

The editor disclaims any effort at precision of scholarly references. It will therefore not be amiss to note that the Lateran Council of 1215 did not merely abolish the use of the ordeals in Church courts<sup>5</sup> but forbade priests to take part in ordeals anywhere. As the priest's blessing was essential, this would of itself have ended the practice if the orders had been rigorously carried out. They were not, as a matter of fact, and Dean Wigmore notes that the ordeals lingered on in various parts of Christian Europe in spite of the Council.

Dean Wigmore, besides the enormous debt which the common law owes him for his epoch-making work in Evidence, has a special claim on the gratitude of American lawyers for his services in the field of Comparative Law, of which the present work is a special and monumental illustration. He has domesticated among us the tradition of Kohler and Vinogradoff rather than the severely practical type of research in which Edouard Lambert's Institute at Lyons has done such notable work. It is in keeping with his general attitude that he has cultivated this field for its value in promoting a more profound understanding of law, by making its base as broad as possible. "Law is not so dull a subject as some men would have it," said Mr. Henry Parker of Lincoln's Inn in 1647, answering the royalist contentions of Judge Jenkins. Certainly, as Wigmore conceives the law and presents it in this book, it is not dull from any point of view.

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**The Rights of Margin Customers against Wrongdoing Stockbrokers and Some Other Problems in the Modern Law of Pledge.** By Edward H. Warren.\* Norwood, Mass.: The Plimpton Press, 1941. Pp. xiv, 464. \$4.00.

Professor Warren's stated purpose in writing this book is to build a modern law of pledge based upon ". . . a juristic structure with foundations as solid, and with lines as simple and stately and with vistas as spacious as those befitting a colonial mansion." If these remarks are meant to be read somewhat literally and are not afforded the immunity of poetic license, one is inclined to question both the attainability of the author's objective in the workings of the judicial process and the underlying assumptions of the legal scholar who believes changing and conflicting needs and interests in a work-a-day world can be satisfactorily accommodated in a logical structure designed to fit all situations in which lawyers invoke the collection of legal rules sometimes assembled under the caption, "The Modern Law of Pledge."

The execution of the author's objective has given us a repository of much valuable legal information, as well as such miscellany as seven rules for careful writing and the fact that the preparation of the book consumed 450 hours, at 15 hours a week for 30 weeks. The subject of the book purports to have been selected as best illustrating the delinquency of judges in not developing and changing the law, in not making it more consonant with the conceptions of businessmen, and in not writing clearer, better reasoned opinions. The foundation for the criticism of judicial decision is laid scholar-like by tracing the law of pledge from the time of the first treatise on common law that has come down to us, Ranulf de Glanville's *Laws and Customs of the Kingdom of England*, in the year 1181.

<sup>5</sup> P. 6.

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Professor Warren's treatise fills an important gap in the law by focusing the law of pledge upon the most important contemporary context in which it appears—margin customers and stock brokers. The author is a man well qualified to undertake to fill the gap. He has been a member of the Harvard Law School faculty for a period of thirty-two years altogether and his field of specialty is the law of real and personal property.

A pledge (as all second year law students know and probably most lawyers) is a type of bailment. Modern procedural codes have repealed forms of action but they do not remove, of course, the fundamental question of whether under substantive law any given type of conduct is permissible. Under a system of common law, the precedents determining whether a right in substantive law existed prior to the procedural codes cannot be ignored in appraising the soundness of decisions made after the adoption of such codes. If certain conduct of a pledgee was not permitted by the common law, the injury to the pledgor was usually in the nature of a conversion. The common law remedy for conversion was an action of trover, which afforded "involuntary purchase" damages representing the full market value of the property at the time of conversion. The author rightly concludes that the only way to make an intelligent determination of whether conduct of a pledgee constitutes conversion is to begin with a thorough understanding of what conversion is. It is for this reason that the author traces from the dawn of the common law the history of the law relating to the wrong of conversion and its remedy in an action of trover. The position of trover is clearly set out in the pattern which is sketched of the six forms of action relating to personal property.

The most serious problem in the modern law of pledge pertains to rights of a customer against a stockbroker. The simple illustration is that of a customer who purchases stock on margin through a stockbroker to whom he pays a portion of the purchase price, leaving the securities in the possession of the stockbroker in pledge for payment of the remainder of the purchase price. The stockbroker, not having sufficient funds of his own to provide the rest of the purchase price of the security, negotiates a larger loan with a bank and as security repledges to the bank the particular securities carried on margin for this customer, mingled with securities of a great many other customers. If the stockbroker becomes unable to meet his obligations, the bank under the powers contained in its hypothecation agreement sells all the securities to satisfy the obligation to it of the stockbroker. The securities being negotiable instruments in negotiable form, the customer's interest is terminated upon their acquisition by a bona fide purchaser.

What are the customer's rights against the stockbroker? One view is that he has only contractual rights, not property rights, in the security, and that the broker's only duty is to produce the stock purchased whenever the customer either wants to sell or desires to pay the full price and take up the stock as an investment. The failure of the broker to return the stock under either circumstance would constitute a breach of contract. The second view is that he has both contractual rights and property rights, that he is the owner of the security and the broker is merely a pledgee holding the stock as security for the payment of the customer's debt to him. Under the second view, an unauthorized pledge of a customer's security by a broker constitutes conversion.

The dispute does not arise merely out of a law professor's interest in legal symmetry. Important consequences depend upon which horse is ridden. Damages for breach of contract are "compensatory," determined at a date *subsequent* to the conver-

sion; damages for conversion are trover's "involuntary purchase price" determined as of the time of the conversion, or, under the better modern rule, the highest market value between that time and a reasonable period after notice. If the market goes up after the conversion, the plaintiff's suit may sound in contract; otherwise, he is likely to sue for conversion. Obviously, the plaintiff who has a choice of remedies (the second view) is much more formidably armed than if he were limited merely to a breach of contract suit. Furthermore, a lapse of time which might give the defendant a defense under the statute of limitations for the conversion might not give rise to a defense to a breach of contract on the subsequently broken implied promise to return the securities.

Professor Warren straddles no fence in taking his position in favor of the customer's right to recover on either theory. Indeed, like a modern Cato, he has made the theme of his book the destruction of Judge Cardozo's court of appeals decision in *Wood v. Fisk*,<sup>1</sup> a decision which is alleged to have thrown into confusion the theretofore clear right of the customer to recover in New York on either theory. *Wood v. Fisk delendum est* is the lead-off chapter in the book, and the author gives seventeen reasons why it must be done.

The author reasons that a repledge of a customer's securities for a larger loan (which is the usual case) has always been considered a conversion and that this is in accord with the understanding of businessmen. Socially, Professor Warren believes that the imposition of an "involuntary purchase" price liability as well as a contractual one—giving the customer an effective remedy if the market goes down as well as up—will be a strong deterrent to solvent brokers against repledges of a customer's securities on loans exceeding the amount of the indebtedness of the individual customer. The author is in accord with *Douglas v. Carpenter*,<sup>2</sup> where the court held that no custom, however general or long continued, could make such a pledge legal, because it would be inconsistent with the contract between the parties and in derogation of the property rights of the customer.

Professor Warren is fully aware of the broker's point of view, or the "business exigencies of the situation"—that stockbrokers have insufficient capital to supply out of their own means the amounts required for the margin purchases of their customers and, therefore, must repledge in order to obtain cash with which to buy the securities ordered by the customer. He takes the position, however, that it is "plainly improper" for a stockbroker to make a pledge, putting his customer's title in such jeopardy, "unless the customer gives a conscious, intelligent consent."<sup>3</sup>

Diligent research is reflected in the chapter presenting the New York law in detail by giving in chronological order a statement of the facts and holding of every New York decision on the subject since 1863 which would appear to be of any assistance to practicing lawyers, together with the author's comments on many of the decisions. This is followed by a concise summary of the law respecting the rights of customers and of stockbrokers with citation of the authorities for each conclusion. The author sets out the provisions of the Securities Exchange Act of 1934 respecting the hypothecation of securities together with the text of the rules adopted thereunder by the Securities and Exchange Commission, and adds the following comment:

Legislation passed by the Congress and rules and regulations adopted by the Securities and Exchange Commission are of the first importance. The author rejoices and is exceeding glad

<sup>1</sup> 215 N.Y. 233, 109 N.E. 177 (1915).

<sup>2</sup> 17 N.Y. App. Div. 329, 45 N.Y.S. 219 (1897).

<sup>3</sup> P. 224.

that such legislation has been passed, and such rules and regulations adopted. Time was when he was only an unheeded voice crying in the wilderness. Now, what he once scarcely dared to hope for (see old notes in Property 1) has become reality.<sup>4</sup>

In conclusion the author appraises what he terms the most difficult intellectual problem in the whole law of pledge, the separation of debt and security, involving cases where the pledgee wrongfully negotiates or assigns to a third party the right to receive payment of the debt due from the pledgor, and sells or repledges the security for the debt to a fourth person. The author attempts to solve these problems by an analysis of a series of hypothetical cases for the reason that "Anyone who steps into the authorities will flounder as in a bog" and "The wisest (and also the kindest) thing to do with respect to some decisions on this topic is not even to mention them."<sup>5</sup>

Professor Warren soundly concludes that stockbrokers who are acting as pledgees are subject to the long-established principles of law applicable to all pledgees and should be required to comply with these principles. In fact, it appears that if a difference exists between stockbrokers and other pledgees, it is that a stockbroker is also acting as agent for the customer, which subjects him to fiduciary obligations not applicable to an ordinary pledgee. It is strongly to be desired that the author's views prevail.

The issues discussed by Professor Warren invite attention to the important problems arising out of the use by stockbrokers in their own business of customers' free credit balances. The urgency of these problems is demonstrated by the fact that a recent Federal Reserve Bulletin<sup>6</sup> indicates that at the end of August, 1941, the free credit balances of customers of member firms of the New York Stock Exchange amounted to 262 million dollars and at the same time such firms had as cash on hand and in banks only 189 million dollars.

This book is unique in that, while describing the law of pledge as conventional law books do, it is the first legal work that actually has a plot which absorbs the interest of the reader until the very climax, the destruction of Judge Cardozo's decision in *Wood v. Fisk*. Moreover, the book is written with vigor, freshness, indignation, and homeliness—traits regrettably not characteristic of most legal writings. Here is the "dry" law of pledge cast in the form of a crusading polemic which will not only enlighten the reader both as to the decisions in this field and Professor Warren's gusty reactions to them, but will also entertain and amuse him in the learning process. This work should become a handbook that will render valuable assistance to every lawyer with a case involving conversion, the law of personal property, or a procedural question requiring consideration of the forms of action respecting personal property.

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*Digest of International Law*. Vols. 1 and 2. By Green Haywood Hackworth.\* Washington: United States Government Printing Office, 1940. Pp. ix, 803 and v, 829. \$2.00 and \$1.75.

These two volumes follow the plan of the *Digest of International Law* edited by John Bassett Moore and published in 1906. They contain extracts from diplomatic

<sup>4</sup> P. 365.

<sup>5</sup> P. 394.

<sup>6</sup> October, 1941.

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