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Book Survey

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WILLISTON ON CONTRACTS (3 ed., 4 Vols.) Revision by Walter H. E. Jaeger. Mt. Kisco, N.Y.: Baker, Voorhis & Co., Inc., 1957-1961. Pp. xxii, 826-I; xv, 1095-II; xii, 937-III; ix, 1167-IV. The legal treatise has been enormously influential in the development of Anglo-American law. Paradoxically, the effect has been both to encourage and to limit *stare decisis*. The summarization and classification of the precedents has helped to provide the courts with ready access to the past, and this has tended to promote adherence to what was previously decided. On the other hand, the commentary or gloss upon the case has frequently been more important than the actual decision in the determination of future controversies and, of course, in the framing of legislation. That this should be true is neither surprising nor undesirable, for as one of the greats succinctly put it: "Every institute and principle of law has a philosophy — as every object in the sunlight has its attendant shadow. In the question for the rule we must insist on including its reasons, and on lifting them out into the open. . . . [W]e must be students of reasons as well as of rules."[1] If, as implied, the proper measure of law is its conformity to standards of reason, then the reflections and analyses of the commentators are indispensable. For it is to them, rather than to the courts, that we regularly must turn for an articulation of "reasons," both pro and con the prevailing view.

Perhaps the most significant contributions have been made by individual writers who undertook to explore and systematize an entire subject or area of the law. And of these no one has had more influence or been held in higher esteem than Professor Samuel Williston, who last September 24 completed his hundredth year. His monumental treatise on contracts, published originally in 1920 and revised in 1936-38, was for years the unchallenged authority on general contractual matters and still exerts a powerful influence. A new revision of *Williston on Contracts* is therefore a noteworthy event, the more so since the work is in the capable hands of Professor Walter H. E. Jaeger.[2]

The magnitude of Professor Jaeger's undertaking staggers the imagination. In recounting his work on the second edition, done in collaboration with Professor George Thompson, Professor Williston wrote as follows in his autobiography: "Professor Thompson was determined that the work should be done in the most thorough manner and was tireless in his efforts. I too was kept busy, for I wrote some chapters entirely and the revision of the text of the remainder of the work was no slight task. The volumes were published separately and both of us felt a great load lifted from our shoulders in 1938 when the last of the eight large volumes issued from the press. The eighth volume consisted entirely of an elaborate index and an alphabetical table of the 70,000 cases, cited in other volumes. When it is added that many of these cases were cited several times in different connections some idea may be had of the labor involved in preparing a comprehensive law book at the present time. My imagination is appalled at the thought of what the difficulty will be in another generation."[3] Should Professor Jaeger write his autobiography, he will doubtless supply verification. To begin with, the new revision, four volumes of which have appeared to date, will probably run to at least twelve volumes. New developments alone during the intervening quarter century make this extension inevitable. Additionally, there has been considerable revision of the old text, buttressed by numerous references to the periodical literature.

Compared to most contemporary authors, Professor Williston was restrained in his criticism of existing law, and in the treatise his primary purpose was to give

1 WIGMORE, SELECT CASES ON THE LAWS OF TORTS, viii (1911).

2 A long-time teacher at Georgetown, Professor Jaeger has written extensively on contracts and related subjects.

3 WILLISTON, LIFE AND LAW 266-67 (1940).

a full report rather than critically evaluate, let alone urge reformation. Significantly, in the preface to the first edition he deemed it appropriate to state that he "made no apology for devoting *some* space to legal analysis and criticism." His jurisprudential method, no longer in vogue, was such that he appeared to accept, on faith, as it were, the basic doctrines and proceeded to emphasize "logic" (deduction from or analogy to judicial authorities) and only rarely would appraise a premise or a conclusion in terms of "policy."[4] This is not to say he deigned to suggest improvements. As principal author of the Restatement of Contracts, which despite its title was largely normative in character, and also of several uniform acts, Professor Williston was second to none in the law improvement department. Yet the thrust of the treatise was strongly in the direction of organizing and stating the *is*, with comparatively few assertions of the *ought*. Similarly, Professor Jaeger's restraint insures that the work will remain, in all essentials, Williston in both approach and content. Policy is still rather sparingly considered. Therein, to my mind, lies both the strength and the weakness of the final product. As an encyclopedia of contract law, it is outstanding. The treatment is comprehensive and exhaustive. Moreover, there need be no fear that the revisor is distorting the picture by the injection of his own beliefs or preferences. Most certainly the treatise will continue to be, as it has in the past, a trusted reference work for the bench and bar. But the user must not expect from the text that which it does not purport to supply. One can learn the message, but for additional assistance in appraising it (and predicting its durability) must press on to other materials. Today with ever-increasing frequency, policy considerations, drawn largely from extra-legal sources, loom large in the shaping of legal doctrine, particularly that which emanates from legislative bodies. For this reason, some portions of the text may become dated rather quickly, and the pocket part supplements called upon for extra duty. I suggest below one such possibility.

Over fifty pages of the first volume are devoted to the matter of definiteness as a requisite of contract. A leitmotif of the common law decisions on definiteness is the recurring statement that the "courts will not make a contract for the parties." There has been, in general, a marked disinclination to fill any gaps or resolve ambiguities by the enforcement of some judicially approved standard (reasonable price, etc.) and thus save the agreement. Similarly, despite evident intention to be bound, so-called "agreements to agree" have with but few exceptions been held to be unenforceable. The exhaustive text treatment amply supports these generalities, with what possibly may be the citation of every pertinent case. However, there have for some time been solid indications that a basic change of attitude is in the making, and the possibility and implications of this should be examined. It has often been argued that the traditional attitude is at variance with commercial expectations and inadequate to satisfy legitimate commercial needs. Adverse business effects have, in part, been mitigated through the utilization of types of "escalator clauses." Thus, rent is geared to gross receipts, wage scales to a cost of living index, price to specified market quotations, etc. Most significantly, the Uniform Commercial Code, decidedly a policy oriented statute, breaks decisively with the older position. Section 2-204(3), which states the principle as to "open term" agreements underlying other sections, provides as follows: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[5] This is a sweeping provision, amplified by the following official comment: "The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, *commercial standards on the*

4 See Professor Fuller's incisive review of the second edition. 18 N. C. L.Rev. 1 (1939).
5 Uniform Commercial Code § 2-204(3).

point of 'indefiniteness' are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like."[6] The important "open price" section is 2-305, subsections 1 and 2 of which provide: "(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if (a) nothing is said as to price, or (b) the price is left to be agreed by the parties and they fail to agree, or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so recorded. (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith."[7]

There is no discussion in the text of the changes that will thus be ushered in by adoption of the Code or of the thinking which prompted them.[8] Moreover, there is no speculation as to the possible impact of these provisions in analogous transactions. Consider, for example, *Ablett v. Clauson,* a rather typical case of "agreement to agree," which after a snag in the District Court of Appeals,[9] received the typical treatment from the California Supreme Court.[10] A five-year written lease provided that the lessees "shall have the first right and a prior option to secure a lease upon said premises before the same are offered to any other person, firm or corporation for lease or rental and that said option shall contemplate a lease for a period of five (5) years upon terms to be then agreed upon." The intermediate appellate court, in supporting the lessee's right to a renewal, observed: "If, perchance, the parties do not agree on the rental or other provisions for the new lease, the court itself will fix them in consonance with the spirit and language of the agreement for a renewal despite the plea that the court is making a contract in contravention of its power."[11] The Supreme Court promptly reversed. Would the result be different under the Code? The short answer is that the Code, strictly speaking has no relevancy, goods not being involved. But would not a lessee's counsel have a potent argument for proposing a change, in view of the marked change in attitude, albeit under statutory compulsion, in the sale of goods area? Would not liberalization in the one area tend to beget liberalization in the other? In the same way, consider the common situation where an attempted description fails because of "indefiniteness." Assume an agreement between a former employee and an employer. The employee having been injured on the job and no longer able to perform his old duties, the employer, for a sufficient consideration, promises to give him "light work"[12] or a "light job."[13] How much longer can we expect courts to reject the employee's suit out of hand on the grounds of indefiniteness? Why should not a court attempt to frame a solution which is believed fair to both parties and thereby save the agreement? Would it really be an infringement of freedom of contract for the court to examine the plant structure and other circumstances and then indicate the type of position which, in context, the expression "light work" encompasses? Will not the Code help force at least a reappraisal of similar decisions? It takes no crystal ball, in my opinion, to foresee a trend

6 UNIFORM COMMERCIAL CODE § 2-204, comment.
7 UNIFORM COMMERCIAL CODE § 2-305.
8 At the time these sections of the text were revised (c. 1956), the prospects of the Uniform Commercial Code were not particularly bright. While it had been widely discussed only Pennsylvania had adopted it. To some it appeared that the New York Law Revision Commission's "rejection," in 1956, was the *coup de grâce.* But all that has changed. Massachusetts adopted the Code in 1957, and has been followed by Kentucky, Connecticut, New Hampshire, Rhode Island, Wyoming, Arkansas, New Mexico, Ohio, Oregon, Oklahoma, Illinois and New Jersey, with other adoptions in the near future virtually assured.
9 263 P.2d 333 (1953).
10 43 Cal.2d 280, 272 P.2d 753 (1954).
11 *Supra,* note 9, at 337.
12 *Cf.* Laseter v. Pet Dairy Products Co., 246 F.2d. 747 (4th cir., 1957).
13 *Cf.* Bonnevier v. Dairy Cooperative Association, 361 P.2d 262 (Ore., 1961).

toward greater judicial enforcement of many heretofore "vague and indefinite" promises. Similarly, may we not expect the number of so-called "illusory promises" to decline sharply, since the Code imposes a fundamental obligation upon all parties to act in good faith?[14]

In his preface to the first edition Professor Williston announced his intention to "treat the subject of contracts as a whole, and to show the wide range of application of its principles." He did this and did it well. Professor Jaeger has striven to continue in the Williston tradition, hoping that the treatise will be "a compact library on the ever-expanding range of subjects involving contractual relations." He is well on the way to attaining his goal. We who are the third party beneficiaries of their prodiguous efforts should be grateful.

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14 UNIFORM COMMERCIAL CODE § 1-203. Good faith for a merchant includes observance of reasonable commercial standards of fair dealing in the trade. UNIFORM COMMERCIAL CODE § 2-103(1)(b).

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