Book Review

CASES AND MATERIALS ON COMMERCIAL LAW. By E. Allan Farnsworth† and John Honnold.†† Brooklyn: The Foundation Press, Inc., 1965. Pp. 1088.

Pity the poor commercial law teacher! Few indeed are the members of his class clamoring for the right to be heard on the grave questions which he must raise; fewer still are those who seek to join him in further exploration in advanced courses or seminars; rare is the occasion when the law review seeks his help and criticism in attacking the provocative difficulties of his subject; and rarer still are the occasions when the law wives seek to be regaled by his comments on bills of lading or notice of dishonor.

This is so for several reasons. First, for most students the subject is made difficult by a lack of familiarity with the activities under scrutiny. The terminology is almost foreign, the structure of the transactions and relationships not understood; and, because the affairs involved are largely impersonal, there is little natural curiosity about them. Furthermore, the student who thrashes his way through the sterile verbiage a few times to locate the legal problems is likely to find in the clearing a choice between tweedledum and tweedledee. The social and economic policies involved are often so remote, and the consequences of applying a principle in preference to its opposite so nearly neutral, that it is hard to feel the decision was worth the effort required to understand it. Finally, when the lawyer has had his say, he is faced with the fact that there are not many listeners. Most commercial disputes are not resolved by resort to legal processes, but are resolved through the economic bargaining system. Many substantial businesses survive in the jungle without consulting lawyers with respect to their commercial affairs. Should they ask, they would often be shocked by the advice they would receive.

This last point is not always clear to the student or we would have greater rebellion than we do. But it is true that students are often trained to give advice that will not be sought, and which if proferred may well be disregarded. As a student of commercial law for some years, I have had my own ardor dampened on a number of occasions by a rediscovery of this fact. A most notable

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illustration was my attempt to persuade the Wyoming Truckers Association to support the Uniform Commercial Code. I pointed out that the Code offered a solution to the problem of the lost order bill of lading; a means is prescribed for releasing the goods with adequate security for the carrier if the outstanding bill should later be presented by a "true owner."[1] The truckers scoffed; this is no problem they said, because goods are always released at the direction of the shipper. Indeed, Wyoming truckers do not require that order bills be surrendered because they are unaware of the existence of order bills. The truckers explained that although some forms are yellow and some are white, they are used interchangeably. The shipper is the customer and the customer is always right. I suppose this is an extreme example; surely all truckers are not so indifferent, especially those who have been burned. But the point remains, and it is sometimes painfully obvious, that commerce pays little heed to law.[2]

Why then burden students with a course in commercial law? First, commerce plays a large part in our life. Students who are so inclined should be permitted to devote some effort to examining the law's relevance to it. There are some potential clients, most notably bankers, who create a demand for such information. Some dangerous shoals can be marked with buoys to protect the innocent drifter from disaster. On a broader scale, those who advise merchants and bankers can be made more aware of the limitations of law in solving problems. It is not the universal solvent we'd like to think it! Hence, the course should be offered, tedious though it may sometimes be.

What can be done for the embattled professor? A great event for commercial law instruction was the 1954 publication of the first edition of Professor Honnold's casebook on *Sales and Sales Financing*.[3] The second edition of that work in 1962 was another worthwhile advance. Regrettably, this latest publication is not. For a detailed account of what has been done in this work the reader is referred to Professor Farnsworth's rather incestuous review of Honnold's second edition.[4] In that review, he described his method of integrating the Honnold book with his own on negotiable instruments. A reading of this review makes it evident

1. UNIFORM COMMERCIAL CODE § 7-601.

2. For an example, see Schultz, *The Firm Offer Puzzle, A study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

3. For agreement with this evaluation, see Gilmore, Book Review, 7 J. LEGAL ED. 97 (1954).

4. Farnsworth, Book Review, 15 J. LEGAL ED. 465 (1963).

that Honnold let Farnsworth have his way on every question in the assembly of this composite volume. In my view this has not always worked out for the best.

For a beginning, Farnsworth threw out Honnold's first chapter on contract formation. While this material is covered in any competent contracts course,[5] the Uniform Commercial Code provisions are unique to commercial contracts and are not inappropriate as a point of departure. I found it a useful opening ploy to examine the provisions of the Code which seek to reconcile the classical-economic and puritan-moral values expressed in the logical cadence of Willistonian contract law to the realities of modern commerce and the modern impulse to protect the economic underdog. Indeed, I have enlarged on this theme a bit to consider the possibility of liability for refusal to make a contract of sale which, I think, is one of those shoals that should be marked in a basic course. The Honnold materials illustrated that a neutral policy is not entirely possible and that basic values may conflict in the simplest situations. In fact, the basic issues are near enough to the surface to be seen by a casual observer. Who knows but what some innocents may take the plunge and start grappling with the problems at a basic level that would be a credit to their craftsmanship. If they should, and if they can be kept in the swim, the rest of the course may be more exciting than we would otherwise anticipate. But the Farnsworth revision has forestalled this approach. To me, the thirty pages and few class hours saved seems too costly an economy.

Farnsworth has substituted a short course in commercial paper, focusing quite properly on checks. This new part of the book must be acknowledged as a substantial improvement on the earlier Farnsworth casebook on negotiable instruments. It offers a sleek, functional organization and a new selection of cases, some of recent vintage and some older ones of rediscovered significance. The presentation is both richer and more orderly than its ancestor. For the range it proposes to cover, it is not as intensive as Steffen's casebook,[6] but it is much more concise and to the point. My question is whether even this much is necessary or desirable. There are really very few debatable problems in this field under the Code — at least few that we know of. A hard problem is one that requires reference to more than one section of the statute. Of the forty odd principal cases in this part of the book, only one

5. The only available contracts book which really does duplicate the additional material suggested is FULLER & BRAUCHER, BASIC CONTRACT LAW (1964).

6. STEFFEN, CASES ON COMMERCIAL AND INVESTMENT PAPER (3d ed. 1964).

arises under the Code.[7] I found little to be gained from reading any of them. They are useful only as problems to run through the statutory machinery. Many could be abbreviated or omitted without loss to the student. What is really needed here is a teaching machine keyed to the statute, leading the student privately through the chore of mastering the statutory provisions dealing with basic situations. This could be supplemented by a few hours of classroom instruction bearing on a few complicated transactions requiring multiple statutory references, the instructor recognizing that these sessions would be devoted largely to building the student's character rather than his intellect. Although Farnsworth has considerably streamlined this section, as I view the contemporary need he has not met it.

I dissent most emphatically from the idea that this material is the proper place to begin a commercial law course, unless the purpose is to anesthetize students. There is economy and logic to Farnsworth's ordering, but it will be a very charismatic teacher who ignites enthusiasm in his students by exposing them at the outset to the dreary tedium of slogging through articles 3 and 4 of the Code. Most classes will be moribund after a few weeks. And there is not enough sex appeal in what comes later to reactivate very many glands. Instructors who want to hold an audience would do well to defer Part I to the middle of the course. No serious loss would be entailed, although it might be advisable to move chapter 5 on Documentary Transactions also, keeping it at the end of the commercial paper material.

The rest of the book is pretty much plain old Honnold, which means it is high quality. A chapter on Accommodation Parties has been added as a conclusion. In light of the approaching universality of the Code, the material on trusts receipts and factors liens, and some of the older cases, might have been omitted. On the other hand, if the book is to satisfy my criterion for a basic course, and mark the dangerous legal shoals on which commercial practices might founder, other extensions might have been in order. Isn't the commercial law student entitled to be warned about price discrimination, standards of identity, and adulteration and misbranding? It is debatable how the student can best spend his time among the many topics claiming his attention, but surely he must learn of the existence of the sundry regulators of commerce who may, like eagles, swoop down some day and devour a client without first casting a shadow. We ought not be so hide-

7. Stone & Webster Eng'r Corp. v. First National Bank & Trust Co., 345 Mass. 1, 184 N.E.2d 358 (1962).

bound about curricular jurisdiction that we fail to put students on notice of the possible legal involvements invited by unwise pricing policies. A short chapter on the subject, which hardly need steal the thunder of advanced courses in antitrust and unfair competition, would have been welcomed. An introduction to federal quality controls would have been appropriate in chapter 7, which deals with warranties.[8] Insurance might properly have borne some scrutiny in connection with problems of product liability and risk of loss. With respect to such matters of breadth, Farnsworth and Honnold are still a good distance behind their competitors, Braucher and Sutherland.[9]

In conclusion, there is still room for a treatment of the subject that will stir the enthusiasm of contemporary students and satisfy their needs for a basic course. The new edition of Braucher and Sutherland is at least competitive. The companion volumes maintained by Dean Hawkland and his colleagues present still another alternative.[10] Two others, one by Professor Mentschikoff of Chicago, and another by my colleague Professor Steinheimer and Minnesota's Professor Kinyon, are in the works. Hopes engendered by the high quality of the earlier Honnold work that the team of Honnold and Farnsworth might pull away from the pack with a bold and imaginative new casebook have not been fulfilled.

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8. See FARNSWORTH & HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 538 (1965).

9. BRAUCHER & SUTHERLAND, COMMERCIAL TRANSACTIONS (3d ed. 1964).

10. BOGERT, BRITTON & HAWKLAND, CASES ON SALES AND SECURITY (4th ed. 1962); HAWKLAND, CASES ON BILLS AND NOTES (1956).

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