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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. Published by the Author, 1941. Pp. xv, 464.

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Professor Warren has written a curious book, not without a certain literary quality. This is the result of a prose that is lucid and chaste, an imagery that is unexpected and robust, and something else that calls to mind the adjectives whimsical, meandering, irrelevant and delightful. It proceeds at many different levels. The preface is a sermon on how to write legal prose, and is undoubtedly intended as a dig at the style of the late Mr. Justice Cardozo, whose work the book attacks. Some chapters lay out cold a few legal ABC's and do it in a way that would delight the heart of any struggling law student. Others are devoted to exacting legal analysis. There are entertaining excursions into legal historical lore, and occasional wanderings into a type of theorizing that borders on the sterile; but the latter are conducted in a spirit of such good fun, in the form of dialogue and otherwise, that they are wholly welcome.

As a work of legal criticism, the value of the book is limited. The "center of the center," to use the author's words, is Cardozo's opinion in *Wood v. Fisk*,[1] containing a very brief discussion of the rights of margin customers against brokers who wrongfully repledge the securities held. Indeed the book might be described as a kind of glorified note on this case. With the decision the author agrees. But the language of the opinion and the use of authorities are subjected to an attack that is so furious as to provoke irritation in the minds of those who, like the reviewer, have looked upon the work of Cardozo as one of the brightest spots in American jurisprudence. This irritation, however, is tempered by the fact that it may be said of Professor Warren, as of one to whom Holmes referred in a letter to Pollock, that "his bark is worse than his bile."

The opinion in *Wood v. Fisk* is held up as representative of a type of judicial expression that has brought courts into disrespect. It "seriously impaired the prestige of the New York Court of Appeals." Up to 1915, one is led to believe, the law of pledge in New York was clear and sound. Then Cardozo created this "cloud of dust," after which all was confusion. This is a good deal to

1. 215 N.Y. 233, 109 N.E. 177 (1915).

charge against a case that admittedly reached the proper result, that according to Shepard's has been only moderately cited, and that even at the moment of decision was in part obsolete as authority by reason of a statute passed after the occurrences with which it was concerned. But it is only when one comes to examine the specific criticisms that the full extent of the author's hyperbole can be appreciated.

A brief statement of the case is called for. Defendants were brokers holding shares of stock owned by plaintiff, their customer, as security for a promissory note. They repledged the shares for an amount in excess of the customer's indebtedness to them, and subsequently were adjudicated bankrupts. Plaintiff presented no claim in the bankruptcy proceeding, but on the maturity of the note, tendered to defendants the amount of the debt, and brought an action for conversion of the stock. The question was whether the discharge in bankruptcy was a defense. It was held that the wrong of defendants occurred at the time of the repledge, not upon tender, that the wrong constituted a breach of contract and the basis of a provable claim. The fact that the damages were not liquidated at the moment of bankruptcy was immaterial as the cause of action was then complete. Hence the discharge was a bar. Nor did the claim fall within the provisions of the Bankruptcy Act excepting from the effect of discharge, liabilities for "willful and malicious injury to the property of another."

Probably no one would claim that the opinion is an outstanding gem among the many which Cardozo wrote. In connection with the last point mentioned above, the opinion characterizes the conversion as "partial and technical," certainly not apt adjectives for what appears as deliberate and gross misconduct of a kind which prior to the decision had been stamped as felonious by the legislature.[2] But defendants converted prior to the passage of the criminal statute and the holding on this phase of the case is in accord with the view widely held that only such conversions as were also crimes fell within this exception of the Bankruptcy Act.[3] The language quoted is doubtless to be attributed to the instinct of advocacy, prominent throughout Cardozo's work, which led him, once a decision was reached, to attempt to make

2. It is to be noted that the statute (Penal Law, § 956) makes the repledging of securities a crime only if it results in loss to the customer.

3. It was later held that where the wrongful repledge occurred after the statute was passed, it came within the exception. Heaphy v. Kerr, 190 App. Div. 810, 180 N.Y. Supp. 542 (1920), affirmed without opinion 232 N.Y. 526, 134 N.E. 557 (1920).

out the best possible case for the prevailing side. And, generally speaking, there are few who would deny that he was a masterful advocate.

Other criticisms among the "seventeen" which Professor Warren marshals are more trivial. The chief animus is directed against remarks in the opinion applicable to the first point: "It [the repledge] may have constituted a conversion [citing cases]. It was unquestionably a breach of contract." The objection is that it is here left in doubt as to whether the repledge was a conversion. But the context makes it clear that this was only Cardozo's way of saying that this was an immaterial point. The opposing argument was that the act of the brokers was a conversion, hence not the basis for a provable claim. The answer was that this made no difference, since the repledge gave rise to a cause of action for breach of contract and this was provable in bankruptcy.[4] The remainder of the opinion leaves no doubt whatever but that the act in question was regarded as a conversion.

Another ground of criticism is that the opinion allegedly indicates that nominal damages were appropriate for the tort. A careful reading of the opinion, however, discloses that the references to nominal damages are primarily in connection with the cause of action for breach of contract, and this was all that was important. The argument of plaintiff apparently was that because prior to the bankruptcy, it could not be known whether damages would be more than nominal, there was no provable claim. The opinion admits the premise but denies the conclusion. Since a cause of action for breach of contract alone was provable, the question of tort damages was beside the point. Undeniably, however, the tort and contract theories are intermingled, and the impression is conveyed that if the broker is able to redeem in time, tort as well as contract damages would be nominal. Since this should be true of tort damages only if the customer agreed to the return of the property, there is some basis for criticism. But the point lying only on the fringe of the argument, I should say the fault was venial.

Warmly to be applauded is the stand taken by Professor Warren for many years against the "custom of the street" which sanctioned practices that subjected customers to unwarranted risks of loss by reason of brokerage failures. I find nothing to indi-

4. The authority for this is Crawford v. Burke, 195 U.S. 176, 25 S.Ct. 9, 49 L.Ed. 147 (1904).

cate that Cardozo was not on his side. Long before *Wood v. Fisk,* as the author notes, he had appeared as counsel for the customer in a case decided by the Appellate Division which had dealt the "custom of the street" its most serious blow up to that time.[5] Fortunately today, by federal legislation and the rules of the S.E.C., these practices have been definitely proscribed.

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CONCERNING ENGLISH ADMINISTRATIVE LAW, by Cecil Thomas Carr. Columbia University Press, Publishers, New York, 1941. Pp. ix, 189.

FEDERAL ADMINISTRATIVE PROCEEDINGS, by Walter Gellhorn. The Johns Hopkins Press, Publishers, New York, 1941. Pp. 150.

We have enlarged the area of governmental activity enormously in recent years. We will probably extend it much further in the immediate future. It is important that we constantly, and carefully, consider how we are going to regulate the exercise of power by the men to whom we give it.

Sir Cecil Carr and Mr. Walter Gellhorn are deeply concerned about this problem. Each has had extraordinary opportunity to observe how governmental power is used and how the governed react to it. For twenty years or more Sir Cecil has been principally engaged in drafting measures for enactment by the British Parliament or by British administrative officials. Mr. Gellhorn, Professor of Administrative Law and Legislation in the Columbia University Law School, was in charge of the research staff which collected data for the United States Attorney General's Committee on Administrative Procedure; this Committee's *Final Report,* published in 1941, is by far the most comprehensive and incisive analysis of administrative law-making and law-enforcing procedure that we have made in this country.[1]

Each of these books consists of lectures delivered before American university audiences. They summarize, for their respective countries, the progress which has been made in regulating the exercise of governmental power by administrative offi-

5. 17 App. Div. 329, 45 N.Y. Supp. 219 (1897).

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1. Final Report of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941).