

Book Review: Cases and Material on Sale of Goods and Sales Financing, by Ivan R. Feltham

Jacob S. Ziegel

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Book Review

Citation Information

Ziegel, Jacob S.. "Book Review: Cases and Material on Sale of Goods and Sales Financing, by Ivan R. Feltham." *Osgoode Hall Law Journal* 3.1 (1964) : 145-148.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol3/iss1/16>

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Cases and Material on Sale of Goods and Sales Financing. BY IVAN R. FELTHAM, PROFESSOR, OSGOODE HALL LAW SCHOOL. TORONTO: OSGOODE HALL LAW SCHOOL. 1962. 2 VOLS. Mimeographed. (no price indicated).

There is a great dearth of teaching materials on commercial transactions suitable for use in Canadian law schools. Of texts (if one eliminates those on bills of exchange and banking) there are none, and the English and American texts require a great deal of adaptation. The casebook position is hardly much better. Dean Falconbridge's collection of cases on the sale of goods was published in 1927, and is now both out of date and out of print. The only other case-book known to this reviewer is Professor Thompson's, which deals with commercial law generally, and it is apparently only being used at the Alberta law school. That the gap in the available Canadian literature is so conspicuous is the more surprising in view of the far reaching changes in the techniques of retail selling and business financing, and the legal problems to which they give rise, which have occurred since the end of the Second World War. The dynamic character of the subject is reflected in the steady stream of judicial decisions, though much of the applicable law is now found in the statute book and in the private agreements of the parties themselves.

For all these reasons, therefore, Professor Feltham's casebook is a most welcome addition to the law teacher's library. Within the limitations he has set himself, Professor Feltham has brought together a well balanced list of cases and, on a much more modest scale, non-judicial materials. I was impressed with the large number of recent decisions in both volumes and I especially welcome the inclusion, in the second volume, of references to Private Members' Bills in the House of Commons and of extracts from the Senate debates on Senator Croll's now heroic Disclosure Bill. It is, however, indicative of the dynamic character of this branch of the law that even in the short period which has elapsed since the casebook was published there have occurred, or are pending, significant changes in the law. Thus at the judicial level we have been presented with such major decisions as *Century Finance v. Richards*, [1962] O.R. 815; *In re the*

*Mr. Ingle is a member of the law firm of Joliffe, Lewis and Osler in Toronto.

Unconscionable Transactions Relief Act (1962), 35 D.L.R. (2d) 449, now reversed by the Supreme Court of Canada; and *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 3 W.L.R. 101 (H.L.). In the legislative realm we have the (Molony) Report on Consumer Protection, a new Hire-Purchase Bill, a Consumer Council, and the Law Reform Committee's Report on the law of innocent misrepresentation — all this from the United Kingdom alone. In Canada the impending report of the Ontario Select Committee on Consumer Credit and the now completed work of the Attorney General's special committee on a Personal Property Security Act, to mention but a few examples, presage equally important developments in the law.

These, of course, are the risks inherent in any legal publication. But the teacher who is conducting a full year's course in commercial transactions may well encounter another obstacle: namely, that Professor Feltham's casebook is only designed to meet the needs of a single semester's course of 36 hours in the subject (and this it does more than adequately). Consequently the teacher may feel the need to "flesh out" the casebook with cases and materials of his own. My own hope is that Professor Feltham can be persuaded to enlarge his already very acceptable work so that it will meet the needs of law teachers elsewhere even in this respect. With this possibility in mind I have jotted down below some of the new material which I personally would like to see incorporated in a revised edition. My notes also include a number of other changes which, in my opinion, deserve to be considered in any event:

Sale of Goods.

There should be at least some cases dealing with the question of the certainty of terms, especially those involving the price. I also think that the distinction between sales and other transactions is more important than the few pages devoted to this topic would seem to suggest. In particular I would like to see some references to hire-purchase agreements and equipment leases and to the conflict between the various land title acts and the sale of goods act concerning the sale of goods which are still attached to the soil at the time of sale.

The decision to omit cases on the Statute of Frauds section (s. 4) was, I think, entirely justified, though Professor Feltham is perhaps unduly optimistic in basing it on the ground that students may be expected to have mastered the section in their contracts course. What does puzzle me is the fact that he has included any cases on the subject at all (viz. *Thames Canning Co. v. Eckardt* (1915), 34 O.L.R. 72; *Woods v. James*, [1946] 2 D.L.R. 69; and *In re a Debtor*, [1939] 1 Ch. 225). Would it not have been better to omit *all* cases and to refer the student instead to the general literature on the subject and the Law Reform (Enforcement of Contracts) Act, 1954?

The question of the seller's obligations and his attempt to limit or exclude them by means of disclaimer clauses is such a dominant one that I think the section dealing with it should be enlarged by

adding some American material and some references to legislation which deals directly with disclaimer clauses. I have in mind such cases as *Henningsen v. Bloomsfield Motors Inc.* (1960), 161 A2d 69 (N.J.) on disclaimer clauses (it is surely one of the very best judgments on the subject to have been written by a common law court anywhere) and such cases as *Torpey v. Red Owl Stores* (1955), 228 F2d 117 and *Sams v. EzyWay Foodliner Co.* (1961), 170 2d 160 (Me) as to the meaning of "sales by description" in the Uniform Sales Act. Under the heading of statutory materials I would include s. 19 of the Saskatchewan Conditional Sales Act (which is copied from s. 8 of the English Hire-Purchase Act), the appropriate provisions in the Sask. Agricultural Machinery Act, UCC 2-302, and the recommendations of the U.K. Committee on Consumer Protection. Finally, there should also be some references to the important American developments in the field of the manufacturer's liability for "implied warranties" and to Professor Prosser's excellent article on the subject in 69 Yale L.J. 1099 (1959/60).

Perhaps I may be permitted a comment of my own on the problem of sales "by description". It seems to me that the alleged difficulties are much exaggerated. In the first place, Lord Wright's admittedly slightly tautologous dictum in *Grant v. Australian Knitting Mills Ltd.*, [1936] A.C. 85 at p. 100 that "a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing, but as a thing corresponding to a description . . ." is supported by the pre-1893 case law: see, for example, *Josling v. Kingsford* (1863), 143 E.R. 177. Secondly, the Sale of Goods Act itself clearly supports the proposition that a sale may be by description notwithstanding that the goods are specific. This is because s. 14(3) of the Imperial Act excludes the seller's liability for unmerchantable goods in a case where the buyer has examined the goods and ought to have seen the defects. Of necessity this must presuppose goods which are specific and identified at the time of the sale. Nevertheless section 14(2) still speaks of a sale "by description". (Surprisingly this obvious point appears to have been overlooked by such writers as Williston, Professor Honnold and Mr. Atiyah, and in a number of American decisions). Additional support to the same effect may be drawn from s. 15 of the Act, which deals with sales by sample. A sample, of course, is specific and identified, yet it is well settled that the bulk must correspond not only with the sample but also with the "description". See *Mody v. Gregson* (1868), L.R. 4 Ex. 49, esp. at p. 55 (It is true that s. 15(c) does not say this expressly, but this is because the term "unmerchantable", which it does use, was employed in the pre-1893 cases to cover both the quality of the goods and correspondence with description).

To return to the review itself, under the heading of the seller's right to sue for the price Professor Feltham reproduces *Home Gas Ltd. v. Streeter*, [1953] 2 D.L.R. 842 (Sask.). In so far as the court's decision turned on the combined effect of s. 11(1)(c) and s. 18, rule

1, however, it is inconsistent with such English decisions as *Varley v. Whipp*, [1900] 1 Q.B. 513 and *Ollett v. Jordan*, [1918] 2 K.B. 41. Ought the student's attention not be drawn to this fact?

Sales Financing.

An initial question arises as to the desirable scope of a casebook on "sales financing". The term itself is of American origin and appears to have been originally confined to retail sales on credit and to trust receipt, i.e., inventory, financing. It is now generally recognized, however, that neither conceptually nor functionally can these forms of secured transactions be logically distinguished from other forms of secured transactions in personal property. Accordingly the most recent American casebooks on "sales financing" have now extended the term so that it covers all forms of secured short and medium term financing. I think this is the correct approach and that it should also guide the future editions of Professor Feltham's casebook. This means that it should include cases and materials dealing with such financing techniques as "section 88" of the Bank Act, floating charges, and accounts receivable financing. Some introductory material on the various financial institutions providing consumer and inventory financing in Canada and the principal acts by which their activities are governed would also be welcome. So long as the various security devices remain unintegrated in Canada, a section should also be added to illustrate their conceptual differences. The student may otherwise fail to see the wood for the trees.

The cases on inventory financing should be brought together under a single heading and amplified. *Holroyd v. Marshall* (1862), 10 H.L.C. 191 is a surprising omission. *Re Smith & Hogan Ltd.*, [1932] S.C.R. 661 and *Re Grand Rivers Motors Ltd.*, [1933] S.C.R. 591 deal with financing techniques that are obsolete, and the cases can be safely omitted: a footnote reference would suffice.

Under the heading of registration problems, some reference should be made to the certificate of title legislation in the United States and the recommendations of the Ontario Select Committee on the same subject. Under the heading of competing claims to the same chattel, subsections should be added dealing with fixtures, accessions, and artisans' claims. The section dealing with the rights of the buyer and secured seller *inter se* should be enlarged by including appropriate references to the statutory provisions in the other Provinces, other Commonwealth countries, and the United States. In this way the student will obtain a better appreciation of the important part which legislation plays in this field and of the diversity of the legislative response to the needs of consumer protection. Finally, a section should also be devoted to conflict of laws problems, since these are of considerable practical importance and are bound to become more so in the future.

JACOB S. ZIEGEL,
College of Law,
University of Saskatchewan.