Notre Dame Law Review

Volume 9 | Issue 4 Article 8

5-1-1934

Book Reviews

Thos. L. McKevitt

Thomas Gately

[his wife] will be entitled to all that belongs to her as my wife. I am in very poor health and would like this attended to as soon as convenient. . . . I don't know what ought to be done, but you do." It was admitted to probate. Here his desire or intention was clearly expressed on the face of the instrument as to what he wished to do with his property after his decease. The courts will not generally so construe an instrument to be testamentary unless the evidential facts are strong enough to support such a view, as they were here.

In *Estate of Meade,* 118 Cal. 428, 62 A. S. R. 244 (1894), the court held that it must satisfactorily appear that he intended the very paper to be his will. A letter directed to an undertaker, asking him in the event of the writer's death to cremate her body and to apprise her brother of such death, and adding that her brother would take charge of her estate and be sole administrator without bonds, to trade, sell, or occupy, as may seem fit to him, was held not to be testamentary in character. The court said that it was not clearly apparent that the instrument was written *animo testandi.*

It has been held that an instrument in the form of a letter from a person in his last illness to his attorney, requesting the latter to draw up a will in accordance with instructions therein set forth, and containing all the requisites of a will as to the disposition of property, may be established as a will by proof of its due execution and publication by the testator as such. *Scott's Estate,* 147 Pa. St. 89, 30 A. S. R. 713 (1892). Here the testator left no room for conjecture as to what his intentions were, by his actions.

"A letter, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of the statute, and must express a genuine present, and not merely an anticipated testamentary intent." *Gardner on Wills* (2nd ed.) 33.

It would seem that the majority opinion expressed by the courts is that where letters testamentary in character are filed for probate, and have all the requirements according to the statutes, there must be expressed within the face of the instruments itself the intention of the testator to make a present disposition of his property; and that courts will strictly construe the law on this point seems to be the only conclusion. Any deviation from this strict and fast rule would result in opening up an avenue for fraud and all that follows in its wake.

It is a question of policy and justice, and how well it can be met, that faces the courts in matters of this kind. It would seem to follow most logically that the most justifiable and desirable way is to hue to the line and interpret most strictly the law for the best way of serving justice and preventing fraud.

John M. Doyle.

BOOK REVIEWS

CASES ON RIGHTS IN LAND. Second Edition. By Harry A. Bigelow and Joseph W. Madden. St. Paul: West Publishing Co. 1934.

The feature which made Professor Bigelow's first edition of his Rights in Land a significant contribution to the case-book system of teaching law was the inclusion by way of introduction of a brief, yet thorough, history of the law of Real Property. Property has always been recognized as the most recondite branch of the law because it reaches far back into history not only for its fundamental tenets but also for much of its terminology. Thus, in including a history of the subject in his case-book, Professor Bigelow has enabled the student

to begin his studies with the background which is absolutely necessary to a proper understanding of the subject. This historical introduction is as much a feature of the second edition as it was of the first. The arrangement is the same but some additions have been made to the text. Among the additions are a number of quotations from and references to Holdsworth's History of English Law, and The Historical Introduction to the Land Law by the same author. The chapter on Possibilities of Reverter, Rights of Entry, and Remainders by Way of Conditional Limitation has also been considerably enlarged.

The cases are again divided into those dealing with rights incidental to possession and rights in the lands of another. Since this division and the supplemental divisions are the same as in the first edition no further allusion need be made to them except to again call attention to the necessity of keeping the author's outline of the subject in mind when using a case-book.

As usual in second editions a number of new cases have been added while only a few of the old ones have been left out. As a result the book is somewhat larger than the old. It has not, however, been made too long or too cumbersome for convenient use, a fault which many authors fall into when they bring out a second edition. New cases are only really necessary when they contain new principles of law or if they more lucidly reiterate existing law. An example of the latter type of cases which justify second editions is *Collins v. Gerhardt* which the authors have included in their section on Streams. Most of the cases are of this type for the laws of real property are the most stable of all laws and the least subject to any radical change.

How much of the new material Professor Madden is responsible for it is difficult to say but the name and work of this able collaborator adds new prestige to an already well-known book.

Thos. L. McKevitt.

CASES ON COMMON LAW PLEADING. By James P. McBaine. St. Paul: West Publishing Co. 1934.

The tendency to disregard entirely the system of Common Law Pleading by those students pointing to a Code state is becoming more and more prevalent. Without considering the basic principles of the various codes the student feels that a full and complete understanding of Common Law would constitute a futile gesture to be undertaken solely by him who would emulate Blackstone and Kent. Although a medium or conservative trend of thought regarding this controversy between the old and the new might not be the panacea of all evils, it is the better method to follow. And, as a suitable text usually provides the stimulus, this work should accomplish the task.

Professor McBaine has presented a succinct summary of these principles designed for study by beginning law students in the ordinary American jurisdiction. The book is divided into two parts. Part I is devoted to the scope of those common law actions regarded as the more important from present-day point of view. Well known cases are cited and for every common law action a modern case has been printed to show the link between the old and the new. Part II consists of materials on Pleading. The introduction gives the student a knowledge of the steps taken from the first pleading to the formation of issues.

It is one of the exceptional texts where the author started with a definite purpose and happily failed to stray with the ensuing tangents. Perhaps this is

due to his original work which includes Trial Procedure, but it tends to be the *unusual* in present day legal texts.

The work is to be highly recommended. Considering the selection of cases, the sequence of subjects and the constant inference of the basic relation between the old and the new, it constitutes a task well done.

Thomas Gately.

CASES ON BUSINESS ORGANIZATION. Volume I. By Roswell Magill and Robert P. Hamilton. St. Paul: West Publishing Co. 1933.

As the title of this text may startle one accustomed to the well established divisions of law, this caption designates a neoteric theory emanating from Columbia University. Unfortunately the reviewer lacks the second volume of this two-volume work. Therefore he is only cognizant of the theory itself plus its constituent parts.

Mr. Magill and Mr. Hamilton, the authors, have combined materials on Agency, Partnership and Corporations. In doing so their essential purposes were: (1) To present a connected series of materials so organized as to bring realistically before the student the relative advantages and disadvantages of the various forms of business organization; and (2) To avoid, as far as possible, the repetition necessarily involved in the disjointed treatment of the several branches of the one entire subject matter. The first volume is devoted to a treatment of Agency; the second volume includes materials on Partnership, Corporations, Business Trusts, Limited Partnerships and Joint Stock Ventures.

The prospective interference with the pedagogical system employed by present day law schools questions the popularity of this work. If to be used solely for review or comparative purposes it will align itself suitably, but to depend on it as a complete guide to the subjects treated would lead the student far astray. The tyro is introduced to Agency because it aids in imparting a better understanding to the further advanced studies of Partnership and Corporations. Conceding that Volume I is a thorough treatment of the subject of Agency, the reviewer cannot comprehend a cursory study of Corporations and Partnership for the avowed purpose of remaining with the business organization.

However, a reading of Volume II may engender the opinion that perhaps these aforementioned subjects are not sufficiently involved to necessitate separate treatment. Until then the opinion that Hanna's treatment of Creditor's Rights combined with a study of pertinent subjects, is more effective, will remain.

Thomas Gately.