Kentucky Law Journal

Volume 28 | Issue 3 Article 12

1940

Book Reviews

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BOOK REVIEWS

EQUITY AND THE LAW. By Louis A. Warsoff. Liveright Publishing Company, New York. Pp. i–x, 1–324. 1938. $3.00.

At a time when intolerance seems to be increasing, legal provisions for equality will assume importance. Professor Warsoff senses a need but fails to rise to the occasion by rehashing materials which are given as well if not better in almost any of the treatises upon American constitutional history.

The first part of Warsoff's book is not first-rate original research being based mainly on brief generalizations and quotations from a few leading decisions. Without inquiring into the more specific antecedents of the equal protection clause, Warsoff derives the idea of equality from the English law of the land provision of Magna Carta (1215), Coke's misguided dictate that the law of the land meant due process, America's extension to legislative as well as executive and judicial powers, Justice Chase's restriction to natural justice and the realization that due process was not just protection but a specific restriction on partial legislation as well. Warsoff tells how Congress, seemingly oblivious to the due process background of equal protection, solidified itself with the South by adoption of the conquered provinces theory in opposition to President Johnson's policy of moderation. Besides attempted elevation of the Negro to terms of parity with the white man, the radical Congressional group headed by Stevens decided to punish the South, preserve the Republican Party, and hold President Johnson in line. Failing to pass the Freedman's Bureau Bill by a two-thirds majority and fearful of a subsequent Democratic Congress repealing the Civil Rights Bill, a Reconstruction Committee drafted the Fourteenth Amendment. In conferring personal rights upon the Negro, Congress showed little concern over Indian and Chinese coverage of the Amendment although discrimination among classes of white men was deliberated. Nothing was said regarding corporations.

In part two, Warsoff accounts for the confusion of the due process and equal protection clauses by the carry-over of the lump concept thinking of the pre-Civil War days and the fear of encountering a too great rigidity. In suggesting the following distinctions: (1) substantively due process is only a minimum, whereas equal protection is a specific guarantee of something (reasonableness) even though all members of a class enjoy due process; (2) mechanically equal protection is (a) not limited to life, liberty, or property, (b) not extended to protection of interests outside of a state's jurisdiction as is the due process clause, the author assumes the role of interpreter.

In the formative stages of equal protection, the desire to make the federal government supreme over the states was manifest as well as the desire to force the South to accept the Negro as its equal. The Supreme Court avoided the radicalism of some of the Northern leaders, and while protecting the Negro on such matters as schools, juror

service, and administration of statutes, faced what Warsoff terms realities in upholding heavier penalties for sex crimes.

In the late 80's the legislative freedom of the states was hemmed in by a departure from the Slaughter House cases upholding the theory of a limited central authority. Large scale business sought to stop state restrictive legislation. Corporations came to receive the same protection as natural persons. A spirit of commercial expansion replaced the emphasis upon states rights. Also evident was the necessity of fitting equal protection into an expanded concept of due process. Some "sore thumb" decisions caused the period to be branded a judicial reign of terror. The courts were charged with legalism so that some yardstick of social legislation was sorely needed. In general, legislatures came to lose their sense of responsibility. Mechanical reasoning was adopted by the state courts.

From 1908–17, Warsoff concludes, the court's expanded outlook on social legislation was transmitted to a new technique of examining practically into the question of what was "reasonable necessity" instead of depending on legalistic and mechanical thinking. Legislative transgression beyond a certainty was the technique applied to the old tests.

With the close of the World War, the courts fell back into legalism, distinguishing persons *sui juris* and *non sui juris* similar to the vogue of 1890–1910. From 1926–30, the personnel of the Supreme Court changed so that a liberal trend emerged again. During 1933–37, the author cursorily treats the chain store tax cases, minimum wages for women, tax assessments, state unemployment acts, and Negro jurors. In conclusion, the late Justice Holmes is quoted that the analogy of criminal presumption of innocence is applicable to discrimination. A mere possibility of difference in opinion should be insufficient to oust legislation. The clearest showing of law not being reasonably directed toward its legitimate end should be required.

The author would have done well to have considered the question when equality is abused. As a matter of fact equality is discrimination, but the author not having realized the fact allows many errors of substantive judgment to be made. Amateurish dramatics such as the skit on Lincoln's death, disjointed and irrelevant pen-portraits of the Reconstruction leaders, inaccuracies of historical and legal fact (e.g., some questioned the constitutionality of the Civil Rights Bill as well as being fearful of subsequent repeal. Due process was more than little argued in the Slaughter House Cases[1]), slighting of tax cases, and loose treatment of the conspiracy theory of corporations to obtain coverage mar what otherwise might have been a clear account of the cases in a socio-economic background. There is no comparison of the same interests who get protection under limitations in state constitutions under the provisions on special and local legislation, or under separation of powers, or under the commerce clause, public purpose in expenditures or exercise of power of eminent domain. The author

[1] Cf. Hamilton, The Constitution Reconsidered (1938) XI, p. 166 ff.

further handicapped the work by the lack of an index, a classified table of cases either logically or chronologically, and uniformity in citation style.

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HANDBOOK OF INTERNATIONAL LAW (3rd ed.). By George Grafton Wilson. St. Paul: West Publishing Company, 1939. Pp. xxiv, 623.

This number of the Hornbook Series, first published in 1910, now appears in a third edition. The fact that the book appears in a third edition is strong indication of its usefulness.

In organization and treatment the treatise is along traditional lines. The usual subjects are covered and the distribution of space is about the same as in the general run of textbooks. To many the amount of space given to the treatment of the rules of war, nearly half of the book, will seem disproportionate. However, notwithstanding the large amount of space allotted to war and neutrality, the new American neutrality legislation is not even as much as mentioned. While the new United States Neutrality Act does not of course change international law, it nevertheless represents a new conception of neutrality, a new policy within the old framework of international law, and a new departure which may profoundly influence the future development of the laws of war and neutrality.

The allotment of so much space to the treatment of war and neutrality means that the rules of the law of peace receive only brief discussion, with the result that the latter receive only the barest statement. This deficiency is partly made up by the great amount of material carried in the footnotes. It raises the question whether a satisfactory treatise on international law, even a handbook, can any longer be successfully comprised within the limits set by the present volume.

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JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES. (1939 4th ed.) Charles Bunn. West Publishing Company. St. Paul, Minnesota. Pp. i–ix, 1–257.

Federal jurisdiction and procedure is too large an order to handle in a summary and completely accurate manner. Professor Bunn without apologies presents with clearness and brevity a carefully prepared outline of the fundamental principles. His past experience as practitioner and general counsel in the Northwest qualifies him to speak broadly. The manual, however, is not profound nor is there original discussion. This revision of the third edition (1927) will be useful primarily to the beginning student who needs to be told a few of the facts of jurisdiction and procedure before launching into a more specific study. For example the essentials of district court jurisdiction, process, venue, concurrent jurisdiction, three judge district courts,

government intervener, removals, the original and appellate jurisdiction of the Circuit Courts of Appeals, the conditions of the Supreme Court's exclusive, original, and appellate jurisdiction including *certiorari* and certification, the cases appealed directly, etc.—all these should be the common knowledge of every student, professor and practioner. Study of the statutes will be necessary except for those constantly working in the federal courts.

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CASES ON MORTGAGES, Second Edition. By Morton C. Campbell. St. Paul: West Publishing Co., 1939. Pp. xxii, 794.

Professor Campbell's excuse for publishing a second edition of his *Cases on Mortgages* is that recent developments in the law of mortgages of real property make a new edition desirable. Specifically the developments to which Professor Campbell refers relate to mortgages for future advances, to mortgages of income, to seizure of income through receiverships, and to competition between mortgages of realty and liens on attached chattels.[1] One could hardly disagree with his conclusion that such topics deserve special attention and are of particular importance, especially in connection with corporate mortgages. Yet when one looks at the cases and material dealing with those topics, he is impressed not with their adequacy but with their absence, for there is an extreme lack of material relating to the above subjects, and that which is included is not particularly recent, only one case having been decided since 1930. However, Professor Campbell supplied his answer to the last criticism when he stated in his preface that "The editor's choice of cases . . . has been governed by quality rather than modernity."[2] And in general one may well agree with him on that point. But that raises the whole question of the purpose and function of a casebook and the need for a second edition.

Obviously the primary function of a casebook is as a teaching tool, a device for training lawyers. And as a method of instruction the case-system has won its place not because it is better able to impart information to the student but because it develops a better understanding and mastery of the technique of handling cases. Each case must, therefore, be chosen with regard to the extent to which the opinion indicates the technique which lawyers and judges use in arguing and deciding controversies, as well as to the amount of information it contains regarding the rules, principles, and standards of the law on the particular point involved. In choosing cases to serve this dual purpose it may be that older cases meet the requirements better than the more recent ones. This is especially true in subjects in which the law is most completely developed, for then the late cases tend to be merely perfunctory applications of the established doctrines without any con-

[1] P. viii.
[2] P. viii.

sideration of their history or the social, political, and economic philosophy which shaped them. However, it must be remembered that we in this country have developed, and are at the present developing, our own law, so that a modern casebook which contained such a large percentage of English cases as was found in the early books would not give the student the proper perspective and would not be a satisfactory teaching tool. Furthermore, many of the old cases involve factual situations which are now obsolete and foreign to a modern student's understanding; cases of that type no longer deserve a place in our casebooks except in so far as they are included to illustrate the historical development of the law. Thus the ideal casebook should represent a balance between cases which are informational in character and those which primarily develop technique and understanding, between cases which give an historical perspective and those which present modern problems. In that way both knowledge and understanding can be developed, and the relation between the social, political, and economic philosophy of the day and the rules, principles, and standards of the law can be appreciated. Once such a casebook is compiled it should remain a good teaching tool until the doctrines of the law are changed or until a new philosophy requires a different approach to the old problems.

Tested by these standards one may well question the recent tendency to publish new casebooks and new editions of old casebooks every few years. Certainly the rules, principles, and standards of the law, with the possible exception of the field of public law, do not change so quickly; and this writer doubts whether many of the new editions really represent a new approach, a changed philosophy.[3] In this respect Professor Campbell exercised more restraint than most compilers of casebooks for he waited fourteen years before bringing out his second edition, and even after such a lengthy period less than fourteen per cent of the cases in the new volume have been decided since the first edition was published.

With the exception of the inclusion of problem questions following each case, the organization of the material and the manner of presentation is entirely orthodox. Professor Campbell seems convinced of the usefulness of such questions, but others, including the writer, would disagree with him.[4] Granted that the use of hypothetical questions has proved advantageous in the classroom, there seems no reason why the compiler of a casebook intended for general use should include in the book the particular questions which he uses in class, any more than he should include his other lecture notes. The use of such questions is better left to each instructor, and the inclusion of

[3] One suspects that perhaps the exigencies of the publishing business may account for some of the books.

[4] Compare the first and second editions of Jacobs' Cases and Materials on Domestic Relations, particularly the statements in the prefaces in which Professor Jacobs indicates a definite abandonment of problem questions; see also a review of Professor Campbell's book in 49 Yale Law Journal 372 in which Professor Wormser questions the use of such material.

questions in the casebook itself tends to force the instructor to use such questions and thus to determine his approach to the problems.

In other respects the book very well measures up to the standard of a good casebook. It contains a well arranged selection of cases which are capable of serving the dual function of supplying a knowledge of the rules, principles, and standards relating to the law of mortgages and of developing an understanding of the technique which lawyers and judges use in dealing with mortgage problems.

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