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Book Reviews

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Book Reviews

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BOOK REVIEWS

THE CRITICAL COURT STRUGGLE IN KENTUCKY. By Arndt M. Stickles, Bowling Green, Ky.: College Heights Book Store. 1929. Pp. 122.

This monograph of Dr. Stickles is a well written and interesting addition to the bibliography of its subject. Probably no movement of the people of Kentucky has had a more profound effect on the subsequent history of that state than the struggle between the conservatives and radicals of the time of which this book treats. The prologue to this clash opened with the controversy over the opinion of the Court of Appeals in the case of *McConnell v. Kenton*, Hughes 257, 322. The success which the people by their agitation in the Legislature and elsewhere had in getting the Court to take back its original opinion in that case and to deliver a second one contrary to the holding of the first was not forgotten when the acute economic distress of the last half of the second decade and the first half of the third decade of the past century lay heavy upon our people, and led them to adopt measures held unconstitutional by the courts but which the people thought essential for their deliverance. The triumph of the party which held fast to constitutional principles now universally recognized and respected steered the Commonwealth into the quiet waters of constitutional and orderly progress which has marked her history since. True it is that the story of these times and of this struggle has heretofore been well and adequately told and that Dr. Stickles' book in the main but retells it. He has, however, brought together much of detail which otherwise would have to be searched for in many places. Especially valuable are his tables giving us the various votes for and against the old court when the question of its continued existence was before the Legislature from time to time. By them we are enabled to determine in some measure the distribution of the sentiment concerning this question in the state. In a table appearing on page 85 of his book, Dr. Stickles has listed the writs of errors to and the appeals taken from the various circuit courts during the existence of the two appellate courts. From the circumstance of where such appeals and writs of errors were lodged, whether with the old or new court, Dr. Stickles has drawn the inference of the position of the circuit judge from whose judgment the appeal or writ of error was taken in this new and old court controversy. I do not believe such inference to be justified. The Act of December 20, 1798 (2 Litt. 226), which was in effect during the old and new court struggle (see Morehead & Brown, Statute Law of Kentucky, 1834 Edition, Volume 1, page 131), put the duty of lodging with the clerk of the Court of Appeals the record in appeals upon the appellant. The Act of December 19, 1796 (1 Litt. 562), which was in effect during this time (Morehead & Brown, *supra*, page 128 at 131), placed the like duty upon the plaintiff in error where the case was taken up upon a writ of error. In the act creating the new court (Section 20, Chapter 53, Acts

1824, page 20) the same procedure was adopted with reference to the new court. As it was upon the appellant or plaintiff in error to file the record, the place of its filing does not, in my judgment, necessarily indicate the position of the circuit judge, but does disclose the views of counsel concerning the legality of the new court. The facts disclosed by this table of Dr. Stickles and the inter-relationship disclosed between it and the table on page 63 of his book giving the vote of districts on the creation of the new court, corroborate my views. For instance, in the table on page 86, we find that from the circuit presided over by Judge George Shannon, nine cases went to the old court and five to the new. If the place of their going indicates the views of the circuit judge concerning the legality of the new court, Judge Shannon was certainly not set in his views on that question. But a further analysis of these figures discloses that every case from Clark, Estill and Madison counties went to the old court, while every case from Bourbon save one went to the new court. Turning to the table on page 63, we find that Bourbon county's representative voted for the new court, while those from Clark, Estill and Madison voted against it. Presumably the representatives voted the sentiment of their community. In the circuit presided over by Judge Robbins, four cases went to the old court, fifteen to the new. Eleven cases from Montgomery county of this circuit went to the new court and two to the old. Montgomery had voted for the new court. One case from Bath went to the old court, three to the new. Bath had voted for the new court. The only case from Floyd went to the new court. It had voted for that court. Although Lawrence had voted for the new court, its single case went to the old. Every case from the circuit of Judge Bridges went to the old court. The counties whence they went had voted for the old court. A like analysis of the other circuits brings the same results. I am confident, therefore, that the Court of Appeals to which the appeals or writs of errors were taken reflect the views of counsel and not those of the circuit judge. The true test of the position of the circuit judge would be to find out how he obeyed the mandates of the respective courts of appeal after the cases had been disposed of by them. He certainly would not obey the mandate of any court which he thought was illegally acting.

The book of Dr. Stickles is well arranged and pleasingly printed with copious footnotes and references to authorities. It will prove a valuable book for the student of our history.

RICHARD PRIEST DIETZMAN

Court of Appeals of Kentucky.

CASES ON EQUITY. By Edgar Noble Durfee. Indianapolis: The Bobbs-Merrill Company. 1928, xxviii, 830.

In addition to presenting the substantive law of equity, a case-book on the subject must present sufficient of the historical background to give the student a proper approach and understanding of the field.

If this is properly and fairly done, the student's task is made much easier. That being true, something more than a mere "case-book" is needed. Historical material gleaned from text-books and elsewhere must be used as well as cases.

Equity case-books have not reached a proper solution of this problem. Too scanty or even biased material has been used. Certainly an orderly arrangement which will be informative to the student has not been used by compilers in the past. In this respect Mr. Durfee, like his predecessors, has failed. The selections made by him are valuable ones and they are instructive, but they do not achieve this difficult goal. The profession still awaits a case-book which does so.

Professor Durfee has deliberately slighted the procedural side of equity, which involves such problems as equitable defenses, trial by jury, and "one form of action." These and related questions are properly material for courses in code pleading and are better handled there. There is not time to develop them in the usual course in equity and the time is better spent in a study of the substantive law.

The arrangement of the material in Parts II and III, under the titles Particular Equitable Remedies, and Vendor and Purchaser, presents no very unusual treatment. The writer, too, has found Specific Performance of Contract a better introductory subject than Injunction Against Tort.

The cases are well edited. Omissions in cases have been thoughtfully made and such pruning has not been so frequent as one sometimes finds. The footnotes are particularly good. Both the material in these notes and its arrangement indicate a thorough study of the subject over many years. They are most valuable and suggestive. The inclusion of a table of cases cited and a full index are further indications of the care and thoroughness of the editor. The make-up of the book is especially good.

ROY MORELAND

WILLOUGHBY ON THE CONSTITUTION OF THE UNITED STATES. By Westel Woodbury Willoughby, in three volumes. Baker, Voorhis & Co., N. Y. 1929, pp. lxxxiii, 2022.

The new three-volume edition by one of the outstanding students of Constitutional Law represents a decided improvement on the two-volume edition of 1910, although it is the opinion of the writer that the old edition was the best text in the field. A brief comparison of the two editions will demonstrate the desirability of the newer work. The first edition contained 1390 pages; the new edition, 2022; the first, 781 sections; the latter, 1284. The new work is much more thorough and exhaustive. Forty chapters have been added. In the new work there has been an attempt made to refer to the leading law review articles dealing with the subjects discussed and wherever possible the author has incorporated into the discussion liberal quotations from the opinions of our highest court.

The three important fields in which a great improvement has been made are interstate commerce, due process and the constitutional aspects of administrative law. The old edition devoted 21 pages to due process; the new, 232 pages. In the discussion of interstate commerce the late edition has a thorough discussion of unfair competition, maintenance of resale and tying contracts and federal legislation generally under the commerce clause. The old edition was rather sketchy, devoting only 144 pages to the problem of interstate commerce. The new edition contains 333 pages. The new edition is also valuable in its treatment of the later phases of administrative laws in its constitutional aspects dealing especially with the delegation of quasi-legislative and quasi-judicial power to administrative agencies. In this field it will be found a valuable supplement to Freund and Dickinson.

However, no adequate conception of this work can be had by merely emphasizing the *volume* of the new edition as contrasted with the old. The writer believes that this work will be considered a masterpiece in the field of Constitutional Law comparable to the monumental work of Wigmore in Evidence and Williston in Contracts. It is indispensable to every teacher of Constitutional Law and to every practitioner interested in constitutional questions.

FORREST REVERE BLACK

HANDBOOK OF THE LAW OF CODE PLEADING. By Charles E. Clark. St. Paul, Minn.: West Publishing Co. 1928, pp. viii, 581.

This book will be consulted more and more by those confronted with problems in pleading which cannot be solved by mere statements of rules in decisions of the courts. It is the only modern book on the subject. Pomeroy's Code Remedies, though there is a recent edition, is of an earlier day and much progress has been made since then. Furthermore, Pomeroy's work was much narrower in scope than Clark's. But, in both, excellence is due mainly to the fact that they are not attempted digests—they rationalize. This "Handbook" takes account of past and present, and looks to the future. Students of the theory of pleading, and practitioners as well, will find the book instructive.

Notwithstanding the work comprises only 525 pages, it is quite comprehensive, and it may fairly be said that it covers the subject more completely than any other work published. The first chapter on "History, Systems and Functions of Pleading" is compact. The extreme condensation of this part of the work has been a matter of some minor criticism, but it seems to the reviewer that in a work of this kind such subjects should be compressed as much as much as possible. The topics of this chapter might well be subjects of a separate detailed treatise, and in fact there are in print several able discussions of them, but this fact is not an argument against a condensed statement as found in this text. The chapter serves as an admirable preliminary to the main discussion which the author gives.

The usual topics are discussed in a way that shows their historical setting, the present state of the law and the possibilities of betterment. It is this triple virtue, let us reiterate, that makes the book valuable for all—students, teachers and practitioners. Teachers, lawyers and judges will read it with profit. This reviewer and others have found it helpful to use in connection with a compilation of cases on pleading. The book has been the subject of many reviews, and there is no particular reason for adding this review except to bring it to the attention of the bar and bench of Kentucky, should they have failed to see elsewhere an estimate of the work.

This measure of praise of Mr. Clark's book does not mean that it is so conclusive on all theories that there can be no difference of opinion as to any of them. Such a book remains to be written. From the nature of the subject it never will be written. But we agree with those who say that it is the best book on the subject, and the author is to be commended, not only for the advance he has made, but for suggesting possibilities of future improvement.

The casual reader will not miss a table of cases, but for one who makes serious use of the work such a table would add materially to its value. The more valuable the work, the more marked is such an imperfection, and both authors and publishers must recognize this fact. It is to be hoped that a second edition of the work will remedy this defect.

FRANK H. RANDALL

AUTOMOBILE INSURANCE. By Charles A. Sunderlin. Albany: Matthew Bender & Co., 1929. Pp. i-xxxiii, 1-614.

The author has avoided a historical discussion of insurance, but he has felt obliged to discuss many items which enter into all types of insurance, such as state regulations, insurable interest, construction of the policy, the agent, waiver and estoppel, representations and warranties, ownership, etc. In most of these topics there is not much that is really new and peculiar to automobile insurance. But the same cannot be said with respect to "theft insurance" and still less to "collision insurance."

The book takes much of the style of a digest, but it is more than that, and should prove valuable in practice involving this type of problems.

ALVIN E. EVANS

THE CASE OF THOMAS J. MOONEY AND WARREN K. BILLINGS. By Henry T. Hunt. 1929. New York: National Mooney-Billings Committee. Pp. i-viii, 1-xxvii, 1-444.

This is an exceedingly interesting document. We must assume that the quoted evidence is accurately quoted. The total impression left on one's mind is that a great injustice has been done to the accused. The evidence upon which convictions were secured seems clearly to be untrustworthy.

In addition, we find here further illustrations of the lawless enforcement of the law. A police officer said (page 218), "I took Weinberg in the automobile by direction of Captain Matheson. I held no warrant. I know that it is the law that an officer holding a prisoner without a warrant is bound to take him before a magistrate. I regard the directions of my superior as sufficient warrant for violating the law." The Captain of Police said (page 219), "I know Weinberg was held without a warrant. I know that the law required he be taken before a magistrate, but in the interests of justice I did not do it. I suspended the law in the interests of justice."

Loyalty to our country and its institutions demands the lawful enforcement of the law, and that the wrongs these men have suffered should, as far as possible, be righted by the Governor.

ALVIN E. EVANS

ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY. By Ernst Freund. 1928. University of Chicago Press. Pp. xxi, 620.

The growing importance of administrative law is evidenced by the appearance in the last two years of four works of more than ordinary merit: "Administrative Justice and the Supremacy of Law," by John Dickinson; "Justice and Administrative Law," by William A. Robson; "Administrative Law," by Frederic J. Port, and "Administrative Powers over Persons and Property," by Ernst Freund. The latter work, by an outstanding scholar, is an admirable treatise of rather limited scope, within the general field of administrative law. The distinctive features of this book are: (1) A novel classification of administrative powers, using such categories as "determinative and non-determinative; service and control powers; enabling and directing; dispensing, examining and summary powers; rule making and abstract fact finding powers." The author excludes in the subsequent treatment a discussion of service, non-determinative rule making and abstract fact finding powers. (2) The work is divided into two parts; the first analytical and the second descriptive, the former being in the opinion of the writer the more valuable. (3) The jurisdictions covered are England, Germany, the United States (federal) and the state of New York. (4) The study is based on statutes more than on judicial decisions. In the preface, the author points out the disadvantage of this approach in that the data set forth are apt to be superseded by the progress of legislation. There is however a distinct advantage, not specifically referred to by the author, but evident all through the work. The statutory approach affords an opportunity to the author to present in a constructive way his own ideas of proper administrative action and to balance the respective rights of the individual and the public.

Prof. Freund feels that in the last few decades the claims of public interest have been *fully* recognized, and he is inclined to hold the conservative view stressing the importance of the protection of private interests. At one place, speaking of discretionary control powers con-

ferred upon administrative officers, he says, "If it is then asked whether, in the exercise of this control, discretion is preferable to rule, there can be little doubt that the answer should be in the negative." (P. 98). The reviewer hopes that the author will further elaborate the analytical portion of the work. If that is done, the descriptive part should be placed first and serve as an introduction. FORREST R. BLACK

OPINIONS OF THE ATTORNEY GENERAL OF KENTUCKY FOR 1925. Frankfort, Kentucky: The State Journal Company. Pp. 478.

The present Attorney General of the State of Kentucky has re-inaugurated a practice which has not obtained for the past several years, namely, the publication in a bound volume of the more important opinions prepared by the Attorney General and his associates. This compilation contains ample indications of the importance of the office of Attorney General to the State. Both the variety of the questions of law presented and the variety of the governmental officers and commissions presenting the questions are a challenge to the Bar of the State to see to it that the office shall always command the services of able lawyers, as it does at the present time. In the absence of the procedural device known as Advisory Opinions in Kentucky the Attorney General's office is of added importance. By that device it is possible in some states for agencies of the government to procure legal advice directly from the highest court. This, however, is not possible in Kentucky.

The book is attractively bound, and contains an adequate index as well as aptly chosen headings. It is hoped that in the near future a like service may be rendered for those years for which no such bound volumes are available. GEORGE RAGLAND, JR.