

Book Review

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Book Review

Security Interests In Personal Property. By Grant Gilmore. Little, Brown and Company, Boston: 1965. Vols. I and II. Pp. 1508, including index. \$45.00.

It has been said about the James brothers that William wrote like a novelist and Henry wrote like a psychologist. Fortunately, I know of no novelist who writes like a lawyer, but Grant Gilmore, author of *Security Interests in Personal Property*, belongs to that rare breed of lawyers who write like a good novelist.

To the untutored, the law of secured transactions must surely be among the dullest. Gilmore's great tour de force is that, with clarity and style, he has shaped into a dramatic tale the intrinsically dull materials found in Article 9 of the Uniform Commercial Code and the prior law of chattel mortgages, conditional sales, trusts receipts, factor's liens, and the host of other secured financing devices. The result is a treatise which should easily take its place as the definitive work on Article 9 of the Code. In a perfect world, the courts would pass a rule requiring every lawyer who argues an Article 9 case to certify that he has read Gilmore.

Except to the coterie of Yale Law School graduates and the dwindling band of admiralty lawyers,¹ Professor Gilmore has not been well known in Maryland.² His credentials, however, are impressive. Beginning in 1946 he served as Associate Reporter and later as Reporter for Article 9. He has taught secured transactions at Yale, Chicago and Harvard for the last twenty years, and he has written many law review articles on the subject.

The first 275 pages of the treatise describe the development of pre-Code security law. Precisely because Article 9 did not spring into existence like Minerva from Jupiter's head, it is very difficult to understand Article 9 without some appreciation of the tortured history of the miscellaneous pre-Code security devices. Professor Gilmore relates in ample detail the development of pledges, chattel mortgages, conditional sales, consignments, leases, trust receipts, factor's liens, field warehousing, assignments of accounts receivables, and assignments of other intangibles such as executory contracts. This history

Editor's Note: Professor Gilmore was recently awarded the James Barr Ames Prize by the Faculty of the Harvard Law School for his *Security Interests in Personal Property*. The Ames Prize is awarded every four years "for a meritorious essay or book on some legal subject."

1. See GILMORE AND BLACK, *LAW OF ADMIRALTY* (1957).

2. Tax lawyers and French scholars may also know of Gilmore. Because his wife wanted to deduct the expenses of her psychoanalytic training and then filed a joint return with her husband, "Grant Gilmore" is the name of a Tax Court case, 38 T.C. 765 (1962). Gilmore's prowess as a French scholar is traceable to his pre-legal days when he obtained a Ph.D. in French and taught French at Yale.

is not only valuable in understanding the background of the Code, but also because some of these old security devices, such as field warehousing, are not appreciably affected by the Code and because the incidence of Maryland's incredible recordation tax depends on which of the old devices is most closely related to the security interest on which the clerk wishes to impose his tax.³ The latter problem is tragic. The Code was intended to abolish all of the formal distinctions between chattel mortgages and conditional sales, between trust receipts and factor's liens. The resurrection of these formal distinctions under the rubric of Maryland's recordation tax simply subverts one of the major accomplishments of the Code.

One of the more interesting sections of Gilmore's historical analysis is his discussion of the distinction between "legal" and "equitable" assignments. No one has ever been able to define an "equitable" assignment. As Gilmore puts it:

There is not the most tenuous semblance of agreement about the word's meaning, or even its principal meaning. The English language is overblessed with words which mean several unlike things at the same time. English poetry no doubt benefits from the possibility of shorthand multiple reference but legal analysis does not.⁴

The discussion of "equitable" assignments leads into a summary of the famous Cook-Williston debate, where those two jurisprudential giants "had at each other, with no holds barred"⁵ in a series of four articles in the *Harvard Law Review* between 1916 and 1918. The debate had actually begun in 1913 when Dean Ames delivered his celebrated lecture entitled "The Inalienability of Choses in Action." Cook "disrespectfully"⁶ entitled his first article "The Alienability of Choses in Action" and concluded that Ames' analysis was inadequate and possibly even misleading. When Williston defended Dean Ames, Cook replied that Williston "has failed to follow the essential features of the analysis presented in my article and so has failed to understand what my conclusions really are."⁷ It is sad that the law reviews have abandoned this type of battle.

After concluding his discussion of the pre-Code security devices, Gilmore devotes the remaining 1000-odd pages of text to Article 9. He begins with an analysis of the scope and coverage of Article 9, definitions of the important terms, conflicts of laws problems, and the functional classification of "goods" into "consumer goods," "equipment," "farm products," and "inventory," and of "intangibles" into "instruments," "documents," "chattel paper," "accounts," "contract

3. MD. CODE ANN. art. 36, § 12(a) (Supp. 1962).

4. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 198 (1965). Another word which amuses Gilmore is "debenture" — "In financial terminology before 1930 (and perhaps today) it meant a corporate obligation which was typically, although not always, unsecured — in more or less the same way that the word 'maiden' means a female who is probably, although not necessarily, a virgin." *Id.* at 1000.

5. *Id.* at 203.

6. *Id.* at 204.

7. Cook, *A Reply to Professor Williston*, 30 HARV. L. REV. 449, 452 (1917), quoted at GILMORE, p. 205.

rights," and "general intangibles." He includes a chapter on the federal security statutes, such as the Ship Mortgage Act of 1920, the patent and copyright laws, Section 503 of the Civil Aeronautics Act, Section 20(c) of the Interstate Commerce Act, dealing with railroad rolling stock, 49 U.S.C. § 313, dealing with trucks, tractors, trailers, and buses.

The treatise then moves to the meat of Article 9: perfection and priorities problems. Although Maryland's rules with regard to the place for filing financing statements are somewhat bizarre, over 99% of Gilmore's discussion of perfection of security interests is relevant for the Maryland lawyer. These portions of the treatise deal with the types of Article 9 problems with which most lawyers have their only contact.

The most challenging part of the treatise is concerned with priorities. If it were not for problems involving priorities, Article 9 would be a relatively easy statute to understand. The pre-Code law in this area was unbelievably obscure; the Code attempts to bring some order out of the obscurity although in some types of situations, as Gilmore points out, the draftsmen have been no less recondite than their predecessors. The broad range of priority problems is summarized by Gilmore as follows:

In all the immense variety of nonpossessory security interests in personal property, there is not a single type which, under some decisional or statutory rule, does not run the risk of subordination to some kind of subsequent claim. The closest thing to invulnerability is a purchase-money loan on the security of goods over which the debtor has no power of disposition; yet even in this relatively safe area the secured party may find his interest subordinated to the non-consensual lien of a mechanic or other artisan who, without the secured party's knowledge or consent, has furnished services or materials with respect to the collateral. The possibility of subordination may arise from the nature of the collateral: if it is negotiable or quasi-negotiable, holders in due course and good faith purchasers regularly take free of any security interests; indeed, under many common law rules, the assignee of a non-negotiable chose in action could lose to a subsequent assignee of the same chose. Or the possibility of subordination may arise from the fact that the debtor has power, express or implied, to dispose of the collateral, as he must, to take the most obvious example, in any inventory financing arrangement: the buyer in ordinary course of trade regularly takes free of any inventory security interest. The inventory lender's claim typically shifts to the proceeds received by the debtor on sale of the collateral, which raises the possibility of conflict between a lender who finances a debtor's inventory and a lender who finances his receivables. Long-term interests, secured by the debtor's after-acquired property, may yield priority to purchase-money interests which enable the debtor to acquire the property. Security agreements which provide for future advances raise the

problem of relative priority between the future advance lender and a lender who, with or without notice, makes an intervening advance or a creditor who acquires an intervening lien. At the frontier between real property law and personal property law contests for priority arise between chattel claimants and real estate claimants: we find this sort of contest in the area of fixtures and again, in a quite different context, in that of crop loans. In the field of construction contracts, governmental and private, there are recurrent disputes about priority between the surety company, which binds itself to take over the work or to reimburse unpaid suppliers on the contractor's default, and the bank, which has made a construction loan to the contractor. Notice filing systems, which provide for filing in advance of any security transaction, have generated a peculiar priority problem, which comes into existence when a lender who has filed last makes an advance and acquires a security interest first. Pervasive, and bulking ever larger in its importance, is the question of the status of the consensual security interest as against the governmental priority or lien. In addition to the many situations in which the secured party runs the risk of subordination, whether he will or not, there is the problem of contractual subordination to which may be joined a consideration of the effectiveness of "negative pledges" or other contractual clauses which purport to prohibit the debtor from further encumbering his property. And finally no discussion of priorities would be complete without some reference to the intriguing case of circular priority in which, by application of the relevant rules, A has priority over B, who has priority over C, who to close the circle, has priority over A.⁸

A review such as this cannot pretend to analyze any of these problems. Most of the problems are not unfamiliar to the commercial and corporate bar of Maryland. Although there have been no cases in Maryland dealing with the relative priority of the construction lender and the surety company, both of whom take assignments from the contractor of moneys to become due from the owner under the construction contract, there still are some construction lenders and surety companies who do not file financing statements against the contractor. Before the Code, neither had to file anything in Maryland. Although, as Gilmore points out, filing may not be the panacea in this area, the failure of one of the two claimants to file is a very simple excuse for a court to use in finding against the non-filer.

Gilmore also discusses one of the budding controversies of the last three or four years, that is, the issue of whether the subordinating creditor has created a security interest in the senior creditor. If A is indebted to B, and C will lend money to A only if B subordinates his debt from A to C's claim, the theory is that B has given C a security interest in B's claim against A. The matter becomes crucial if B goes into bankruptcy. If C wants to claim a priority over B's other creditors against A, C probably should file a financing statement against B.

8. GILMORE, *op. cit. supra* note 4, at 653-55.

Otherwise, B's other creditors will have no public notice of C's claim.⁹ It undoubtedly is an understatement to say that counsel for most senior lenders have rarely, if ever, even thought of this problem.

The completely unsatisfactory state of the law involving the federal government's priority for debts and taxes is described by Professor Gilmore as similar to

an old parlor game in which all the players but one try to guess what the remaining player is thinking of. The state courts and the lower federal courts have been playing that game with the Supreme Court since 1950 — so far with scant success. Until the oracle chooses to reveal itself more clearly, it would be pointless to attempt to predict how the game will come out.¹⁰

Gilmore's conclusion, like that of every other commentator, is that Congress should pass legislation to rescue us from the "choate-inchoate" morass.

Another needed piece of legislation is a complete revision of Section 60(a)(6) of the Bankruptcy Act. Professor Gilmore describes in considerable detail all of the various theories which have been propounded in determining whether Section 9-108 of the Code is invalid. It provides that under certain circumstances the attachment of a security interest to after-acquired property "shall be deemed to be taken for new value and not as security for an antecedent debt." The obvious purpose of 9-108 was to insulate the after-acquired property clause from attack by a trustee in bankruptcy under the preference provisions of the Bankruptcy Act. ("The language of § 9-108 has evidently been like a red rag to the § 60 bull.")¹¹ The validity of § 9-108 is one which, it is hoped, will reach the Supreme Court fairly promptly. The journey has begun in *In re Portland Newspaper Publishing Co., Inc.*¹² decided just a few months ago.

Where appropriate, Professor Gilmore has not merely been content with an exposition of the law. He has pointed out its inconsistencies and ambiguities. He has also been assiduous in citing the leading cases and more important law review articles on each subject. He has not, in the fashion of the encyclopedias, cited every conceivable case or article relating to each problem.

In summary, *Security Interests in Personal Property* is indispensable for every lawyer who has any contact with commercial law. Professor Gilmore is to be commended for a monumental and highly readable contribution to this field.

*Shale D. Stiller**

9. *Id.* at ch. 37. See also Coogan, Kripke & Weiss, *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participating Agreements*, 79 HARV. L. REV. 229 (1965); Henson, *Subordinations and Bankruptcy: Some Current Problems*, 21 BUS. LAW. 763 (1966).

10. GILMORE, *op. cit. supra* note 4, at 1062.

11. *Id.* at 1309.

12. *Op. of Referee Snedecor*, (D. Ore. 1966), CCH Installment Credit Guide ¶ 98, 483, appeal pending before United States District Court of Oregon.

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