Security Interests in Personal Property. GRANT GILMORE. Boston: Little, Brown & Company, 1965. 2 vols. Pp. xxxiv, 1508. $45.00.

This is an excellent and important work, the recipient of the Ames Prize for a "meritorious" book awarded by the faculty of the Harvard Law School, and the most significant and authoritative commentary on the Uniform Commercial Code that has yet appeared. Article 9 on Secured Transactions is by all odds the part of the Code which has had the greatest impact on the legal profession, and Professor Gilmore was its principal draftsman. It is therefore pleasant for a fellow laborer to be able to report that the commentary is solidly competent and sometimes brilliant, and that it is faithful to the spirit of the sponsors of the Code who employed him as reporter.

Unlike its principal competitor, *Secured Transactions under the Uniform Commercial Code*,[1] the work is not a collection of separate essays. Although portions appeared earlier in legal periodicals, they have been integrated into a coherent whole, designed more for reference than for straight reading in cold blood. Yet despite the complex and technical subject matter, a lucid style is maintained throughout, sometimes sprightly almost to the point of insouciance.

The first 286 pages, as the preface explains, consist of "a survey, largely historical," of pre-Code law. The survey is justified as a portrayal of the state of mind of the draftsmen, or at least of the principal draftsman; much of it is repeated, summarized, or incorporated by reference in the subsequent discussion of the Code. The history is inevitably impressionistic rather than exhaustive, but it goes beyond the prefatory justification, perhaps because of the author's "own fondness for writing history." Sometimes a completion urge also seems to be at work: the discussion of the Uniform Trust Receipts Act, for example, includes six pages of very close analysis of two hypothetical cases. The UTRA has now been superseded in all but four of the states which enacted it. "No reported cases have yet been found dealing with" the first case; "No one seems yet to have suggested" the second.[2]

The balance of the work consists of explanation of article 9 of the Code and of analysis of the issues it presents. The discussion covers every significant issue under article 9 which has come to my attention. It includes some issues which I do not believe exist; sometimes the author seems to have a similar belief. The discussion always illuminates; some issues are exhausted, others disposed of summarily. Though

1 COOGAN, HOGAN & VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1963).

2 § 4.7 at 111 nn.5 & 6.

others no doubt will disagree, I believe that Professor Gilmore deals fairly even with those points on which he and I differ; the level of candor is unusually high. The discussion is not confined strictly to the Code, but ranges over such related topics as competing federal statutes, automobile certificate of title acts, subordination agreements and negative pledge clauses, circular priority systems, federal tax liens, and bankruptcy problems. The defense of the controversial section 9-108 against the attacks of bankruptcy buffs[3] requires particular mention: it is brilliant advocacy, although I do not subscribe to all that is said.

This brings me to what is in some ways the most fascinating aspect of the work, the conflict between the roles of draftsman and commentator. At one pole the draftsman-commentator is an oracle: Karl Llewellyn used to argue that the judicial impact of *Williston on Sales* as an exposition of the Uniform Sales Act was "no pleasant anomaly in a legal system which has not hitherto taken pleasure in the delegation to private persons of essentially legislative power."[4] At the opposite pole is a violation of the principle that a lawyer should not attack the validity or effect of his own work.[5] Professor Gilmore's preface discloses the problem: "It should be remembered that the anonymous 'draftsman,' whose shortcomings I exhibit, was not infrequently myself."[6] As that sentence suggests, he purports to write in his capacity as disinterested academic observer, not to present the official views of the sponsoring organizations: "I have tried to strike a balance between what seem to me to be the real accomplishments of the Code and the occasional defects which mar it."[7]

Such detachment, coupled with a style which is distinctly not oracular and with candid disclosure of the points at which he departs from organized consensus, should be and probably will be sufficient to prevent the work from being treated as retroactive legislative history. As I have indicated, I find candor in full measure. Others among the hundreds who have worked on the Code and who have experienced the rejection of particular proposals may resent Professor Gilmore's publication of his dissents, but eternal loyalty to majority decisions on controverted points would be an unwise and unworkable requirement. In my opinion his criticisms stay well within the bounds permissible for loyal participants in a collective enterprise.

When an author assumes the Olympian role of detached critic of his

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3 § 45.6.

4 See REVISED UNIFORM SALES ACT 49 (1941).

5 See DRINKER, LEGAL ETHICS 113-14 (1953).

6 P. x.

7 *Ibid.*

own work, the reader naturally looks for traces of unconscious bias as well. A draftsman for a group effort must learn to accommodate points of view different from his own and to accept editorial improvements gracefully, but he is likely to be less than completely happy when he yields as well as when he is outvoted. Sometimes he is wise to yield even though the improvement does not really improve the draft. As the project develops, however, his views tend to harden, for in a project as intricately interwoven as the Code, change becomes progressively harder to accommodate. At some point the job must be finished and frozen, at least temporarily, and as that point approaches changes must be resisted more and more vigorously. Thus the later the change, the greater the pain of the draftsman.

In the drafting of article 9, Professor Gilmore had much greater control of the process leading up to the 1952 Draft than in the revisions made in 1956 and subsequently. One would therefore expect him to think that a good many of the later changes, particularly those accompanied by the phrase "rewritten for clarity," were on balance unfortunate. And so, indeed, it turns out. This is not the place for a full catalogue of the points at which the reviewer disagrees with the author on points of law or policy, but it seems appropriate to give an illustration or two of the psychological process I have described.

Lapse and circular priority. Section 9-103(3) of the Code provides for certain cases where collateral is brought into the state which enacts the Code. In such cases "the security interest continues perfected in this state for four months"; if perfected in this state after the expiration of the four month period "perfection dates from the time of perfection in this state." The comment says that after four months the security interest "is subject to defeat here by those persons who take priority over an unperfected security interest (see Section 9-301). Under Section 9-312(5) the holder of a perfected security interest is such a person even though during the four month period the conflicting interest was junior. Compare the situation arising under Section 9-403(2) when a filing lapses."

Section 9-403(2) provides for "lapse" of a filed financing statement five years after the date of filing; "Upon such lapse the security interest becomes unperfected." The comment substantially repeats the comment to section 9-103 quoted above, and adds an illustration to make it clear that a junior security interest becomes entitled to priority when a senior interest becomes unperfected by lapse. The comment adds: "This rule avoids the circular priority which arose under some prior statutes, under which A was subordinate to the debtor's trustee in

bankruptcy, A retained priority over B, and B's interest was valid against the trustee in bankruptcy. In re Andrews, 172 F.2d 996 (7th Cir. 1949)."

In Professor Gilmore's section 21.6 on lapse, the comments quoted above are "discussed, disapproved and disavowed."[8] The 1952 draft of section 9-403(2) had been clear the other way, like the decision in the *Andrews* case. "Conceivably" the change in the text of the Code in 1956 "was merely a typist's or typesetter's error";[9] Professor Gilmore, though "in general responsible for preparing the Article 9 Comments," is "not responsible" for the language here criticized and "is, indeed, unaware of its origins."[10]

In the *Andrews* case the contestants were two chattel mortgagees and a trustee in bankruptcy. A failed to refile, but the court gave him first claim; the money came out of the pocket of B, originally the junior mortgagee, whose only fault was failure to search the record; the trustee in bankruptcy took everything above the amount of B's claim. In reaching this result, says Professor Gilmore, the court "sensibly" broke out of the circle; "as the *Andrews* case shows, solutions to circular systems, when they do arise, are not hard to come by."[11] In chapter 39 on circular priority systems, however, after a review of "these appalling complexities" without reference to the lapse problem, he expresses doubt as to the utility of an attempt to "approximate the reasonable expectations of the parties,"[12] instead, we should follow what courts, or at least some of them, have actually done in recent decisions, on the ground that "experience . . . solves more problems than logic."[13]

As one who participated in the 1956 deliberations on the Code, I find this treatment of the lapse question unsatisfying. My recollection is that most of the members of the responsible subcommittee were far less cheerful than Professor Gilmore now is about the prospect of circular priority, and that the revisions in question are two examples of great pains taken to eliminate circular priorities. I believe I supplied the *Andrews* citation after the subcommittee had settled the policy; I know I have always regarded the *Andrews* decision as a botch. However that may be, Professor Gilmore's attempt to make the 1956 text mean what the 1952 text said, contrary to the comment, involves him in a chain of reasoning about "knowledge" and "constructive notice"

8 § 22.8 at 627 n.7.
9 § 21.6 at 589 n.4.
10 *Ibid.*
11 § 21.6 at 589.
12 § 39.2 at 1032.
13 § 39.4 at 1045.

which does violence to the Code's definitions and the statutory text. One is tempted to quote his own language on another point: "On any decent principles of statutory construction it is, to say the least, harder [though apparently desirable] to see how the . . . provision can be thus cheerfully construed away. . . ."[14] Compare his apparent recommendation of "latitudinarian disingenuity" on another point.[15]

Fixtures. Section 9-313 on priority of security interests in fixtures was also generally rewritten in 1956. The 1952 draft seemed to say that a seller could retain a security interest in the cement foundation of a building and on default remove the foundation, subject to an obligation to "reimburse any encumbrancer or owner of the realty other than the debtor for the cost of repair of any physical injury." According to Professor Gilmore, "It was the thought of the draftsmen that coupling the right to remove with the duty to reimburse effectively limited the subsection (1) priority. . . ."[16] The revising subcommittee was apparently able to visualize cases of malicious creditors or consequential damage where the duty to reimburse for repair of physical injury would not be a sufficient limitation. In any event, to Professor Gilmore's distress, a new sentence was inserted to make it clear that there can be no removal of structural materials which become an integral part of the real estate. He argues ably that the new sentence should be read in accord with its wording and its purpose, and should not be read as introducing unintended complexities. Unfortunately his argument is weakened by observations which seem simply to express pride of authorship. An illustration is his conclusion "that the 1956 revisions of § 9-313 can, if approached in a cheerful spirit, be construed to have left the main lines of the relatively satisfactory 1952 draft unchanged."[17]

A similar reaction was provoked by another change in the same section. The 1952 draft denied priority to an unperfected fixture interest as against subsequent advances by a prior encumbrancer of the realty made without knowledge of the fixture interest and before its perfection. In accord with the general policy of section 9-312 of conditioning special priorities on the taking of appropriate steps to perfect, the 1956 draft limited the denial of priority to cases where the prior encumbrance is "of record." Professor Gilmore denounces the change as "an unexplained addition" which "makes no sense at all."[18] A second 1956

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14 § 21.7 at 593.
15 § 31.5.
16 § 30.2 at 805-06.
17 § 30.3 at 814.
18 § 30.6 at 828.

change extended the denial of priority to cases where the subsequent advance was "contracted for" without knowledge of the fixture interest and before perfection. In Professor Gilmore's book this too is "an unexplained addition"; he conducts an extraordinary argument with himself as to what it means:

(1) Perhaps a future advance clause means that any subsequent advance whatever is "contracted for."[19] (2) "The revisers must have been thinking of" so-called "obligatory" future advance arrangements.[20] (3) But "obligatory" advances could rarely be compelled once the encumbrancer learns of the fixture interest.[21] (4) Priority "surely" should not rest "merely" on advances "contracted for" before the fixture interest attached.[22] (5) "On grounds of policy, it can be reasonably argued that" priority should be given to advances "made without knowledge of the fixture interest."[23] (6) Two pages later: "It would not be impossible for courts to use 'contracted for' in such a way as to re-establish the vague but real priority which the construction mortgagee, under different guises, enjoyed at common law."[24] (7) "An astute and sensitive court might manipulate 'contracted for' in such a way as to do only good, while avoiding evil."[25] (8) Nearly 100 pages later, in the chapter on future advances: "[I]t is nonsense, at least on the conceptual level, to make a distinction between obligatory and voluntary advances."[26] (9) Finally, where a Code security interest conflicts with an earlier filed Code security interest: "There is no explicit language in any of the sections which have been discussed which make (*sic*) knowledge or notice relevant."[27] A good faith limitation may be implied, but "there is no bad faith in A's continuing to make contemplated advances, related to the original financing transaction, even though he knows of intervening liens or security interests."[28]

With deference, it is suggested that Professor Gilmore's reasoning last quoted is equally applicable to the analogous fixture problem, and that his confusion stems largely from reluctance to give a literal and sympathetic reading to statutory language inserted by someone else. Section 9-313 makes reference to the prior encumbrancer's knowledge

19 *Id.* at 829.
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Id.* at 831.
25 *Id.* at 832.
26 § 35.4 at 926.
27 § 35.7 at 942.
28 *Ibid.*

at the time his subsequent advance is "contracted for," but makes no reference to subsequent knowledge or notice. A "good faith" limitation is not merely implied; it is explicit in section 1-203. But there is no bad faith in continuing to make contemplated advances, related to the original financing transaction, even with knowledge of an intervening fixture interest. The fixture party is not left helpless: since the prior encumbrancer must be "of record," the fixture party has an opportunity to discover his peril.

The foregoing does not of course exhaust the points at which the reviewer balked, or even those which illustrate the thesis that any draftsman worth his salt will have a bias in favor of his own work which may survive the most intensive self-analysis and self-criticism and may show through to the informed reader of self-commentary. But a book review should not be a treatise, and I must content myself with brief mention of some of the undelivered comments from which I suffer:

Commingled goods. (1) It is not true that "perfected" in the first line of section 9-315(1) "in context, can only mean perfected by filing."[29] (2) The comment to the same subsection does *not* suggest "that paragraph (b) is limited to cases where 'components are assembled into a machine,' "[30] any more than it suggests that paragraph (a) is limited to cases of "cake mix or cake." (3) Section 9-313(1) does not have any "apparent meaning" at all with respect to unperfected security interests. It is strictly limited by its opening clause to cases where "a security interest in goods was perfected." Professor Gilmore's contrary reading is an example of his addiction to negative implications, which appears more than once. "All men are mortal" does not mean that all other animals are immortal.

Statutory liens. The "unexplained appearance of the possessory language in the 1956 draft"[31] of section 9-310 is easily explained by section 67c of the Bankruptcy Act,[32] the *Quaker City Uniform* case,[33] and the unreasoning prejudice of the revisers against circular priorities, referred to above. Professor Gilmore neglects section 67(c)(2) of the Bankruptcy Act, which is somewhat more drastic than section 67(c)(1), which he does discuss. In this instance we are told unnecessarily that a provision for possessory liens "does not lead inevitably" to a negative

29 § 31.4 at 846.

30 *Id.* at 848.

31 § 33.5 at 888.

32 30 Stat. 564 (1898), as amended, 11 U.S.C. § 107(c) (1964).

33 *In re* Quaker City Uniform Co., 238 F.2d 155 (3d Cir. 1956), *cert. denied*, 352 U.S. 1030 (1956).

implication with respect to nonpossessory liens.[34] The Massachusetts omission to which he refers[35] was corrected by amendment in 1958. "For no apparent reason," it is said, the carrier's lien is given priority while the warehouseman's lien is not; Professor Gilmore then explains the reasons, quoting the sponsors' published exposition of the 1956 changes.[36]

Knowledge and priority. Section 9-312(5) lays down a first-to-file rule of priority and a first-to-perfect rule, without any reference to "knowledge." This contrasts sharply with section 9-301, giving rights to "a person who becomes a lien creditor without knowledge of the security interest and before it is perfected." As indicated above, Professor Gilmore sometimes seems to assume that both provisions mean what they say. But the priority rules were entirely rewritten in 1956; it is, of course, "less than crystal clear" that the apparent meaning was intended and deliberate.[37] In his direct discussion of the point he mixes up arguments as to policy with arguments as to interpretation until he is able to find a "puzzling situation." He then treats "good faith" and "knowledge" as interchangeable, in defiance of the Code definitions, and concludes, "a reasonable man might be swayed by either of these arguments," without indicating whether he is talking about a reasonable legislator or a reasonable judge.[38] I would agree as to the legislator, but not as to the judge.

Resale after default. Professor Gilmore concludes that proper notice and a "commercially reasonable" sale are conditions precedent to the recovery of a deficiency.[39] The Permanent Editorial Board created by the sponsors of the Code urged a contrary view in an amicus brief in the case of *Norton v. National Bank of Commerce*,[40] and the decision, rendered after Professor Gilmore had gone to press, accepted our view on this point.

Bankruptcy. I have already indicated my admiration for Professor Gilmore's defense of section 9-108. Sorrowfully, however, I must report another negative implication. Section 9-108 describes two types of transfers of after-acquired property to a secured party, providing that the security interest "shall be deemed to be taken for new value and not as security for an antecedent debt." "By necessary implication,"

34 § 33.5 at 888.
35 *Id.* at 888 n.4.
36 § 33.6 at 890.
37 § 34.2 at 898.
38 *Id.* at 898-902.
39 § 44.09.
40 398 S.W.2d 538 (Ark. 1966).

says Professor Gilmore, "after-acquired property interests of any other type are, as a matter of state law, antecedent debt transfers."[41] Not so, any more than it is implied that transfers of property not after-acquired, or transfers to one who is not a secured party are necessarily antecedent debt transfers. Indeed, two pages further on, Professor Gilmore refers to a type of transfer which may or may not fall within the two types described in section 9-108: the substitution of new collateral for old collateral of equivalent value.[42] Here he forgets his "necessary implication" and makes no suggestion that section 9-108 seeks to reverse the pre-Code cases holding such transfers not preferential.

Enough has been said to demonstrate that the reviewer read the work. Read it with respect, and with interest and profit. It remains only to repeat what was said at the outset: the work is important, and it is well done. It is not as unreliable as an oracle, but one can pick a nit or two if one tries. The discussion makes adequate disclosure when it stands on shaky ground; with all faults, it will be hard to surpass. For the present, this is the one indispensable treatise for a lawyer who advises on Code security interests.

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41 § 45.6 at 1313.
42 *Id.* at 1315.
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Lawyers in the Making.[1] SEYMOUR WARKOV & JOSEPH ZELAN. Chicago: Aldine Publishing Company, 1965. Pp. xxii, 180. $5.00.

Would you like to know the difference between the mean LSAT (Law School Admission Test) score of salesmen's sons who contemplated law study in 1961 and the mean LSAT score of like-minded farmers' sons? If so, I can tell you: one point. The farmers' sons lead the salesmen's sons, 508 to 507.[2]

Can you guess how many Jewish lawyers' sons with high scores on the API (Academic Performance Index) preferred a career in medicine as compared to equally high-scoring Catholic and Protestant lawyers' sons? Probably not. The answer is 18% as against 12% for the talented scions of the other two faiths.[3]

1 The book, a joint publication of the National Opinion Research Center (NORC) and the American Bar Foundation, is included in the NORC's Monographs in Social Research.
2 P. 21, table 1.16.
3 P. 49, table 3.7.