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Creditor's Rights and Secured Transactions Under the U.C.C. Cases and Materials

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BOOK REVIEWS

Creditors' Rights and Secured Transactions Under the U.C.C.—Cases and Materials. WILLIAM E. HOGAN† and WILLIAM D. WARREN.‡ Brooklyn, N. Y.: The Foundation Press, Inc. 1967. Pp. xxiii, 842. $13.00.

This new casebook by Professors Hogan and Warren attempts to cover in one volume fields covered three or four decades ago by a combination of Hanna's *Cases on Security* and Hanna and MacLachlan's *Cases on Creditors' Rights*. Hanna treated the area in two separate courses; one pertaining to unsecured creditors, the other to secured creditors.[1]

In 1932 John Hanna may have been right in thinking of bankruptcy as a matter involving primarily the problems of unsecured creditors. Today, Hogan and Warren take a different view: "The unsecured creditor gets so little out of the typical bankruptcy estate that we wonder why he has been so long a favorite in Creditors' Rights courses."[2] "We use as our central theme the conflict between the trustee in bankruptcy, with his avoiding powers under Bankruptcy Act Sections 60(a) and (b), 67, 70(c) and 70(e), and the secured creditor."[3]

To one whose practice for several decades has been concentrated in the field of creditors' rights, the Hogan-Warren approach to bankruptcy and security law makes considerable sense. However, this is not to say it is the only sensible approach.[4]

There are, of course, instances in which a general creditor might resort to his right to force a non-paying debtor into "straight" bankruptcy. Nevertheless, the low percentage of bankruptcy "dividends"[5]

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1 J. HANNA, CASES ON SECURITY, at vii (1st ed. 1932).

2 P. xiii.

3 *Id.*

4 *Compare, e.g.*, V. COUNTRYMAN, CASES ON DEBTOR AND CREDITOR (1964) *and* S. RIESENFELD, CASES ON CREDITORS' REMEDIES AND DEBTORS' PROTECTION (1967), for very different approaches.

5 Tables of Bankruptcy Statistics are published each year by the Administrative Office of the United States Courts. The Tables for the Year Ending June 30, 1966 [hereinafter cited by Table number], are typical, illustrating the nature of bankruptcy proceedings. In that fiscal year there were 192,354 cases filed, an increase of 6.7% over the previous year. Of these, 175,924, or 91.5%, were "nonbusiness" bankruptcies, which usually means no assets to pay creditors. The 93 Chapter X cases and the 909 Chapter XI cases probably involved substantial liabilities, but the typical creditors' rights course barely touches on these "chapter" proceedings. The 28,261 Chapter XIII cases, are likewise in a class by themselves. *See* Table F 2. Of the 175,227 "straight" bankruptcy cases, 136,667 involved no

generally paid to unsecured creditors strengthens this writer's feeling that the unsecured creditor's sole reward is likely to be simply the emotional satisfaction in seeing an uncooperative (or unlucky) debtor deprived of his assets. In any event, once bankruptcy proceedings are underway, the contest for distribution of proceeds realized from a large segment of the bankrupt's assets is likely to involve conflicts between the bankrupt's trustee and those who are, or at least hope they are, holders of security interests in personal property.[6] Even if the trustee wins, unsecured general creditors may still get little or no benefit.[7] Creditors given priority under section 64, including the United States,[8] may receive a sizeable portion of the proceeds from sale of the free assets, while much of the remainder goes to maintain the bankruptcy machine.[9] A handful of lawyers in each metropolitan area have inherited, at least partly by default of business lawyers generally, the job of representing both the trustee in bankruptcy and the general creditors. To these specialists, a knowledge of the intricacies of bankruptcy procedure is a necessity. It is important for them to know, for example, whether the trustee can deprive a prospective secured party of his alleged collateral in a summary proceeding before the referee, or whether he must resort to a plenary proceeding in another forum. A law school course, however, need not supply such specialized knowledge of every legal refinement.

For every lawyer actually engaged in the work of liquidating financial wrecks in straight bankruptcy proceedings, there are dozens

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assets, or only enough assets to contribute towards costs of administration. There remained 18,532 approximately 10% of the "straight" bankruptcy cases, in which there were any assets for distribution to creditors. Table F 4a. Most secured creditors are paid outside of the bankruptcy proceedings, but secured claims in bankruptcy paid such creditors $32,427,785. Priority creditors got $14,789,084. Unsecured creditors received $24,194,351, or 6.9% of their claims in the 10% of the bankruptcy cases where unsecured creditors got anything. Tables F 5, F 6. Administrative costs absorbed slightly more than distributions to unsecured creditors—$24,617,313.

6 In the normal case, the secured party can either use his secured position as a means of making bankruptcy unattractive to unsecured creditors, and therefore avoid it while he works out an informal plan from his position of strength, or he can enforce his security outside of bankruptcy. In some instances he may be forced to realize on his security in the bankruptcy proceedings.

7 In the 10% of bankruptcy proceedings which involved enough assets to enable the referee to distribute something to the unsecured creditors, they received only 6.9% of their claims. In 90% of "straight" bankruptcies, unsecured creditors received nothing. Table F 6.

8 *See* 31 U.S.C. § 191, 11 U.S.C. § 104 (1964).

9 As indicated in note 5 *supra*, in 1966 the cost of administering the bankruptcy system for the 10% of the asset cases slightly exceeded the distributions to unsecured creditors in such cases.

who should know the bankruptcy principles that cannot be disregarded in shaping the many business transactions (aggregating billions of dollars) that will never get near a bankruptcy court. The primary reason for taking a security interest is, of course, to protect the secured party in the event that a now-healthy borrower will become bankrupt. Every secured transaction must be designed so that the secured party will have priority over a bankruptcy trustee, if bankruptcy occurs. In every loan or sale of goods where the lender or seller is unwilling to extend credit on the unsecured promise of the debtor, it must be determined at the outset what steps should be taken to make sure that the prospective security interest to be created meets the acid test: Will it withstand attack by a trustee-in-bankruptcy? A real estate mortgage often constitutes the collateral; and a prediction of its standing in bankruptcy is less difficult than a determination for inventory not yet in existence. Thus, the more serious problems involve transferrable personal property collateral. This casebook is designed to enable an instructor to give a course in the related fields of creditors' rights and secured transactions in personal property that will help future commercial lawyers give appropriate legal counsel to the client involved with personal property security.

After a short introduction, the casebook devotes ninety-six pages to "The Process of Collection." These materials, mostly cases, include sixty-six pages on "The Individual Creditor's Remedies and the Trustee's Powers Under the Bankruptcy Act, § 67a," and thirty pages on "Fraudulent Conveyances." In contrast, Stefan Riesenfeld, in his contemporaneous *Creditors' Remedies and Debtors' Protection,* devotes over three hundred pages to somewhat comparable materials. Riesenfeld's materials in this area are not only more extensive than those of Hogan and Warren, but are superior to any current treatment of this area, whether in case or text form. For this reason, I have been tempted to use Riesenfeld's materials, but find it difficult to justify spending so much time on so small a portion of the creditors' rights field. Hogan and Warren's chapter on "Fraudulent Conveyances" is likewise a bare-bones treatment. The chapter on "Initiating Bankruptcy Proceedings" might be skipped by commercial lawyers.[10] On the other hand, Chapter V, "Systems for Administering Claims Outside of Bankruptcy," contains an excellent introduction to the common-law settlement, the composition, the trust mortgage, assignments for benefit of creditors, the rehabilitation chapters of the Bankruptcy Act

10 Nine pages is excessive for a case on the "person" who can file a petition in bankruptcy; *see* Associated Cemetery Mgmt., Inc. v. Barnes, 268 F.2d 97 (8th Cir. 1959).

(Chapters X, XI, and XIII), and corporate dissolution. One could wish, however, for a more generous bibliography here as elsewhere. The effect of the federal priority under Revised Statutes Section 3466[11] is introduced at this point, although it might be more appropriately included with other priorities under section 64a. Chapter VI is a minimum treatment of the assets of the bankruptcy estate—section 70a.

A section on "Consumer Goods and Equipment Financing" introduces the simpler security devices—those used on collateral that does not change its character while it is collateral—the pledge, chattel mortgage and conditional sale. Here the student is introduced to the mysteries of *Moore v. Bay*[12] and *Constance v. Harvey*[13]—two cases that demonstrate the effect in bankruptcy of failure to meet a mechanical requirement under a state's chattel security law. While it is difficult to see how either of these landmark cases will haunt the UCC secured creditor, both dramatically illustrate the principle that there is no room in secured transactions for small mistakes. Then follows a substantial number of UCC cases which raise many of the essential questions on how to operate under Article 9. The questions raised by these cases in connection with bankruptcy proceedings demonstrate that the separate study of security law and bankruptcy law may be meaningless.

Part 5 (Chapters IX, X, XI, and XII) entitled "Inventory and Accounts Receivable Financing," probably constitutes the outstanding contribution of the book. Although secured transactions involving consumer goods and equipment largely follow pre-Code law, in this area the Code makes a considerable departure from prior developments. The fringe areas, as well as the classical "accounts receivable," are covered in this section.[14]

The selection of cases is generally good. It is not surprising that some of the UCC cases are somewhat thin; the surprising point is rather that the editors have found so many good cases decided under a statute in effect more than a decade only in Pennsylvania. Some cases would profit from greater use of the editor's blue pencil, and something comparable to Countryman's[15] editorial material could further shorten the book for the reader's benefit.

Hogan and Warren does not serve the same need as Riesenfeld,

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11 31 U.S.C. § 191 (1964).

12 284 U.S. 4 (1931).

13 215 F.2d 571 (2d Cir. 1954) *cert. denied*, 348 U.S. 913 (1955); *cf.* Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603 (1961).

14 Chapter XII covers Sureties, Subordinations and Participations, and Negative Pledge Agreements.

15 V. COUNTRYMAN, *supra* note 4.

Countryman or Moore and Phillips[16] for a course emphasizing procedures for enforcing creditors' rights and debtors' remedies, nor does it cover many areas of secured transactions treated in a casebook like Osborne's.[17] However, it is a workable teaching book for a course designed to parallel its title.

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16 J. MOORE & W. PHILLIPS, DEBTORS' AND CREDITORS' RIGHTS: CASES AND MATERIALS (1966).

17 G. OSBORNE, CASES ON SECURED TRANSACTIONS (1967). Osborne's casebook, however, omits consideration of Article 9.

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