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BOOK REVIEW

SECURED TRANSACTIONS. By William B. Davenport and Daniel R. Murray Philadelphia, Pennsylvania: The American Law Institute 1978.

*Reviewed by Hon. Ellen A. Peters**

SECURED TRANSACTIONS by William B. Davenport and Daniel R. Murray is one of a series of texts published by the American Law Institute-American Bar Association Committee on Continuing Professional Education (ALI-ABA). This text is a revision of an earlier work published in 1966 by Ray D Henson and the current senior author ALI-ABA handbooks on the various articles of the Uniform Commercial Code have been, as the foreword indicates, an important part of ALI-ABA's educational programs for the bar. Although published in paperback,¹ in what is denominated a student edition, SECURED TRANSACTIONS is a book by practitioners for practitioners. Like its predecessor, the text presents an orderly overview rather than a critical analysis of the provisions of Article 9 of the Uniform Commercial Code, the Secured Transactions Article. The authors have endeavored to illuminate in 400 pages the complexities inherent in the organization and theoretical framework of Article 9 to enable practitioners who are novices with respect to Article 9 to cope successfully with problems likely to be encountered in the course of their practice.² This is a tall order.

It is true that Karl Llewellyn's³ vision for the Uniform Commercial Code was the creation of a body of law that would be readily accessible to everyone engaged in commerce and a fortiori to anyone trained in the law. Llewellyn felt, not without justification, that commercial law had become artificially complex because of arcane common law constructs such as title, which dominated the law of sales, and overlapping inconsistent statutes, such as those

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1. SECURED TRANSACTIONS is also available in hardbound edition.

2. *Preface* to W. DAVENPORT & D. MURRAY, SECURED TRANSACTIONS at ix (1978) [hereinafter cited by section and page numbers only].

3. Karl Llewellyn was the principal draftsman (and Chief Reporter) for the Uniform Commercial Code.

then regulating secured transactions.⁴ The goal of codification always has been to bring order out of chaos by cutting away the underbrush of accumulated precedent. There is no question that the Uniform Commercial Code has in fact enabled commercial law to take a quantum leap into the 20th century to resolve more successfully and more expeditiously many of the problems that plagued clients and practitioners and courts ever since the enactment of the last commercial codification at the turn of the century.⁵ We are vastly indebted to the American Law Institute and the National Conference of Commissioners on Uniform State Laws and all of the individuals who helped to draft the Uniform Commercial Code. They produced an enormously useful Code—but not a miracle. For it would have taken a miracle simultaneously to modernize and to simplify the vast array of transactions governed by the Uniform Commercial Code. The legal philosophy underlying the Uniform Commercial Code, that identifiable fact patterns would provide a better guide to the resolution of commercial conflicts than articulation of analytic principles, is clear enough, but legal realism ultimately proved inadequate to the challenge. Over the twenty years that the Code was drafted, it became necessary to develop new constructs,⁶ such as acceptance and “identification” in Article 2, and “perfection and proceeds, and, more recently “last event, in Article 9. As long as facts continue to be sufficiently unruly not to fall ineluctably into one exclusive pattern, the resolution of disputes is immeasurably aided by standards and guidelines and, inevitably legal principles. Inescapably these legal principles can always be improved by the application of the law-

4. One of the more obscure of the pre-Code statutes governing chattel security arrangements was the Uniform Trust Receipts Act (1933), which Llewellyn himself had drafted.

5. The nucleus of the first American codification of commercial law was the promulgation of the Uniform Negotiable Instruments Law (1896) and the Uniform Sales Act (1906). Other statutes such as the Uniform Bills of Lading Act (1909) and the Uniform Warehouse Receipts Act (1906) are essentially elaborations on and amendments of particular provisions of the Uniform Sales Act. Later enactments like the Uniform Conditional Sales Act (1918) and the Uniform Trust Receipts Act (1933) were both narrower in scope and less widely accepted. Although many state legislatures enacted variety of commercial statutes to govern chattel mortgages, factor liens, and accounts receivable financing, these statutes were neither uniform nor part of general codification. For an account of the history that led to the first codification, see G. GILMORE, *THE AGES OF AMERICAN LAW* 69-72 (1977) and G. Gilmore, *Commercial Law in the United States: Its Codification and other Misadventures*, in *ASPECTS OF COMMERCIAL LAW: SALES, CONSUMER CREDIT, AND SECURED TRANSACTIONS* 449 (J. Ziegel & W. Foster eds. 1969).

6. G. GILMORE, *supra* note 5, at 85-86.

yer's skill in discovering refinements and distinctions. In the end, the law is often better but it is rarely simpler. And so it is with the Code.

The authors' effort to provide a comprehensible overview of Article 9 starts with a sensible organizational plan that deals separately with agreement, perfection, default, and priorities. These are certainly the cornerstones that are essential to an understanding of secured transactions. Within each of these major subdivisions, the authors review the text of the provisions of Article 9 in its 1962 and its 1972 versions, noting differences where applicable and reporting many of the salient cases. The text is eminently readable, and, especially in the chapter on priorities, contains numbers of illuminating hypothetical problems. As an exegesis on the provisions of Article 9 of the Code, taken section by section, the text is remarkably successful in providing in one brief volume a great deal of useful information.

Invariably in a text of limited scope and size, the authors make choices of emphasis and ellipsis that should not be faulted although they would not necessarily be shared by others working and teaching in the field. Nonetheless, within the ambit of the task which the authors have set for themselves, I found some omissions perplexing. In the literature of secured transactions and in the caselaw⁷ one recurrent issue has been the extent to which the execution of a financing statement,⁸ whose primary purpose is to notify third persons of the existence of a security interest, can be made to serve the requirements of a written security agreement⁹ whose primary purpose is to serve as a statute of frauds between the contracting parties. I was unable to find this question addressed anywhere in the chapter on Security Agreements although the chapter on Perfection, in its introductory section¹⁰ states, accurately enough, when a written security agreement is required in a secured transaction and none exists, the filing of a financing statement covering the secured transaction does not perfect the security interest until the prerequisite of the written security agreement, also required for attachment, is fulfilled. But surely this is both too little and too late. The issue is precisely whether the prerequisite of the written security is, with or without parol evidence, ful-

7. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 788-91 (1972).

8. U.C.C. § 9-402 (1972).

9. *Id.* § 9-203(1).

10. § 4.01 at p. 116.

filled by the filing of the financing statement. That issue is neither clearly identified nor resolved; nor can a newcomer to Article 9 reasonably be expected to find the relevant references concerning security agreements in a chapter dealing with perfection.

A second fundamental issue that has given rise to boundless litigation concerns the distinction between leases which are intended, or are found by courts to have been intended, to be security interests and leases which are "pure" leases outside of the regulatory scope of Article 9. That issue is briefly considered in the chapter concerned with the basic concepts and scope of Article 9.¹¹ I am skeptical whether so abbreviated a discussion is likely to serve as an adequate introduction to the complexities of cases such as *In re Leasing Consultants, Inc.*¹² and *Citizens and Southern Equipment Leasing, Inc. v. Atlanta Federal Savings and Loan Association*.¹³ Furthermore, the authors' prediction that a lease without an option to purchase would be unlikely ever to be construed to create a security interest has been recently proved erroneous by *Bill Swad Leasing Co. v. Stikes (In re Tillery)*.¹⁴ The line between leases and security agreements is sufficiently erratic and opaque to have warranted more extensive treatment.¹⁵

Two problems with the discussion of perfection illustrate related concerns about the accuracy of the text at some important junctures. It is vital that a comprehensive text be especially explicit about the Code's concept of, and directives for, perfections. Perfection is after all the crucible by which security interests are tested. An unperfected security interest does not survive the debtor's bankruptcy and, hence, is least efficacious when most needed. The authors' introductory definition of perfection as "obtaining the maximum protection available for the particular type of collateral"¹⁶ is unfortunately both inaccurate and misleading. It fails entirely to correspond to the Code's definition,¹⁷ a reference not without difficulty but nonetheless one that cannot readily be ignored or subordinated to a footnote.¹⁸ It fails to inform the reader

11. § 2.04(a) at pp. 27-28.

12. 486 F.2d 367 (2d Cir. 1973) (cited in § 4.07(a) at p. 210 n.338).

13. 144 Ga. App. 800, 243 S.E.2d 243 (1978).

14. 571 F.2d 1361 (5th Cir. 1978).

15. It would have been advisable to have noted in the discussion of exclusions (rather than, or perhaps in addition to § 2.04(c) at p. 30), the surprisingly successful escape of the surety from Article 9. § 2.03(b) at p. 18.

16. § 4.01 at p. 115.

17. U.C.C. § 9-303 (1972).

18. § 4.01 n.7 at p. 116.

of the fundamental distinction between perfection and priority that is one of the most important organizing principles of Article 9.¹⁹ This distinction is best exemplified by the Code's sections concerning purchase money security interests in consumer goods. Without the filing of a financing statement, such security interests are automatically perfected;²⁰ but a financing statement must be filed if the secured creditor is interested in avoiding subordination to a subsequent good faith consumer purchaser.²¹ I do not mean to suggest that the authors fail to recognize this distinction, but I cannot accept their assertion²² that their definition effectively expresses the idea that perfection confers priority over some classes of competitors but not over others.

The authors, furthermore, are sometimes unclear about implementation of the rules for perfection. An instance arises out of their discussion of chattel paper. Although confronting some of the difficulties that inhere both in the concept²³ and in the operation²⁴ of security interests in the form of chattel paper, the authors do not sufficiently warn of related pitfalls that may not be self-evident to the Article 9 newcomer. Chattel paper is generated whenever writings evidence both a monetary obligation and a security interest in, or a lease of, specific goods.²⁵ A typical example is the execution of a security interest, formerly known as a conditional sales contract, and a promissory note in conjunction with the purchase of an automobile on time. The chattel paper may be discounted by assignment to a third party and this refinancing may in turn be perfected either by filing or by taking possession of the chattel paper. The authors advise, soundly, that perfection by possession is ordinarily preferable to perfection by filing, since possession eliminates the hazard of unauthorized subsequent transfers of the chattel paper.²⁶ They fail to warn, however, that perfection as to the chattel paper, whatever its form, is not necessarily effective as perfection with regard to the security interest in the underlying chattel.²⁷ In

19. Compare U.C.C. §§ 9-301 to -306 with U.C.C. §§ 9-307 to -316.

20. U.C.C. § 9-302(1)(d) (1972).

21. *Id.* § 9-307(2).

22. § 4.01 at p. 115.

23. § 2.10(c) at pp. 71-75.

24. § 4.07(a) at pp. 209-12.

25. U.C.C. § 9-105(b) (1972).

26. § 4.07(a) at p. 211.

27. Negotiable documents of title, in contradistinction to chattel paper, do incorporate rights as to underlying goods. Under the U.C.C., security interests in goods subject to document must be perfected by perfecting security interest in the doc-

the example above, delivery of the security agreement and the note to the secured creditor perfects that creditor's rights against other takers from the assignor—the automobile dealer—but does not obviate the need to perfect a security interest in the automobile against takers from the buyer. Perhaps the dealer will already independently have perfected and then the secured creditor as assignee is protected without reperfecting.²⁸ Perhaps the distinction between the two security interests is so transparently obvious that no reader could possibly be misled. My suspicion is that dealers do not always enter liens on certificates of title, and my experience with students has been one of considerable confusion about the duality of interests incorporated in chattel paper. In any case, I would have supposed that precautions for the novice practitioner about inquiry into rights in the underlying collateral would have been at least as appropriate as precautions about chattel paper executed in duplicate or triplicate.²⁹

Other readers of SECURED TRANSACTIONS may find these omissions less troublesome than I do. It is arguable that occasional lapses, if such they are, are outweighed by the excellence of the presentation of such issues as multistate transactions and priorities. On the latter subject, the authors effectively demonstrate the wisdom of their introductory observation that the rules for priority are best examined in the context of concrete problems.³⁰ The complexity of their hypotheticals does, however, belie their rather sanguine observation about the relative ease with which most problems of priority can be resolved.³¹

My fundamental difficulty with this text, and more generally with the genre of one-volume introductory texts, is that I am less

ument. U.C.C. § 9-304(2) (1972). Davenport and Murray discuss the merger problem with respect to leases in § 4.07(a), but fail to address the more customary case of the ordinary security interest. Why the doctrine of merger has not been extended to chattel paper is not clear. Possibly the reason is based on the fact that chattel paper includes monetary obligations that are not negotiable in form. Merger has historically been an aspect of protection for holder in due course of negotiable paper. Possibly the reason lies in commercial trade and usage. The kinds of goods that are apt to be the subject of bailment are commercially unlike the specific chattels that are apt to become the underlying collateral for chattel paper. In these respects, chattel paper may usefully be seen as halfway house between documents of title and accounts receivable. Accounts also may arise out of the sale of goods, but the assignment of accounts carries with it no expectations whatsoever about chattel security.

28. U.C.C. § 9-302(2) (1972).

29. § 4.07(a) at p. 211.

30. § 7.01 at p. 304.

31. *Id.*

sanguine than are the authors about the risks of oversimplification. Even in law and especially in the law of secured transactions, a little knowledge can be a dangerous thing. Nowhere does the present volume more clearly illustrate the problem of oversimplification than in the superficiality of its treatment of the relationship between Article 9 and the federal law of bankruptcy. The authors acknowledge, of course, that bankruptcy is, in their words, "the acid test" for secured transactions. The authors, themselves seasoned practitioners, clearly appreciate the seriousness of this "acid test." But is the novice practitioner being well served when he is informed, essentially without qualification, that: (1) A secured party need have no fear about the enforceability of a well-documented security interest in bankruptcy;³² (2) a secured party can rely on the case law to have validated the Code's floating lien on inventory and accounts vis-a-vis the Bankruptcy Act;³³ (3) a secured party can, in bankruptcy, avoid vulnerability for filing a financing statement within 21 days, even though the Code allows only 10 days?³⁴

The problems that bankruptcy poses for a secured lender are significantly exacerbated by the enactment of the Bankruptcy Reform Act of 1978,³⁵ effective October 1, 1979. The authors were undoubtedly unfortunate to have come into print just as this new Act was being enacted. But its enactment had been presaged by years of discussion in study commissions and in the Congress, and the tendency of its revision to favor debtors and unsecured creditors was clearly foreseeable. In each of the instances in which the authors offer words of reassurance to the secured creditor, he is now in greater jeopardy than he was before, and he was not free of risk even on September 30, 1979.

On the enforceability of security interests in bankruptcy it is noteworthy that adequacy of documentation, while necessary is not invariably sufficient to assure happiness after bankruptcy. Bankruptcy means that secured collateral is likely to be managed through the administrative office of the bankruptcy court and cannot simply be privately repossessed in the event of default. Under the new Act, bankruptcy jurisdiction attaches even to property in the possession of the secured creditor;³⁶ it has always governed the

32. § 6.11 at p. 301.

33. § 3.07 at p. 108.

34. § 4.03(c) at p. 161.

35. 11 U.S.C.A. §§ 101-151326 (West Supp. 1979).

36. 28 U.S.C.A. § 1471(e) (West Cum. Supp. 1979) (effective April 1, 1984).

much more frequent case of collateral in the possession of the debtor³⁷ Bankruptcy administration has been known to entail prolonged and extensive litigation concerning even exquisitely documented secured transactions,³⁸ and even impeccable documentation has been known to be outweighed in bankruptcy by the debtor's need to use the secured collateral.³⁹ Furthermore, no documentation can alter the fact that the filing of a petition in bankruptcy serves automatically to exclude subsequently-acquired property from the ambit of the security interest.

The viability of the floating lien of a security interest in inventory or in accounts, in the event of bankruptcy is dramatically limited by the preference section of the Bankruptcy Reform Act.⁴⁰ *DuBay v. Williams*,⁴¹ the case that has come to be seen as the principal case upholding the floating lien, has not had a good press either in bankruptcy circles or among aficionados of the Code.⁴² Its flat holding that any after-acquired property arrangement is totally validated by compliance with the Code's instructions for the filing of a financing statement might well have been limited, even under the old Bankruptcy Act, to cases involving the fact pattern that *DuBay* itself illustrates. *DuBay* dealt with the easy case, the substitution of essentially fungible collateral of substantially equal value. The hard case is the case in which the debtor's estate would be diminished, on the eve of bankruptcy⁴³ by permitting a formerly undersecured creditor to invoke his security interest to improve his position at the expense of the debtor's estate. None of the reported cases has apparently had to face this issue. Its outcome, highly doubtful under the Bankruptcy Act of 1898, is now clear: the transaction is preferential⁴⁴ and the secured creditor

37. 11 U.S.C. § 11 (1976) (repealed 1979).

38. See, e.g., *In re New Haven Clock & Watch Co.*, 253 F.2d 577 (2d Cir. 1958).

39. See, e.g., *In re Yale Express System, Inc.*, 370 F.2d 433 (2d Cir. 1966).

40. 11 U.S.C.A. § 547 (West Supp. 1979).

41. 417 F.2d 1277 (9th Cir. 1969).

42. The study committee for the bankruptcy reform commission that was charged with considering revision of federal bankruptcy law in light of the enactment of the U.C.C. was chaired by Professor Grant Gilmore, principal draftsman of Article 9. The Gilmore report criticized *DuBay* and recommended reform similar in principle to the present § 547. 417 F.2d at 1277. NATIONAL BANKRUPTCY CONFERENCE, REPORT OF THE COMMITTEE ON COORDINATION OF THE BANKRUPTCY ACT AND THE UNIFORM COMMERCIAL CODE (1970), reprinted in [1978] 6 U.S. CODE CONG. & AD. NEWS 6164.

43. Formerly four months under § 60 of the Bankruptcy Act of 1898, 11 U.S.C. § 96 (1976) (repealed 1979), now 90 days (or one year if an insider) under the Bankruptcy Reform Act of 1978. 11 U.S.C.A. § 547 (West Supp. 1979).

44. 11 U.S.C.A. § 547(c)(5) & (e)(3) (West Supp. 1979).

loses. No one should enter into inventory or accounts receivable financing without an understanding of this risk, and without some suggestion about practical means for minimizing the risk. An appropriate warning is especially important here, because the Code's abolition⁴⁵ of the rule of *Benedict v Ratner*⁴⁶ can easily be overread. *Benedict* required that a secured transaction be policed as a condition of its intrinsic validity and that requirement in those terms is no longer the law. But regular monitoring of the state of the secured collateral while it is entrusted to the debtor may well continue to be sound commercial advice for other reasons, such as avoidance of the law of preference.

The extent to which belated filing of a financing statement can be deemed timely for bankruptcy purposes, by reference to the provisions of section 60 of the now-superseded Bankruptcy Act of 1898⁴⁷ is a matter that is today arguably only of historical interest. The issue has not, to the best of my knowledge, surfaced in litigation, and the learned commentators have always been in profound disagreement.⁴⁸ Under these circumstances, the assertion that section 60 will come to the rescue to validate a filing within the 21-day period following execution of the secured transaction is hard to justify. Since October 1, 1979, reliance upon such advice would be extraordinarily precarious. The new preference section not only eliminates any 21-day period, but cuts back on the Code's own provision of shelter for belated filing, within 10 days, of purchase money security interests. Under the Code, the 10-day period begins to run from the date on which the debtor received possession of the secured collateral;⁴⁹ under the Bankruptcy Reform Act, the security interest must be perfected "before 10 days after such security interest attaches."⁵⁰ Particularly in purchase money transactions, in which the collateral necessarily represents new value, it is

45. U.C.C. § 9-205 (1972).

46. 268 U.S. 353 (1925).

47. Section 60(a)(7)I.(B) of the Bankruptcy Act of 1898 provided that the time of transfer (for the purposes of the law of preference) be determined to allow twenty-one day period for recording where applicable state law failed to provide stated period within which recordation had to be accomplished. 11 U.S.C. § 96(a)(7)I.(B) (1976) (repealed 1979).

48. Compare 1A P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 9.03(5)(c), at 994 (1965) with 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 45.8, at 1325 (1965) and J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 874 (1972).

49. U.C.C. § 9-301(2) (1972).

50. 11 U.S.C.A. § 547(c)(3)(B) (West Supp. 1979).

likely that the security interest will attach before the debtor receives possession of the collateral. Far from extending the time to perfect, the new Bankruptcy Act makes prompt filing more urgent.

A text entitled SECURED TRANSACTIONS that contains no systematic treatment of the relevant aspects of the law of bankruptcy⁵¹ and offers instead piecemeal advice that is more apt to mislead than to inform will not, I believe, be a useful resource. No one has the right to expect answers to every hypothetical or to the first case in litigation. But, pressed for time, is it not more appropriate to caution rather than to instill overconfidence, to provide guidelines and to suggest general principles, rather than to leapfrog, through narrowly chosen examples, over the most difficult questions that the practitioner and the student of secured transactions must learn to resolve?

The matter of general principles brings me to my final observation about the organization and the scope of the text under review. When the Uniform Commercial Code was first promulgated, more than twenty-five years ago, it was the path of wisdom to approach it piecemeal, to try to assimilate its provisions article by article. I wonder whether that approach has not now been exhausted in the extensive literature that the Code has generated. To purloin the related observation of Chief Justice Marshall in *M'Culloch v. Maryland*,⁵² it is a Code we are expounding.⁵³ Commercial transactions routinely transcend the necessarily artificial lines of the various Code Articles. The Code's division into Articles was not intended to create a series of iron curtains but reflects rather the historical accident of pre-existing laws separately addressing sales of goods, bills and notes, and chattel mortgages. It is not always easy to reconcile the commandments of the various Articles,⁵⁴ especially since they exhibit considerable diversity in drafting style. Nonetheless, this is the analytic task that students of the Code must confront in the 1980's. Only when we have

51. The text contains no separate chapter or subdivision devoted to problems created by the law of bankruptcy. Bankruptcy is discussed instead in §§ 3.07, 4.03(c), and 6.11. Some specific hypotheticals are briefly considered in the priorities chapter, in §§ 7.03(j) and 7.03(j)(5).

52. 17 U.S. (4 Wheat.) 316, 407 (1819).

53. See Judge Wisdom's similar observation about the Louisiana Civil Code. *Shelp v. National Surety Corporation*, 333 F.2d 431, 436 (5th Cir. 1964) (Wisdom, J.).

54. As a starter, the following inconsistencies in U.C.C. sections may be noted: (a) 9-113 and 2-401, (b) 9-318(4) and 2-210(2); (c) 9-307(1) and 2-403(2); (d) 9-206 and 3-302; and (e) 9-309 and 7-503(1).

achieved a firmer understanding of the fundamental principles, sometimes the competing fundamental principles,⁵⁵ that the Code as a whole embodies, will we have a sure footing for concrete advice about the problems that confront the practitioner in his first encounter with any aspect of the Uniform Commercial Code.

55. For first inquiry into an exploration of some of these issues, see Jackson & Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978).