

LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

The postwar period has been, and is still, a time of unprecedented peacetime business activity; it has witnessed a resurgence of small business; and, in recent months, it has become increasingly a time of tightening credit. At such a time, those who are interested in the vitality of small business may well turn to a consideration of problems which are normally the concern of the practitioner of private commercial law—problems which materially affect the availability of working capital for new and independent enterprise.

At the close of the war, *LAW AND CONTEMPORARY PROBLEMS* published a symposium on *Financing Small Business*, dealing generally with the problems of organization and finance which confront the small enterprise in the postwar economy. The present symposium is designed to explore in detail one specific phase of the financing problem: the availability of short-term credit for working-capital needs.

Only the established business can rely on unsecured borrowing to fill working-capital requirements; the newcomer must offer security. The most liquid assets of the business in need of working capital are likely to be its book accounts and its stock in trade. Traditionally, however, legal and practical obstacles have hampered the utilization of these assets as security. Ever since the common-law dogma attributing nonassignability to a chose in action yielded to practical necessity, a movement has been under way to clear away the legal obstacles; other barriers, both legal and practical, have gradually yielded to the ingenuity of borrowers and lenders and their draftsmen. The time has come for a union of law reform and business ingenuity in a final attack on the remaining hindrances to full utilization of these assets as security.

Such an attack is in progress. It is concentrated principally in the work which is being done jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws in the preparation of a uniform code for secured commercial transactions.¹ Concurrently, the effort to resolve the troublesome problems posed by Section 60a of the Bankruptcy Act appears to be approaching a climax. Both of these developments are weighted with significance for the veterans who are going into business for themselves, for the institutions which would finance them, and for the economy in general.

¹ Article VII of the proposed Uniform Commercial Code, now in preparation, will deal with this subject.

In the opening article of this symposium, Mr. Burman discusses the practical aspects of inventory and receivables financing. Mr. Koch, of the Federal Reserve Board, follows with an analysis of the economic aspects of this type of financing, with special reference to national fiscal policy. In the next article Mr. Birnbaum discusses the interrelations of form and substance in field warehousing—that engaging device which has been evoked by the legal objections to mortgages on shifting stocks of goods.

The pioneers in accounts-receivable financing have, of course, been the factors; their financial function and the services they perform for borrowers are discussed by Mr. Silverman. Mr. Livingston and Mr. Kearns remind us of the need for being constantly mindful of the unpleasant possibility of bankruptcy, discussing the special implications of that event for lenders on these types of security; in addition, they suggest that further consideration be given to the use of inventory and receivables financing in the operation of businesses during bankruptcy. Mr. Kupfer reports on the status of the movement to amend Section 60a of the Bankruptcy Act, which has beclouded many of these security transactions with the specter of preference. The related controversy over the requirement of publicity for assignments of accounts receivable is summarized by Mr. Pemberton, a neutral observer.

Turning briefly from the employment of inventory and accounts receivable as security, we find a comparable problem with respect to a major asset in certain specialized lines of business. What accounts receivable are to the average firm—and what the trade acceptance was to its predecessor of another generation—the letter of credit is to the small exporter.² Logically, such a credit furnished by the buyer should be available as security upon which the exporter may borrow operating funds; yet access to this security is impeded by the custom which prevails in financial circles of treating documentary credits as nonassignable unless they are expressly made assignable. Mr. McGowan, analyzing the supposed foundation of this concept, urges the financial community to discard it, and outlines a procedure for the full employment of letters of credit in security transactions.

Finally, Mr. Llewellyn, Chief Reporter for the Uniform Commercial Code, discusses some of the still unsolved problems of accommodating conflicting interests which are encountered in the codification of security law.

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² A separate division of the Commercial Code (Article V—Foreign Banking) will contain a chapter devoted to letters of credit.