

Cases and Materials on Debtor-Creditor Law

William F. Young Jr.

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

William F. Young Jr., *Cases and Materials on Debtor-Creditor Law*, 60 Cornell L. Rev. 689 (1975)
Available at: <http://scholarship.law.cornell.edu/clr/vol60/iss4/7>

This Book Review is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

BOOK REVIEW

Cases and Materials on Debtor-Creditor Law. WILLIAM D. WARREN & WILLIAM E. HOGAN. Mineola, New York: The Foundation Press, Inc. 1974. Pp. xxvi, 872. \$16.00. Supplement Pp. 382. \$4.50.

This book is good news. It is a book for students about the law of creditors' rights and of secured transactions under the Uniform Commercial Code. An earlier version, in 1967, was entitled *Creditors' Rights and Secured Transactions under the U.C.C.*¹ The editors seem to proceed on the same general principles of casebook construction as before, but they have improved the product markedly. Most of these principles I heartily support. They have designed the book for use by *students*, and not for other uses such as promoting their theories or providing citations.² They have also retained the belief, which I hold to be self-evident, that "the interplay between the avoiding powers of the trustee in bankruptcy and the rights of creditors holding UCC security interests is one of the most important themes of a modern Debtor-Creditor course."³ It is no mean feat to select and arrange materials for such a course so that they are both comprehensible and reasonably comprehensive. As one who has tried and failed, I admire this collection, and I am using it with satisfaction.

¹ Old-timers will remember that an editor of another casebook in this field retained his initial title through successive editions, and changed his name. Now the other shoe has been dropped. Although they have changed their title, Professors Warren and Hogan proceed under the same names they began with, some years ago.

² I have some reservations about the editors' restraint in the matter of citations. Reading through the text, I repeatedly felt the want of references to journal articles that would illuminate the topics under consideration. On the intersection of state law and bankruptcy law, the views of Professor Countryman are an essential part of the published record. See, e.g., Countryman, *The Use of State Law in Bankruptcy Cases* (pts. 1-2), 47 N.Y.U.L. REV. 407, 631 (1972). This is particularly so as to the intersection of the Code and the Bankruptcy Act, and on this matter articles by Professor Kennedy equally deserve notice. See, e.g., Kennedy, *The Impact of the Uniform Commercial Code on Insolvency: Article 9*, 67 COM L.J. 113 (1962). Passing references to their work in the opinions reproduced (pp. 664, 761) are not enough.

The neglect extends also to Professor Gilmore, who has provided the subtlest justification—or apology—for section 9-108 of the Code. G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 45.6-.7 (1965). Section 45.8 of the same work should certainly be cited in connection with Note 3, p. 371. Other scholars might be mentioned, but there can be nothing invidious about speaking of these three. Somehow the editors even persuaded themselves to leave students in the dark about the extent of their own distinguished contributions to the literature. What I think is wanted is a short "selected bibliography."

³ P. xv.

Ordinarily it is an empty exercise to notice the dates of opinions used in a casebook, but the facts in the present case are extraordinary. Of the principal cases that Warren and Hogan have reproduced, more than a third were decided since 1971. In this group I am afraid they have netted some ephemera. The risk is apparent in chapter 1, "The Collection Process," which opens with that ancient precedent, *Sniadach v. Family Finance Corp.*⁴ About a hundred pages of the chapter, covering attachment and repossession, are occupied with corollaries of that case, and of *Fuentes v. Shevin*.⁵ Shortly after the book went to press, four members of the Court announced the demise of *Fuentes*.⁶ But as this review goes to press, the *Fuentes* case may have been given a new—albeit limited—lease on life.⁷ The moral is that the advance sheets cannot alone tell us what the law's enduring ideas are.⁸

The sequence of topics in the book is an attractive one, although it is fairly conventional in some respects.⁹ Individual collection proceedings come first, and then collection proceedings are considered in separate chapters for consumer and business debtors. The first Bankruptcy Act provision considered, aside from a look at Chapter XIII, is section 4, and the last, aside from jurisdiction, is section 17. The editors showed good judgment, I

⁴ 395 U.S. 337 (1969); p. 1.

⁵ 407 U.S. 67 (1972); p. 52.

⁶ *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Justice Powell, concurring in the decision, was one of these, along with three of the dissenters. Justice Brennan also dissented, but he would only say that the decision was inconsistent with *Fuentes*. Thus, only four of the Justices considered that the *ratio decidendi* of *Fuentes* remained unimpaired.

⁷ See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975). In a brief concurring opinion, Justice Stewart noted, in the fashion of Mark Twain, "It is gratifying to note that my report of the demise of *Fuentes v. Shevin* . . . [in] *Mitchell v. W.T. Grant Co.* . . . seems to have been greatly exaggerated." 95 S. Ct. at 723.

⁸ I find one citation that is not *au courant*. *Sherrock v. Commercial Credit Corp.*, 269 A.2d 407 (Del. Super. 1970) (p. 552), was reversed, in good time for the fact to be noticed. *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972).

Advances in the minimum wage can overtake any editor. See pp. 12, 15.

⁹ The sequence is open to criticism in a few respects. I think the editors will be sorry that they placed *In re Dudley*, 72 F. Supp. 943 (S.D. Cal. 1947), *aff'd*, 166 F.2d 1023 (9th Cir. 1948), in a section on exemptions, in chapter 1, p. 156. To be sure, it is about a debtor's conversion of assets into exempt form on the eve of bankruptcy; but the opinion might just as well be placed in the chapter on fraudulent conveyances, farther along. As it stands, students who do not already know the law of bankruptcy will be more mystified than need be about the court's reference to the period of four months before the proceeding.

Also, without a background in fraudulent conveyance and preference law, it will be hard for students to follow Professor Hanna's remarks on assignments for the benefit of creditors. Pp. 245-46. For want of a bankruptcy background, the resonances of the succeeding section will also be missed. Pp. 254-63.

think, in giving short shrift to bankruptcy procedure. I have toyed with the notion of sketching jurisdiction early on, so that a choice of forum can be noticed from time to time, incidentally, in connection with cases primarily chosen for other points. Naturally, there is nothing to prevent an instructor from taking up the chapter on jurisdiction out of order. The location of fraudulent conveyance materials is perhaps unconventional: it follows a chapter on bankruptcy avoiding powers. I am satisfied that this will work, however, and that the succeeding chapter—an “introduction” to Article 9—is rightly placed. The climax of this sequence is a chapter treating inventory and receivables financing.

Every good casebook is a mass of compromises, and this one is no exception. In commercial law subjects particularly, there is a compromise to be made between the specialties of practice and the doctrinal structure, as organizing principles. Most of the materials here are arranged in a doctrinal sequence. But in chapter 8 there is a selection of topics connected by similarity of business function; these include consignments, field warehousing, and floating liens. Here also there is a helpful description of the uses and varieties of receivables financing arrangements.¹⁰ More items of this nature would have been welcome. For example, the trust receipt needs an explanation that is not provided. The device appears unheralded in a case in chapter 7.¹¹ A case in the following chapter gives some details of a trust-receipt transaction.¹² Here, by the way, is the first proclamation that Article 9 reduced the distinctions of form among secured transactions—the reform that most preoccupied its authors.¹³ Finally, on the dischargeability of a trust-receipt obligation, the book offers *Davis v. Aetna Acceptance Co.*¹⁴ Nothing essential would be lost, I believe, if every reference to trust receipts were omitted, but once they are introduced a student ought to be told of their common uses and peculiar—as they once were—characteristics.

If there were unlimited time for the teaching of creditors' rights, I should like to devote separate segments of the course to

¹⁰ The editors reprint portions of Professor Greenberg's article, *Inventory and Accounts Receivable Financing*, 1965 U. ILL. L.F. 601, 612-18; pp. 627-32.

¹¹ *Associates Discount Corp. v. Old Freeport Bank*, 421 Pa. 609, 220 A.2d 621 (1966); p. 546.

¹² *In re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. 1966); p. 589.

¹³ The matter is further explained in *In re Yale Express System, Inc.*, 370 F.2d 433 (2d Cir. 1966), a full chapter later. P. 680.

¹⁴ 293 U.S. 328 (1934); p. 744.

the financing of vehicles, farm financing, and perhaps other "functional" units.¹⁵ And I should like to have a chapter on Governments as Creditors—or at least on the United States as a creditor.¹⁶ This book has instead, as its conclusion, a chapter on "Tax Liens and the Federal Priority." Here I find an exemplar of my general point that the book tends to pre-formulate issues for its users and is less congruent with business unities than it might be.

Another example is a section titled "Subordinations."¹⁷ It consists of the case of *Canter v. Schlager*¹⁸ and three brief notes. The case concerns the impact of the Code on a contractor's bonding company making claim by way of subrogation—the section title having been meant to include the word "subrogation." The notes have to do with subordination agreements, and nothing to do with construction credit. The association of these subjects does not seem to be rewarding, in the absence of further explanation. If *Canter* and *In re J.V. Gleason Co.*,¹⁹ a case in a prior chapter, were brought together, they would make a solid nucleus for a section on construction financing, which I envisage as a counselor's delight.

Canter contains a reference to section I-103 of the Code, on supplementation by "principles of law and equity,"²⁰ and a one-sentence excerpt from *French Lumber Co. v. Commerical Realty & Finance Co.*:²¹ "No provision of the Code purports to affect the fundamental equitable doctrine of subrogation."²² These references touch on a theme that I try to make a major one in teaching creditors' rights. The general question is, how far do the detailed provisions of the Code, and of the Bankruptcy Act, displace exogenous principles of law? I find a good deal in this book that will help me develop this theme. I find, for instance, *Bank of Marin v. England*,²³ including Justice Harlan's dissent;²⁴ *Clovis National*

¹⁵ What the editors have done for accounts financing, with the excerpt mentioned above (see note 10 *supra*), I should like for them to have done also for trust receipts, field warehousing, and consignments.

¹⁶ This is where I would have placed *In re Freedomland, Inc.*, 480 F.2d 184 (2d Cir. 1973), *aff'd sub nom.*, *Otte v. United States*, 419 U.S. 43 (1974). P. 710.

¹⁷ Pp. 522-27.

¹⁸ 358 Mass. 789, 267 N.E.2d 492 (1971); p. 522.

¹⁹ 452 F.2d 1219 (8th Cir. 1971); p. 398.

²⁰ P. 523.

²¹ 346 Mass. 716, 195 N.E.2d 507 (1964).

²² *Id.* at 719, 195 N.E.2d at 510; p. 523.

²³ 385 U.S. 99 (1966); p. 346.

²⁴ But the dissent by Justice Fortas, 385 U.S. 99, 111 (1966), is not noticed.

Where *Bank of Marin* is relied upon in a case three chapters later (p. 503), a back-reference would be helpful.

Bank v. Thomas,²⁵ as to waiver in relation to Article 9; and a nice new case on advances to a troubled corporation by dominant stockholders.²⁶ But I do not find the text, questions, and cross-references that would help me realize the theme. Where is *Pepper v. Litton*?²⁷ I miss it sorely. The objections sometimes made to security interests on the ground of unconscionability should have been illustrated, both for the edification and the enjoyment of students.²⁸ I should also like to have at least a précis of the *French Lumber Company* case. A role for estoppel in ranking security interests is hardly hinted at,²⁹ and there is not full disclosure about the restiveness of some judges under the Code ranking system.³⁰ As one court said, an inclusive financing statement gives a creditor a "throttle hold" on the debtor's financing arrangements if the Code system is not qualified in some way—unconscionability? estoppel?³¹ The opinion in that case is set out at some length,³² but the editors omitted the vital point.

The work of the Commission on the Bankruptcy Laws is represented by Chapter I of its report, reproduced as an appendix,³³ by portions of the "Act of 1973" in a paper-bound supplement,³⁴ and by references to these in the text at appropriate points.

Where we find the district court opinion in the *Portland Newspaper* case relied upon in another case (p. 651), I should go so far as to identify it as the same opinion referred to earlier. P. 639, n.5.

²⁵ 77 N.M. 554, 425 P.2d 726 (1967); p. 553. See also *Avco Delta Corp. Canada Ltd. v. United States*, 459 F.2d 436 (7th Cir. 1972); p. 478.

²⁶ *In re Trimble Co.*, 479 F.2d 103 (3d Cir. 1973); p. 714.

²⁷ 308 U.S. 295 (1939). I customarily ask my students to pay a moment's silent tribute to the ingenuity of Pepper's lawyer.

²⁸ A splendid illustration would have been *In re Johnson*, 13 UCC REP. SERV. 953 (Bankruptcy referee's opinion, D. Neb. 1973). But see *In re Turnage*, 493 F.2d 505 (5th Cir. 1974).

²⁹ There is an excerpt from *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967). Pp. 537-38. I would have preferred the opinion in *In re Smith*, 326 F. Supp. 1311 (D. Minn. 1971).

First Sec. Bank v. Wright, 521 P.2d 563 (1974), might be explained on the ground of estoppel or "implied subordination," but not otherwise. Students should be equipped with that explanation, as far as it goes.

³⁰ But see *John Miller Supply Co. v. Western State Bank*, 55 Wis. 2d 385, 199 N.W.2d 161 (1972); pp. 536-37.

Consider the provocative view of Judge Oakes, expressed in *In re Riss Tanning Corp.*, 468 F.2d 1211 (2d Cir. 1972). While concurring in the decision, he said: "I do so reluctantly because the effect of 'dragnet' clauses is to protect larger or institutional creditors against smaller trade creditors or subsequent lien holders." *Id.* at 1213.

³¹ *Coin-O-Matic Service Co. v. Rhode Island Hosp. Trust Co.*, 3 UCC REP. SERV. 1112, 1116 (R.I. Super. 1966).

³² P. 535, Note 1.

³³ The portion on railroad reorganizations is omitted.

³⁴ Chapters I-VII.

The text is virtually noncommittal about the merits of the report except in one respect: it reproduces George Treister's argument for separating the judicial and administrative functions of bankruptcy judges.³⁵ In this I think the editors were wise, for a basic creditors' rights course cannot well include the proper material for judgment on the proposed Act as a whole. There is not much overt criticism of the existing Act in the book, either, but there are some slighting comments that convey chiefly an air of condescension.³⁶ That sort of thing cannot pass for serious evaluation, and I think the book would be better without it.

The editors have generally omitted quotations of the current Bankruptcy Act from the text;³⁷ for these, readers may refer to the supplement. The supplement also contains the Bankruptcy Rules (1 through 928) and Forms (1 through 30). Only snippets of text and comment material from the Code are provided in the chapter focused on the Code. Students should, of course, provide themselves with Article 9 and associated sections, complete, showing the 1972 amendments.³⁸ All this is unexceptionable. The book is relatively free of mechanical blemishes; none of them seem to be important. But it is sad that a misprint occurs in the only poetry I found in the book: The Latin versicle in *Twyne's Case*.³⁹ Some improvement in the apparatus is wanted.⁴⁰ The editors leave it to the instructor to explain the use of Chandler Act section numbers—hardly an inspiring classroom exercise—and the structural significance of that Act would only gradually dawn on an unaided reader. When opinions written before the Chandler Act

³⁵ Treister, *Bankruptcy Jurisdiction: Is It Too Summary?*, 39 S. CAL. L. REV. 78 (1966); pp. 763-65, 771-80.

³⁶ See, e.g., pp. 271-72, 320, Notes. For a shot at Article 6 of the Code—"this mean little Article"—see p. 610.

³⁷ The practice is not altogether consistent. See, e.g., pp. 673, 674, 738.

³⁸ There are no forms to represent security interests. Teachers will at least want to hand around a form UCC-1; in New York they will want to advise students of the Secretary of State's Guide to Filings.

³⁹ 76 Eng. Rep. 809, 815 (Star Ch. 1601); p. 426. The word "clausulae" also comes out wrong in this reprint. These errors carry over from the prior version of the book.

Cosmetic treatment would have been warranted, where the Supreme Court of New Jersey speaks of "praying" upon a bankrupt's distress. *Kielb v. Johnson*, 23 N.J. 60, 127 A.2d 561 (1956); p. 429. Similar treatment is called for where the Supreme Court of Texas misspells Millard Ruud's name. *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 465 S.W.2d 933 (1971); p. 509.

⁴⁰ For example, in reproducing *Zartman v. First Nat'l Bank*, 189 N.Y. 267, 82 N.E. 127 (1907), the editors omit the summary of proceedings below. P. 584. Hence a reader must infer that the trustee was the plaintiff, and the the bank was the appellant. There is nothing to be said for leaving these facts to induction.

are quoted, obsolete references to section numbers should be flagged.⁴¹ As late as the last page, the editors are still giving parallel citations to Title 11, all of which should be dismissed with a few words near the outset.

No further carping about this book could be justified. In conception and in detail it is a superior casebook. Without any intention whatever of being gracious, I shall mention now some of the many features that excite my admiration. Several sections are prefaced by notes that provide overviews.⁴² These are likely to be helpful to students, for they are clear and concise. As aids to teachers, the editors have set Problems at strategic points, which serve in part as exercises and in part as teasers.⁴³ These and the editors' questions seem well-conceived to me.⁴⁴ There are very few blind references to cases.⁴⁵ The treatments of bankruptcy jurisdiction,⁴⁶ of bulk transfers,⁴⁷ and of the 1970 discharge amend-

⁴¹ These include the references to section 12 in *Zavelo v. Reeves*, 227 U.S. 625 (1913), and to sections 67a, 67e, and 67f in *Moore v. Bay*, 284 U.S. 4 (1931), *Dean v. Davis*, 242 U.S. 438 (1917), and *Straton v. New*, 283 U.S. 318 (1930). Pp. 690, 353, 385, 666.

⁴² E.g., pp. 179 (coercive collection conduct), 420 (fraudulent conveyances).

⁴³ A rapid but pointed treatment of Article 6 of the Code ought to be possible, for instance, starting with the Problem on p. 610. Similarly, other problems offer a conspectus of a bankruptcy trustee's rights in life insurance policy values. Pp. 336, 340. On the latter topic, however, the book lays too much emphasis, I think. The matter is further pursued in *In re Hygrade Envelope Corp.*, 393 F.2d 60 (2d Cir. 1968). P. 378. Having gone so far, I believe, the editors should provide readers with the circumstances of the death of Jack Wohl, the *cestui qui vie* in that case. For discussion of another phase of that case see also pp. 390-92.

⁴⁴ For questions that are a continuing challenge to owners and creditors of failing firms see p. 448.

The following question relates to UCC 9-301 and § 70e of the Bankruptcy Act: "Is 'subordinate' under the Code the equivalent of 'voidable' under the Bankruptcy Act?" P. 356. Professor Countryman states that no one has had the temerity to say "no." Countryman, *supra* note 2, at 657. For years I have asked my students the question, with mixed results. I am delighted to see that others are asking.

For examples of many superior Notes see pp. 736-37, 743-44.

⁴⁵ An example of the bad is the citation to *Harris v. Manufacturers Nat'l Bank*, 457 F.2d 631 (6th Cir. 1972). P. 719. The reference follows an excerpt from § 4-508 of the Proposed Bankruptcy Act of 1973, about discrimination against bankrupts. What should go here is a question: Is it "discriminatory treatment" for a lender to withhold credit because the prospective borrower has been discharged?

The editors use Notes to dispatch *Nunnemaker Transp. Co. v. United Cal. Bank*, 456 F.2d 28 (9th Cir. 1972). Pp. 626, 655. My information from counsel leads me to doubt their characterization of the collateral; and in any event there is more to this case than they disclose.

For a blind statutory reference see p. 191 (cross-reference to § 425.205(1) of Wisconsin Consumer Act). In view of the substantial excerpt from this Act, a citation to the symposium it prompted (1973 Wis. L. Rev. 333) would be appropriate.

⁴⁶ Pp. 763-94.

⁴⁷ Pp. 609-19. The topic does not seem to fit very well under the heading "Inventory Financing."

ments⁴⁸ are especially judicious, I think. The treatment of a seller's right of reclamation is imaginatively located.⁴⁹ Without exception the excerpts drawn from journals are well chosen.⁵⁰ For some cases, where the information is suggestive, the names of counsel are included;⁵¹ this is skillful editing. I am appreciative of the few older cases included—especially *Hanover National Bank v. Blake*.⁵² Like the editors, I am often gripped by the very latest cases, and I welcome many of these—such as *In re Blair & Co.*⁵³ For these and many other merits, let us be grateful. I warmly commend this book to the attention of fellow teachers and students of debtor-creditor law.

*William F. Young, Jr.**

⁴⁸ Pp. 757-62.

⁴⁹ The editors deal with this at the end of a section on the position of secured parties in the bankruptcy order of distribution. Pp. 684-85.

⁵⁰ The editors are right that the colloquy on Chapters X and XI covers an astonishing amount of ground in brief compass. *American Bar Panel Discussion—Your Corporate Client Is in Financial Difficulty and Solicits Your Advice*, 28 Bus. LAW. 253 (1972); pp. 301-17. Somewhere, I think, students should be informed of the incidence of proceedings under these chapters and under Chapter XIII.

⁵¹ See, e.g., *Rockmore v. Lehman*, 129 F.2d 892 (2d Cir. 1942), *cert. denied*, 317 U.S. 700 (1943) (list of amici); p. 624.

⁵² 142 N.Y. 404, 37 N.E. 519 (1894); p. 241.

⁵³ 471 F.2d 178 (2d Cir. 1972), *vacated and remanded*, 414 U.S. 212 (1973); p. 274.

* Professor of Law, Columbia University Law School. B.A. 1947, LL.B. 1949, University of Texas.