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Book Review

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BOOK REVIEW

OUTLINE OF CONTRACTS, By Paul R. Conway. New York: American Legal Publications, Inc., 1968 $15.00.

Although the Outline is actually only 832 pages in length, the pagination does not adequately recognize or indicate the content of this volume which is more of a text than it is an outline. Much of the material is in 8-point type, especially the digests; cases supporting the principles of law are stated in **bold face type.**

It is refreshing and reassuring, in this age of innovation without progress, to observe that the traditional development of the law of contracts is adhered to and preserved. While it is uniformly recognized that progress is always essential, not infrequently, the question must be posed: Is it progress or just change? In this instance, the table of contents clearly indicates adherence to the traditional approach to contract law which seems by far the most logical yet developed.

In this volume, Professor Conway happily combines the old with the new. He has brought up to date the various contract concepts and a substantial revision appears in chapters 6 and 16, "Contracts Without Consideration", and "Remedies and Measure of Damage for Breach", respectively.

Probably the most significant change is the inclusion of the pertinent sections of the Uniform Commercial Code, now adopted in 49 of our 50 jurisdictions.[1] These sections are not merely cited but the more significant ones are quoted in full. Also, the explanatory official comments are frequently quoted where desirable. In Appendix B appears a comprehensive table showing the jurisdiction, citation, and the effective dates of the UCC. Another table shows where in the Outline the UCC is cited or quoted.

The book is especially valuable as a text for use in connection with any standard casebook on the law of contracts. Helpful hints are provided for the first-year student as to the use of the book whether for day-to-day preparation, for review, or for the final examination. As the book is keyed to the Restatement of Contracts and to Williston on Contracts, Third (Jaeger) Edition, any student desiring to engage upon a study in depth of any given topic will find his work greatly facilitated. Both the Restatement of Contracts in its original form as well as the first 175 sections of the second edition are included in this volume.

In the introductory chapter, considerable space is devoted to the rules

1. Louisiana is the only state which has not adopted the Uniform Commercial Code.

of interpretation and construction as illustrated by the cases.[2] This is, indeed, a good beginning because the student early becomes aware of the reaction of the courts to the agreement *sub judice*. Here will also be found a discussion of the parol evidence rule, integration of the contract, extrinsic evidence, custom and usage, capacity of the parties, and an examination of the impact of the Uniform Commercial Code on the law of contracts.

It is indeed noteworthy that in the table of contents, not only is the chapter title included, but all the section titles appear as well. While this makes the table of contents longer, it is most helpful to one seeking a particular topic. Furthermore, the index appears to be quite adequate.

An interesting feature of this book, wherein it differs from most student books, is that there are no footnotes. In fact, the entire arrangement is quite intriguing. In each section, there are headnotes, wherein the rules of law are stated, followed by an explanation of the principle of law involved. Brief digests of the various cases illustrate the principle under consideration.

In examining this book, and the index thereto, there is one gap that is rather conspicuous: There seems to be no reference to collective labor agreements, although the Supreme Court of the United States on numerous occasions has described these as contracts.[3] However, a gap or lacuna in the earlier edition has been effectively filled by the discussion of joint ventures.[4] Since this type of business association is so frequently utilized today, especially for *ad hoc* enterprises, this is indeed a welcome and necessary addition.[5]

2. In this connection, *see* 4 Williston, Contracts, chapter 22 INTERPRETATION AND CONSTRUCTION OF CONTRACTS (3d ed. Jaeger 1961).

3. Among the leading cases wherein the Supreme Court of the United States has considered the nature of the collective labor agreement are: Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955); Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957); Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Retail Clerks International Association v. Lion Dry Goods, Inc., 369 U.S. 17 (1962); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95 (1962); Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962); Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962); Smith v. Evening News Association, 371 U.S. 195 (1962); John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Boys Market, Inc. v. Retail Clerks' Union, Local #770, 398 U.S. 235 (1970).

See also Jaeger, *Collective Labor Agreements and the Third Party Beneficiary*, 1 B.C. Ind. & Com'l L. Rev. 125 (1960), discussing Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); Jaeger, Collective Labor Agreements (1962); 9 Williston, Contracts, chapter 34, COLLECTIVE LABOR AGREEMENTS, especially § 1020A (3d ed. Jaeger 1967).

4. Conway, Outline of Contracts, 385-387 (1968).

5. The subject of joint ventures is extensively treated in 2 Williston, Contracts, chapter 13, JOINT DUTIES AND RIGHTS UNDER CONTRACT, especially §§ 318-319 (3d

As the author places great reliance on the Restatement of Contracts, it is not surprising to find a complete table of citations to the Restatement, both first and second, at the end of the volume. This is indeed helpful to either the student or practicing lawyer who seeks to locate any section of the Restatement by reference to the page number in the Outline.

No effort has been spared to make this a very practical book which can be of value to both the lawyer, that is, the active practitioner, and to the student in law school. For the latter, indeed, it is a "must." This reviewer has used the Outline for a number of years and found it a very effective teaching adjunct.

Contrary to a prevailing and current practice, the author of the Outline has retained joint obligations in chapter 10. Most modern casebooks have discarded the treatment of this subject, largely because it has become almost entirely statutory.[6] The jurisdictions may be divided into two groups: Those which have modified the substantive law of joint obligations and those which have approached it from a procedural point of view. Substantially, however, whichever approach is used, the main effect is to make the joint obligations joint and several.[7] In this chapter, there is a reference to Williston on Contracts, Third (Jaeger) Edition, Section 336. "Statutory Changes," and Section 344A, "Table of Statutes Modifying the Rule of Survivorship."

In the joint venture section,[8] there appear to be two unfortunate omissions, namely the cases of *Wittner v. Metzger*[9] and its companion case, *Bank of Newark v. Terminal Construction Corp.*[10] Both illustrate the modern trend in joint ventures.[11]

There appears to be some doubt as to whether a distinction should be made between contracts of guaranty, that is, contracts whereby the principal debtor must first refuse or fail to pay the obligation before the obligation of the guarantor arises and suretyship contracts. Many courts have held that the suretyship contract constitutes an original rather than a collateral undertaking and as such would not come within the Statute of Frauds since

ed. Jaeger 1959), where the author-editor devotes 105 pages to this emerging and increasingly useful form of business association.

See also Jaeger, *Joint Ventures*, 9 Am. L. Rev. 1, 111 (1960); Jaeger, *Partnership or Joint Venture?* 37 Notre Dame Law. 138 (1961); Jaeger, *Joint Ventures: Recent Developments*, 4 Washburn L. Rev. 9 (1962).

6. As to these statutory changes, *see* 2 Williston, Contracts, §§ 336 and 336A, Table of Statutory Changes in Joint Obligations.

7. Conway, Outline of Contracts, Ch. 10, 368-389 (1968).

8. *Id.* 385-387.

9. 72 N.J. Super. 438, 178 A.2d 671 (1962), *cert. den.*, 37 N.J. 228, 181 A.2d 12 (1962).

10. 217 F. Supp. 341 (D. N.J. 1963), *aff'd per curiam* 328 F.2d 315 (3d Cir. 1964).

11. *See* in this connection, Jaeger, *Joint Ventures: Recent Developments*, 4 Washburn L.J. 9 (1962).

it is not dependent upon the debt, default or miscarriage of another.[12] Thus, if a contract to pay the debts of another is also the primary debt of the person so promising, there is no occasion for considering it within the Statute of Frauds.[13]

A significant case on this point, *Guinn v. Mazza*,[14] in which the opinion was delivered by then Justice Warren Burger, now Chief Justice of the United States, would have been worthy of inclusion, as no doubt would many another celebrated precedent. However, in justice to the author of the Outline, it must be said that several hundred samplings indicate that very few (if any) of the really significant cases have been omitted in the total of 1500 cases which appear in the Outline.

There is one point in particular where the author takes issue with the Restatement of Contracts, Second, and, in the opinion of this reviewer, with entire justification. The second edition of the Restatement simply declares "if the requirement of consideration is met, there is no additional requirement of (a) gain, advantage or benefit to the promisor or a loss, disadvantage, or detriment to the promisee." The comment to section 81 states: "Today when it is said that consideration must involve a detriment to the promisee, the supposed requirement is often qualified by statement that a 'legal detriment' is sufficient even though there is no economic detriment or other actual loss. It is more realistic to say simply that there is no requirement of detriment."[15]

Professor Conway suggests that the phrases legal benefit and legal detriment are useful and should be retained since one or the other form of consideration is often the only type present in a given fact situation where no actual economic benefit or detriment can be shown. Furthermore, use of these terms affords an easy guide to an analysis of problems in consideration. Finally, courts for several centuries have recognized a reason for the use of these terms in a technical sense in consideration cases, and have utilized them repeatedly in their opinions.[16] Hundreds upon hundreds of useful judicial precedents would be rendered nugatory by adherence to the proposed Restatement, Second, concept.

It is not fully understood exactly what is meant by the additional requirement of a gain or detriment. To distinguish between a legal detriment and an economic detriment is hardly in point since the question must be: Is the party who is rendering the detriment under an obligation to do what

12. 10 Williston, Contracts, chapter 38, CONTRACTS OF SURETYSHIP AND GUARANTY (3d ed. Jaeger 1967).

13. 3 Williston, Contracts, § 470 *et seq.* (3d ed. Jaeger 1960).

14. 296 F.2d 441 (Dist. Col. Cir. 1961), quoting 3 Williston on Contracts § 481A (3d ed. Jaeger 1960) and citing 2 Williston on Contracts § 402 (3d ed. Jaeger 1960).

15. Restatement (Second) of Contracts § 81, Comment.

16. 1 Williston, Contracts, chapter 6, CONSIDERATION (3d ed. Jaeger 1957).

he has promised to do or has done at the request of another regardless of whether there is any economic loss or disadvantage to him?[17]

Among the cases found missing is *Arthur Murray Studio of the Dance of Cleveland, Ohio v. Witter*,[18] a most significant classic case on injunctive relief where the judicial opinion covers a wide range of cases involving the question of restrictive covenants in employment contracts.[19] The case has been cited repeatedly, and is relied on in numerous decisions.[20] Its omission is unfortunate.

The author states the "effect of lack of mutuality of obligation. Where both sides are not firmly and equally bound by their contracts, specific performance will be denied to either party."[21] A happier choice of words may be suggested: Instead of "equally," the author might well have used "reciprocally."

Another case that should have been included is *National Equipment Rental, Ltd. v. Szukhent*,[22] since it is a leading Supreme Court decision dealing with installment contracts.

In Chapter 18, "Discharge by Operation of Law," the author discusses a variety of situations wherein a contract becomes "unenforceable or is entirely void." He lists seven specific types, namely, fraud, duress, mistake, illegality, impossibility, frustration, and merger. Whether the word "discharged" is quite accurate in this connection may be open to question.

Another section deals with discharge by barring the remedy, referring to bankruptcy, and the statute of limitations.[23] A discharge in bankruptcy, of course, is a familiar term, but whether discharge is the proper word in connection with the statute of limitations is again open to question. This is emphasized by the fact that if the statute of limitations is waived, there is no "discharge." The word usually associated with that statute is "bar."

17. *Id.* § 103 *et seq.*

18. 62 Ohio L. Abs. 17, 105 N.E.2d 685 (1952); the able and recondite opinion of Judge Earl R. Hoover of the Ohio Court of Common Pleas is discussed in detail in 11 Williston, Contracts, chapter 43, SPECIFIC PERFORMANCE AND OTHER EQUITABLE REMEDIES, especially § 1447 (3d ed. Jaeger 1968).

19. These cases dealing with restrictive covenants in contracts of employment are cited in 11 Williston, Contracts, 1021-1035 (3d ed. Jaeger 1968); *cf.* 14 Williston, Contracts, chapter 48, ILLEGAL AGREEMENTS: RESTRAINT OF TRADE, especially § 1633 *et seq.* (3d ed. Jaeger 1972).

20. Arthur Murray Studio of the Dance v. Witter, *supra* n.18, is quoted or cited, *inter alia*, in: DeLong Corp. v. Lucas, 278 F.2d 804 (2d Cir. 1960); Perthou v. Stewart, 243 F. Supp. 655 (D. Ore. 1965); Hill v. Rice, 259 Ala. 587, 67 So. 2d 789 (1953); Baker v. Starkey, 259 Iowa 480, 144 N.W.2d 889 (1966); Prentice v. Rowe, 324 S.W.2d 457 (Mo. 1959); Adams v. Adams, 156 Neb. 540, 58 N.W.2d 172 (1953); Button v. Day, 203 Va. 687, 127 S.W.2d 122 (1962).

21. Conway, Outline of Contracts, 627 (1968).

22. 375 U.S. 311 (1964).

23. *See* 16 Williston, Contracts, chapters 59, BANKRUPTCY, and 60, STATUTE OF LIMITATIONS (3d ed. Jaeger 1973).

Again, the use of illegality as the equivalent of discharge seems rather odd since in such cases there is no contract to enforce.

It can hardly be said that fraud actually discharges the contract since the fraud is either in the execution, when there is no contract to discharge, or it is in the inducement where there is a contract but it remains voidable until the injured or defrauded party decides to avoid it.[24] This can hardly be said to do anything more than terminate the obligation. Furthermore, if the injured party refrains from avoiding the contract, it continues to remain in force until by normal performance it is *discharged.*

The same criticism may be directed to the coverage of duress.[25] In other words, is the effect of duress "discharge"? Actually, such a transaction is either entirely void, or it can be avoided by the party suffering the alleged compulsion.[26]

In the treatment of mistake, a similar criticism is justified because if both parties are laboring under a mistake of fact, there is no contract, since there has never been any mutuality of assent. This can hardly be described as the discharge of a contract since there is no contract to discharge.[27]

When the author begins a discussion of illegality, he places this in the chapter on "Discharge by Operation of Law," yet it seems hardly possible to equate discharge with illegality. Here again, illegality prevents the creation of a contract since one of the fundamental requirements is that the agreement must have a lawful object before it can be properly described as a contract. The use by the author of the term "an illegal contract" is, to say the least, highly questionable since it assumes that one can have a contract where the object is illegal and this is hardly consonant with the concept of contract.[28]

This criticism may be made quite general with respect to the various types of illegal agreements the author covers, although when he describes

24. *See* 12 Williston, Contracts, chapter 45, FRAUD AND MISREPRESENTATION (3d ed. Jaeger 1970).

25. *See* 13 Williston, Contracts, chapter 47, DURESS AND UNDUE INFLUENCE (3d ed. Jaeger 1970).

26. *Id.* § 1602 *et seq.*

27. As to mutual mistake of fact preventing the formation of a contract, there being no mutuality of assent, see 13 Williston, Contracts, chapter 46, MISTAKE: REFORMATION AND RESCISSION (3d ed. Jaeger 1970).

28. However, the author may console himself with the thought that he is in good company since the Supreme Court of the United States has, from time to time, described illegal agreements as "contracts"; as, for example, in: Marshall v. Baltimore & Ohio R. Co., 57 U.S. (16 How.) 314 (1853); Providence Tool Co. v. Norris, 69 U.S. (2 Wall.) 45 (1864); Trist v. Child, 88 U.S. (21 Wall.) 441 (1874); Hazelton v. Sheckels, 202 U.S. 71 (1905); Crocker v. United States, 240 U.S. 74 (1915); Pan-American Petroleum & Transportation Co. v. United States, 273 U.S. 500 (1926); Manmouth Oil Co. v. United States, 275 U.S. 13 (1927); United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); United States v. Acme Process Equipment Co., 385 U.S. 138 (1966).

contracts in restraint of trade, a differentiation should be made between the agreements which are illegal because of unreasonable restraint and contracts that are in reasonable restraint of trade.[29] The actual cases that are digested and cited are, however, quite adequate to cover this material. Some of the more familiar precedents include *United States v. Addyston Pipe and Steel Company*,[30] presenting the rule as to conventional restraints of trade. The author emphasizes, quite properly, that the restraint must be reasonable both as to time and as to space.

Subsequently, the author deals with the subject of impossibility,[31] still under the general heading of "Discharge by Operation of Law." Here again, there would be a question as to whether a genuine contract had been entered into where there was objective impossibility of performance. The question is presented: Can there be discharge when the contract could never have been performed in any case?

In connection with destruction of the subject matter of a contract—although this is also placed under "Discharge by Operation of Law," more accurately it is an excuse for failure to perform. The leading case of *Taylor v. Caldwell*[32] is cited in support.

The volume closes with a discussion of discharge by merger, whether by instruments under seal, judgment or by arbitral award.[33]

Professor Conway has prepared a significant adjunct to the existing works on the law of contracts. His succinct treatment commends itself to the law student and the active practitioner alike; both will profit from its use.

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29. *See* 14 Williston, Contracts, chapter 48, ILLEGAL AGREEMENTS: RESTRAINT OF TRADE (3d ed. Jaeger 1972).

30. 85 F. 271 (6th Cir.), *aff'd* 175 U.S. 211 (1899).

31. *See* 16 Williston, Contracts, chapter 58, IMPOSSIBILITY (3d ed. Jaeger 1973).

32. [1863] Q.B., 3 Best & S. (Eng) 826.

33. *See* 16 Williston, Contracts, chapter 57 (3d ed. 1973), as to arbitration.

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