

10-1-1963

A Canny Helmsman in Uncertain Waters: The Working Scholar: Credit

Vern Countryman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Vern Countryman, *A Canny Helmsman in Uncertain Waters: The Working Scholar: Credit*, 18 U. Miami L. Rev. 11 (1963)

Available at: <https://repository.law.miami.edu/umlr/vol18/iss1/7>

This Tribute is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

*A Canny Helmsman in Uncertain Waters*¹

THE WORKING SCHOLAR: CREDIT

VERN COUNTRYMAN*

During the period separating the two World Wars, legal educators were led by some of their best minds in a massive assault upon nineteenth century conceptualism. In a movement which began at Columbia but caught fire at Yale, they set out to demonstrate the error of the abstract generalization, the delusive qualities of the categorical label, and the shoddy analysis which underlay both the systematic statement of legal rules in learned treatises and the systematic pursuit of those rules through the inductive processes of the case method of instruction. It is one of the ironies of the history of this movement, and perhaps further evidence of the validity of its indictment of the existing order, that its exponents had also to be categorized and labeled. In a term as infelicitous as any they attacked, they became the Legal Realists.

Wesley Sturges was one of their number. At least he must be counted in their ranks so long as their efforts were devoted to exposing the error of dominant ways of thought. But an effort so confined was vulnerable, or could be made to appear vulnerable, to one line of attack: it was purely destructive, offering no alternative to that which it sought to destroy.

Many in the movement sought to rebuild as they tore down, but their prescriptions for the new order were varied. Some resorted to the quantitative methods of the natural sciences and sought to substitute for the old abstractions a system of weights and measures applied to "operative factors." Wesley did not join in that endeavor. Indeed, he was once at pains to demonstrate that statistics on the increase of wage earner bankruptcies were not to be related to the severity of state collection remedies and could not be made to prove that restrictions upon the bankruptcy discharge and provisions for a wage earner's plan of arrangement would reduce the number of defaulting wage earner debtors.¹

Others sought new approaches and new solutions by teaming with the social scientists. Wesley did not follow this course either and, after observing those who too exuberantly did, was moved to voice a warning about the indiscriminate resort to such partnerships:

There is no little commotion among law professors and deans about the "correlation" of "law" and "economics." It is proposed to have "economists" do their stunts in "economics"

* Dean and Professor of Law, University of New Mexico.

1. Sturges & Cooper, *Credit Administration and Wage Earner Bankruptcies*, 42 *YALE L.J.* 487 (1933).

in an amalgamation with the instructors of "law." The pressure has become so acute at times that one would have lacked prestige and efficacy in attempting to take up with a class in law school the searching qualities of demurrers or the distinctions as to "frivolousness" and "sham" in motions to strike, unless one had at least "a plan" whereby an "economist" might participate in the work. The passion for "correlating" has become so intense and promiscuous that any old economist will do.²

Still others found salvation in a resort to "natural law," or a variant thereof under which "democratic values" were substituted for truth eternal. Wesley lacked the arrogance to embrace either of these approaches, though he possessed the tolerance to abide all approaches, as he had ample opportunity to demonstrate during his 1945-1954 deanship at the Yale Law School.

For Wesley it was sufficient to expose the slogan that substituted for thought, to impeach the generalization which made the like seem unlike and the dissimilar similar, and to lay bare the problem for solution. With this much done, men of intelligence and good will could then attempt to fashion solutions for their time as they have always done, with such assistance as could be obtained from improved knowledge of facts and understanding of man and his environment. It seems now safe to say that time has vindicated Wesley's approach, that the real contribution of the Legal Realists to legal education was in their "destructive" attack on prevailing substitutes for thought and in their insistence upon the rigorous analysis of words and concepts. In discharging this function, Wesley had no peer. Fortunately for the development of the law relating to credit, he gave his talents to that field as well as to commercial arbitration.

His first published work in the field of credit, *Legal Theory and Real Property Mortgages*³ was typical Sturges: witty, courteous and devastating. Legal writers had for years been expounding upon the distinctions between the "title theory," the "lien theory" and the "intermediate theory" of mortgages. Wesley undertook to analyze what they had said, with results which could hardly have been comforting to those who had written. Some examples:

(1) Pomeroy had written⁴ that in England, "In law, the mortgagee is clothed with the entire legal estate" and "vested . . . with legal title," but "In equity, the mortgagee has no estate, but only a lien; while the mortgagor is clothed with the equitable estate . . . which is to all intents

2. Book review, 25 GEO. L.J. 497, 500 (1937). These remarks were not inspired by a general hostility to economists. No one appreciated more than Wesley the talents of the gifted Walton Hamilton.

3. 37 YALE L.J. 691 (1928), written with Samuel O. Clark, then an editor of the *Yale Law Journal*.

4. POMEROY, EQUITY JURISPRUDENCE §§ 1179, 1182 (4th ed. 1918).

and purposes the full ownership, except that it is subject to be cut off and destroyed by" foreclosure. Where in equity, Wesley wanted to know, "is the legal estate, if there *is* one"? And what was this "only a lien" which "is 'no estate' in equity but 'the legal title' in law"?

(2) Kent had said⁵ that "the case of mortgages is one of the most splendid instances of the triumph of equitable principles over technical rules." Did the Chancellor use "principles" and "rules" synonymously? Wesley inquired. If not, what distinction was intended? If so, Kent had said that equitable principles triumphed over technical principles, and what did *that* mean? Was an "equitable principle" one incorporating "a broad ethical meaning of fairness" or merely any principle employed by a court of equity?

(3) Durfee had explained⁶ that "the original common law theory of mortgage was that there were no mortgages" but only conditional conveyances for which the courts of law had "no special rules . . . which could be called a 'law of mortgages.'" However, equitable doctrines had developed by the middle of the Eighteenth Century and "these doctrines, by reason of the practical supremacy of equity over law . . . came to be . . . the really substantial 'law of mortgages' so recognized everywhere except in courts of law." Again Wesley called for a definition of terms. Did "doctrines" and "law" have some unspecified differences in meaning? If not, then Professor Durfee had only succeeded in saying that "the equitable doctrines came to be the 'really substantial *doctrine* of mortgages' in equity; and the equitable law came to be the 'really substantial *law* of mortgages' in equity; and the equitable law came to be the 'really substantial *doctrine* of mortgages' in equity, and this was 'recognized everywhere except in courts of law.'"

In any event, Wesley was "inclined to entertain sympathetically the student's complaint that his instruction in these theories is useful, if at all, only in a way not yet disclosed." The attempt "to report synoptically on the total nature of 'the mortgage,' to set forth a conceptual entirety of 'the mortgage,' is the technique of the metaphysician" whose aim is "to give an account of everything all at once."⁷ But when the supposed differences between the three theories were tested against the results of the reported cases in states allegedly subscribing to one or another theory, the attempted distinction seemed to explain nothing at all.

5. 4 KENT, COMMENTARIES *158.

6. Durfee, *The Lien or Equitable Theory of Mortgage—Some Generalizations*, 10 MICH. L. REV. 587, 592-93 (1912).

7. When Wesley was assigned to write on the history of real property mortgages, he gave a fair account of the varying "theories of mortgage," but cautioned that in attempting to resolve any particular issue arising out of a mortgage transaction attention should be paid to the language of the instrument, the purposes of the transaction and the procedural remedies available. "It is especially insignificant in this connection to determine as a matter of legal doctrine the nature of the mortgage." Sturges, *Mortgage*, 11 ENCY. SOC. SCI. 32, 35 (1933).

Execution creditors of the mortgagor were allowed to reach his interest in title theory states where he was said to have "no legal estate," in lien theory states where he was "the real owner of the land" and in intermediate theory states where the mortgagor was supposed to have "title" until default. But the mortgagee with judgment on the mortgage debt was not allowed to levy execution on the mortgaged property under any theory, and neither were judgment creditors of the mortgagee. Disposition of the dower rights of the wife of the mortgagor seemed with uniformity to turn on differences of facts—the time of marriage, of execution of the mortgage, of foreclosure, whether or not the mortgage was for purchase money—and not at all upon the prevailing theory of the nature of a mortgage. True, the cases dealing with the mortgagee's right to possession in absence of agreement seemed to fall into categories which gave him possession (a) before default, (b) after default and (c) after foreclosure, and these results might be made to correspond to the three theories. But if so, "the terms in which each of the theories is expressed . . . are more general than is necessary to report the particular rule of law, and . . . the specific rule of law is not mentioned in their terms." Moreover, there was the nagging question "which begat the other"—broad theory or narrow decision?

The theories fared no better when tested on the decisions of a single jurisdiction. A variety of cases selected at random from North Carolina, a state also selected at random, revealed the court disposing of various issues, with the explanation sometimes that the mortgage "carries the legal title to the mortgagee," sometimes that the mortgagor "in equity has the entire estate subject to the incumbrance," sometimes that the mortgagor is entitled to the rent before foreclosure because "title to the rent is dependent on that of the property," and sometimes that "the mortgagee is the depository of the legal estate, and holds it for the security of his own debt and then in trust for the mortgagor." But, as compared with decisions of other states, North Carolina was not exceptionally confused concerning its theory of mortgage:

We are reluctant to refer to the situation as one of "confusion" because the opinions of the North Carolina Court were approached with a feeling that, true to life generally, questions in mortgage law are many and complex and that a court confronted with its live parties presenting conflicting claims is likely to be influenced by the particular case to the prejudice of any simple generalization, general legal principles, legal theory or conception of "a mortgage," and that the symmetry of any doctrine or conception will be lost in that "wilderness of a single instance." Unless it is postulated that the establishment and preservation of such a symmetry is the primary, fundamental, far-reaching function of the court we do not criticize it for its variations. . . . Without presuming to declare why judges behave like judges, we do submit that the writing of opinions couched

in one or more terms which are more, rather than less, abstractions, in terms of generalizations, general legal principles, legal doctrine or legal theory, is a problem involving the functions of language. . . . [W]e believe . . . that the words reporting the theories, doctrines and generalizations which are under consideration are not used as symbols designed to be *descriptive*, but rather to be *emotive*. They are "one word more" in soliciting approval, in urging plausibility, for a particular judgment.⁸

All of this, and the plight of Messrs. Pomeroy, Kent and Durfee, can only be familiar to Wesley's former students, for the same thing occurred daily in class. As it was never my privilege to be enrolled in his classes (though I did on occasion visit them to remind myself of my own inadequacies), let me summon the recollection of one who was:

The virtuosity of Wesley's classroom technique is legendary among all his students. His wit, which seemed never to fail him, was razor-keen. His fertility in inventing hypothetical variations appeared to be inexhaustible. His ingenuity in playing the devil's advocate was unbelievable. A not infrequent sight in Wesley's classes, which the rest of us followed with a barely concealed delight, was that of the learned and consciously brilliant Editor-in-Chief of the YALE LAW JOURNAL falling ignominiously into helpless contradiction with himself as he shifted his position back and forth, back and forth, following the will-of-the-wisp logic of the imperturbable instructor who, with a wave of his magic wand, would transform the indisputably white into the incontrovertibly black—and back again. I should add that all this prestidigitation was carried out without the slightest suggestion of cruelty toward the victim at whose expense these mystifying tricks were performed. It was not, perhaps, an altogether enjoyable experience to the victim while it was going on but it was, unquestionably, an instructive one. And no one ever doubted that Wesley was as wholeheartedly devoted to his students as his students were to him.⁹

The same conceptualism which dominated legal thinking in the 1920's also dictated the shape of the law school curriculum. If the divisions of the curriculum and the content of courses did not entirely "owe their origins to the common law writs," as one member of the Realist group has suggested,¹⁰ it was at least true that they were "largely the product of the groupings of material made by certain text-book writers of the late eighteenth and early nineteenth centuries. . . ."¹¹ A few schools had brought problems of Corporations and of Partnership into a single course, but this was largely "a tandem arrangement, *i.e.*, one fol-

8. *Op. cit. supra* note 3, at 713-14.

9. Gilmore, *For Wesley Sturges: On the Teaching and Study of Law*, 72 YALE L.J. 646, 653-54 (1963).

10. Arnold, *Wesley A. Sturges: In Memoriam*, 72 YALE L.J. 640 (1963).

11. Powell, *Modern Movements in Legal Education*, 6 AM. L. SCH. REV. 402, 405 (1929).

lowing the other in point of time rather than a combination of the materials . . . into one course."¹² Harvard had initiated combined courses in Wills and Conveyancing and in Mortgages and Suretyship, but they too involved "little more than the giving of the substance of two courses with a single examination at the end of the year."¹³ In most law schools, problems involving various aspects of credit were dealt with in separate courses on Mortgages, Suretyship, Negotiable Instruments, Sales, Trusts, Bankruptcy, Personal Property, Real Property, Equity and Procedure.

In 1930 Wesley published his *Cases on Credit Transactions*, materials he had been using for five years at Yale, which brought together for comprehensive and integrated consideration the problems of secured credit, whether the security consisted of property or the personal undertaking of another, whether in the form of a conditional sale of goods or a real estate mortgage, whether credit was extended in the course of a sale of goods or in a loan unrelated to a sale.

Here for the first time was presented ample opportunity for comparative evaluation of the full range of security transactions devised by lawyers' ingenuity. Suretyship, pledge, mortgage, conditional sale, trust receipt, and their variants were examined in terms of the manner of their creation, the obligations thereby imposed on debtor and creditor, the protection afforded against other creditors, third party purchasers, encumbrancers and the bankruptcy trustee, and the methods of enforcement. In recognition of the fact that the creditor might find it desirable to obtain credit for himself on his own credit extensions, a separate chapter dealt with "Security Holders' Use of the Credit and Security Documents."

Here, as elsewhere, conceptualism frequently befogged the issues. In dealing with suretyship arrangements, for instance, judges and writers were wont to make distinctions in the abstract between the "surety" and the "guarantor," between the obligation which was "primary" and that which was "secondary" or that which was "independent" and that which was "accessorial," between defenses which were "purely personal" and those which were not. In his materials and in class, Wesley probed for the meaning, if any, of these terms, and directed inquiry to similarities and differences in the language of documents, in the purposes of transactions and in the facts out of which particular disputes arose, attempting, as he stated in the preface, "to deal with commercial law in terms of commercial doings."

But, as old concepts were exploded, new ones must also be tested. Thus, the old notion that the surety was a "favorite of equity" entitled to have his undertaking strictly construed, being apparently inspired by

12. Arnold, *Book Review*, 31 COLUM. L. REV. 734 (1931).

13. Sayre, *Book Review*, 16 IOWA L. REV. 335 (1931).

cases where the surety appeared as accommodating friend or relative, did not seem appropriate when the commercial surety company appeared on the scene:

As a result of this development courts and legal writers have come to compare "the modern compensated surety," "the corporate surety," with other sureties and have attempted to generalize the effect upon the law of suretyship. There have been many arguments for and against the proposition that these surety companies are insurers and that, as such, their obligations are more stringent and their defenses more restricted than are those of an individual surety-guarantor. To the extent that many of these surety bonds are sold for a premium, which is determined on the basis of a law of averages experienced on the particular risk assumed, and in view of the fact that these contracts, generally very elaborate in detail, are written by the company, aspects of an insurance policy are apparent. But, on the other hand, insurance is a broad term in commercial and legal usage. It is difficult to catch functional similarities between a bond of a surety company which has been given for the value of property in lieu of surrendering it in a replevin action and an insurance policy sold to an automobile owner to protect him from liability claims for personal injuries. This is not an argument against treating the two contracts similarly on some given legal issue. Their functional distinctions do, however, tend to encourage doubt if there is not substantial oversimplification in identifying these transactions which are functionally so different. . . . The generalizations as to the effect of the advent of the surety company upon the law of suretyship suffer from the same vice as those upon the distinctions between suretyship and guaranty.¹⁴

Wesley's pioneering book—now in its fourth edition¹⁵—was widely adopted and inspired the creation in many law schools of functionally oriented courses on secured credit transactions, as it also inspired the creation of similar competing course books.

Three years after this book first appeared, it was followed by *Cases on Debtors' Estates*, dealing comprehensively with the various methods of liquidating the estates of insolvent debtors—composition and extension agreements, assignments for the benefit of creditors, receiverships and bankruptcy. Here again, the treatment was not accumulative, but comparative and functional. The materials relating to each liquidating device were presented to permit comparative examination of problems relating to initiating the liquidation, administration of the estate, discharge and final settlement. Here again, there were traditional concepts to explore and question: "consideration" as applied to the composition

14. Sturges, *Suretyship and Guaranty*, 14 ENCY. SOC. SCI. 482, 485-86 (1933).

15. STURGES, *CASES ON CREDIT TRANSACTIONS* (4th ed. 1955).

or extension contract; "duress" as applied to the assignment for creditors; "collusion" and "fraud" as applied to the consent receivership; the concepts of the "wage earner," the "farmer" and the corporation not "moneyed, business, or commercial" who are protected from involuntary bankruptcy. Also subject to question were the distinctions between an assignment and a mortgage; between the "bankruptcy test" and the "equity test" of insolvency; between a "lien" and a "priority"; between state "bankruptcy laws" which are suspended by the federal Bankruptcy Act and state "insolvency laws" which are not; between "dominion reserved" by the debtor which would invalidate an assignment of accounts receivable under *Benedict v. Ratner*,¹⁶ and "policing" by the assignee which would save it; and between the secured creditor with "title" who can reclaim his security and the one with a "lien" who cannot.¹⁷ As bankruptcy and receivership reform was in the air, the book included much of what was to become a part of the legislative history of the Chandler Act of 1938, as did the second edition published in 1937.

Like two other books which appeared shortly before his,¹⁸ Wesley's work again marked a departure from the traditional curriculum under which Bankruptcy was treated in a separate course, the assignment for creditors was treated, if at all, as a special form of Trust, composition and extension agreements might or might not be mentioned as the class in Contracts considered consideration, and receiverships were dealt with in Procedure and/or Equity.

With his two coursebooks Wesley brought virtually the entire range of credit problems into a focus which stressed study in terms of function rather than form. The only significant omission was of the devices by which unsecured creditors seek to collect their claims—devices whose use not infrequently results in precipitating a bankruptcy liquidation. But perhaps this omission was due to the fact that colleagues had pre-empted these matters in an experimental new course in Procedure.¹⁹ In any event, Wesley did not leave this field untilled. His study of the system of grab law implemented by the writs of attachment, garnishment and execution, creditors' bills, supplemental proceedings and the judgment lien led him to advocate a process of underfiling, by which a proceeding

16. 268 U.S. 353 (1925).

17. That this testing of concepts is still necessary is evidenced by *In re Lakes Laundry, Inc.*, 79 F.2d 326 (2d Cir. 1935), *cert. denied*, 296 U.S. 622 (1935), concluding that machinery held by the debtor under conditional sales contracts was not "property of the debtor" to be dealt with in a § 77B reorganization under the Bankruptcy Act, by the draftsmen of Chapter X of that Act who preserved the same language in § 216(2), and by the draftsmen of Article 9 of the UNIFORM COMMERCIAL CODE who enact in § 9-202 that "Each provision of this Article . . . applies whether title to collateral is in the secured party or in the debtor" and who comment (Comment 1 to § 9-507) that they have thereby overruled the *Lakes Laundry* case.

18. HANNA, *CASES ON CREDITORS' RIGHTS* (1931); BILLIG AND CAREY, *CASES ON THE ADMINISTRATION OF INSOLVENT ESTATES* (1932).

19. See ARNOLD & JAMES, *CASES ON TRIALS, JUDGMENTS AND APPEALS* (1936).

initiated by one creditor would be administered for all, and a system of priorities based on the time of extending credit. This system, he persuasively argued, would encourage a more rational administration of credit extension by creditors themselves, since the virtue to be rewarded would no longer be the diligence of racing to collection but "diligence in ascertaining the status of the debtor—and this before credit is extended."²⁰ His proposals have not been adopted, and consumer credit extensions have been increased in the last decade alone by 220%²¹ by creditors who seem driven chiefly by the desire to get as much on the books as possible regardless of collectibility.²² In the same period, personal bankruptcies have increased more than 400%.²³

Unhappily for those of us who labor in the field of credit, the press of other duties took Wesley away from the problems of insolvent estates some twenty years ago,²⁴ but we all remain greatly in his debt. More than any other man, he created what we try to perpetuate in his example.

Unfortunately, we have not learned well what he taught us, or preserved all that he gave us. In many schools the study of secured credit problems is again divided along basically artificial lines. The teachers of Sales and Negotiable Instruments, apparently on the theory that "goods is goods and bills is bills" and that all transactions relating to either should be lumped together, have taken over the problems of chattel and documentary security—a curricular development now fortified by the corresponding coverage of the Uniform Commercial Code. This leaves problems of real property security and of suretyship, to the extent not touched by negotiable instruments law, as isolated remnants to be dealt with elsewhere, frequently in the same uneasy tandem arrangement which prevailed at Harvard thirty years ago. And all too often the chattel security teacher on the one hand and the teacher of mortgages and suretyship on the other know and think too little of alternative security arrangements, they both have an inadequate understanding of the insolvency administration in which security really becomes important, and the teacher of insolvency administration is similarly deficient in his understanding of security arrangements. We would do well to go back and move forward on the course Wesley charted for us.

20. Sturges, *A Proposed State Collection Act*, 43 YALE L.J. 1055 (1934).

21. From \$28.9 billion in December, 1953, to \$63.45 billion in December, 1962. FED. RESERVE BULL., February, 1954, p. 186; *Id.*, February, 1963, pp. 244-45.

22. See S. REP. No. 1688, 86th Cong., 2d Sess. (1960); H.R. REP. No. 1111, 86th Cong., 2d Sess. (1959).

23. From more than 33,000 in 1953 to more than 133,000 in 1962. ADMIN. OFFICE OF UNITED STATES COURTS, TABLES OF BANKRUPTCY STATISTICS (1953-1962).

24. Others carried his coursebook through two more editions, in 1940 and 1949.