Securities over Personalty edited by Michael Gillooly (The Federation Press, Sydney, 1994) pages i-xxxii, 1-314, index 315-9. Price $75.00 (hardback). ISBN 1 86287 129 9.

Securities over Personalty is a collection of 10 essays derived from papers given at a conference on that topic held in Perth in June 1993.[1] In the best tradition of this genre,[2] the collection includes pieces written in response to other essays,[3] and those commented upon have had the opportunity to incorporate their responses.[4]

The title of this collection is in fact misleading. It is not confined to personal property securities. As would be expected, there are papers on various types of those securities: floating charges,[5] equitable liens[6] and pledges.[7] Choses in action receive separate treatment,[8] as does the intriguing problem of circularity in the resolution of priority disputes.[9] The rest of the collection, however, deals with law reform. Although the focus is on the reform of this complex area of law, the essays in this section contain much of theoretical and practical interest to the student of law reform in general.

Michael Gillooly's introduction provides a good summary of each of the essays, and so that will not repeated here. The following comments merely attempt to give a flavour of each essay, of its relationship to the others, and hence of the collection as a whole.

The literature on floating charges grows incessantly. It ranges from broad questions of how a floating charge 'floats',[10] to detailed treatment of sub-topics such as 'automatic crystallisation'.[11] The essay by John Chandler, entitled 'The Modern Floating Charge', surveys the principal issues surrounding the floating charge, and touches on two areas not often discussed: can a floating charge be created by natural persons, and can one create a floating equitable mortgage (that is, a floating security which effects an assignment of property to the security holder, rather than

1 9-10 June 1993 at the Centre on Commercial and Resources Law of Murdoch University and the University of Western Australia.

2 See also, eg, Paul Finn (ed), *Equity and Commercial Relationships* (1987).

3 John Naughton, 'Commentary on Commercial Pledges' in Michael Gillooly (ed), *Securities over Personalty* (1994) ch 6; John Goldring 'Problems of Law Reform: The Law of Personal Property Securities — A Commentary on Chapters by Professors Ralph Simmonds and Tony Duggan' in Michael Gillooly (ed), *Securities over Personalty* (1994) ch 10.

4 See, eg, Norman Palmer, 'Pledge' in Gillooly, above n 3, 149; Ralph Simmonds, 'Some Notes on the Reform of Personal Property Security Law in Australia' in Gillooly, above n 3, 201, 203, 206, 230, 232. Cross-references to other essays have also been incorporated (eg, Palmer, above, 134 n 48; Simmonds, above, 225 n 139).

5 John Chandler, 'The Modern Floating Charge' in Gillooly, above n 3, ch 1.

6 John Phillips, 'Equitable Liens — A Search for a Unifying Principle' in Gillooly, above n 3, ch 2.

7 Palmer, above n 4.

8 Dianne Everett, 'Security over Receivables' in Gillooly, above n 3, ch 3.

9 Michael Gillooly, 'Priorities and the Problem of Circularity' in Gillooly, above n 3, ch 4.

10 See, eg, K J Naser, 'The Juridical Basis of the Floating Charge' (1994) 15 *The Company Lawyer* 11.

11 Fiona Burns, 'Automatic Crystallisation of Company Charges: Contractual Creativity or Confusion?' (1992) 20 *Australian Business Law Review* 125.

merely creating an hypothecation)?[12] On both questions Chandler answers tentatively 'Yes'. In effect, he resorts to the 'flexibility principle' underlying both the US Uniform Commercial Code's Article 9 and those proposals for reform based on Article 9. Professor Simmonds describes that principle in chapter 8: 'Presumptively, there is no reason why new forms [of security] cannot be created, and why the existing forms cannot be transformed'.[13] Chandler's comments demonstrate that, even if root and branch reform of personal property securities is not undertaken, the 'development' of law through the incremental process of the common law can still be informed by the same ideas.

The High Court of Australia in *Hewett v Court*[14] affirmed the flexibility principle in relation to equitable liens: the list of categories of equitable liens is not necessarily closed.[15] Professor John Phillips' essay, 'Equitable Liens — A Search for a Unifying Principle',[16] recognises the occurrence of equitable liens in cases such as *Re Hallett's Estate*[17] (a 'charge'[18] imposed by the court to recognise a beneficiary's right to trace trust property into a mixture of money), cases of subrogation,[19] and cases where recovery is allowed from a defendant who has 'freely accepted' money or goods from the plaintiff.[20] Phillips is appropriately cautious about the relevance of these areas to his project. Even if a personal right exists to recover in those circumstances, proprietary rights are not a necessary concomitant; and if property rights do arise, the category of the equitable lien may not be the most appropriate. Those areas should therefore not be used in order to derive a unifying principle for equitable liens, but rather should be analysed in light of whatever principle is derived independently of them.

Phillips focuses on the discussion of equitable liens in *Hewett*. The essay moves from detailed analysis of the judgments to a discussion of 'a more fundamental conflict ... between the principles of equity designed to achieve fairness between individuals in particular legal relationships and the statutory regimes providing for the distribution of assets amongst all creditors'.[21] That conflict is often overlooked if analysis of insolvency law merely assumes that 'property is property is property'

[12] Chandler, above n 5, 4-6 and 8, respectively.

[13] Simmonds, above n 4, 199; see also 225.

[14] (1983) 149 CLR 639, 649 (Gibbs CJ), 650 (Murphy J), 668 (Deane J); cf 657-8 (Wilson and Dawson JJ).

[15] *Hewett v Court* (1983) 149 CLR 639, 646; Chandler, above n 5, 31.

[16] Phillips, above n 6. As noted in the first footnote, the essay was previously published in the UK. It is unfortunate that it was not revised to take account of the 5th edition of The Law of Securities by Edward Sykes and Sally Walker, since the other essays in this collection refer to it. Despite its previous publication, there seem to be more typographical errors in this essay than in the others.

[17] (1880) 13 Ch D 696, 705. See Phillips, above n 6, 28.

[18] Phillips notes the strict terminological distinction between charges and equitable liens: the latter are court-imposed hypothecations, whereas the former are consensually created (Phillips, above n 6, 26).

[19] Phillips, above n 6, 30-1.

[20] See, eg, Andrew Burrows, *The Law of Restitution* (1993) 11-14, 315-20. Phillips bases his discussion on a passage quoted from Edward Sykes and Sally Walker, *The Law of Securities* (5th ed, 1993) 204-5 (Phillips, above n 6, 28), although the cases cited by Sykes and Walker are omitted.

[21] Chandler, above n 5, 51.

— in other words, that considerations of the effect of insolvency is always extraneous to the determination of proprietary rights. As Phillips implies, this is a conflict to be recognised and, as far as possible, resolved; not ignored. Moreover, that is not just the province of the law reformer, but of anyone who is attempting to analyse legal rules and make them intelligible.[22]

Professor Dianne Everett's essay 'Security over Receivables'[23] maps out the numerous unresolved issues surrounding the taking of security interests over choses in action. The complexity is due to the variety of statutory and general law rules affecting assignment, creation of security interests and priorities, which broadly aim at ensuring that an assignee's or security holder's interest is objectively ascertainable. That is, of course, a concern in respect of any personalty. However the concern is heightened where the personalty itself is incorporeal. The aim of this essay is not so much to offer a resolution of those issues,[24] but to support comprehensive reform and the establishment of a single register of security interests over receivables, of the kind espoused by Professor Duggan.[25]

The next chapter, 'Priorities and the Problem of Circularity',[26] is not confined to securities over personalty. Any student who has been surprised to find circular results, when applying even the basic *bona-fide*-purchaser-of-the-legal-estate-without-notice rule to, say, successive mortgages of old title land, should find Michael Gillooly's essay a worthwhile path to understanding the problem.

Gillooly concludes the essay with a suggestion of how better to resolve problems of circularity. The approach taken is simply to identify those conflicts arising from the application of priority rules which are of differing 'ranks', and then apply those rules in order of that ranking. The ranking suggested by Gillooly is based on the source of the particular priority rule: Commonwealth statute, State statute or general law. Unfortunately, Gillooly does not go back to apply that suggestion to the cases of circularity discussed previously. It would show that ranking the priority rules on the suggested basis will have little application. Ranking would not apply where circularity arises due to a priority agreement, since there is only one 'rank' of rule being applied.[27] It would not apply in cases of the *bona fide* purchase rule,[28] the *Dearle v Hall* rule,[29] or cases of 'circularity due to failure to register' a security interest.[30] In each case, the circularity does not arise from inconsistent rules of differing 'rank'.[31]

[22] Cf Simmonds, above n 4, 205, 211.

[23] Everett, above n 8.

[24] But see Everett, above n 8, 59, 80, where the solution to certain issues is suggested.

[25] A Duggan, 'Personal Property Security Interests and Third Party Disputes: Economic Considerations in Reforming the Law' in Gillooly, above n 3, ch 9, 268 ff.

[26] Gillooly, 'Priorities and the Problem of Circularity', above n 9.

[27] It may be based on a right in general law (see ibid 95), or in Commonwealth or State statute (see ibid 98). But it will only be based on one such right.

[28] Cf ibid 92.

[29] Cf ibid 108.

[30] Cf ibid 111.

[31] The cases of circularity arising from statutorily preferred unsecured creditors (ibid 114) do lend themselves to Gillooly's suggested ranking. The basis of that ranking, however, is not some independent legal principle for resolving circularity, but the general principle for dealing with

If the priority does not arise from differently ranked rules, then Gillooly's default rule is to distribute all assets which are subject to the circularity problem *pari passu*.[32] His remark that there would 'be some degree of judicial resistance to treating secured creditors like unsecured creditors'[33] is perhaps an understatement. It is not that the default rule is necessarily unreasonable; however it must be supported by much more detailed analysis of the role of secured lending.[34] It is not sufficient merely to say that 'such a rule appears to be the only reasonable basis'.[35]

As Simmonds remarks, 'analysis should be "functional", not "formal".'[36] Gillooly's suggested ranking tends to be 'formalist'. However, his analysis of the circularity problem indicates a more functional solution. Gillooly notes that a priority rule will not result in circularity if it focuses solely on matters such as registration.[37] Whether priorities are determined by virtue of registration, the giving of notice or creation, the rule is merely 'first in time'.[38] Where the determining factor is a common referent such as 'time', circularity is avoided. It is only where the determining factor is object-specific, such as a party's knowledge, that a linear ordering may not result. It is the focus on a party's knowledge that underlies the circularity in each of the 'failure to register', *Dearle v Hall* and *bona fide* purchase cases. Each such object-specific rule is an exception to the more general, default rule of 'first in time'.[39] That default rule, whether it be first to register, first to give notice or first to be created, then provides a starting point. The question should then be: what is the purpose of the object-specific rule? Is it to alter the priorities between party A and party B (who has requisite knowledge of party A) notwithstanding the effect it may have on party C (whose interest party B did not know about); or is it only to do so to the extent consistent with the existing rights of party C? That, in effect, is to approach the problem in the same way as in the case of circularity due to a priority agreement: what was intended?[40]

Returning to analysis of particular personal property securities, Professor Norman Palmer's essay, 'Pledge',[41] also embodies the 'flexibility principle' in his suggestion that 'it is not inconceivable that future authority will recognise a pledge

conflict between laws from different sources. It depends upon interpreting the relevant statute. In other words, one may find that the statute itself (presuming it is *intra vires*) requires the unsecured creditors it prefers be preferred even over holders of fixed security interests. It could be otherwise. A statute might merely intend preference to be given so long as fixed security interest holders are not prejudiced. In that case, the suggested ranking approach would seem to yield unintended results.

32 Ibid 123.

33 Ibid.

34 Of the type engaged in by Professors Simmonds (Simmonds, above n 4, 202ff) and Duggan (Duggan, above n 25, 236 ff).

35 Gillooly, 'Priorities and the Problem of Circularity', above n 9, 123.

36 Simmonds, above n 4, 198.

37 Gillooly, 'Priorities and the Problem of Circularity', above n 9, 111-2. That must be so for both the 'master' principle and 'exceptions': see ibid 91.

38 Ibid 91.

39 Ibid.

40 Ibid 103, 107.

41 Palmer, above n 4. The case cited at Palmer, above n 4, 142 n 92 has now been reported at [1993] BCC 385.

of intangibles'.[42] That will greatly expand the potential of the pledge in the one area which is, as John Naughton notes in his commentary,[43] commercially significant in Australia: the pledge of documents which themselves constitute title to assets. The advent of the 'paperless transaction'[44] could be the opportunity for that sort of expansion. The rest of Palmer's essay will give the reader a sound understanding of the pledge as it is. Palmer's exposition of authority and theory is clear and concise, and it is supplemented by equally lucid hypotheses where authority or theory is deficient. John Naughton's 'Commentary on Commercial Pledges'[45] is in a similar vein; both essays complement each other well.

Naughton concludes his essay with reference to law reform proposals regarding the pledge.[46] That bridges nicely the transition from the more expository first half to the reform-based concerns of the final four chapters. Professor John Farrar's short essay, 'Reform of the Law of Company Security Interests: Trans-Tasman Perspectives',[47] gives a brief comparison between the existing Australian system, and the various proposals for its reform, and the existing New Zealand system, and the proposals for its reform (with which Farrar was 'most closely involved').[48] Appended to the essay is a tabular summary of the reform proposals of the Australian Law Reform Commission (the 'ALRC') (based on a collaborative discussion paper with the New South Wales Law Reform Commission), the joint proposals of the now-defunct Victorian Law Reform Commission and the Queensland Law Reform Commission (the 'VLRC/QLRC'), and the New Zealand Law Commission.

The last three essays, Professor Ralph Simmonds' essay entitled 'Some Notes on the Reform of Personal Property Security Law in Australia',[49] Professor A Duggan's essay, 'Personal Property Security Interests and Third Party Disputes: Economic Considerations in Reforming the Law',[50] and Professor John Goldring's, 'Problems of Law Reform: the Law of Personal Property Securities',[51] all give the reader a different, yet equally informed, perspective. Simmonds draws on the Canadian experience of reform in this area to inform comment on the ALRC's proposals (with some less detailed comments on the VLRC/QLRC's proposals at the end of the paper). Duggan 'was a consultant to the Victorian Law Reform Commission'.[52] Goldring was a Commissioner of the ALRC.[53] Both Simmonds

[42] Ibid 139.
[43] Naughton, above n 3, 152.
[44] Ibid 154.
[45] Naughton, above n 3.
[46] Ibid 163.
[47] John Farrar, 'Reform of the Law of Company Security Interests: Trans-Tasman Perspectives' in Gillooly, above n 3, ch 7.
[48] Simmonds, above n 4, 195.
[49] Simmonds, above n 4.
[50] Duggan, above n 25.
[51] Goldring, above n 3.
[52] Goldring, above n 3, 291.
[53] Ibid 292.

and Duggan are critical of the ALRC proposals for failing adequately to explain why certain views were adopted.[54]

The most enlightening aspect of these three pieces is their discussion of the aims, both theoretical and practical, of law reform in this area and in general. Simmonds and Duggan show the necessity for any reform to be based upon an understanding of the purpose of the relevant area of law in the first place: in this case, why should the law allow security over personalty?[55] Duggan's aim is that reform should be principled; the principles he espouses being those of the economic rationalist.[56] Simmonds' aim is to increase flexibility and intelligibility,[57] essentially practical goals. Goldring takes a more pragmatic view of reform still, suggesting that the 'major test of success of a law reform proposal — the performance indicator — is whether or not it is achieved.'[58] That leaves one wondering about the role of 'quality' of law, and hence of justice.

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54 Simmonds, above n 4, 215; Duggan, above n 25, 285.

55 Simmonds, above n 4, 202 ff; Duggan, above n 25, 236 ff.

56 Regardless of the merits of those principles as the justification of legal rules (cf Goldring, above n 3, 300 ff), they undoubtedly help to identify a wide variety of relevant issues for consideration by the law reformer.

57 Simmonds, above n 4, 205, 211. As noted, those are aims which even the analyst of legal rules should bear in mind (see text to n 22 above).

58 Goldring, above n 3, 293.

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