Notre Dame Law Review

Volume 1 | Issue 5 Article 4

3-1-1926

Book Reviews

Edwin W. Hadley

and to show the sentiments we so profoundly entertain towards him; now.

"THEREFORE, BE IT RESOLVED, By the faculty of Law, now here for the first time assembled to pay honor and reverence to Col. Hoynes, that one night each year be set apart, preferably in the second semester, for a reception to the venerable founder of the law school, and for such exercises as may be appropriate to be known as "Hoynes Night," and that such anniversary shall be observed as a permanent function in the life of the College of Law.

"BE IT FURTHER RESOLVED; That a copy of these resolutions be furnished to Col. Hoynes, to THE NOTRE DAME LAWYER, and to the other university publications."

BOOK REVIEWS

SELECT CASES on the LAW of TRUSTS. By George P. Costigan, Jr. American Casebook Series. St. Paul: West Publishing Company. 1925. pp. xxii, 1017.

This new casebook has been long expected, for Professor Costigan is thorough in his thoughts and prolific with his pen and was bound to evolve his own pedagogical scheme for the great subject of trusts. Whether this scheme will be especially useful to other teachers is another and a personal matter. The reviewer has attempted the course on both 44 and 64 lecture-hours, and has found it impossible to cover all of Professor Scott's 836 pages; the 1000 pages provided by Professor Costigan will need extensive trimming.

In the general choice of topics, the immortal Dean Ames, *maestro* of both Scott and Costigan, has been followed. The order and arrangement of topics has been greatly changed, a matter of slight practical import since each teacher epecially arranges his order of topics and cases in using any casebook. The placing of the elements of a trust and the creation of a trust under the single head of "elements" seems a happy plan, since they are logically handled at the same time by either student or lawyer in analyzing a new set of facts. It seems that the Statute of Frauds and the Statute of Wills also belong in the same place

with the problem of creation, but Professor Costigan has there differed from Professor Scott and allows three chapters to intervene before the two statutes are introduced. It is strange that a problem is first solidified and then scattered.

Placing resulting and constructive trusts at the end of the book is a plan already followed by this reviewer. If the rights, powers, and duties of trustee and *cestui* are covered at the end of express trusts, the student has a complete idea which makes easier reading of the difficult cases on trusts imposed by law. This does not do too great a violence to logic, as at the end of the course the student may be directed so to arrange his review that the type of trust under his facts in examination or in practice will be fully examined and determined first, before testing the duties and rights thereunder.

The great majority of cases printed as the main text are rather recent, and are well chosen. The notes are profuse and excellent, quoting enough matter on each side of a controversy to force the advanced student still to do his own thinking.

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THE GROWTH OF THE LAW. By Benjamin N. Cardozo. New Haven: Yale University Press. 1924. pp. 145.

It has been estimated that more than 25,000 cases are being reviewed annually by the various appellate courts throughout the country. Although no two of these cases are exactly alike in their facts, yet enough are of such similarity in character that the same principles of law are relevant. From a study of these reported cases the student is expected to induce some general principles, which are called law. This is not an easy task, when we realize that for almost every principle there is a conflict of authority. Different courts, confronted with identical facts, reach conclusions diametrically opposite. And single courts will often reverse themselves. What is solemnly affirmed to be law one day for one pair of litigants, will upon mature consideration, be declared error the next. Thus, at the present time, law is anything but certain. Precedents may be cited to a court

for it to consider, but it is in no way duty bound to follow them. Attention will be given to earlier decisions, but if to a judge in a later case—either in the same jurisdiction or in another—the adjudicated cases seem to have been decided erroneously, they will be reversed. What is law in Illinois may not be law in Indiana; and what was law in Illinois in 1922 may not be so in 1926.

In view of all these contradictions, of what may law be said to consist? In the effort to formulate a reply, two conflicting doctrines have arisen. One group of writers maintain, rather pessimistically, that law is merely a "succession of particulars," that each case is of little value except to furnish the parties immediately concerned with a rule of action; that it exerts no influence upon subsequent cases. Obviously this theory is erroneous, for despite the many conflicts among the decisions, there does appear at least the semblance of uniformity. The settlement of a dispute does not depend entirely upon the personal belief of the court. A judgment does not arise spontaneously from the mind of the judge rendering it. There is some kind of an abiding principle, manifesting itself in the chain of decisions.

Therefore, declares Judge Cardozo, we must discard this definition as a possible solution of our difficulties. Yet, in denying such a doctrine, we must be careful not to accept as the only alternative, the theory which takes us to the other extreme, and teaches us that law is something positive and certain—that for every set of facts, there is a corresponding rule, immutable and eternal. Although the law is more than the whim of the presiding judge, it most assuredly is not the expression of the absolute. The certainty of the moral law cannot be postulated of the human law. Courts are not infallible, and do not pretend to voice a decision that is correct beyond the possibility of doubt. Courts are not endowed with the superhuman faculty of knowing absolutely what is right, and what is wrong. Progress brings different ideas regarding the morality of an act, and one generation may sanction what the previous one condemned. A decision, once enunciated, does not render subsequent controversy useless. Although the law is something

more than a collection of individual rules, yet it is something less than a catalogue of absolute rights.

Both of the above doctrines are thoroughly analysed in "The Growth of The Law," and both are rejected. Yet in rejecting, Judge Cardozo constructs also, and evolves a doctrine that can hardly be said to be wrong. After prefacing his definition of law with an exposition of the need for a restatement, he defines law as "that body of principle and dogma which with a reasonable measure of probability may be predicted as the basis for judgment in pending or future controversies. When the prediction reaches a high degree of certainty or assurance, we speak of the law as settled, though, no matter how great the apparent settlement, the possibility of error in prediction is always present. When the prediction does not reach so high a standard, we speak of the law as doubtful or uncertain. Farther down is the vanishing point where law does not exist, and must be brought into being, if at all, by an act of free creation."

Of course, this "collection of dogma and principle" has its source in reason. Certain forces must be obeyed. These forces are divided into four classifications: logic, or analogy; history, or the method of evolution; custom, which acquaints us with tradition; and the force of justice, with its expression in the method of sociology. When these forces are combined and applied with care to a given controversy there will emerge a rule which will be reasonable and fair. In this way the quality of an act may be judged, not with certainty, true, but with some degree of assurance that the conclusion will be correct.

But we have not reached the ultimate answer yet. A case may be decided according to what the court considers custom, for instance, but the court might have erred in construing the pertinency of the custom. "Custom" is not an absolute term; it is not easily apprehended. What may appear to be tradition to one court may not appear so to another. Doubtlessly, one is wrong—but which? Here the study of values is brought into play, and the end is near. A thorough knowledge of axiology, as the study of the estimate of comparative values in ethical, social, and aestheic problems is called, is indispensable. Appreciation of the merits of contending theories must be had. Philosophy is the basis of all law. We must learn how to recognize what is wrong, and what is right. Recourse to some sound system of ethics is necessary.

Judge Cardozo's analysis of the law is keen. The development of his subject is logical, clear, and natural, and the truth of his conclusion cannot be denied.