Book Review: Commercial Transactions: Cases and Problems and Text – Forms -- Statutes

Grant Gilmore
Yale Law School

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BOOK REVIEWS

COMMERCIAL TRANSACTIONS. By Robert Braucher,1 Arthur E. Sutherland, Jr.,2 and Bertram F. Willcox.3 Brooklyn: The Foundation Press, Inc. 1953. Two volumes: Cases and Problems, pp. xxviii, 1095; Text-Forms-Statutes, pp. xxvi, 403, xxxii, 816. $15.00.

Although I am on several issues in disagreement with the plan of these volumes, there are, even from a dissenter's point of view, many things that compel admiration. The case material is extraordinarily rich. Professors Braucher, Sutherland, and Willcox appear to have read every reported case in the enormous area of law with which they deal. Thus, quite apart from its merits as a teaching tool, the book has great value as a reference work for practitioner and academician alike. The case harvest ranges from the classical "leading case," included principally for historical interest — such as Price v. Neal4 — to the hypermodern, such as the string of post-1950 cases on the effect of accounts receivable statutes on the rule of Benedict v. Ratner.5 On the whole the authors have concentrated on the recent cases, but so amply is their book proportioned that they have probably included more of the traditional material than will be found in many of the old-line casebooks.

The authors have been quite as generous with forms as they have with cases, and to equally good effect. The Text-Forms-Statutes volume contains forty-four forms, which include the conventional negotiable instruments — check, promissory note, and draft; the documents of title — warehouse receipt and bill of lading, in both nonnegotiable and negotiable versions; fire and marine insurance policies; conditional sale contracts; chattel mortgage; trust receipt; and letter of credit forms. It has long been a legitimate complaint of students that discussions of such things as bills of lading and trust receipts, which no one in the class except (possibly) the instructor has ever seen in the flesh, are largely a waste of time. Professors Braucher, Sutherland, and Willcox have done the most thorough job of satisfying this objection that has appeared to date. Except for examples of an accounts receivable financing agreement and a factor's lien agreement, they have included everything that could be useful to student, instructor, and practitioner.

In the Cases and Problems volume, Parts I (333 pages) and V (197 pages) contain what used to be taught in the Sales course: warranties, passage of title, seller's and buyer's remedies, purchase money security, documents of title, documentary sales. In addition Part V contains about 50 pages on insurance questions, which have customarily not been cov-

1 Professor of Law, Harvard Law School.
2 Professor of Law, Harvard Law School.
3 McRoberts Professor in Administration of Law, Cornell Law School.
5 268 U.S. 353 (1925).
ered outside of specialized Insurance courses. The warranty treatment is unusually full and exceptionally interesting. The nature of documents, their negotiation, and the incidents of documentary sales are also rehearsed at length; these sections in particular, I felt, while teaching the book, were well-organized and contained a great deal of illuminating matter. On the other hand, the introductory purchase money security material, which concludes Part I, seemed to me to be scanty, overly compressed, and confusing.

Part II (331 pages) contains most of the conventional negotiable instruments material, with certain additions and deletions. Part II-A raises the question of formal requisites; here the authors have used a novel and interesting approach which prefaces the discussion of what is negotiable paper with a fairly elaborate consideration of financing on the security of open accounts receivable. The progression in Part II-A is from the nonnegotiable chose in action to the negotiable promissory note, dealt with principally in the context of its use in consumer installment finance. There are ideas which look well on the drafting board but work out poorly in practice, and this may be one of them. The sequence from nonnegotiable to negotiable ought to be helpful to students, but most of mine lost sight of the forest from the profusion of trees which surrounded them. From the basic question of negotiability the authors proceed to matters which used to appear in a chapter called "Liability of Parties," here rechristened "Payment by Check"; in addition to standard material on the status of drawer, drawee, and indorsers, the authors have included in this part good discussions of the relationship between a depositor and his bank (stop payment orders and overdrafts) and the mechanics of bank collection.

The focus of discussion then shifts rather surprisingly to what might be considered, in connection with what has gone before, the old-fashioned law of suretyship. Three short sections, in which the authors have depended to an unusual degree on running analytical comment, rehearse the standard suretyship doctrines (the strictissimi juris slogan, availability of defenses, the Pain v. Packard doctrine, rights to subrogation, reimbursement, and the like) as an introduction to the complicated problems raised by the Negotiable Instruments Law's fragmentary coverage of the rights and liabilities of accommodation parties on negotiable papers. The NIL problems themselves get two more sections. The suretyship material is concluded by a final section on letters of credit, which are presumably brought in at this point because historically the first analogy to which the courts turned in working out the letter of credit complex was the suretyship relation. Today the suretyship analogy, which once had its uses, is misleading to a practitioner and confusing to a student. I feel that the authors would have done better to omit the letter of credit at this point and develop it in connection with their elaborate treatment of the documentary sale in Part V, where in fact some addi-

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tional letter of credit material appears, separated by five hundred pages or so from the initial consideration under the suretyship heading.

Suretyship is followed by a full-dress treatment of problems of forgery and alteration of negotiable instruments (including the cases of the impostor and fictitious payee). Here, I confess, the principle of organization completely eludes me. The authors’ thought in the earlier subdivisions of the negotiable instruments material was apparently to use present-day financing and banking transactions as the framework: thus the note is brought up in the context of consumer installment finance, the check material emphasizes the position of the bank as depositary, collection agent, or drawee, and the suretyship material may have been included in view of the practice of banks and personal loan companies to require sureties or accommodation parties to go on notes. If I am correct in what I think is the basic plan of organization, which is a good one, then I do not know at all why the forgery and alteration material is presented at such length and with such prominence. Here the authors seem to have reverted to a more old-fashioned approach to the law, which is not in itself bad, but which creates the rather uneasy effect of a comfortable Victorian easy chair alone in a roomful of modern furniture.

The notable addition which the authors have made to the usual collection of negotiable instruments materials is their inclusion of suretyship. Their most notable deletion is in the scanty part reserved for the holder in due course, who has traditionally been the hero of the play. The authors have not attempted the impossible task of ignoring the holder in due course altogether; there are incidental references to the ex-hero throughout, but there is no schematic treatment of the concept. The authors’ idea seems to have been to treat “holder in due course” as a subcategory in a part of the book (Part III) organized about the more general idea of good faith purchase. As an idea for teaching in a book which like this one cuts across several of the traditional fields, the generalized treatment of good faith purchase, as it applies both in and outside negotiable instruments law, seems to me to be an exceedingly fertile and fruitful one. My objection is that the authors do not seem to have accomplished what they set out to do, though I may be wrong in assuming that they set out to do it. Part III has the promising title of “The Protection of Third Parties,” and Subpart A holds out a discussion of “Bona Fide Purchase.” The promise is deceptive: three sections, in all 38 pages, are given to good faith purchase in the law of sales, negotiable instruments, and investment securities (the treatment of negotiation and good faith purchase of documents of title being postponed for separate consideration in Part V). This brevity contrasts oddly with the eight sections and 79 pages on forgery and alteration of negotiable instruments alone. I agree with the authors that a study of the good faith purchase concept in its various guises, including that of the holder in due course, would be excellent teaching material (although I do not understand in the least why they chose to treat the good faith purchase of documents separately), but I think they have given it far too little space.
The third major division of the book, in addition to Sales and Negotiable Instruments, is what may be called Chattel Security. There is quantitatively a great deal of this type of material scattered through the book and, as always, the selection of cases and other material is excellent. No other casebook that I am familiar with comes even close to Braucher, Sutherland, and Willcox in its thoroughness of coverage of the principal developments over the past ten or fifteen years in this rapidly changing and exceedingly difficult field. My quarrel with them is, once again, on questions of organization, and, in this part of the book, I must reluctantly conclude that I have no idea what they are driving at.

Security first comes up at the end of Part I on Sales under the heading "Purchase Money Security." At that point there are half a dozen sections dealing with such diverse issues as the familiar attempt to disguise a security transaction by calling it something else, the equity of redemption, the foreclosure of chattel security, and the effect of usury laws and small loan legislation. Next, the commercial paper part starts out with some difficult material involving accounts receivable financing and the effect of recent statutes on the rule of *Benedict v. Ratner*; then, in connection with negotiable notes, two sections contrast the position of the "financing agency" as a holder in due course of notes and a bona fide purchaser of property. After a gap of more than three hundred pages, a series of sections under the heading "The Protection of Creditors" takes up successively the question of a seller’s retention of goods sold (which in part repeats material already covered at a much earlier point), fraudulent conveyances, bulk sales, and preferences. This group of creditors’ rights sections is followed by a group devoted to the operation of recording acts, including state motor vehicle registration and national recordation. Following all this comes the main chattel security part of the book, which in successive sections takes up the distinguishing features of such security devices as consignment, pledge, conditional sale, trust receipt, chattel mortgage, and factor’s lien. The two final sections in this part seem to repeat material (particularly the *Benedict v. Ratner* complex) already covered 500 pages earlier.

The several sets of sections devoted to security problems (not including the material on documentary pledges and letters of credit) run to approximately three hundred pages, nearly a third of the book. Yet it seems to me that, in their eagerness to widen their coverage and stay abreast of the times, the authors have scanted or ignored entirely several basic problems. The treatment of default rights is not only sketchy but also comes in almost at the beginning of the material, before there has been any consideration of what the various security devices are, either factually or doctrinally. There is nothing on the important and interesting question of the financing of so-called fixtures. The treatment of consumer finance suffers from being made to do double duty: it is used partly to illustrate on a highly conceptual level the basic concepts of negotiability (for which it is poorly suited) and partly to illustrate developing social and judicial controls over lending practices (where
the negotiability concepts merely get in the way). Finally, there is the curious manner in which the authors have split the security material: if their arrangement is followed the result in a full year course would be that, after two or three weeks in the fall, there would be a gap of several months after which, sometime in the spring, the discussion would take up where it had left off.

It is a great deal easier to throw bricks than it is to build something with them. Professors Braucher, Sutherland, and Willcox have attempted an ambitious piece of construction. While I feel that their execution has been imperfect, I have the greatest admiration for their undertaking. Their prodigious labors have made apparent, as no other casebook has done, both the strengths and weaknesses of a currently fashionable approach to law teaching which goes under the name of "integration."

The present law school curriculum is in great measure the product of historical accident. This is particularly evident in the split between so-called public law and private law courses. With the exception of Constitutional Law, which has presumably always been with us, the law curriculum of, say, 1910 consisted in the main of the private law courses; even now more than one graduate of the Harvard Law School looks back nostalgically to what was unquestionably a golden era in the School's history and demands a return to the fundamentals of the common law as a panacea for the ills which beset us. The exigencies of our own century have compelled the addition of layer on layer of public law to the primitive curriculum. The public law courses have come in one by one in response to shifts in the nature of law practice: no doubt students ought to learn more about the action of trover for conversion than they are apt to learn, at least in my own school, but after all the first memorandum of law which the graduate will have to write is much more apt to deal with a subsection of the Public Utility Holding Company Act than with the niceties of the forms of action. By now a good half of the available law school time has been gobbled up by the public law courses. Meanwhile the private law side has not been allowed to keep a steady eye on the fundamentals of the common law. The field of commercial law which Professors Braucher, Sutherland, and Willcox have claimed as their own has become a statutory maze which need hardly yield the palm to the Internal Revenue Code for difficulty, obscurity, and incomprehensibility.

The radical reconstruction of the law school curriculum has taken place by accident, without forethought or plan, and has ended us in obvious confusion. Everyone is agreed that something must be done, but there is no large measure of agreement on what. Two propositions, however, command a nearly unanimous suffrage: one is that too many courses are being taught, the other is that the traditional dividing lines between courses no longer make sense in many cases. The idea has gained currency that by recombining related material formerly taught in independent courses there can be achieved both a more rational presentation of basic concepts and a net saving of semester hours. The
two fields in which this sort of reorganization has to date been most thoroughly carried out are both on the private law side: one is what is being called Estate Planning, which picks up parts of the old courses in Trusts, Future Interests, and Taxation; the other is in Commercial Law where the new course, in the Braucher, Sutherland, and Willcox version, supersedes the old courses in Sales, Negotiable Instruments, Chattel Security, Suretyship, and (at least in part) Creditors’ Rights. Thus in six or even four semester hours the student gets in one package what he formerly spent up to twelve hours on in several packages.

We can all subscribe to the ideas that the law school curriculum must be pruned and that it is desirable for related materials to be presented in such a way that the relationship can be perceived by the student. But that does not tell us how to accomplish those results. When four or five courses, which required twelve or fifteen semester hours, are combined into one course, which is given in four hours or six, one of two sacrifices must be made: either the new course must give up the breadth of coverage which the old courses had or, if the old coverage is maintained, the new course must to a degree give up the attempt to penetrate in depth the material covered. Professors Braucher, Sutherland, and Willcox seem to have made the latter choice, which is, I believe, a disastrous one for legal education.

We must not confuse law school education with undergraduate college education. It may be that the essential function of the liberal arts college is to produce citizens who have a decent smattering of the essential knowledge on which our culture depends. That is not the function of the law school. The law school exists to teach not facts, but what to do with facts; not rules and doctrines, but how rules and doctrines grow and die; not the state of the law, but the process of legal change. The law school curriculum should not be broadened; it should be narrowed. Whatever we teach should be taught intensively and in depth. One case, painstakingly analyzed and laboriously dissected, is worth more than a hundred cases imperfectly digested. We should avoid like the plague the brisk, comprehensive, and up-to-the-minute survey.

It is more convenient and more effective to discuss legal method with our students against a background that is contemporary rather than one that is fifty or a hundred years old. Issues that are presently unsettled and in controversy strike more fire and response from the students than do those that have been classified, ticketed, and put away on the shelf. It is inevitable and desirable that the factual content of law school courses should shift decade by decade. But the factual content, at any given time, is not, and should never be allowed to become, the main thing; the graduate of the class of 1910 is instinctively in the right in insisting on a return to the fundamental elements of the law.

The organization of our society is more complicated today than it was forty-five years ago and by reflection a lawyer's practice is more complicated. The active practitioner must command a much wider range of knowledge and of technical skills than his predecessor. One way or another he must learn more, quantitatively, than his father had to. There
is a great temptation to use the law school as an engine for pumping the embryonic lawyer full of those necessary facts. To the extent that the law schools yield to the temptation, a mediocre generation of lawyers will be produced.

The solution to the law school dilemma of too much law and too little time in which to teach it lies in a deliberate exclusion of material from the formal instruction given in the courses. The courses and seminars offered in the second and third years should increasingly become studies of selected problems within a field rather than broad-gauge surveys of entire fields. The adoption of such a policy is made possible today by the fact that, in the present century, there has developed a comprehensive legal literature. In almost all fields of law we have general treatises which are at least adequate and in some instances truly distinguished. The law reviews provide detailed treatment of every imaginable subject. When the Harvard Law School introduced the case method of teaching, none of this literature was available. Today we have it and the way out of our dilemma is to use it. If our students do not know how to read, they should be required to learn. Once they know how to read, they should, after having received the basic instruction of the first year, learn a great deal of their law by reading for themselves. The time available for instruction should then be used for intensive study of narrow problems, which is the only way I know of training lawyers, as distinguished from people who know rules of law.

The Text-Forms-Statutes volume of Braucher, Sutherland, and Willecox seems an attempt to make students learn their law by reading it themselves. It contains a series of text discussions paralleling the sections into which the Cases and Problems volume is divided. These discussions, according to the authors, are planned to be used as “preparatory summer reading, and as a supplement to casebook instruction during the year.” (p. v) The preparatory summer reading idea seems to have induced the authors to write this material in a deliberately oversimplified style. The oversimplification has the further consequence that the text is by no means as useful as it might otherwise have been for the suggested alternative of use as a supplement to casebook instruction during the year. But the idea of a specially prepared text tailored to accompany and supplement the case and problem material is a good one, and I dare say we shall see much more of this sort of thing in casebooks from now on.

It is unfortunate that the idea of “integration” has become confused with the idea of saving time in the overcrowded curriculum, since the two are essentially unrelated. Presenting related materials in context does not necessarily take less time than presenting them separately; it may take more. In any case the idea of “integrating” in one course material which has previously been taught in separate courses ought to be judged on its own merits and not adopted or discarded merely on the basis of how many hours of classroom instruction it saves. “Integration” is a tricky word. I do not think that a course in Sales is integrated with a course in Negotiable Instruments merely because the two sets of ma-
terials are bound within the covers of one book. Integration, if it is to be anything more than an empty slogan, must be more than that.

The authors have started with the idea that here is a common core of substance in the transactions which cluster around the sale of goods. There is the sale itself, with the rights and liabilities arising from the transfer of property. There is always the question of payment and frequently a question of credit extension; these often involve the execution of negotiable instruments, and the instruments in turn involve the use of the bank collection system. Finally there will be security transactions, with either the goods themselves or the accounts, notes, or drafts arising from their sale standing as collateral. It is obvious that all these "transactions" are in a sense related; certainly the business man who sells goods, and the lawyer who advises him, must think of all these aspects as parts of one whole. It is tempting to conclude that all these things, being related, are better taught in one course — should be, as the phrase goes, integrated. It may be noted that we have at best a partial integration; in addition to thinking of the sales aspect, the payment and credit aspect, and the security aspect, the businessman and his lawyer must also think of such things as tax advantages, fair trade laws, antitrust statutes, and so on. Yet no one seriously proposes that all these aspects of commercial life be integrated into one course. There is still some merit in the idea of the division of labor. But, the argument must run, sales, negotiable instruments, and chattel security transactions are so closely connected that they at least are better taught together.

Much of the Braucher, Sutherland, and Willcox casebook seems to me to be integration on the slogan level. The first three hundred pages on Sales are followed by another three hundred pages on Negotiable Instruments. These two blocks of material do not correlate, communicate, or cross-check any more in this format than when they are bound separately; the law of checks and the law of warranties are quite as separate — or quite as integrated — here as they have been in the past, no more and no less. I do not mean in the least to suggest that the authors have missed a trick and that, by giving more thought to the matter, they could have so arranged their material as to cast light on the essential connection between the rule that a check is not of itself an assignment and the rule that a buyer may recover damages for breach of warranty. I do not think there is any essential connection. Despite the seductive sound of the word "integration," the only way you can teach the law of checks and the law of warranties is as two separate things — which is what they are. Putting the check material and the warranty material within the covers of one book may be a little more convenient — or a little less — than having the material in two books, but it has nothing to do with integration.

There are on the other hand several parts of the book in which the authors have experimented with reorganizations of material that qualify as "integration" in any league. The most interesting of these attempts to me was the gathering together of material in Part III under the
heading “The Protection of Third Parties.” Here comparable concepts from the law of sales, the law of assignment, and the law of negotiable instruments are brought together and their conjunction should illuminate for many students what have hitherto been dark and cloudy areas of the law. If this is what is meant by integration, the more we can get of it the better. I trust that the next edition of the casebook will contain a good deal more material like that presently included in Part III. It is hard stuff to teach; it is hard to study; it is rewarding to both teacher and student.

In reviewing most casebooks it is sufficient to say that the authors have (or have not) done an admirable job of collecting and organizing their material; that the notes are (or are not) exhaustive, illuminating, clear, concise, and witty; that the typography is clear and the width of the margins satisfactory. Professors Braucher, Sutherland, and Willcox have made it impossible to discuss their book except in terms of basic theories of legal education. If the reviewer could restrict himself to comment on the craftsmanship and scholarship which have gone into the book, the review would be, except for some reservations as to organization, an almost uninterrupted paean of praise. Life always becomes more difficult when matters of theory elbow their way in. I am not even sure that I am in theoretical disagreement with the three authors; it may be that they would, in their triune fashion, agree with all that I have said and that I am disagreeing with three other fellows or else objecting to conclusions which some people (but not the authors) might draw from premises on which we all agree.

Whether I am fighting with Professors Braucher, Sutherland, and Willcox or with a straw man of my own creation, the following propositions seem to me to be of importance:

1. The law school curriculum is overcrowded, but the only way to make enough space is by jettisoning some of the existing cargo and not by a repackaging job.

2. Many of the existing divisions between courses are arbitrary, whimsical, and irrational. A good deal of progress can be made by presenting related concepts, as they appear in traditionally separate fields, in context; the Braucher, Sutherland, and Willcox book indicates some of the possibilities of this sort of reorganization.

3. The type of integration referred to in (2), which is useful, is primarily integration on a conceptual level. It should not be confused with the mere gathering together in one course or one casebook of conceptually unrelated material simply on the ground that there are many facets to a commercial transaction. There is nothing wrong with teaching Sales and Negotiable Instruments as parts of one course instead of as two separate courses; but neither does it make very much difference which way you do it.

4. Law school education is on a graduate and not an undergraduate level. The survey-type course has no place in the law school. What is most disturbing about the book is the temptation it affords to succumb to survey-type teaching. It contains enough to furnish half a dozen
courses, all of them good. If the instructor will make a judicious selection out of this mass, the book contains a wealth of admirably chosen material. But any attempt to "teach through" the book in four or six or eight semester hours can lead only to the type of course which the law school should not tolerate.

(5) In bringing the subject matter of law school courses up to date we should always keep in mind that we are attempting to teach students how to think and not merely to cram them full of useful knowledge. The focus of law school instruction should be on the theoretical rather than the practical side of the law. The anguished cries that are occasionally heard from some sections of the practicing bar are as nothing to what would be heard if the law schools really did go over to "practical" instruction. The "fundamental principles of law" are no more numerous and no more complex now then they were in 1910. The setting has changed; the decor is different; but there is nothing functional in allowing ourselves to be swamped in a multitude of details.

GRANT GILMORE *

COGITATIONS ON TORTS. By Warren A. Seavey.1 Lincoln: The University of Nebraska Press. 1954. Pp. 72. $2.00.

Professor Seavey pays a graceful tribute when he says that, in matters of procedure, the Americans might learn much from the English judges. May I, as an English judge, return the compliment, and say that, in matters of substantive law, the English might learn much from the American professors. This little book contains three lectures given in honor of Dean Roscoe Pound by one of his most distinguished disciples. They show a breadth of vision which is refreshing and invigorating to one who is sometimes cast down by the narrow scan of precedents. Professor Seavey has taken a broad canvas and painted in fine strong colors a picture of the law of torts, past, present, and future.

Professor Seavey adopts Pound's theory that a rule of law is the result of weighing the conflicting interests of the parties. On the one side there is the value to the community of what the defendant is doing. On the other there is the interest of the community in not having harm occur. He shows how this weighing of interests has continually affected the development of the law. A striking instance could be given from England in regard to the liability of hospital authorities. When these were charitable institutions, the courts exempted them from liability for the negligence of their doctors and nurses.2 Their value to the community was so great that it would not be right to saddle them with liability to patients. But when they became state institutions, the courts held them liable.3 There was no reason why the state, with its bottom-

* Professor of Law, Yale Law School.
1 Bussey Professor of Law, Harvard Law School.