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Security Interests in Personal Property, by Grant Gilmore (1965)

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SECURITY INTERESTS IN PERSONAL PROPERTY. By Grant Gilmore. Boston & Toronto: Little, Brown & Company, 1965. Pp. xxxiv, 651 (Vol. I); xiii, 652-1508 (Vol. II).

Security Interests in Personal Property is a badly needed addition to American legal literature, accomplished in a highly competent way. The utility of this treatise to a person concerned with personal property security can hardly be overstated. It is the first comprehensive text treating secured transactions under the Uniform Commercial Code. Professor Gilmore's coverage of the pre-Code law of personal property security is a pioneering effort, no previous author having seen fit to tackle this tough area *en masse*.

I. UCC ARTICLE 9

Professor Gilmore's principal emphasis is on the Uniform Commercial Code's article 9 (secured transactions; sales of accounts, contract rights and chattel paper), with whose drafting he was closely identified, first as Associate Reporter, and then as Reporter. He examines article 9 in detail, disclosing a good deal of its drafting history, and providing information about the drafters' objectives in particulars which, at many points, go beyond the Comments. The author also isolates trouble spots (described in the Preface as "ambiguities, inconsistencies, and mistakes in the drafting of the article"[1]), and suggests solutions, sometimes legislative, sometimes practical lawyers' tactics.

The development of the discussion is indicated by the headings of its major divisons, namely: "The Uniform Commercial Code: The Article 9 Security Interest"[2]; "Security Transactions Subject to Federal Statutes"; "Perfection of a Security Interest"; "Priorities"; and "Rights in the Collateral Before and After Default."

Those to whom the UCC is as yet unfamiliar will find Professor Gilmore a helpful guide in the effort to understand the objectives and organization of article 9. His explanation of its structure and terminology will dissipate much of the mystery.

[1] P. x.

[2] This Part heading is not entirely illuminating. The individual chapter headings are: Chapter 9, "Some Preliminary Generalities"; Chapter 10, "Scope and Coverage of Article 9; Terminology: 'Debtor,' 'Secured Party,' 'Collateral'; Transactions Included and Excluded; The Choice of Law Provisions"; Chapter 11, "What is a 'Security Interest'? Formal Requisites: 'Attachment'; The So-called 'Floating Lien' "; Chapter 12, "The Classification of Property; Pledgeable and Non-pledgeable Property; Assignments of Intangibles."

Those whose purpose is professional competence on an Article 9 matter will especially welcome the assistance provided by the author on points of potential difficulty, and his suggestions about the appropriate counters to problems. Particularly valuable is his identification of problems which are not obvious.

II. Pre-Code and Non-Code Law

Personal property security law and practice before the Code was an area of extraordinary complexity. What to do with this mad montage of chattel pledges, security assignments of documents and intangibles, chattel mortgages, chattel trusts, conditional sales, trust receipts and factors' liens has baffled a great many people. I doubt that teachers who have tried to follow the lead of Wesley Sturges[3] and John Hanna[4] have derived much satisfaction from the endeavor to bring some semblance of order out of what is a singularly intractable mass, even in a given jurisdiction, to say nothing of the national situation. Typical student opinion of the pre-Code security transactions course is probably unprintable. From the perspective of a lawyer trying to steer secured-party clients through the pre-Code area, personal property security must often seem to be a jungle dominated by security-devouring trustees in bankruptcy. All concerned have been handicapped by the absence of any text taking a broad view of personal property security, organizing, reconciling, pointing out common threads in the tangle, delineating trends, and otherwise accomplishing what a good text writer can do with a complex area of the law.[5]

Such an era of confusion merits memorializing in the hope that history can hereafter be a teacher. For the next legal generation, all of this should be of more than antiquarian interest. A comprehensive picture of the legal system displaced by article 9 is in a sense a portrayal of a chamber of horrors. Periodic backward glances should do much to keep all segments of the profession alerted to the importance of resisting efforts by special interests to develop aberrations

[3] Sturges, Cases on Credit Transactions (1930) (and subsequent editions).

[4] Hanna, Cases on Security (1932) (and subsequent editions), particularly Part 1, Personal Property as Security.

[5] This is not to suggest that there have been no treatises on topics which fall within the area of personal property security. A number, of varying ages and degrees of utility, are extant. In preparing in 1964 a bibliography of personal-property-security texts for student use, I felt obliged to include four references to pledges, eight to conditional sales, three to chattel mortgages, two to trust receipts, and two to letters of credit.

which would in time re-create the same kind of confusion.

An attempt to explain either the over-all scheme of article 9, or its details, of necessity embroils the commentator in the pre-Code legal situation. To quote from the author's Preface:[6]

> The particular shape and structure which Article 9 assumed can be understood only in the light of the state of law from which it issued. The thinking of the draftsmen and their advisers was conditioned, and not infrequently confined, by the problems which had in fact provoked debate and controversy in the development of security law toward the state of intolerable complexity which it appeared to have reached in the 1940's.

Also to be remembered are UCC section 9-104, which removes certain personal property security transactions from the coverage of article 9, and UCC section 10-102(2), which preserves the earlier law for transactions entered into before the Code becomes operative. The pre-Code law will continue to affect lawyers and their clients for a long time to come.

With an eye, we may assume, for all of these aspects of the pre-Code law, Professor Gilmore undertakes an assignment which he explains in an introductory note:[7]

> The chapters in Part 1 focus on the boundaries within which the various devices came to be confined: the types of property which could be made the subject matter of a pledge, mortgage, conditional sale, and so on, and the types of transactions which could be carried out under one or another of the devices. The formal requisites for creation of a security interest under the various devices are also described. Subsequent Parts deal with such matters as perfection, priority and default both under Article 9 of the Code and under the pre-Code security devices.

Professor Gilmore has done, in my opinion, a superb job of integranting article 9 with the background of law and practice from which it derives. His discussion at many points progresses from earlier law to the Code drafters' analysis of present-day legal and business problems, then to the possible solutions as the drafters saw them, and finally to the Code solutions and the reasons for them.[8] On occasion

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[6] P. vii.

[7] P. 3.

[8] Particularly notable examples are: (a) the discussion of the rule of *Benedict v. Ratner* in ch. 8 and ch. 11 especially at pp. 357-59; (b) pp. 449-61 on returns for a "temporary and limited purpose"; (c) pp. 895-901 on the effect on a subsequent secured party of knowledge of an earlier unperfected security interest; and (d) ch. 36 on "Financing Bank and Surety."

the final step is an expression of discomfort with a Code solution and a discussion of alternatives, or a finding of ambiguity and a suggestion for its resolution.

Excellent too is Professor Gilmore's discussion of the pre-Code situation, viewed as a record of an era. He has said enough, and not too much, it seems to me, for a reader whose primary concern is with the solution of professional problems under the Code, and whose reading may both inculcate a better understanding of article 9 and strengthen a resolve to protect the advances made by that article.

A lawyer whose problem is governed by the law apart from the Code may or may not find an answer in this treatise. The author has not attempted to provide an encyclopedia. A researcher who wants to know how the Washington court has construed Washington Revised Code section 61.04.020 (chattel mortgage filing), for example, will have to look elsewhere.

A student who is concerned with a particular kind of pre-Code security arrangement such as a chattel mortgage or a conditional sale will not find all he wants in any one division of the treatise. Although the chapters in Part I are neatly labelled "Pledge," "The Chattel Mortgage," "The Conditional Sale (Herein of Consignments and Leases)," "The Trust Receipt," "Accounts Receivable Financing (Herein of the Rule of Benedict v. Ratner)," it must be remembered that various details are not in Part I but are instead interwoven with the discussion of article 9. A by-product of the combination of this distribution of subject matter with the author's dual subject-matter indexing system[9] is a necessary caveat for a researcher into the pre-Code law: he is obliged to examine carefully both of the subject-matter indices.

These observations are intended to be factual and not critical. It would have been well nigh a physical impossibility, and would certainly have been a bootless enterprise, to have undertaken a discussion of all of the details of the pre-Code situation in our fifty-plus jurisdictions. Moreover, what was done rather resembles in difficulty the seventh labor of Hercules and I am not inclined to be captious about the details the author chose to leave out. As a matter of fact, he provides in relatively short compass an amazing amount of useful information about the pre-Code law. On a number of matters, particularly security assignments of intangibles, field warehousing, factors'

[9] See text accompanying notes 44-47 *infra.*

liens, trust receipts, surety-financing bank contests, accessions, commingled goods, circular priorities, subordination agreements, negative pledges, the priority of federal tax liens, and bankruptcy problems, a researcher may very well find his answer here more easily than he can anywhere else. One will also discover that the discussions of fixtures, motor-vehicle-title statutes, artisans' liens, future property, future advances, and fraudulent conveyance principles of the *Benedict v. Ratner* complexion, will at the least be very helpful in getting the general picture, although in these areas the vagaries and quantity of local law are such as to put special emphasis on the kind of detail which Professor Gilmore may or may not have included.

The segmented discussion of the pre-Code law, particularly relating to perfection, priorities and default remedies both strengthens the discussion of article 9 with which the pre-Code material is integrated and fosters a better understanding of the differences and similarities in the pre-Code law as it applied to the different types of pre-Code security devices.

III. Some of the Details

If I have managed to accomplish my purpose, the following should provide a reasonably representative indication of Professor Gilmore's handling of specifics.

(1) Anyone who pokes around in UCC section 9-106 with a professional chore such as planning or drafting at hand may react as he might if he uncovered a basket of live eels. Where do these things begin and end? The superficial simplicity of the section's definitions of accounts, contract rights, and general intangibles obscures a tangle which is made especially awkward by the fact that section 9-102(1)(b) brings sales of accounts and contract rights, but not sales of general intangibles, within the coverage of article 9. The author spells out the beginnings and endings of the several definitions and explains how the section came to have its present content.[10] By way of conclusion, he states: "The three-headed classification, being not only unnecessary but harmful, should be done away with at the earliest possible moment."[11]

The narrow definitions given to "account" and "contract right" also cause trouble in UCC section 9-318(4), where these terms are

[10] Pp. 379-82.
[11] P. 383.

used in specifying the area within which a contract term prohibiting assignments shall be inoperative. Professor Gilmore points out the problem and goes on to say:[12]

> It is not clear why §9-318(4) was not made applicable to all intangible claims; no reason suggests itself why the rule should not be applied by extension, as may be appropriate, to cases involving claims which may not, technically, be "accounts" or "contract rights." There is surely nothing in the Article to suggest that the contrary rule was being deliberately adopted for the classes of intangibles not specially referred to. The apparent restriction of the rule to accounts and contract rights presumably reflects the fact that no-assignment clauses have caused the greatest amount of trouble in this area; the draftsmen were more anxious to hunt down the existing beasts than to bother with hypothetical dragons.

(2) The author notes the failure of section 9-318(1) to mesh with section 9-206(1) as to waivers of defenses by account debtors.[13] The former section talks of sales transactions; the latter refers to both "buyers" and "lessees." He goes on to say:[14]

> The present wording of the §9-318(1) cross reference can unfortunately be read to mean that only "account debtors" who are buyers of goods can ever waive their contract defenses. The purpose of this tedious discussion is to suggest that such a senseless restriction was never intended and that the careless wording of the cross reference, to the extent that it suggests such a restriction, should be disregarded.

(3) A draftsman who is pondering section 9-203(1)(b) preparatory to putting together a security agreement is apt to be much impressed by the passage worded: "In describing collateral, the word 'proceeds' is sufficient without further description to cover proceeds of any character." This seems to have a purpose both profound and pervasive. It apparently contemplates routine security agreement references to proceeds, yet no disclosure of the reason is to be found in either text or Comment. An explanation is given by Professor Gilmore, and a prosaic one it is. We are reminded of the substantive coverage of proceeds in section 9-306, then:[15]

> The §9-203 sentence was intended to make clear that exact or detailed descriptions of particular types of proceeds were not required. It ought

[12] P. 392.
[13] P. 1094.
[14] Pp. 1094-95.
[15] P. 351.

> to have been part of §9-110 on description, where it would have done no harm. It is to be hoped that its inclusion in §9-203 will not lead to holdings that a new, and entirely unnecessary formal requisite has been created.

The author also mentions the automatic perfection provision of section 9-306(3) and remarks: "However, by including a 'proceeds' clause in his financing statement, the secured party may run the risk that he will be taken to have given the debtor a power of sale; except for inventory, he may decide that it is better to leave the proceeds clause out."[16] With this sentiment I am unable to agree.[17]

(4) In the pre-Code era, an attempted pledge without possession was the subject of some litigation and a good deal of uncertainty, both of which are examined by Professor Gilmore.[18] He continues the discussion into the Uniform Trust Receipts Act,[19] and on into article 9.[20] Concerning UCC sections 9-304(4) and 9-304(5), which grant temporary perfection without filing or possession but to differing classes of collateral and with differing criteria, the author comments:[21]

> It seems unfortunate that subsections (4) and (5) preserve distinctions which go back to UTRA and the common law: none of the discrepancies as to perfection between the two subsections (concerning time, purpose, value, the necessity of a written security agreement, the types of collateral covered) makes much sense. On the other hand, none of the discrepancies seems likely to lead anyone into error except in a freak situation. Combining the two subsections might have made

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[16] *Ibid.*

[17] The decision whether to include a reference to proceeds in the original financing statement seems to me to be controlled by the fact that the demand of UCC § 9-306(3) for perfection beyond the ten-day period of automatic perfection is not limited to situations in which the secured party authorized the disposition or knows it has occurred. To be safe, the secured party must file as to proceeds at the outset if he is not in possession of the collateral, because a wrongful disposition can occur of which he is unaware. I would be inclined to mention proceeds in every financing statement and in every security agreement. The latter procedure seems to be desirable because an argument, concededly far-fetched, especially in the instance of proceeds, can be made to the effect that a financing statement reference to collateral is ineffective if there is not at some point a security agreement covering that collateral. The argument can be grounded on a pessimistic coupling of UCC § 9-204(1): "A security interest cannot attach until there is agreement . . . that it attach," with UCC § 9-303(1): "A security interest is perfected when it has attached . . ." (there are other-requirements also), which suggests that a financing statement reference to proceeds should be supported by a security agreement reference to proceeds. As a counter to the implied-authorization hazard, I should think that a security agreement clause forbidding disposition of the collateral by the debtor, save as the security agreement otherwise provides, will suffice.

[18] Pp. 449-52.

[19] Pp. 453-55.

[20] Pp. 455-61.

[21] P. 460.

things easier for the reader, but no real harm appears to have been done.

(5) In Chapter 30, "Fixtures under Article 9: The Problems of Perfection and Priority," Professor Gilmore reviews the antecedents, drafting and content of UCC section 9-313 in a discussion which should help materially to foster understanding and acceptance of the article 9 approach to fixtures. Two aspects of section 9-313 are critically considered.[22] As used in subsection (4) of that section, the word "subsequent" is far from clear. Of this the author writes:[23]

> A purchase which is made after affixation is certainly "subsequent" to the security interest, so that the purchaser will win if he is "without knowledge." But the security interest may, and in all probability will, attach before affixation. Is a purchase made during the period after attachment and before affixation "subsequent"? ... It is suggested that the buyer or mortgagee who makes his "purchase" after the security interest has attached but before the goods have been affixed should be held to be a "subsequent purchaser" if in fact he relies on the incoming fixtures and is without knowledge of the security interest. If he has not relied on them—if he has not made his advance in the good faith belief that the fixtures would come in free of encumbrances—he is in the position of a "prior" interest and should not be protected.

Of the requirement in section 9-313(4)(c) that the real estate encumbrance be of record as a condition to priority for subsequent advances, it is said:[24]

> The requirement that the mortgage (or "encumbrance") be "of record" was an unexplained addition in the 1956 revision of §9-313. As the paragraph is presently drafted, the requirement makes no sense at all; the "prior" mortgagee would be equally misled by the subsequent fixture interest, whether or not he had recorded his own mortgage. The requirement would make sense under a somewhat different drafting approach which is presently suggested.

(6) UCC section 9-207 spells out in some detail the rights and duties which exist when collateral is in the secured party's possession. Subsection (1) states the secured party's duties. Subsection (2) is in general concerned with the secured party's rights while in possession, but includes in subpart (d) a provision worded: "The secured party must keep the collateral identifiable but fungible collateral may be commingled." Since counsel in advising or drafting will naturally

[22] Pp. 825-28.
[23] Pp. 825-26.
[24] P. 828.

assume there is a meaning behind everything, the location of this duty in subsection (2) would appear to be significant. Professor Gilmore informs us that the contrary is the case, and that (d) should have been placed in subsection (1). He goes on to say: "The only harm that could follow from the misplacement comes from the fact that the preamble to subsection (2) purports to make all the rules of the subsection subject to agreement 'otherwise.' "[25]

Subsection (2) of section 9-207 contains language in subpart (b) which on close scrutiny becomes increasingly obscure. It reads: "The risk of accidental loss or damage is on the debtor to the extent of any deficiency in any effective insurance coverage." Of this passage the author comments:[26]

> The novel part of paragraph (b) is the insurance clause, which might well have been, but is not, clarified by a Comment. It is clear enough that the insurance coverage referred to must be insurance taken out by the secured party to protect only his own interest and not the debtor's. The provision would be the merest gibberish if it were taken to include insurance payable to the debtor. The rule of paragraph (b) is then that when the secured party's interest is insured and the debtor's is not, the secured party bears the risk of loss.

Subsection (2) also has in subpart (a) an authorization for a charge against the debtor of indicated expenses incurred by the secured party. The interrelation between this provision and the distribution provision of section 9-504 is considered.[27] The former type of expense can be added to the debt; the latter section contemplates only the order in which disposition-proceeds shall be distributed. The author comments:[28]

> If it is assumed that the expenses were reasonable and were in fact made in compliance with the §9-207 duty of custody and preservation, this is an improper result... the possible inference from §9-504(1) that post-default expenses should not be regarded as included in the secured obligation or that the debtor should not be personally liable for them should be disregarded.

(7) The notion that a promise to create a security interest is a sufficient basis on which to ground an "equitable pledge" or an "equitable mortgage," if the promisee has actually extended his credit,

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[25] P. 1154.
[26] P. 1140.
[27] P. 1132.
[28] Pp. 1132-33.

was a prominent feature of the pre-Code law. So was the idea that an attempt to create a security interest, which failed for non-compliance with a "legal" requirement, might be salvaged, at least between the immediate parties, by the same method. This, the Comment to UCC section 9-203 informs us, is not true under article 9.[29] Of the Comment, Professor Gilmore remarks:[30]

> With deference, as Judge Learned Hand used to say, the author, in his capacity as treatise writer, would like to suggest that, in his earlier capacity as Comment writer for Article 9, he overshot the mark.

He goes on to note that statutes of frauds have not, so far, reached their avowed goals and suggests at page 346 that the statute of frauds stated in section 9-203 may not have "the universal scope which the § 9-203 Comment reaches for."

(8) Article 9 establishes a new and very sensible technique by which a secured party can be forced by the debtor to produce information about the current debt balance and the current roster of the collateral. UCC section 9-208 does not provide for an effective request for such information save by the debtor. Professor Gilmore says of this limitation:[31]

> There is one bothersome situation, under § 9-208, in which it is not to the debtor's interest to provide information, while the person seeking the information has a legitimate reason for inquiry. This is the case of a creditor who is contemplating the initiation of an action to recover his debt (or the making of a levy after judgment has been recovered).... This seems a clear case in which amendment of the Code provision would be desirable, although care should be taken not to push §9-208 to the opposite extreme by giving a right of inquiry to all intermeddlers, competitors and law review editors. The amendment might provide that, in addition to the debtor, a creditor should have the right to inquire if he has instituted an action on his debt.

(9) The Pandora's box opened by the Supreme Court in *United States v. R. F. Ball Constr. Co.*[32] has become of great concern to counsel for secured parties, as the sweep of the choateness test for private security priority over federal tax liens has become better understood by the profession and the rule of the *Ball* case has been

[29] In Point 5 the warning appears: "Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies subsection (1)(b), is not enforceable even against the debtor, and cannot be made so on any theory of equitable mortgage or the like."
[30] P. 345.
[31] Pp. 472-73.
[32] 355 U.S. 587 (1958).

implemented in subsequent decisions. The choateness problem is examined in detail in Chapter 40. Future prospects for the doctrine are considered in section 40.5, which is entitled: "The present state of the controversy: Hypotheses and speculations," and which begins:[33]

> There is 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. The most that can be done is to review the range of possibilities which, at the moment of writing, seem to be within the bounds of reasonable speculation.

(10) UCC section 9-204(5) states in language which could hardly be more sweeping: "Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment." When we come to correlate this proposition with UCC sections 9-204(1) and 9-303(1), however, we bump heads with a really tough problem and one which is critically important in future advance financing. These sections inform us that a security interest cannot attach until there is value, and that a security interest is not perfected until it attaches. There is perfection when the initial credit is extended (assuming there is agreement and filing, and that the debtor has rights in the collateral) but does that perfection extend to the later advances? Is the perfection in gross, dating from the initial "value," or piecemeal as segments of value are made available to the debtor? Professor Gilmore examines the problem at length and concludes that the statute, correctly construed, accords perfection in gross and from the time of the initial value.[34]

(11) Under the Code, filing is not designed to last forever. UCC section 9-403(2) sets a cut-off point after which a filing is no longer effective and section 9-403(3) provides for a continuation procedure. As worded, section 9-403(2) seems clear enough: the filing is good for so long, and then it ceases to be good. The natural import of these Code sections is that a failure to continue means vulnerability to subsequent interests, not to interests previously acquired by others in a subordinate capacity. The Comment to section 9-403 under

[33] P. 1062.
[34] Pp. 933-42.

Point 3, however, says in effect that if a secured party fails to file a continuation statement he becomes junior to competing interests then extant although they were junior when acquired. This anomalous situation is considered by Professor Gilmore, who concludes: "It is submitted that the Comment just referred to is wrong, not only in principle but as an explanation of the statutory text."[35]

(12) At two points in the remedies sections of article 9, a secured party is required to send a notice to the debtor and to certain holders of subordinate security. In practice the precise course of conduct contemplated by the statute becomes important to the secured party and his lawyer, but the statutory language does not divulge the critical details. The notice of sale demanded by UCC section 9-504(3) is discussed:[36]

> As a matter of English usage, the word "reasonable", in the provision just quoted, evidently makes a time reference: the notification must be sent out far enough ahead of the sale so that those entitled to receive it will have a reasonable time in which to decide what to do to protect their interests. That, however, can hardly be the end of the matter. Every aspect of the sale must be carried out in a commercially reasonable manner, and that obviously includes the notification. The purpose of the notification requirement is to give the debtor, his representatives and competing secured parties the information they need in order to decide whether to redeem the collateral or to bid for it at the sale. A notification which did not give such information would not be commercially reasonable. At a minimum it would be necessary to describe the collateral and state the amount of the obligation for which it is being sold.

The use of certified or registered mail is also recommended.

A similar comment[37] is made concerning the notice of intent to

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[35] P. 589.

The author is critical of two other features of § 9-403(3): "It is unfortunate that § 9-403(3) adds to the provision for refiling within the six-month period prior to lapse the suggestion that only 'timely filing' of the continuation statement is effective to preserve the original filing." P. 587. Later on, he states at pp. 587-88 that:

> Another flaw appears to be the provision that a continuation statement must "state that the original statement is still effective." It is not clear what purpose this self-serving statement is meant to serve.... It is to be hoped that the courts will not follow the formula which the nineteenth century courts customarily applied to this sort of situation: the statute must be strictly complied with; the most technical noncompliance voids the security interest. Article 9 is filled to overflowing with cautionary statements to the effect that harmless, good faith error should not be penalized; that sensible approach should be applied to this curious lapse from good sense.

[36] P. 1241.

[37] P. 1224.

retain the collateral, which is required by UCC section 9-505(2). The latter section permits the recipient of such a notice to object "in writing within thirty days" but does not indicate when a notice of objection shall be operative. The author's discussion of the section continues:[38]

> It could be argued that an objection is "made" within the time limit if it is mailed on the thirtieth day, no matter when it is received or whether it is ever received. At this point the statutory text may be defective but the argument should not prevail. Thirty days is ample time—indeed it is probably more than enough time and a shorter period should have been chosen—for any potential objector to make up his mind and get his objection into the hands of the secured party who made the proposal. The proposing party should not bear the risk of the mails after the 30-day period has run.

(13) A perennial problem in security-realization procedures is how to attract bidders. One obvious move in the right direction is to give them assurance that a good title can be obtained in the realization sale, not just a lawsuit with the debtor. To this end, UCC section 9-504(4) states such protective principles, but states them differently for public and private sales. The section and its details are examined[39] with particular emphasis on the distinction between the no-knowledge standard of subsection (a) (public sales) and the good faith test of subsection (b) (sales not public). The author is critical:[40]

> The distinction between the affirmative presence of good faith and the negative absence of bad faith, which has long been familiar in negotiable instruments law, has never been a workable one. It may be hoped that the courts will pay no attention to it in this context and will conclude that paragraph (a) is merely a more concrete description of the "good faith" generally referred to in paragraph (b). There is a certain danger in the suggestion that purchasers at private sales must meet a higher standard than purchasers at public sales. The most obvious way of constructing the higher standard would be to say that the private sale purchaser is under a duty to make diligent inquiry into all the circumstances of the sale and is bound by whatever such inquiry would have revealed while the public sale purchaser is bound only by what he knows. "Good faith" in paragraph (b) was certainly not intended to support such a construction, which would seriously interfere with disposition by private sale which it was one of the basic policies of the Article to encourage.

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[38] Pp. 1224-25.
[39] P. 1249.
[40] *Ibid.*

Any treatise reader will find places at which he would have preferred something more or something different. My nominations are noted.[41] All of them relate to the article 9 discussion. These criti-

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[41] I would have welcomed some help, or more help:

(a) At about p. 350, with the question: "Can a security interest be created under UCC § 9-203(1)(a) [that is, by possession] by the kind of notice to a bailee who has not issued a negotiable document which is contemplated by UCC §§ 9-304(3) and 9-305?"

(b) At pp. 350 and 458, with the question: "Why does UCC § 9-203 contain no language integrating the possession provision of § 9-203(1)(a) with the idea implicit in § 9-304(5) that a security interest created by possession under a security agreement which does not conform to § 9-203(1)(b) will continue despite cessation of the possession?"

(c) At p. 475, with the question: "Can a secured party require prepayment of the $10 charge permitted by UCC § 9-208(2) as a condition to issuance of the statement required by § 9-208(1)?"

(d) At p. 475 or thereabouts, with the vulnerability of an assignee under a termination statement or release executed by the assignor, if the latter is at the time the secured party of record, and about the ways and means open to an assignee who has neglected to either show his assignment on the original financing statement pursuant to UCC § 9-405(1) or to take an assignment-statement pursuant to UCC § 9-405(2).

(e) At p. 477, with the question: "Are the Article 9 property classifications (*e.g.*, inventory, farm products) a safe index of 'types' for UCC § 9-402(1) purposes?"

(f) At pp. 667-69, with the priority problems which can develop if a secured party who holds a negotiable note which is part of chattel paper undertakes to sell the note without disclosing the existence of the security. Do we look to UCC § 9-308 or to § 9-309 for answers?

(g) At p. 733 or thereabouts, with the question: "As to instruments which are proceeds, will a financing statement reference to proceeds, as is contemplated by UCC § 9-306(3)(a), suffice or does § 9-304(1) apply?"

(h) At pp. 738-39, in understanding the reference in UCC §§ 9-306(5)(b) and 9-306(5)(c) to a "security interest" for an unpaid transferee of chattel paper or of an account, in the case of sales of such assets.

(i) At p. 1193, with the author's statement: "The obligation secured will be, of course, a money obligation." The context is a discussion of default events. *Cf.* passage at page 334 on the matter of obligations. Cannot a security agreement secure any lawful undertaking of a "debtor," such as an undertaking to deliver a race horse or to construct a building? These may, of course, through the litigation process, reduce to money damages.

(j) At p. 1209, with the position of junior secured parties in the execution procedure contemplated by UCC § 9-501(5), particularly concerning notices and distribution methods.

(k) At p. 1219, with the author's statement: "The right to redeem under [UCC] § 9-506 continues until the secured party has disposed (or entered into a contract to dispose) of the collateral, unless it is sooner terminated by a post-default agreement, which must be in writing, or by a discharge of the secured obligation under § 9-505." What of the impact on redemption of the alternative procedures made available to a secured party by § 9-501, particularly foreclosure, and the execution procedure permitted by § 9-501(5)?

(l) At p. 1220, with the author's stress on "waiver" of redemption rights. The pertinent language in UCC § 9-506 is "unless otherwise agreed." Has the familiar in-lieu-of-foreclosure transaction become a "waiver" rather than an agreed-on sale of the debtor's interest to the secured party?

(m) At about p. 1250, with the apparent gap between UCC § 9-504(1)(c), which contemplates distribution of a surplus to holders of subordinate security interests, and § 9-504(3), which permits certain sales without notification to such subordinate persons. Is a junior secured party obliged to routinely file a demand for a surplus with the senior secured party?

(n) At p. 356, with the question: "Where a security agreement covers after-acquired collateral, will the proper place to file be separately determined as to

cisms weigh very lightly when balanced against the assistance which Professor Gilmore has provided.

IV. STYLE AND FORMAT

Those who like their legal writing obscure, turgid and pedestrian will not be pleased with Professor Gilmore's work. As the excerpts previously quoted have perhaps imperfectly revealed, his writing is concise, clear,[42] readable, often sprightly, and on occasion entertaining.

Volume I contains a Table of Contents covering both volumes. Volume II has a Table of Contents covering that volume. Chapters are divided into numbered and titled parts,[43] an arrangement which facilitates both cross-references (which are numerous) and subject matter index references.

Three indices are provided: the first, a cross-reference table which keys Uniform Commercial Code section numbers to the treatise; the second, a subject matter index to discussions of the Uniform Commercial Code; and the third, a subject matter index to discussions of the pre-Code and non-Code situation. Although the use of multiple subject matter indices seems to be unusual I find it helpful.

The author's index descriptions are uncommonly detailed and specific.[44] The searcher is ordinarily directed not to a chapter or even to a page but to a passage, which is indeed a blessing.[45] It may be surmised that a user's concern will more often than not be with a Uniform Commercial Code problem, and he will appreciate the shorter range of his search in an index which is devoted entirely to Code matters. He must, however, not forget the other index. In an admonitory note, the author reminds us of the difficulties for a searcher posed by the fact that index preparation is in large measure a subjective process.[46]

each item by the debtor's residence or the property classification at the time the collateral is acquired?"

[42] I do have trouble with the parenthetical passage at p. 374 which reads: "'In the possession of' evidently means 'owned by.' Not even a farmer could give an effective security interest in goods which he did not own, solely on the ground that he had possession of them. On the other hand the insistence on possession suggests that goods owned by a farmer but in the possession of a non-farmer cease to be 'farm products.'" Sentences one and three seem to be contradictory. Moreover, I would have welcomed some light on the drafters' purpose in using the word "possession" at this point.

[43] For example, Chapter 39, "Circular Priority Systems," is divided into § 39.1, Types of circularities; § 39.2, Proposed solutions; § 39.3, Circularity litigation since 1940; § 39.4, The courts and their critics.

[44] For example, the two pages given to "Priority, rules of" (pp. 1427-29), are followed by a page of references to "Priority (rule of § 9-312(5)), Chapter 34," and then by several references to "Priority (surety vs. assignee), § 36.7."

[45] For example, "§ 35.8, text at n.9," or "§ 32.5, n.5," or "§ 29.2, text following n.1."

[46] "Frequently the line between Code and non-Code is no easier to draw than

He also reminds us that article 9 makes some changes in terminology which necessitate coverage of basically similar matters in both indices and under different headings.

Although I did find a few points at which the foot soldiers performed with less than exemplary precision, my reading indicated a generally high level of editorial excellence.[47]

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the lines between substance and procedure, law and fact or day and night. The critical reader will find many instances of entries made in one of the subject matter indexes which he would, had he prepared the index, have placed in the other. The sometimes arbitrary allocation of material between the two subject matter indexes illustrates the fact that it will often be necessary to consult both indexes." p. 1383.

[47] Those few points are:

(a) Reciprocal cross references between the letter of credit discussions at pp. 343 and 394 would have been helpful.

(b) "Elmendorf-Anthony Co." is rendered as "Elinendorf-Anthony Co." at p. 916, n.1, and so appears in the Table of Cases.

(c) The statement-request procedure which is provided for in UCC § 9-208 is indexed at p. 1413 under the heading "Filing, duty of secured party to give information when requested by debtor (§ 9-208)" rather than under Request, or Information, or Inquiry, or Statement, or any other of the ideas which occurred to me as I tried to locate this discussion in the subject matter index. The Index 1 cross-reference table, at "§ 9-208," produced the reference at once. (It is to § 15.3 of the text.)

(d) The subject matter index heading "Surety" at p. 1441 does not disclose § 44.5, n.1, which relates to § 9-504(5). The cross-reference index heading "§ 9-504(5)" refers to § 44.4 n.1 rather than to § 44.5 n.1.

(e) At pp. 16-17 the text statement "On this theory, Article 9 of the Code recognizes a possessory interest in chattel paper...." is accompanied by a footnote reference to § 9-304; the reference should probably be to § 9-305, although this is a perfection rather than a substantive section. In terms of recognition, arguably § 9-203(1)(a) is the appropriate reference.

(f) At p. 320 n.8, §9-301 is cited; the correct citation is §9-103.

(g) At p. 789 line 26, a reference is made to the "1965 revision"; "1956" is obviously intended.

(h) At p. 7 n.8, it is said of Whiting v. Rubenstein, 7 Wn. 2d 204, 109 P.2d 312 (1941), "late perfecting pledgee upheld against pledgor's receiver in bankruptcy." The contest was between a state court receiver and a lender whose advances preceded transfer of the collateral; the receiver attacked the transfers as preferences under the Washington corporation preference statute, then Rem. Rev. Stat. § 5831-2 (now WASH. REV. CODE ch. 23.72), and lost; the court was concerned with substance rather than perfection and apparently followed the familiar relation-back theory.

(i) At pp. 14-15, n.11, Hodge v. Truax, 184 Wash. 360, 51 P.2d 357 (1935), is discussed. Of the case it is said that the action was by "Hodge's administratrix," and "there is an obscure suggestion that a transferee of a contract right for security was a pledgee and not an assignee." It is further said: "The court, noting that 'the contract' had been delivered to the bank by Hodge, concluded that the bank, as pledgee, had the power to compromise the Truax-Hodge debt and that the discharge was binding against the administratrix." The action was in fact brought by a legatee holding under a decree of distribution. 184 Wash. at 362-70, 51 P.2d at 358-61. The court said: "there can be no question but that, when the assignment and the two contracts were delivered to the bank, it was a pledge." 184 Wash. at 366, 51 P.2d at 359. As the majority of the court saw the problem, a pledgor's right to sue on a pledged contract right after the statute of limitations had run on the secured debt was the issue and this issue was resolved against the pledgor. Concerning the compromise, the court said: "The twenty thousand dollars paid by Truax was in full settlement of the balance which he owed thereon. It will be admitted that the appellant,

V. Conclusion

In his discussion of the background, drafting and content of article 9, Professor Gilmore has given us an invaluable research aid. I should think that for some time to come anyone who is grappling with an article 9 matter, whether as a law student, law teacher, practitioner, referee in bankruptcy, or judge, will want to consult this treatise. I should think, too, that anyone who is at grips with a personal property security problem which is not or may not be covered by article 9 would be well advised to include Professor Gilmore's treatise in his research.

I would hope that legislators, if tempted to tinker with article 9, will ponder, before acting, the lessons implicit in Professor Gilmore's reconstruction of the legal system which article 9 replaces. That kind of confusion can develop again. (On the other hand, it is to be hoped that the Permanent Editorial Board for the Uniform Commercial Code will propose appropriate uniform modifications of article 9 for legislative consideration.)

I would hope that judges will, in construing and applying article 9, also recall the background against which article 9 was drafted and remember that a major function of this vitally important uniform law will be lost in non-uniform construction. I know of no place in which relevant background information can be as conveniently examined as it can in this treatise.

Finally, I would hope that critics of article 9 as "revolutionary" will read Professor Gilmore with particular care. No other source so clearly puts this statute in the mainstream of American legal development or so clearly identifies article 9 with the better common points and the essential elements of the law it supersedes.

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not being a party to the settlement, was not bound thereby." 184 Wash. at 364, 51 P.2d at 359. The appellant was Mrs. Hodges, the legatee and plaintiff.

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