless of the amount of consideration paid. The evident purpose is to remove from judicial sales an element of risk that might make them less valuable, and to make such sale conclusive in determining rights acquired thereunder. Probably this is desirable, although it might be noted that the purchaser at a judicial sale takes other risks (for instance, he ordinarily obtains no title if the judgment debtor had none),[16] and also that the provision may in some cases reduce the amount of the debtor's estate that will be available to creditors, and to that extent vary from the purpose of the section. If, as an example, the property subject to the foreclosure sale were worth $2000, and the purchaser bought it in for $1000, the reservation that the Act makes in his favor would cost the estate $1000. Presumably the purchaser at the judicial sale would not be protected at all if he were not a bona fide purchaser.[17]

The provisions of Section 67(a) which concern the rights of the bona fide purchaser parallel Section 60(b), dealing with preferences, which protects the interest of a bona fide purchaser or lienor from a preferred transferee, to the extent of the consideration paid. They are also related to Section 70(d), dealing with the trustee's title, which protects a bona fide purchaser from the bankrupt after petition but prior to adjudication, to the extent of the consideration actually paid.[18] It is perhaps permissible to digress here to point out that the old Act did not deal with liens obtained after the filing of the petition. The courts remedied the omission

15. § 67 (a) (3). The criticism was made of the old § 67 (d) that through its faulty wording it raised an implication that all other liens, except those for a present consideration, were bad regardless of when they arose. See McLaughlin, *supra* note 4, at 596. The new section is perfectly clear.

16. *In re* Nebel, 44 F. (2d) 849 (W. D. Pa. 1930); Boyer v. Campbell, 312 Pa. 460, 167 Atl. 284 (1933).

17. The only title held valid at all under this subdivision is that of the bona fide purchaser. Under the former Act, a purchaser at an execution sale was not protected if he was not a bona fide purchaser, i. e., if he had knowledge of the debtor's insolvency. Dreyer v. Kicklighter, 228 Fed. 744 (S. D. Ga. 1916).

18. The filing of the petition was stated to be a caveat to all the world in Mueller v. Nugent, 184 U. S. 1 (1902). *Cf.* Grand Rapids Dry Goods Co. v. Ostendorf, 6 F. (2d) 506 (C. C. A. 6th, 1925); Southern Ry. Co. v. Cole, 49 Ga. App. 635, 176 S. E. 512 (1934).

and held such liens void.[19] The new Section 67 does not mention the point, as Section 70(d) covers it. The same principle of protecting a bona fide purchaser to the extent of consideration paid by him is established by the fraudulent transfer provisions of Section 67(d)(6).

Summary jurisdiction: The clause giving summary jurisdiction to the bankruptcy court[20] to determine the rights of any party under Section 67(a) is probably the most significant change that occurs in this part of the new section. It represents a complete reversal of the former Act, for the rights of the lienor had to be determined by plenary proceedings.[21] The gains hoped be achieved are the elimination of unnecessary delay and expense. Under the old procedure, a hearing was necessary to determine whether the party in possession of property was an adverse claimant. If he were found to have such status, nothing in the Act authorized summary jurisdiction, and consequently plenary proceedings were then necessary to adjudicate the rights of the parties.[22] If the party in possession were found not to be an adverse claimant, of course, the court simply took over the property inasmuch as there then was no bona fide claim made against such action. The marked advantages of the present procedure appear plain. The trustee is not remitted to another court, there to endeavor to regain the property through the medium of a jury verdict. Instead, the bankruptcy court resolves all the issues.

But the broad sweep of the provision brings before the court for summary determination some questions of fact that may multiply the tasks of the court. For example, it is a defense to the lienor under Section 67(a)(1) that the bankrupt was solvent when the lien was obtained. That leaves an issue of solvency to be determined by the court,[23] which issue may call for an extensive examination of books and records. Under Section 67(a)(2), the transfer of indemnifying property to the surety on the releasing bond is made void if the lien obtained by the attaching creditor would have been void, so that the same issue exists here. Under Section 67(a)(3), where the title of a bona fide purchaser is protected to the extent of consideration paid, the court must decide whether the particular claimants were bona fide purchasers.

The foregoing comments on the new tasks confronting the bankruptcy court are not offered as a criticism of the innovation giving summary jurisdiction to the court, but rather as merely a statement of what the new law will require. It is also interesting to note that the authors of the new Act apparently did not feel justified in providing for summary jurisdiction for the recovery of property under Section 60, treating of preferences, or for the recovery of property under Section 67(d), treating of fraudulent transfers, although similar issues are there presented.

Statutory Liens

Statutory liens are explicitly given a favored position under the provisions of the new Act. They are made valid even though perfected within four months of bankruptcy, though the debtor may then be insolvent, and

19. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300 (1911); Fairbanks Shovel Co. v. Wills, 240 U. S. 642 (1916); Lake View State Bank v. Jones, 242 Fed. 821 (C. C. A. 7th, 1917).

20. § 67 (a) (4).

21. As provided by the former § 23.

22. See Weidhorn v. Levy, 253 U. S. 268, 272 (1920); Beeler v. Schumacher, 71 F. (2d) 831, 832 (C. C. A. 6th, 1934), *aff'd*, 293 U. S. 367 (1934).

23. Formerly this issue had to be determined by plenary proceedings. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426 (1924).

though they may constitute a preference that would otherwise be void under Section 60 of the new law. Moreover they may be perfected after bankruptcy has occurred, and in the event that state law requires seizure of the property to perfect the lien, filing of notice with the court is made sufficient for this purpose.[24]

This type of lien is strongly favored under state laws, and the provisions mentioned are evidently intended to promote the state policy. Mechanics' liens, for example, may be perfected within the time allowed by law under state statutes, and cannot be defeated by the prior placing of a mortgage upon the property.[25] Other instances of favored treatment accorded by states to certain classes of statutory liens might be enumerated. It is sufficient to point out that the local policy of states is given full recognition under the provisions of the bankruptcy law, relating to statutory liens. The provisions, which are completely new to the law, to a large extent codify the results of judicial decisions, and therefore put such decisions beyond judicial change. To illustrate, courts previously held that statutory liens perfected within four months of bankruptcy were valid,[26] and several decisions had declared that these liens, inchoate at the time of the petition, might thereafter be perfected.[27] This latter point had not, however, come before the Supreme Court, a fact that furnishes another sound reason for enacting the principle into the statute.

It would appear that the section might have been written to include certain favored common law liens, such as a landlord's lien, as well as statutory liens. That the landlord's lien might be perfected within the four months' period had been judicially declared under the old Act.[28] Whether such a lien exists by virtue of the statute or under the common law does not seem to affect the question of whether it ought to be put in a better position than liens obtained through judicial proceedings. The considerations must necessarily be identical in either case. Inasmuch as the new Section 67 specifically mentions statutory liens, it might be thought that it was intended to exclude any common law lien, on the theory that the mention of the one class prevents an implied inclusion of another class, a result certainly not intended.

Priorities Between Statutory Liens and Costs of Administration and Wage Claims

Statutory liens, and landlords' liens of any kind, if not enforced by sale prior to the filing of a petition in bankruptcy, are, under the new Section 67, postponed in payment to costs of administration and wage claims up to $600 that were earned within three months of bankruptcy, to the extent that such liens are on personal property not in the possession of the lienor. But statutory liens for wages are restricted in amount to $600

24. § 67 (b).

25. Ustruck v. Home Ass'n, 166 Minn. 183, 207 N. W. 324 (1926); Building Supply Co. v. Greenberg, 107 N. J. L. 361, 153 Atl. 581 (E. & App. 1931); Citizens Bank of Palmerton v. Lesko, 277 Pa. 174, 120 Atl. 808 (1923).

26. Henderson v. Mayer, 225 U. S. 631 (1912) (statutory landlord's lien obtained within four days of bankruptcy); Fudickar v. Glenn, 237 Fed. 808 (C. C. A. 5th, 1916) (rent lien); *In re* Purvis, 293 Fed. 102 (S. D. Miss. 1923) (mechanics' lien).

27. New York-Brooklyn Fuel Corp. v. Fuller, 11 F. (2d) 802 (C. C. A. 2d, 1926); see *In re* Weston, 68 F. (2d) 913, 916 (C. C. A. 2d, 1934). But the theory is that the rights of the party cannot be altered after bankruptcy: Ludowici Celadon Co. v. Potter Title & Trust Co., 273 Fed. 1009 (C. C. A. 3d, 1921).

28. City of Richmond v. Bird, 249 U. S. 174 (1919); *In re* Robinson and Smith, 154 Fed. 343 (C. C. A. 7th, 1907), where the lien was obtained within two days of the filing of the petition.

earned within three months of bankruptcy, and liens for rent are limited to claims incurred within three months of bankruptcy, except as against other liens.[29]

As a practical matter, costs of administration clearly should be met first, since administration is indispensable to bankruptcy proceedings. It evidently also was considered that there were sufficient reasons as a matter of policy to prefer wage claims in limited amount, although this proposition does not seem to be as completely clear as the first mentioned. But what the reasons may be for the distinction between personal property accompanied by possession and that not accompanied by possession does not appear and is difficult to discover. Perhaps, this is a purely practical concession to the probable opposition to a law that would remove property from the possession of one person in order to turn it over to another, and thereby trench upon a common feeling that possession carries with it a high degree of rights akin to ownership.[30] Nor is any convincing explanation offered for the difference that is established between real and personal property.[31] Once again, there may have been thought to exist practical reasons. Perhaps it was thought well not to tamper with the reliance usually placed on this form of security by creating a situation where it might be taken away from the secured party. But if it is important to put the two above-mentioned classes of claims in a superior position, it is important to do so in all cases. It is also possible that it was thought, at least in part, that real property liens are generally larger and therefore more difficult to liquidate; but to permit an administrative difficulty to prevail over what is thought to be a sound declaration of policy does not seem feasible. It has been stated by competent authority that the provision is principally aimed at the situation whereby liens for taxes were permitted to accumulate without enforcement, and then came in for payment ahead of costs of administration.[32] If that is an explanation for the section, it should be noted that tax liens on real property, which is far more likely to be encumbered by such liens than is personal property, still come in as preferred claims and any achievement that the section makes toward a solution of this problem will be narrowly limited to the situation where personal property is subject to accumulated tax claims.

The provision that statutory liens for wages and all liens for rent shall be restricted as above mentioned, except as against other liens, presents a problem for analysis whose answer is not readily apparent. The limitation applies only in favor of unsecured creditors. That suggests that the limitation will always apply, for there will always be some unsecured

29. § 67 (c). The wage claims must have been earned within three months of the commencement of the proceeding under § 64 (a) (2). Under § 64 (a) (5), the landlord's priority is restricted to rent legally due and owing for the actual use and occupancy of the premises.

The new section directly changes previously declared judicial law. Formerly valid liens preceded in payment claims entitled to priority under § 64: Richmond v. Bird, 249 U. S. 174 (1919); *In re* Brannon, 62 F. (2d) 959 (C. C. A. 5th, 1933); *In re* Dublin Veneer Co., 1 F. Supp. 313 (S. D. Ga. 1932).

30. There is the theory of estoppel that can be relied on as a justification. There is no pretense that costs of administration are incurred upon possession by the bankrupt of lien-weighted property, nor any suggestion of the elements of an estoppel in favor of wage claimants.

31. It is said that "by reason of the historical development and the inherent differences existing in the incidents attaching to real and personal property, it would seem advisable to restrict the remedy thus provided to liens on personal property. . . ." *Analysis of H. R. 12889*, 74th Cong., 2d Sess. (1936) 212 n.

32. Weinstein, *Preferences, Liens and Title of Trustee*, 13 J. N. A. REF. BANKR. (1938) 19, 24.

creditors who will receive only a percentage on their claims, and while any unsecured creditors receive less than payment in full, it seems that the liens for wages and for rent must be limited. It is difficult to understand when the condition can occur in which such liens are not restricted against other liens.[33]

Fraudulent Transfers

The provisions of the new Section 67 contain an elaborate revision of the part of the old Act dealing with fraudulent transfers. Four points of particular importance are to be noted. To govern the determination of what acts may constitute fraudulent transfers, the chief provisions of the Uniform Fraudulent Conveyance Act have been adapted to the bankruptcy law and incorporated into this section.[34] Another type of transfer is made fraudulent, the transfer that is made in order to use the consideration obtained to give a preference to a creditor that is voidable under Section 60.[35] Two remaining features of the new section bring important modifications on issues involving the element of time. Transfers that are fraudulent may be set aside if they occurred not within four months of bankruptcy, as under the old Act, but within one year of bankruptcy.[36] Finally, the effective date of a fraudulent transfer is deemed to have occurred only when neither a bona fide purchaser, nor a creditor of the debtor, could any longer have acquired any rights in the property transferred superior to the rights of the transferee.[37]

Provisions against fraudulent transfers: To appraise the change whereby the sections of the Uniform Fraudulent Conveyance Act have been largely written into the bankruptcy law, the nature of the material that they replace will be briefly summarized. The former Section 67(e) provided that conveyances made with intent to hinder, delay, or defraud creditors, within four months of bankruptcy, should be void. This set up a federal law of fraudulent conveyances, based on the Statute of Elizabeth,[38] and made available to the bankruptcy courts the large body of decisional law developed under that statute.[39] The latter part of the old Section 67(e) went on to provide that conveyances that were void against creditors under state law should be void as against the trustee, if made within four months of bankruptcy. But under Section 70(e) of the old Act, the trustee could also proceed to avoid a transfer of the bankrupt that any creditor might have avoided, and the only time limit on such right was the applicable state statute of limitations.[40] Therefore, in both of those sections, the right of the trustee to avoid any transfer was derived from the right of the creditors; and the part of Section 67(e) that voided transfers against the trustee if they were void against the creditors under state law,

33. The committee that drafted the section states that the restriction is intended only for the benefit of the unsecured creditors and that the other lien holders are not to profit by this limitation. But no instance is set forth to illustrate when there can be an unlimited priority against other liens and at the same time a restriction as against unsecured creditors. *Analysis of H. R. 12889*, 74th Cong., 2d Sess. (1936) 212 n.

34. § 67 (d) (1), (2), (4), (6).

35. § 67 (d) (3).

36. § 67 (d) (2), (4).

37. § 67 (d) (5).

38. 13 ELIZ. c. 5 (1570).

39. See discussion, McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act* (1937) 4 U. OF CHI. L. REV. 369, 384.

40. Stellwagen v. Clum, 245 U. S. 605 (1918); *In re* Lamie Chemical Co., 296 Fed. 24 (C. C. A. 4th, 1924), in which the court apparently speaks of the former Section 67 (e) erroneously in referring to the former § 70 (e); Holbrook v. International Trust Co., 220 Mass. 150, 107 N. E. 665 (1915).

was wholly unnecessary, for it enabled only what Section 70(e) enabled, but limited the period to four months, which the latter did not do. Under the new provisions of the new Section 67(d), there is no reference to state law, and the right to avoid a transfer under state law exists solely under Section 70(e).

Under the new section, instead of the brief expression "conveyances with intent to hinder, delay, or defraud creditors", there now appears the codification of the best judicial decisions of state courts [41] under the Statute of Elizabeth.[42] This revision is a marked improvement for several reasons. To determine whether a given transaction is fraudulent as against creditors, the court need no longer consult a great mass of judicial decisions, for the new provisions state specifically what conveyances are fraudulent, as against what creditors, and declare what intent is necessary. The machinery by which the court will proceed is thereby modernized and expedited through simplification. Moreover, the new law must result in uniformity of decisions in the bankruptcy courts throughout the United States, as they will all be guided by explicit provisions.

A most important substantive change in bankruptcy law has been brought about by the provision of the new section which extends the period in which the interdicted conveyances are fraudulent to one year, instead of the four months' period.[43] The change was made because it was felt that fraudulent activities were usually begun prior to four months before bankruptcy, since the debtor usually foresaw his ultimate failure considerably in advance of the happening of the actual events. The result of the change should be that in cases where debtors have indulged in fraudulent activities, the assets of the estate available to the creditors will be increased. The provision is distinctly favorable to creditors. Since bona fide purchasers are protected in dealings with the debtor, those who have dealt with the debtor cannot be harmed unless they are parties to the fraud. As to the debtor himself, there are no conceivable grounds on which he can legitimately object that he is barred from the fruits of his own misdealings. This provision strengthens the position of the trustee, particularly when coupled with another new clause of Section 67(d), which states that the transfer is not deemed to have been made until neither a bona fide purchaser from, nor a creditor of, the debtor, could have acquired no rights in the property transferred, that is, until there was complete and effective recording. The former Section 67 contained no reference to the unrecorded transfer.[44] The new provisions parallel similar ones in Section 60(a), governing the date on which a preference is deemed to have been made, and in Section 3(b), relative to the date on which certain acts of bankruptcy are deemed to have been committed.

As a result of the incorporation of adapted provisions of the Uniform Fraudulent Conveyance Act, the elimination of any reference to state law in Section 67, and the lengthening of the four months' period to a year, in which conveyances may be fraudulent, the trustee in a state which has

41. See McLaughlin, *supra* note 39, at 388.

42. 13 ELIZ. c. 5 (1570).

43. § 67 (d) (2), (4). Compare on issue of preference, Goldstein, *The Four Months Clause in Bankruptcy—Its Diminishing Value—Some Practical Aspects* (1924) 1 AM. BANKR. REV. 11.

44. See criticism by McLaughlin, *supra* note 4, at 596. It might be noted that not only failure to record may be invoked to invalidate a transfer, but failure of any other act that might enable a bona fide purchaser to prevail, such as failure of a vendor of personal property to deliver possession to the vendee, under the Uniform Sales Act, § 25.

adopted the provisions of the Uniform Act has a choice of proceeding under the provisions of that Act under federal law, through Section 67(d), or under state law, by virtue of Section 70(e). Both sections make fraudulent transfers void as against the trustee if they are void against any creditor having a provable claim in bankruptcy. It must not be thought that there is a complete overlapping of the sections in such situation, however. Section 70(e) makes a transfer void as against the trustee, not only if fraudulent under state law, but also if it is voidable for any other reason. The section, therefore, might enlarge the trustee's right to upset preferences, such as those in an assignment for the benefit of creditors, over the rights provided in Section 60. A state law, for instance, might extend the four months' period to a longer time in which such preferences would be voidable. Also the choice between state and federal law may be important where the conveyance was made more than a year before bankruptcy, if the state law has a longer limitation on the right of action than one year. In a state which has not adopted the Uniform Act, the trustee will probably proceed under Section 67, for the Uniform Act in theory represents the best law available on the subject of fraudulent conveyances, and is likely broader in scope. However, he may find state law advantageous either by virtue of its provisions, or by virtue of a longer limitation on the right of action than one year.

The Doctrine of Dean v. Davis: The remaining important addition to the fraudulent transfer provisions of the new law converts into a fraudulent conveyance a transfer with intent to use the consideration obtained to effect a preference to a third person that is voidable under Section 60.[45] The principle is based upon the doctrine of *Dean v. Davis.*[46] There the debtor, in contemplation of bankruptcy, and without expectation of being able to repay the loan, borrowed money, and as security mortgaged all his property to a third party. The money obtained was used to pay a creditor who was demanding payment. The Supreme Court held that the transfer to the lender was a fraudulent conveyance, but stated that such a transaction might be in good faith and not fraudulent.[47] Under the new provision, every transfer to *A* with intent to use the consideration to effect a voidable preference to *B* is fraudulent, a fact that takes the rule of the case further than it went. Nor is it clear under what circumstances *A* will be a bona fide purchaser protected under Section 67 (d) (6). Under the language of the *Dean* case, he may know the debtor's intention, and still be a bona fide transferee, if the debtor has an honest purpose, such as to extricate himself from temporary difficulties.[48] Whether he will be regarded as a bona fide transferee under such circumstances is conjectural.

But in an important respect, this provision curtails the doctrine of the *Dean* case. The transfer to *A* is fraudulent only if the preference to *B* is voidable under Section 60. That limitation did not appear in the original case. Thus unless *B* has reasonable cause to believe that the debtor is insolvent when he is paid, the transfer to *A* is unassailable.[49] The theory is narrow and peculiar. It is plain that *B's* mental state in receiving his preference has nothing to do with the issue of whether the debtor and *A* seek to defraud other creditors. Yet it is made controlling.

45. § 67 (d) (3).
46. 242 U. S. 438 (1917).
47. *Id.* at 444.
48. *Ibid.*
49. Under § 60 (b), the preference is voidable only if the creditor has reasonable cause to believe that the debtor is insolvent.

The section would be more effective if it applied where the debtor uses the consideration obtained to give *B* a preference, regardless of whether such preference is voidable. As the provision stands, either both transactions are voidable, or neither one is, depending upon what *B* should have suspected as to the debtor's insolvency.[50]

Preference as a fraudulent transfer: An additional point of more than academic interest has not been settled by the revised Act. That is the question whether a preference can be held void as a fraudulent conveyance, if accompanied by an intent to defraud. There have been cases that answer this question affirmatively.[51] Then the case of *Dean v. Davis* produced some language [52] which according to one commentator virtually abolished the distinction between a preference and a fraudulent conveyance.[53] The opposing view was subsequently taken by a circuit court, which declined to hold that a preference not voidable as such could be set aside as a fraudulent conveyance, limiting *Dean v. Davis* to its precise facts.[54] Under Section 67(d)(2)(d), a conveyance with actual intent to hinder, delay, or defraud a creditor is made fraudulent, and this language could be used to void a preference as a fraudulent conveyance. But because the fraudulent conveyance section has been set forth in detail with no mention of such rule, and inasmuch as Section 67(d)(3) was written into the Act to cover the type of situation actually decided in the *Dean* case, it is hardly likely that there was any thought of abolishing the distinction.

Evaluation of the Revision

A suggestion was at one time made that Section 67 should include a statement that an assignment for the benefit of creditors constituting an act of bankruptcy, and a receivership instituted within four months of bankruptcy, are void as against the trustee.[55] Under the old Act this followed only by implication from Section 3, making these occurrences acts of bankruptcy, or else by treating them as liens sought and permitted in fraud of the provisions of the Act, under the former Section 67(c)(3).[56] No such provision has been incorporated into Section 67, but the end has been achieved through Section 70(a)(8).

That the new section improves upon its predecessor can hardly be questioned. Particularly is this true in the fraudulent conveyance provisions, which represent a marked improvement, through incorporating in substance the provisions of the Uniform Act, extending the four months' period to a year, and dealing effectively with transfers invalid against a

50. See Wolfe, *Detection of Fraud Under the New Bankruptcy Law* (1938) 13 TEMP. L. Q. 1, 13.

51. *In re* Steininger Mercantile Co., 107 Fed. 669 (C. C. A. 5th, 1901); Sherman v. Luckhardt, 67 Kan. 682, 74 Pac. 277 (1903); Webb's Trustee v. Lynchburg Shoe Co., 106 Va. 726, 56 S. E. 581 (1907).

52. "A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, hinders, delays, or defrauds creditors within the meaning of 67e. . . . A transaction may be invalid both as a preference and as a fraudulent transfer." 242 U. S. 438, 444 (1917).

53. Note (1933) 28 ILL. L. REV. 103, 104.

54. Irving Trust Co. v. Chase Nat. Bank, 65 F. (2d) 409 (C. C. A. 2d, 1933), criticized in (1935) 29 ILL. L. REV. 799.

55. McLaughlin, *supra* note 4, at 599.

56. The trustee takes title from an assignee for the benefit of creditors by implication from § 3, Randolph v. Scruggs, 190 U. S. 533 (1903). The assignment for the benefit of creditors operates as a fraudulent conveyance. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co., 99 Fed. 699 (E. D. Mo. 1899). The trustee supersedes a receiver on the ground that the bankruptcy law is paramount. Bank of Andrews v. Gudger, 212 Fed. 49 (C. C. A. 4th, 1914).