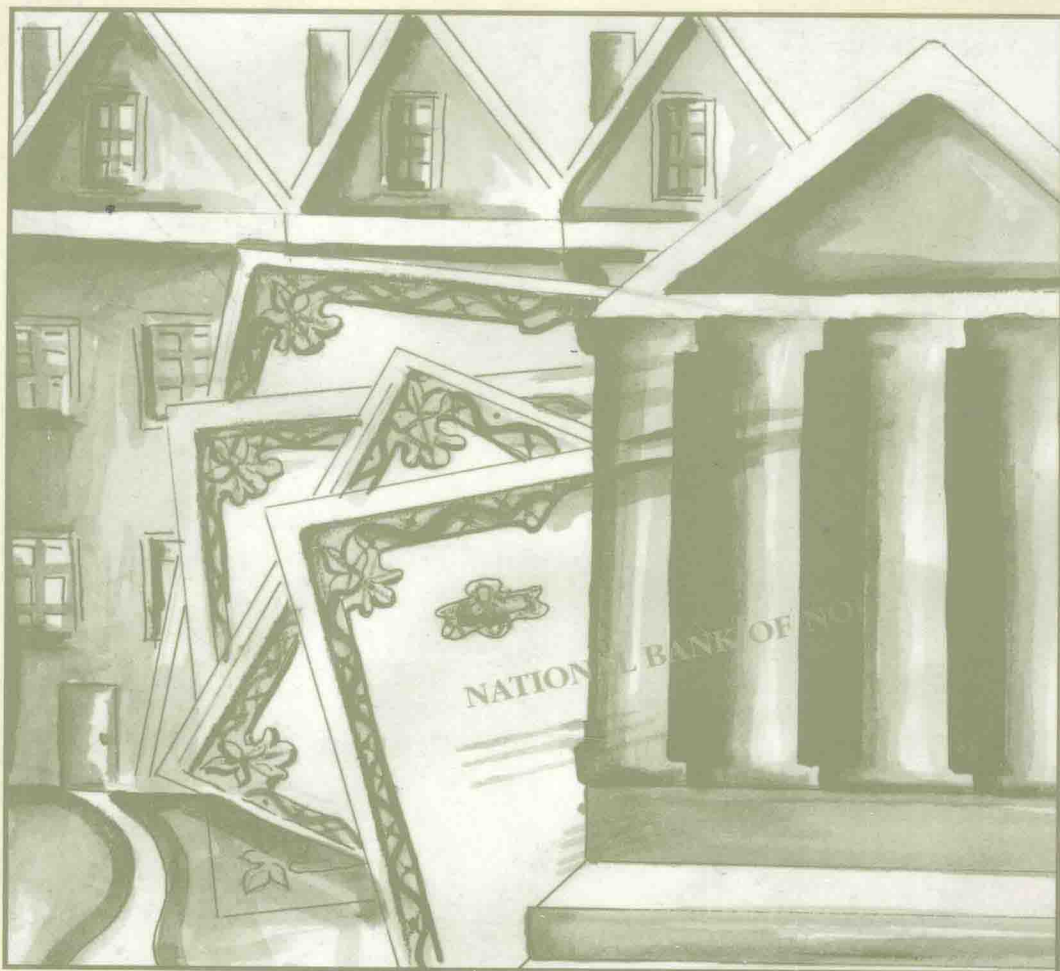


Secured Transactions

Third Edition

James Brook



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EXAMPLES & EXPLANATIONS

SECURED TRANSACTIONS

Examples and Explanations

Third Edition

James Brook

*Professor of Law
New York Law School*

ASPEN
PUBLISHERS

111 Eighth Avenue, New York, NY 10011
www.aspenpublishers.com

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Aspen Publishers
111 Eighth Avenue
New York, NY 10011

Printed in the United States of America

1 2 3 4 5 6 7 8 9 0

ISBN 0-7355-5097-2

Library of Congress Cataloging-in-Publication Data

Brook, James, 1946–

Secured transactions : examples and explanations /
James Brook. — 3rd ed.

p. cm. — (Examples & explanations series)

Includes index.

ISBN 0-7355-5097-2 (alk. paper)

1. Chattel mortgages — United States. 2. Security
(Law) — United States. 3. Personal property — United
States. 4. Personal property — United States. I. Title.
II. Series.

KF1053.Z9 B76 2005
346.7307'4—dc22

2004029183

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For Johanna and Andrew

Preface

I start with a simple assumption. You come to this book because for one reason or another you want to learn the basic law relating to secured transactions involving personal property collateral as such transactions are governed by Article 9 of the Uniform Commercial Code. You may be trying to pick this up on your own, but more likely you are in a course — either a course devoted distinctly to the topic or a more expansive survey course in Commercial Law that will necessarily devote a great deal of time to the subject. The book may have been assigned or recommended as additional reading by the professor teaching the course, or you may have come upon it on your own as means of review. Whatever the circumstances, I hope this book is of help. If it is, it will not be simply because you bought it or even because of the considerable energy I put into writing it, but because of the time, energy, and the thought you put into using it. Here are a few basic points you should understand from the outset if you are to make the best use of what I have written and what you have bought.

- This is not a review text. You may find it helpful to think of it as a kind of workbook, giving you an organized way of *working through* the various sections, definitions, concepts and controversies that make up the modern law of secured transactions as rendered in Article 9 of the Uniform Commercial Code.
- This volume is not a substitute for your own copy of the Uniform Commercial Code (including Official Comments). I will be quoting snippets of the Code from time to time. At other points I may simply suggest that you “recall the rule of §9-322(a)(1)” or “look to §9-609(c).” What you have here should not distract you, however, from the fundamental proposition that the law you are learning is found in, not merely suggested by or illustrated through, the exact language of the Code as it has been enacted into law in the several states. I assume throughout that as you work through the material you will always have at your side and at the ready the primary text for the study of secured transactions, the Code itself.
- The general organization and sequence of chapters follows what is a fairly standard order in which the various topics are taken up in courses on Secured Transactions. You should certainly start with Chapter 1 and move on from there. If this book has been assigned or recommended by your professor you will of course follow his

or her instructions as to which chapters to look to when and even as to which Examples to do and which to leave for another day. If you are working through the book on your own and trying to coordinate it with your course, you should be able to determine fairly easily which chapters to take up just by the chapter headings, but if you are having any trouble finding where to turn there is help available by Topic in the Index and a Table showing which Uniform Commercial Code (U.C.C.) sections are dealt with, both at the back of the book.

- Each chapter is structured in the same way: an introductory text, a set of Examples for you to ponder, followed finally by my own Explanations of the questions asked and issues raised by the Examples. It is very important that you appreciate that the introductory text does not purport to outline or give a full account of the chapter's topic. This is not the type of book where you are given all the law up front and then asked to apply the rules and principles to the questions that follow. The law you are going to have to apply is to be found in the Uniform Commercial Code which you have right there with you. In some chapters the introductory text can be very brief. In others it goes on for a while. But in any event the introductory text is meant only to set the stage; its purpose is to put you on the best possible course for learning *through the Examples*. In other words if you aren't prepared to go through the Examples thoroughly on your own—if not writing down a carefully constructed answer to each one then at least jotting down an idea or two on how you see the situation and how you expect the Code would deal with it—then there's really not much point in your starting the chapter to begin with.

One final note on the Examples: It will not surprise you if when you get to my analysis in the Explanations you find I cannot always offer a simple yes or no in many cases. I am, after all, a law professor and this subject, like any other you have already studied, has its unresolvable questions, places where the statute seems to be of little or no help, and “subtle” difficulties. On the other hand, don't think just because this is the study of law that the answer to even the most simple question must necessarily be open to argument or subject to competing analyses. Sometimes, perhaps most of the time, a question can and should be answered in a word or two, directly and without any hedging. If the answer is “Yes,” you should say “Yes.” If “No,” say “No.” Beyond that, of course, you should go on to say *why*—citing the Code, chapter and verse—you respond as you do. I always give my students in Commercial Transactions courses some rules of thumb to follow, which are in general good advice when dealing with this material, in writing their examination answers:

- Where an answer is given or suggested by a specific section of the Code, make reference to that section.
- Where a particular subsection is relevant, cite the subsection.

- Where a particular word or phrase in the section or subsection is of importance to your answer, identify exactly what that word or phrase is.
- Where an Official Comment answers — or seems to answer — the question, refer to it, reporting as you do whether you have any qualms or questions about the position taken in the Comment.
- Where the answer appears to be dictated by a single fact or a set of facts, make clear what facts those are.

If, as will sometimes be the case, the answer has to be “that depends,” say *on what* you see the outcome depending. If you need to know other facts to better analyze the situation, say *whom* you would ask and *what* you would want to know. If the answer seems to depend on how a court would interpret a particular provision or how it would settle a seeming conflict between two provisions, what are the various possible interpretations or resolutions? What argues for one resolution over the other?

As I have said, I hope and expect this book will be helpful. If at the same time you find it stimulating and even mildly entertaining, then so much the better.

James Brook
January 2005

Acknowledgments

I would like to thank Dean Rick Matasar and Associate Deans Steve Ellmann and Jethro Lieberman, who have shown their support in a variety of ways for this project and for my other endeavors at New York Law School. I also wish to acknowledge the continuing contribution of my staff assistant, Silvy Singh, without whom my workdays would be much more difficult and certainly a lot less pleasant. Thanks as well to my colleagues at New York Law School and to the large numbers of students over the past few years with whom I first got a chance to work over and test out so many of the Examples that form the core of this book. The feedback that I have been given by them, in ways subtle and not so subtle, has been of enormous help even if I have not always said as much at the time.

Special thanks go to the people of Aspen Law and Business, and in particular to Carol McGeehan, Melody Davies, Kathy Yoon, and John Devins. Their consistent encouragement, gentle nudging when nudging was called for, and good-natured support make them a pleasure to work with and to know.

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A Note on Revised Article 1

In 2001, the National Conference of Commissioners on Uniform State Law (NCCUSL) and the American Law Institute (ALI), the two bodies responsible for upkeep of the Uniform Commercial Code, promulgated and sent to the states for adoption a revised version of Article 1. This article, comprising the General Provision of the Code including an important set of definitions and general principles, inevitably ends up coming into play and being cited in any work dealing with any aspect of commercial law. This “new Article 1” was, at least for a few years, adopted only in the U.S. Virgin Islands. There are a couple of controversial provisions in the proposed text that have kept it from being readily adopted across the country, which leave its eventual fate in some doubt. Recently there has been a bit more action. As of this writing, seven states (Alabama, Delaware, Idaho, Hawaii, Minnesota, Virginia, and Texas) have adopted the new Article 1, although not necessarily in exactly the form that NCCUSL and the ALI have recommended. The controversy continues.

For your purposes in using this book, it really doesn’t matter which version of Article 1 — the original or the revised — you refer to. Just to keep us on our toes, however, I have found that some statutory supplements used in such courses have begun putting the new version of Article 1 at the front of the book, while others have kept the original Article 1 at the front of the book and put the revised version in an appendix. As a practical matter there is no real difference in substance between the original and the new versions of this article, at least as far as we will be using it here, but the definitions have been renumbered and other important passages moved around, which can easily enough lead to confusion or at the least exasperation.

The references to Article 1 in this volume are few enough that I have followed the path of least resistance and given parallel cites to both versions. So, for example, Original §1-201(39) is for all intents and purposes the same as Revised §1-201(b)(37) [or, as I’ll end up abbreviating it, “§1-201(39) = §1R-201(b)(37)”. You should be able to use this edition whichever version of Article 1 your professor, or your own predilection, has you following.

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PART ONE

The Article 9 Security Interest and Its Attachment

I

The Scope of Article 9

By Way of Introduction

Let's start at the very beginning. Look at §9-101. Nothing terribly interesting or surprising there. Do read, however, the first two sentences of Official Comment 1 to this section:

This Article supercedes former Uniform Commercial Code (UCC) Article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures.

The former Article 9 to which the comment alludes—which you will also find referred to at times as the “old” or “prerevision” version of the article—was initially promulgated by those bodies that have taken upon themselves responsibility for drafting and upkeep of the Uniform Commercial Code in the early 1960s.* The drafters of that initial version of Article 9 had been confronted with a particularly difficult task. Over the years there had arisen a great variety of devices, each with its own intriguing if not terribly illuminating name—for starters, I could mention the pledge, chattel mortgage, conditional sales agreement, trust receipt, and factor's lien—intended to give one party a security interest in another's personal property. The individual states tried to keep up with these developments,

* The Uniform Commercial Code is a joint project of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Any given part of this project, whether it be the creation of the initial version or a subsequent amendment or wholesale revision of any article, entails a long and complex process involving large numbers of individuals, a drafting committee, numerous advisors and consultants, and so on. The final written product (conventionally referred to as being the work and conveying the intention of a vaguely defined group known as “the drafters” of this or that article or revision) must then be approved by both the sponsoring entities, the ALI and NCCUSL, who then send it out to the states for their individual adoption of the proposal as part of their state statutory law.