Osgoode Hall Law Journal

Volume 21, Number 4 (December 1983)

Article 6

Book Review: Debtor and Creditor: Cases, Notes and Materials, by B. Cotter (Second Edition), J. B. Laskin, E. Gertner, B. J. Reiter, M. A. Springman and M. J. Trebilcock (eds)

B. Cotter

BOOK REVIEW

DEBTOR AND CREDITOR:
CASES, NOTES AND MATERIALS, by B. COTTER.
(Second Edition). Edited by J.B. Laskin, E. Gertner, B.J. Reiter,
M.A. Springman and M.J. Trebilcock. Toronto:

Neither a borrower, nor a lender be;
William Shakespeare, *Hamlet*, Act I, Scene iii.

If Laertes and the rest of us could have complied with Polonius's bit of wisdom, there would have been no need for the casebook reviewed here or, obviously, for this review. But, if the advice could not be followed in Shakespeare's time (and it was not), what chance can there be of heeding it today? Or wanting to for that matter? One may more easily appreciate the view of Rabelais: "Nature n'a crée l'homme que pour prêter et emprunter."[1] (Nature has created man to no other end but to lend and borrow.)

This disturbing little cynicism has a remarkable ring of truth, however, regarding the pervasiveness of credit (and its correlative, debt) in modern western societies. It is not surprising, then, that the law has developed an historic and substantial body of rules to govern relations between debtor and creditor. Nor is it surprising that the demands of modern society have put enormous pressure on the whole debtor-creditor system.

This casebook examines this system and, to an extent never previously attempted in a Canadian casebook on the subject, examines underlying values and prospects for reform. Admittedly, the subject itself is technical, limited in scope, sometimes intricate, eminently practical and occasionally dull. It is nevertheless an important aspect of legal organization, and policy choices on the many planes of debtor-creditor relations mirror, sometimes darkly, the values of a modern western society seeking to promote and to balance social and economic goals.

Turning to the casebook, an initial comment on appearances is appropriate. This edition is published by Emond-Montgomery Ltd. and is a polished effort. Sections of chapters are better highlighted, the printing is more professional, and the materials much easier to read. But for occasional careless editing, it would be excellent. It substantially improves on the presentation of the first edition.

The book is structured to present three distinct features: first, the economic and social climate in which debtor and creditor law operates; second, the traditional law on the subject; and third, an evaluation of various proposals for law reform.

The early chapters consider the economic and social setting upon which debtor-creditor law operates. These materials, largely articles, comments and questions, are insightful and are much better organized than in the first edition. They carry a distinct "law and economics" flavour and lead one to expect that Professor Trebilcock's move from first to fifth among the authors'

---

[1] Rabelais, *Works*, Book iii, ch. 4.

credits does not mean that his influence on the materials is much diminished.

The second and major aspect of the casebook is the presentation of the traditional law. This presentation is done in chronological fashion beginning with the creation of the debtor-creditor relationship and ending with the ultimate relationship, bankruptcy. This organization, consistent with the first edition, is, with two exceptions mentioned later, the only sensible way to present materials on this subject.

Debtor-creditor law, with the exception of bankruptcy and insolvency, rests almost exclusively in the provincial domain. Much of the material in the book is drawn from the legislation and cases of one province. Not surprisingly, that province is Ontario. The decision to focus on one province's law offers at least three advantages. First, the law can be presented as a cohesive whole and its internal functioning and misfunctioning made susceptible to clearer scrutiny. Second, this approach is much more suited to the reform-oriented commentary which is offered in the book. A third advantage is that it promises for the book an extensive Ontario readership. There are, however, some disadvantages to this approach. Ontario has not been a very innovative province on many debtor-creditor issues. By concentrating on Ontario, the authors have overlooked innovative developments pursued in geographic frontiers, such as British Columbia, Saskatchewan or even Nova Scotia. One example is the Mareva injunction. Rule 49 of the Nova Scotia Civil Procedures Rules has made a procedure equivalent to the Mareva injunction available in that jurisdiction since 1972.[2] It does not receive treatment even in an expanded discussion of this topic in Chapter 4. Another negative consequence of the Ontario orientation is that it will prevent as extensive a readership across Canada as this fine effort deserves. This last matter is, alas, largely a consequence of the subject itself.

The third feature of the casebook, and the most significantly expanded emphasis in the second edition is its law reform orientation. This is achieved largely through the inclusion of passages from the work of law reform com-

---

[2] 1. Nova Scotia Civil Procedure Rule 49 provides a mechanism where by a plaintiff may obtain an Attachment Order directing the sheriff to seize a defendant's property for the purpose of securing the amount of the plaintiff's claim. Rule 49.01(1) provides;

> Where a defendant,
> (a) resides out of the jurisdiction, or is a corporation that is not registered under the Corporations Registration Act;
> (b) conceals himself or absconds within the jurisdiction with intent to avoid service on him of any document;
> (c) is about to leave or has left the jurisdiction with intent to change his domicile, defraud his creditors, or avoid service of a document;
> (d) is about to remove or has removed his property or any part thereof permanently out the jurisdiction;
> (e) has concealed, removed, assigned, transferred, conveyed, converted or otherwise disposed of all or any part of his property with intent to hinder or delay his creditors, or is about to do so;
> (f) has fraudulently incurred a debt or liability in issue in a proceeding;

a plaintiff may, at or after the commencement of the proceeding and before judgment and as an incident of the relief claimed, make application for an attachment order in Form 49.04A.

missions, most notably the Ontario Law Reform Commission's recent and extensive *Report on the Enforcement of Judgement Debts and Related Matters.* This material is significant and thought provoking, adds to the strength of the casebook, and increases the prospect of a broader (non-Ontario) readership. For much of this contribution, Messrs. Gertner and Springman are presumably responsible.

Turning to the specifics, the most significant improvements in this edition are the much revised organization of the chapters on Seizure and Sale of the Debtor's Property (chapter 7), Garnishment (chapter 8), Distribution of Proceeds of Enforcement (chapter 11), Mechanics' Liens (chapter 12), Transactions Impeachable by Creditors (chapter 13) and the Bankruptcy materials (chapters 14-18). For example, the subject of execution against a debtor's property is now organized more carefully, on the basis of the nature of the property itself. This enables the authors to weave the law of exemptions into this structure. It is a significant improvement and, I suggest, corresponds with the way people actually think about these topics. It remedies what was in my view a defect in the structure of the first edition.

A second example concerns mechanics' liens. That chapter in the first edition was described in a review by Professor McLaren as "a very useful chapter . . ." which "should prove of value to student and practitioner alike."[3] If this is so, the new chapter will be priceless. The authors have reduced the case materials in this chapter and, in an attempt to give complete coverage to a difficult and complex topic, have substituted a series of notes and comments of their own. This makes it very much less a teaching chapter and more a 70-page treatise, but if mechanics' liens are part of the subject of debtor-creditor law, and nearly everyone thinks so,[4] this is the only way to manage the topic. In this area the organization is excellent, and the material is reasonably comprehensive.

The Bankruptcy chapters require some special comments. By now it must be a frustrating topic to the authors. On this score they have once again taken a risk, and once again they have lost. As in the first edition, they have anticipated the adoption of a new *Bankrupty Act* and have tailored these chapters to a "Present Act-New Act" presentation. With this "New Act" in place, the presentation would have been a marvellous success. But the "New Act," Bill C-12,[5] never made it and, as the first edition was tainted by a bad guess, so too is the second edition. (Indeed, so confident were the authors on this issue that they included most of the English text of the "New Act" as Appendix E and a substantially edited version of the present *Bankruptcy Act* as Appendix D.) This does not reduce the value of the learning exercise to be gained by careful consideration of these chapters but the knowledge conveyed

---

[3] (1980), 58 Can. Bar Rev. 791 at 792.

[4] It sometimes seems that I am in a small minority in taking a different view. Mechanics' liens are, in my opinion, simply one aspect of security interests in real property with derivative statutory rights. The justification for treating them as debtor-creditor matters (i.e., *unsecured* creditor matters) may be that they are unsecured rights transformed into security interest by statute. If so, the topic ought to encompass statutorily created security interests generally and not be limited to mechanics' liens. This would serve to introduce an aspect which is largely overlooked in this book, the increasing litigation over the status of such statutory security interests.

[5] Bill C-12, 1980 (32nd Parl. 1st Sess.).

is not presently capable of practical application.[6] I am not as critical of this effort as was Professor McLaren of the first edition.[7] However, these chapters are sure to be frustrating to anyone who wants today's law today and tomorrow's law tomorrow.

It is easy to multiply criticisms based on this attention to the "New Act," but it is also easy to overlook the benefits that flow from the attempt. One crucial benefit concerns a major stumbling block in bankruptcy proposals of the last dozen years, the problem of employee wage claims.[8] This issue is a heated one, but the authors have moved past the rhetoric to present the serious issues in a reasonably comprehensive way,[9] accompanied by insightful commentary. This presentation will not get the "New Act" passed, but it will make this issue more fully understood by readers.

There are two criticisms of the book which are of significance. The first concerns the interface between secured and unsecured creditors. The failure to pursue seriously the relationship between unsecured creditors and holders of personal property security interests; this was a criticism of the first edition. The authors of the second edition have been largely unmoved. Indeed, the second edition reduces its treatment of the conflict between garnishing creditors and assignees of book debts to a note (though a very good one).[10] Analysis of garnishment and execution is often clarified in the context of a conflict with secured creditors. These issues deserve fuller coverage.

The second major deficiency is that the treatment of provincial law of reviewable or impeachable transactions (chapter 13) precedes any discussion of bankruptcy. One presumes this was premised in both editions on the expectation that reviewable transactions in bankruptcy cases would be limited to those that the new *Bankruptcy Act* said were reviewable, and that provincial law would accordingly be virtually inapplicable.[11] This development has not come

---

[6] Rumours abound that no further bills will be introduced in the near future and that the present *Bankruptcy Act* will be the subject of patchwork amendments in the 1983-84 year.

[7] *Supra* note 3, at 794.

[8] The problem is tracked in a note in the case book. That it has been a major problem delaying the implementation of a new *Bankruptcy Act* was recently highlighted in an impassioned editorial by Professor Ziegel, (1982-83), 7 Can. Bus. L.J. 249.

[9] One oversight has been the extent of provincial legislative activity attempting to create a security interest in wages, vacation pay and the like, so as to change and strengthen the nature of employee claims and thereby circumvent s. 107 (1)(d) of the present *Act*. This activity has been spurred on by federal inactivity and has undermined the concept of a unitary system of bankruptcy administration.

[10] Left out are excerpts from the marvellous situations in *Kare* v. *North-West Packers Ltd. and McGuckin*, [1955] ≤ 2 d.L.R. 407 (Man. C.A.) and *General Brake & Clutch Service Ltd.* v. *W.A. Scott & Sons Ltd.* (1975), 59 D.L.R. (3d) 741 (Man. C.A.), where in the latter case Freedman C.J. for the court overruled the former decision and set the law (and his 1955 trial court decision) on the right course again.

[11] This was the purpose of s. 10(3)(a) of Bill C-12, which provided:
10(3) Notwithstanding any other Act of Parliament or any Act of the Legislature of a Province, where a bankruptcy order or an arrangement is made in respect of a debtor, no person may
(a) take or continue any proceeding to review or set aside a transfer to or form the debtor on the grounds that such transfer is a fraudulent preference or conveyance
except in accordance with subsection (4), sections 168 to 185 and section 246; Section 10(4) makes possible the continuation or proceedings commenced under provincial law prior to the bankruptcy.

to pass. The present law, an ill-fitting legislative patchwork, remains. This patchwork was preserved in *Robinson* v. *Countrywide Factors Ltd.*[12] (which is apparently for the same reason given scant treatment), and leaves this area of the law an intricate mix of provincial legislation, old English legislation, and *Bankruptcy Act* provisions. To see these provisions in anything approaching a complete picture requires their consideration as one package. This requires the topic to be discussed at the end of the book, after the Bankruptcy setting has been presented. I am sympathetic to the strategy behind the topic's division. However, the failure of the "New Act" to materialize undermines the strategy and this casebook is less effective for it.

Let me sum up by saying that the casebook is obviously not perfect. But the authors have made a distinct improvement on an already very good first edition. In particular the reform commentary running through the text integrates the present law and future possibilities in a way that makes the reading and learning enjoyable. Anyone interested in both aspects of this subject will be rewarded by these materials and by the authors. Notwithstanding the admonition from Shakespeare, those of us who teach, learn, and work in this area are substantially in their debt.

[12] [1978] 1 S.C.R. 753, 72 D.L.R. (3d) 500.

* Professor Cotter is a Visiting Scholar in Residence, School of Law, Duke University.