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Bankruptcy—Rights and Powers in Chapter XIII*  

JOHN T. COPENHAVER, JR.**

An understanding of the rights and powers of the various parties involved in a Chapter XIII proceeding is not easily had. The statutory language is somewhat windblown, sometimes confused and frequently ambiguous. Reported decisions in Chapter XIII cases are few. However, Chapter XI, dealing with arrangements, and Chapter XIII, dealing with wage earner plans, contain many identical or quite similar provisions, so that an interpretation of one of the chapters often has significance as authority for a like position under the other chapter. Where such is the case, reference will be made to cases decided under or a treatise on Chapter XI.

In order to eliminate undue detail, this analysis will be confined to proceedings arising under section 622, except where noted otherwise. A section 622 proceeding is one initiated by the debtor who files an original petition under Chapter XIII at a time when no bankruptcy proceeding is pending by or against him. Of course, section 622 proceedings comprise nearly all of the Chapter XIII cases filed.

From the outset it is helpful to keep in mind two basic principles of Chapter XIII. First, a Chapter XIII proceeding is voluntary with the debtor from beginning to end. Second, Chapter XIII envisions payment by the debtor of his creditors primarily out of future earnings.

Of fundamental importance is section 602. There it is stipulated that the provisions of Chapters I to VII (the ordinary bankruptcy

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1 Bankruptcy Act ch. 13, 52 Stat. 930 (1938), 11 U.S.C. ch. 13 (1964), will be cited throughout this article as “Chapter XIII.” The subdivisions of Chapter XIII will be cited only to the section numbers of volume 52 of the United States Statutes at Large pp. 930-935. Section 621 provides for the filing by the debtor of a Chapter XIII petition in a pending bankruptcy proceeding.
3 § 623, 646(4); 10 COLLIER, SUPRA note 2, ¶ 24.06(5).
sections 1 to 72) shall apply to Chapter XIII proceedings insofar as they are not inconsistent or in conflict with the provisions of Chapter XIII, and that, for the purposes of such application in a section 622 proceeding, the date of the petition in bankruptcy and the date of adjudication shall be taken to be the date of the filing of an original petition under section 622.

The general incorporating provisions of section 602 are supplemented in Chapter XIII by other incorporating provisions of a more specific nature. These further provisions declare that, where not inconsistent with the provisions of Chapter XIII, certain rights, powers and duties shall be the same in a section 622 proceeding as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the section 622 petition was filed. Thus, it is provided that the jurisdiction, powers and duties of the court shall be the same (section 612); the powers and duties of the officers of the court and the rights, privileges, and duties of the debtor shall be the same (section 636); and the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same (section 641).

THE RIGHTS AND POWERS OF A CHAPTER XIII TRUSTEE

Section 633(4) states that at the first meeting of creditors the court shall, if the debtor's plan is accepted, "appoint a trustee to receive and distribute, subject to the control of the court, all moneys to be paid under the plan . . . ." Chapter XIII makes no further specific reference to the Chapter XIII trustee as such except for the perfunctory matters of the trustee's bond, the trustee's costs and commissions and the discharge of the trustee. Bearing in mind that the underlying purpose of Chapter XIII is to rehabilitate the debtor out of future earnings rather than to liquidate and distribute his present assets, section 633(4) serves to point up two essential differences between the rights and powers of a Chapter XIII trustee and those of an ordinary bankruptcy trustee. First, the Chapter XIII trustee does not take title to the debtor's property as does an

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4 § 633(4).
5 § 659(2), (3).
6 § 662.
ordinary bankruptcy trustee under section 70a. 7 Second, the Chapter XIII trustee administers out of the future earnings of the debtor, whereas the ordinary bankruptcy trustee generally has no right to any property acquired by a bankrupt after his petition in bankruptcy has been filed.8

In further connection with the question of title, the congressional intent may be found by contrasting section 633(4) of Chapter XIII with corresponding provisions in Chapters X, XI and XII. All four chapters were enacted simultaneously in 1938. Yet, Congress expressly provided that the trustee under Chapter X (section 187) and Chapter XII (section 442) shall be vested with the same rights and powers as an ordinary bankruptcy trustee would hold and that under Chapter XI (section 342), where no receiver or trustee is appointed, the debtor in possession9 shall be vested with all the title and powers of an ordinary bankruptcy trustee.

Nevertheless, the Chapter XIII trustee does take on some of the rights and powers of an ordinary bankruptcy trustee.10 The provisions of section 636 just noted specify that, unless inconsistent with Chapter XIII, the powers and duties of the officers of the court shall be the same in Chapter XIII as if a petition in ordinary bankruptcy had been filed. The "trustee" is an "officer" of the court under section 1(22). As already indicated, it is clear enough that it would be inconsistent with the provisions and the underlying purpose of Chapter XIII to conclude that title to the debtor's assets falls by operation of law to the Chapter XIII trustee. But it is not inconsistent with either the provisions of Chapter XIII or its underlying purpose to hold that the Chapter XIII trustee possesses the rights of an ordinary bankruptcy trustee under section 70c.11 In fact, to

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7 8 COLLIER, BANKRUPTCY ¶ 6.31, p. 957 n.1 (14th ed. 1963). Cf. United States v. Belkin, 358 F.2d 378 (6th Cir. 1966), wherein it is held that the filing of a Chapter XIII petition by an insolvent debtor is sufficient to invoke the priority of the United States as a voluntary assignment under 31 U.S.C. 191, the priority provision of which is in turn embodied in the Bankruptcy Act as the fifth priority under Section 64a(5); however, the court does not hold that the Chapter XIII trustee takes title, but merely declares that the possession and control of the debtor's property passes to the court to the same extent as in a Chapter XI proceeding. Thus, the Sixth Circuit seems to conclude that the passing of possession and control of one's property is alone sufficient to constitute a voluntary assignment within the meaning of 31 U.S.C. 191.

8 § 70a; 10 COLLIER, supra note 2, ¶¶ 25.10, 26.01.

9 A "debtor in possession" is an officer of the court, an entity separate and distinct from the debtor. Chapter XIII makes no provision for a debtor in possession, although the debtor does remain in possession of his assets.

10 City Nat'l Bank & Trust Co. v. Oliver, 230 F.2d 686 (10th Cir. 1956), 56 A.L.R.2d 749, note at 755; 10 COLLIER, supra note 2, ¶ 26.01, at p. 215.

11 Ibid.
conclude otherwise would be contrary to the express provisions of section 641 which prescribes that "the rights, duties and liabilities of creditors and of all other persons with respect to the property of the debtor," shall be the same as would be the case in an ordinary bankruptcy proceeding.\textsuperscript{12}

Consequently, the claims of those contending to be secured creditors must meet the test of sections 60, 67 and 70e, as well as 70c. The result is that the claims of creditors are fixed as secured or unsecured in keeping with established bankruptcy principles and procedures. And where the party contending to be a secured creditor declines to file a claim, the trustee may invoke the court's broad jurisdiction over the property of the debtor so as to stay the hand of a creditor whose position is infirm by reason of sections 60, 67, 70c or 70e.\textsuperscript{13} This is not to say that the Chapter XIII trustee is also empowered with the right to recover preferences and avoid fraudulent conveyances, except insofar as such recovery or avoidance results incidentally through the trustee's use of section 57g against a claim filed by a creditor.\textsuperscript{14} Absent the Section 57g situation, the recovery of preferences and the avoidance of fraudulent conveyances are beyond the scope of a Chapter XIII proceeding.

At the same time, while a proceeding under Chapter XIII is pending, the running of all periods of time prescribed by the Bankruptcy Act are suspended in respect to the recovery and avoidance of any such preference or transfer and in respect to the commission of an act of bankruptcy (section 676). Accordingly, rights arising in connection therewith are not lost.

**The Plan, Secured and Unsecured Creditors, Acceptance, Modification and Confirmation**

A wage earner plan is defined by section 606(7) as being "a plan for a composition or extension, or both." Section 646 sets forth the mandatory and permissive features of the plan and directs, among other things, that a plan "(1) shall include provisions dealing with unsecured debts generally, upon any terms;" and "(2) may include provisions dealing with secured debts severally, upon any terms."

In order to be confirmed, a plan must first be accepted. A plan is deemed accepted under section 651 when it has been accepted in

\textsuperscript{12} City Nat'l Bank & Trust Co. v. Oliver, supra note 10.
\textsuperscript{13} §§ 611, 612, 614, 658.
\textsuperscript{14} Re § 57g, see Katchen v. Landy, 382 U.S. 323 (1966).
writing by all creditors affected thereby, whether or not their claims have been proved. But where the plan is not accepted by all creditors affected thereby, section 652 provides that a plan shall be deemed accepted when (1) accepted in writing by a majority in number and amount of the unsecured creditors whose claims have been proved and allowed before the conclusion of the first meeting or adjournment thereof, and (2) accepted in writing by the secured creditors whose claims are dealt with by the plan, whether or not any such creditor has also filed his claim therein.\(^\text{15}\)

When is a creditor "affected" by a plan? As set forth in section 607, "A creditor shall be deemed to be 'affected' by a plan only if his interest shall be materially and adversely affected thereby." The entire class of unsecured creditors is always affected by the terms of a wage earner plan because provision must be made for them therein. Likewise, each secured creditor who is provided for in the plan is affected thereby and is "dealt with" therein. As a result, the plan cannot be confirmed unless each secured creditor provided for in the plan accepts the plan.\(^\text{16}\)

On the other hand, any secured creditor who is not provided for in the plan is not to be deemed "dealt with" by such plan. Unfortunately, the lone reported court decision considering this specific question has concluded to the contrary, albeit erroneously. In the case of In re O'Dell,\(^\text{17}\) the plan provided for all unsecured creditors but only for those secured creditors who accepted the plan. One of the secured creditors rejected the plan and then proceeded to object to confirmation. Although the issue is not stated in the opinion with the precision one would desire, it is plain enough that the court considered the plan to be one which, because of the rejection, did not include the rejecting secured creditor; otherwise, the plan could not possibly have been confirmed in the face of a rejection by a secured creditor within the plan, and the court would have had no occasion to consider the matter further. The court held that a secured creditor, even though not provided for in the plan, is "dealt with" by the plan simply because (1) section 611 confers upon the court jurisdiction of the debtor's property, (2) the debtor's property has passed into the custody of the court by virtue of the

\(^\text{15}\) Interstate Fin. Corp. v. Scrogam, 265 F.2d 889 (6th Cir. 1959).
debtor's possession and (3) section 614 authorizes the court upon cause shown to stay until final decree any act or action to enforce a lien.\(^{16}\)

The effect of the *O'Dell* decision would require that *every* secured creditor must accept the plan, even though not provided for therein; that is, the plan could not be confirmed over the supposed veto power of a secured creditor who is wholly outside the plan. One need look no further than section 646, which prescribes the provisions of a wage earner plan, to ascertain that the *O'Dell* decision is a misconception: section 646 provides that a plan *shall* include provisions dealing with unsecured debts generally and *may* include provisions dealing with secured debts severally. The words "shall" and "may" are used throughout Chapter XIII in a most discriminating fashion, carefully designed to distinguish between the mandatory and the permissive. Consequently, although the debtor must deal with all of his unsecured creditors generally, it is quite plain that he *may* in his plan choose to deal with some or all or none of his secured creditors, except that claims secured by real estate must in any event be excluded from the plan.\(^{17}\) Accordingly, a secured creditor's failure to accept a plan from which he is excluded is not a bar to confirmation.

But even where a secured creditor within the plan declines to accept the plan, it is often a simple matter for the plan to be modified so as to exclude such creditor therefrom, thereby permitting the plan to be deemed accepted and paving the way for confirmation.\(^{20}\) Section 653 authorizes the court to permit the debtor to propose written alterations or modifications of the plan prior to confirmation, such as one to exclude from the plan a non-assenting secured creditor. If the court finds under section 654 that the proposed modification does not materially and adversely affect the interest of any creditor, the manifest implication of section 654 is that such modification may be adopted by the court ex parte and the plan deemed amended accordingly without the necessity of procuring acceptances anew. That is, the acceptance of the original

\(^{16}\) The court's reasoning misses the mark: the question is not whether a secured creditor might for some purposes be subjected to the jurisdiction or injunctive decree of the court during the course of the proceeding, but rather, whether the secured creditor is dealt with by the plan.

\(^{17}\) Section 606(1) provides that, for the purposes of Chapter XIII, "'claims' . . . shall not include claims secured by estates in real property or chattels real . . . "; 10 *Collier*, *supra* note 2, \(\S\) 28.03.

\(^{20}\) 10 *Collier*, *supra* note 2, \(\S\) 28.02 n.24.
plan will be treated as acceptance of the amended plan. In addition, sections 654 and 655 prescribe the mechanics whereby, prior to confirmation, a modification which does materially and adversely affect the interest of any creditor who has not agreed to such modification can be brought on for hearing. No provision is made in Chapter XIII for amendment after confirmation.\textsuperscript{21}

On the other hand, some plans avoid the necessity of amending so as to eliminate a non-asserting secured creditor who is within the plan. This is sometimes accomplished by providing in the plan that all such secured creditors who fail to accept the plan by the conclusion of the first meeting are to be deemed not provided for under, and not dealt with by, such plan. This may also be accomplished by the more sweeping method of providing in the plan that the debtor’s executory contracts with all secured creditors who fail to accept the plan by the conclusion of the first meeting are automatically deemed rejected under the terms of the plan. Rejection, of course, is a two-edged sword that will frequently result in foreclosure by the secured creditor on his security.\textsuperscript{22}

For the purpose of classifying a creditor as secured or unsecured, it is important to bear in mind that the following creditors are deemed unsecured, whether in ordinary bankruptcy or Chapter XIII, even though they may think of themselves as secured creditors: (1) a creditor whose lien or security is invalid as against the trustee under sections 60, 67, 70c or 70e;\textsuperscript{23} (2) a creditor whose security is composed of property owned by one other than the debtor;\textsuperscript{24} and (3) any creditor to the extent that security held by him is of a value less than his lien debt.\textsuperscript{25}

A fourth instance in which an otherwise secured creditor may be regarded as unsecured for dividend purposes in ordinary bankruptcy proceedings arises in connection with exempt property which is nevertheless subject to a valid lien in favor of a creditor. In bankruptcy proceedings generally, such a creditor is unsecured, according not only to the weight of authority\textsuperscript{26} but also to the definite

\textsuperscript{21} 10 COLIER, supra note 2, \$ 29.03.
\textsuperscript{22} 8 COLIER, supra note 7, \$ 3.15(7); and 10 COLIER, supra note 2, \$ 22.06.
\textsuperscript{23} Ibid.; note 10, supra.
\textsuperscript{24} \$ 1(28).
\textsuperscript{25} 10 COLIER, supra note 2, \$ 22.10 n.10.
\textsuperscript{26} REMINGTON, BANKRUPTCY \$ 910 (Henderson ed. 1956).
trend of the more recent cases. This is so even though the creditor may in any event look to his security. The majority view accords with section 1(28) which provides that the term "'Secured creditor' shall include a creditor who has security for his debt upon the property of a bankrupt of a nature to be assignable under this Act . . ."; and it likewise accords with the case of Lockwood v. Exchange Bank, holding that title to the exempt property of the debtor does not pass to his trustee in bankruptcy. Inasmuch as title to exempt property is not "assignable under the Act" to the trustee, a creditor holding a lien thereon is deemed unsecured under the majority rule.

In Chapter XIII, however, it would appear that a creditor holding a lien on property of the debtor is secured whether such property be exempt or non-exempt. Under Chapter XIII, none of the debtor's property is assignable by operation of law to the Chapter XIII trustee. The Chapter XIII trustee does not take title to the property of the debtor except in certain unusual circumstances wherein the plan or the order confirming the plan so provides. Thus, if section 1(28) as above quoted is applicable in Chapter XIII, secured creditors in Chapter XIII would become virtually extinct. This, of course, is completely at odds with provisions throughout Chapter XIII which make a clear distinction between secured and unsecured creditors. Inasmuch as section 1(28) as quoted above is in plain conflict with Chapter XIII, it is not applicable insofar as it would treat as unsecured those creditors who hold liens on property of the debtor, such property not being assignable under Chapter XIII. Consequently, the term "secured creditor" is entitled to its meaning in normal parlance insofar as property of the debtor is concerned. Moreover, such an interpretation serves to eliminate the anomalous situation that would result where the creditor holding a lien on exempt property is treated as unsecured for purposes of the plan, but remains secured wholly outside the

27 In re Guilliot, 47 F. Supp. 929 (W.D. La. 1942) (Chapter XI); Robinson v. Exchange Nat'l Bank, 28 F. Supp. 244 (N.D. Okla. 1939); In re Anderson, 11 F.2d 380 (D. Minn. 1926); see Feder v. John Engelhorn & Sons, 202 F.2d 411 (2d Cir. 1953) (dictum). Some of the older cases adopt a contrary view, but several of them, such as Fenley v. Poor, 121 Fed. 739 (6th Cir. 1903), have been undercut, though not directly repudiated, by the holding in Lockwood v. Exchange Nat'l Bank, 190 U.S. 294 (1903); see other cases collected in 1 Collier, BANKRUPTCY ¶ 1.28, p. 130.8 n. 14 (14th ed.).

28 Supra note 27.

29 See text, supra beginning after note 6; and see supra note 7.

30 § 70; see text, infra beginning at note 49.

31 § 602.
scope of the plan, entitled to foreclose unless his full contract payments are met.32

Jurisdiction Over the Property of the Debtor

The summary jurisdiction of the bankruptcy court over the property of the debtor is enlarged under Chapter XIII.33 First, section 612 provides that the jurisdiction, powers and duties of the court shall be the same as if an ordinary bankruptcy proceeding had been commenced. This serves to confer upon the court the ordinary bankruptcy summary jurisdiction based on possession in the debtor at the time of bankruptcy.34

Second, section 611 provides that, where not inconsistent with the provisions of this chapter, the court shall "have exclusive jurisdiction of the debtor and his property, wherever located, and of his earnings and wages during the period of consummation of the plan." And, apparently, to make clear that the court's jurisdiction continues throughout the Chapter XIII proceeding, section 658 provides that, during the period of extension, the court "shall retain jurisdiction of the debtor and his property for all purposes of the plan and its consummation . . . ." This section serves to extend the summary jurisdiction of the court to all property owned35 by the debtor, even though not in his possession.

In the exercise of this jurisdiction, the court's process may generally transcend state lines.36 This means that, even where the court is dealing with property owned by the debtor which is located outside its territorial limits and is not in its actual possession, the court may send its process beyond those territorial limits. As a consequence, ancillary proceedings over such property in Chapter XIII are eliminated.37

Furthermore, jurisdiction over the debtor's property is not limited by reason of any lien held thereon by a creditor who refuses to accept the debtor's plan, nor is such jurisdiction limited by reason of the fact that such property is real estate subject to a lien in favor of one whose claim cannot be dealt with under a wage earner plan.38

32 See text, infra at note 41.
33 8 Collier, supra note 7, ¶ 3.01(1).
35 8 Collier, supra note 7, ¶ 3.02.
36 8 Collier, supra note 7, ¶ 3.03(1), (2).
37 8 Collier, supra note 7, ¶ 3.04(1).
Injunction and the Secured Creditor

Section 614 of the act provides as follows:

The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor.

This section empowers the court to enjoin or stay without notice suits other than those to enforce liens upon the property of the debtor. As to suits to enforce liens upon the property of a debtor and as to any act by a secured creditor to enforce a lien upon the property of a debtor, this section provides that the court may, "upon notice and for cause shown," enjoin or stay the same. The "property" of the debtor referred to in section 614 embraces property of whatever character. And so it is that even though a claim secured by lien upon the debtor's real estate cannot be dealt with in a wage earner plan, the holder of such claim is subject to injunction under section 614.39

Nevertheless, an injunction to stay a secured creditor who is not dealt with by the plan, either because the claim is secured by real estate or because such secured creditor is not provided for under the plan, cannot issue under section 614 except upon notice and for cause shown. It is perfectly plain that section 614 requires that notice be given of the application for an injunction to stay the enforcement of a lien before the injunction thereunder is granted. Inasmuch as such an injunction under section 614 is to issue only upon notice and for cause shown,40 it is likewise perfectly plain that the secured creditor sought to be enjoined is entitled to be heard thereon.

Where the purpose of the injunction is to stay a secured creditor who is not dealt with by the plan, whether for the duration of the plan or for any extended period of time, a section 614 injunction can issue only after the court, under the rule of the Hallenbeck

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40 8 COLLIER, supra note 7, § 3.22(3).
case,\textsuperscript{41} has first found the following: (1) the injunction or stay is necessary to preserve the debtor's estate or to carry out the Chapter XIII plan; (2) the granting of the injunction will not directly or indirectly impair the security of the lien; (3) the owner of the secured indebtedness will not be required to accept less than the full periodic payments specified in his contract; and (4) in addition to usual equitable considerations, the debtor's submission of his plan is in good faith and the plan is feasible.

Additionally, section 614 may doubtless be invoked to enjoin a secured creditor, who is not dealt with by the plan, for a limited period of time in order to permit the court sufficient time in which to adjudicate controversies respecting the creditor's lien on property of the debtor.

However, this does not mean that an injunctive decree staying the enforcement of a lien on property of a debtor cannot, under appropriate circumstances, be entered without notice under other authority possessed by the court. There will always be circumstances under which the court, acting under the broad powers of section 2a(15), will properly exercise its jurisdiction to stay a secured creditor for a brief period of time, as, for example, where a temporary restraining order is required in order to maintain the status quo pending a hearing and determination of the right to a section 614 injunction.\textsuperscript{42}

\textbf{THE PARTIALLY-SECURED CREDITOR; AND THE SUBORDINATE LIEN CREDITOR WHOSE LIEN IS IN FACT VALUELESS}

The \textit{Hallenbeck}\textsuperscript{43} case lays down the conditions that must be met in order to stay the hand of a protesting secured creditor. Foremost among these is the requirement that the debtor must meet the full periodic contract payments.\textsuperscript{44} Although the circuit court in \textit{Hallenbeck} did not so state, it appears from the earlier district court opinion that the court was there dealing with a creditor who was wholly secured by an asset worth more than the lien debt.\textsuperscript{45} What

\textsuperscript{41} Supra note 38. See also \textit{In re Clevenger}, 282 F.2d 756 (7th Cir. 1960); \textit{In re Duncan}, 33 F. Supp. 997 (E.D. Va. 1940); \textit{In re Garrett}, supra note 39.

\textsuperscript{42} 8 COLIER, supra note 7, \textit{supra} 3.22(2). Section 2a(15) invests the bankruptcy court with jurisdiction to: "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act. Provided, however, That an injunction to restrain a court may be issued by the judge only. . . ."

\textsuperscript{43} Supra note 38; see also cases cited supra note 41.

\textsuperscript{44} Ibid.

\textsuperscript{45} In re Hallenbeck, 209 F. Supp. 283 (W.D. Va. 1962).
of the other extreme, where a so-called secured creditor is a subordinate lien creditor who holds a second lien on assets worth no more than the first lien thereon? It is apparent that such a creditor is in fact not secured at all. Where such a creditor declines to file his claim as an unsecured creditor in an amount limited to the unpaid principal balance of his debt with interest only to the date of filing, the debtor should move quickly to reject the executory contract giving rise to the "lien." Such rejection by the debtor will be made under section 613(1), unless the plan itself provides for rejection under section 646(1), in which latter case confirmation of the plan will bring about rejection. After hearing upon notice to the rejectee, the court, if it finds the value of the asset to be less than sufficient to cover the prior lien thereon, will not only fix the damages in the principal amount of the debt with interest to the date of filing, but the court may also enjoin the creditor from further efforts of any kind to enforce its security agreement against such asset. Where, as in this situation, the subordinate lien creditor holds a lien which has nothing more than a mere nuisance value arising out of its possible use to harrass and obstruct the rehabilitative process, the court must be deemed empowered to enjoin under either section 2a(15) or section 614. The debt, having been fixed as an unsecured claim, is payable only under the plan along with the other common creditors.

It is well to note at this point that the court in Chapter XIII is frequently called upon to determine the fair value of a debtor's property in order to segregate the secured indebtedness from the unsecured, including the splitting of a single debt which is only partially secured. Such findings are prerequisites to determinations of such matters as: (1) whether the debtor proposes to treat an unsecured debt, including the unsecured portion of a partially-secured debt, on any basis other than the pro rata treatment required by section 646(1); (2) whether the plan has been duly accepted; (3) whether a particular debt is provided for under the plan so as to be dischargeable under sections 660 or 661; (4) whether the debtor holds an equity or interest which ought to be preserved in a given article or piece of property, in instances where such a finding is material to the issuance of an injunction under the rule of the Hallenbeck case; (5) whether a subordinate lien creditor is in reality unsecured, in instances where such a finding is necessary to the issuance of an injunction staying foreclosure under such a lien; and (6) whether, in view of the foregoing determinations, the
payments to be made both under and outside the plan are such that
the court may confirm the plan as being feasible. These findings of
value are made as a natural and necessary incident to the exercise
of the jurisdiction, powers and duties of the bankruptcy courts in
Chapter XIII proceedings. Thus, the basis for such determinations
is separate and distinct from the provisions of section 57h which, in
ordinary bankruptcy, come into play only where a proof of claim
is filed. Authority for the enforcement and effectuation of such
determinations is to be found, where no specific grant of power is
apparent, in the broad powers of section 2a(15).

This leads to a consideration of perhaps the most perplexing of all
problems in Chapter XIII—what is the treatment to be accorded
the protesting partially-secured creditor? Suppose a creditor holds
a valid lien securing indebtedness that runs twice the value of the
property serving as security. Such creditor holds a secured debt
as to half his claim and an unsecured debt as to the other half.
Assuming that the property is of such a nature as to be reasonably
necessary to the debtor's rehabilitation under Chapter XIII, the
debtor may wish to seek the protection of the court in the hope of
retaining this property. If the creditor will not agree to split his
claim into secured and unsecured segments, can the debtor retain
the property by complying with the rule of the Hallenbeck case?
No, for that rule relates to a creditor as to whom the debtor must
make the full periodic contract payments, whereas a debtor is not
to be permitted to make the full periodic contract payments on a
partially-secured debt. Obviously, where the contract payments are
being applied to a debt which is only partially secured, such serves
to treat severally not only the secured part but also the unsecured
part; and this is plainly prohibited by section 646(1) which requires
that all unsecured debts be treated alike. Moreover, the full contract
payments will likely include post-filing interest which ordinarily is
not allowable on unsecured claims.

It can be forcefully argued that the court should evaluate the
security and then permit the contract payments to be made to the
extent of the value of the security (plus interest for the delay in
payment of such value), with the balance of the claim allowable as
unsecured. However, the cases indicate as a general proposition
that the creditor is entitled to demand that he receive either his

46 3 COL LiER, B ANKR UPT CY ¶ 57.20(3) (14th ed. 1961).
47 63a(1); see 3 COLLiER, supra note 46, ¶ 63.16(1).
contract payments or his security. Presumably, this means all, not merely some, of his contract payments.

So, where security worth less than the lien debt does have some value, as distinguished from no value or mere nominal or nuisance value, section 641 would seem to require that the creditor be permitted to foreclose his security. As already pointed out, section 641 provides that the rights, as well as the duties, of the creditors and all other persons with respect to the property of the debtor shall be the same as in ordinary bankruptcy unless inconsistent with the provisions of Chapter XIII. Inasmuch as the debtor cannot be authorized to make all of the contract payments on a partially-secured debt, the creditor should be accorded the ordinary bankruptcy right to foreclose and realize as best he can on his security in accordance with the terms of his security agreement.

Rights of the Debtor as to His Property

It has been noted that the Chapter XIII trustee does not automatically take title to the debtor's property. In a section 622 case, title remains vested in the debtor throughout the pendency of the Chapter XIII proceeding unless, prior to confirmation of a plan, the debtor is adjudicated a bankrupt, or unless, upon confirmation, either the plan as confirmed or the order of confirmation directs under section 70i that title shall be vested in another party.

If the debtor in a section 622 proceeding is adjudicated a bankrupt prior to confirmation, it is provided in section 667 that the ordinary bankruptcy trustee takes title to all of the debtor's property as of the date of the filing of the section 622 petition. Inasmuch as disposition by the debtor of his property in a section 622 proceeding might be undone by an ordinary bankruptcy trustee if confirmation should be refused and the case converted to ordinary bankruptcy, and inasmuch as the status quo during the period from the date of filing to the date of confirmation should be maintained by the debtor and all others by virtue of sections 636 and 641, it is

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46 See also In re Copes, 206 F. Supp. 329 (D. Kan. 1962); Hallenbeck v. Penn Mut. Life Ins. Co., supra note 38; In re Clevenger, supra note 41; In re Garrett, supra note 39; In re Pappas, supra note 16; In re Duncan, supra note 41.

47 § 70i provides: "Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall vest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangement or plan."
the duty of the debtor to see that the estate is preserved while the proceeding is pending action on confirmation.

But if the plan fails after confirmation and the section 622 case is converted by the debtor into an ordinary bankruptcy proceeding, the ordinary bankruptcy trustee, pursuant to the terms of section 669(1) is only "vested with the title to all property of the debtor as of the date of the entry of the order directing that bankruptcy be proceeded with." So it is plain that, once a plan is confirmed, the debtor's title as of the date of filing a section 622 proceeding is no longer subject to divestment in favor of an ordinary bankruptcy trustee by relation back to the original filing date. As a result, the debtor after confirmation is at liberty to dispose of his property, whether by sale or by encumbrance, unless the plan or the order confirming the plan provides otherwise or unless the debtor has, for proper reason, been enjoined by the court.\(^5^0\) Of course, neither the court nor the trustee is in a position to police the myriad of transactions in which the debtor will engage during the existence of the plan. As a protective measure in the event bankruptcy be ordered after confirmation, section 669(3) serves to apply sections 60, 67 and 70 to the debtor's transactions in the same manner as if an ordinary bankruptcy proceeding had been commenced on the date of entry of the order directing that bankruptcy be proceeded with.

If the debtor holds a substantial equity in a given asset or if the debtor owns property of substantial value which is encumbered by a lien invalid as against the trustee, then the court may well want to make certain that such property is protected from dissipation by the debtor during the course of the proceeding.\(^5^1\) In such a case, it would seem appropriate for the court to suggest to the debtor that, prior to confirmation, he propose a written modification of his plan under which he agrees that he will retain such property or that such property shall be deemed to vest under section 70i in the Chapter XIII trustee for designated purposes of the plan or pending successful completion of the plan. Even though Chapter XIII contemplates payment by the debtor primarily out of his future wages and earnings, this does not mean that property of the debtor is excluded from use in meeting the claims of the creditors. Not only may the plan provide that such property be utilized to supplement payments out of future earnings, but Chapter XIII should be deemed suffi-

\(^{5^0}\) Seedman v. Friedman, 132 F.2d 290 (2d Cir. 1942) (Chapter XI).
\(^{5^1}\) See, e.g., City Nat'l Bank & Trust Co. v. Oliver, supra note 10.
ciently flexible to permit in a proper case payment of a major portion of one's debts out of the debtor's property where the plan so provides. In this connection, section 646(7) specifically provides that a plan under Chapter XIII "may include any other appropriate provision not inconsistent with this chapter." Should the debtor decline to amend so as to comply with the court's suggestion, then, assuming section 656 applies, it may be appropriate for the court to find that the plan is not "for the best interests of the creditors" and refuse confirmation.

On the other hand, if the existence of such an asset should not come to the court's attention until after the plan has been confirmed, it would seem to be within the court's jurisdiction to enjoin the debtor under section 2a(15) from disposing of such asset. Even though such property would not be devoted to the payment of the claims of creditors in the course of the Chapter XIII proceeding, such property would at least be available to the creditors in the event such proceeding should ultimately be converted to bankruptcy; or, absent ordinary bankruptcy, such property would remain available for the claims of creditors in non-bankruptcy forums upon subsequent dismissal of the Chapter XIII proceeding. For obvious reasons, the vesting of title to such an asset in the Chapter XIII trustee pending consummation of the plan is a far safer course than merely enjoining the debtor.

FORECLOSURE AND CONSENT OF THE COURT

Section 641 provides that, "Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same . . ." in a Chapter XIII proceeding as if an ordinary bankruptcy proceeding had been filed. In ordinary bankruptcy it is incumbent upon a lien creditor to obtain permission of the court to foreclose upon property which has passed into the possession and custody of the court, even though no stay order has been entered.52 In the absence of such permission, the foreclosure sale will be treated either as utterly void53 or, according to the more moderate view and seeming trend of the cases, as voidable in the

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52 Issacs v. Hobbs Tie & Timber Co., supra note 34; 1 Collier, Bankruptcy ¶ 2.02(1), (2), (3) (14th ed. 1962).
discretion of the court.\textsuperscript{54} Thus, section 641 would seem to require that “creditors and . . . all other persons,” whether holding liens on real estate or personalty, must obtain the permission of the Chapter XIII court to foreclose just as in ordinary bankruptcy.

Certainly this must be the rule prior to confirmation.\textsuperscript{55} During the relatively brief period generally required for action on confirmation of a wage earner plan, it is imperative that the status quo remain intact except as the court may specifically authorize and direct. During this period, time is required in order that the debtor might formulate and file his plan, that the creditors might consider the plan and accept or reject and that the court might pass upon the plan and its acceptance and determine whether confirmation should be ordered. To permit these matters to be considered in a calm and deliberate atmosphere, without undue haste or harrassment, and with the debtor’s rehabilitation as the goal, it is essential that creditors be deemed precluded from taking action which might jeopardize the entire plan without first gaining the court’s consent. Moreover, if the plan is not confirmed, it may be that the proceeding will be immediately converted into an ordinary bankruptcy case, in which event the encumbered property will be available for administration.

After confirmation, an accepting secured creditor who is provided for in the plan is not free to foreclose without the prior approval of the court. Even where the debtor defaults in his payments under the plan, resulting in failure to meet the installments due under the plan to such an accepting secured creditor, the court cannot authorize foreclosure unless the plan contains a special escape provision, under section 646(7), permitting such action. Absent such a provision, the release of the secured creditor from the plan would constitute a post-confirmation modification of the plan—and Chapter XIII makes no provision for modification after confirmation.\textsuperscript{56} Thus, the only remedy open to a secured creditor in such a situation is to seek dismissal of the proceeding under section 666.

\begin{itemize}
\item \textsuperscript{54} Hardt v. Kirkpatrick, 91 F.2d 875 (9th Cir. 1937), cert. denied, 303 U.S. 626 (1936); Heffron v. Western Loan & Bldg. Co., 84 F.2d 301 (9th Cir. 1936), cert. denied, 299 U. S. 597 (1936). Additional cases are collected in \textcopyright{1} COLLIER, supra note 52, \| 2.02 nn. 10, 11, 21 and in Annot., 112 A.L.R. 506 (1938); 5A REMINGTON, BANKRUPTCY \$ 2522.30, 2522.31 (Henderson ed. 1953).
\item \textsuperscript{55} Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658 (2d Cir. 1940) (Chapter XI); but see In re Potts, 47 F. Supp. 990 (E. D. Ky. 1942) (Chapter XI) (dictum).
\item \textsuperscript{56} 10 COLLIER, supra note 2, \| 29.03.
\end{itemize}
But whether, after confirmation, a secured creditor not provided for in the plan must obtain the prior permission of the court to foreclose, either as to reality or personalty, is open to some question. Authoritative decisional law on this point is lacking. It is true that confirmation of the plan has set the proceeding on an established course and that the debtor has had ample time to work out arrangements with those secured creditors who are to be handled outside the plan. It is likewise true that the debtor and other interested parties have had sufficient time to make use of the injunctive remedies available under section 614. Nevertheless, a potential deficiency claim or the loss of a substantial equity or a determination as to the validity of a supposed lien can be as important to the body of creditors in a Chapter XIII proceeding as in ordinary bankruptcy. Consequently, it would appear rather clear that, even after confirmation, section 641 imposes upon the secured creditor, unaffected by the plan though he be, the same duty to seek permission to foreclose as in ordinary bankruptcy. The secured creditor who fails to obtain such consent may well find at some future date that he is being called upon to meet the demands of the trustee or other interested parties either to restore the status quo or to recompense the estate for losses allegedly sustained by reason of such foreclosure.\footnote{See text and note, supra note 54.} Or it may be that the court will follow the line of cases which, in ordinary bankruptcy, holds the foreclosure sale as utterly void.\footnote{Supra note 53.} In particular, and regardless of which line of ordinary bankruptcy cases may be followed, the doubt cast upon the title to real estate subjected to such a foreclosure sale is of major importance. And, of course, any deficiency claim filed by a foreclosing secured creditor who has failed to secure prior permission of the court will be scrutinized indeed.\footnote{3 COLLIER, supra note 46 \(\|\) 57.20(5.3). For contrast with the pledgee in possession situation, uncommon in Chapter XIII proceedings, see id. at \(\|\) 57.20(5.1), (5.2).}