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## Gilmore: Security Interests in Personal Property; Coogan, Hogan & Vagts: Secured Transactions under the Uniform Commercial Code

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## BOOK REVIEW

**Security Interests in Personal Property.** By Grant Gilmore. Boston: Little Brown & Co. 1965. 2 Vols. Pp. xxxiv, xiii, 1508.

**Secured Transactions under the Uniform Commercial Code.** By Peter F. Coogan, William E. Hogan and Detlev F. Vagts. New York: Matthew Bender & Co. Vol. 1. 1963. Pp. 1541. Vol. 2. 1964. Pp. 910.

The four books under review represent the most thoughtful and best written work yet done in the area of secured transactions. Within them there is history, detail, research aids, practical solutions to practical problems, theory and much more. The discussions contained in all four books concerning the inadequacies of Article 9 of the Uniform Commercial Code and the practical methods that should be used to overcome these inadequacies will be of considerable help to the entire legal profession.

These books are not easy to review. To sit down and read through four volumes on secured transactions is not what one would call a form of relaxation. Fortunately for the user, however, there is no need to read straight through. As he becomes concerned with a problem, he can look through the tables of contents, the indices or the synopses and locate easily the discussion relevant for his purposes. Thus, both sets are so fashioned as to make the material readily accessible.

The two Gilmore volumes, *Security Interests in Personal Property*, fill the void that has lasted these many years. There has not been a definitive treatment of secured transactions for reasons readily apparent: With the multitude of security devices available and the problems inherent in each, together with the basic lack of any legal or functional relationship among them, it was pretty much impossible for one person to treat the subject as it should be treated. Professor Gilmore has accomplished the impossible. In a very simple, straightforward and readable style he begins his treatise with an exhaustive analysis of pre-Code security law. Part I, consisting of eight chapters of about two hundred and eighty pages, treats the independent security devices from their earliest days until the time of the Code's adoption. Not only is the history there, including the purposes each device sought to fulfill, but the cases are there as well. Pertinent statutes, such as the Uniform Trust Receipts Act, are fully discussed in a manner that would make one think that they have not been repealed. In his preface, Professor Gilmore begins with this very point:

In the preparation of a book such as this, it might seem appropriate to have dispensed with the analysis of pre-Code law in order to focus the discussion exclusively on the new statute. I believe that there are several reasons, in addition to my own fondness for writing history, why the opposite course, which has been followed here, will prove to be helpful even to the overburdened practitioner.<sup>1</sup>

In expressing these reasons, it is pointed out that the Code is not a break with

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<sup>1</sup> P. vii.

the past but rather, in many respects, a continuation of it. Most importantly, the draftsmen of the Code worked from their own experience with the past and, functionally, the Code changes very little. Many of the old practices will prevail under Article 9—a chattel mortgage will probably continue to be called a chattel mortgage and no harm done—and much of the pre-Code law will be used to construe and interpret the Code.

Thus, the first part of the treatise is invaluable. The chapters include thorough discussions (and thorough case citations) of the pledge, chattel mortgage, conditional sale, consignment, lease, trust receipt, factor's lien, field warehousing, accounts receivable financing and the use generally of intangible property. Nowhere else can such treatment be found, and this alone attests the worth of these volumes. For a more specific example, one can look at the problem of the mortgage with an after-acquired property clause. Professor Gilmore starts at the beginning, with *Mitchell v. Winslow*,<sup>2</sup> and points to Mr. Justice Story's holding that the inventory mortgage was not defeasible by an assignee in bankruptcy. With the simplicity that pervades the set, Gilmore notes: "Had Story's views prevailed, we should have been spared much grief."<sup>3</sup> Now therein lies a tale. And the tale is beautifully told in the following twenty pages replete with footnotes and cases tracing the developments from the mortgage into other types of security devices.

Throughout this part, each security device is traced from its origins in sufficient detail. The trust receipt is another excellent example of how Professor Gilmore starts at the beginning and works his way to and through the Uniform Trust Receipts Act. When the reader moves on into the succeeding parts of the book dealing with Article 9, the applicability of this historical treatment is brought into sharp focus. As one gets to specific Article 9 problems in Volume 2, the relationship between the old and new is clearly shown<sup>4</sup> and this treatise thus cannot help but be of assistance to the lawyers and courts when some particularly sticky Code problems arise.

Chapter 9 begins the discussion of Article 9. This chapter illustrates another of the great features of the treatise. It is a short chapter, concerned mostly with the drafting history of Article 9. Throughout the entire discussion, Professor Gilmore, one of the draftsmen of Article 9, gives us the benefit of his experiences in working on the Code. We are told with much candor where Article 9 is deficient through inadvertence or mistake; we are told why certain wording is as it is; and we are told about some of the practical difficulties encountered by the draftsmen. In all, this information, of a type not generally available, can only help the reader to gain further understanding in the use and application of Article 9. A particularly good example of the candor that is displayed can be found when the need for a signed security agreement is discussed. Professor Gilmore quotes the Official Comment to section 9-203 and then says:

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<sup>2</sup> 17 Fed. Cas. 527 (D. Me. 1843).

<sup>3</sup> P. 27.

<sup>4</sup> E.g., chapter 27 deals with "Proceeds" and it commences with a review of the litigation under the Uniform Trust Receipts Act; in chapter 26 on "Inventory, Farm Products and Other Goods," there is included a summary of the discussion concerning the mortgage, conditional sale for resale, the Uniform Trust Receipts Act and the Factor's Lien Acts.

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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.<sup>5</sup>

In the chapter dealing with the Code's classification of property, the author also takes to task the division of intangibles into accounts, contract rights and general intangibles. He summarizes his position in this regard both at the beginning and end of the section when he says: "It is a fair criticism that the draftsmen used three terms when one would have sufficed."<sup>6</sup> Further, "The three-headed classification, being not only unnecessary but harmful, should be done away with at the earliest possible moment."<sup>7</sup>

The balance of the treatise, Parts II through VI, deals with Article 9: definitions, scope, classification, perfection, priorities and default are all thoroughly discussed. In addition, the relationship of federal statutes, such as the Bankruptcy Act, the federal priority statute and the federal tax lien statute is discussed in some detail. Tangential problems, including subordination agreements, bank and surety conflicts, the negative pledge and problems of circular priority, are also covered. Throughout these discussions the author is not content with a mere exposition of the subject matter. He sifts through and lifts out the troublesome problems which are then carefully analyzed with the purpose of offering solutions to help guide us all. While one may not agree with all of Professor Gilmore's analyses and conclusions, the fact is that where arguments of reason exist on both sides of a question, he expresses such arguments. Where he prefers one over another, he says so and says why.

Finally, three further points should be noted. First, Professor Gilmore's writing style is such that one can actually read through a volume without falling asleep. It is alive throughout in a fashion one would never expect in a two-volume treatise on security law. One example will have to suffice. In discussing the Uniform Trust Receipts Act, the author points out some of the most difficult problems with the language contained in it, and concludes:

The case law harvest under the statute (which has been scanty) gives little sign that there was much experimentation under § 2(1). It may be that the almost impenetrably obscure language preserved the statute from anything like a general rape.<sup>8</sup>

Second, while it was previously noted that case citations abound, it was not mentioned that citations to law review articles and books are plentiful. There is much reference to the Coogan, Hogan and Vagts set<sup>9</sup> throughout and in many instances rather detailed discussion of points made by these other authors. Thus, it is helpful to have the references and, further, to be able to compare the points of view while having both sets at hand.

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<sup>5</sup> P. 345.

<sup>6</sup> P. 380.

<sup>7</sup> P. 383.

<sup>8</sup> P. 102.

<sup>9</sup> There are no reciprocal cross-references in the Coogan set since this set was published prior to the Gilmore set.

Third, helpful indices are included in this set: there is a table of cases, and separate indices to sections of the UCC, the subject matter of the UCC and the subject matter of non-Code and pre-Code laws. In addition to a complete table of contents, one is included before each chapter. All in all, the technical format of the treatise is quite an assist in guiding the user to that part with which he is most concerned.

*Secured Transactions under the Uniform Commercial Code* is the work of many people. Much of it was originally published in the form of separate law review articles and then up-dated for inclusion in these books. As the preface indicates, they are "addressed primarily to lawyers"<sup>10</sup> and emphasis "is placed upon the work of the lawyer as counsellor."<sup>11</sup> To accomplish the stated purpose, many hypotheticals are used throughout for discussion and to show concretely the application of Article 9 provisions. In this regard, too, Mr. Coogan's "Lazy Lawyer's Guide" is included and is something that deserves re-reading.<sup>12</sup> Like Professor Gilmore, the senior author, Mr. Coogan, was one of the draftsmen of Article 9. Thus, these books also contain many insights that could be expressed only by one with this type of background and experience.

Throughout the set, the articles by Mr. Coogan, Professor Kennedy, Mr. Gordon and the other contributors clearly strive for and succeed in achieving a presentation of the Code's utility, which is thorough, easily understandable and related to everyday problems. In a sense one may find an overlapping, as, for instance, between the Kennedy and Gordon articles: the latter presents an argument on one point of conflict between Article 9 and the Bankruptcy Act, while the former treats excellently the whole of the relationship.<sup>13</sup>

Volume 2 of the Coogan, Hogan and Vagts set is directed more toward specific financing problems. The chapters include discussions of the use of corporate securities as collateral, receivables financing, fixtures, intangibles, and the impact of the Sales Article of the Code and retail installment sales legislation. Finally, there is a piece by Messrs. Weintraub and Levin on Bulk Sales.

The two sets under review are not easy to compare. The immediate reaction is that the Coogan set is much more practical; the Gilmore set is much more of a research tool. This reaction, not altogether unfounded, is too general. Much in Gilmore is of practical utility and much in Coogan is analytical and helpful for research purposes. Probably the most accurate statement is that they complement each other. Perhaps the real difference between them is something that will become apparent in the future. Both have indications that they will be kept up-to-date. The Gilmore set, in bound volumes, has a space earmarked for pocket parts and the Coogan set

<sup>10</sup> 1 Coogan, Hogan & Vagts iii.

<sup>11</sup> Ibid.

<sup>12</sup> The Lazy Lawyer's Guide to Secured Transactions Under the Code, p. 72.

<sup>13</sup> Compare Kennedy, Trustee in Bankruptcy Under the Uniform Commercial Code: Some Problems Suggested by Articles 2 and 9, p. 1052, with Gordon, The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem, p. 1162.

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is published in the Matthew Bender & Co. loose-leaf style. Because the Gilmore set follows more of a pattern of working through Article 9, it is likely that as case material develops the supplementation will more easily fit within the text discussion and will be more readily available for the researcher. How this will work with the Coogan set is not so easily discernible. Will the new material be in the form of additional chapters or articles? For example, Messrs. Coogan, Kripke and Weiss have recently had published an article in the *Harvard Law Review* on one of the newer problem areas.<sup>14</sup> Indications are that this will be incorporated into the Coogan set. My reaction is that as far as new text discussions arise because of new developments, the Coogan set is adaptable for inclusion therein. As important judicial developments arise, the Gilmore set is more adaptable in this sphere.

As is obvious from the body of this review, both sets of books are thought to be excellent. I, of course, do not agree with all of Professor Gilmore's arguments or conclusions, nor do I agree with all that is contained in the Coogan set. However, this form of criticism, on matters of opinion, really has no place in a review of books of this kind; my opinions regarding substance in no way reflect on the worth of the books themselves. Furthermore, no attempt has been made at picking out printing errors or the like, although Gilmore's books do contain some annoying errors of this kind; again, however, this has nothing to do with the set's utility. Without hesitation or qualification of any kind, I believe the two sets are musts for the lawyer's library and for the law teacher. I personally feel indebted to Professor Gilmore for what he has contributed. His is a monumental work and deserving of thanks and praise. An original work on security interests from the past to the present would have been thought impossible, except that Professor Gilmore has done it.

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<sup>14</sup> Coogan, Kripke & Weiss, *The Outer Fringes of Article 9: Subordination Agreements, Security Interests in Money and Deposits, Negative Pledge Clauses, and Participation Agreements*, 79 *Harv. L. Rev.* 229 (1965).