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Book Reviews

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BOOK REVIEWS

CONSTITUTIONAL LAW. By Charles W. Gerstenberg. Third Edition. New York: Prentice-Hall, 1932.

Much has been written about the respective advantages to be gained from the casebook and from the textbook methods of teaching law. There are strong arguments in favor of each method. Each method also has its disadvantages. The book here under consideration is a compromise between these two schools. Unlike most compromises, it does not possess the weakness of both sides. In fact, it does not possess the weakness of either side. It is a combination of theory with practice in such a manner that it does not obscure the principles in a mass of detail, nor neglect the practical application of the principles for mere speculative reasoning. It is a book equally useful as a text and as a reference; one equally at home on a student's desk and on a lawyer's shelf. More than this cannot be said for any legal achievement.

All of these remarks are mere statements. To prove them adequately it would be necessary to print the whole work. However, in the limited space at our disposal, we shall attempt a brief summary of the evidence upon which we base our conclusion.

In the first place, this is a workable text. It is limited to the comparatively brief length of a little under six hundred pages. It is a logical development of the leading principles of constitutional law and it does not bury these principles in a maize of details, nor in an over-abundance of only slightly revelant cases. It is a book easily handled, both in size and in material. It is a step, and not a small one, toward simplification and codification of the law on this subject.

As to the specific method of treating the subject, the book is divided into two unequal parts. Each of these parts contains an entire development of the underlying principles upon which our constitutional law is founded. Each of them in itself is a development of the subject, but from a different viewpoint. To resort to an analogy, each is a separate eye. Each sees all there is to be seen. But to look through both, is to gain a perspective of the subject not to be had from either view by itself. And a good perspective of a subject is the end every legal student pursues.

The first part of the book consists of text matter, a brief development, under twenty-one headings, of the history and the development of constitutional law, and its underlying principles. This part of the book is concisely and well written. Each of the twenty-one divisions contains many subdivisions, and the principles are illustrated by many footnotes and amplified by numerous references. It contains the working principles of the subject, and gives the theories upon which the continuance of our form of government depends.

The second part of the book, consisting of four hundred and fifty pages, contains, under the same headings as the first part, the leading cases which show the application of the principles developed in that part. Only leading and recent cases are included, and only the parts of those which are necessary to the illustration of the points under consideration. The cases are well selected, and in most of them the editors have condensed and restated the facts, mentioning only those necessary for an understanding of the point being developed. This adds much to the clarity and takes nothing from the effectiveness of the book.

The work is well annotated, and has an appendix containing the Constitution of the United States, with all its amendments. The lack of an index is regrettable, but it is partially replaced by the exhaustive table of contents. In spite of this omission, however, this is a book we can heartily and sincerely recommend to students and lawyers alike.

John M. Crimmins.

CASES AND OTHER AUTHORITIES ON EQUITY. By Walter W. Cook. Three volumes. Second Edition. St. Paul: West Publishing Co. 1932.

These three volumes represent a complete course in the substantive law of equity, in the broadest sense of the word. They embrace under the general heading of equity all the matter usually covered in collateral courses related to but not generally covered under that specific heading. With this in view, the division of the work into three volumes is understandable. Each of the volumes treats a different phase of the subject, and each may be used as a separate text, although it is advisable to follow the development of the complete course as the author treats it.

The first volume is concerned with the general groundwork of the subject. It treats the historical development of equity with a view to explaining the present form of the subject by a consideration of the origin of its principles. Any history of the subject which does not attain this end has been omitted from the book. Only eighteen pages have been given to historical development, and these pages are made up of quotations from authorities on the subject. This introduction thus has the twin advantages of brevity and completeness. The author then proceeds to the consideration of the powers of courts of equity, the principles governing the exercise of equitable powers, and bills of peace, interpleader, *quia timet,* and to remove cloud on title. This completes the topics covered in the volume intended to introduce the student to the history and the principles which underlie equity jurisdiction. The book contains about six hundred and seventy pages and 243 cases are treated. These cases are as recent as possible, and are selected with an eye to showing the subject as it now exists, modified by historical development, rather than to showing the history of the subject for its own sake.

The second volume proceeds to the consideration of some of the particular applications of the general principles of equity as developed in the first volume. It treats of specific performance, fulfillment of conditions, express and implied, part performance and the Statute of Frauds, equitable conversion by contract, equitable servitudes, and misrepresentation, mistake, and hardship as defenses to specific performance. The book comprises 660 pages and treats 220 cases. As in the first volume, mere historical development has been sacrificed to the presentation of the subject from an analytical and functional point of view. The reason for this arrangement is found in the author's quotation from Mr. Justice Holmes' "Collected Papers," pp. 224-225: "History, with which I have been dealing thus far, is only a means, and one of the least of the means, of mastering a tool. From a practical point of view, as I have illustrated upon another occasion, its use is mainly negative and sceptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations. Every one distinctly recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers have always followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants." In the light of this explanation, the author's treatment of the cases is very reasonable.

The final volume treats the matter usually contained in the collateral courses of *quasi-contracts* and reformation, rescission, and restitution. Its general headings are mistake (including misrepresentation and non-disclosure), benefits conferred under agreements which have been wholly or partially performed, and benefits conferred under compulsion and undue influence. This is the largest of the three volumes, containing 850 pages and treating 321 cases. The selection of the cases is based on the same norm as are those in the other two volumes. The development of this whole volume is based on the underlying legal principle of unjust enrichment, and its various ramifications. This last volume contains the most modern of the equitable doctrines, and is the least static of the three.

All three of these volumes are copiously illustrated by footnotes. The cases cited are chosen with the intention of leading the student to key decisions and articles, rather than of impressing and overwhelming him by their number. Each of the volumes is well indexed, always an important point in a casebook.

Much may be said for this development of the principles of equity. Confusion is avoided by following one author through the entire field, and thus escaping the various and often contradictory viewpoints from which different authors consider the related subjects. These volumes give unity and cohesion to the student in his study of equity, and enable him to see and to remember it as one complete whole, rather than as several allied but entirely separate courses. For this result, among others, the author deserves congratulations and the publishers deserve patronage.

John M. Crimmins.

RESTATEMENT OF THE LAW OF CONTRACTS AS ADOPTED AND PROMULGATED BY THE AMERICAN LAW INSTITUTE. Two volumes. St. Paul: American Law Institute, Publishers. 1932.

Two fabrikoid-bound volumes have appeared in a blaze of glory. The completion of these two volumes marks the end of the first step in the momentous task undertaken by the leading legal minds of our country, the clarification and the codification of the Common Law. Articles are appearing on them in all the legal journals in the country. Writers and commentators are wracking their brains in an attempt to bring forth more laudatory adjectives and more striking similies to apply to them. A blaze of glory, indeed.

In the mind of the average lawyer, the very brilliancy of the light shed upon the work's appearance may tend to discredit its true worth. The stage has a saying that before the days of electric lights, actors had to make their reputations by acting. Subconsciously, so much advertisement may lead one to believe that the work's reputation is being established by lights rather than by performance. Here, however, we have the case of a performer to whom the lights are only an incident, not a necessity. And as incident, the advisability of whose use is debatable at that. For too much light draws attention from the lighted object to the lighting effects, and makes us think that maybe after all it's something being done with mirrors. Let us disregard the universal approval, the superlative adjectives, and the eminence of the authors of the laudatory phrases for a moment, and attempt to dim the lights to see the work as it really is.

Here we have a new reference book for the law of Contracts. It, in itself, is not law. Under our system of government, law is made by the legislatures and interpreted by the courts. Many of the authors of the restatement are legislators and many of them are judges. But in the composition of this work they are neither legislating nor judging. And it cannot be too strongly borne

in mind that when these men speak as legislators or judges, their word becomes law, not because of the men who are speaking, but because of the office from which they speak. Therefore we come to our first conclusion, that the veracity of the work is primarily dependent on the confidence to be placed in the ability and the learning of its authors. It has no binding effect *proprio vigore*. It has no official existence. It is a private reference book, containing the viewpoint of its authors as to what the law is.

We must, then, judge this work as we would any reference book. And the measure of our confidence in a reference book is based first of all on the ability of the author, and secondly on the amount of time and effort that author has put into the composition of this particular work. Ability and effort are the criterion of worth.

Judging by these standards these volumes constitute the most outstanding reference book in modern history. It is impossible to enumerate all the members of the Council for the Institute. Suffice it to say that it contains, among many others, the names of such men as Cardozo, Learned Hand, Lemann, Morawetz, Pomerene, Roberts, and Root. The Committee on Contracts is composed of Williston, Corbin, Ferson, McGovney, Page, Thompson, McCurdy, Chafee, Durfee, and Lewis. The mere enumeration of these names does more to establish the unquestioned ability of the authors than any long drawn out recital of their various achievements could do. These names speak for themselves. The confidence to be placed in the ability of the writers of this reference book is of the highest order.

And now as to the amount of time and effort these authors have put into the composition of the books. The procedure is described in the Preface: "Work on this part of the Restatement was begun in June, 1923. The process by which the work was carried on, was for the reporter and his committee to develop drafts, to be submitted to the council for discussion and amendment, and then to be submitted to annual meetings of the Institute and to bar associations and the profession generally. Thus in the nine years during which the work on Contracts has gone forward there have been thirty-four conferences of the Reporter and his advisers each from three to seven days duration; fifty-one preliminary drafts have been considered, no final preliminary draft being presented to the Council until the committee has been satisfied that it was as nearly perfect as they could make it. The Council have considered seventeen final preliminary drafts and submitted ten tentative drafts of various parts of the work for consideration and discussion to eight annual meetings of the Institute. In September, 1928, a revision of the first 177 sections was published as a preliminary official draft. These tentative drafts as well as the preliminary official draft of the first 177 sections have also been considered at conferences of the representatives of State Bar Association Co-operating Committees. . . . The annual meeting last May (1932), joined with the council in authorizing the publication of the present volumes as the Institute's Restatement of Contracts." Need we comment on the respect which this zeal and diligence demand?

All this has been a consideration of the authority to be given to the work. So much space has been given to this phase of the discussion because this is about the only field left open to us. Any criticism of the contents of the work by an individual would be the height of presumption after the amount of consideration given to it in its preliminary stages by lawyers all over the country. Doubtless certain parts of it will be found to be inaccurate and incomplete. It is the peculiar nature of the law that any given statement of it is complete only until the first case adjudicated by a court of last resort after its promulgation. But these inaccurate or incomplete statements will be discovered by the trial of its statements by their application to particular circumstances and in no other way.

Certain extrinsic features of the work, however, deserve mention. The first of these is the absence of annotations in the books. This is explained by the policy of the publishers. Annotations are to follow, in separate volumes, for the reason that there will be a different set of annotations, and consequently a different volume, for each set. In the interest of compactness some convenience has been sacrificed. These annotations will be sold unbound for $3.00 a volume, bound $4.00.

Even in the general excellence of the work the index is deserving of special mention. Often the practical worth of a reference work in law depends on the availability of its material, and its material is available quickly and accurately only through the medium of its index. The index in this work is a model for brevity and for exhaustiveness.

We have considered the true nature of this work and applied to it the norms by which we judge the value of books of its class. By our own tests, we have here a reference book deserving of the highest respect and the gravest consideration. The effect which it will undoubtedly have on American law and American lawyers is justified by the ability of its authors and the exhaustiveness of their efforts. It is our sincere advice to every law student, even with our very practical knowledge of the impoverished condition of the average student, to acquire these books at the earliest possible moment, and to place them within easy reach of his right arm. They will be often used.

John M. Crimmins.

CASES AND MATERIALS ON TRUSTS AND ESTATES. Volume I. By Richard R. Powell. St. Paul: West Publishing Co. 1932.

Professor Powell, author of "Possessory Estates," and professor of law at Columbia University, presents a new grouping in two volumes which is a very effective treatment of the subjects of "Trusts," "Future Interest," and "Wills." Unfortunately the reviewer has only the first volume at his disposal.

The volume is the product of much research, exhaustive class room tests, and the gathering of material hitherto widely scattered. The plan that the above mentioned subjects should be treated together has been subjected to four years of experimentation. During that time the courses were printed in tentative forms; from time to time substantial changes were made to fill in discovered gaps and needs. The present volumes contain the material found worthy of survival.

As Professor Powell states, "The methods now functioning in the United States for the distribution of wealth constitute the central theme of this work." Each volume is divided into three main divisions or parts. Part I concerns itself chiefly with an introductory function; presenting a clear, interesting, and profound historical background, and information as to current economic problems. Part II deals with the essential rules which guide one in ascertaining desired disposition to which effect is to be given. Part III completes the second half of the first volume. Emphasis is laid on the planning of an instrument which speaks the actual desires of the disposing party.

It should not be out of place to briefly list the main divisions of the second volume as mentioned in the "Preface" to Volume I. Part IV is concerned with the conservation of the wealth of the disposing party by a careful study of the taxing statutes. Part V is a consideration of the rule against perpetuities, the restrictions on accumulation, and other restrictions imposed on dispositions of property. Part VI is a treatment of the problems which arise in the course

of giving effect to the dispositive provision. These problems deal with the transferability of the created interest, their subjection to the claims of creditors, and also situations which arise in the course of a trustee's handling and closing of a trust estate.

Professor Powell questions the usefulness of the separation of the subject matter of "Wills," "Trusts," and "Future Interests." Due to his practical experience at the bar, and in the class room he believes that much duplication is eliminated by uniting the above mentioned topics rich in cross illumination. In the unity of this body of material Professor Powell has attempted to produce a teaching medium having four particular stresses. The first stress found in chapters 1 and 2, presents the student with a picture of the past evolution of this law, of the present day forces which are roots of the law of the future, and of the problems of wealth accumulations, inheritance, and testamentary disposition. The second stress is the difficulty of a student in "meeting the problems for the handling of which he is supposedly prepared," and also an attempt "to compel the relational thinking, in the student's preparation for class." The third stress is the effort to lessen the gap between theory and practice. The fourth stress is to arouse the student to his possibilities in the social aspect and importance of the topics.

The attractive volume is effectively indexed by topics and cases cited. It also contains a valuable table of Statutes covering the field, and these include both those of all the States of the Union and those of England, Alaska, Philippine Islands, Puerto Rico, France, Germany, Japan, and Russia.

Volume I contains two hundred and seventy-one briefly summarized cases. Each case in the body of the text is numbered. The insertion of questions in connection with the cases is a valuable asset to the text aiding the student to better appraise the facts in the cases. Copious footnotes are included. Valuable information is found to comprehend various problems through the summaries of law review articles. Facts of the cases included in the footnotes are sufficient to enable students to appraise their merit. The work includes little matter of interstate estates. The author has purposely omitted these as the law applicable is simple.

In conclusion it may be said the author has through painstaking research, and scholarly arrangement collected material to this time scattered, and reduced the number of needed class room hours by eliminating the duplication of effort and more effective presentation of matter artificially segregated.

Daniel C. Lencioni.

CASES ON PUBLIC UTILITY REGULATION, WITH SUPPLEMENTAL NOTES. By Francis X. Welch. Washington: Public Utilities Reports, Incorporated. 1932.

This new case book on the regulation of public utilities is the work of the legal editor of Public Utilities Reports, Inc. As such it raises high expectations, which are well met. It is a volume which will attract the interest not only of lawyers but of all economists who are interested in the economics of business concentration. It is well adapted for use in the hands of students.

The most striking feature of Mr. Welch's work is its modernity. This is shown in several ways. It is refreshingly up to date in that "approximately half the cases in the book have been decided since 1928." Equally modern is its emphasis upon the municipal public utilities rather than upon the railroads. Most important of all, it is modern in its selection of and emphasis upon certain current problems of regulation.

There are cases on air transportation and on highway transportation. Of particular interest is the case (Stephenson v. Binford, 53 Fed. (2d) 509, P. U. R. 1932A, 1.) involving the constitutionality of Texas' noteworthy attempt to bring the contract haulers under state control. An entire chapter is devoted to practice and procedure before the commissions. The final chapter portrays the sporadic and weak attempts so far made to regulate the holding companies.

The editor's notes are always interesting and thought-provoking. One of the most shrewd observations is that contained in the the note on page 377, in which Mr. Welch points out the exchange of positions with regard to the measure of utility value which has taken place in the last third of a century. The utility supporters switched from advocacy of original investment to reproduction cost, and the representatives of the public changed from present fair value to original cost. The reason was simple—the rise of prices. For the past two years some observers have been privately predicting a second swap of positions, to be brought about by the fall of prices. Actual indications of such a change of views on the part of some of the protagonists on each side are not now wanting.

The book is somewhat marred by an unusual number of misprints or mistakes in copying. For example, a case decided in the third year of the reign of William and Mary is dated 1796—a century out of place. In one case (Georgia Railway and Power Co. v. Commission), Justice Brandeis is represented as having delivered the opinion and also dissented from it. Most of these slips are obvious and inconsequential, however.

The cases are well selected and arranged to give a picture of the American system of public utility regulation as a whole. If one were disposed to offer critical comment it would no doubt be concerned with the subject of write-ups. The great holding company systems have been developed by a procedure which involves the use of write-ups and frequent sales and resales on an ascending scale of prices. Commission consent to most of these transactions was actually obtained. Yet the only write-up case included in this volume is a small and uncomplicated one, in which the application was refused. That is hardly typical of what has occurred in the past decade. In the last two chapters, however, there are several interesting cases which reveal certain of the types of transactions between companies in the same system, which have also played a large part in recent public utility development.

On the whole, Mr. Welch has given us an important, useful, and interesting book.

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