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BOOK REVIEWS

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BOOK REVIEWS

SECURITY INTERESTS IN PERSONAL PROPERTY. By Grant Gilmore. (Little, Brown & Company 1965. Pp. 1508. \$45.00).

Shortly after drafting the Uniform Sales Act, Professor Williston of Harvard Law School compiled a four-volume treatise which became the standard reference work on the law of sales. Indeed, in sales litigation, a court was more likely to cite *Williston On Sales*¹ as authority than the governing Uniform Sales Acts.

A half-century later, a parallel situation has developed in a related area of commercial law. Professor Grant Gilmore, co-reporter of the Uniform Commercial Code article on personal property security has recently completed a definitive two-volume treatise on this subject. It is likely that the sales parallel will be complete as this book becomes in its time the guiding light to assist bench and bar through the maze of complex problems dealt with in the secured transactions article of the Uniform Commercial Code.

One of the remarkable characteristics of this book—which may prove to be its detraction to anyone who would seek the answer to complex legal questions in the form of a one sentence black-letter rule of law—is the extensive historical reconstruction of the pre-Uniform Commercial Code law, usually as a prelude to an analysis of the Code provisions. Since the basic source of personal property security law in this country for the next generation will be Article Nine of the Uniform Commercial Code (South Carolina has recently become the forty-fifth state to enact the Code), one may have thought that a modern treatise on the subject would have confined the discussion to an analysis of that statute. Professor Gilmore tells us in the preface why analysis of pre-Code law was necessary.

The particular shape and structure which Article 9 assumed can be understood only in light of the state of law from which it issued . . . Article 9, far from having been a break with the past, is a continuation of it. The pre-code law, which largely determines both the form and substance of Article 9, will continue, for a generation or more, to be a vital force in its construction and interpretation.

1. WILLISTON, SALES (3rd ed. 1948).

After a problem area has been brought to the surface and viewed from the vantage point of an historical observer, the author examines the Uniform Commercial Code treatment with the insight provided him as a co-reporter for Article 9. The trouble spots are confronted and exposed with a clear analysis of the issues involved. At this stage of the discussion, reference is frequently made to the "draftsman" of the applicable Code section with such apparent detachment that the reader is inclined to forget that this "anonymous" person is actually the author of the book. This fact does not, however, lead to a glossing over of the occasional defects which appear in the Code upon this second and reflective look. Gilmore the commentator pulls no punches in dealing with Gilmore the drafter in pointing out possible ambiguities or inconsistencies in the Code language.

This book's approach may be illustrated by its treatment of the important and recurring problems encountered by the practitioner in attempting to establish an effective inventory financing arrangement. Only after a detailed discussion of the havoc wrought over the past forty years by the United States Supreme Court decision of *Benedict v. Ratner*² requiring a policing of collateral and its proceeds as a prerequisite to the validity of the security arrangement, is Code section 9-205 introduced. The reader is then able to fully comprehend the significance of the language of that section which provides "a security interest is not invalid or fraudulent against creditors . . . by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral." The long controversy over the effectiveness of the "after-acquired property clause" in a security agreement and its importance to effective inventory financing is examined in depth before the Code section which expressly validates this provision is considered. These points, along with the treatment of the continuing security interest in the proceeds from the sale of collateral and the validation of arrangements for future advances, are finally tied together so that the reader observes the construction of the "floating lien" whereby a secured party takes a security interest which "floats" over all of his debtor's present and future business assets.

Continuing this example of the treatment of the floating lien in inventory financing, Professor Gilmore plunges headlong into the depths of the almost unbelievably complex but very

2. 268 U.S. 353 (1925).

real problems which may be encountered in conflicts between the secured creditor and the trustee in bankruptcy in competing for the spoils of the limited assets of the debtor. Again, history background and basic policy considerations are called upon to make the discussion more comprehensible. Only after a careful dissection of section 60 of the Bankruptcy Act³ making certain preferential transfers of property by insolvents to secure an antecedent debt voidable by the trustee in bankruptcy, and a look at the trustee's powers and his statutory personality, is the reader told—or reminded—of the specific problems that may arise. We are told that there remains an open question as to whether the secured party's interest in the after-acquired property is a transfer for an antecedent debt voidable as a bankruptcy preference despite the Code language of section 9-108—that such a security interest “shall be deemed to be taken for new value and not as security for an antecedent debt.” The arguments which the trustee in bankruptcy will make to invalidate this arrangement as being in conflict with the Bankruptcy Act and the counter-arguments which will be made by counsel for the secured party are clearly and precisely set out.

While a considerable portion of this book is devoted to a discussion of the problems of inventory financing—Article Nine is sometimes referred to as a “floating lien” statute and Professor Gilmore as drafter and commentator seems to be fascinated almost to the point of obsession with its immense complexity—the book does not ignore some of the more mundane aspects of secured financing. The every-day problems which the practitioner encounters in this area of practice are treated. The different types of security devices depending upon the objectives sought are explained, including the methods of protection against third parties, rights in the collateral before and after default, and problems of priorities between conflicting claims to collateral. Under the latter heading, the chapters dealing with the complex matters of circular priority systems and priority of the United States for debts and taxes are especially well done—characteristic of the tendency of this book to reach its highest level when dealing with the more difficult problems of secured financing.

In a book of this scope and length the quality of the index will often be the measure of its usefulness as a quick reference tool

3. Bankruptcy Act, 11 U.S.C. § 96 (1964).

for the busy lawyer. The author has accomplished this purpose by providing several indexes designed to accommodate the special circumstances of the book. The first collects all specific references in text and footnotes to sections of the Uniform Commercial Code. Two subject matter references separate the Uniform Commercial Code material from the non-code and pre-code law.

In summary, this is a book to be read through as a general orientation to Article Nine of the Uniform Commercial Code and then to be placed at a convenient place in the practitioner's library for ready reference as problems arise.

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THE RISE OF THE LEGAL PROFESSION IN AMERICA. By Anton-Hermann Chroust. (University of Oklahoma Press, 1965, Pp. 696, two vol. boxed. \$15.00).

This is a scholarly work, but not oppressively so. It even has some sensational aspects, at least for those lawyers who have assumed that their profession, from a position of public respect and high authority, has provided our country's leadership from its beginnings. Mr. Chroust makes it clear that at several points in American history lawyers not only enjoyed little respect or authority, even in the courts, but operated under the threat of actually being abolished as a group because of their obstruction of the democratic ideals that were supposed to be developing on our shores.

Respect for the lawyer in this country has generally followed respect for the law and that of course is as it should be, but what is hard for us to comprehend is that in most of the American colonies the law, or at least the English common law, was held in marked disrespect. In Massachusetts for example the Puritan clergymen staunchly maintained that the only justice which could ever be required to be administered between their parishioners should be administered by them in accordance with the "Word of God." A resolution of 1639 in Connecticut provided that "the word of God should be the only rule to be attended unto in ordering the affayres of the government in this plantation." In the Quaker Utopia of Pennsylvania disputes were settled for some time by "peacemakers" who had no rules to follow other than those of their own consciences. Even in the colonial governments which did not claim the right to administer justice in accordance with their interpretation of Holy Writ, there was a general resentment at being bound by the "despotic" common law of England. There was a frequent attempt to declare that only the common law rules which were in keeping with the "traditions and institutions" of the particular colony would be controlling. With no judicial reports to establish precedents and no legal training or even education on the part of most of the judicial officers, justice was largely administered under such a system on a case-to-case basis. And this seems to be the way the colonists wanted it. Summary judgments by ignorant laymen were preferable to giving the despised lawyers and the despised common law a monopoly in the courts.

Gradually, however, all of the Utopian schemes of law without lawyers simply proved unworkable and it was realized that, like it or not, knowledgeable specialists in legal matters were needed. Litigants who were distrustful of their ability to try their own cases, as their governments expected them to do, happily turned to attorneys-in-fact to represent them. There being no trained bar in most of the early colonies, these courtroom assistants were mostly pretentious laymen—pettifoggers, to use the word which Mr. Chroust constantly uses to describe them. Such an interim situation could not, of course, last longer than the time needed to produce a trained and conscientious bar. This development, once it started, was rapid in all of the colonies and on the eve of the American Revolution we had indeed the situation which we as lawyers have always taken pride in, without (not having read Mr. Chroust's book) appreciating the vicissitudes which preceded it—the situation of legal leadership, not only in the administration of justice in the courts but also in the administration of government. Of the fifty-six signers of the Declaration of Independence no less than twenty-five were trained lawyers, as were thirty-one of the fifty-five delegates to the Constitutional Convention.

In Mr. Chroust's analysis of the status of law and the lawyers in each of the colonies, the situation in South Carolina is described as completely apart from the typical. In the first place, after the ill-fated *Fundamental Constitutions* of John Locke and Lord Ashley, the English common law was formally accepted as the fundamental law of the Colony. Secondly, our courts were earlier organized and on a sounder basis than in most of the other colonies. The power of the courts to admit to their bars was well controlled and the education of the early South Carolina lawyers was much higher than in the other colonies, largely because the aristocratic traditions of Charleston families had compelled their sending the sons who aspired to be lawyers to London for training in one of the Inns of Court. Mr. Chroust makes the comment that apparently no one in Charleston believed that quality education was available west of London and says that John Rutledge was completely unaware of the existence of any college in America prior to his attendance at Stamp Act Congress in 1765. Be that as it may, Mr. Chroust tells us that of the thirty or so lawyers who comprised the Charleston Bar at the time of the Revolution no less than twenty-four had been educated in one

of the Inns of Court. He points out, however, that this situation gave rise to at least one unfortunate result. It precluded the organization of an effective bar association, such as the one in New York which had advanced the standing and the standards of their lawyers so remarkably. He theorizes:

Also the fact that the "Carolina Templars," who were mostly the scions of the exclusive class of wealthy and aristocratic planters, probably had a low opinion of the legal and social qualifications of their locally trained brethren and, hence, might have refused to consort with them, may have prevented the formation of a sense of professional solidarity and common purpose among the South Carolina lawyers. Barristers owed allegiance to their particular Inn but, as a rule, had no feelings of allegiance to the legal profession as such.

The pre-eminence of the profession in the days just preceding the Revolution was, unfortunately for the lawyers and for the nation, not long to endure. Mr. Chroust attributes its rapid decline in the post-Revolutionary years to many factors. A substantial number of the leaders of the bar had left the country or retired from practice, many because they had been loyalists. A fresh hatred for all things English, including again the common law, had arisen. The country was in the grip of an economic depression, and lawyers, in that they represented foreclosing creditors, were largely blamed for it. American legal education had been slow to develop and there were still few books published, either statutes or decisional law. Public distrust of lawyers, some of it justified, developed to such an extent that there were punitive efforts in several of the legislatures in the new states to curtail, or even eliminate, the practice of law altogether. Mr. Chroust says that the only bright spot in the otherwise dismal picture of the legal profession in the years just following the Revolution was the establishment of a federal bar. The era of the John Marshall Court was opening and the landmark constitutional decisions which it was to render were to be molded largely by the ability and the resourcefulness of the lawyers who argued them in the Supreme Court. There were truly "giants in those days."

One of the most interesting chapters in the book then takes us into the practice of law on the frontier. The bench was a

handhewn bench and the judge who sat on it was usually a local Indian fighter, with little education and certainly no legal training, who owed his position purely to his ability to manifest authority. Court day was a social and sporting event and one of the main purposes of the judge was to keep things interesting for the spectators. Mr. Chroust says: "Probably each Court Day produced as many new cases as it settled—or tried to settle—old ones." Despite the physical hardships and the meagerness of fees (fifty cents for drawing a deed, three dollars for trying a case before a justice of the peace), and in the teeth of public resentment of lawyers engendered partly by "Jacksonian Democracy," the profession eventually prospered in the frontier country. The excitement of it took many leaders of the bar to the west—John Breckenridge from Virginia to Kentucky and the founder of the Taft dynasty to Ohio. The roots were thus laid not only for strong courts but for strong local governments in general.

Mr. Chroust actually ends his chronological account of the fortunes of the bar at about the year 1840. He adds a summary chapter dealing with the bar associations and other machinery (usually weak) to control the practice, and a similar chapter tracing the development of legal training in America. Both are excellent, but one is left perplexed at the sharp cut-off of the general history at 1840. Surely the author is not saying that the legal profession has not "risen" in this country since that date. It has, demonstrably.

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