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Cases on Contracts

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BOOK REVIEW

Freedman, Monroe. *CASES ON CONTRACTS*. Washington, D. C.: Lerner Law Book Co., 1967. Pp. xx, 1108. \$15.00.

The first edition of a casebook offers the reviewer a conceptual scheme for the presentation of the course materials. The reviewer can only guess as to whether the organization developed and the cases and notes chosen will withstand the savage onslaught of eager and questioning minds in the guerilla warfare of classroom education. The second edition of a casebook, however, presents the reviewer with the opportunity to evaluate the practical application of the materials, both in the selection of items to be studied and in the pedagogical arrangement of them. For, in the last analysis, it is only in the smithy of lecture hall bantering that the worth of a casebook either shines brightly through the mire or becomes indistinguishable from it. A casebook is, after all, merely an educator's tool for the presentation and inculcation of knowledge and therefore the test chosen must be a pragmatic one—does it work? A second edition purports to verify or refute the author's original guess as to the value of the materials he has assembled.

Professor Freedman's new edition differs little from its predecessor. Implicit in this fact is the author's determination that the book has "worked." I had the privilege of being a member of the first class to use the first edition and in my opinion it worked then. It is not strange, therefore, that in the four years of its existence, the book has remained substantially intact as originally conceived. Before noting the changes made in the new edition, it might be useful to explore why the book "worked" in the first place.

The year 1947 marks a turning point in the development of Contracts casebooks, and perhaps in the development of casebooks in all subjects. It was in that year that Fuller published his monumental *Basic Contract Law*. Fuller's innovation, when viewed from today's perspective, seems minor; and that is the mark of a truly great idea. Fuller took what traditionally was considered to be the last chapter in Contracts books, Remedies, and placed it at the beginning. The name was changed from "Remedies" to "The General Scope of the Legal Protection Accorded Contracts," and a whole new approach to the law of Contracts was born.¹

¹The Fuller innovation seems minor today because it has almost become commonplace for books to begin with the chapter on Remedies. This idea is carried to the extreme in J. DAWSON & W. HARVEY, *CONTRACTS AND CONTRACTS REMEDIES* (1959) where the materials on Remedies cover 297 pages.

Commonwealth casebooks as a rule stick to the traditional arrangement. See R. MCGARVIE, C. PANNAM & P. HOCKER, *CASES AND MATERIALS ON CONTRACT* (1966); J. SMITH

Replacing the doctrinal arrangement which spun out the law chronologically, Fuller's approach made Contracts a functionally taught course. Besides presenting the law as it probably will appear to the lawyer in his office as the client walks in the door, a functional arrangement serves to unify the entire course by presenting a viewpoint or perspective from which to develop the succeeding topics. Chronological organization, though orderly and perhaps logical, tends to be without design. Time itself can be accidental and without purpose, and so too must materials which are organized to follow its dictates. A functional approach, however, offers the advantage of an idea or concept which serves as the focal point for the development of all the materials. Not only does the student absorb the essential elements of a subject, he additionally learns them in conjunction with a philosophy of the course.

All Contracts casebooks present essentially the same materials—offer, acceptance, consideration, remedies, etc.—but the crucial question in judging any casebook is: does the author present a philosophy of the course, or a perspective for developing the course, which is a significant one in terms of the education of the student in the law? This is not to say that there is only one "best" perspective but rather that of the many available ones, only a few may be said to be educationally worthwhile. In this regard, the Fuller book is disappointing. After the original insight of placing the cases on Remedies first, the book appears to revert to the traditional chronological development. The cases chosen are almost uniformly excellent and challenging, and Fuller's notes which appear throughout are highly informative; but something is lacking. The materials are jumpy and do not tie together as cohesively as one would like. This cohesive organization is the great attraction of the Freedman book. It may also be said to be its downfall.

Freedman, in arranging his cases, made one crucial editorial decision. That decision was to compile a book which must be taught and not merely read. In the final analysis, the worth of the Freedman book must be judged by the ability of the instructor who teaches from it.^{1a} The book

& J. THOMAS, *A CASEBOOK ON CONTRACT* (3rd ed. 1966). One notable exception is J. MILNER, *CASES AND MATERIALS ON CONTRACT* (1963) which starts with Remedies and then deals with Consideration.

Many American casebooks retain the old chronological development of the law. See H. JONES, E. FARNSWORTH, & W. YOUNG, *CONTRACTS* (1965) (The Remedies chapter, however, is moved up to precede chapters on Conditions, Assignments, Third Party Beneficiaries, and Discharge); H. SHEPHERD & H. WELLINGTON, *CONTRACTS AND CONTRACT REMEDIES* (1957).

^{1a} Freedman's book is difficult to teach from because it requires a great deal of creativity on the instructor's part. It is a very challenging book because the emphasis is upon classroom discussion in the form of hypotheticals to fill in the nuances of contract law. Freedman's book is designed for the student to be shown in class how to conjure up his own hypotheticals and thus fill in the analytical links behind the selection of the cases. The student learns early that

does not purport to be a hornbook on the law of Contracts, as some casebooks aspire to be. The materials are almost exclusively cases with some notes added to serve as introductory material or as hints gleaned from Professor Freedman's practice of the law. It is with the cases, however, that the student will be expected to learn the law of Contracts.

Freedman has chosen his cases well. In fact, he has chosen them with particular care since his purpose in putting together the materials was not merely to collect the leading decisions, the odd decisions, and the informative though perhaps tangential decisions, but rather to select *the* particular case which follows the cases already selected to precede it. The student using this book will not learn all the nuances of Contract law but he will learn how to think them through. The emphasis on reasoning is very heavy in Freedman's book and he has accomplished his purpose in a very satisfying way. His book is about one-third shorter than standard casebooks but it has far more depth. Freedman has trimmed the fat out of Contract law and has honed it down to its bare essentials.

Left with the "guts" of the course, Freedman chose his cases carefully to bring out these essentials without unnecessary duplication. Thus, the first chapter, as in Fuller's book, starts out with cases designed to explore the question—what is a contract? The case chosen to begin the course, *Shabean v. Knight*,² is a marvelous vehicle for bringing out most of the major threads which by the end of the book Freedman has carefully woven into the garment of Contracts. The case involves a doctor's failure to sterilize his patient, the plaintiff, as per their contractual arrangement. The suit is in contract and the measure of recovery sought is the expense of rearing the unwanted child until its majority. The court decided that it would be against public policy to allow a man the joy of raising his child coupled with the added joy of having someone else foot the bills. The contract itself was held not to be against public policy. Just a few of the questions which this case suggests are: What is the relation between right, duty, and remedy? Was the proper remedy sought in this case? If not, what should the plaintiff have asked for? What remedies are available in tort? What is the relation between tort and contract? Is there any significance in the fact that the defendant is a doctor? What if the facts were that the doctor was unlicensed? Or, instead of this case, suppose what was involved was a car promised to have good brakes but which actually had no brakes? What is the relation between public policy and private contract? Is there ever such a thing as an entirely "private" contract?

which is missing is just as important as that which is present. The task of the instructor is thus more difficult, but a lot more fun.

² 11 Pa. D. & C. 2d 41 (1957).

Shabean is followed by the famous *Hawkins v. McGee*³ decision in which the proper measure of damages in Contracts cases was discussed by the court. The *Hawkins* case leads off the Fuller book, but it fits better after a case such as *Shabean*, since it may then be used to instruct the students on what should have happened in that unfortunate litigation. *Hawkins* evokes more intelligent discussion once the groundwork has been laid by devoting time to the questions raised by *Shabean*. Freedman next includes a tort variation of *Shabean* and follows it with a case especially written to test some of the public policy aspects of Contracts.⁴ The first section of the book is thus cohesive and forms a solid foundation for discussion of the whole area of Remedies, which is the next topic in the book.

Remedies cannot totally be divorced from the public policies which surround them and thus the doctrine of unconscionability as a limitation on freedom of contract appears early. This introduces at the outset the major theme of the regulation of fairness in dealing. But where does one draw the line? Liquidated damage clauses and penalty clauses help locate the line drawing process and so they follow naturally. But what can you put in a liquidated damage clause and what is the measure of the recovery if such a clause was not written into the contract? The next section on Remote and Speculative Damages takes up this question. The limitation provided by the doctrine of mitigation of damages then appears because analytically it is the next inquiry which occurs to the mind. Several other sections add to the armory of legal and equitable remedies available to the nondefaulting party. But what about a party, in default himself, who sues to recover a benefit conferred? Freedman adds several cases on this point because it logically follows after the remedies of the nondefaulting party and because it serves as an introduction to the law of restitution with which both contract and tort are intimately connected.⁵ A final section in this chapter serves to raise the problems of personal service contracts and the remedies available against malicious interference with contractual arrangements.⁶

³ 84 N.H. 114, 146 A. 641 (1929).

⁴ The case ending this section was written as a hypothetical case, with several opinions, to fill a gap in the materials. It raises questions of public policy in the context of illegality.

⁵ See Seavey & Scott, *Restitution*, 54 L.Q. REV. 29, 31-32 (1938).

⁶ At this point the inclusion of a case such as *Schisgall v. Fairchild Publications, Inc.*, 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. 1955), would serve as an excellent companion to the case Freedman has chosen, *Pure Oil Co. v. Dukes*, 101 Ga. App. 786, 115 S.E.2d 449 (1960). In *Schisgall* the court said that in a proper case, a malicious breach of contract would also constitute a tort, especially where the plaintiff would have difficulty proving damages in contract. The *Pure Oil* case forced an election on plaintiff where the breach of contract was *also* a tort, independent of the contract. Plaintiff's complaint was held to be in contract and tort damage claims were denied. These cases raise interesting questions on the problem of whether there

It is at this juncture that Freedman substantially parts company with the other Contracts casebooks. The next chapter in the Freedman book is Consideration. Analytically, this decision is correct. There is no reason to revert back to offer and acceptance after dealing with remedies except in order to return to a chronological presentation of the law. After exploring the vagaries of remedies in Contracts, the next question to arise is: well, what *is* a contract? It is true that offer and acceptance are a *part* of a contract but they are more like preconditions for the existence of the contract than equivalent to the contract itself. The heart of the contract is consideration; or, what are the parties trying to do? The introduction of materials on consideration immediately following materials on remedies serves a very important pedagogical function. It allows the student to see the types of bargains for which remedies will be awarded or denied while the idea of remedy is still fresh in the student's mind. Some casebooks which have accepted the Fuller innovation tend to treat problems of Offer and Acceptance after the Remedies chapter.⁷ This is a mistake. Cases on remedies naturally raise the question: what is it which we are seeking to remedy and to what type of conduct will we deny relief? To postpone the answer to these questions is to lose the importance of the first chapter. It may be argued that remedies will be denied where the formalities of offer and acceptance are not complied with, and no doubt this is true. But it misses the point. The Remedies chapter raises what ultimately is a philosophical question: What promises are to be enforced and why? The doctrine of Consideration is the answer given by the common law to these questions.⁸

No treatment of Consideration is adequate without a voyage into the vagaries of Estoppel, and the earlier the student gets this under his belt, the sooner he will be able to understand part of the underlying rationale of the law generally, no less Contract law specifically. In this chapter, therefore, Freedman introduces the familiar promissory estoppel and equitable estoppel. In addition, however, and to the best of my knowledge

exists a remedy for a violated right, and what the nature of that remedy would be if one existed. In *N.Y. Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936), included in the last chapter in Freedman's book, Mr. Justice Cardozo says that the court will find a remedy where there has been a wrong. These cases show that the answer is not that clear.

At this point one might also want to include the other side of the coin—a case involving the wilful performance of a contract. See, e.g., *Wolf v. Marlton Corp.*, 57 N.J. Super. 278, 154 A.2d 625 (Sup. Ct., App. Div. 1959), in which a buyer, not able to convince the seller to let him out of a contract for the purchase of a house, threatened to uphold the contract, buy the house, and sell it to an undesirable person and thereby ruin the reputation of the seller-builder and lower the value of the tract.

⁷ J. DAWSON & W. HARVEY, *CONTRACTS AND CONTRACTS REMEDIES* (1959); L. FULLER & R. BRAUCHER, *BASIC CONTRACT LAW* (1964).

⁸ See R. POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW*, ch. 6 (1922).

this is unique to American Contracts casebooks, Freedman includes materials on the English *High Trees* estoppel, which is considered to be one of the most important innovations in Contract law for quite some time.⁹

Freedman then turns to the formalities of Contract law—the problems of formation. Included within this material is a separate section on the problem of manifestation of assent through an agent. This may very well be the student's only exposure to traditional agency problems since the first year course in Agency has become like the platypus—virtually extinct. The inclusion of several cases on agency is most beneficial for introducing the student to this branch of the law as well as rounding out the examination of problems of communication in a business environment.

Succeeding chapters deal with Conditions, Assignments, Third Party Beneficiaries and Privity of Contract, Renegotiation of Contractual Obligations, and Advising the Aggrieved Party on a Course of Action. The last chapters bring the discussion back around to the ever important topic of Remedy—the book has thus come full circle. One is tempted to suggest that literature provides an example of a book coming full circle—James Joyce's *Finnegan's Wake*. One is also tempted to suggest that the comparison of the two books does not stop there, a fact to which student affirmation is far from lacking.

One of the most important aspects of the Freedman book is its heavy emphasis on the Uniform Commercial Code. Throughout the book, virtually every section contains references to the Code and problems to be solved under the Code. The case material is subjected to Code scrutiny in class, and at least one major question on the Code appears on Freedman's Contracts exam. This great stress on the Code serves several functions. In the first place, the Code is law in every state except Louisiana

⁹ See C. CHESHIRE & C. FIFOOT, *THE LAW OF CONTRACT* 81-87 (6th ed. 1964); G. TREIBEL, *THE LAW OF CONTRACT* 84-87 (2d ed. 1966); Campbell, *Gratuitous Waiver of Contractual Obligations*, 1 N.Z.U.L. REV. 232 (1964); Turner, "High Trees House" Re-Inspected—Promissory Estoppel in 1963, 1 N.Z.U.L. REV. 185 (1964). The name "High Trees" comes from the case promulgating the rule, *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] 1 K.B. 130. Failure of the American casebooks to pick up this doctrine is a highly significant omission since the *High Trees* estoppel represents the first major judicial attempt to overhaul the doctrine of consideration. See Blackshield, *Constitutionalism and Comstockery*, 14 KANS. L. REV. 403, 436 n.185 (1966); Denning, *The Way of an Iconoclast*, 3 SYDNEY L. REV. 208 (1960); Denning, *Recent Developments in the Doctrine of Consideration*, 15 MOD. L. REV. 1 (1952).

Estoppel material at this juncture also has the advantage of continuing one of the major themes running through the Freedman book—the relationship between contract and tort. In addition, the material emphasizes the fact that certain business actions can give rise to lawsuits even though these actions are not strictly speaking *ex contractu* or *ex delictu*. The problem of the appropriate remedy, dealt with in depth in the previous chapter, thus recurs here where the problem is more sophisticated.

and is thus highly relevant for students from all parts of the country (except Louisiana; but these students can see what they are missing). The Code undoubtedly changes many Contracts principles by its express terms and will change many more by implication and analogy.¹⁰ Second, the introduction of a code to first year students serves as a method for supplementing or comparing judicial case law reasoning. The student learns how to think like a judge as well as a legislator and to appreciate the difference between these two reasoning processes.¹¹ In addition, he learns to work out problems under a code and compare this with problems raised by case law. The systematic comparison of Code and case equips the student with the full panoply of lawyer's tools for legal thinking. Finally, the student is better able to handle higher level courses such as Commercial Law, Sales, Secured Transactions, etc., which subject the U.C.C. to intense and minute scrutiny. The student already familiar with the Uniform Commercial Labyrinth will adapt to the commercial law courses far more quickly and meaningfully than a student who has not had the pleasure of a nodding acquaintance with that singular document.

Freedman includes an appendix containing 17 exam questions guaranteed to confound and confuse the hale and heartiest Contracts scholars. The questions can be used on an exam (as Freedman does, but changing the answers each year to avoid a "pat" answer developing), for study group or review purposes, or in the classroom in a problem-method format.

Freedman's book, however, is not without its faults. The omission of many aspects of Contracts law may deprive the book of popular acceptance. Similarly, by honing down the law, it has become a highly personal book and may therefore not be sufficiently clear to Contracts teachers who might plan to use it. The inclusion of a detailed teachers' manual would go far towards suggesting the material to be brought out in each case and the purpose behind the inclusion of that particular case which was chosen.

Another objection is the lack of note material. A casebook should not be a hornbook but it should furnish a guide to where the student might look to improve his knowledge on certain points. A few citations in each chapter to the better and more relevant material might save the hapless first year student many miserable hours in the library not finding

¹⁰ See R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS ch. 4 (1966); Anderson, *Contracts Law in the Uniform Commercial Code* (pts. 1-2), 1 ILL. CONT. LEG. EDUC. 1, 65 (1963).

¹¹ Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291.

the enlightenment he so desperately seeks. Other types of note material are also lacking.¹²

One of the major criticisms is the woefully sparse material on the Statute of Frauds. Professor Freedman has decided to include cases on the Statute in the first chapter but the materials put together are not sufficient even to convey the range of problems raised by the Statute, no less suggest possible solutions. This section is perhaps the weakest in the book and much in need of supplementation.

Professor Freedman has established himself as a leading authority in the field of legal ethics.¹³ One wishes that he had turned his situational approach¹⁴ to the law of Contracts and included a note dealing with the ethical obligations, if any, of a lawyer who drafts adhesion contracts, uses oppressive bargaining power wielded by his client to work a harsh bargain or settlement on a "weak" businessman, and so on. In the conflict between public policy and private contract, surely the lawyer faces ethical problems. One wishes that Professor Freedman had explored this area with the same depth and perception that he has brought to bear on the ethical problems of defense attorneys and of prosecutors.¹⁵ Perhaps we can hope to see such a note in a subsequent edition.¹⁶

Minor, but annoying, points about the book include the fact that there is no Table of Cases and no Index. It is true that the Table of Contents lists the cases but this is no substitute for an alphabetical list of cases to expedite research.

Ultimately, as was noted earlier, the great attraction, or downfall, of the book lies in the conscious attempt by the author to strip down the law of Contracts and work from the heart out to the flesh. This approach may be too "raw" for many who themselves prefer a fuller inclu-

¹² The examination of communication problems in business would be substantially furthered by the articles on business practices authored by Professor Stewart Macaulay. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Macaulay, *The Use and Nonuse of Contracts in the Manufacturing Industry*, 9 PRAC. LAW., Nov. 1963, at 13. At a minimum, there should be citations to Professor Macaulay's works so that the student would at least be aware that they exist. Inclusion of excerpts from his works would be a significant addition to the casebook.

¹³ See TIME, May 13, 1966, at 81.

¹⁴ Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1047 (1967).

¹⁵ Freedman, *supra* note 14; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

¹⁶ Freedman includes a problem in the book designed to raise many of the ethical problems involved in this area of the law. Because there is little material, if any, on ethics to which the student is exposed throughout his law school career, more material here would be highly beneficial. M. FREEDMAN, CASES ON CONTRACTS 84 (2d ed. 1967).

sion of materials. This matter of preference, coupled with the decision to accept or reject the major themes Freedman stresses by his case selection, is what helps the teacher determine whether or not to use the book. A reviewer obviously cannot legislate preferences on the part of his audience, but, for whatever it is worth, I intend to use Freedman's new edition of *Cases on Contracts*.

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