1973

Executory Contracts in Bankruptcy: Part I

Vern Countryman

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/2459

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenxx009@umn.edu.
Executory Contracts in Bankruptcy: Part I

Vern Countryman*

Since the mid-1930's the Bankruptcy Act¹ has contained provisions authorizing assumption or rejection of executory contracts, including unexpired leases, of the bankrupt or debtor. To some extent, these provisions codified and changed doctrine which the bankruptcy courts had previously developed without statutory aid. To a large degree, they were inspired by difficulties which had developed in connection with real estate leases because "the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."² However, since some of the problems of leases are unique and have been extensively treated elsewhere,³ this Article will focus on executory contracts other than leases. The treatment of leases will be considered only when it seems helpful in the solution of problems involving other executory contracts.

---

¹ U.S.C. Title 11. Since U.S.C. section numbers do not correspond to the section numbers of the Act as enacted, I will refer hereinafter only to the section numbers of the Act.


I. PROLOGUE

Long before the English Bankruptcy Act contained any express provisions on the subject, the courts had concluded that the assignee in bankruptcy taking title to the bankrupt's property could elect to abandon, rather than retain, that which was worthless or onerous, including leases and other executory contracts. Provisions of subsequent English Acts originating in 1869 and providing for "disclaimer" not only of leases and contracts but of "any other property" differ significantly from our own much later provisions.

A. THE JUDICIALLY CREATED DOCTRINE OF ABANDONMENT

Our Supreme Court first considered the matter in a case arising under the Bankruptcy Act of 1867 which presented the question whether the bankruptcy assignees, who were vested "by operation of law" with the bankrupt's title to all nonexempt property, had thereby acquired shares of corporate stock held by the bankrupt and the consequent liability for corporate debts which state law imposed because of the defective incorporation of the issuer. On the basis of the English practice, the Court stated, "It has long been a recognized principle of the bankrupt laws that the assignees were not bound to accept property of an onerous or unprofitable character." It also found that the assignees had done nothing to indicate acceptance of the stock and concluded that "neither they nor the assets of [the bankrupt] in their hands are subject to the individual liability of stockholders for the debt of the corporation."

---

7. 32 & 33 Vict. c. 71, § 23 (1869). An earlier provision dealt solely with leases. 49 Geo. 3, c. 121, § 19 (1809).
11. American File Co. v. Garrett, 110 U.S. 288, 295 (1884). This decision had been foreshadowed by Glenny v. Langdon, 98 U.S. 20, 31 (1878), holding that creditors of a bankrupt could not maintain an
The notion that acceptance, rather than abandonment, required some affirmative indication from the bankruptcy assignee was adhered to in a later case involving the bankrupt's seats on exchanges, which, by the rules of the exchanges, could not be used until the bankrupt's debts to other members had been paid. These debts far exceeded what could have been realized from a sale of the seats. The bankruptcy assignees did nothing to indicate acceptance of the exchange seats until twelve years after their appointment and eight years after a Supreme Court decision in another case had held that such an exchange seat passed to a bankruptcy assignee subject to the limitation on its use. During this time the now discharged bankrupt paid the balances of his debts to fellow exchange members. When the bankruptcy assignees then sought to claim and sell the seats, their claim was rejected. The "masterly inactivity" of the assignees was characterized as "sedulously avoiding for years any action to set aside a fraudulent conveyance because the Bankruptcy Act of 1867 gave the bankruptcy assignee title to all property conveyed by the bankrupt in fraud of creditors. The decision was said not to leave the creditors without a remedy. The assignee had an option to abandon or accept the cause of action and, if he "should erroneously or unwisely fail" to accept, the creditors could apply to the bankruptcy court "to compel him to carry out their wishes." Since the doctrine of abandonment was later to be applied to equity receiverships (see text accompanying notes 22 et seq., infra), it seems fair to say that a possible case for its application was presented earlier but that neither court nor counsel recognized the occasion. In Express Co. v. Railroad Co., 99 U.S. 191, 194, 200-01 (1878), the express company had made an unsecured loan to the railroad company in return for a contract which entitled the express company, until the loan was fully repaid, to have its shipments carried by the railroad company at a specified rate, the freight charges to be applied in discharge of the loan. When the railroad company went into receivership and the receiver refused further express company shipments "unless upon conditions whereby said contract was virtually surrendered or ignored," the express company sought specific performance of its contract. While indicating that such a contract in some circumstances might be specifically enforceable, the Court denied relief on alternate grounds. First, the contract provided that it should terminate upon full repayment of the loan, which "might be made immediately upon the rendition of the decree" so that the "action of the court would thus become a nullity." Second,

[a] specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make.

As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can be thus diverted.

As will be developed in text accompanying notes 86 et seq., infra, this would be a proper case for application of the doctrine of abandonment if the contract were construed, as it might have been, to require the express company to give to the railroad company all of its shipments between points served by the latter.

responsibility” while knowingly “allowing the bankrupt, by use of after acquisitions, to create a value not theretofore possessed.” Hence, “[t]heir conduct can be viewed in no other light than that of an election not to accept these rights as property of the estate.”

A different rule was applied, however, when the bankrupt failed to schedule a cause of action among his assets, with the consequence that the assignee did not learn of the asset until a post-bankruptcy creditor levied on the proceeds of the cause of action some twelve years after bankruptcy. Under such circumstances, it was concluded that, since “the assignee should not have been held to have exercised the right of choice between prosecuting the claim and abandoning it,” he should be allowed to take the proceeds of the claim from the levying creditor.

A similar result was later reached under the Bankruptcy Act of 1898, which pursuant to § 70a(5) gives the trustee the title of the bankrupt as of the date of the filing of the petition [to all nonexempt] property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered.

A bankrupt who failed to schedule a claim for usury was later held not entitled to prosecute it. While bankruptcy trustees

14. Dushane v. Beall, 161 U.S. 513, 518 (1896). Cf. Sessions v. Romadka, 145 U.S. 29, 39 (1892), where the bankrupt failed to schedule a patent owned by him and the bankruptcy case was closed without any reference to the patent. A prospective purchaser later inquired of the former bankruptcy assignee about buying the patent and was told that the assignee had been discharged and had no power to act and that he should deal with the bankrupt. When this advice was followed and the purchaser from the bankrupt later sued another for patent infringement, the infringer was held not entitled to challenge the purchaser's title. Of the former assignee's conversation with the purchaser, the Court said:

A plainer election not to accept can hardly be imagined. Granting that up to that time he had known nothing about the patent, it was his duty to inquire into the matter if he had any thought of accepting it, and not to mislead the [purchaser] by referring him to the bankrupt as the proper person to apply to. But the Court noted also that "no claim to this property is now made by the assignee, but ... his alleged title to it is set up by a third person, who confessedly has no interest in it himself."

15. Prior to Chandler Act amendment in 1938 (52 Stat. 879), § 70a(5) gave the trustee "the title of the bankrupt, as of the date he was adjudged a bankrupt" to all nonexempt "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." 30 Stat. 565-66 (1898).
were said to have "a reasonable time" to decide whether to accept or abandon property, and if they decided to abandon it "the bankrupt could assert title thereto," there could be no abandonment "when the trustee is ignorant of the existence of the property and has had no opportunity to make an election."\(^{16}\)

In a later case,\(^{17}\) an abandonment by the trustee took place with the approval of the bankruptcy court and, therefore, involved the consequences of the abandonment rather than the question of whether an abandonment had in fact occurred. The property abandoned was national bank stock, which, though fully paid, was subject to assessment up to its par value to pay the debts of the bank. Before the stockholder's bankruptcy the Comptroller of the Currency had declared the bank insolvent, a receiver had been appointed to wind up its affairs, and it had become apparent that a full assessment would be made on all shares. In his bankruptcy proceeding, the stockholder had scheduled his liability to assessment on the shares and had received a discharge before the assessment on the shares was formally made.

In a subsequent suit by the bank's receiver to enforce the assessment, the stockholder asserted the following defenses: (1) that he had been divested of the shares, and hence of the liability, by his bankruptcy proceeding, and (2) that any liability he might have had was covered by the bankruptcy discharge. He lost on the first defense but prevailed on the second. The Court concluded that the former defense failed because "[w]hatever title or inchoate interest may have passed to the trustee was extinguished" by his abandonment of the shares.\(^{18}\) In order to rule on the second defense, however, it was necessary to fix the time when the revesting of the title to and the liability on the shares occurred, because under § 17a of the Bankruptcy Act only provable debts are discharged and the Court had earlier read § 63a to mean that only liabilities in existence at the time the bankruptcy petition was filed were provable.\(^{19}\) The Court stated that the revesting occurred "by relation as of the filing of the petition," invoking the "precise analogy . . . in the law of gifts and legacies" under which

\[^{18}\] Id. at 602.
\[^{19}\] Zavelo v. Reeves, 227 U.S. 625 (1913).
case at hand the result will be the same whether title is con-
ceived of as remaining in the bankrupt or as afterwards revert-
ing.20

It concluded that the liability was sufficiently non-contingent so
that the claim was provable in the bankruptcy proceeding even
though the formal assessment came later. The Court therefore
held the liability was covered by the stockholder's bankruptcy
discharge.21

Meanwhile, the option to abandon or accept property had
also been extended to equity receivers. In the first case making
this extension, the Court expressed some doubt concerning the
propriety of the extension since such receivers are merely cus-
todians of, and do not take title to, the debtor's property.22 But,
assuming that the receivers had the option, the Court concluded
that they had not elected to adopt the debtor railroad's long term
lease on track by operating over it for fourteen months, without
producing enough income to pay any rent, before surrendering
the track to the lessor when the receivership court promptly
granted the lessor's first request to repossess.23 The receivers
were held entitled to a "reasonable time" to make their election
and were found to have done nothing to indicate an acceptance
of the lease.24

20. Brown v. O'Keefe, 300 U.S. 598, 602-03 (1937) (citations omit-
ted).
21. Id.
23. Id. at 101.
24. Id. See also St. Joseph & St. Louis R.R. v. Humphreys, 145
U.S. 105 (1892), reaching the same conclusion with respect to an-
other leased line of the same debtor. Here the result was foreshadowed
by Sunflower Oil Co. v. Wilson, 142 U.S. 313, 321, 322 (1892), involving
a contract under which a railroad in receivership had previously
leased rolling stock at a stipulated annual rental and had agreed to (1)
haul all freight of the lessor at specified rates, (2) apply the freight
charges to the rentals, and (3) purchase the leased property at a
specified price on a date which followed the appointment of the re-
ceiver. Two months after the receiver's appointment and six weeks
after the purchase date, the lessor sought to compel the receiver to
make the purchase. However, the receiver was allowed to invoke a
provision in the contract which was read to relieve the debtor of the
obligation to purchase and to entitle it to return the property if on the
purchase date it was "unable to purchase." The receiver was said to be
entitled to a reasonable time to elect whether to adopt the contract or to
"decline to assume this obligation, and return the property" pursuant to
the terms of the contract. He was, however, held obligated to pay
"the stipulated rental for it so long as he used" the property, but with
the correlative right to recover freight charges withheld by the lessor
in excess of that rental.
In the following year, another lessor in the same receivership presented the same question and obtained the same answer, save that he was allowed a priority claim for the reasonable value of use and occupancy of the line by the receiver during the period when the bondholders were unsuccessfully opposing the lessor's attempt to repossess. However, by this time doubts about the application of the doctrine of abandonment to equity receivers had vanished:

The general rule applicable to this class of cases is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. If he elects to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent.\(^{25}\)

Attempts by the draftsmen of leases to limit or eliminate the option of the receiver or bankruptcy trustee met with only modest success. A provision forfeiting the leasehold if the lessee "shall assign [his] lease . . . or if said lessee's interest therein shall be sold under execution or other legal process"\(^{26}\) was held inoperative when the lessee was put into bankruptcy on an involuntary petition, since the passage of the lessee's estate to the bankruptcy trustee "was by operation of law and not by the act of the bankrupt."\(^{27}\) Neither did it operate on the trustee's later sale of the leasehold: that was not a "voluntary assignment by the lessee, nor a sale of the lessee's interest, but [a sale] of the trustee's interest held under the bankruptcy proceedings for the benefit of creditors."\(^{28}\)

In a later case, a provision that the filing of a bankruptcy petition by or against the lessee should ipso facto terminate the lease and entitle the lessor to recover the rental reserved in the lease for the balance of the term was held to be an unreasonable attempt to liquidate damages and invalid as a penalty.\(^{29}\) However, an ipso facto clause which fixed the landlord's damages at the difference between the present value of the future rent reserved under the lease and the present value of the fair rental

\(^{25}\) United States Trust Co. v. Wabash Western Ry., 150 U.S. 287, 299-300 (1893).
\(^{26}\) Gazlay v. Williams, 210 U.S. 41 (1908).
\(^{27}\) Id. at 47.
\(^{28}\) Id.
value of the premises for the balance of the term was held effective to terminate the lease and to give the lessor a measurable claim provable in bankruptcy.\textsuperscript{30} And a covenant providing for the same measure of damages on any termination of the lease was held operative to measure the landlord's damage claim in a receivership proceeding after the receiver had rejected the lease.\textsuperscript{31} But the Court was at pains to point out that the claim was not for rent, which "issues from the land, is not due until the rent day, and is due in respect of the enjoyment of the premises let."\textsuperscript{32} Rather, it was a claim based on "a personal covenant that liquidated the damages upon a footing that was familiar and fair."\textsuperscript{33} Under a lease lacking such a covenant, the landlord who re-entered and terminated the lease on the receiver's rejection of it was held to have no claim provable in the receivership.\textsuperscript{34}

In 1934, the Supreme Court confirmed a series of lower court decisions holding that a provision in § 63a(4) of the Bankruptcy Act for proof of claims based on contract was not intended to cover a landlord's claim under a covenant in the lease which gave him the option to re-enter and relet the premises and to recover the difference between the rent reserved in the lease and the amount received from reletting.\textsuperscript{35} In part the decision was based on the conclusion that Congress had adopted the lower courts' construction in failing to alter § 63a(4) in several subsequent amendments to the Act.\textsuperscript{36} It was also based on the notion that the exercise of the landlord's option brought into existence a "new contract" which was not in existence at bankruptcy and hence could not provide the basis for a provable claim.\textsuperscript{37} One year later, a similar covenant was held not to give a provable claim to a lessor who had re-entered, but had not relet before bankruptcy and following rejection by an equity receiver. Since his claim was to be reduced, and might be extinguished, by what he received on reletting, "it was, at the time the petition in bankruptcy was filed, uncertain, a mere matter of speculation, whether any liability ever would arise."\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{30} Irving Trust Co. v. A.W. Perry, Inc., 293 U.S. 296 (1934).
\item \textsuperscript{31} William Filene's Sons Co. v. Weed, 245 U.S. 597 (1918).
\item \textsuperscript{32} \textit{Id.} at 601.
\item \textsuperscript{33} \textit{Id.} at 602.
\item \textsuperscript{34} Gardiner v. William S. Butler & Co., 245 U.S. 603 (1918).
\item \textsuperscript{35} Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320 (1934).
\item \textsuperscript{36} \textit{Id.} at 336.
\item \textsuperscript{37} \textit{Id.} at 338.
\item \textsuperscript{38} Miller v. Irving Trust Co., 296 U.S. 256, 258 (1935).
\end{itemize}
The consequences for parties whose leases did not contain appropriate clauses were unsettling. If the claim was not provable the lessor took nothing from the bankrupt estate. But if the claim was not provable, it was also for that reason nondischargeable. These results were disturbing to noncorporate bankrupt lessees who remained liable for future rent and to the lessors of corporate bankrupt tenants who could look forward to realizing little on their undischarged claims against the corporate shells.

B. Congressional Treatment of Executory Contracts

Congress began to rectify the situation in 1933 with the enactment of §77 of the Act, providing a statutory procedure for the reorganization of interstate railroads, theretofore accomplished by means of equity receivership. Two years later, §77 was extensively revised. That section contemplates that executory contracts, including unexpired leases, may be rejected either by the trustee in reorganization or by the terms of the plan of reorganization. It further provides that, in either event, "any person injured" by the rejection shall be "deemed to be a creditor . . . to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings." Section 77B, added in 1934 to provide for the reorganization of other corporations, followed a similar pattern, as did its 1938 successor, Chapter X. Chapters XI, XII and XIII, also enacted in 1938, continued this pattern.

These provisions, of course, did not touch the problem in a straight bankruptcy case. Congress approached this matter in 1934 by enacting §63a(7) to provide for proof of "claims for damages respecting executory contracts including future rents." In the general Chandler Act revision of 1938, this provision became §63a(9) authorizing proof of "claims for anticipatory breach of contracts, executory in whole or in part, including un-

41. Section 74, added by 47 Stat. 1467 (1933) to authorize compositions and extensions of secured and unsecured debts for noncorporate debtors (and destined to be replaced in 1938 with Chapters XI, XII and XIII), dealt with the matter much more simply. It merely included in §74a among the other claims that could be dealt with, "whether or not such claims would otherwise constitute provable claims under this Act," a "claim for future rent."
42. 48 Stat. 911 (1934).
43. 48 Stat. 924, 991 (1934).
44. 52 Stat. 873 (1938).
expired leases of real or personal property.\textsuperscript{45} The Chandler Act also contributed two new provisions bearing on the problem. One provision added § 63a and was designed to reconcile the notion of post-petition rejection giving rise to a provable claim with the notion that only claims in existence at the time the petition is filed are provable.\textsuperscript{46} That section, as later amended, provides that \textquotedblleft[n]otwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition initiating a proceeding under this Act.\textsuperscript{47}

The other provision added a new § 70b. As later amended, it reads in part:

The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected.\textsuperscript{48}

\textsuperscript{45} In both versions, in language not significantly changed in 1938, this provision made clear that there was continued latitude for the lease draftsman by providing \textquoteleft[[t]hat the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved ... for the year next succeeding the date" when the landlord recovered possession, \textquoteleftplus an amount equal to the unpaid rent accrued, without acceleration, up to such date." 52 Stat. 873 (1938).

\textsuperscript{46} \textit{See} text accompanying note 19 \textit{supra}. As I have argued elsewhere, reconciliation is necessary only because the requirement that a claim must be \textit{in existence} when the petition is filed is confused with a nonrequirement that the claim be \textit{matured} at that time. Countryman, \textit{The Use of State Law in Bankruptcy Cases (Part I)}, 47 N.Y.U.L. Rev. 407, 413 (1972).

\textsuperscript{47} 52 Stat. 873 (1938); 66 Stat. 426 (1952). Before the 1952 amendment, this section provided that rejection should constitute a breach \textquoteleft\textquoteleftas of the date of the filing of the petition in bankruptcy, or of the original petition under chapter X, XI, XII, or XIII of this Act.'

\textsuperscript{48} 52 Stat. 880 (1938); 76 Stat. 571 (1962). Prior to the 1962 amendment the first sentence of § 70b read: \textquoteleft\textquoteleftWithin sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: \textit{Provided, however, That the court may for cause shown extend or reduce such period of time.}'

The Supreme Court has provided in Bankruptcy General Order 15, 28 U.S.C., that the bankruptcy court may order that no trustee need be appointed if the schedule of a voluntary bankrupt discloses no assets and if no creditor appears at the first meeting. In that event, § 70b provides that \textquoteleft\textquoteleftany such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed.' The originators of this proposal explained
Thus all of the provisions added to the Bankruptcy Act since 1933 have one characteristic in common—they deal only with executory contracts, including unexpired leases. With one minor exception,\textsuperscript{49} the Act contains no provisions dealing expressly with the abandonment of other property. That is left to court-created doctrine. Our concern here, however, is not with such other property or with unexpired leases,\textsuperscript{50} but with other executory contracts. That it was “intended to protect the interests of the other party to the contract or lease.” “If... no trustee has been appointed within such period, it is only fair that the other party should know his rights and have the status of the executory contract or lease settled.” Analysis of H.R. 12889, House Judiciary Committee Print, 74th Cong., 2d Sess. 227 (1936).

\textsuperscript{49} In 1926, § 70a(2), which gives the trustee title to the bankrupt’s nonexempt patents, copyrights and trademarks, was amended to give him title to applications for these property rights, as well. But a proviso was added which, as slightly revised in 1938, reads:

That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records.

\textsuperscript{50} Most of the learning with respect to leases relates to real property leases. Save for patent license agreements involving use of patented items to be considered later, the cases dealing with leases of personalty can be summed up in a footnote. A few older cases held that the lessor had no provable claim for future rents in a straight bankruptcy proceeding where he had repossessed the property because of the lessee’s prebankruptcy default. In re Miller Bros. Grocery Co., 219 F. 851 (6th Cir. 1915); In re Merwin & Willoughby Co., 206 F. 116 (N.D.N.Y. 1913). Other cases came to the same conclusion where the lessor had repossessed under a provision of the lease entitling him to do so in the event of the lessee’s bankruptcy. Lamson Consol. Store Service Co. v. Bowland, 114 F. 639 (6th Cir. 1902); In re Quaker Drug Co., 204 F. 689 (W.D. Wash. 1913). They are all based on interpretations of the leases but are obviously influenced by analogy to the real property lease where future rents “issue from the land” and are not collectible unless the lessee has had the use of the land. See text accompanying note 32 supra. The Sixth Circuit, however, later rejected the real property analogy in a receivership case where the lessor had repossessed under a provision of the lease entitling him to do so on the insolventcy of the lessee and allowed proof of claims for loss of future rents under a liquidated damages clause. Lamson Co. v. Elliott-Taylor-Wolfenden Co., 25 F.2d 4 (6th Cir. 1928). Cf. In re Gelino’s, Inc., 43 F.2d 832 (E.D. Ill. 1930), appeal dismissed, 51 F.2d 875 (7th Cir. 1931), cert. denied, 284 U.S. 659 (1931). Electrical Prod. Consol. v. Sweet,
tory contracts. This brings us to a threshold inquiry: what is an executory contract, other than unexpired lease, which may be assumed or rejected in bankruptcy proceedings?

II. WHAT IS AN EXECUTORY CONTRACT?

As Professor Williston has said, "All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." But that expansive meaning can hardly be given to the term as used in the Bankruptcy Act or even to the Act's occasional alternative reference to contracts "executory in whole or in part." The concept of the "executory contract" in bankruptcy should be defined in the light of the purpose for which the trustee is given the option to assume or reject. Similar to his general power to abandon or accept other property, this is an option to be exercised when it will benefit the estate. A more recent case, American A. & B. Coal Corp. v. Leonardo Arrambide, S.A., 280 F.2d 119, 125 (2d Cir. 1960), held that where a debtor in possession under Chapter XI rejects ship charters, which the court treated as leases of personal property, the shipowners were not entitled to first priority claims for administration expense for demurrage accruing after the filing of the petition and before rejection, where the debtor in possession made no use of, and the estate did not benefit from, the vessels. See also In re Rochester Shipbuilding Corp., 32 F. Supp. 98 (W.D.N.Y. 1940), authorizing a bankruptcy trustee of a shipowner to reject a charter despite the fact that the charterer had guaranteed payment of a ship mortgage and had the right to apply charter hire payments to the mortgage debt. But the charters involved in both of these cases were apparently time charters, which are "contracts for the carriage of goods designated by one person in the ship of another person, who himself remains in control of the navigation of the vessel," unlike a demise or bareboat charter which "shifts the possession and control of the vessel from one person to another, just as the shoreside lease of real property shifts many of the incidents of ownership from lessor to lessee." G. Gilmore & C. Black, THE LAW OF ADMIRALTY 215 (1957).

51. 1 S. WILLISTON, CONTRACTS § 14 (3d ed. 1957), quoted in 3A W. COLLIER, BANKRUPTCY §§ 63c, 70b, 77b (twice), 106(7), 116(1), 202, 216(4), 238b, 238c, 306(4), 313(1), 324(1) (twice), 353, 355(2), 357(2), 376, 378(c), 406(4), 413(1), 424(1) (twice), 458, 461(4), 481, 483(c), 606(5), 613(1), 624(1), 642, 646(6), 666.

52. Bankruptcy Act §§ 63c, 70b, 77b (twice), 106(7), 116(1), 202, 216(4), 238b, 238c, 306(4), 313(1), 324(1) (twice), 353, 355(2), 357(2), 376, 378(c), 406(4), 413(1), 424(1) (twice), 458, 461(4), 481, 483(c), 606(5), 613(1), 624(1), 642, 646(6), 666.

53. Id. §§ 63a(9), 70b, 77b (twice), 238a(3), 238b, 378(n)(3), 378(b), 483a(3), 483(b).
fortiori, it should not extend to situations where the only effect of its exercise would be to prejudice other creditors of the estate.

A. CONTRACTS PERFORMED BY THE NONBANKRUPT

Executory contracts, in the sense in which Professor Wills-
ton spoke, abound in a bankruptcy proceeding. One example is the contract under which the nonbankrupt party has fully ren-
dered the performance to which the bankrupt is entitled, but which the bankrupt has performed only partially or not at all. Such a contract will give the nonbankrupt party a provable claim in the bankruptcy proceeding, whether it is liquidated or un-
liquidated and whether it is absolute or contingent as to lia-

ability. The trustee's option to assume or reject should not ex-
tend to such contracts. The estate has whatever benefit it can ob-
tain from the other party's performance and the trustee's rejection would neither add to nor detract from the creditor's claim or the estate's liability.57 His assumption, on the other hand,

54. By contrast, a "pure tort" claim is not provable, Schall v.
Comers, 251 U.S. 239 (1920), unless reduced to judgment before bank-
ruptcy so as to be provable under § 63a(1) as a "fixed liability, as evidenced by a judgment," or unless it constitutes a "right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy" so as to be provable under § 63a(7). But a tort claim is provable if the claim is of such a nature that the claimant could prove by "waiving the tort and standing upon the implied assumpsit," even though he fails to do so. Davis v. Aetna Acceptance Corp., 293 U.S. 328, 331 (1934) (claim of sec-
cured creditor for conversion of collateral); Tindle v. Birkett, 205 U.S.
183 (1907) (claim of unpaid seller of goods that he was induced by fraud to make the sale); Crawford v. Burke, 195 U.S. 176 (1904) (claim by customer for conversion of securities pledged with stockbroker).

55. In Frederic L. Grant Shoe Co. v. W.M. Laird Co., 212 U.S. 445
(1909), an individual with an unliquidated claim for breach of warranty on the sale of goods was held to qualify as a petitioning creditor under § 59b, which then authorized involuntary petitions by creditors with provable claims of $500 or more where the claim was liquidated at more than that amount in the debtor's contest of the petition and prior to his adjudication thereon.

56. Even before the 1938 enactment of § 63a(8), providing for the proof of "contingent contractual liabilities," a surety's claim on a con-
tract of indemnity with his principal was held provable where the principal had defaulted on the underlying obligation before his bankruptcy although the surety did not pay the resulting damages until after bank-
ruptcy. Williams v. United States Fidelity & Guar. Co., 236 U.S. 549
(1915). So was the liability of an indorser on notes not due at the time of the indorser's bankruptcy. Maynard v. Elliott, 283 U.S. 273 (1931). See also Brown v. O'Keefe, 300 U.S. 598 (1937), discussed in text accom-
pанинг note 17 supra.

57. It would not affect the allowability of an "unliquidated or con-
tingent claim," which under § 57d is not to be allowed "unless liqui-
would in no way benefit the estate and would only have the effect of converting the claim into a first priority expense of administration and thus of preferring it over all claims not assumed—a prerogative which the Bankruptcy Act has never been supposed to have vested in either the trustee or the court.

The cases finding that the nonbankrupt party has fully performed, as far as they go, support this conclusion. A series of decisions in the Second Circuit hold that the trustee of one who has guaranteed the obligation of or become a surety for a lessee of real estate cannot reject his debtor’s obligation after the lessee’s default. As that court analyzed the problem:

In so far as [the contract of suretyship] was an executory contract it was an unilateral obligation to perform the same obligations the lessee had agreed to perform. In all other respects it was not executory at all but had been performed. Consequently, when the attempted rejection of it was made there was nothing for the surety in reorganization to reject. What it did was simply a way of asserting a continued refusal to perform by one already in default. Nothing was thereby changed and no new rights arose. It is implicit in the language of the statute that a rejection of an executory contract involves the relinquishment of some right thought too burdensome to be retained and not merely the repudiation of an obligation which could in no circumstances ever be an asset to the debtor.

The situation for which the statute provides is one in which, in making a determination whether or not to reject, the advantages of giving and receiving further performance are to be weighed against the disadvantages. A guarantor of a lease has no interest in the lessor’s future performance. Such an agreement of guar-
anty is not in itself any part of a bargain for future performance. Rather than having any interest in the lessor's performance, the guarantor's interest would be better served by non-performance, since in that event the guarantor would be released from the obligation which he has undertaken. The agreement of guaranty is therefore not an executory contract. The guarantor, by the lessor's execution of the lease, has received all of the consideration for which he bargained with the lessor. The contract between them is executed except for the guarantor's obligation to pay upon default of the lessee. By his "rejection" the guarantor would be relinquishing no benefits; he would merely be repudiating his obligations. A guarantor is therefore no more entitled to reject his agreement of guaranty than would any bankrupt be entitled to "reject" his accrued debts. In my judgment, the court's approach constitutes an application of the right rule to the wrong case due to faulty analysis of the contractual relationship of lessor-creditor and surety. It may be correct to say that the surety or guarantor, "by the lessor's execution of the lease, has received all of the consideration for which he bargained with the lessor." But he also has a sufficient interest in the lessor's continuing obligations to the lessee so that, while the lessor's default would not give him a claim for damages, the lessor's material default would, as the court recognizes, release the surety or guarantor as well as the lessee. Therefore these are not contracts under which the lessor has yet rendered the full performance to which the bankrupt surety is entitled. These are contracts which the trustee of the surety might in some cases properly want to assume, depending on the surety's relationship to the lessee, and are contracts which he should in other cases be able to reject.

There will be some suretyship contracts under which the creditor has fully performed at the outset. That would be true of the surety on a single loan who receives all the performance he is interested in, not when the lender executes the loan agreement but when he makes the advance to the debtor. But in most, if not all cases, the relationship of surety and lessor is mutually executory for the term of the lease. The lessor's continuing obligations to lessee and surety may be several and it will be the rare lease, if indeed it is a lease, where he is relieved of the implied covenant of quiet enjoyment.

62. It would also be true of a continuing guaranty to the extent that the lender had made a series of loans. Only if he was contractually obligated to more additional advances in the future would the contract of the guarantor be executory.
63. 1 AMERICAN LAW OF PROPERTY § 3.47 (A.J. Casner ed. 1952). With even that covenant gone, it is far from clear that what remains is
Perhaps for this reason the Second Circuit's decisions in these cases have been ignored by other courts which have reached the same conclusion where the contract was fully performed by the nonbankrupt party. In re San Francisco Bay Exposition, although decided by a Chapter XI court, did not involve an interpretation of the Bankruptcy Act. However, its analysis is applicable to the Act. In that case, a state savings and loan association that owned and operated a hotel had, in order to aid the financing of the Exposition and in consideration of similar subscriptions by others, agreed in December, 1938, to pay the Exposition a percentage of all of its hotel rentals collected between March and October, 1939. The Exposition opened for business in February, 1939; the savings and loan association went into liquidation proceedings under a state commissioner on March 4, 1939, and the Exposition went into Chapter XI proceedings on October 20, 1939. Before the latter date the state commissioner, acting under a state statute authorizing him to “disaffirm any executory contracts (including leases) to which such association is a party, and disaffirm any partially executed contracts (including leases) to the extent that they remain executory,” had notified the Exposition that he disaffirmed the subscription contract. The Chapter XI court held that he had no power to do so and that the Exposition was entitled to collect from him the $6,519.04 due under the contract. After noting the similarity between the state statute and § 70b of the Bankruptcy Act, the court said:

The Referee [in bankruptcy] assumed that any contract not completely performed by either party is executory in the sense which gives rise to the right of disaffirmance. Upon that assumption he held that the Commissioner could disaffirm the subscription agreement, because even though the Exposition had performed, the Commissioner had not; ergo, the contract was executory and the Commissioner could disaffirm. In a literal sense, executory contracts are, of course, those wherein performance in whole or in part has not been had. . . . In the sense used in both the California statute and the Bankruptcy Act, they . . . are the type of contracts which call for performance in futuro, such as leases, contracts for electric power, light, heat, delivery of commodities, services and the like. Both by State and Federal Statutes, there is vested in trustees the power to decide whether the performance of such contracts is beneficial or burdensome. . . . Where, however, the contract has been fully performed by one party, giving rise to the obligation of payment upon the

---

64. 50 F. Supp. 344, 345-47 (N.D. Cal. 1943).
65. Id. at 347.
CONTRACTS IN BANKRUPTCY

part of the other, renouncement by the party having the obligation to pay, is equivalent to a breach. If [the savings and loan association] had borrowed $6,519.04 from a bank and executed its promissory note therefor, could it disaffirm, prior to maturity, on the ground that the contract was executory, being still unperformed by it? Granted the power to disaffirm, it amounts to a breach and gives rise to the right to recover damages on the part of the injured party; since the measure of damages for failure to pay money is equal to the amount that should have been paid, the right of disaffirmance is illusory. Prior to disaffirmance by the Commissioner, [the savings and loan association] had received the consideration it expected and the Exposition agreed to give.

... I conclude that this is not the type of executory contract, which is subject to disaffirmance under the statute. Even if disaffirmed, the obligation to pay the debt still persists.66

This decision was followed by In re Forney,67 where a mortgagee had agreed that the mortgagors could sell the mortgaged property free of the mortgage in return for the mortgagors' assignment, contained in the agreement, to the mortgagee of so much of the net proceeds of the sale as was necessary to pay the mortgage debt. After the sale the mortgagors went into bankruptcy. Their trustee took no action with respect to the contract within the time specified in § 70b68 and then argued that the contract should be deemed rejected. The court disposed of his argument stating:

Although the agreement for the sale was not fully performed at the time of adjudication in that the remaining proceeds had not been disbursed to the mortgagee, ... this is not the type of contractual situation to which [§ 70b] is applicable. The act necessary to give rise to the obligation to disburse the proceeds under the agreement, namely the sale of the property free of the mortgage, had been fully performed. Accordingly, the agreement was no longer an executory contract within the meaning of the statute but a partially executed contract, executory only as to the obligation to transfer the proceeds of the sale to the mortgagee. Cf. In re San Francisco Bay Exposition....69

Forney, in turn, was regarded as dispositive in Stell Manufacturing Co. v. Gilbert,70 where the seller of custom built furniture had received a down payment and had delivered and in-

66. Id. at 346-47 (citations omitted).
67. 299 F.2d 503, 507 (7th Cir. 1962).
68. Id. at 507.
69. See text accompanying note 64 supra.
70. 372 F.2d 113, 115 (5th Cir. 1967). See also In re Kosting, 350 F. Supp. 1071 (D. Conn. 1972), holding that the trustee of the seller of land could not assume a contract with a real estate broker, and thus convert his claim for a commission into a first priority administration expense, where the broker had fully performed by finding a buyer and obtaining a binder agreement executed before the seller's bankruptcy.
stalled the furniture before the bankruptcy of the buyer. The seller's attempt to reclaim the furniture from the bankruptcy trustee was unsuccessful. The finding below that title had passed to the buyer on delivery and acceptance of the goods was affirmed. The seller's further argument that the trustee must be deemed to have rejected the contract because he had not assumed it within the time limits fixed by § 70b received a short answer: "[T]he only thing that remained executory about this contract was the obligation to pay. Therefore, § 70(b) does not apply, In Re Forney . . . . Indeed, a sale of goods, title to which has passed to buyer, is not executory under Texas law . . . ."

It seems clear, therefore, that a contract which is executory only in the sense that it provides the fully performed nonbankrupt party with a claim against the bankrupt estate is not one which may be assumed or rejected. Section 70b and related provisions\(^7\) of the Act are not concerned with claims provable against the estate under § 63a but with assets of the bankrupt which pass to the trustee under § 70a.\(^7\) Of course, the nonbankrupt party who has fully performed may have provided an asset which comes into the bankrupt estate and which the trustee will have the option to abandon or accept, quite apart from the bankrupt's liability with respect to it. But if the trustee does accept the property, he accepts it cum onere, taking its burdens with its benefits, whether the burden be a liability imposed upon the

\(^{71}\) The last sentence quoted is followed by a citation to two Texas cases. One gives no support and the other holds that, where title to the goods has passed to the buyer, he becomes liable for the price whereas, under an "executory contract of sale" breached by the buyer, the seller's measure of damages is the difference between the contract price and the market value of the goods. The sentence and the citations are, in any event, irrelevant. What constitutes an "executory contract" within the meaning of the Bankruptcy Act is no more to be determined by how the state characterizes the contract for other purposes than is the meaning of "property" in § 70a(5) to be determined by state characterization for other purposes. See Chicago Bd. of Trade v. Johnson, 264 U.S. 1 (1924). See also Segal v. Rochelle, 382 U.S. 375 (1966), holding that whether property can be "transferred" under § 70a(5) is also a federal question.

\(^{72}\) See notes 52 & 53 supra.

\(^{73}\) The originators of § 70b were preoccupied with the problem of leases, although their proposal dealt with all executory contracts. They explained that their original thought was to include it "as a proviso in [§ 70a], for the reason that it involves the title of the trustee to the property interests of landlords or tenants who become bankrupt, but subdivision (b) follows immediately and the context is so close that the present arrangement is thought preferable because the provisions constitute largely an independent subject." ANALYSIS OF H.R. 12889, supra note 48, at 228.
owner by law solely by virtue of his ownership,\textsuperscript{74} a condition to full enjoyment imposed by a contract valid against the trustee,\textsuperscript{75} or a lien which the trustee cannot avoid.\textsuperscript{76} But the trustee's acceptance of such property should not amount to assumption of a contract of sale so as to elevate an unsecured obligation for the purchase price to the level of a first priority administration expense. Nor should his abandonment of the property, or even his mistaken attempt to reject the contract of sale, have any effect on a seller's unsecured claim for the price.\textsuperscript{77}

Of course, to speak of a contract under which the nonbankrupt party has "fully performed" is to draw an extremely fine line, one which would include among the executory contracts which the trustee can accept or reject some which should be excluded. What of the nonbankrupt building contractor who has fully performed save that he has failed to connect the water or has made a defective connection? Such a failure, even if not cured, would entitle the bankrupt to damages but would not be sufficiently material to permit him to refuse to accept the building or to excuse his performance.\textsuperscript{78} The trustee's rejection of such a contract would neither add to nor detract from the estate's benefits or its liabilities; his assumption of it, which likewise would not benefit the estate, should therefore not convert the contractor's claim into a first priority administration expense. Hence, a contract so nearly performed by the nonbankrupt party that failure to complete performance would not be sufficiently material to excuse performance by the bankrupt should not be


\textsuperscript{75} Chicago Bd. of Trade v. Johnson, 264 U.S. 1 (1924), where the bankruptcy trustee established his title under § 70a to an exchange seat worth $10,500, but was told that he held it subject to an exchange rule that forbade transfer until the bankrupt's $60,000 in debts to other members of the exchange were paid. See also Hyde v. Woods, 94 U.S. 523 (1873), discussed in text accompanying note 12 supra.

\textsuperscript{76} Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603 (1961); York Mfg. Co. v. Cassell, 201 U.S. 344 (1906). The fact that the subsequent enactment of what is now § 70c would today enable the bankruptcy trustee to avoid the unfiled conditional sales contract involved in York v. Cassell in no way alters the underlying principle, as the trustee in Lewis v. Manufacturers Nat'l Bank discovered when his attempt to invoke § 70c failed.

\textsuperscript{77} Cf. Gerber & Co. v. First Nat'l Bank, 110 Conn. 583, 148 A. 669 (1930), where it was assumed that a bankruptcy trustee of a buyer of goods could adopt or reject the contract of sale which had been fully performed by the seller.

\textsuperscript{78} 4 A. CORBIN, CONTRACTS §§ 945-46 (1951); 6 A. CORBIN, CONTRACTS §§ 1253-54; RESTATEMENT OF CONTRACTS §§ 274-76 (1932).
treated as an executory contract in bankruptcy. 79

B. CONTRACTS PERFORMED BY THE BANKRUPT

Another example of a contract executory in the Willistonian sense which should not be treated as an executory contract within the meaning of the Bankruptcy Act is a contract which the bankrupt has fully performed, but which the nonbankrupt party has performed only partially or not at all. 80 The bankrupt's claim to further performance under such a contract obviously is an asset which in most instances will pass to the trustee under § 70a(5) or (6). 81 It is fairly obvious from the terms of the Act alone that

79. The version of the "perfect tender" rule of the Uniform Commercial Code for contracts for the sale of goods presents some complications. Under § 2-601, if "the goods or the tender of delivery fail in any respect to conform to the contract," the buyer is given an option to accept or reject the goods and, under § 2-711, may cancel the contract. Rejection must be made within a reasonable time after tender (§ 2-602) and, if not made within that time and after an opportunity to inspect the goods, constitutes an acceptance (§ 2-606). The buyer may have a damage claim whether he accepts (§ 2-714) or rejects (§§ 2-711, 2-712, 2-713). If acceptance or rejection has occurred before the bankruptcy of the buyer, that should conclude the matter. The buyer's bankruptcy trustee should be confined to a claim for damages, subject to the seller's right to cure the defective tender under UCC § 2-508. If neither has occurred before the buyer's bankruptcy, the reasonable time allowed by the Code for election should include the time necessary to select a trustee and to allow him to inform himself and make the election. But if the nonconformity is not material, the contract should not be treated as an executory contract within the meaning of the Bankruptcy Act, i.e., the trustee's rejection of the goods should not be treated as a rejection of such a contract and a breach of it under § 63c, and the seller should still have the opportunity to cure the defective tender under § 2-508. Similarly, the trustee's acceptance of the goods should not be treated as an acceptance of the contract so as to convert the obligation for the price into an administration expense.

The Code seems to recognize something approximating the doctrine of material breach only as a basis for revocation of acceptance of goods (§ 2-608) or for rejection of nonconforming tenders under installment contracts (§ 2-612).

80. This conclusion finds some slight support in In re H.K. Porter Co., 24 F. Supp. 766, 767 (W.D. Pa. 1938), where a debtor in possession under § 77B was held not entitled to reject an assignment of rents on its mortgaged property, which it had earlier made in return for the mortgagee's abstaining from foreclosure after default, because "[s]o far as the debtor is concerned, it is an executed contract."

81. Section 70a(5) gives the trustee title to all the bankrupt's nonexempt "rights of action arising upon contracts." The 1938 amendment of § 70a(5) which gave the trustee title to all nonexempt "property, including rights of action," (emphasis added) which the bankrupt can transfer or his creditors can reach by legal process (see note 15 supra), was apparently designed to reach noncontractual rights of action not covered by § 70a(6). See 4A W. Collier, Bankruptcy ¶ 70.28(1) (14th
such claims in favor of the bankrupt were not viewed as executory contracts. Obviously, the trustee's assumption of the underlying contract would add nothing to his title to the claim. And it would make no sense to say, as § 63c does of executory contracts, that the trustee's rejection of a contract fully performed by the bankrupt "shall constitute a breach of such contract." Nor could the other contracting party, who has received full performance from the debtor, have much of a claim under provisions in the chapters providing that upon rejection of an executory contract any person injured by the rejection shall be deemed a creditor.82

Since the bankrupt's claim against the other party is an asset which will pass to the trustee, it is one which the trustee can accept or abandon just as he can accept or abandon noncontractual claims. But his acceptance of the asset merely leaves the other party's liability where § 70a of the Act has already transferred it, while his abandonment of it merely leaves the other party liable to the bankrupt as he was before bankruptcy.

Indeed, this is the manner in which the Act and the courts have treated such contracts when questions have arisen as to the treatment of actions on them which the bankrupt had pending at bankruptcy. Section 11c of the Act provides that the trustee may, with approval of the court, prosecute any suit commenced by the bankrupt prior to adjudication. This section has been construed by the courts, which follow the statute in making no distinction between suits based on contract and others, as meaning that the trustee has three choices: (1) he may take over the bankrupt's suit; (2) he may allow the bankrupt to continue it for the benefit of the estate; or (3) he may abandon the claim to the bankrupt.83

Here again, the concept of a nonexecutory contract should accommodate the contract so nearly performed by the bankrupt that his failure to complete performance would not constitute a material breach which would excuse performance by the non-bankrupt party. Rejection of such a contract by the trustee should not be treated as a material breach excusing the other party's performance. Nor should the trustee's assumption of such a contract require either that performance of the bankrupt's obligation be completed at the expense of the estate or that the non-bankrupt party's damage claim be elevated to a first priority expense of administration.

C. CONTRACTS UNPERFORMED ON BOTH SIDES

Thus, by a process similar to one method of sculpting an elephant, we approach a definition of executory contract within the meaning of the Bankruptcy Act: a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

84. Again, the "perfect tender" rule of the Uniform Commercial Code presents soluble complications where the seller has become bankrupt. See note 79 supra. If the buyer has either accepted or rejected the goods before bankruptcy, that should conclude the matter, subject to the seller's right to cure the defective tender under UCC § 2-508, and leave the buyer with a provable claim in bankruptcy. If the buyer has not made his election before the bankruptcy of the seller, he may do so afterwards with similar results. The trustee may act to assume or reject the contract before the nonbankrupt buyer makes his election. But if the nonconformity of the tender is not material, the contract should not be treated as executory, the trustee's rejection should not deprive the buyer of his election, and the trustee's assumption should not elevate the buyer's damage claim to a first priority administration expense.

85. Obtain a large piece of stone. Take hammer and chisel and knock off everything that doesn't look like an elephant.

86. To avoid further complication of an already complex subject, this article speaks generally of two-party contracts. But its analysis will apply to multiparty contracts as well, so long as the "other party to the contract" is limited to one from whom some performance is owing to the bankrupt. Thus, if A and B in a single contract each undertakes to sell a given quantity of goods to C and at C's bankruptcy A has performed but B has not, and C has paid neither, the contract is not execu-
Such a contract, similar to the contract under which the other party has fully performed but the bankrupt has not, represents a claim against the estate. But here that claim may be reduced or totally eliminated if the trustee rejects the contract, because the other party is required to mitigate damages by an amount approximating the value of the performance he is spared by the trustee's rejection. In addition, such a contract, like the one under which the bankrupt has fully performed but the other party has not, represents an asset of the estate to the extent that it carries the unperformed obligation of the other party. But if the trustee elects to assume the contract, as when he accepts other assets to which he takes the title of the bankrupt under § 70a, he takes it cum onere and must render that performance which the bankrupt had contracted to perform as a condition to receiving the benefits of the contract. Whether in a given case the trustee will assume or reject depends, presumably, on his comparative appraisal of the value of the remaining performance by the other party and the cost to the estate of the unperformed obligation of the bankrupt, although the Act is silent on that point. 87

Consistent with this analysis, although often without any extensive analysis of their own, the courts have treated a variety of contracts as executory contracts under the Act where the obligations of both the bankrupt and the other contracting party remained at least partially and materially unperformed at bankruptcy. The cases include a contract by which the bankrupt undertook to perform construction work against progress payment as to A, but is executory as to B. If C is joined in bankruptcy by D, who had guaranteed payment of the purchase price, D's contract is also not executory as to A, but is executory as to B.

87. Creedon & Zinman, Landlord's Bankruptcy: Laissez Les Laissees, 26 Bus. Law. 1391, 1393-97 (1971), argue, in heavy reliance on the equity receivership case of American Brake Shoe & Foundry Co. v. New York Rys., 278 F. 842 (S.D.N.Y. 1922), that the trustee has no right to reject a lease unless he demonstrates that the lease is "burdensome" in the sense either that it cannot be performed by the trustee or that performance by him would be unprofitable to the estate. But they overlook the decision in Group of Institutional Investors v. Chicago, Mil., St. P. & Pac. R.R., 318 U.S. 523, 549, 550 (1943), where the Court said of a similar contention, "The argument ... that only burdensome leases may be rejected is based on certain statements of ours that burdensome leases may be rejected ... and on cases like American Brake Shoe & Foundry Co. v. New York Rys. Co. ... ." The Court went on in that case to sustain the rejection of a lease in the § 77 reorganization plan of the lessee, despite a showing that the lessee could operate profitably under it, on the ground that "the question whether a lease should be rejected ... is one of business judgment." Cf. Shanker, The Treatment of Executory Contracts & Leases in Bankruptcy Chapter X & XI Proceedings, 16 Pac. Law., April, 1972, at 21-22.
ments,\textsuperscript{88} a contract to grant a concession to sell refreshments in the debtor’s motion picture theatres in return for a percentage of gross sales,\textsuperscript{89} a contract to sell the bankrupts’ business under the terms of which the buyer remained liable for a part of the purchase price and the bankrupts remained obligated to pay certain accounts payable, to advise and consult with the buyers, and not to enter a competing business,\textsuperscript{90} and a joint venture agreement for construction of a shopping center under which the bankrupt was to provide the money and the other party the services.\textsuperscript{91} They even include a contract by which the debtor retained an attorney to represent it in Chapter XI proceedings.\textsuperscript{92}

This is not to say that all of the cases are consistent with this analysis or with each other. With respect to a number of types of contracts recurring in bankruptcy contexts, there are sometimes irreconcilable results. Here again the results seem frequently to be arrived at without any analysis. The inconsistencies would have been avoided under the analysis proposed above.

\textsuperscript{88} Stauduhar v. Limbach Co., 308 F. Supp. 696, 699 (E.D. Wis. 1970). But in this case the court seems to have overlooked the significance of the bankruptcy trustee’s power to avoid prebankruptcy transfers as well as to reject executory contracts. The trustee of the bankrupt contractor had rejected the contract and the bankrupt’s surety had settled with the other contracting party for completion of the work. The dispute was over progress payments earned by the contractor’s prebankruptcy performance, which were claimed by both the surety under the contractor’s prebankruptcy assignment to it of all sums due under the contract in the event of default and by an assignee from the trustee. Although the surety had not filed a financing statement covering its assignment, the court could not see how this fact would “create any liability” of the other contracting party to the trustee’s assignee, even though failure to file meant the assignment to the surety was unperfected against levying creditors under § 9-301(1)(b) of the Uniform Commercial Code and hence against the contractor’s bankruptcy trustee under § 70c.


\textsuperscript{90} Wagstaff v. Peters, 203 Kan. 108, 453 P. 120 (1969). Cf. In re Michigan Express, Inc., 339 F. Supp. 266 (W.D. Mich. 1972), holding that, where the bankrupt had purchased a business under a contract obligating him to pay the seller for consulting services for the next five years and went into bankruptcy two years later, the contract was not executory because no actual consulting services by the seller were contemplated and the arrangement was merely a device to spread over a five-year period a part of the purchase price for the business already transferred.

\textsuperscript{91} Workman v. Harrison, 282 F.2d 693 (10th Cir. 1960).

\textsuperscript{92} In re Mona Shops, Inc., 106 F. Supp. 471 (S.D.N.Y. 1952), holding that the contract was properly subjected to review by the referee because the attorney had failed to advise the debtor of his option to assume or reject it.
1. **Land Contracts**

   a. **Before Statutory Treatment of Executory Contracts**

   Prior to the 1930 amendments to the Bankruptcy Act dealing with executory contracts, a number of cases arose concerning the rights of parties to contracts for the sale of land. In these cases, the full contract price had not been paid by the buyer, and title had not been conveyed by the seller, at the time of bankruptcy of either buyer or seller. The disposition of these cases lends support to the proposed analysis.

   One such case involved a vendee who was not in default at his bankruptcy and a vendor who failed in his attempt to prove that he was induced to enter the contract by fraud. The vendee's trustee was allowed to assume the contract and sell the land. In a later case, a vendee was in default before his bankruptcy but the vendor waived the breach and tendered a warranty deed after bankruptcy. The vendor was not permitted to prove a claim for the full balance of the price because, at the time of the bankruptcy of the vendee, the vendor had not yet discharged a prior mortgage on the property and could not convey good title. However, in this case the mortgage had been discharged after the vendee's bankruptcy, and the vendor had a possible claim for the vendee's use and occupancy of the land. The court therefore suggested that the trustee of the vendee should consider whether the interests of the estate would be best served if he waived the vendor's default and assumed the contract.

   Similar reasoning applied where, prior to the vendor's bankruptcy, the vendee had defaulted under a one-payment contract, but the vendor had waived the breach and placed an executed deed in escrow for delivery to the vendee on payment of the purchase price. The vendee's trustee was held entitled to assume and

---

94. *Burns Mortgage Co. v. Bond Realty Corp.*, 47 F.2d 985 (5th Cir. 1931). But where prior to the vendee's bankruptcy the vendor had initiated a repossession action in state court because of the vendee's default, obtained judgment and possession, and the 30-day redemption period had expired before a trustee was elected, the trustee was held not entitled to recover the land. *In re Winter*, 17 F.2d 153 (E.D. Mich. 1927). And where the vendor under a contract to convey land in return for services defaulted under a trust deed on the property and the trustee under the deed sold the property after the vendee had fully performed and before the vendor's bankruptcy, the vendee was held to have a provable claim for damages for anticipatory breach. *In re Beverlyridge Co.*, 35 F.2d 818 (9th Cir. 1929).
enforce the contract on payment of the purchase price with interest from the due date.\textsuperscript{95} But where the vendee was in default on the first four installments under his contract at the time of his bankruptcy, the vendor, who was not required “to treat nonpayment of an installment . . . as a total breach of the contract, even if he might so treat it,” was held to have a provable claim for damages for breach of contract.\textsuperscript{96} Damages were measured by the difference between the present value of all installments and the value of the land at the closing date. In another case where the vendee in possession had not defaulted prior to his bankruptcy but a default in an installment payment occurred thereafter, the vendor was allowed to exercise his contractual option to terminate for default and to retake the land.\textsuperscript{97}

However, where the vendee had contracted to buy, taken possession of, and fully paid for the land under an oral contract, all of which occurred prior to the vendor’s bankruptcy, the vendee was held entitled to a decree of specific performance against the vendor’s trustee. The trustee took no better title under § 70a than the vendor held at his bankruptcy. While it was recognized that the vendee’s rights under her oral contract might be subject to those of levying creditors, the trustee of the vendor, under the 1910 version of the § 47a(2)\textsuperscript{98} “strong arm” clause, had that status only with respect to property coming into the possession of the bankruptcy court; as to the property in the possession of the vendee, he stood in the position of a judgment creditor with an execution returned unsatisfied.\textsuperscript{99}

Perhaps the most complicated of the early cases involved a vendor who had gone into equity receivership and a vendee na-

\textsuperscript{95} Mound Mines Co. v. Hawthorne, 173 F. 882 (8th Cir. 1909).
\textsuperscript{96} In re Marshall’s Garage, 63 F.2d 759, 761 (2d Cir. 1933). Cf. Kenyon v. Mulert, 184 F. 825 (3rd Cir. 1911), where the vendee had defaulted under his installment contract and the vendor had obtained a decree of specific performance before the vendee’s bankruptcy but later agreed with the bankruptcy trustee, with the approval of the court, to rescind the contract. The vendor was held to have no provable claim for the balance of the purchase price.
\textsuperscript{97} In re Dermer, 56 F.2d 223 (S.D. Cal. 1931).
\textsuperscript{98} 36 Stat. 838 (1910).
\textsuperscript{99} Clark v. Snelling, 205 F. 240 (1st Cir. 1913). Cf. Dunlop v. Baker, 239 F. 193 (4th Cir. 1916), where an individual holding a binding option to purchase real estate in the vendor’s possession at the time of the latter’s bankruptcy was held entitled to a decree of specific performance. The decree was based on the vendee’s offer to pay the option price and as much more as was necessary to pay all debts represented by the trustee’s status as an hypothetical levying creditor under § 47a(2).
tional bank that also went into liquidating receivership under the National Bank Act. The vendor's receiver assumed the contract but was held not entitled to a decree of specific performance against the receiver of the bank-vendee because the latter had the right to reject the contract and because specific performance would prefer the vendor's estate over other creditors of the vendee. Hence, the vendor's receiver was entitled only to a claim for damages. 100

b. Under the Statutory Concept of Executory Contracts

The cases decided since the 1930 amendments all involve contracts for the purchase of land under which the full price had not been paid and title had not been conveyed. They focus more precisely on the statutory concept of an executory contract than the earlier cases and, for the most part, support the proposed analysis. In In re New York Investors Mutual Group, Inc., 101 the vendee paid $15,000 and was to pay a $90,000 balance on closing, but the vendor went into bankruptcy before the closing date. The vendor's trustee was held to have rejected the contract by failing to act within the time specified in § 70b and thus to have defeated the vendee's right to specific performance. 102 Even though under applicable state law the doctrine of "equitable conversion" gave the vendee "equitable title," that title was subject to the trustee's power to reject the contract under § 70b. 103 The contract of sale had been recorded before bank-

100. National Bank v. Louisville Trust Co., 67 F.2d 97 (6th Cir. 1933), cert. denied, 291 U.S. 665 (1934). The court based its preference argument on Express Co. v. Railroad Co., 99 U.S. 191 (1878), discussed note 11 supra. Of course, a preference to the vendor would result if the receiver of the vendee elected to assume the contract since payment of the purchase price would then become an expense of administration. Presumably, however, the vendee's receiver should only assume the contract where he concludes that, despite the preference, other creditors would benefit because he could dispose of the land for more than he would have to pay. Where both parties are in receivership or bankruptcy, therefore, it is not surprising that one receiver or trustee would reject what the other would assume.


102. Although the closing date had passed without the discharge of a mortgage which would have prevented the vendor from conveying the title required by the contract, the time within which the vendor's trustee would have been deemed to have rejected the mortgage under § 70b had apparently expired before the closing date. Cf. Burns Mortgage Co. v. Bond Realty Corp., 47 F.2d 985 (5th Cir. 1931), discussed in text accompanying note 94 supra.

103. National Bank v. Louisville Trust Co., 67 F.2d 97 (6th Cir. 1933), cert. denied, 291 U.S. 665 (1934), discussed in text accompanying note 100 supra, reasoned in the opposite direction: since the power to
ruptcy, a precaution necessary only to protect the vendee against subsequent good faith purchasers and mortgagees taking through the vendor. The contract provided that the vendee should have a lien on the premises for the $15,000 it had paid. The effect of that provision on the trustee's ability to reject the contract without returning the amount paid was not decided because the new purchaser to whom the trustee had sold the property had agreed to pay that amount to the vendee.

In In re Philadelphia Penn Worsted Co., an assignee for the benefit of creditors sold the debtor's realty at auction for $25,000 and accepted a 15% deposit, the balance to be payable on closing. But within four months of the assignment, and before the assignee and the vendor agreed on a closing date, an involuntary petition in bankruptcy was filed against the debtor on the ground that the assignment constituted an act of bankruptcy. After adjudication, the bankruptcy trustee having received a better bid for the property, it was held proper for him to reject the original contract and to solicit further bids. As a consequence, the original vendee from the assignee had to bid $31,000 to retain the property. The contract was found to be executory under applicable state law. However, on the authority of New York Investors Mutual Group, Inc., the state doctrine of "equitable conversion" was held to be subject to the trustee's power to reject under § 70b. In response to the vendee's contention that the realty [and hence the assignee's contract to sell it?] was not property of the bankrupt, the court replied that § 70a(8) gives the trustee the "title of the bankrupt" to property held by an assignee for the benefit of creditors under an assignment which constituted an act of bankruptcy, and also provides that such property shall be deemed held by the assignee as agent of the bankrupt.

Reject precludes specific performance there is no "equitable conversion," that phenomenon being merely an incident of the right to specific performance. See also 3 American Law of Property § 11.22 (A.J. Casner ed. 1952).

105. 278 F.2d 661 (3d Cir. 1960).
106. As indicated in note 71 supra, the state courts' characterization of the contract seems irrelevant.
107. Although the court quoted the language reproduced in the text, it followed the time-honored custom of ignoring the question, what is the "title of the bankrupt" to property he has transferred to an assignee for the benefit of creditors. It also ignored the fact that § 2a(21) authorized it to require the assignee to "deliver" the land, the assignee's contract, and the 15% deposit (if still in the assignee's possession or under his control) to the bankruptcy trustee.
original 15% deposit on the payment due under his new contract with the bankruptcy trustee.

_Gulf Petroleum, S.A. v. Collazo_108 reached a similar conclusion with respect to a vendee who had paid the vendor two-thirds of the purchase price for land before the latter became a bankrupt. The failure of the vendor's trustee to act within the time specified in § 70b was held to constitute a rejection of the contract so that the trustee was free to sell the land to another. But here the contract of sale provided that the amounts paid by the vendee to the vendor should be held in escrow until the closing date and should be returned to the vendee if closing did not take place for any reason other than the vendee's default. The escrow provisions of the contract were viewed as a separate contract which the trustee could not reject since the vendee had fully performed. Hence, the vendor, and subsequently his bankruptcy trustee, held the money in trust. The vendee was therefore entitled to a recovery to the extent he could trace the funds. To the extent the money could not be traced, the vendee would have a general claim for it against the bankrupt estate in addition to his general claim for damages resulting from the trustee's rejection.109

Both the land contract and its escrow provisions were treated as executory in _In re Swindle._110 In that case, the vendor, prior to his bankruptcy, had received a down payment from the vendee and had placed a deed in escrow. The deed was to be delivered to the vendee on payment to the escrow agent of the

---

108. 316 F.2d 257 (1st Cir. 1963).
109. See also _In re Ross Dev. Co.,_ 98 F. Supp. 872 (E.D.N.Y. 1951), holding that vendees who had made down payments under land contracts with a vendor who was to construct homes on the property prior to his conveyances had provable claims for damages. In _Ross,_ the vendor was in default on some contracts prior to his bankruptcy and the bankruptcy trustee had rejected the others. In _In re Robertson,_ 41 F. Supp. 665 (W.D. Ark. 1941), a vendor, under a land contract calling for payment of the entire purchase price at closing, went into bankruptcy before closing. The trustee rejected the contract by failing to act within the time specified in § 70b. As a result, the vendee lost his damage claim for failure to file a proof of claim within the six-month period fixed by § 57n and the trustee resold the property. Cf. _In re Charles Nelson Co.,_ 27 F. Supp. 673 (N.D. Cal. 1939), holding that where the vendor deposited a deed in escrow and the vendee, after making some installment payments, filed for reorganization under § 77B, installment payments falling due before the trustee had elected to assume or reject the contract would not be ordered paid as first priority administration expenses where the estate had received no benefit from the property.
balance of the purchase price, from which sum the escrow agent was to pay off a prior unrecorded mortgage and to remit the balance to the vendor. After the vendor's bankruptcy, the vendee paid the balance of the price to the escrow agent. When the vendor's trustee then elected to assume the contract he was permitted to do so, but the mortgagee was held entitled to payment from the escrow funds—the trustee took the contract *cum onere*.

Nothing was said about the possible invalidity of the unrecorded mortgage against the trustee of the vendor-mortgagor who, pursuant to the strong-arm clause in § 70c, had the status of a hypothetical levying creditor as of the date of bankruptcy. Perhaps this was because the applicable recording statute protected only a subsequent bona fide purchaser who recorded first, although the state court had held out hope to both attaching creditors and bankruptcy trustees of the mortgagor that they might somehow qualify as such bona fide purchasers. Or perhaps the escrow provisions of the contract were viewed as imposing a trust on the escrow funds for the benefit of the mortgagee which was valid as against the trustee of the mortgagor without regard to the validity of the mortgage.

A final decision, *In re Mesa Steel Corp.*, is presented in an opinion which is as obscure in its statement of the facts as in its reasoning. Vendor, with record title to land subject to an unrecorded $40,000 mortgage, contracted to sell the property to Vendee #1 in return for shares of stock in Vendee #1 and the assumption by Vendee #1 of "all liens" on the property. Vendee #1 then contracted to sell the land to Vendee #2 for $60,000, payments to be made to an escrow agent. Vendee #1 thereafter unilaterally directed the escrow agent to pay the mortgage from escrow payments. After Vendee #2 had paid $42,000 into escrow, but before any payments were made on the mortgage, both Vendor and Vendee #1 went into bankruptcy (whether in the same or different courts does not appear). The trustee of Vendee #1 then obtained from the trustee of Vendor a deed which purported to convey the property free of the mortgage. The trustee of

---

114. A possible justification for this procedure may be founded on the theory that the unrecorded mortgage, being void as to "creditors and subsequent purchasers" under Ariz. Rev. Stat. Ann. § 33-412 (1956), was invalid as to vendor's trustee under § 70c. Whether the trustee had ever obtained a ruling to that effect does not appear.
Vendee #1 also elected to assume the contract with Vendee #2.

The court handling the bankruptcy of Vendee #1 held that the mortgagee was entitled to be paid from the escrow payments made by Vendee #2. The path to this conclusion, as nearly as it can be traced, runs as follows: Both contracts were executory, and the trustee of Vendee #1 had assumed them both. (Apparently he assumed the first by obtaining, and the trustee of Vendor assumed it by giving, a deed to the property.) Under applicable state law Vendor held his record title as security for the covenant of Vendee #1 to “assume and pay” the mortgage. This security interest of Vendor in the record legal title was good against the trustee of Vendee #1 despite his status as an hypothetical levying creditor under § 70c. (The effect of the deed executed by the trustee of Vendor was not discussed.) The mortgagee was subrogated (?) to Vendor’s security interest. Therefore (sic), the trustee of Vendee #1, having assumed both contracts, must perform the covenants of Vendee #1 under both115 and “stands as a conduit” for payment of the mortgagee from escrow funds.116

Save for the Mesa Steel Corp. case, which defies understanding on many points, the cases decided under the Bankruptcy Act’s provisions relating to executory contracts more or less explicitly employ the analysis proposed above. Certainly a contract under which the vendee still owes a material part of the purchase price and the vendor has not transferred title, and is not obligated to do so until that price is fully paid, is an executory contract. The fact that the vendee’s payments go to an escrow agent rather than to the vendor, whether or not the agent is to apply them for the vendor’s benefit prior to closing, does not seem to call for a different conclusion. The escrow agreement should not be treated as a “separate contract,” whether or not it is embodied in a separate document, in any case where ob-

115. Perhaps the theory is that the escrow agreement imposed a trust on the escrow funds for the benefit of the mortgagee which was valid against the trustee of Vendee #1 regardless of the validity or invalidity of the mortgage.

116. Without any explanation, the court also concluded that the mortgagee’s claim on the escrow funds was prior to a federal tax lien on those funds. It does not appear when the tax lien arose or whether or not it was filed. Both of the land contracts were made and both Vendor and Vendee #1 went into bankruptcy in 1961. Under Int. Rev. Code of 1954, § 6323 as it then was (68A Stat. 779 (1954)) the tax lien was subordinate to a mortgage prior in time and, until filed, to a subsequent mortgagee. W. Plumb & L. Wright, Federal Tax Liens 69 (2d ed. 1967).
ligations of the parties under that agreement and the balance of the bargain are mutually dependent. The fact that the vendor as a part of the bargain has executed and placed with the escrow agent the formal documents necessary to effect a transfer of title likewise should not alter the result where the vendee is not entitled to have the transfer effected until payments are completed. Hence, on bankruptcy of the vendee while the contract remains in this mutually executory condition, the vendee’s trustee can assume the contract, complete the payments as an expense of administration, and compel specific performance by the vendor. Alternatively, he can reject the contract and give the vendor a provable claim for damages. Whether the rejecting trustee also has a claim for return of payments made to the vendor or an escrow agent, or a security interest in the land for payments made, should depend on the terms of the contract and, if they provide for forfeiture of such payments, on their validity under applicable nonbankruptcy law.

Similarly, where the contract stands in this mutually executory condition on the bankruptcy of the vendor, his trustee can assume the contract, tender a transfer of title, and recover the unpaid balance of the purchase price. Or he can reject the contract and leave the vendee to prove a claim for damages.

117. 3A A. CORBIN, CONTRACTS § 696 (1960). Thus, the fact that the vendee has made all escrow payments required, as in Gulf Petroleum, S.A. v. Collazo, 316 F.2d 257 (1st Cir. 1963), discussed in text at note 108 supra, or that the vendor has placed all required documents in escrow, should not render the escrow agreement nonexecutory as long as other material requirements of the bargain between vendor and vendee are unperformed by each. This is not to say, however, that the escrow provisions of an executory contract may not have given an enforceable interest in identifiable escrow payments to the vendee, as in Gulf Petroleum, S.A. v. Collazo, to a third party, as in In re Swindle, 188 F. Supp. 601 (D. Ore. 1960), discussed in text at note 110 supra, or to the vendor.

118. But the question of entitlement to payments made by the vendee who ends in bankruptcy may arise even though the contract is not executory. Even where the contract is otherwise fully performed on both sides before the bankruptcy of the vendee, the vendor has no preferred claim to the balance of a part of the purchase price retained but not entirely needed by the vendee to discharge liens on the property where the vendor makes no showing that the retainage was held in trust or that the unused balance could be identified in the vendee’s bankrupt estate. American Service Co. v. Henderson, 120 F.2d 625 (4th Cir. 1941). Cf. Lathrop v. Specht, 186 Iowa 225, 172 N.W. 296 (1919), holding that when an assignee for the benefit of creditors rejects an executory contract to sell land he must return a down payment made by the vendee even though there was no showing that the amount paid was ever received by the assignee.
Whether the vendee has an enforceable interest in identifiable escrow payments,\textsuperscript{119} or a security interest in the land for payments made,\textsuperscript{120} would again depend on the terms of the agreement and their effectiveness under applicable nonbankruptcy law. But any such interest of the vendee in real estate not perfected against bona fide purchasers would be in jeopardy under § 60 and any interest in either the land or escrow payments not perfected against levying creditors could be defeated by the vendor's trustee under § 70c.\textsuperscript{121}

Thus, under this analysis, the vendee, on rejection by the bankruptcy trustee of the vendor, will lose the land. Unless he is well counseled and protected by draftsmanship in advance, he may also be left with only a provable general claim for damages.\textsuperscript{122} On the theory that this treatment of the vendee under an installment land contract is unfair as compared to the treatment of one who buys land under a purchase money mortgage, it has recently been argued that the courts should find for the vendee an "equitable lien" on the land for the amount he has paid or alternatively that § 70b should be amended to prohibit the trustee of the vendor from rejecting an executory contract for the sale of land under which the vendee is not in default.\textsuperscript{123} Whatever the future of these proposals may be,\textsuperscript{124} the assump-

\textsuperscript{119} See notes 117-18 supra.
\textsuperscript{120} See text accompanying note 104 supra.
\textsuperscript{121} I would also argue that if the vendee's interest was unperfected against a contractual or statutory lienor with a provable claim in the vendor's bankruptcy case, the trustee could defeat the interest under § 70e; but others would disagree. See Countryman, The Use of State Law in Bankruptcy Cases (Part II), 47 N.Y.U.L. Rev. 631, 657-661 (1972).
\textsuperscript{122} In another manifestation of the belief that the truth, if it will not make us free, will at least give us some protection against our own gullibility and the designs of others upon us, Congress in 1968 enacted the Interstate Land Sales Full Disclosure Act, 82 Stat. 590, 15 U.S.C. § 1701 \textit{et seq.} (1970). Regulations issued under that Act require developers using the mails or interstate commerce for the sale of subdivision lots to file with the Department of Housing and Urban Development and supply to the purchaser in advance of sale information which makes it "unmistakably clear" if "the buyer . . . is exposed to the risk of losing his investment in the event of the developer's failure or bankruptcy." 24 C.F.R. § 1710.110 (1972).
\textsuperscript{123} Levy, Bankruptcy and The Land Sale Contract, 23 Case W. Res. L. Rev. 393, 403-05, 409 (1972).
\textsuperscript{124} Recognition of an "equitable lien" would give the vendee a secured claim for the return of the amounts he had paid rather than an unsecured claim for damages. As recognized in part by Levy, id. at 405, and in full by Shanker, supra note 87, at 27-28, some amendment of § 60a(2) and (6) would apparently be necessary to accommodate the equitable lien. Forbidding the trustee to reject the contract would give the vendee the benefit of his bargain and would, in some cases, put
tion that the purchase money mortgagor of realty is in a better position seems correct. In the great bulk of such cases, where the credit is extended by a bank or other third-party lender who takes a mortgage from the vendee, the mortgagee-lender has performed its obligation when it makes payment to the vendor or otherwise advances the purchase money. Even in "title theory" jurisdictions, no formal conveyance of title from mortgagee to mortgagor is required if the mortgagor repays the debt at maturity. Hence the mortgage should not be viewed as an executory contract which the bankruptcy trustee of either the mortgagor or the mortgagee can reject.

In the rarer type of case, where the vendor of land is himself the purchase money mortgagee, including those cases where applicable nonbankruptcy law will treat the land sale contract as a mortgage, the situation seems no different. The vendor-mortgagee in either a title or lien theory state has fully performed when he has executed the deed and surrendered possession of the property. Ergo, his mortgage also should not be treated as an executory contract.

This analysis of the purchase money mortgage of realty, which is equally applicable to the nonpurchase money mortgage after the mortgagee has advanced all he is obligated to advance, has apparently appeared self-evident to the parties involved. There seems to be no recorded instance of attempted assumption or rejection by a receiver for or a trustee of either mortgagor or mortgagee.

the trustee of the vendor in the construction business. See In re Ross Dev. Co., 98 F. Supp. 872 (E.D.N.Y. 1951), discussed in note 109 supra. Aside from an assumption that vendees under land contracts are always consumers while all other creditors, including others whose executory contracts are rejected by the vendor's trustee, are "commercial creditors" who are better able to protect themselves, Levy, supra note 123, at 410-11, there is no attempt to justify the more favorable treatment of land contract vendees over other parties to executory contracts under either proposal. Silverstein, Rejection of Executory Contracts in Bankruptcy and Reorganization, 31 U. Chi. L. Rev. 467, 478 (1964), argues that because real property is unique the court should, in "cases of unusual hardship on the vendee, as where no comparable real estate is obtainable, . . . deny rejection on condition that the vendee agree to a higher purchase price." This seems but another way of saying that the trustee of the vendor can reject the contract and make a new one with the vendee at a higher price as was done in In re Philadelphia Penn Worsted Co., 278 F.2d 661 (3d Cir. 1960), discussed in text accompanying note 105 supra.

126. See Levy, supra note 123, at 405-07.
The resulting unfairness in the treatment of vendees under land contracts as compared with purchase money mortgagees is not, however, the inexorable product of a distinction between executory and nonexecutory contracts under the Bankruptcy Act. It is, rather, the result of unfair treatment imposed by state law. The trustee of a purchase money mortgagee being unable to reject the contract, the mortgagor is undisturbed by the mortgagee's bankruptcy although he may thereafter make his payments to someone else who buys the mortgage from the mortgagee's bankruptcy trustee. And in the event of the mortgagor's bankruptcy, his trustee is left with the mortgagor's right under state law to save his equity either by redeeming the property from the mortgage,\textsuperscript{127} selling the property subject to the mortgage,\textsuperscript{128} or claiming the equity from the proceeds of a liquidation of the property in the bankruptcy proceeding or at foreclosure sale.\textsuperscript{129} Or, if the mortgagor's equity has no value, his trustee may abandon the property.\textsuperscript{130}

On the other hand, when the vendor under a land contract becomes a bankrupt, rejection of the contract by his trustee may leave the vendee with only a provable general claim. And if the vendee becomes a bankrupt and his trustee finds it is not feasible to assume the contract and perforce rejects it, he will have no better rights than the vendee after default and may find that state law forfeits the payments already made. But this is only because the bankruptcy law now confines the vendee on the vendor's bankruptcy and the vendee's trustee on the vendee's bankruptcy to the vendee's rights under state law. It need not do so. It could be written to invalidate state-tolerated forfeiture provisions in private contracts.\textsuperscript{131}


\textsuperscript{128} In re Humeston, 83 F.2d 187 (2d Cir. 1936); In re Haywood Wagon Co., 219 F. 655 (2d Cir. 1914), cert. denied, 238 U.S. 625 (1915).


\textsuperscript{130} Federal Land Bank v. Nalder, 116 F.2d 1004 (10th Cir. 1941), cert. denied, 313 U.S. 578 (1941); Isaacs v. Hobbs Tie & Timber Co., 76 F.2d 209 (5th Cir. 1935), cert. denied, 295 U.S. 753 (1933); Bushong v. Theard, 37 F.2d 650 (5th Cir. 1930); In re Harrison, 179 F. 490 (8th Cir. 1910); In re Columbo, 271 F. Supp. 640 (W.D. Va. 1967); In re Yal- den, 109 F. Supp. 603 (D. Mass. 1953); In re Malcom, 48 F. Supp. 675 (E.D. Ill. 1943); In re Watts, 19 F.2d 528 (E.D. La. 1927).

\textsuperscript{131} Or, as I have suggested in another context, the equitable powers of the bankruptcy court could be invoked to invalidate unconscionable contract provisions. Countryman, \textit{The Use of State Law in Bankruptcy Cases (Part I)}, 47 N.Y.U.L. Rev. 407, 428-30 (1972).
2. Sales of Goods

In the land contract cases, the contracts are viewed as executory if the vendee has not paid the full price and the vendor has not conveyed the title, whether or not the vendor has surrendered possession to the vendee. The formalities essential to the transfer of title are a substantial part of the vendor's performance under the contract, as is his obligation to preserve, or at least to acquire by the closing date, record title of the sort required by the contract to be conveyed.132

But where the contract is for the sale of goods the emphasis shifts. Although we have an elaborate system for recording encumbrances on goods, we have no comparable system for recording title to them.133 Nor are any formalities essential to the passage of title (or of "property," as it was under the Uniform Sales Act). That impalpable event occurs when the parties intend that it shall occur. This was the rule of the common law134 and of the Uniform Sales Act135 and is now the rule of § 2-401 (2) of the Uniform Commercial Code. Physical delivery of the goods rather than transfer of title is the important aspect of the seller's performance. The latter may precede or follow the former, but presumably that is a matter to which the parties have already committed themselves, so that delivery is normally the seller's last act of performance. Indeed, as § 2-401 (2) of the Code now puts it, "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods," and any reservation of title by the seller thereafter "is limited in effect to a reservation of a security interest."136 Hence title must pass at or before delivery of the goods. An attempt to delay its

132. This is not to suggest that delivery of possession is not an important part of the vendor's obligation, but only that the transfer of title is of such importance that a vendor who has surrendered possession but has not transferred title has not performed all material parts of his obligation. The same would be true of a vendor who had transferred title but had not surrendered possession.

133. An exception is to be found in the Certificate of Title Acts of some states applicable to motor vehicles. See 1 Gilmore, Security Interests in Personal Property §§ 20.1-20.4 (1965). Although the case has not yet arisen, the importance of the certificate under some of these statutes may justify bankruptcy treatment of contracts for the sale of vehicles similar to the treatment of contracts for the sale of land.

134. 2 S. Williston, Sales § 261 (1948).


136. The Code draftsmen were so enamored of the last proposition that they stated it twice, once in § 1-201 (37) and again in § 2-401 (1).
passage beyond that time is ineffective for the purpose intended although it will reserve to the seller a security interest.

The Code goes even further in § 2-401: “Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title.” Save for a few such references, of no significance here.\textsuperscript{137} § 2-401 provides its rules for determining the passage of title only because some other non-Code “public regulation” depends upon location of title.\textsuperscript{138} Nothing in the Code’s disdain for the title concept suggests that bankruptcy courts should now give it more significance than they have in cases involving pre-Code sales of goods.

a. Before the Uniform Commercial Code

What those cases reveal is the treatment of contracts for the sale of goods as executory if some part of the goods remains undelivered and some part of the purchase price remains unpaid, without inquiry into the location of title. In only one case, where neither money nor goods had moved, was the matter of title even adverted to. “Assuming that the property had passed to the buyer, . . . the obligation to deliver the articles to the buyer continued” and the “contract was executory.”\textsuperscript{139}

Hence, where neither payment nor delivery has been completed, the trustee of the seller may reject the contract and leave the buyer with a provable claim for breach\textsuperscript{140} which the buyer may set off against his liability for the price of goods already delivered and accepted before bankruptcy.\textsuperscript{141} Alternatively, the trustee of the seller may assume and perform the contract and hold the buyer for the price,\textsuperscript{142} in which event the buyer is entitled to a credit for any part of the purchase price already paid\textsuperscript{143} or for defective goods returned to the seller before bankruptcy.\textsuperscript{144}

\begin{footnotes}
\footnote{137. They are collected in R. Nordstrom, Law of Sales § 125 (1970).}
\footnote{138. Uniform Commercial Code § 2-401, Comment 1.}
\footnote{140. United States v. Chichester, 312 F.2d 275 (9th Cir. 1953).}
\footnote{141. United States v. Brunner, 282 F.2d 535 (10th Cir. 1960).}
\footnote{142. In re Italian Cook Oil Corp., 190 F.2d 994 (3rd Cir. 1951); In re De Long Furniture Co., 188 F. 886 (E.D. Pa. 1911).}
\footnote{143. Atchison, Topeka & Santa Fe Ry. v. Hurley, 153 F. 503 (8th Cir. 1907), aff'd on other grounds, 213 U.S. 126 (1909); Grief Bros. Cooperative Co. v. Mullinix, 254 F. 391 (8th Cir. 1920).}
\footnote{144. Dilsuro v. Electronic Wholesalers, Inc., 239 A.2d 162 (D.C. App. 1968).}
\end{footnotes}
There are also a few cases recognizing that the trustee or the receiver of a buyer under such a contract has the option to assume or reject, although in each case the trustee’s decision was to reject and leave the seller with a provable claim for breach.\textsuperscript{146} An early case, where the seller without knowledge of the buyer’s receivership had delivered the goods, held that the receivers must either assume the contract and pay the price as a cost of administration or reject the contract and return the goods, since, in the event of rejection, they were entitled to possession only of goods “owned” by the debtor at the time of their appointment.\textsuperscript{146} If Judge Learned Hand had the same case today in a bankruptcy context and with the benefit of the Uniform Commercial Code he might say that a rejecting trustee of the buyer would have no better right to the goods than would the buyer himself if he had repudiated the contract as of the date of bankruptcy.\textsuperscript{147}

Nonetheless, while the concept of title has not been significant in determining whether contracts for the sale of goods remain executory, it persists as a source of confusion about the remedies available to one contracting party when the bankruptcy trustee of the other rejects contracts which involve more than simply the sale of goods. Early cases, involving contracts under which the bankrupt had undertaken to pay for the erection of a building on his premises and had gone into bankruptcy after the builder had delivered the construction materials but before he had erected the building or received payment, granted the builder’s petition to reclaim the materials on a finding that he still had title to them. No mention was made of the trustee’s option to assume or reject the contract.\textsuperscript{148}

\textit{In re Universal Medical Services, Inc.},\textsuperscript{149} continues that ap-

\textsuperscript{145} Continental Motors Corp. v. Morris, 169 F.2d 315 (10th Cir. 1948) (trustee); Samuels v. E.F. Drew & Co., 292 F. 734 (2d Cir. 1923) (receiver); Menke v. Willcox, 275 F. 57 (S.D.N.Y. 1921) (receiver). \textsuperscript{146} Eames v. H.B. Claflin Co., 220 F. 190, 191 (S.D.N.Y. 1915). \textit{See also} Pacific Western Oil Co. v. McDuffie, 69 F.2d 208 (9th Cir. 1934), cert. denied, 293 U.S. 568 (1934), holding that prior to the receiver’s election to assume or reject a contract to purchase oil the seller does not have a first priority claim for oil delivered before the receivership.

\textsuperscript{147} Under U.C.C. § 2-703, when the buyer repudiates the contract the seller may withhold the goods and claim for damages.

\textsuperscript{148} \textit{In re Thornton Co.}, 11 F.2d 669 (M.D. Pa. 1926); \textit{In re John H. Parker Co.}, 268 F. 868 (N.D. Ohio 1920); \textit{In re P.J. Sullivan Co.}, 247 F. 139 (N.D.N.Y. 1918).

\textsuperscript{149} 460 F.2d 524 (3d Cir. 1972). Some of the facts are taken from the opinion below. \textit{In re Universal Medical Services, Inc.}, 325 F. Supp. 890 (E.D. Pa. 1971).
CONTRACTS IN BANKRUPTCY

proach. There, the debtor had contracted to have a raised steel floor installed in its premises for a fixed price apparently payable on completion. At the time of the debtor's Chapter XI petition and the appointment of a receiver, the installer had delivered all of the flooring and had placed 75 per cent of it into a grid system attached to the existing floor but had not yet attached the flooring tiles to the grids. Before the Chapter XI proceeding had failed and the debtor had been adjudicated a bankrupt, the installer sought to reclaim the flooring. After the adjudication and the appointment of a trustee, it being conceded that the trustee had rejected the contract, the court held that the installer could reclaim the flooring because he had retained title. Under applicable Pennsylvania case law, unless otherwise provided by the contract, title to materials furnished by a builder did not pass to the owner of the premises until "affixed" to the realty. The flooring unattached was not "affixed."

b. Under the Uniform Commercial Code

No mention was made in Universal Medical Services of the Uniform Commercial Code although it was in effect in Pennsylvania long before the contract was made. If applicable, § 2-401 (2) would mandate that title passed when the installer completed "his performance with reference to the physical delivery of the goods," since it was not "otherwise explicitly agreed" that title would pass at a different time. Indeed, under Sections 1-201 (37) and 2-401 (1), any attempt by the installer to postpone the passage of title beyond that time would have been effective only to reserve a security interest. But perhaps Article 2 of the Code does not apply to construction and installation contracts. Section 2-102 provides that Article 2 applies "to transactions in goods" unless the context otherwise requires, specifically excluding "any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction." But nothing in Article 2 suggests that its draftsmen had in mind a construction or installation contract or a sale of goods which are to become fixtures when the seller completes his performance, although § 2-107 does provide for sales of goods to be severed from the realty.

150. The Comment to § 2-102 advises only that Article 2 "regulates the general sales aspects" of purchase money security transactions.

151. Nordstrom, supra note 137, at § 21, follows in the tradition of Williston, supra note 134, at § 9b, in carefully distinguishing sales from gifts, bailments and leases but ignoring construction and installa-
scope of Article 2 in § 2-102, its provisions do not speak of “transactions in goods” but rather of “contracts for sale,” “sales,” “buyers” and “sellers.” It may be, therefore, that construction and installation contracts are to be governed by non-Code law.

On the other hand, it seems unlikely that all installation contracts will be excluded from the Code’s coverage or that any distinction between construction and installation contracts will prove to be viable. (Why distinguish, for example, between the floor installer in Universal Medical Services and the builder who is to install floors as a part of the construction of a building?) What, for instance, of the seller who is obligated by his contract not only to give the buyer possession of a machine but also to make such adjustments after delivery as are necessary to put it in good operating order? Obviously what is to be “delivered” is an operational machine, not an imperfectly assembled assortment of its component parts. Certainly it does not stretch the

tion contracts. Cases involving other contracts, performance of which is not likely to be interrupted by the bankruptcy of either party, which find the implied warranty provisions of Article 2 inapplicable because “service predominates,” are not particularly helpful here. Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (beauty treatment); Lovett v. Emory University, 116 Ga. App. 277, 156 S.E.2d 923 (1967) (blood transfusion). Cf. Newmark v. Gimbel’s, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (beauty treatment); Jackson v. Muhlenberg Hospital, 53 N.J. 138, 249 A.2d 65 (1969) (blood transfusion). See also Wm. H. Wise & Co., Inc. v. Rand McNally Co., 185 F. Supp. 521 (S.D.N.Y. 1961), holding that a contract between a book publisher and a printer for the printing of a book by the latter, with the publisher supplying the manuscript and art work and the paper stock on which the book was to be printed, was a contract of service rather than sale so that the printer, although he might have a common law or statutory artisan’s lien, did not have a statutory vendor’s lien. North American Leisure Corp. v. A. & B. Duplicators, Ltd., 468 F.2d 695, 697 (2d Cir. 1972), reaches the same conclusion concerning a contract under which a debtor in Chapter XI proceedings had supplied a master sound tape to a duplicating company which was to duplicate the master on tapes, cartridges, and cassettes supplied by the duplicating company. The “single factor of who supplies the majority of the materials” was held not to be dispositive, the contract was held to be one of service rather than sale, and the duplicating company was held not entitled to a vendor’s lien under UNIFORM COMMERCIAL CODE §§ 2-703 and 2-706, although perhaps entitled to a statutory artisan’s lien.

152. “A ‘sale’ consists in the passing of title from the seller to the buyer for a price” (§ 2-106(1) ) which may be “payable in money or otherwise” (§ 2-304(1) ).

153. “Buyer” means a person who buys or contracts to buy goods” (§ 2-103(1) (a) ).

154. “Seller” means a person who sells or contracts to sell goods” (§ 2-103(1) (d) ).
language of § 2-401(2) very far to say that the seller has not completed his performance "with reference to the physical delivery of the goods" until the machine is operational, and hence that title will not pass earlier unless otherwise explicitly agreed. Moreover, the provisions of Sections 1-201(37) and 2-401(1), limiting the effect of a reservation of title after delivery to a reservation of a security interest, could also be read to encompass such an expanded concept of "delivery."

But to what end? Should the reading of § 2-401(2)—or of explicit provisions in the contract—to retain title in the seller mean that he is entitled to reclaim the goods from a rejecting trustee of a bankruptcy buyer? Since under § 70a the trustee of the buyer takes only such rights against the seller as the buyer

---

155. Although nothing helpful was decided, this situation was presented in Texas W. Financial Corp. v. McCraw Candies, Inc., 347 F. Supp. 445 (N.D. Tex. 1972). There, the seller went into bankruptcy after delivering a candy-wrapping machine and after nine months of adjustments had rendered it only 90% operational. The seller had discounted the buyer's $7,000 note and chattel mortgage to a finance company for approximately $6,000 and the finance company had withheld $2,000 of that amount until the machine was completely operational. Because the seller did not schedule the contract as an asset, the bankruptcy case was closed without any action with respect to it. In the finance company's later interpleader action, in which no one manifested an interest in having the bankruptcy case opened, it was held that: (1) notwithstanding § 70b, the bankruptcy trustee should not be deemed to have rejected a contract of which he was unaware; (2) title to the contract vested in the trustee under § 70a even though it was not scheduled; (3) the seller was entitled to a quantum meruit recovery equal to two-thirds of the withheld sum (which was consumed by a federal tax lien for undischarged withholding and social security taxes); and (4) the buyer was entitled to the balance.

See also Entron, Inc. v. General Cablevision, 435 F.2d 995 (5th Cir. 1970), holding that the implied warranty provisions of Article 2 of the Uniform Commercial Code are applicable to a contract to supply materials and construct a cable television system, and Burge Ice Machine Co. v. Weiss, 219 F.2d 573 (6th Cir. 1955), holding the implied warranty provisions of the Uniform Sales Act applicable to a contract to supply and install refrigeration equipment.

156. In connection with § 2-501, which provides rules for determining when goods are identified to the contract "[i]n the absence of explicit agreement," Comment 3 advises:

An "explicit" agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where a usage of the trade has previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this section.

Even without express incorporation, §§ 1-205(3) and (4) provide that a usage of trade can be used to "give particular meaning to and supplement or qualify" but not to contradict, the terms of an agreement.
had, the answer to that question must be found in nonbankruptcy law. But nothing in the Code provides the answer for all cases. Repossession of goods is not one of the remedies listed in the Code’s general arsenal for unsecured sellers.\footnote{157} Aside from § 2-702, which would in some circumstances entitle a seller on credit to reclaim from an insolvent buyer without regard to the location of title (and which I have elsewhere argued should not be applicable in bankruptcy\footnote{158}) only § 2-507(2) seems to bear on the problem. Without regard to the location of title, that section provides:

Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

One bankruptcy court has read this provision to mean that the seller on a cash sale can recover his goods when the buyer’s check for the price bounces because of his bankruptcy, and has concluded (although the Code is completely silent on the subject) that this right to reclaim is good against “any creditor” of the buyer and hence against the buyer’s bankruptcy trustee.\footnote{159} No consideration was given to whether this conclusion was contrary to the Bankruptcy Act’s policy against preferences\footnote{160} or (perhaps because the seller had fully performed) to its policy of permitting the trustee of the buyer to reject executory contracts.\footnote{161}

Except for the unsecured credit seller who has successfully retained title despite surrender of possession, the Code provides no repossession remedy. Perhaps this is because such a seller has entered into a transaction outside the scope of the Code, as was earlier suggested,\footnote{162} in which event he would have to look to non-Code law for his remedies. Or perhaps, even though his transaction is covered by the Code, his remedies are not confined to those which the Code expressly confers. Perhaps he can supplement his remedies by non-Code law, although when the Code

\footnote{157. \textit{Uniform Commercial Code} §§ 2-703 through 2-710.}
\footnote{159. \textit{In re Mort Co.}, 208 F. Supp. 309, 310 (E.D. Pa. 1962). Another bankruptcy court was apparently ready to reach the same conclusion, but gave effect to some rather remarkable interstitial legislation in Comment 3 to § 2-507 indicating that the ten-day limit on demands for reclamation imposed on credit sellers by § 2-702 is applicable also to cash sellers under § 2-507. \textit{In re Helms Veneer Corp.}, 287 F. Supp. 840 (W.D. Va. 1968).}
\footnote{160. See note 100 supra.}
\footnote{161. See note 103 supra.}
\footnote{162. See text accompanying notes 150-54, supra.
speaks in § 1-103 of "principles" which may supplement Code provisions it seems to imply substantive law rather than the law of remedies. But when a court undertakes to determine whether to create or perpetuate a special remedy for a seller solely because he has retained title to the goods, it might feel some restraint in view of the effort in both Article 2 and (as will shortly appear) Article 9 of the Code to eliminate the significance formerly attributed to title.

Since the Code also contemplates that "explicit agreement" may cause title to pass to the buyer before the seller has completed his performance with reference to delivery,163 the buyer may also assert a right based on his title to claim goods which he has not yet received when the bankruptcy trustee of the seller rejects a contract of sale.

Here again, the claim finds no support in the Code, which authorizes the buyer to claim the goods in only three situations, all without regard to the location of title. Section 2-502 gives buyers who have advanced all or a part of the purchase price a right in some circumstances to claim the goods from an insolvent seller.164 Section 2-716(1) authorizes specific performance for the buyer "where the goods are unique or in other proper circumstances."165 And § 2-716(3) gives the buyer "a right of replevin for goods identified to the contract if, after reasonable effort, he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or

163. Uniform Commercial Code § 2-401(2). Under § 2-401(1) title cannot pass prior to identification of the goods to the contract, an occasion which, under § 2-501(1), will in any event give the buyer "a special property and an insurable interest" in the goods. And by § 2-401(3), unless "otherwise explicitly agreed," where delivery is to be made without moving the goods, if the goods are already identified at the time of contracting and no documents are to be delivered, title passes at the time of contracting.

164. Elsewhere I have argued that this provision should not be given effect in bankruptcy and, specifically, that where the contract remains executory because the buyer has advanced only a part of the price, § 2-502 cannot deprive the seller's trustee of his option to assume or reject the contract. Countryman, supra note 158, at 435-51.

165. Comment 1 compounds the ambiguity of the statutory language: "without intending to impair in any way the exercise of the court's sound discretion in the matter, this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale."

166. "After a breach [by the seller] the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller" (§ 2-712(1)).
if the goods have been shipped under reservation\textsuperscript{167} and satisfaction of the security interest in them has been made or tendered.”

The buyer who can establish his right to invoke these provisions for reclamation, specific performance or replevin may successfully claim the goods from the seller’s rejecting trustee if he can persuade the bankruptcy court (1) that his rights are superior to those of the seller’s levying creditors, whose status the trustee acquires under § 70c\textsuperscript{168} and (2) that enforcement of those rights is not contrary to the Bankruptcy Act’s policy against preferential treatment\textsuperscript{169} or its policy permitting the trustee of the seller to reject any contract which remain executory.\textsuperscript{170} But the buyer who cannot qualify under these Code provisions and who bases his claim to the goods solely on his title to them will have to establish his claim by creating or resurrecting some non-Code law which gives more significance to title than does the Code.

Finally, what of the case the Code draftsmen apparently regarded as typical, or at least as commonplace—the case in which title passes to the buyer on the seller’s performance with respect to the physical delivery of the goods and in which any reservation of title by the seller thereafter is effective only to reserve a security interest? On the analysis suggested here, such a contract should not be viewed as executory since the seller has fully performed. Rather, the contract is similar to a purchase money mortgage on real estate.\textsuperscript{171} On the seller’s bankruptcy, his se-

\textsuperscript{167} “Where the seller has identified goods to the contract by or before shipment: (a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. . . . (b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security . . . .” (§ 2-505(1)). Under § 2-401(2) such a reservation of a security interest will not prevent the passage of title.

\textsuperscript{168} The Code is unclear on the point. By § 2-402(1), “rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods” under § 2-716. Since “creditor” is defined in § 1-201 (12) to include “a general creditor, a secured creditor, [and] a lien creditor,” the “unsecured creditors” referred to in § 2-402(1) apparently are not “lien creditors” and the rights of the latter may not be subject to the buyer's right to recover the goods under § 2-716. But only in Article 9 is the term “lien creditor” defined. Section 9-301(3) states that a lien creditor is “a creditor who has acquired a lien on the property involved by attachment, levy or the like” and that definition is only for the purpose of identifying the “lien creditor” who may defeat an unperfected security interest under § 9-301(1)(b).

\textsuperscript{169} See note 100 supra.

\textsuperscript{170} See note 105 supra.

\textsuperscript{171} See text accompanying notes 123-26 supra.
cured claim against the buyer would constitute an asset which his trustee could collect or sell. On the buyer's bankruptcy, assuming that the seller had perfected his security interest under Article 9 of the Code, the trustee of the buyer would take only the buyer's equity, which he should be able to preserve in the same manner as does the trustee of a real estate mortgagor.

There is much in the pre-Code cases to support these conclusions. With no suggestion that executory contracts were thought to be involved, the courts have permitted trustees of bankrupts who had given valid security interests in personal property to redeem the property, to sell it subject to the security interest, or to claim the bankrupt's equity from the proceeds of a liquidation of the property in the bankruptcy proceeding or at a nonjudicial sale.

For the most part the treatment of conditional sales contracts has been consistent with the treatment of other security interests in personality. All the conditional sales contract cases seem to have arisen on the seller's petition to reclaim the collateral, which is an appropriate way for the seller to raise the is-

---

172. For security interests "arising solely" under Article 2, such as the one acquired under § 2-505 by shipment under reservation (see note 167, supra), neither a security agreement nor a filed financing statement is required by § 9-113 until the buyer lawfully obtains possession. Apparently, the security interest which the seller obtains by attempting to reserve title after delivery is not regarded as "arising solely" under Article 2, since it is provided for by § 1-201(37) as well as § 2-401(1). See Uniform Commercial Code § 9-113, Comment 5.

173. See text accompanying notes 127-30 supra.


175. Gotkin v. Korn, 182 F.2d 380 (D.C. Cir. 1950) (chattel mortgage); John Schaap & Sons Drug Co. v. Rone, 19 F.2d 517 (8th Cir. 1927) (chattel mortgage); In re Haywood Wagon Co., 219 F. 655 (2d Cir. 1914), cert. denied, 236 U.S. 625 (1915) (chattel mortgage).

176. Drybrough v. Ware, 111 F.2d 548 (6th Cir. 1940) (chattel mortgage); In re E.A. Kinsey Co., 184 F. 694 (6th Cir. 1911) (lien of unspecified nature). See also Goggin v. Division of Labor Law Enforcement, 336 U.S. 118 (1949).

177. Middleton v. Fidelity-Philadelphia Trust Co., 35 F.2d 851 (3d Cir. 1929) (pledge of securities). See also Major Appliance Co. v. Gibson Refrigerator Sales Corp., 254 F.2d 497 (5th Cir. 1958), holding that the trustee may maintain a conversion action against a secured creditor who removed goods from a field warehouse when the debtor was not in default.
sue whether the buyer's trustee should abandon the property.\textsuperscript{178} Where the trustee indicated that he did not wish to redeem the property, reclamation was granted.\textsuperscript{179} In other cases reclamation was approved unless the trustee elected to redeem.\textsuperscript{180} In still other cases in which the trustee unsuccessfully asserted that the conditional sales contract was invalid as to him but made no suggestion that he be allowed to redeem, reclamation was allowed on a finding that the contract was valid.\textsuperscript{181} Where the seller under a valid contract had repossessed the goods before bankruptcy, he was allowed to retain them, at least where they were worth less than the balance of the purchase price owing.\textsuperscript{182} This result was consonant with the treatment of the holder of a valid chattel mortgage acting prior to bankruptcy who repossessed mortgaged goods worth less than the mortgage debt and was allowed to retain them.\textsuperscript{183}

But these were all straight bankruptcy cases where the holder of a valid conditional sales contract or other security interest is entitled, in one way or another, to a fairly prompt cash realization on his security. A different situation is presented under the rehabilitory provisions of the Bankruptcy Act, under

\begin{footnotesize}
\begin{enumerate}
\item[178.] Cf. Quinn v. Gardner, 32 F.2d 772 (8th Cir. 1929), where the referee, on petition of the holders of real estate and chattel mortgages, ordered the trustee to abandon the mortgaged property. After first ruling that the mortgages were invalid as to the trustee, Quinn v. Union Nat'l Bank, 32 F.2d 762 (8th Cir. 1929), the court reversed the abandonment order solely for that reason.
\item[179.] In re Terrill, 246 F. 743 (8th Cir. 1917).
\item[180.] Bailey v. Baker Ice Machine Co., 239 U.S. 268, 274 (1915); Miller v. McCray Refrigerator Co., 130 F.2d 873 (8th Cir. 1942); In re Abell, 19 F.2d 865 (7th Cir. 1927); In re Wegman Piano Co., 221 F. 128 (N.D.N.Y. 1918).
\item[181.] York Mfg. Co. v. Cassell, 201 U.S. 344 (1906); In re Curb Service Laundry & Dry Cleaning, Inc., 145 F.2d 756 (2d Cir. 1944); Great W. Stage Equip. Co. v. Iles, 70 F.2d 197 (10th Cir. 1934); In re L.S. Remson Mfg. Co., 232 F. 594 (2d Cir. 1918); In re White's Express Co., 215 F. 894 (2d Cir. 1914). Cf. Shook v. Levi, 240 F. 121 (9th Cir. 1917), where the conditional seller established the validity of his contract and was allowed to reclaim, but the trustee of the buyer was held entitled to a return of the partially paid purchase price to the extent that it exceeded the reasonable value of the use of the property by the buyer.
\item[182.] Of course, where the trustee of the buyer succeeded in establishing the invalidity of the conditional sales contract, the seller was not allowed to reclaim. In re Master Knitting Corp., 7 F.2d 11 (2d Cir. 1925).
\end{enumerate}
\end{footnotesize}
some of which Congress has authorized the rehabilitation plan to deal with secured claims in a manner which, at the least, postpones their maturities, and under all of which the bankruptcy court is given exclusive jurisdiction over the property of the debtor wherever located. Under these provisions, the court is authorized to enjoin until final decree any act or proceeding to foreclose on the security.

In considering the rehabilitory provisions applicable to railroad reorganizations in § 77, the Supreme Court in the Rock Island case held that pledgees in possession of pledged securities might be enjoined from selling their collateral despite the debtor's post-petition default where the sale might hinder, delay or obstruct the reorganization. However, the Court suggested that the result might be different in a straight bankruptcy proceeding.

But where conditional sales contracts were involved, the tyranny of the title label for a time obtruded. Three months after the Rock Island decision, the Court of Appeals for the Second Circuit in the Lake's Laundry case concluded that where

184. This is true of most secured claims in railroad reorganizations under § 77 (§ 77(b) ), other corporate reorganizations under Chapter X (§§ 106(1), 216(1) ), and real property arrangements under Chapter XII (§§ 406(1) and (2), 461(1) and (2) ). It is also true of claims secured by personalty under Chapter XIII (§§ 606(1), 646(1) and (2) ).

185. § 77(a), Chapter X (§ 111), Chapter XI (§ 311), Chapter XII (§ 411), Chapter XIII (§ 611).

186. While what is now § 77(j) expressly authorizes only a stay of "any judicial proceeding" to enforce a lien, § 2a(15) authorizing "such orders . . . as may be necessary for the enforcement of the provisions of this Act" was held sufficient to empower a § 77 court to enjoin non-judicial sale by pledgees of securities. Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648, 677-78 (1935). The other provisions are not limited to judicial proceedings. Chapter X (§§ 113, 116(4), 148), Chapter XI (§ 314), Chapter XII (§§ 414, 428), Chapter XIII (§ 614).

187. Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 677-78 (1935). The Court recognized that "[i]t may be . . . that during the period of restraint the collateral will decline in value," and emphasized that it was sanctioning only "reasonable delay" during which the reorganization should be "speedily determined." Id. at 685. Ten years after the injunction was issued, and after the district court had approved a plan under which the pledgees were to receive new bonds and stock in the reorganized debtor, one group of pledgees was paid in cash and the other group was allowed to sell its collateral to purchasers who became entitled to the new securities allowed under the plan on the pledgee's claims. See Chicago, R.I. & Pac. Ry. v. Fleming, 157 F.2d 241, 247 (7th Cir.), cert. denied, 329 U.S. 780 (1946).

a laundry operator was in default under the conditional sales contracts on its machinery at the time it filed its petition for reorganization under § 77B (the predecessor of Chapter X), the sellers were entitled to reclaim the machinery. True, the Rock Island decision indicated that if the sellers "had only a lien upon the property, as they would were they mortgagees," they could be enjoined. And § 77B, like § 77, authorized a modification of the rights of secured creditors, gave the bankruptcy court exclusive jurisdiction of the property of the debtor wherever located, authorized it to enjoin "judicial proceeding to enforce any lien upon the estate" until final decree, and provided that the plan might "deal with all or any part of the property of the debtor." But the court could not read § 77B to "ignore the distinction between property mortgaged by a debtor and property held by a debtor as conditional vendee," the latter being "the property of the conditional vendor," and "not property of the debtor," until the contract price was paid. While the court did "leave open all questions as to final disposition of the proceeds of such equities in the property as the debtor may be found to have when it is repossessed and dealt with as the laws of New York provide," the proceeds of those equities seemed unlikely to be sufficient to make a reorganization feasible, as Judge Learned Hand pointed out in dissent.

Even though this approach was somewhat modified in the White Plains case wherein a conditional buyer in default at the time of his Chapter XI petition was permitted to redeem his equipment within a "reasonable time" on payment of some $5,000 due under an acceleration clause, it held little hope for the

189. 48 Stat. 911 (1934).
190. § 77B(b) (1).
191. § 77B(a).
192. § 77B(c) (10).
193. § 77B(b) (10).
195. In re White Plains Ice Serv., Inc., 109 F.2d 913 (2d Cir. 1940). See also In re Burgemeister Brewing Co., 84 F.2d 388 (7th Cir. 1936), reaching the same conclusion in a § 77B case. In Kagan v. Indus. Washing Mach. Corp., 182 F.2d 139, 142 (1st Cir. 1950), the court's rhetoric was more extreme than its ruling. There, in the straight bankruptcy proceeding following an abortive Chapter X effort of a defaulting conditional buyer, wherein the trustee had sold the collateral, it was said:

it being conceded . . . that the bankrupt defaulted in payment, and hence that the condition of the sale was broken, it follows that title to the machine remained in the vendor, . . . and that it is entitled to reclaim its property, or in this case its proceeds.
salvation of businesses unable to raise the full balance of the purchase price for their equipment where that price was secured by the title of the conditional sale rather than the lien of the chattel mortgage.

With the enactment of the Uniform Commercial Code, the Second Circuit has reconsidered what it wrought in Lake's Laundry and White Plains. Section 9-202 of the Code, sharing a theme adopted in Article 2, provides: "Each provision of [Article 9] with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or the debtor." An inexplicably placed comment elaborates on the significance of this provision:

A case may be put in which the liquidation value of an insolvent estate would be enhanced by disposing of all the debtor's property (including that subject to a security interest) in the liquidation proceeding and in which, if a secured party repossesses and sells that part of the property which he holds as collateral, the remainder will have little or no resale value. In such a case the question may arise whether a particular court has the power to control the manner of disposition . . . in order to preserve the estate for the benefit of creditors. Such a power is no doubt inherent in a Federal bankruptcy court, and perhaps also in other courts of equity administering insolvent estates. Traditionally it was not exercised where the secured party claimed under a title retention device, such as conditional sale or trust receipt [citing Lake's Laundry and White Plains]. But since this Article adopts neither a "title" nor a "lien" theory of security interests . . ., the granting or denying of, for example, petitions of reclamation in bankruptcy proceedings should not be influenced by speculations as to whether the secured party had "title" to the collateral or "merely a lien".

In Yale Express, a Chapter X case involving chattel mortgages on the debtor's trucks rather than conditional sales contracts, the court took note both of § 9-202 and of the above-quoted comment and concluded that its earlier approach, though perhaps "defensible at the time," was no longer "in keeping with the developments in the body of recent commercial law." Since the Code has abolished the technical distinctions between the various security devices, the federal bankruptcy courts should no longer

But the court affirmed a ruling below that the vendor was entitled to the balance of the purchase price with interest from the due date to the extent that the proceeds of the trustee's sale were sufficient to cover the interest.

196. See discussion in text preceding note 137 supra.
197. UNIFORM COMMERCIAL CODE § 9-507, Comment 1. In the 1972 revision of the Code, this comment is revised to take account of the developments discussed in text accompanying notes 198-200 infra.
199. Id. at 437.
feel compelled to engage in the purely theoretical exercise of locating "title"... Equitable considerations and the substance of the transaction should govern, regardless of the form of the security agreement. 200

After a remand and findings by the Chapter X court that the otherwise reasonable prospects of reorganization would be frustrated if the chattel mortgagee's reclamation petition were granted, it was held that reclamation was properly denied without payment of rentals to the mortgagee (since other secured creditors would be equally entitled to rental payments and thus reorganization would also be frustrated), at least where the trustee had offered to value the mortgagee's collateral presently so that its position in any Chapter X reorganization would not be prejudiced by depreciation. 201

But if one court has brought its conception of the remedies available to a conditional seller of goods abreast of commercial developments, a few others seem to persist in a conception of conditional sales contracts which cannot be reconciled with the treatment of other contracts under which one party has fully performed. After some earlier intimations to that effect, 202 In re Pagliaro, 203 approved by the Court of Appeals for the Ninth Circuit, held that the bankruptcy trustee of a buyer who did not act within the time fixed by § 70b to assume or reject a conditional sales contract had rejected it. Hence, he could not maintain a conversion action against the seller who had repossessed the goods after bankruptcy without the permission of the bankruptcy court and had sold them for more than the balance due under the contract, since a defaulting buyer could not have maintained such an action against the seller. To the trustee's ar-

200. Id. at 437-38.
201. In re Yale Express Sys., Inc., 384 F.2d 990 (2d Cir. 1967).
202. In re Daterson Publishing Co., 188 F. 64 (3d Cir. 1931) and In re Roger Williams Bldg. Corp., 99 F.2d 212 (7th Cir.), cert. denied, 307 U.S. 635 (1939), assumed that conditional sales contracts for goods are executory contracts which the trustee of the buyer may assume or reject.
argument that § 70b applies "only to instances where performance in future is owing on both sides," the court responded: "No authority was cited and none can be found which applies that restricted construction to the section" (a reply which could not be given today). The court cited cases recognizing the trustee's right to redeem the property subject to the contract for the proposition that "[l]ong before [§ 70b] was promulgated the right of a trustee to adopt or reject a conditional sales contract was recognized.

Following this decision another bankruptcy court in the same circuit found that the bankruptcy trustee of a conditional buyer, by selling the goods covered by a conditional sales contract, had assumed the contract and was therefore liable to the conditional seller only for some $500 of the unpaid purchase price rather than the $5,200 proceeds of sale. The Court of Appeals for the Third Circuit has also found a conditional sales contract to have been assumed and has therefore reached a similar conclusion where, on the trustee's opposition to the seller's reclamation petition, the referee found the contract valid but also found that the debtor had a valuable equity and ordered the contract "paid off" from the proceeds of sale of the collateral by the trustee. Very recently, in *Danning v. Brunswick Corp.*, the Ninth Circuit concluded that, where the trustee of the vendee under conditional sales contracts does not act within the time allowed by § 70b, he has rejected the contracts and cannot thereafter sell the property covered by them.

Although the results in these cases are perhaps correct, the analysis and the terminology employed seem faulty. Proceeding on the premise, erroneous I believe, that the conditional sales contracts before them were executory contracts within the meaning of § 70b, the courts have confused the trustee's right to redeem the property under the security interest which he takes from the bankrupt under § 70a with his right to assume executory contracts under § 70b. Furthermore, they have confused his right to abandon as valueless the bankrupt's equity in collateral, which he takes under § 70a, with his right to reject executory contracts under § 70b. Although the consequences may have
been the same in each case if the court had spoken of redemption rather than assumption, or of abandonment rather than rejection, focus on the proper concept would produce a sharper and perhaps different resolution of the issue. If the courts in the Pagliano\textsuperscript{210} and Danning\textsuperscript{211} cases had been looking for abandonment of property rather than rejection of an executory contract, they would not have treated expiration of the time prescribed by § 70b as conclusive of the issue.

As much cannot be said for the Ninth Circuit's decision in Smith v. Hill,\textsuperscript{212} which held that, where a conditional seller of real estate and personal property had a foreclosure action pending and had a receiver appointed in a state court at the time the conditional buyer filed a Chapter XI petition, it was error for the Chapter XI court to order the state receiver to turn over the property to the debtor in possession. The Supreme Court had previously held\textsuperscript{213} in a straight bankruptcy proceeding that the power given the bankruptcy court by § 2a(21) in the exercise of its summary jurisdiction to order receivers to turn over property in their possession was inapplicable to a receiver of rents and profits appointed before bankruptcy in the foreclosure of a valid real estate mortgage. In a straight bankruptcy proceeding, the summary jurisdiction of the bankruptcy court extends only to property in its custody. The court cannot enjoin the continuation of a foreclosure proceeding by a state court which had acquired custody of the property prior to bankruptcy.\textsuperscript{214} Hence the Court concluded that since the bankruptcy court could not halt the state foreclosure action, to apply § 2a(21) "would mean that the foreclosure would go on apace in the state court while the funds collected by the receiver would be turned over to the bankruptcy court for administration,"\textsuperscript{215} a division of authority between state and federal courts which Congress could hardly have intended. The Ninth Circuit could find "no support in either reason or authority for applying a different rule in an action by a conditional vendor to enforce his rights against a defaulting vendee under a conditional sales contract."\textsuperscript{216} But in reaching that conclusion

\begin{itemize}
  \item \textsuperscript{210} 99 F. Supp. 548, 552 (N.D. Cal. 1951), aff'd per curiam sub nom. Costello v. Golden, 196 F.2d 1017 (9th Cir. 1952), discussed in text accompanying note 203 supra.
  \item \textsuperscript{211} 466 F.2d 1010 (9th Cir. 1972), discussed in text accompanying note 209, supra.
  \item \textsuperscript{212} 317 F.2d 539 (9th Cir. 1963). 
  \item \textsuperscript{213} Emil v. Hanley, 318 U.S. 515 (1943).
  \item \textsuperscript{214} Straton v. New, 283 U.S. 318 (1931).
  \item \textsuperscript{215} Emil v. Hanley, 318 U.S. 515, 520 (1943).
  \item \textsuperscript{216} Smith v. Hill, 317 F.2d 539, 542 (9th Cir. 1963).
\end{itemize}
the court completely ignored the provisions of § 311 giving the Chapter XI court "exclusive jurisdiction of the debtor and his property, wherever located," and of § 314 expressly authorizing that court to "enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor." It also ignored the argument, on which it has vacillated in other cases before and since," that the effect of the former provision is to extend the summary jurisdiction of the Chapter XI court to all property in which the debtor has an interest, whether or not the property is in the custody of that court. Instead, it suggested that the debtor in possession might protect his equity by assuming the contract and intervening in the state foreclosure action to preserve any right of redemption he might have under state law. By thus ignoring the provisions of Sections 311 and 314, the Ninth Circuit seems to have brought itself, at least in cases where the conditional seller has repossessed before the Chapter XI proceeding starts, close to a position the Second Circuit was to renounce three years later.

218. 8 W. COLLIER, BANKRUPTCY ¶ 3.02 (14th ed. 1971). A contrary view is asserted in 9 H. REMINGTON, BANKRUPTCY §§ 3572-74 (6th ed. J. Henderson 1955), where it is argued that the only purpose of § 311 of the Act is to extend the territorial jurisdiction of the Chapter XI court but that its jurisdiction is otherwise confined to property in its custody.
219. In re Yale Express Sys., Inc., 307 F.2d 433 (2d Cir. 1966), discussed in text accompanying note 198 supra. True, Yale Express was a Chapter X case where the bankruptcy court's position is even stronger because, unlike Chapter XI, the secured creditor's claim can be brought under the plan. But Chapter XI courts acting under §§ 311 and 314 have enjoined: (1) the continuation of nonjudicial sales of real estate under deeds of trust, In re Victor Builders, Inc., 418 F.2d 880 (9th Cir. 1969); In re Tracy, 194 F. Supp. 293 (N.D. Cal. 1961); (2) commencement of judicial proceedings to foreclose under deeds of trust on realty, In re Victor Builders, Inc., supra; and (3) the commencement of proceedings to foreclose chattel mortgages, Indiana Nat'l Bank v. Gross, 208 F.2d 619 (7th Cir. 1953); In re Atlantic Steel Prod. Corp., 31 F. Supp. 408 (E.D.N.Y. 1939). Cf. In re Holiday Lodge, Inc., 300 F.2d 516 (7th Cir. 1962). And under the similar provisions of §§ 611 and 614 of Chapter XIII, where the wage earner's plan may not deal with claims secured by realty, the courts have enjoined the commencement of foreclosure proceedings under mortgages and deeds of trust on realty. Hal- lenbeck v. Penn Mutual Life Ins. Co., 323 F.2d 566 (4th Cir. 1963); In re Townsend, 348 F. Supp. 1284 (W.D. Mo. 1972); In re Howard, 344 F. Supp. 1138 (E.D. Ark. 1971); In re Pizzolato, 281 F. Supp. 109 (W.D. Ark. 1967); In re Garrett, 203 F. Supp. 459 (N.D. Ala. 1962). See also In re Willett, 265 F. Supp. 999 (S.D. Cal. 1967).