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Book Reviews

BOOKS REVIEWED

Proceedings of Second Seminar for Referees in Bankruptcy. Conducted by the Administrative Office of the United States Courts. New York: Clark Boardman Co., Ltd. 1965. Pp. xiv, 475. $15.00.

The publication under review represents a collection of working papers presented by leading referees at the Second National Seminar for Referees in Bankruptcy held in March 1965 in Washington, D.C.

The Judicial Conference of the United States, having recognized a need to establish a greater uniformity in practice and procedure, authorized the institution of national seminars for newly appointed referees. The first of these seminars[1] was held in the Spring of 1964 under the able chairmanship of the Honorable Asa S. Herzog, Referee in Bankruptcy for the Southern District of New York. Without question, the first seminar was a resounding success and, as a result, the Judicial Conference authorized the second seminar.[2]

The working papers presented at these seminars were, of course, not originally prepared for publication. Due to the time limitation imposed upon the lecturers, the papers do not purport to explore any particular phase of the Bankruptcy Act in depth; rather, they were prepared with the idea of furnishing a basis for discussion and of providing an opportunity to exchange ideas.

In spite of this limiting factor, the volume should be of great interest to the practicing bar. While currently available textbooks give exhaustive treatment to the substantive portion of the Bankruptcy Act, they do not, by and large, furnish much aid with regard to the solution of many procedural problems which confront referees and practitioners alike. Experience has shown that these procedural problems frequently hinder an effective, speedy administration of bankrupt estates. The topics selected for this second seminar deal almost exclusively with procedural problems of general interest. A few of the working papers are, of course, addressed exclusively to problems peculiar to the referee's office, such as problems involving the internal management of the referee's office. Many of the working papers are accompanied by suggested forms which can be a great aid to a busy practitioner in handling problems which are always present during the administration of an estate. The forms were either prepared by the authors or represent the composite thinking of many experienced referees.

The publication follows the sequence in which the papers were presented at the seminar and, therefore, the work does not give the reader a guided tour of the Bankruptcy Act, either section by section or in a chronological fashion. Nevertheless, it is easily readable and can, without difficulty, be used as a handy reference book. Without slighting the importance and quality of any given selection, the reviewer is of the opinion that attention should be called to some of the working papers.

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1. For a record of this seminar, see Proceedings of Seminar for Newly Appointed Referees in Bankruptcy (1964).

2. Due to the invaluable assistance and help of the Administrative Office of the United States Courts, it now appears certain that these seminars will be held on an annual basis and eventually will be attended by all active referees. Although the original seminar was intended to serve as an indoctrination course for newly appointed referees only, the second seminar was greatly enlarged in scope to furnish an opportunity for much needed continuing legal education, to serve as a forum under the guidance of experienced referees who served as discussion leaders, to foster a better national uniformity in practice and procedure, and, finally, to assist in maintaining a reasonable level of the cost of administration of insolvent estates. Foreword to Proceedings of Second Seminar for Referees in Bankruptcy at iii (1965) [hereinafter cited as Second Seminar].

The working papers presented on fee allowances in straight bankruptcy and in Chapter XI proceedings should be of particular interest to the reader. The topic is dear to the heart of every practitioner, and the working paper presented by Referee Snedecor[3] furnishes an excellent picture of the many factors which a referee must take into account when passing on fee applications. Referee Rudin's presentation[4] on the same topic in relation to Chapter XI proceedings is equally well written and shows good insight.

The working papers presented by Referees Calverley[5] and Brody[6] deal with problems connected with the conservation and liquidation of estates. Referee Calverley points out in detail the factors which the referee must consider before a receiver is appointed, discusses the different types of receiverships, and outlines the proper functions of each. The very scholarly and concise presentation by Referee Hiller,[7] one of the foremost experts on the Uniform Commercial Code, on treatment of secured transactions under the Uniform Commercial Code should also be of particular interest to practitioners.

The topics of ex parte procedure and procedure of contested matters is covered by Referees Washabaugh[8] and Seidman.[9] It is the opinion of this reviewer that these topics represent an area in the field of bankruptcy practice which is most misunderstood and where the lack of uniformity among different judicial districts is most prevalent. For this reason, both these articles should be of particular interest to the practicing bar and should foster a better understanding of the workings of the bankruptcy court, and thereby establish a greater degree of uniformity.

Referee Washabaugh's article sets forth in detail the type of matters which could properly be handled ex parte and also covers some problems connected with adversary proceedings under the summary jurisdiction of referees and, especially, the applicability of the Federal Rules of Civil Procedure to proceedings in bankruptcy courts. Referee Seidman's article deals with procedural problems connected with involuntary petitions, and also discusses summary jurisdiction of the bankruptcy court, with special emphasis on the procedural problems connected with reclamation petitions, turn-over orders, and counterclaims filed by trustees to claims of creditors.

Referee Strasheim's article,[10] examining the procedural matters connected with objections to discharge, leads the reader through all phases of the procedures involved; he discusses in some detail all statutory grounds for objecting to discharge, the pleading requirements, utilization of pre-trial procedures, conduct of a trial, burden of proof, and the ultimate decision and findings. The article is accompanied by valuable forms[11] which will be helpful not only to referees, but also to practitioners.

The volume concludes with the working papers presented by experienced referees on the various chapter proceedings. Referee Asa S. Herzog,[12] the chairman of the seminar, and Referee Daniel R. Cowans,[13] a well-known author in the bankruptcy

3. Snedecor, Fees and Allowances in Straight Bankruptcy, Second Seminar 27.

4. Rudin, Allowances in Chapter Proceedings, Second Seminar 39.

5. Calverley, Conservation and Liquidation of Estates (pt. 1), Second Seminar 51.

6. Brody, Conservation and Liquidation of Estates (pt. 2), Second Seminar 65.

7. Hiller, Conducting Hearings and Examinations, Second Seminar 77.

8. Washabaugh, Ex Parte Practice and Procedures on Contested Matters, Second Seminar 127.

9. Seidman, Contested Matters: Involuntary Petitions and Summary Jurisdiction, Second Seminar 141.

10. Strasheim, Objections to Discharge, Second Seminar 155.

11. See id. at 173-80.

12. Herzog, Mechanics of Chapter XI (pt. 1), Second Seminar 377.

13. Cowans, Mechanics of Chapter XI (pt. 2), Second Seminar 391.

field, deal with the mechanics of Chapter XI proceedings; and Referee Clive W. Bare, who was the chairman of the regional seminar held in Atlanta, deals with the procedural aspects of Chapter X proceedings.[14] Referee Herzog's articles give a very concise and lucid picture, in chronological sequence, of the necessary steps which a practitioner must follow. The article is accompanied by a chart depicting the first meeting and the adjourned first meetings and the agenda of the different types of meetings, up to the point when the first meeting is closed.[15]

Referee Cowan's article examines the problems which arise in the period from the first meeting up to confirmation of the plan, including the problems of examination of the debtor, the selection of a trustee, the selection of a creditors' committee, a receipt and determination of acceptances and hearing on confirmation of the plan.

Referee Herzog's second article[16] on Chapter XI briefly discusses the grounds which could form a basis for an adjudication or dismissal of an abortive Chapter XI proceeding. Referee Herzog is also represented by an article on the procedural aspects of Chapter X,[17] in which he discusses the referee's role in a corporate reorganization, whether he is acting as special master or on a general reference; in addition, he treats, to some extent, the problems connected with the approval of a Chapter X petition and the many procedural problems which must be solved after the petition has been approved by the judge. Special emphasis is placed in the article on section 162[18] hearings and also the second key hearing which is held when the plan is submitted by the trustee.

The other mandatory hearings under Chapter X are discussed in Referee Clive W. Bare's article,[19] which also deals with some problems in connection with section 236[20] providing for a dismissal of a Chapter X proceeding upon the occurrence of certain contingencies.

The last chapter proceeding covered in the volume is Referee O'Neill's article on the wage earner, or Chapter XIII, proceeding.[21] The annual statistics prepared by the Administrative Office of the United States Courts clearly indicate that, with the exception of a few jurisdictions, the wage earner plan is infrequently used in spite of the fact that personal non-business bankruptcies are constantly on the increase and are now reaching alarming proportions.[22] This lack of use is not solely attributable to the different judicial atmosphere which is present in the several states where it is not used. It is also due in large measure to the general unfamiliarity of the practicing bar with the advantages of the Chapter XIII proceeding and the procedures involved. For this reason, Referee O'Neill's article should assist the practicing bar in explaining the mechanics of a wage earner proceeding. The article is accompanied by extensive forms[23] which help to simplify the wage earner proceeding without disregarding the mandatory requirements of the chapter with regard to procedure.

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14. Bare, Procedural Aspects of Chapter X (pt. 2), Second Seminar 423.
15. Herzog, supra note 12, at 389-90.
16. Herzog, Mechanics of Chapter XI (pt. 3), Second Seminar 405.
17. Herzog, Procedural Aspects of Chapter X (pt. 1), Second Seminar 409.
18. Bankruptcy Act § 162, 52 Stat. 889 (1938), 11 U.S.C. § 562 (1964).
19. Bare, supra note 14.
20. Bankruptcy Act § 236, 52 Stat. 899 (1938), 11 U.S.C. § 636 (1964).
21. O'Neill, Chapter XIII, Wage Earner's Plan (pt. 1), Second Seminar 433.
22. Ibid.
23. See id. at 442-66.

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Bankruptcy and Arrangement Proceedings. By John E. Mulder and Leon S. Forman. Philadelphia: Joint Committee on Continuing Legal Education of the ALI-ABA. 4th ed. 1964. Pp. xvi, 192. $4.75 paperbound.

Bankruptcy Arrangements Under Chapter XI. By George J. Hirsch and Sydney Krause. New York: Practising Law Institute. 4th ed. 1964. Pp. 132. $7.00.

Both of these books are excellent short summaries of the important subjects in bankruptcy practice. Several texts, some of many volumes, cover the field in depth, and are of value to the practitioner who handles numerous bankruptcy matters, or who must research some point at length. In comparison, the subject books, by their own admission, are not intended for the latter, but for the lawyer who needs a quick and easy introduction to bankruptcy. They are well written, easy to understand, and contain valuable references to the statutes and other texts for the reader who has to go deeper. And even for one who is often in bankruptcy court, they contain, as the ALI-ABA book states, "some helpful hints."[1]

The ALI-ABA book is half again as long as the PLI book, and covers somewhat more ground. Both devote themselves to straight bankruptcy and to arrangement proceedings for debtors other than large corporations. The important subject of arrangements for large corporate debtors under Chapter X is largely omitted from both. While I cannot quarrel seriously with the choice of the authors, whose space was limited, my feeling is that we are now seeing more and more of these reorganizations and that lawyers who have commercial practices will be drawn into them at least in behalf of creditors. Future editions of these books should cover this area. I believe it would also be worthwhile to devote a few paragraphs, at least, to wage earners' plans and real property arrangements, in order to complete the general survey of the field.

For the New York City area practitioner, I would recommend the PLI book rather than the ALI-ABA work, since the PLI book contains many references to the rules of the Southern and Eastern District Courts, which cover this area. I might note that these references fail to cite the particular rule involved, which is an omission that future editions should supply, but the rules are well labelled and indexed, and a lawyer should have no trouble finding the pertinent one. I also note that the PLI book is written by two of the outstanding bankruptcy experts in New York, who inevitably reflect in their text the attitudes and tendencies of the New York judges and referees, a practical aid of substantial importance to the practitioner. I would suggest that the book could be of further assistance if it included some of the features of the ALI-ABA book, which I shall mention below.

For the practitioner outside the New York City area, I would prefer the ALI-ABA book. It covers many points largely unmentioned in the PLI book. For example, it discusses the availability to a debtor of stays of other litigation once the petition in bankruptcy is filed.[2] It treats briefly the effect of the Uniform Commercial Code upon bankruptcy law.[3] It has a valuable section containing suggestions on out-of-court settlements between debtors and their creditors, which can often avoid the expense, delay, and stigma of bankruptcy proceedings.[4] It has a useful table of Bankruptcy Act and General Orders citations and an adequate index. For the ALI-ABA book,

1. Mulder & Forman, Preface to Bankruptcy and Arrangement Proceedings at ix (4th ed. 1964).

2. See id. at 35-36.

3. Id. at 93-95.

4. Id. at 130-42.

however, I must sound a small note of disapproval. While its citations are copious, the tendency is to refer the reader to a group of authorities at the beginning of each chapter, rather than to pinpoint a precise authority for a particular point. This puts an undue burden of search upon the novice, which the authors could easily alleviate.

JOHN M. FRIEDMAN*

Bankruptcy Law and Practice. By Daniel R. Cowans. Foreword by Hon. Richard H. Chambers. St. Paul: West Publishing Co. 1963. Pp. xxviii, 1079. $25.00.

Oh, the debtor is but a shame-faced dog,
With the creditor's name on his collar;
While I am a king and you are a queen,
For we owe no man a dollar!—*Charles P. Shiras*[1]

Although borrowing is common to our present day credit economy, it was not always so. Through the ages, moral strictures have been handed down against borrowing. Every schoolboy has heard Polonius' advice to Laertes:

Neither a borrower, nor a lender be;
For loan oft loss both itself and friend,
And borrowing dulls the edge of husbandry.[2]

Unfortunately, men do not universally heed these strictures, and soon need relief from their debts. One of the earliest relief statutes is found in the Code of Hammurabi:

If a man owe a debt and Adad [the storm god] inundate his field and carry away the produce, or, through lack of water, grain have not grown in the field, in that year he shall not make any return of grain to the creditor, he shall alter his contract-tablet and he shall not pay the interest for that year.[3]

In modern times, we have granted more extensive relief through liberal bankruptcy laws, the aims of which are the rehabilitation of the unfortunate debtor. This view was expressed by President Grover Cleveland: "The so-called debtor class [is] . . . not dishonest because [it is] . . . in debt."[4]

Referee Cowans has undertaken to write a practical law book "to assist the general practitioner to handle the problems of a debtor considering bankruptcy."[5] This he has done. His book is not one of general treatment of the entire field of bankruptcy; it is not a hornbook of bankruptcy law. It is a book that a practicing attorney, with little or no bankruptcy experience, will find useful in counseling a client on the wisdom or necessity of going into bankruptcy, and will help to steer the attorney around some of the more obvious shoals and pitfalls of such a proceeding.

The scope of the treatise is restricted to voluntary and involuntary proceedings under Chapters I-VII ("straight" bankruptcy) and Chapter XIII (wage earner

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1. Shiras, I Owe No Man a Dollar, in The Redemption of Labor and Other Poems 60 (1852).

2. Hamlet, Act I, Scene 3.

3. Code of Hammurabi § 48, in Harper, The Code of Hammurabi, King of Babylon About 2250 B.C. at 27 (2d ed. 1904).

4. First Annual Message by President Cleveland, Dec. 8, 1885.

5. Preface to Cowans, Bankruptcy Law and Practice at iii (1963).

plans), the proceedings that usually involve individuals seeking relief from debts that may be miniscule in the aggregate, or, on the other hand, may add up to millions.

Referee Cowans' book deals with the subject chronologically, starting from the source materials for bankruptcy law, and proceeding to considerations involved in the determination of whether a particular debtor should go into bankruptcy, the nature and extent of his discharge, and the grounds for opposition and denial. The claims or debts that are affected by the discharge and those which are non-dischargeable are considered. The author discusses the property that the bankrupt may retain (exempt property) and that which he must surrender to his creditors, as well as the effect of transfers of the bankrupt's property prior to bankruptcy. He deals with such practical problems as the preparation and filing of the bankruptcy petition and other papers, and discusses the nature and jurisdiction of the bankruptcy court, the officers of the court, and the parties in interest in a proceeding. He outlines the sequence of events as they take place in the bankruptcy court in voluntary and involuntary proceedings, points out the importance of the first meeting of creditors, and describes the events that usually transpire at this meeting, as well as the proceedings subsequent to the first meeting. Also discussed are involuntary bankruptcy proceedings, reviews and appeals—and even attorney's fees.

The book is divided into twenty chapters of text of varying length, and a chapter of forms containing various papers to be filed in a bankruptcy proceeding, with meaningful discussion on how to complete the forms. There is an appendix containing Chapters I-VII and XIII of the Bankruptcy Act, the General Orders, an extensive Table of Cases, Statutes, Orders and Rules, and an Index. The chapters are subdivided into many numbered sections for handy reference. The author has reserved a number of sections at the end of each chapter for supplementary material, and there are provisions for annual supplements.

Referee Cowans has by no means restricted his discussion to the dry bones of the Bankruptcy Act and its administration. Interspersed throughout is the practical knowledge and wisdom of the experienced referee in bankruptcy who has observed and helped to cure the financial ills of countless debtors, who has passed upon the peccadilloes of dishonest debtors, and who has agonized while inexperienced attorneys have floundered their way through a bankruptcy proceeding in his court.

The author discusses the emotional problems of the prospective bankrupt, the so-called stigma attached to seeking bankruptcy relief, and, in addition, ventures into economic considerations—the amount owned by the bankrupt, whether he has adequate earnings to support his family, and the effects of a bankruptcy proceeding upon his future, such as Civil Service employment with the Government or a military career. He points out, reassuringly, that bankrupts usually are able to re-establish new credit, both for consumer goods and to begin again in business.[6] He also discusses the various aspects of out-of-court settlements and even suggests guide rules for the intelligent and successful handling of these negotiations.[7]

In his discussions of the nature and extent of the bankrupt's discharge, Referee Cowans wisely points out one weakness in the Bankruptcy Act as administered today. While the bankrupt is granted his discharge in the federal court, the question of whether a particular debt is discharged will be decided afterwards in litigation in the state courts—and if the bankrupt does not plead his discharge and defend on that basis, he will be deemed to have waived it.[8] He observes the essential unfairness

6. Id. §§ 61, 66.

7. Id. §§ 72, 73. See also id. § 89.

8. Id. §§ 184, 923.

in not leaving this determination to the bankruptcy court, because bankrupts frequently are left without the means to defend such lawsuits. The result is that default judgments can deprive the bankrupt of the benefit of his discharge as to claims or debts so enforced.[9] He recommends that the effect of the discharge, for all purposes, should be determined by the bankruptcy court as a matter of simple justice.[10] He points out also that, under the present statutory scheme, the bankrupt will receive notice that his discharge has been granted or denied, but creditors are never notified.[11] If the discharge is denied, creditors may not learn of the fact and not press enforcement of their claims, resulting in a windfall to the bankrupt.[12] One suggested solution is to require the referee to send to all creditors listed by the bankrupt, or who file claims, a notice that the bankrupt's discharge has been either granted or denied.[13]

Referee Cowans allays a popular misconception of injured creditors, pointing out that not all misconduct or wrongdoing constitutes grounds for objection to a bankrupt's discharge, and he cautions that specifications of objections must be prepared and pleaded strictly within the statutory framework of section 14b of the act.[14] He discusses in detail the various grounds for objection to discharge and the procedural aspects of the hearing on objections and the burden of proof. A whole chapter is devoted to what are provable claims or debts (which are dischargeable), and another chapter to those debts or claims which are non-dischargeable, such as taxes, alimony, maintenance and support, liabilities for willful and malicious injuries to persons and property, for seduction of an unmarried woman, for debts not scheduled in time for proof and allowance, or debts created by fraud, embezzlement, misappropriation and defalcation, or wages earned by an employee within three months of bankruptcy.

Referee Cowans also explains what property the bankrupt may keep, the property exempt under the laws of a state, such as a homestead, or, sometimes, a life insurance policy, or the essential tools of his trade and his household goods and supplies, or causes of action for personal injuries. He discusses what property will or will not pass to the bankrupt's trustee, and the effect of abandonment of property by the trustee. He sets forth the federal exemption laws which protect such items as social security payments, veterans' benefits, annuities and pensions under the Railroad Retirement Act, and the whole gamut of state exemption laws.

In summary, Referee Cowans has demonstrated convincingly the efficacy of bankruptcy proceedings as providing relief for the honest debtor. He discusses the major problems to be faced and overcome on the debtor's road to discharge and the pitfalls to be avoided by the unwary or inexperienced. He leaves no doubt as to his own feelings on the wisdom and the utility of bankruptcy laws in restoring the honest debtor to society. Debtors' prisons exist no longer, and we have determined

9. Id. § 923, at 501-02.

10. Ibid.

11. Id. § 185.

12. Id. § 185, at 105. See also § 183.

13. Cf. §§ 185-187.

14. See id. § 187, at 108. Bankruptcy Act § 14b, 71 Stat. 599 (1957), 11 U.S.C. § 32(b) (1964), provides, in part: "[T]he court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by . . . creditors . . . at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard."

to offer greater relief to the unfortunate debtor than that which Stephano imparts to Trinculo in *The Tempest*:

He that dies pays all debts . . . .[15]

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15. The Tempest, Act III, scene 2.

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