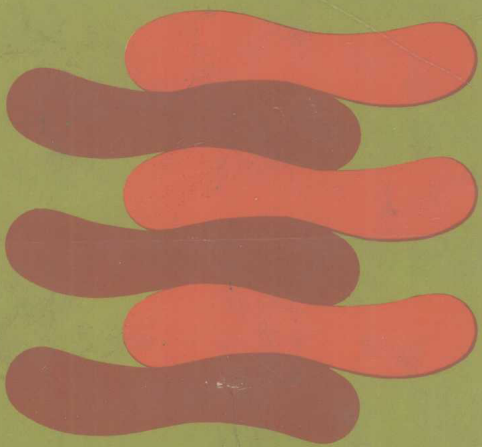
SECURITY OVER CORPOREAL MOVABLES

EDITED BY
J.G. SAUVEPLANNE



SIJTHOFF

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They also thank the participants to the Colloquium for their willingness to make their papers available for insertion in the volume.

August 1973

Preface

It is always a great pleasure to welcome the first result of a new initiative. This is notably the case if the initiative concerns an association which still is in its infancy. For during one of the first meetings of the Governing Committee of the Netherlands Association of Comparative Law it was decided—on a proposal made by the late Professor Szirmai and warmly supported by the first President of the Association, Professor Kisch—to promote the periodic publication of comparative legal studies on specific subjects. I find it a great pleasure and also a privilege to announce the publication of the first volume of the Netherlands Comparative Law Studies.

First of all I wish to express my particular gratitude to Professor Sauveplanne, who was willing to assume the editorial responsibility for this first volume, who approached the authors and held the necessary consultations with them. I am also grateful to these authors for their collaboration in successfully accomplishing the proposed task. I thank the United Kingdom National Committee of Comparative Law for its willingness to co-sponsor this edition.

The publication of the first volume of these studies has been made possible thanks to the financial support which was obtained from the Faculties of Law of the Universities of Leiden, Rotterdam and Amsterdam as well as from the Catholic University College of Tilburg. The Association is very thankful for this support. As the project concerns the publication of a series, volumes II and III of which are already in course of preparation, the Association hopes and believes that this support shall be continued and augmented, as long as the introduction of these studies makes it desirable.

I also wish to express my gratitude to the publisher. His collaboration to an initiative to which our association attaches great value was a stimulating experience.

We are already familiar with many views on the sense and function of comparative law. Without detracting in the slightest way from the proper value of these views, I am convinced that in this field experience is the best teacher. When working in the field of comparative law one seeks

for methods and possibilities of comparison. One discovers those aspects from which it is possible to draw conclusions. One actually experiences the importance of national legal systems as a necessary background for the function of a rule or an institute, and consequently one realizes the limitation of possibilities for unification and transplantation of law. I hope that to all those who collaborated to this volume, this collaboration also gave them personal satisfaction in this more general sense, and that they look back on a fruitful experience as a comparatist. May this phenomenon repeat itself many times in this series of studies.

H. J. M. Jeukens,
President of the Netherlands
Association of Comparative Law.

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J. G. Sauveplanne

Introduction

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1. *The design of the book*

This book deals with security over corporeal movables. It describes the law with regard to real or collateral security over these movables. It treats of the legal aspects of both possessory, non-possessory and proprietary security. In this respect, it covers a wide field.

However, in another respect the scope of the book is more restricted. It describes the law on security over corporeal movables, and therefore does not deal with security over intangibles, nor with such matters as floating charges over entire businesses. But this does not mean that these subjects will not be mentioned at all. In several systems such a close connection exists between the different types of security, notably in establishing priorities, that a description of the law on security over corporeal movables would remain incomplete if the other types of security interests were wholly left out.

The book contains a description of the law of England and Wales, Scotland, the United States, Canada, France, Italy, the Netherlands, Germany, Sweden, Switzerland, and a number of Asian countries.[1] Most of these papers were originally presented to a Colloquium on Security over Corporeal Movables, organized by the United Kingdom National Committee of Comparative Law, and held at Edinburgh from September 14-16, 1971. They were afterwards revised by their authors so as to make them suitable for publication. They are preceded by a comparative survey of the law relating to title to goods. A final chapter contains a comprehensive comparative account as well as an attempt at drawing some conclusions to desirable future developments of the law in this field.

2. *Structure of legal systems involved*

The legal systems on the European continent are codified systems. In all Western European countries the principal source of law is formed by statutory rules, and the main body of these rules has been collected in

codes.[2] In contrast to these systems stands the judge made law of the systems that form part of the English legal family; in these systems the primary source of law is formed by the decisions of the courts, and the main body of legal rules is deduced from these decisions.

This does neither mean, however, that continental law can only be found in written provisions, nor that the laws of the English legal family are merely based on judicial precedents. In developing the law on the continent judicial decisions play an increasingly important role; a vast amount of statutes penetrate ever more deeply into those fields of law which 'common law' judges long considered to be their exclusive domain. Nowadays, there is hardly any provision in a code which has not been construed by the courts, nor is there hardly any field of case law where the legislator has not interfered with the process of law-making. This holds particularly true in the area of personal property security. Thus in the United States that body of law is now entirely in statutory form; namely, Article 9 of the Uniform Commercial Code. In this area, therefore, a code is the prime source of law and the judicial decisions are primarily for the purpose of interpreting that code.[3] On the other hand, in Germany and the Netherlands the law on personal property security, notably with regard to proprietary security interests, has to a large extent been developed by the courts and still is primarily based on judicial decisions.

English law makes a distinction between, on the one hand, rules of Common Law, on the other hand, rules of Equity. The latter have been defined as a sort of supplement or appendix to the Common Law, and it has been added that, though they do not contradict the rules of Common Law, they can produce a result opposed to that which would have been produced if the Common Law had remained alone.[4] However, in the field of property law they have had a greater significance than a mere appendix to the Common Law. In this field, including the field of chattel security law, Equity has constructed a concurrent system of rules which for many purposes are just as important as the Common Law rules. Most of the essential principles of property security during the past several centuries were actually developed by the Equity courts. Nowadays almost everywhere Common Law and Equity are administered in the same courts of justice, but they still form two distinct bodies of law.[5] This distinction is unknown to continental legal systems. On the contrary, in these systems moral and equitable principles have always formed part of the law, and have helped to guide the judge in determining the contents of legal provisions. Nor does Scots law make such a distinction. This law, although uncodified, presents a close affinity with continental legal systems, based as it is on the traditions of the Roman law. On the other hand, it has, during the last centuries, been strongly influenced by English

legal concepts which have penetrated into the field of both case and statute law.

As is shown by the Scottish example, the so-called English legal family does not form a geographic entity. This also applies to the North-American area, where one finds some European enclaves. The Canadian Province of Quebec has a codified legal system; the main body of its private law is to be found in a civil code of French origin. The State of Louisiana also has a French civil code; this State up till now refuses to introduce into its legislation the provisions of the Uniform Commercial Code, as it is of opinion that they are incompatible with its system.

3. *Classification of security interests*

A distinction can be made between, on the one hand, security interests which confer on the creditor a right *in rem,* and, on the other hand, interests which only confer on him a right *in personam.* The latter can only be enforced as against the defaulting debtor and his creditors in bankruptcy, whereas the former are opposable to any third party. However, this distinction is not always as absolute as would appear at first sight. Thus the creditor will often be prevented from opposing his security to a third party who possesses the goods charged, because the latter's possession is protected by law, as may be the case with regard to a bona fide purchaser. On the other hand, some security interests which operate primarily *in personam* only can nevertheless to a limited extent be opposed to third parties, and therefore contain some elements that are reminiscent of a right *in rem.*

A further distinction can be made between possessory and non-possessory security interests. Possessory security interests charge goods that are not or do not remain in the debtor's possession, but that are brought into the possession of the creditor or of a third party; to this class belong pawn or pledge and liens. Non-possessory security interests charge goods that remain in or are brought into the debtor's possession. They can be sub-divided into, on the one hand, proprietary and, on the other hand, non-proprietary security interests. With the latter ownership of the goods charged remains vested in the debtor; to this class belong mortgages and preferential rights. With proprietary security interests ownership of the goods charged is or remains vested in the creditor; to this class belong such devices as conditional sales, hire purchase, transfer of ownership for the purpose of security.

Finally, one can make a distinction between contractual and statutory security interests. The first are created by contract, the latter are imposed by law.

NOTES

1. Only the descriptions of Italian, Swedish and Swiss law do not originate from papers presented to the colloquium.

2. Although in Scandinavian countries codification has remained rather fragmentary, also in these countries the principal source of law is formed by statutory rules which, notably in the field of private law, are to a large extent collected in codes, cf. Sundberg, Civil law, Common law and the Scandinavians, in *13 Scandinavian Studies in Law* (1969) 179.

3. Comparable developments are taking place in several of the Provinces in Canada.

4. See Geldart, *Elements of English Law,* 7th ed. (1966), p. 19.

5. Except, of course, where they have been replaced by a single system of statutory law, as in Article 9 of the Uniform Commercial Code.

1 *J. G. Sauveplanne*

Title to Goods

CONTENTS

1. *Ownership and possession*

In the legal systems of continental Western Europe the most important property right is the right of ownership. Ownership vests an absolute title in the owner; the latter has the best right over the goods owned and, once established, can maintain his right as against all the world. He can however be hampered in the full exercise of his right by the concurrent existence of other rights over the same goods which represent a lesser interest, such as a usufruct, a pledge or a mortgage. These so-called limited property rights invest their holder with some of the attributes of ownership and consequently restrict the actual owner's power to enjoy the use of his property.

These systems of property rights are so called closed systems. The law contains an enumeration of property rights that is considered to be exhaustive, and leaves no room for creating other property rights. It defines the scope of each right and determines its nature and content.

The systems mentioned make a distinction between, on the one hand, ownership and, on the other hand, possession. The owner has an absolute title to the goods owned and he disposes of proprietary remedies, such as revindicatory actions, for the purpose of maintaining his title. Those entitled to limited property rights have, within the limits imposed by the nature and content of each such right, similar remedies at their disposal. Possession of goods, on the other hand, does in itself not vest a title in the possessor. Nevertheless, a possessor can rely on his possession in several ways; this possession cannot only give rise to a presumption of title, but it can also form the basis of an acquisition of title by way of bona fide purchase or acquisitive prescription, provided the possessor possesses the goods in the belief that he has obtained title to them.[1]

A different concept of ownership prevails in Swedish law. Authors have long been divided on the question whether or not an absolute concept of ownership is compatible with their system. Actually, prevailing opinion rejects the absolute concept and concieves of the term ownership as a collective noun for a bundle of rights each of which can give rise to