

Outline of the Law of Sales (Book Review)

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connection it should be noted that pertinent statutory sections from many states, including New York, are quoted and compared.

For the most part the criticisms above outlined are not directed to the scholarship displayed by Professors Hall and Glueck, but to the adaptability of the work in the usually limited course in the subject. Unless additional courses in procedure and administration are made available to students, the organization of the single course in criminal law compels an economy of materials and a prudent distribution of emphasis upon the fundamentals of the criminal law, in theory and in practice, which have not been observed in this work. Nevertheless, until a more utilitarian product appears in the field, this reviewer will continue to use this course book in his own classes.

G. ROBERT ELLEGAARD.*

OUTLINE OF THE LAW OF SALES. By Frederick A. Whitney. Brooklyn: New York, 1941, pp. xii, 309.

Professor Whitney modestly calls the new edition of his book on Sales an "Outline". He is doing himself an injustice by doing so. To students and lawyers who visit the lawbook stores and see stacks of "Outline of This" and "Outline of That" the term has come to mean a pamphlet containing a set of rules of thumb not articulated to the principles underlying them, covering single-issue, run-of-the-mine factual situations and without critical analysis or commentary. Outlines of this sort have given the term a bad name. They are extremely light lunches to be partaken of only when in desperate haste or because of intellectual poverty and are likely to cause at least indigestion if not ptomaine poisoning.

Now this book which Professor Whitney pleases to call an "outline" is nothing of the above sort. It is a full meal to be eaten at leisure. It is not a pamphlet but a book into which the author has packed a surprising amount of information. It is written chiefly to the New York law and the citations are overwhelmingly of New York cases. This might be thought by some to be a point for criticism. Yet the facts are that New York is a great commercial state and that its courts have been called upon to decide almost every variety of question that might arise in the field of Sales. So its reports are rich in illustrative cases and uncommon problems. When an interesting question has presented itself in another jurisdiction and has not been passed upon by the New York courts the author cites the case. But most of the time he is satisfied to use as authority the New York courts of high and low degree. His painstaking canvass has turned up over four hundred New York cases on different points; citations from other sources bring up the number he uses to nearly five hundred.

The ferment that has taken place in other fields of the law in recent years has shown plenty of signs of developing in the field of Sales also. The historical approach to the subject has been through the Title-concept; now advocates

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of the Contract-concept approach are taking their places on the forensic stage.¹ One authority has taken the "remedy" approach in his book.² No doubt there are others who would throw on the garbage heap concepts of any kind. Professor Whitney has steered a middle course. As he says in the preface: "Since the Uniform Sales Act is written largely in terms of title passing, and since the courts in deciding cases have uniformly used the Title-concept approach in cases in replevin, trover or reclamation proceedings, considerable space in this book is devoted to the question as to when title passes in sale transactions." In this I think he is wise; it will be a long time before the Title-concept approach loses its vitality.

The author not only sets out the rule applicable to a set of facts but also frequently examines into the reason for the rule. He does not hesitate to point out the unsoundness of some of the cases, and of authoritative ones too. I was glad to see his criticism of those which hold that when the buyer pays by check it is to be presumed that title is not intended to pass until the check is paid, even though the buyer is given possession of the goods.³ He also condemns the line of cases, mostly English, which appear to hold that when the buyer furnishes receptacles the property in each portion of the goods put into a receptacle *eo instanti* passes.⁴ It is not clear how New York will go on this question. The Court of Appeals has cited some of the English cases without criticism.⁵ Of course, if the buyer assents to a series of performances by the seller, such as the sending off of his tank cars as fast as the seller loads them, it is readily found that he assented to a piecemeal performance since that is for which he contracted. But it is quite another thing to suppose that when he orders a lot of ten drums (which he furnishes), to be filled with oil and sent off when all ten are ready that he assents to take title piecemeal as each drum is filled. The principle underlying Rules 1, 2, 4 and 5 of Section 100 of the Personal Property Law is that until the buyer gets the performance he bargained for, *i.e.*, completed performance, it is not natural to assume that he assents to take title. This is good Contract-concept approach as well as good Title-concept approach.

Book-reviewers, I have noticed, seem to feel that they must find something to criticize; they are a good deal like grandstand quarterbacks in this respect. I do not wish to be called a radical by reason of not abiding by the precedents so I have sought for material to which I could take exception. The author, as have many courts (and even Williston himself it seems), uses the term "divisible contract" as synonymous with "severable contract".⁶ I think this is apt to cause confusion because by reason of the definition of "divisible contract to sell or sale" in the Sales Act it is a term of art in Sales which bears a different meaning than as ordinarily used in Contracts.⁷ Under this definition the contract may be divisible although not severable in the contractual sense, as I

¹ The leader is Llewellyn. See his numerous articles in the law reviews.

² See John Barker Wait's Second Edition of his book on Sales.

³ Pp. 43-46.

⁴ Pp. 125-128.

⁵ *Procter & Gamble Co. v. Peters*, 233 N. Y. 97, 134 N. E. 849 (1922).

⁶ Pp. 29-30.

⁷ "Divisible contract to sell or sale' means a contract to sell or a sale in which by its terms the price for a portion or portion of the goods less than the whole is fixed as ascertainable by computation." N. Y. PERS. PROP. LAW § 156.

understand it. The definition says nothing about an intention to exchange performances as to a portion of the goods contracted for. It is a price term rather than a performance term. Consider its application to the cases where there has been a partial destruction of specific goods before the title passes and the buyer elects to take title to the remaining goods.⁸

Just as in the preceding paragraph *re* divisible contracts I have probably failed to make my point clear by trying to compress too much into too little, the author here and there makes brief and rather dogmatic statements that require more elucidation to be correctly understood. Speaking of cash sales, for example, he says that although in general the rule is that if the goods are specific and nothing remains to be done by the seller, the presumption is that title passes at the time of the bargain, but "the parties show a different intention where the contract requires the goods to be paid for cash on delivery."⁹ But might it not be a sale with a vendor's lien? If *nothing remains to be done by the seller* I think it would and should be so construed. It is indeed difficult to put into definition the conception of a technical cash sale. If all the duties on both sides are to be closed out simultaneously with the bargain, as in an over-the-counter bargain accompanied by delivery of the goods and payment of the price, we have a cash sale. Again, if payment by the buyer is conditioned on simultaneous completion of some positive duty by the seller and vice versa, *e.g.*, delivery by the seller to the buyer's place of business "cash on delivery", we have a cash sale.¹⁰ But if the buyer is to take delivery at some time subsequent to the bargain and nothing remains to be done by the seller but to let the buyer take possession when he comes for the goods then the phrase "cash on delivery" imports that the seller does not propose to give up possession until he is paid. On principle it should be presumed that title passes.¹¹

But enough of grandstand quarterbacking. Professor Whitney has steadily enlarged and improved his book through three editions. The comprehensive coverage of New York cases, of the Sales Act, of the Conditional Sales Act, of the Bulk Sales Act and of the Trust Receipts Act makes this edition exceptionally useful for New York lawyers. Lawyers and students everywhere will find it to be an excellent summary of the law, furnishing a wealth of illustrative cases.

GEORGE W. BACON.*

CASES ON RESTITUTION. By Edward S. Thurston. St. Paul: West Publishing Co., 1940, pp. xxviii, 964.

Restitution is an act by which exact reparation so far as possible is made for an injury which has been done to another. This is the definition of restitution considered from a moral standpoint.

⁸ N. Y. PERS. PROP. LAW §§ 88, 89.

⁹ P. 41.

¹⁰ Levin v. Smith, 1 Denio 571 (N. Y. 1845).

¹¹ The case which is regarded as laying the foundation for the rule that title is presumed to pass if the goods are specific and in a deliverable state at the time of the bargain and nothing remains to be done by the seller did so hold. Tarling v. Baxter, King's Bench (1827) 6 Barn. & C. 360.

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