



2-1-1927

Book Reviews

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Recommended Citation

Dudley G. Wooten & Clarence J. Ruddy, *Book Reviews*, 2 Notre Dame L. Rev. 137 (1927).

Available at: <http://scholarship.law.nd.edu/ndlr/vol2/iss4/6>

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BOOK REVIEWS

CASES IN CODE PLEADING, By Charles A. Keigwin, Professor of Law in Georgetown University. 1926. Lawyers Co-operative Publishing Company, Rochester, N. Y.

CASES ON CODE PLEADING, By Archibald H. Throckmorton, Professor of Law in Western Reserve University. 1926. West Publishing Company, St. Paul, Minn.

Bancroft's CODE PLEADING IN THE WESTERN STATES, 5 vols. 1926. Bancroft-Whitney Company, San Francisco, Cal.

An adequate review of the above named recent contributions to the literature of the law of pleading, under what has come to be known as the "Code" system, would require a greater labor and more space than are now available to the writer. Of the three books, in the judgment of this reviewer, the case-book by Prof. Throckmorton is the most teachable in a law school; that by Prof. Keigwin shows great labor and a power of analysis, but proceeds upon a false assumption as to the nature and scope of "code" pleading, the cases selected are not the most authoritative and are marred by substantial omissions from the opinions of the courts, and the original matter in the nature of a "summary of doctrine" is written in an obscure and involved style, contains much that is of questionable validity, and on the whole is calculated to confound the student; the monumental treatise from the press of Bancroft-Whitney Company is of course not intended for class-room use, but is the last word in "code" pleading in those States where the system is indigenious and has reached its highest degree of accuracy and practical application. A defect in both of these two new case-books is that they fail to report more decisions from the jurisdictions where an unwritten code has been followed from the inception of statehood, where the courts and the lawyers have not been hampered and enslaved by the common law traditions and technical rules, and where nobody ever bothers to discuss the forms of action or the distinctions between law and equity, in the manner of pleading or the character of the tribunal in which the action is brought. There are entirely too many cases from New York, where, by a

false tradition in the profession, the "code" system is supposed to have originated, and where, by repeated amendments and revisions and the complicated rulings of a puzzling judicature, whatever of simplicity and clearness there was in the original work reported and adopted in 1848 has been overlaid, refined and buried in subtleties, so that today the New York system is almost as hopelessly involved in the mesh of technical learning as ever was the common law pleading it was intended to supplant. The same is true in large measure of the California code and decisions: the legislature and the courts have gradually followed the pernicious example of New York, and covered up beneath garments of technical style and finish what was once the healthy and wholesome body of the method of pleading that really belonged to that State by its inheritance from Mexico and Spain, and which ought never to have been superseded by an importation from an Eastern jurisdiction. The whole conception of the true origin, philophy and practical purpose of the "code" system has been perverted and lost sight of, under the erroneous notion implied in the very use of that word "code". Equally objectionable is the use of the terms "reformed pleading" or "modern system", for all these names connote the assumption that there is something new, original, artificial, and distinctively American in this method of stating the facts of a case, so as to show a good cause of action and to bring to definite and final issue the controverted issues of fact and law necessary to be decided in order to arrive at a just and satisfactory judgment. It is the universal and uniform custom of the courts in the States originally governed by the rules of common law pleading and procedure, and among the text-writers and compilers of case-books on the subject, to consider the New York Code of 1848 as the genesis of a new and theretofore unknown system; and accordingly they all follow that lead with a servility and satisfaction that is exasperating to a lawyer who has learned pleading and put it into practice in a State where no other system was ever known or considered feasible. Even Hepburn, in his admirable little volume, "The Historical Development of Code Pleading", published twenty years ago and now unhappily out of print, was not able to escape the common obsession of the "code" idea. Professor Keigwin utters the same fallacy in the

first sentence of his "preface" to his case-book: "Code Pleading may be conceived as a complete and self-sufficient apparatus of forensic statement, and therefore independent of all prior institutions of like purpose",—a pretty sentence, withal, but one which embodies an error fundamentally and historically misleading in any proper conception of the subject. It is a great misfortune that the descriptive title of "Code Pleading" was ever given to this system, for it has become so imbedded in the professional and judicial mind, and carries with it such a persistently false implication, that it is now almost a hopeless task to undertake to correct it. As a matter of fact the system called by that name and usually attributed to New York, is as old as the Roman Civil Law and the system of equity procedure which arose from a blending of the Civil and the Canon Law. It came to America with the Spanish and French colonists, and was perpetuated in the territories acquired from Spain and France by force of natural usage and inheritance, without the necessity for formal codification. Consequently, it is found in its most perfect and practical use in the Western and Southwestern States and in Louisiana, where those jurisdictions have adhered to their traditional institutions and have kept away from the common law principles and practices. Texas, for instance, is not classed as a "code" State, and she has never had a formal written code of pleading, but David Dudley Field, in his report accompanying the New York Code of 1848, expressly acknowledges his indebtedness to the Texan system and to the general rules of the Civil Law, especially the equity rules, for the best part of his work, which, however, was rendered largely impossible of complete accomplishment by the judicial system and the common law traditions of New York. He frankly admitted that it was impracticable for his Commission to frame and recommend a complete code, because of the invincible conservatism of a bar and bench devoted to the common law system, and the already established judicature of the State, which precluded such innovations as he would have liked to see introduced from Texas and other jurisdictions, which had inherited from Civil Law sources the true philosophy and principles of pleading. But other States, in which these obstacles did not exist to the same degree, made haste to adopt the New York Code, and thereby committed

themselves to the policy of trying to standardize and stabilize the rules of pleading by legislative enactment, a thing not possible in the nature of the subject and not desirable upon any sound basis of logic and reason. It was a foolish and fatal policy, especially in those States which were not trammelled by the common law and its votaries, and most of them have lived to regret it. California, as before stated, improvidently imitated New York, mainly through the influence of Stephen J. Field, the brother of David Dudley and an influential lawyer on the Pacific Coast, with the subsequent experience of being compelled to amend and revise her code until, like that of New York, it has become so cumbersome and technical as to be incomprehensible in many features. Other Western States, like Washington, Idaho, Montana, the Dakotas, Colorado, New Mexico, Arizona, Utah, Oklahoma, and Wyoming, were not so slavish in their adoption of the New York idea, but retained many of the features of the native system which came to them from their former Spanish and Mexican affiliation, and they wisely left a large field of discretion to the courts to formulate and enforce rules in line with that inherited method of pleading. Texas refused to adopt any written code, but preserved the flexible and common sense traditions of the Civil Law, as did Louisiana, with the result that it is a rare thing in those two jurisdictions to have a case disposed of upon any technical rule of pleading the facts which constitute the cause of action, provided those facts are properly alleged and present a legal or equitable ground or relief. It is from the real code States—those where the common law system never obtained in the beginning—that decisions should be selected for study by law students. Bancroft's exhaustive treatise, which also contains appropriate forms, furnishes the sources from which such a case-book could be made, instead of collating numerous decisions from New York and other States where a mongrel system prevails. A satisfactory case-book on this subject remains to be made, but is a great desideratum in our law schools. Nobody will ever improve upon the common law method of alleging facts with accuracy, certainty and logical brevity. Its phraseology and terminology are the most admirable use of language ever perfected by human reason and experience, and a pleader under the "code" system is all the better

fitted to frame his pleading if he is thoroughly grounded in the common law method of allegations; but the "code" pleader finds it hard, in his student days, to rid himself of those technical subtleties as to the forms of action, by which, as an old writer said, "the right was nothing, the mode of stating it everything". The common law system should be studied as a mental discipline and a linguistic guide in logic, while the "code" system should be studied as a common sense method of arriving at the very justice and reason of the case. It is difficult to separate the two in a law school, for students must be prepared to put both of them in practice according to their present residences and future circumstances. The essential truth to be inculcated in the teaching of "code" pleading is to get rid of the idea that it is "modern" and an American or English product. Like most other phases of modernism, "What is true in it is not new, and what is new is not true". Prof. Keigwin has adopted the plan of accompanying his cases with a text "summary of doctrine", in which he seeks to formulate the rules established by the decisions, as a labor-saving device for the instructor. It is no doubt an aid to the teacher, but it is likely to prove fatal to the mental activity and industry of the student, for it is predigested food, dispensing with the necessity for the labor and thought required to understand the decisions.

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INTRODUCTION TO ANGLO-AMERICAN LAW. Indiana University Studies, Vol. XIII. By Hugh Evander Willis. Bloomington: Indiana University. pp. 234.

Two weeks ago a puritanical Kansan introduced a bill in the state Legislature designed to prevent couples from marrying unless they had on deposit in a bank, \$1,000, "over and above debts, liabilities and exemptions". This ardent political reformer meant well, no doubt; but his scheme was so utterly fallacious that it met with hearty derision as soon as it was introduced. The good man has yet to learn that fundamental truth known to every young man, that financial stability does not insure marital happiness. But perhaps the Senator did not have marital happiness in mind when he suggested the law; perhaps he intended to

protect the various potential creditors of youthful couples. This is a more charitable view to take; but the bill is still very, very silly. Creditors have too many other means at hand to insure the payment of debts without having a law passed forbidding marriage. They can simply refuse to extend credit, for one thing, unless they are reasonably certain of payment. Countless other remedies are apparent too, all much more proximate than the prohibition of marriage. The institution of marriage must not be allowed to depend upon a pocketbook. Too much else is at stake. . . . Anyway, it seems that loving Kansas couples need not be unduly alarmed. Kansans still have a sense of humor, even if they are a little doubtful about the purpose of government, and they refused to consider their Senator's law seriously.

Those of us who believe that man still has a few unalienable rights do not fear the type of person represented by the Kansas solon. Shallow political reformers are not dangerous; they are ludicrous, and their errors are patent. The danger comes from a different source. Ignorance, unless it be general, is impotent; a little learning, based upon unsound, albeit plausible, theories, is far more to be feared.

The most dangerous man in politics is the man with wrong conceptions of government; and the most dangerous educator is the professor who encourages such conceptions. From a wrong political philosophy no good can come. Professor Willis' Introduction to Anglo-American Law outlines a philosophy which is basically wrong; at least it shatters the American idea of government. If Willis is right, then the whole system of American government is built on an unstable foundation, and we do wrong to boast of it. For a hundred and fifty years we have believed that Jefferson was right when he declared that all men are endowed by their Creator with certain unalienable rights; now Professor Willis blandly tells us that Jefferson was wrong.

Professor Willis, following the method of Dean Pound, divides the history of Anglo-American law into five periods: I. the Archaic period; II. Strict Period; III. Period of Equity; IV. Period of Maturity; V. Period of Socialization. This method of division is perhaps a felicitous one, and certainly as good as any other yet devised. But since Professor Willis starts out upon the ancient and purely gratuitous premise that each

generation is better than its forebears, he must of necessity condemn the Period of Maturity (embracing the Revolutionary days) in order to praise contemporary doctrines. For example, there is no doubt that our first statesmen would have shuddered to think that marriage should ever be meticulously regulated by the government; yet eugenic laws are now becoming a matter of course in some States. The worthy founders were a little touchy on the subject of individual rights, and jealously guarded them against infringement. . . . But now comes Professor Willis with his absolute denial of all rights—except those which are granted by a capricious government! He waves away the Declaration of Independence and the Bill of Rights with the remark that they are simply expressive of the philosophy of the period (page 116). Natural Rights were unduly emphasized, says he. “The natural result of this overemphasis . . . was to raise the question of why people had rights. The explanation that they were natural and God-given was exploded by the discovery that the only natural rights which men had were the actual rights which Englishmen had obtained for themselves. Then it was discovered that the reason why men had rights was in order to protect certain social interests. . . . The natural order” of government and law “is, first, social interests; second, rights; third, duties; fourth, remedies; and fifth, courts and legal procedure (legal redress). Individuals have rights and duties because only thus, under the legal scheme, can social interests be protected.” But, Professor, just what *are* these social interests? Is a combination of individuals somehow mysteriously endowed with interests which are not resident in any one of them? The old question, Professor; was man made for the state, or the state for man?

The trouble with Professor Willis is that he forgets that man is created by God; that man therefore owes God certain duties; that since he was endowed by God with rationality, he must act rationally; that he has a duty to act rationally; that he has a right to fulfill all of these duties without molestation; that in other words he has a right to life, to liberty, to property, and to everything else that is necessary for him to live rationally; that *every* man owes these duties and possesses these rights; that every man must observe the equal rights of his fellows; that governments were instituted for the sole purpose of protect-

ing these rights; that the state is not a transcendent power; that since no individuals can violate these God-given rights (*God-given*, Professor Willis), neither can the state—a collection of individuals—do so; that “social interests” exist only that individual rights can be better protected; that social interests are therefore secondary to natural rights; that many present schemes, such as eugenic laws, are really denials of these primary, natural rights; that therefore such schemes are unjustified and an unwarrantable extension of the power of the state. . . . The fact that man had to fight for a recognition of his natural rights does not argue against their existence. A right is not extinguished because it is violated. Not all governments have observed natural rights, it is true; but that fact argues against the government, not against the rights.

The chief difference between the Kansas senator and Professor Willis is that the latter puts up a more plausible argument for State absolutism. But it is this very plausibility that makes the professor the more dangerous of the two men. One does not need to be very astute to see the fallacy in the proposed Kansas statute; but not everyone can so easily see that Willis' ideas eventually lead to the same kind of laws.

C. J. R.