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Modern Securites Transfers, by Carolos L. Israels and Egon Guttman

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BOOK REVIEWS

MODERN SECURITIES TRANSFERS. By Carlos L. Israels and Egon Guttman. Boston: Warren, Gorham & Lamont, Inc. 1967. Pp. xix, 513. $27.50.

The topic of discussion is the "private law" which governs the rights and duties of those who buy and sell securities as well as those who participate in the transfer process.[1] The words of art herein are not "full disclosure," "false or misleading," "prospectus," or "registration statement"; rather, they are "delivery," "indorsement," "bona fide purchaser," and "registration of transfer."[2] There is no gainsaying the need for a scholarly and practical guide to the commercial legislation governing securities transfers. The question is: Does this book fill the requirement?

The basic techniques of this text do much to unveil the mysteries and mandates of Article 8 of the *Uniform Commercial Code*.[3] The innovations and clarifications wrought by the *Code* are first viewed against a background of antecedent approaches under the common law, predecessor securities statutes, and negotiable instruments legislation.[4] As one reads on, however, the primary significance of this work becomes abundantly clear. The involutions of the *Code* — necessary consequences, perhaps, of the drafter's art — suddenly gain new coherence and intelligibility in the transactional context furnished by the authors. The statutory soul of securities transfers is joined with the flesh and blood of practice, and one finds himself thrust into the daily activities and affairs of the corporate

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[1] The policy of the "commercial law" of securities is stated well by the authors: "Since . . . investment securities are intended to pass from hand to hand in 'market' transactions of one form or another, the instrument must be in the legal sense fully 'negotiable.'" C. ISRAELS & E. GUTTMAN, MODERN SECURITIES TRANSFERS § 1.03 (1967).

[2] "Unlike the federal Securities Acts and state Blue Sky statutes the [Uniform Commercial] Code is not a regulatory law .... It is pure private law dealing only with the relationships between the issuer of securities and their holder and between successive holders of securities." *Id.* § 2.08 (footnotes omitted).

[3] While this text deals primarily with the UNIFORM COMMERCIAL CODE, mention is made periodically to pertinent sections of the Uniform Stock Transfer Act, the predecessor in many States to Article Eight; the MODEL FIDUCIARY SECURITIES TRANSFER ACT; and the UNIFORM ACT FOR THE SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS.

[4] The UNIFORM NEGOTIABLE INSTRUMENTS LAW and its successor, Article 3 of the UNIFORM COMMERCIAL CODE, failed to create negotiability for stock certificates and "registered form" bonds because such securities did not fit within the definition of "negotiable instrument." C. ISRAELS & E. GUTTMAN, *supra* note 1, §§ 1.04-.05.

transfer office[5] or in the position of a bank officer who has been asked by a customer to guarantee a security indorsement.[6] Casting the law in its transactional habitat greatly facilitates the lawyer's understanding of statutory reticulation; but more, it allows the non-lawyer professional to use his knowledge of actual securities transactions to gain some insight into the legal underpinnings of the system in which he operates.

The practical aspects of this book further enhance its broad base appeal to all who are involved in the change of ownership process.[7] Besides providing a comprehensive appendix of relevant forms,[8] the authors have interspersed throughout the text a number of word formulas which may be used to conform to statutory requirements.[9] Generally, alternate forms are critiqued to show their relative suitability in the light of *Code* provisions. Of particular significance — once again on the practical side — is the separate treatment given to the essentials of transfer taxation[10] and the specific kinds of insurance available to protect against the liabilities and risks imposed by statute.[11]

The fundamental form of presentation is one to which this writer has mixed reactions. The *Uniform Commercial Code* sections are cited in brackets within the body of the text. This is convenient, especially since almost every sentence of the book has some referent in the *Code,* which appears in appendix form, together with drafters' comments and some frequently enlightening comments by the authors.[12] Normal footnote procedure is used to cite non-*Code* materials. While this combination system of citation seems generally appropriate and helpful, one wonders whether it has been used to attain its fullest effect or to provide the reader with an effective research vehicle.

Instances arise where the text proceeds too long without textual or footnote references.[13] Broad principles of law are presented un-

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[5] *E.g., id.* chs. II, VII-IX, XIII.

[6] *E.g., id.* chs. X-XI.

[7] The practical approach is maintained throughout the text. For some typical instances, see *id.* §§ 3.05, 6.07, 7.04, 10.18, 10.21, 13.06.

[8] *Id.* app. B.

[9] *E.g., id.* at 503-08, 703, 1011, 1102-04.

[10] *Id.* ch. XIV.

[11] *Id.* ch. XV.

[12] *Id.* app. A.

[13] *E.g., id.* §§ 3.22, 4.04, 4.07, 6.07, 7.06, 10.02, 13.08, 13.13, at 1319.

adorned by citation[14] or accompanied only by cryptic footnotes.[15] But one is tempted to excuse these lapses on the assumption that the authors have deliberately sought to produce a treatise comprehensible to lawyers and nonlawyers alike, a goal which creates an antinomy between the need for intelligibility to nonlawyers and the desire to present penetrating and exhaustively documented legal analyses which might encumber nonlawyer comprehension. In a book which has so successfully presented a basic framework for understanding the law in context, a book in which the authors have bent every effort to facilitate knowledge of fundamental structures, perhaps one should not expect the depth of analysis[16] on specific

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[14] *E.g.*, *id.* §§ 1.05, 2.02, 3.22, 5.03, 6.07, at 611, 8.11, at 812, 10.02, at 1003, 13.08. It seems that some additional explanation of the terms "registered as to principal," *id.* § 5.04, and "settlement date," *id.* § 6.06, might be valuable for the *profani.*

[15] *E.g.*, *id.* at 405 n.3, where it would seem appropriate to mention § 4(3) of the Securities Act of 1933, 15 U.S.C. § 77d(3) (1964); C. ISRAELS & E. GUTTMAN, *supra* note 1, at 812 n.14, where the discussion of *criminal* liabilities under § 5(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77e(a)(2) (1964), should carry a cite to § 24, 15 U.S.C. § 77x (1964); C. ISRAELS & E. GUTTMAN, *supra* note 1, at 812 n.18, where the following additional authorities might be helpful: Cady v. Murphy, 113 F.2d 988 (1st Cir. 1940); Lennerth v. Mendenhall, 234 F. Supp. 59 (N.D. Ohio 1964); Wall v. Wagner, 125 F. Supp 854 (D. Neb. 1954), *aff'd sub nom.* Whittaker v. Wall, 226 F.2d 868 (8th Cir. 1955); C. ISRAELS & E. GUTTMAN, *supra* note 1, at 1208, where it would appear appropriate to qualify the last full sentence by a cross-reference to paragraph (vi) of § 12.12; *id.* at 1319 n.21, where the citation should include reference to Securities Act of 1933, § 5, 15 U.S.C. § 77e (1964).

[16] For example, in dealing with the issuer's duty when it is presented with a security for transfer into the name of a person whose infancy is disclosed, a more detailed analysis of CODE provisions seems possible. C. ISRAELS & E. GUTTMAN, *supra* note 1, § 3.07. When the issuer is asked to "transfer into" the name of a disclosed infant, it seems that, if the minor were not a special endorsee, the issuer could claim (1) that he was exonerated from liability because there was no duty to inquire into adverse claims, UNIFORM COMMERCIAL CODE §§ 8-404(1), 8-403; and (2) that he was obligated to effect transfer, *id.* § 8-401. If the minor were a special endorsee, the issuer could refuse transfer at least on the ground that the security, bearing the special indorsement of the minor only, was not indorsed by the appropriate persons, *id.* §§ 8-401(a), 8-308(3)(d). The issuer could demand guarantee of the special indorsee's signature, *id.* § 8-401(a), thus protecting itself somewhat because the guarantor warrants that the signer had legal capacity to sign. *Id.* § 8-312(1)(c). Further, if the minor were the presenter and special endorsee, he would have warranted that his special indorsement was effective. *Id.* § 8-306(1).

Upon a "transfer out" of the disclosed minor's name, the issuer could, in the absence of an effective fiduciary indorsement, refuse transfer, noting (1) that it would be liable for wrongful transfer under *id.* §§ 8-404 and 8-403, and (2) that it did not have a duty to transfer under *id.* §§ 8-401 and 8-308. Further, if the issuer were to transfer to a bona fide purchaser, while the minor could proceed against the issuer for transferring without necessary indorsements, he could not proceed against the purchaser. *Id.* § 8-315(1).

There are several other matters which struck this writer as deserving of greater elaboration. First, the authors seem to state the "simple rule" that the indorsement of a special endorsee is not required for registration into his name. C. ISRAELS & E. GUTTMAN, *supra* note 1, at 506. There is no attempt to relate this statement to UNIFORM

problems and the elaborate citation that are characteristic of the traditional legal treatise.

Whatever its shortcomings,[17] this text will undoubtedly earn for its authors the distinction of being the first, and perhaps foremost — time will tell — exegetes of Article 8. The book's clear and coherent analysis[18] of the *Code* in context makes it, at the very least, an indispensable "first course" in the private law of securities transfers.

Finally, one cannot help but mention James A. Austin's foreword comment that this work's value is likely to persist until such time as "the sole evidence of a shareholder's ownership is a blip on a magnetic tape with all transfers of share registrations handled solely by data processing machines."[19] Recent pressures on the "back offices" of securities broker-dealers indicate that Mr. Austin's remarks are perhaps more imminently prophetic than he realized. What then will become of the traditional concepts of "delivery," "indorsement," "presentation," "guarantee of signature," "registration of transfer," and the "bona fide purchaser"? For example, what will be the evidence of delivery, if the security "certificate" consists of a series of electronic bits in the memory of someone's computer?[20] How will indorsement be effected? These are just a few of the problems that must be faced on what appears to be the

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COMMERCIAL CODE §§ 8-401 and 8-308. *See* C. ISRAELS & E. GUTTMAN, *supra* note 1, at 901.

Second, the statement is made that an individual shareholder may, under SEC Rule 14a-7, 17 C.F.R. § 240.14a-7 (1965), "require" management to mail proxy materials to other shareholders. C. ISRAELS & E. GUTTMAN, *supra* note 1, at 709. This should be modified by noting that management may elect to furnish a list of shareholders to the individual requesting dissemination. SEC Rule 14a-7(c), 17 C.F.R. § 240, 14a-7(c) (1965).

Finally, it is asserted that the reason for the issuer's right to reasonable assurances of genuine and effective indorsement, UNIFORM COMMERCIAL CODE § 8-401(1)(b), is the imposition of absolute liability upon the issuer for wrongful registration upon an unauthorized signature, *id.* § 8-311. C. ISRAELS & E. GUTTMAN, *supra* note 1, at 1002, 1101. It should be noted that a second substantial reason underlies the issuer's right, *viz.*, the issuer's liability for transfer upon a genuine but *ineffective* signature. UNIFORM COMMERCIAL CODE §§ 8-404, 8-308.

[17] The book seems to be plagued by more than its share of technical errors. *E.g.*, C. ISRAELS & E. GUTTMANN, *supra* note 1, at 903 n.8 ("wrongful" should probably be "rightful").

[18] The authors have followed a very helpful practice of using topical paragraphs at the beginnings, and summary paragraphs at the ends, of most chapters.

[19] Austin, *Foreword* to C. ISRAELS & E. GUTTMAN, *supra* note 1, at iv.

[20] For those interested in securities *regulation*, the question of "electronic delivery" is equally troublesome. For example, at what point will a prospectus have to be delivered in conjunction with the electronic delivery of a security subject to registration under Securities Act of 1933, § 5, 15 U.S.C. 77e (1964)?

newest frontier of development in the marketing of securities. It is hoped that an Israels or Guttman will step forward to aid the process of transition.

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WATER RIGHTS. By J. H. Beuscher. Madison, Wisconsin: College Printing & Typing Co., Inc. 1967. Pp. 434. $12.00.

In the past few years water pollution and water scarcity[1] have developed into recognized national problems.[2] National interests dictate that our fixed and relatively constant supply of water be used so as to effectively meet a constantly growing demand.[3] Governmental response to these needs has resulted in numerous changes in the law of water, the most important being the evolution of the law from "private" to "public." This has been accomplished by: (1) the growth of federal activity in the field of water law;[4] (2) the increased utilization of administrative regulatory bodies at both the State and federal level;[5] (3) the expansion in geographical jurisdiction of the organizations dealing with water;[6] (4) and the recognition of the national character of water problems, for no longer are they primarily problems of the arid West.

The immensity of our water problem, as well as increased public awareness, has resulted in an outpouring of books.[7] Surprisingly, few of these books are concerned with the legal aspects of water problems.[8] The little that has been written has usually been collections of materials from conferences and symposia dealing with the legal problems of water use and misuse.[9] Two casebooks have appeared,[10] but legal writing has generally been confined to the journals and law reviews.[11]

Professor Beuscher's book has thus been written in an area of the law in need of modern materials. In spite of the title, it is a book of cases and materials.[12] It differs from Professor Trelease's work[13] in that it more adequately recognizes water development in the Eastern United States. However, more important than its geographical outlook is the author's devotion to modern *public* water law. Three chapters, representing more than one-third of the text, deal with: "Limitation Imposed on Private Water Rights by Assertions of Public Interest;"[14] "Water Pollution Abatement;"[15] and

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"Allocations of Water Between States and Interstate Water Compacts."[16] The attention to the public aspect of water law is welcome. Unfortunately the material is limited. For example, water pollution control through State administrative agencies is covered

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[1] Scarcity, as the term is commonly used in connection with water supplies, does not necessarily mean absence of water. Often it means the absence of cheap water due to the costs of treating polluted water and/or transporting it long distances.

[2] The problems of pollution and scarcity are related. It is the use of water for transporting wastes from our concentrations of population that destroys or greatly increases the cost of using water for other beneficial purposes; scarcity is the result.

> [3] [T]he average annual stream flow that discharges into the oceans from the continental United States — is essentially fixed and amounts to about 1,100 billion gallons a day. . . . [I]n 1954 withdrawals amounted to less than a third and waste-ridden returns less than a fifth of the total; in 2000, it is predicted, withdrawals will be a little over four-fifths and polluted returns about two-thirds of the entire U.S. stream flow. J. BEUSCHER, WATER RIGHTS 333-34 (1967), *quoting from* NATIONAL ACADEMY OF SCIENCE, WASTE MANAGEMENT AND CONTROL 12-13 (1966).

See generally M. COHN, SEWERS FOR GROWING AMERICA (1966); Bryan, *Water Supply and Pollution Control Aspects of Urbanization*, 30 LAW & CONTEMP. PROB. 176 (1965).

[4] Federal growth has come about in several ways. By legislation the federal government has actively entered into water pollution abatement. *See* 33 U.S.C. § 466 (1964). The Supreme Court has essentially used the commerce clause to swallow the navigability clause of the Constitution. *See* Federal Power Comm'n v. Union Elec., 381 U.S. 90 (1965). Thus, federal groups such as the Federal Power Commission and the Department of Interior exercise a great deal of administrative control over water resource management. *See* Udall v. Federal Power Comm'n, 387 U.S. 428 (1967). Finally, national water projects give the federal government control of water distribution. *See* Arizona v. California, 373 U.S. 546 (1963).

[5] This is recognition that a doctrine of riparian rights is poorly equipped to handle water problems involving a myraid of interrelated, yet diffuse users. Appropriation States have used administrative agencies for many years. For example, California has used a water permit system since 1914. Most riparian States, however, have administrative agencies that deal primarily with waste pollution.

[6] By consent of Congress, numerous interstate river basins have compacted to work on area wide problems. The Ohio River Valley Water Sanitation Commission, organized as a compact in 1936, has made admirable progress in water pollution abatement. *See* J. BEUSCHER, *supra* note 3, at 391-95.

[7] *See* J. JACOBSTEIN & R. MERSKY, WATER LAW BIBLIOGRAPHY 1847-1965 (1966).

[8] One exception is E. MURPHY, WATER PURITY (1961).

[9] *See* J. JACOBSTEIN & R. MERSKY, *supra* note 7, at 29-41.

[10] J. SAX, WATER LAW: CASES AND COMMENTARY (1965); F. TRELEASE, H. BLOOMENTHAL & J. GERAUD, NATURAL RESOURCES (1965).

[11] *E.g., Legal Problems in Water Resources: A Symposium*, 45 CALIF. L. REV. 584 (1957).

[12] For those seeking a treatise, WATER AND WATER RIGHTS (Clark ed. 1967) is a new multivolume set. At present the first three volumes are in print.

[13] F. TRELEASE, H. BLOOMENTHAL & J. GERAUD, *supra* note 10.

[14] J. BEUSCHER, *supra* note 3, at 285.

[15] *Id.* at 333.

[16] *Id.* at 373.

in 10 pages, six of which are extracts from two cases. The four pages of the editor's comments are further minimized by the format.[17] Another example is the limited material on interstate compacts. A nine-page extract from the Delaware River Basin Compact, one case extract, and four pages of notes complete a subject more thoroughly treated than most of the topics.[18]

When turning to the material dealing with private water law we find an approach that differs in emphasis more than in content from the other works in the field. This emphasis materializes in the author's use, wherever possible, of "Eastern" rather than "Western" cases to illustrate the law. By utilizing cases from jurisdictions representing a balanced geographical distribution, the author demonstrates the national scope of water law development. The editorial efforts, bringing together administrative and legislative material affecting legal development, further this goal. The author's notes, concise and incisive, weaving cases and statutory development into a system of water law which balances private rights with public needs, are a valuable feature of the book.[19]

The gravamen of the criticism of the text is this: The appetite is whetted but not satisfied. More material is needed, particularly in the public law aspects of water control. It is not enough to handle regional water quality management with a short extract from the report of the National Academy of Science.[20] One immediately wants to know not just the legal authorization for regional water development authorities but also details concerning their successes and failures. The text builds an awareness of the organizations that deal with water problems without providing the reader with any understanding of these organizations.

Thus, the text helps inaugurate a new era of water law. The days of provincialism are over. If the complexity of the law is inversely proportional to the supply of pure water, then, we are all to be controlled by a complex law. For those persons seeking to develop a broad understanding of this area of the law, this well-written text can be recommended. For those seeking understanding in depth, additional material will be required.

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[17] *Id.* at 352-61.

[18] *Id.* at 391-408.

[19] *See id.* at 65-285.

[20] *See id.* at 333-38, *quoting from* NATIONAL ACADEMY OF SCIENCE, *supra* note 3, at 3, 12-13, 22-23, 187-89.

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