BOOK REVIEWS

PERSONAL PROPERTY SECURITY LAW IN ONTARIO. By Fred M. Catzman, Q.C., and others. Toronto: The Carswell Company Ltd., 1976. Pp. 262.

The new Ontario Personal Property Security Act 1967 [1] was proclaimed in force on April 1, 1976, at about the same time as this first Canadian text book on the new law relating to personal property security was published.

The Act is intended to be a comprehensive code of the law of security in personal property. It introduces new concepts to this branch of the law and, indeed, completely transforms the existing law, which was chaotic and imbued with outmoded Victorian notions. The Act is based on Article 9 of the Uniform Commercial Code of the United States, and, as will readily be appreciated, presents many difficulties of interpretation—new philosophy, new concepts, new terminology, and a difficult prose.

The new law had an incredibly long period of gestation. A Committee on security in personal property, chaired by Fred M. Catzman and originally formed under the auspices of the Canadian Bar Association, commenced its work in 1960. Later, it became a Committee of the Ontario Attorney-General. The first version of the Bill on Personal Property Security was completed in 1964, reviewed by the Ontario Law Reform Commission in 1965 and introduced, subject to the changes made by the Law Reform Commission, in the Ontario legislature. It was passed in 1967, but the bulk of the Act was not proclaimed in force until April of this year.

Such was the scene when Catzman's book was published. As the first Canadian text on the newly introduced law, by an author closely associated with its genesis, it naturally arouses considerable expectations. Unfortunately, these expectations are not fulfilled. The book gives the impression of having been written in a hurry and without adequate care and thought.

The book is a reprint of the Act with annotations, a format well established by Chalmers in his now classic treatises on the Sale of Goods and Bills of Exchange. It is a useful approach in a reference book concerned with a codified body of law. Regrettably, however, a table of comparison with the corresponding articles of the Uniform Commercial Code is not included. There are sporadic references to some corresponding articles, but no systematic referral or table. Such a table would be very useful to a student of the new law, who has now to undertake a search of his own for a corresponding article in the U.C.C. The index at the end is by no means exhaustive; the reviewer failed to find listed there such common security devices as a bill of lading, chattel mortgage, conditional sale, or foreclosure, just to mention a few. There is a rambling introduction of thirteen pages

[1] R.S.O. 1970, c. 344, *as amended.*

which mentions many things, such as pre-Act law, source of legislation, purpose and scope of the law, some basic concepts and definitions and a brief summary of the Act; but all this is rather sketchy and unsystematic. Nothing is said about the genesis of the Act, although in the body of the text there are references to the Catzman Committee [2] and the Ontario Law Reform Commission. [3] There is no reference to the similar legislation in various stages of implementation in other provinces or, except for a brief footnote, [4] to the Draft Uniform Personal Property Security Act prepared under the auspices of the Canadian Bar Association in 1969. A more comprehensive explanation of the history of the new legislation, its philosophy, and the problems in adapting a U.S. code to Canadian conditions would have been valuable, and there is hardly a person better qualified to write it than Catzman. A final comment about the authorship: this is attributed on the title page to Catzman and five other persons, these five being arranged in alphabetical order without any indication anywhere in the book of the nature and extent of their contributions.

Two questions must be asked in evaluating a textbook on current law. Firstly, what is the book's educational merit; *i.e.*, is it likely to be helpful to and be understood by legal practitioners and students? Secondly, what is the book's intellectual merit? These two functions are, of course, complementary, and the weight given to each one determines the aim of the book and the market for which it is intended. It is difficult to say what the aim of this book is: as an introduction for the uninitiated it is not explanatory enough, for it assumes considerable knowledge of the law of securities and of commercial practices and documents; as an authoritative text on the new law it is not sufficiently comprehensive, analytical or critical.

The book's usefulness to practitioners and students alike will be impeded by its failure to explain fundamental terms and concepts—for example, the nature and legal characteristics of such common security devices as a document of title, a "non-negotiable" document of title, a bill of lading, or a trust receipt. The treatment of a trust receipt is typical. In the Introduction it is said to be a "modern technique" "widely developed in Great Britain and the United States to finance export and wholesale inventory transactions". [6] The annotations to section 26 (temporary perfection) also contain a paragraph headed "Trust Receipts" which is anything but satisfactory. It contains the following sentences: "A considered dictum of Rose J., in *Re Dom. Shipbuilding & Repair Co.*, effectively discouraged its use. Cumbersome attempts to frame substitutes ran into difficulties." [5] What was that dictum? What were those attempts and difficulties? These documents are important; in many instances different legal consequences attach to them and different provisions of the Act are applicable. Yet a practitioner or a

[2] *See* Catzman, at 50, 55, 57 & 184.
[3] *Id.* at 184-86.
[4] *Id.* at 162-63.
[5] *Id.* at 124.

student not already an expert in commercial practices would have little, if any, understanding of them. In its treatment of fixtures [6] the book makes no reference to the basic principles of common law which determine when a chattel becomes a fixture; not a single example is even given of a fixture. Yet the whole question of fixtures has become quite complex: is built-in furniture or an air conditioning system a fixture? In the part on remedies [7] it is implicit that the person exercising his right of sale, foreclosure, etc., is the holder of a senior security interest. What remedies are available to the holder of a subordinate security interest? Can he seize and sell the collateral? Will the senior security interest be discharged? Does the purchaser obtain a clear title? Can the holder of a senior interest prevent such a disposal and how? The answers to these very important and practical matters are not even suggested.

As mentioned, the book is not comprehensive, is deficient in analysis and critical examination of the subject-matter, and glosses over deficiencies and ambiguities in the Act. It lacks exactly the qualities required of a first text on a newly proclaimed and untried code. Thus the definition section fails to comment on the Act's omission of a definition of book debts. Apart from a brief allusion in one sentence to the fact that the definition of "debtor" does not include the owner of the collateral where he is a different person from the debtor, [8] no analysis is made of this defect, although throughout the Act numerous references to the debtor clearly refer to the owner of the collateral. The corresponding article of the U.C.C., which specifically covers this situation, is not cited. In discussing the definition of "instrument", to state that an instrument does "not include writings which constitute part of a chattel paper, *e.g.*, a promissory note attached to and forming part of a conditional sales contract . . ." [9] is too simple and not necessarily correct in every case, especially in view of the recent decision of the Supreme Court of Canada in *Industrial Acceptance Corp. v. Richard.* [10]

The new Act contains a number of inconsistencies and ambiguities which the book passes over in silence. Section 7, for example, provides for continuity of perfection for 60 days when collateral is brought into Ontario (subsection 1), but where a secured party receives notice of the transfer, a financing statement must be registered within 15 days of the notice or before the expiration of the 60 days, whichever is earlier, otherwise the perfection ceases (subsection 2). Subsection 3 then goes on to say that a security interest that has ceased to be perfected owing to the expiration of the 60-day period may thereafter be perfected in Ontario. The Act is thus silent as regards a security interest which ceases to be perfected because of the expiration of the 15 days notice (as provided in subsection 2). Can such

[6] *Id.* at 160.
[7] *Id.* at 216-39.
[8] *Id.* at 20.
[9] *Id.* at 23.
[10] [1975] S.C.R. 512, 51 D.L.R. (3d) 559 (1974).

an expired interest be perfected again? There is no answer in the text and there are no annotations to subsection 3. [11]

Section 16, which deals with an agreement not to assert defences against an assignee, is ambiguous. It reads: "Except as to consumer goods, an agreement by a debtor . . . ." This is capable of two interpretations. Firstly: "except as to consumer goods, such an agreement is validated by section 16, but as regards consumer goods, any such waiver is invalid". Secondly: "consumer goods are exempt from the application of section 16, which is neutral on the controversial question of waiver, that matter being left to other legislation". No mention is made of those two possible interpretations, although the author appears to go along with the second one. [12]

Section 22 contains provisions for the subordination of an unperfected security interest. There are inadequate annotations to this badly drafted section. The statement is made that a conflict between an unperfected security interest and an artisan's lien will have to be resolved on common law principles. [13] This is true, but what are these principles? Should the reader have to search elsewhere to discover the principles determining the priorities of security interests in personal property? The same section also provides for the subordination of an unperfected interest to the interest of a transferee of "goods in bulk or otherwise, not in the ordinary course of the business of the transferor . . .". What is the meaning of "or otherwise"? Does section 22 apply if the transfer is in the ordinary course of the business of the transferor? These problems are not attended to, except for an inexact statement that the transfer need not have been in the ordinary course of the transferor's business, which does not explain anything. [14]

Section 36 covers the priorities of security interests in fixtures. It says nothing about perfection, so it would appear that, on a literal interpretation of the section, an unperfected security interest in a fixture would in certain circumstances have priority over a duly registered real property mortgage. This possibility is tersely indicated in a parenthesis, "(whether or not he perfects)", [15] but no further explanation is offered. Subsection 3 requires in certain instances "actual notice of the security interest". There is no discussion of what may constitute actual notice and no cross-reference to section 54(3) which states that registration of notice in the land registry office constitutes "actual notice" for the purposes of section 36(3). A secured party's obligation to account for any surplus on the disposal of the collateral is spelled out in section 59, but, unlike the U.C.C., the Act is silent about what happens where there is a deficiency. So is the book.

The language of the book cannot be described as lucid or easily readable and there are some mistakes (or misprints?) undoubtedly due to carelessness. The following statement is made about section 15, which provides

[11] *Supra* note 2, at 44-45.
[12] *Id.* at 85.
[13] *Id.* at 112.
[14] *Id.* at 115.
[15] *Id.* at 162.

that a security agreement may secure future advances: "The security agreement . . . provided for the creation of a security interest in future advances." [16] The agreement may have provided for a security interest in the collateral in respect of advances to be made in future, but certainly not for a security interest in future advances. Elsewhere it is stated that "[s]ection 40 deals with the position of an assignee from an account debtor . . ." and yet four lines later, reference is made to the "assigning creditor". [17] This section clearly deals with the position of an assignee from an account creditor and not an account debtor. [18]

The book will undoubtedly fill the need for a Canadian text on the new law of personal property security. It contains a wealth of material not available elsewhere and will facilitate the understanding of a difficult branch of law. This reviewer has been critical of a certain paucity of explanation and analysis and of the insufficient planning and care which appear to have gone into the preparation of the book, but he will be the first to admit that it is basically sound, containing hardly any substantive errors, and that it will be of considerable assistance to anybody confronted with the new Act.

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TREATY LAW IN CANADA. By A. Jacomy-Millette. Ottawa: University of Ottawa Press, 1975. pp. xviii, 431.

At a time when there is talk of the patriation of the Constitution and Quebec is claiming, and to some extent exercising, the right to enter into treaty relations on its own, without reference to the federal government, Dr. Jacomy-Millette's study of *Treaty Law in Canada*—an up-dated translation of her *L'Introduction et l'Application des traités internationaux au Canada* published in Paris in 1971—acquires added topicality and significance. The first fifty pages of this monograph, which deal with the historical background, constitute a useful introduction for anyone seeking a short account of Canada's development from colonial status to statehood. It is probably as well to be reminded of some of the difficulties that were experienced with regard, for example, to Canadian participation in the Peace conference and the Treaty of Versailles. [1] Of equal interest is the somewhat different position regarding the Treaty of Lausanne, in which Canada did not participate, thus "enabling the Canadian government to refuse to be bound by the commit-

[16] *Id.* at 78.

[17] *Id.* at 167.

[18] Another passage illustrative of the book's lack of clarity may be found at 139-40, dealing with section 29—security interests in returned or repossessed goods.

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[1] A. JACOMY-MILLETTE, TREATY LAW IN CANADA 14-15 (Helwig transl. 1975).

ments made by the United Kingdom. However, the government acknowledged that by virtue of this treaty, signed in the name of the Empire, the state of war between Canada and Turkey was at an end". [2] One must also not overlook the fact that as early as the end of 1918 Sir Robert Borden was indicating that foreign policy issues as seen by Canada might not coincide with those of the Imperial Government, and he emphasized that relations with the United States were more significant than relations with Europe. [3] Mme Jacomy-Millette draws attention to the special relationships then existing between Canada, the United States and the British Empire and compares them with "the contemporary triangle of Canada, Quebec and the French-speaking world". [4] Perhaps one of the most important cases dealt with in this section, and one which is likely to become increasingly important in the future, is the Privy Council opinion in the *Labour Conventions* case, [5] which "remains unquestionably the law of Canada" [6] concerning the distribution of powers in implementing international treaties. As early as 1951 Professor Laskin (as he then was) suggested that the Supreme Court need not follow the Privy Council unquestioningly, [7] and in 1976 in an obiter dictum in *MacDonald v. Vapour Canada Ltd.*, [8] Chief Justice Laskin suggested that it was probably time to "reconsider" the earlier case.

It is interesting to note that while the learned author states that her "guidelines are essentially in the work of the International Law Commission" [9] and while, adopting the phrase of the American delegates, she describes the Vienna Convention as "the Treaty on Treaties", [10] her definition of a treaty is not that of the Convention. She defines a treaty as "an international agreement whatever its particular designation, concluded between subjects of international law and governed by international law. This definition compares with that given by Duff J. . . . [in the *Employment of Aliens* case, [11]] at a time when States were almost the only subjects of international law: 'A treaty is an agreement between States . . . a compact between States and internationally or diplomatically binding upon States.' " [12] The Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law", [13] and this, surely, is closer to Mr. Justice Duff's definition than Mme Jacomy-Millette's. Her definition, in so far as it envisages agreements made by a province or any organ

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[2] *Id.* at 19.
[3] *Id.* at 35.
[4] *Id.*
[5] Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326 (P.C.).
[6] *Supra* note 1, at 39.
[7] Laskin, *The Supreme Court of Canada: A Final Court of and For Canadians*, 29 CAN. BAR. REV. 1038, at 1075 (1951).
[8] 7 N.R. 477, at 509 (1976).
[9] *Supra* note 1, at 41.
[10] *Id.* at 42, n. 9.
[11] *In re* Employment of Aliens, [1922] S.C.R. 293.
[12] *Supra* note 1, at 45.
[13] Art. 2(1)(a), quoted *id.* at 43.

less than a state government, automatically confers international personality and subjectivity on the entity in question, a status that does not follow from the mere fact that, for example, Ontario and other English-speaking provinces "have held discussions with their American neighbours to work out a policy for preventing and controlling forest fires". [14] The same is true of agreements such as those providing for reciprocal recognition of judicial decrees signed with a Commonwealth country, for "these are not international agreements but merely a matter of enactment of similar legislative provisions by the parties". [15] When a true international agreement is involved, "[c]onsultations are first organised at the domestic level between federal representatives and the provinces involved. At the termination of the meetings, or concurrently, negotiations are undertaken with the foreign country by the competent federal authority, sometimes with the participation of provincial representatives. The federal government nevertheless retains full responsibility for conclusion of the agreement in question, from an external point of view". [16] Even when the "English" provinces have complained of their non-role on the international level, they have tended to restrict themselves to seeking greater participation on the consultation level. However, "direct relations with foreign powers are increasing", [17] at least in the economic and trade fields, accompanied by, in some cases, the establishment of provincial "missions" abroad.

As far as Quebec is concerned, there is a tendency "[i]n the field of external relations . . . to promote the expansion of relations with French-speaking countries, which are regarded as essential if the French fact is to survive in Canada and on the North American continent". [18] Much attention has been given in recent years to Quebec's endeavours to negotiate with France on the cultural level, but it must be borne in mind that this was already envisaged by the Franco-Canadian "umbrella" cultural agreement of 1965. [19] In discussing the legal basis of Quebec's claims to treaty competence, Mme Jacomy-Millette refers to the federal clause as it appeared in Article 5(2) of the International Law Commission draft Treaty Convention, and while she cites Professor Lissitzyn's statement that "[a]t the first session of the Vienna Conference in 1968 . . . no speaker denied that members of a federal union can possess treaty-making capacity", she does not mention in this context that at the plenary session, when Canada suggested a separate vote on this proposal, the paragraph was rejected by a vote of 66 to 28, with 13 abstentions. The Conference agreed by a vote of 88 to 5, with 10 abstentions, merely that "every State possesses capacity to conclude treaties". No reference remains regarding members of a federal union. It is only in the

[14] *Supra* note 1, at 70.
[15] *Id.* at 71. *See also* Attorney-General for Ontario v. Scott, [1956] S.C.R. 137.
[16] *Id.* at 72.
[17] *Id.* at 76.
[18] *Id.* at 79.
[19] *Id.* at 82-83.
[20] Quoted *id.* at 89, n. 90.

next chapter that this fact appears, when the author points out that at Vienna some federal states, including the Soviet Union, supported the original draft, while the majority led by Canada opposed it.[21] In fact, even if the provision had remained, the problem would not have been settled. The consequence would have been that international law would have conceded the right of a constituent part of a federal union to enter into a treaty, but this would not in any way have altered the constitutional position. It would merely mean that if the constitution conferred such competence, then the unit in question enjoyed the power to make an internationally binding treaty. It should be remembered that the present membership of the United Nations is even more jealous of state sovereignty than was the group which drafted the Charter of the United Nations, and even that group envisaged ratification in accordance with constitutional processes. Despite the rejection of the former paragraph 2 of draft Article 5, the learned author still states that this paragraph formulates a "generally recognized principle of international law",[22] a difficult contention to support, it is submitted, in either customary or treaty law. It is further submitted that in her efforts to sustain this view, she exaggerates the relevance of domestic law on the external level. It would be interesting to know how many members of the United Nations would agree that "[t]he actors in the international community, which are mainly sovereign States, only recognize the capacity of member States to conclude their own international agreements when the federal Constitution permits and defines the limits of this capacity"?[23] How many states possess experts able to tell them accurately what a foreign constitution means? In the light of that query, can one really say that "the difficulty over interpretation by third countries would not arise if uncertainty did not exist at the domestic level"?[24] The principle that a country must accept the view of its contracting partner as to the meaning of the latter's constitution is too well established for statements of this character to carry much weight.

No one would argue with Dr. Jacomy-Millette when she reminds us that not only do states possess personality and subjectivity today, but that certain organizations have recognized that non-states possess a limited capacity for action on the international level.[25] It may well be that we are still excessively tied to archaic views of sovereignty and international personality. Her suggestions for the future therefore become important. She advocates an amendment of the B.N.A. Act to confer some external potential upon the provinces:

> International agreements concluded by the provinces would be restricted to matters within their constitutional jurisdiction, as stated in the *British North America Act* and its amendments. However, there would be no obligation to make use of this power, merely authorisation giving each

[21] *Id.* at 96.
[22] *Id.* at 97.
[23] *Id.*
[24] *Id.* at 98.
[25] *Id.* at 98-99.

> province a choice of acting directly on the international level or leaving this responsibility to the federal government, pursuant to an empirical approach on the matter.
> . . . [T]he new written constitutional provisions would also specify the chief responsibility of the federation in this area and foresee accordingly a machinery for joint consultation before international agreements are entered into by the provinces. A requirement of prior consultation would also be specified for treaties concluded by the federal government affecting primarily provincial interests and legislative jurisdiction. [26]

This might settle the constitutional confusion, but it would require acceptance by third states together with recognition by them that the provinces enjoying or exercising such capacity to enter into agreements would also be able to carry out any obligations arising therefrom, so that there would be no basis for holding the federal government liable in such circumstances. Not only would this require a new approach to international law in this field, it would also necessitate amendment of the Vienna Convention or a clear understanding that any agreements entered into by a province were not "treaties" in the sense defined by that Convention. As a second alternative, Dr. Jacomy-Millette suggests an amendment clearly giving sole treaty-making capacity to the federal government, again accompanied by a requirement of prior consultation. Even though she suggests that in both cases a permanent consultation body should be established, it is submitted that her second alternative would, given the present Canadian temper, merely serve to emphasize and aggravate the problems with which we are confronted.

Further sections of *Treaty Law in Canada* are concerned with the role of Parliament and the functions of the judiciary, but, in the light of current constitutional controversies, there is no need for this review to deal with these aspects of Dr. Jacomy-Millette's study. Enough has surely been said to indicate the amount of thought that has gone into the study, and the interesting and stimulating nature of the presentation. This monograph is a major contribution to Canadian aspects of international law, and the University of Ottawa Press is to be congratulated on making it generally available.

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MEDIEVAL LAW TEACHERS AND WRITERS, CIVILIAN AND CANONIST. By J. A. Clarence Smith. Ottawa: University of Ottawa Press. 1975. Pp. 129.

It is assumed in many quarters that the study of medieval canonists and civilians has been the private preserve of a few scholars. On the contrary. During the past forty years there has been a rapid growth in the study of these early expositors of Roman law and their contribution to the development of western legal systems.

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[26] *Id.* at 100.

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Two fundamental problems confront one at the outset of any study of medieval law. First, the Tower of Babel fell squarely on it. Latin and Greek provide us with the basic texts and commentaries, while modern scholarship appears in Italian, French, German, Spanish, Dutch, various slavic languages, and occasionally in English. For the specialist this presents a necessarily surmountable difficulty. For the non-specialist the languages often deter interest or concern from this vital topic in the history of law. Secondly, as the formal study of medieval law has burgeoned so dramatically in so many different quarters, there has been an increased demand for handbooks and guides to materials. Clarence Smith has attempted both to bridge the language gap and master the welter of hard-to-find scholarship. His work, as such, is a useful tool for specialists and non-specialists alike.

This handbook covers roughly five hundred years of Western European lawyers and canonists (1100-1600). Emphasis is given to the major benchmarks in the story—to the development of the major texts, their distribution, and revision; to the major commentators, lawyers, teachers and formulators of legal policy. The modest size of this work precludes either extensive or intensive treatment of the imposing array of subjects. Paragraphs must suffice for even the most prominent, such as Rofferd, Bracton, or the *Decretum*. Yet each entry, or topic, carries with it footnotes to the scholarly literature of various languages; moreover, the short entry has an advantage for quick reference.

Any brief handbook, however, that covers a large topic suffers from compression; Clarence Smith's is no exception. Despite the efforts to balance coverage with analysis, certain weaknesses inevitably appear. First, since all these topics are handled in a paragraph or two, at times it is difficult to distinguish between major and minor figures. Second, some sections suffer from over-generalization. The worst example of this process is found in a section entitled "Political Geography to 1100," where compression has stripped the topic of any meaning or utility for the subsequent paragraphs. The problem here is symptomatic of the difficulties in general with the first chapter, "Prologue 500-1100", where the author has covered more subjects than tolerable within the allotted space. Thirdly, the arrangement of the book hinders the development of an integrated essay. Since there are 172 bold-face, numbered topics in the text and for each one the author has written essays that focus on the particular point at hand, the over-all work at times becomes simply a collection of paragraphs; as a result, in some sections it is difficult to obtain a general sense of medieval Roman and canon law or the complex interaction of their various facets.

These problems notwithstanding, Clarence Smith's work is valuable to anyone interested in medieval law. Brief entries and a good index will provide law students and general readers with, for the most part, an informative sketch of single topics. Moreover, beginning students will derive from the text a reliable introduction to the Roman and canon aspects of medieval

law; those who are interested will have at hand a good select list of references for each subject. For the English-speaking audience, Clarence Smith has provided a handbook that is far more convenient to use than Coing's ponderous, if more thorough, guide to medieval and early modern private law, and, in the process, has made a valuable contribution to the study of medieval law.

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