

Cases and Materials on Commercial and Consumer Transactions

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BOOK REVIEW

Cases and Materials on Commercial and Consumer Transactions.

WILLIAM E. HOGAN AND WILLIAM D. WARREN. Mineola, New York: The Foundation Press, Inc. 1972. Pp. xxvi, 951.

The great professors of commercial law were not simply masters of statutory technicalities, they were law reformers, empirical researchers, statutory draftsmen, and philosophers of law. This range of abilities and interests was important to their teaching, as indeed similar attributes are important to any exciting teaching. Gilbert Highet in his book, *The Art of Teaching*, explained:

Young people hate grown-ups for many reasons. One of the reasons is that they feel grown-ups' minds are fixed and limited. Whenever they meet a man or a woman who does not always say what they expect, who tells them novel stories about strange aspects of the world, who throws unexpected lights on what they sadly know as ordinary dull life, who seems as completely alive, sensitive, energetic, and zestful as they themselves, they usually admire him or her. . . .

The neglect of this principle is one of the chief reasons for the bad teaching that makes pupils hate schools and universities and turn away from valuable fields of knowledge.¹

During the long campaign for general adoption of the Uniform Commercial Code, it was difficult to disregard Highet's principle. The examination of business customs and practices as part of the effort toward law reform provided a basis for telling "novel stories about strange aspects of the world."² However, the impetus which this campaign once gave to great teaching may be lost unless professors of commercial law continue to concern themselves with problems of law reform. One of the assets that Professors Hogan and Warren bring to the preparation of teaching materials in commercial transactions is their concern for such reform.³

The curriculum in commercial law, which initially contracted under the influence of the UCC, is now expanding. Secured transactions, products liability, and consumer protection deserve and are

¹ G. HIGHET, *THE ART OF TEACHING* 15 (1950).

² *Id.*

³ For example, Professor Hogan was a Consultant to the New York Law Revision Commission in 1960-1961. Professor Warren served as a Reporter-Draftsman on the Uniform Consumer Credit Code and is currently a Consultant for the California Law Revision Commission.

receiving greater attention than they received during the early 1960's.⁴ Some would exclude products liability and consumer protection from a commercial transactions course on the ground that commercial lawyers should be concerned solely with relationships between merchants. Although these subjects do need the more thorough attention of a separate course or seminar, commercial transactions would be a poorer course without them and students would be justified in describing such an abridged course as "fixed and limited."⁵ The current efforts to reform consumer credit and other laws protecting consumers afford an occasion not only to discuss the drafting of reform legislation but also to examine the relationship between law and economics and to question whether current laws or proposed reforms are adapted to emerging social realities.

The structure of teaching materials can either facilitate or inhibit good teaching. The Hogan and Warren materials are admirably organized in several respects. In order fully to explain their structure one must mention an earlier book by the same authors, *Cases and Materials on Creditors' Rights and Secured Transactions Under the UCC*,⁶ which undertakes to examine the interplay between bankruptcy law and secured transactions and contains a thorough presentation of inventory and accounts receivable financing.⁷ Together the two Hogan and Warren books form the basis for complementary courses. Secured transactions deserves more extended treatment than can be accorded it in an introductory course in commercial law. Only when it is presented as a substantial portion of a second course may it be given the intensive treatment it deserves. A course which discusses secured transactions in combination with the Bankruptcy Act and other relevant statutes begins to fill the need for a comprehensive course in credit. In addition, such an approach encourages students to examine the interrelationships among the various areas of law. Professors Hogan and Warren make the examination of these interrelationships a structural principle of both their books.

At one particular place in their book on commercial and consumer transactions the two topics interrelate very fruitfully. When presenting

⁴ See Donnelly, *Materials on Commercial Transactions: Back to the Curriculum Committee*, 25 J. LEGAL ED. 94 (1973).

⁵ G. HIGHER, *supra* note 1, at 15.

⁶ W. HOGAN & W. WARREN, *CASES AND MATERIALS ON CREDITORS' RIGHTS AND SECURED TRANSACTIONS UNDER THE UCC* (1967).

⁷ The secured transactions material in their latest book on commercial and consumer transactions is good, but it does not cover such topics as inventory and accounts receivable financing with the depth of the earlier book.

the doctrine of holder in due course of a negotiable instrument, the authors use *Unico v. Owen*⁸ to raise the topical question whether this doctrine should apply to consumer credit transactions.⁹ To explore that problem fully one must also discuss assignments free of defenses under section 9-206 of the Uniform Commercial Code, the use of credit cards, and laws such as New York's Specious Cash Sales statute,¹⁰ which subject a creditor who ostensibly establishes an independent relationship with the debtor to the defenses which the consumer-debtor has against the seller. This presents an opportunity to examine a variety of legal forms into which the same economic relations can be cast. The discussion of these various forms provides an excellent occasion to present the role and structure of credit in our society.¹¹ The interplay here between consumer and other areas of commercial law makes possible both a comparative examination of certain basic economic and legal structures and an analysis of the manner in which legal concepts are used to characterize business relationships. It also affords relief from the somewhat unreal world of negotiable instruments.

A generally accepted purpose of a commercial transactions course is to introduce law students, who often have been educated in liberal arts colleges, to the patterns of business activities and to the complexities of statutory interpretation. The course serves other traditional and perhaps not unrelated functions. The legal realists who drafted the Uniform Commercial Code were very much concerned with the relationship between abstract rules of law and practical realities. This concern manifested itself in field research and an attempt to adapt the law to business custom and practice. In drafting the Code, however, the realists were presented with a peculiar challenge: having described statutory rules as "paper rules,"¹² they now faced the dilemma of creating additional paper rules or of somehow finding an acceptable alternative. The manner in which the drafters surmounted this challenge has made the commercial transactions course a very useful occasion for teaching the creative mode of legal realism.¹³

⁸ 50 N.J. 101, 232 A.2d 405 (1967).

⁹ P. 343.

¹⁰ N.Y. GEN. BUS. LAW § 252 (McKinney Supp. 1972). See also NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMER ACT § 2.407 (1970).

¹¹ Preceding this discussion, the materials provided a basis for examining the dealer's own relationship with the finance company by presenting *Pickett v. Nationwide Acceptance Co.*, 222 Tenn. 423, 436 S.W.2d 442 (1969), followed by forms for a dealer's agreement for assignment of chattel paper and an automobile dealer's agreement with a bank for performance of conditional sales contracts purchased by the bank. Pp. 288-300.

¹² Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447-52 (1930).

¹³ Another good occasion is the course in conflicts of law.

The sales material, which serves as a primary vehicle for presenting these insights and which offers an opportunity for a miniature course in the legal process, raises the difficulty of attempting to integrate into a single unit material previously examined in different courses. A modern contracts course covers much of the sales material in a different context and the students discuss products liability in their torts course. A major virtue of the Hogan and Warren materials is the manner in which they resolve this difficulty. Their efficient coverage of sales does not impair its value as a tool for teaching statutory interpretation, legal realism, and the legal process in a business context.

One can use the material on remedies of sellers and buyers to introduce planning¹⁴ and counseling. The "turkey" problem,¹⁵ dealing with the situation of the buyer who just before Thanksgiving receives a shipment of nonconforming turkeys, provides an effective basis for this discussion. In the short segment on documentary transactions¹⁶ the authors refer back to this problem, thus allowing for discussion of the effect of documentary transactions on the buyer's remedies. I have had success in working the "turkey" problem from the point of view of an attorney for the seller. From such a perspective one can examine the role of documentary transactions in the planning process.

In addition to the excellent organization of the materials prepared by Professors Hogan and Warren, the contents of the materials themselves are admirable. The selection of cases on products liability, for example, is well-considered. By initiating the discussion of this topic with *Green v. American Tobacco Co.*,¹⁷ one can plunge both into the conceptual problems that are such a fascinating part of products liability and into the current controversy over the exact definition of a product defect.

I would not, however, be a reviewer if I did not quibble with some features of these very excellent materials. I regret, for example, the absence of the crashworthy car cases,¹⁸ which present the problem of defining a product defect in a contrasting context. More extensive notes on federal regulation of product quality standards would also be desirable. A commercial transactions casebook ideally should contain an abundance of problems and documents. There are a number of prob-

¹⁴ For a discussion of planning, see Dauer, *Expanding Clinical Teaching Methods into the Commercial Law Curriculum*, 25 J. LEGAL ED. 76 (1973).

¹⁵ P. 192.

¹⁶ P. 244.

¹⁷ 391 F.2d 97 (5th Cir. 1968), *overruled*, 409 F.2d 1166 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

¹⁸ See, e.g., *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

lems and documents in the Hogan and Warren materials; however, the number is insufficient. In fairness, I should note that many of the cases can be used as a basis for discussing planning or litigation problems, and that each reservation I have noted can be minimized by the user of the book supplying very short supplementary material. Only one distinct improvement in the chapters on consumer credit can be imagined: they are so valuable that they should be issued in addition as a separate pamphlet to make them more widely available.¹⁹ Among other advantages, a teacher using the creditors' rights and secured transactions book by Professors Hogan and Warren could choose to present a more comprehensive study of credit by discussing debtors' right at greater length.²⁰ length.²⁰

I plan to experiment when I next use the materials under review by starting with the section on negotiable instruments and the bank collection process.²¹ An introduction to banking law will guide the student directly into analysis of relatively complex business transactions. This portion of the materials is also an appropriate place to begin discussion of statutory interpretation. Although the relevant Code provisions are fairly simple and traditional in structure, the need to correlate a number of sections will develop in students one of the essential skills for reading statutes. This arrangement of the Hogan and Warren materials will also allow discussion of *Unico v. Owen*²² and the patterns of credit transactions to take place early in the course. Again, students will have an early opportunity to delve into the analysis of business transactions, and in this instance to examine the relationship between commercial and consumer law. Moreover, in using this section of the book one can introduce unconscionability and the underlying

¹⁹ Some materials from the National Consumer Act (*see note 10 supra*) also might be usefully employed in the section on consumer credit.

²⁰ When commercial transactions is taught in two separate courses, one cannot be certain that the creditors' rights students will have used the Hogan and Warren materials for their more basic course.

²¹ A possible outline of the early part of the course would be: (1) Liability of Parties, pp. 247-301, (2) The Commercial Bank and Its Customer, pp. 443-538, (3) Transfer, Defenses, and the Good Faith Purchaser, pp. 302-439. I might then move directly to the material on risk, pp. 156-73, followed by the chapter on the remedies of buyer and seller, pp. 174-245. After the sales remedies, I would discuss the chapter concerning limitations on creditor agreements and practices, pp. 798-852. I so admire the products liability material, pp. 17-145, that I would restrict my wordiness by leaving this material until later, perhaps after the restrictions on creditors' and sellers' agreements. I would close with the material on consumer credit, pp. 717-97. If my coverage of this section was brief because of time considerations, I would be prepared to discuss it during my course in creditors' rights.

²² *See note 8 and accompanying text supra.*

principle of good faith. The negotiable instruments material would serve as an admirable introduction to a commercial transactions course for the additional reason that leading historical cases are presented there. I believe in allowing students to make the acquaintance of Lord Mansfield,²³ but it would be preferable to have his ghost appear at the beginning of a course rather than halfway through it.

In an article written last summer I stated that I was seriously considering *Cases and Materials on Commercial and Consumer Transactions* for my first semester course.²⁴ I am glad to have the opportunity to say now that I was satisfied with these fine materials and that I plan to use them again. The materials address vital current questions, such as the problems of determining whether a product is defective, whether the issuer of a credit card should be subject to defenses which the user of the card has against his seller, and whether there should be high ceilings on interest rates and freedom of entry in the consumer credit market. Monotony in teaching commercial transactions is a fault. As Hight suggests, "It is a fault, because the world changes, and scholarship must change with it; and the teacher changes, and his teaching should change with him."²⁵ Through their concern with law reform and with current issues of consumer protection, Professors Hogan and Warren have provided a basis for continued vitality in the teaching of commercial transactions.

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²³ The authors reprint *Peacock v. Rhodes*, 2 Doug. 633, 99 Eng. Rep. 402 (K.B. 1781), at p. 302.

²⁴ Donnelly, *supra* note 4, at 99.

²⁵ G. HIGHT, *supra* note 1, at 91.

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