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Hawkland: A Transactional Guide to the Uniform Commercial Code

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in the United States, if the contract language is carefully prepared, the usual type of sales tax can be avoided. However, the possessory interest tax remains unmitigated.

The rules of the game thus get tighter. The validity of the state tax will turn inevitably upon the precise language of the contract in issue.¹⁸

The legal problems presented in the field of government contracting, as well as the unusual factual situations which so often occur, are challenging. They demand the full attention of the lawyer who would specialize in the field. Only in the past fifteen years has any real effort been made by practitioners in the field, from both government and private sides, to develop textbook materials in what is now recognized as an established field of legal expertise. While there have been many contributions to the problems posed by the taxation of government contractors, until Mr. Wolf's book, there was no text. Mr. Wolf is to be commended for a thorough and lawyer-like performance of his chosen task. He has made a significant contribution, one without which no procurement library is complete.

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A Transactional Guide to the Uniform Commercial Code. By William D. Hawkland with Chapter Four by William R. Klaus. Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. 1964. Two volumes, Pp. xl, 565; 540.

. . . I consulted the Attorney-General, the Lord Chief Justice, the Master of the Rolls, the Judge Ordinary, and the Lord Chancellor. They're all of the same opinion. Never knew such unanimity on a point of law in my life! *The Mikado*

A Transactional Guide to the Uniform Commercial Code is a two volume work, designed to be supplemented, presumably annually. Although it is attuned to transactions, it is not a true transactional guide. The authors have broken their treatment of the Code into four categories which could be loosely described as "transactional divisions." The book treats ordinary sale on open account transactions, transactions where security is taken upon a sale or upon the making of a loan, bulk sales transactions, and transactions involving investment securities. Within these broad groupings, particular transactions are studied as they relate to the various sections of the Code.

The major part of Volume One treats the matter of sales on open account. The remainder of the volume discusses unsecured loans and discounts under the U.C.C., effectively considering the contents of Article 3, Commercial Paper. In Volume Two, the first three hundred pages are devoted to personal property security, Article 9; the next thirty pages concern bulk

¹⁸ See *E. I. Dupont de Nemours & Co. v. State*, 44 Wash. 2d 339, 267 P.2d 667 (1954).

transfers; and the next fifty pages treat investment securities, under the authorship of William R. Klaus. Thereafter follow one hundred pages of suggested forms.

The book opens with its most impressive portion, a discussion of the formation of a sales contract. The favorable impression left by this part of the work remains with the reader as the discussion moves easily through each fundamental of pertinent contract law and into the various mercantile and commercial practices and customs which have been codified. One reader convenience is that the relevant sections of the Code are set out as the transaction is discussed. The author then compares the Code with the Uniform Sales Act, inspecting the question of whether the latter's provisions have been rejected or retained, the reason for the rejection or retention, and the desired effect. Following this, reference is made to cases, if any, which have construed the sections under consideration. Occasionally there are references to amendments which have been made since the 1952 and 1958 drafts, and, where the Code has alternative provisions, they are sometimes listed and discussed.

The entire book is handled in the manner of a classroom presentation, informally and, for the most part, without supporting footnotes. There is little attempt to embellish the presentation with the usual professorial inquiry into legal Gordian knots.

One typical example of the discussions is in the section on "Seller's Remedies After Acceptance," which treats the seller's right to reclaim goods sold where payment is not made by the buyer. The background is explained in part in this manner:

In a credit economy such as ours, sellers are expected to assume the risk that their buyers on open account will remain solvent long enough to make payment. This risk is reduced considerably by the existence of professionally collected credit information, which makes possible fairly selective credit selling. In spite of this aid, sellers frequently "guess wrong" about their buyers' ability to pay, and if an insolvency ensues, they are relegated to the position of general creditors unless they have been careful or lucky enough to take security. To avoid this fate, sellers frequently allege that they have not "guessed wrong" but have been deceived by their buyer's misrepresentations of solvency. If the misrepresentations can be proved, and if the rights of third parties have not been interjected into the situation, it seems sensible and just to permit sellers to rescind and re-vest the property interest in themselves. This rule has been the law for over a century, and no one now seriously disputes it.¹

The author then explains the arguments presented on behalf of both the seller and the buyer relating to the right to reclaim the goods, and follows this with the judicial solution and reasoning. He then reports:

While the courts apparently stress the time factor in most of these

¹ P. 299.

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cases, factual variations occur from situation to situation, and this has made it difficult to formulate any working principle to serve as a guide under the common law and U.S.A. In an effort to promote a more certain result without, at the same time, upsetting the delicate balance that the courts had struck, the draftsmen of the U.C.C. prepared subsections 2-702(2) and (3).²

After quoting the pertinent U.C.C. provision, the author discusses the leading case interpreting the section, *In re Kravitz*.³ This case held that under Pennsylvania law a lien creditor, and consequently a trustee in bankruptcy, could cut off a defrauded seller otherwise entitled to reclaim his goods under section 2-702(2) and (3).

Dean Hawkland goes on to explain that Illinois, New York and New Mexico have amended their acts by deleting the reference to a lien creditor. There are also some interesting background references to Professor Karl Llewellyn's views and notes.⁴

Some of the book's interesting sidelights are to be found in its commercial definitions, such as the new definition of "puffing" given in the discussion on auctions. An impression shared by many attorneys is that puffing is an art practiced by salesmen who are selling goods or a service and who are entitled to some leeway in their description. But Dean Hawkland states:

Secret bidding at auctions by the seller or one acting on his behalf is known in the trade as "puffing," a practice that is considered fraudulent because it creates the misleading impression that there is greater competition for the goods than actually exists.⁵

The informality of presentation is somewhat illustrated in Volume Two where the author is discussing the financing statement and the formal requisites of section 9-402. He states:

Normally, of course, the signature of the debtor must be affixed to the financing statement. While "signature" is defined broadly by subsection 1-201(39), *it has been held* that a carbon copy or a duplicate of the financing statement actually signed by the debtor does not contain his "signature" for purposes of this rule, unless the debtor separately signs it. (Emphasis supplied.)⁶

The reference Dean Hawkland makes is probably to the decision by Referee Hiller in *In re Kane*.⁷

² P. 300. Section 2-702(3) provides that the seller's right to reclaim is subject to the rights of a buyer in the ordinary course or other good faith purchaser or lien creditor.

³ 278 F.2d 820 (3d Cir. 1960).

⁴ P. 303. Memorandum by K. N. Llewellyn replying to the Report and Memorandum of Task Group 1 of the Special Committee on Commerce and Industry Association of New York, Inc., on the Uniform Commercial Code, August 14, 1954, 1 N.Y.L. Rev. Comm. Study of the U.C.C. 126 (1954).

⁵ P. 39.

⁶ P. 612.

⁷ United States District Court, Eastern District of Pennsylvania. This decision is discussed in Section of Corporation, Banking and Business Law, A.B.A., Uniform Commercial Code Handbook 313-16 (1964), by Russell L. Hiller, Referee in Bankruptcy,

Another example of the book's informal approach is found in the discussion on the question of giving notice prior to foreclosure of collateral loans where the collateral consists of stock certificates, bonds, or other securities. Dean Hawkland states: "Notification, however, should be given as a matter of courtesy, even though it may not be required in this situation."⁸ The foreclosing creditor might well be uneasy at the suggestion that the documents of title covering commodities pledged as collateral might not be properly foreclosed without notifying the debtor because: "Again, considerations of courtesy *if not legal safety*, would impel most secured creditors to give notice in this situation." (Emphasis supplied.)⁹

Undoubtedly by a typographical error, the text interjects further confusion into the maze erected by the supposed conflict on preferences between section 60(a) of the Bankruptcy Act and section 9-108 of the Code.¹⁰ Section 60(a) defines a preference as, *inter alia*, a transfer of property for or on account of an antecedent debt. Section 9-108 of the Code provides that a security interest in after-acquired collateral shall be deemed to be taken for new value and not as security for an antecedent debt if the debtor acquires his rights in the collateral either in the ordinary course of his business or under a contract of purchase made pursuant to the security agreement within a reasonable time after new value is given. Thus arises the supposed conflict. In Dean Hawkland's example, if a loan is made and perfected on January 1, the inventory is replaced by proceeds on July 28 and the debtor files a bankruptcy petition on August 1, the secured party would argue that the date of transfer of the proceeds as collateral was January 1, not July 28. A statement then made will likely trap the unwary: "If these dates were established, there would be no preference, because the transfer would have been made for an antecedent debt."¹¹ What Dean Hawkland apparently meant to say was that, if the date of the debt and the date of the transfer were the same as set forth in the example, the transfer would *not* have been made for an antecedent debt. The work has a number of these omissions and typographical errors.¹²

Eastern District of Pennsylvania. Although the decision is not likely to be easily accessible, it would be of interest to those reading the treatise to know where it was held and in which court. Other cases have construed "signature" more broadly. *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. 1965), and *Alloway v. Stuart*, 385 S.W.2d 41 (Ky. Ct. App. 1964) are recent examples.

⁸ P. 699.

⁹ *Ibid.*

¹⁰ See *Uniform Commercial Code vs. Bankruptcy Act*, 51 A.B.A.J. 690 (1965), which compares the positions taken in *Riemer, Bankruptcy-Preferences-Conflict between Section 9-108 of the Uniform Commercial Code and Section 60(a) of the Bankruptcy Act*, 70 Com. L.J. 63 (1965), and *Henson, "Proceeds" Under the Uniform Commercial Code*, 65 Colum. L. Rev. 232 (1965). Dean Hawkland seems to agree with Mr. Henson's viewpoint.

¹¹ P. 721.

¹² For example, on page 566, discussing general principles of personal property security, the author states that "all creditors have an 'interest' in the exempt property of their debtors, because this property may be reached through execution or attachment if the debtor defaults on his obligations." If by "exempt" the author refers to the property that is not subject to a perfected security interest, the point is well taken. If, on the other hand, he is referring to property exempt to an individual, such as a

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The preface indicates that the book will point out the amendments and variations that have been made in the Code by the enacting states, but it carries out this promise to a very limited extent. In a few instances a reference to important changes is made but they do not set forth the variations adopted by all of the states. It would be advantageous were the supplement to contain this information. The table of Code citations referring to pages in the book where the Code section is cited will be most helpful to readers. There is also a good subject index.

To those of us who did not participate in the formation of the Code, and especially to those who are being called upon to study the Code for adoption in their own states, Dean Hawkland and Mr. Klaus provide a readable introduction to its background and history. The book does not, however, provide detailed answers to most problems. Nonetheless, it does provide a push in the right direction by informed authorities. I am sure that the authors do not expect all readers to agree with their every position. Being Code apologists, they tend to maintain for the most part that the Code position is not only the better view but, properly understood, the only reasonable rule.

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Registration and Regulation of Brokers and Dealers. By Ezra Weiss. Washington: Bureau of National Affairs, Inc. 1965. Pp. xxvii, 363.

Emphasis in the securities regulation field has recently shifted from the problems which arose primarily from the widespread distribution of unseasoned securities in the late 1950's and early 1960's. It has turned, instead, to re-examination and increased regulation of the markets on which publicly held securities are traded. Much of the Securities and Exchange Commission's Special Study Report of 1963 is devoted to the operations of these markets and to the prevailing standards of conduct among the broker-dealers who operate them. Some of the recommendations in this Special Study have already been enacted into law or adopted as administrative rules; more undoubtedly will be. One senses, also, that the climate producing this increased regulation has also produced greater vigilance by the Commission's staff in enforcing established rules and in insisting upon stricter adherence by broker-dealers to the high standards imposed by the federal securities laws and the doctrines which the Commission and the courts have developed under them.

The Commission and its staff have never been patient with broker-

personal property exemption, there is an error in that it should read "non-exempt." In discussing the provisions of section 9-108, he states, at page 721: "This section recognizes the concept of collateral as a floating entity: original inventory is replaced by proceeds, which in turn are replaced by new proceeds, ad infinitum." He probably meant that the inventory is replaced by proceeds, which are replaced in turn by new inventory.