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## Book Reviews: *Merrill on Notice*, by Maurice H. Merrill, Kansas City: Vernon Law Book Co., 1952, 3 vols.

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## BOOK REVIEWS

*Merrill on Notice.* By Maurice H. Merrill.<sup>1</sup> Kansas City: Vernon Law Book Co., 1952. 3 vols., pp. xl, 2285. \$45.00

In 1926 Dr. Maurice H. Merrill joined the faculty of the University of Nebraska Law School and took over the course in Agency previously taught by a most eminent authority in that field, Dean Warren A. Seavey. The meticulous scholarship of Dean Seavey undoubtedly was an inspiration to his successor, for in the years that followed Professor Merrill, both in the classroom and in print, demonstrated his complete grasp of the subject of Agency. Within a year Professor Merrill published the concluding section of an important series of articles on Agency commenced by Dean Seavey which had appeared in early issues of the Nebraska Law Bulletin.<sup>2</sup> Ten years later, in 1936, Dr. Merrill published two significant articles in which he sketched in broad outline the "anatomy of notice" and "unforgettable knowledge,"<sup>3</sup> which together were a partial synopsis of the treatise finally published in 1952. Former students and lawyers in Nebraska and Oklahoma, long familiar with Dr. Merrill's outstanding scholarship and analytical ability, will receive personal pleasure and satisfaction in the appearance of *Notice*.

This product of a twenty-five year period of gestation is monumental and unique. It is monumental in that the treatise will long endure as a memorial to a careful, practical and wise scholar; it is unique in that Professor Merrill has cut across traditional categories of law and gathered together in one schematic whole components which theretofore had been isolated in divers strata. In this systematic work, the rather obscure elements of notice, knowledge and notification which had been engulfed in the law of procedure, property, criminal law, administrative law, torts, contracts, etc., have been subtracted from alien masses and woven together into a new unified whole so that they take on new content and meaning.

In this process of distillation and compagination it was found that the old terminology was inadequate and ambiguous, so a new nomenclature was devised. In lieu of the old dichotomy of "actual and constructive" notice, the terms "cognitive" (knowledge) and "absolute" (notification) are used in order to clarify the concepts. "Cognitive notice" includes knowledge, facts putting one on inquiry (reason to know), and notification which need not be remembered. "Absolute

<sup>1</sup> Professor of Law, University of Oklahoma since 1936. Professor of Law, University of Nebraska, 1926-1936.

<sup>2</sup> Seavey, Agency, 1 Neb. L. Bull. (No. 4) 5 (1923); Seavey, Agency, 2 Neb. L. Bull. (No. 1) 5 (1923); Merrill, Agency, 6 Neb. L. Bull. 135 (1927).

<sup>3</sup> Merrill, The Anatomy of Notice, 3 U. of Chi. L. Rev. 417 (1936); Merrill, Unforgettable Knowledge, 34 Mich. L. Rev. 474 (1936).

notice" is subdivided into notification (formal or by performance of an act creating notice), unforgettable knowledge, and facts which one is under a duty to know.<sup>4</sup>

In justifying the adoption of new terminology, Professor Merrill points out:

A classification apparently most favored in the past by judges and writers divides the subject into actual notice and constructive notice. . . . There has been so much confusion and ambiguity in the application of these terms that it seems undesirable to accept them as the basis for a thorough analysis of the notice concept. . . . This distinction *apparently* made by these cases is between notice arising from knowledge or direct communication and notice arising in every other manner. . . . The result is that, by failing to discriminate between notice based on knowledge and that based either on formality or on imperative legal policy, the distinction between notice actual and constructive fails to account for the most significant differences in the law of notice. When we add to this the variant sense in which the terms have been applied by different courts, the reasons for discarding the terminology, as far as possible, are manifest. . . .<sup>5</sup>

As vouchsafed by the author, "this is a book of principles rather than a digest or encyclopedia." Throughout the development of his subject, Dr. Merrill points to the policy or value factors underlying principles of law, and comments, suggests, approves or disapproves of principles and their applications. There is constructive criticism of cases and authorities, an analysis of precedents, and at times a prediction of trends. The author's familiarity with innumerable fields of law, his reading of thousands of cases, and his great gift for legal analysis, will invoke respectful attention to his views.

Enough has been said to indicate that both imagination and scholarship went into *Notice*. In addition, the treatise fills a practical need and gives a pragmatic treatment to its subject. As pointed out in the Preface, a busy lawyer cannot get through a week without touching upon notice in some way. But before these volumes were published there was no complete and unified treatment of the subject, no systematic analysis of the problems.

The lawyer today needs to consider such matters as the distinction between cognitive and absolute notice; under what conditions knowledge, including the perception of inquiry-provoking facts, will serve as a substitute for notification; what are the necessary elements of notification; what information is legally forgettable; the requisites of notification by mail, publication, or by posting; the essentials of emanation and authentication in respect to notification; the concepts of waiver and frustration of

<sup>4</sup> As pointed out by Dr. Merrill, this terminology is adopted with amendments and modifications from that used by Dean Seavey. See Seavey, *Notice Through An Agent*, 65 U. of Pa. L. Rev. 1 (1916); Restatement, Agency § 9 (1933).

<sup>5</sup> 1 Merrill, *Notice* 10-11 (1952).

notification. All these matters receive unified and systematic treatment here for the first time.<sup>6</sup>

Of practical value is the chapter and section analysis, containing a detailed breakdown of subject matter. The index covers 112 pages with 559 principal headings. Almost 30,000 cases are listed in the Table of Cases. A practising lawyer, confronted with a problem in this area, will be able to find authority and analysis in short order.

From the standpoint of a teacher, who seldom is bothered with practical problems, there is but one regrettable omission in these volumes. Unfortunately, the decision in *Mullane v. Central Hanover Bank & Trust Co.*,<sup>7</sup> came too late for inclusion and discussion in the section dealing with notice by publication. The problem of procedural due process, apparently, is outside the scope of the treatise. My regret is that the treatise was not extended to include it, although obviously that might require another volume.

*Notice* will prove to be work of inestimable value to the legal profession. In addition, it casts some illumination on the law of Agency, which is fast becoming a neglected subject in the law school curriculum due to its absorption into Business Associations. *Merrill On Notice*, Seavey's *Studies In Agency*,<sup>8</sup> along with the *Restatement*, are authoritative texts in the field, and together they contain the substance of the law of Agency and a penetrating analysis of its principles.

HENRY H. FOSTER, JR.<sup>9</sup>

<sup>6</sup> 1 Merrill, Notice iii (1952).

<sup>7</sup> 339 U.S. 306 (1950), discussed in Note, 32 Neb. L. Rev. 432 (1953).

<sup>8</sup> West Publishing Co. (1949).

<sup>9</sup> Professor of Law, University of Nebraska.