Michigan Law Review

Volume 4 | Issue 3

1906

# Recent Legal Literature

Harry B. Hutchins
*University of Michigan Law School*

Joseph H. Drake
*University of Michigan Law School*

Jerome C. Knowlton
*University of Michigan Law School*

Edwin C. Goddard
*University of Michigan Law School*

John R. Rood
*University of Michigan Law School*

# RECENT LEGAL LITERATURE

POMEROY'S EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES, Pomeroy's Equity Jurisprudence. By John Norton Pomeroy, LL. D. Third edition, annotated and enlarged and supplemented by two volumes on Equitable Remedies, by John Norton Pomeroy, Jr., A. M., LL. B. San Francisco: Bancroft-Whitney Company, 1905. Equity Jurisprudence; 4 Vols., pp. lviii, 859; xiii, 860-1806; xv. 1807-2626; viii, 2627-3525; Equitable Remedies, 2 Vols., xxx, 932.

We have before us the third edition of a remarkable work; for Pomeroy's *Equity Jurisprudence* must be regarded as, in a sense, an epoch-making treatise, so far as equity jurisdiction in the United States is concerned. It was written from the modern point of view. While the author saw a possible danger threatening equitable principles in the modern radical changes in pleading and procedure, he realized that the equity treatise of to-day, so far as its general plan and attitude are concerned, should be adapted to these changes, and that by so adapting it, he might do much to counteract an apparent tendency in some of the code states to give undue prominence to purely legal rules and to ignore equitable notions. He appreciated, moreover, the necessity of molding our jurisprudence so that its principles and remedies should meet the demands of modern methods and conditions. He recognized that equity "is an agency 'by which law is brought into harmony with society,' and that it is one of the factors which operate in judicial evolution." *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, 562. The equity treatise of to-day, he says in his preface, "must recognize the existing conditions both of law and equity, the limitations upon the chancery jurisdiction resulting from varying statutes, and the alterations made by American legislation, institutions and social habits. * * * It is true that the fudamental principles are the same as those which were developed through the past centuries by the English chancery; but the application of these principles, and the particular rules which have been deduced from them, have been shaped and determined by the modern American national life, and have received the impress of the American national character." Imbued with such notions, the author gave to the profession a work that was at once recognized as a masterpiece. It is probably not too much to say that during the past twenty years this work has exerted directly, through the tribunals of last resort, a greater influence upon our jurisprudence than any other single treatise. An examination of the editor's notes in the edition under review, in which he has referred to several thousand cases in which the author's statements of equitable principles have been recognized or quoted by the courts, will impress one with the extent to which this treatise has judicial sanction as an authority.

The present edition of the *Jurisprudence* has been expanded to four volumes, due to the extended annotations. The original text and notes have been left intact, excepting that two new paragraphs have been added to the section upon the *jurisdiction of equity to prevent a multiplicity of suits*, the

editor's work having been cast into a series of separate notes. If this course needs any justification, it is to be found in the preface to the present edition, in which it is stated that "the author's text and notes have been left as they were written, the editor believing that the peculiarly authoritative character conceded by the courts to that text, required that no chance should be afforded of confusing the author's language with his own." The work of the editor seems to have been thoroughly well done. The notes are exhaustive and bring the matter considered down to date. In many cases they have added very materially to the rather limited discussion in the text. To single out one from many that are valuable, the note upon *following trust funds that have been "mingled,"* vol. 3, p. 2019, is an admirable supplement to the author's somewhat brief and general treatment of the subject. The practitioner will find in this note a collection under appropriate heads of all of the principal cases in which the question has been discussed. The editor has certainly added much to the value of the treatise as a working tool for the busy lawyer.

The editor's work as an annotator does not extend to *Part Fourth,* upon *"the remedies and remedial rights which are conferred by the equity jurisprudence."* Here he gives simply the original text and notes. But he has added as an author to the original treatise a work upon *Equitable Remedies.* One volume of the proposed two has appeared, in which he considers, after the introductory chapter, wherein the equitable remedies are classified and the subject of *laches* briefly treated, *interpleader, receivers* and *injunctions.* The editor, in giving to the profession his work upon *Equitable Remedies* in the form of supplemental volumes is, as he states in the preface, attempting to carry out the purpose of his father, the author, which was to add to the original treatise one or more volumes upon the subject. If the author had been permitted to fulfill his purpose, he doubtless would have done so in connection with a second edition of the original work, from which he would have omitted his brief consideration of *equitable remedies,* and thus have avoided the repetition that is so prominent in the plan of the present editor and author. For the latter retains in his supplemental work, as he states in the preface, "nearly all the language of my (his) father's brief text pertinent to the subject treated." To put the matter differently, practically everything appearing in the fourth volume of the present edition under the head of *remedies and remedial rights* is found, and usually in the same language, so far as the subjects are treated, in the supplemental volume of the edition. The author of the supplemental work justifies his course on the ground of consideration for the convenience of the reader; and it may be that members of the profession who give attention to the matter, will agree with him. But ordinarily one does not care to purchase duplicate pages in the same set of books. And the dove-tailing together of sentences and paragraphs written by two persons whose style and attitude towards the matters considered are noticeably different, does not always produce a happy result. The style of Professor Pomeroy is distinctive and characteristic; it at once challenges and holds the attention; while that of the son, although clear, lacks individuality. The work of the former is, as a rule, constructive, while that of the latter is accumulative. And so we have in

the supplemental volume before us, and presumably we shall have in the volume yet to be issued, a want of harmony and continuity that mars the work from the literary point of view. Indeed, the author, without doubt, realized the differences suggested, for he says in his preface that "it is hardly necessary to state that no pretension is made to those high qualities, both of style and of original thought, which have given to my father's book its important place in our legal literature. My point of view has been that of the annotator." A better course, as it seems to the writer, would have been to annotate *Part Fourth* of the original work with a reasonable degree of fullness, even if thereby another volume had become necessary, and then to publish, if thought desirable, a separate and independent work upon the subject of *equitable remedies.* By this course the objections suggested would have been obviated, and the profession would have had a new edition of the *Equity Jurisprudence* as originally planned and prepared by Professor Pomeroy, but brought down to date *in every part* by an able and painstaking annotator.

But aside from the faults suggested, the volume upon *Equitable Remedies* will be found to be a good piece of work. The author is accurate in his statement of principles and has been thorough and diligent in the collection of authorities in support of the text. The book will undoubtedly commend itself to the busy practitioner. H. B. HUTCHINS.

---

ROMAN WATER LAW, translated from the Pandects of Justinian. By Eugene F. Ware, Esq., of the Topeka Bar. St. Paul: West Publishing Co., 1905. pp. 31, 160.

This is a good and timely book presenting, according to its sub-title, all of the Roman law concerning fresh water, found in the *Corpus Juris Civilis.* There is an introduction of 31 pages on the historical relations of Roman water law to the modern law on the subject, and the rest of the 160 pages is taken up with the translations of the different paragraphs of the *Corpus Juris Civilis* on the law of waters, arranged under the rubrics, Rivers, Rain Water, Springs, Sewers, Reservoirs, Irrigation, etc., and to this is added the law of waters of the Spanish *Las Siete Partidas,* as given in the translation of that work by Lislet and Carleton.

The book will be found valuable by legislators and courts of our southwestern states in dealing with the many new questions presented in the course of the development of the irrigation plans in the arid regions. The law of waters of our trans-Mississippi states seems to be in the main an indigenous product, developed at first by California miners as a body of customary rules for their own direction and afterward adopted by Congress and by the courts of the United States and of the various states. (See the article in this REVIEW, November, 1902, pp. 91-101, by John B. Clayberg). It is rather unfortunate that our legalists have been thus far working apparently in ignorance of the fact that there was a fully developed water law in the Roman system in which many of the problems with which our courts have been struggling were settled in accordance with equitable principles

centuries ago. This Roman water law now made accessible to English readers will doubtless be a very convenient spring from which to draw in the future. The preparation of the translation was probably suggested to the author because of his own professional connection with the very interesting litigation now pending between Kansas and Colorado. (See *The Green Bag* for October, 1905, p. 587 ff.) Some years since we had from the hands of the same author THE IRRIGATION LAWS OF KANSAS, WITH EXTRACTS FROM THE LAWS OF THE UNITED STATES ON THE SUBJECT OF IRRIGATION, and the brief of the complainants in the above mentioned Kansas-Colorado case shows his firm grasp of the history and principles of this branch of the law.

In the Introduction the author justifies his application of the term "Pandects" to the entire *Corpus Juris Civilis* by saying that the Code, Digest, Institutes and Novels are called generally "The Pandects". The generality of this error might be questioned, and it seems hardly wise to perpetuate it, in view of the universal German custom of using "Pandecten" by way of contrast to "Institutionen", and the use by the Justinian codifiers of the alternative title of *Digestæ seu Pandectæ* as applied to the codified *jus*, to contrast with the *leges* of the *Codex*. The statement on page 25 that the Institutes are the only portion of the Pandects [*Corpus Juris Civilis?*] which has been translated into English was probably written before the publication of the translation of The Digest of Justinian, by Charles Henry Monro, the first volume of which came from the Cambridge Press last year. There is, too, a similar work by Maude, published by the Cambridge Encyclopedia Co., in 1902, and translations of selected titles by Roby, Moyle, Grueber and others. In the discussion of the contribution of the Spaniards to the law of waters, the author has not considered THE LAW OF WATERS FOR SPAIN, translated by the United States Bureau of Insular Affairs, which may be said to be now a part of our system by its adoption in Porto Rico. (See PORTO RICAN CODE, § 432.) It seems rather unfortunate that the *Corpus Juris Civilis*, edited by Kriegel-Hermann-Osenbrueggen, in 1865, has been used by the translator in place of the more modern standard edition by Mommsen-Krueger-Schoell, but any difficulties in citation which might arise have been forestalled by the convenient device of printing the first lines of the paragraphs quoted in the table of contents.

The translation has in the main the prime requisite of a legal document; namely, clearness. The insufficiencies of translation appear in those passages referring to Roman procedure, as is naturally to be expected from the highly technical character of the language. It would seem that these terms might well have been handled, as suggested by Monro in his preface to the translation of The Digest of Justinian, by simply giving them in the original form and putting in a foot-note an explanation of their meaning. The translation of the familiar phrase, *"non vi non clam non precario"*, in the *interdictum retinendæ possessionis*, by the expression "without force, stealth or *variation*," sounds very strange to a student of the classical Roman law. It is said that this translation of *precario* has become usual in the courts of the irrigation states and that it refers to the irregular, non-legalized use of the water. For example, if one having a right to use the water for one hour at sunrise should use it also at noon he would not acquire the right which he would obtain, if he

used it *"non precario,"* that is, "without variation." If this meaning, so far away from the classical interpretation, has become fixed in our courts, it would be well to make some explanation in a note of such a striking peculiarity.

The difficulty of translating the term *utile* in the phrases *utile interdictum, utile judicium,* etc., seems to have been solved in each case by the use of the word "mandatory". This leads to no serious misapprehension of the effect of the remedy, though it gives us no light on its character either in Sections 219 and 220, where *utile interdictum* is translated "mandatory injunction," or in Section 156, where *utile judicium* is translated "mandatory decree", but in Section 244 we have a mandatory injunction issuing to enforce the "right of being admitted." As a matter of fact, in each case the *utile* is used to describe the process granted to one possessing a *jus in re aliena* as distinguished from the direct process granted an owner.

The author's treatment of the technical term *"bonorum possessor,"* by translating it as "legal representative" and then putting the Latin equivalent in parenthesis, might well have been applied to the handling of other difficult phrases. This obviates any possible misunderstanding that might arise from the fact that the English is not in all respects conterminous in meaning with the technical Latin.

These criticisms are, however, no derogation of the essential merits of the book, and they may be corrected in a second edition which, it is said, will soon be printed, as the present edition is already nearly exhausted. The work is well worth the doing in the present formative period of our law of waters in the Southwest. The borrowing from the Roman law of waters is likely to be from the rules of substantive law on the subject, and this book gives them in an intelligible form. JOSEPH H. DRAKE.

---

## RECENT BOOKS ON QUASI-CONTRACTS

CASES ON QUASI-CONTRACTS, edited, with notes and references, by James Brown Scott, A. M., J .U. D., Professor of Law in Columbia University. New York: Baker, Voorhis & Company, 1905. pp. xvi, 772.

SELECTED CASES ON THE LAW OF QUASI-CONTRACTS. By Edwin H. Woodruff, Professor of Law in the College of Law, Cornell University. Indianapolis: The Bobbs-Merrill Company, 1905, pp. xvi, 692.

These two books appeared during the past few months and are valuable contributions to the literature of the subject. There is in them very little duplication of cases, so that each may be said to fairly supplement the other. The cases are well selected and quite thoroughly annotated and are something more than simply illustrative of a comparatively new and developing topic in the law. In the leading law schools of today instruction is given in this subject and the books are primarily intended for the use of students, but they are quite necessary to a resourceful practitioner, ambitious to accomplish the best results through the simplest and most direct remedies.

Professor Scott has undertaken to abridge Professor Keener's cases on the subject to the extent of retaining the more important ones and at the same time bring the book to proportions commensurate with the subject

Professor Ames' classification of the nature and extent of quasi-contract is followed. The first chapter of the book is of exceptional value. It treats of the historical sources of the obligation and gives extracts from leading authors on the Science of Jurisprudence, showing the origin of the quasi-contractual idea.

The editor divides his work into books: Book I. The sources, extent and nature of quasi-contract. Book II. The obligation of quasi-contract. Each book is divided into chapters covering well recognized subdivisions of the subject. The cases selected are arranged in accordance with this plan. This gives the student not simply the case but also its relation to the general subject under consideration.

Professor Scott's book possesses two excusable faults. The same were in Professor Keener's selection. There are perhaps too many old English cases. Many of them are several centuries old. These are of great historical value and we would not call attention to their presence if there were not so many of them. It is difficult to interest the student in short and imperfectly reported cases three or four centuries old.

Professor Keener's cases covered all obligations enforcible through the legal fiction of a promise in the action of assumpsit. Professor Scott has followed him in this respect and over half of the volume before us is given to a selection of cases showing when the breach of an express contract will support the legal fiction in assumpsit. This is a very important question under both the common law and the code system of pleading. There is a marked distinction, however, between an obligation imposed by law and the legal fiction through which it is enforced. The promise may be false but the obligation is real. Any consideration of the quasi-contractual obligation apart from the remedy provided for its enforcement would be inadequate, but, in our judgment, the remedy ought not to be regarded as the main source of the obligation.

In his book of cases Professor Woodruff divides the subject into three parts: I. Recovery upon a record. II. Recovery upon a statutory, or official or customary duty. III. Recovery upon the doctrine of unjust enrichment. In this way he covers the field quite satisfactorily and within reasonable limits. Professor Ames' valuable article on the *History of Assumpsit* is given as an appendix. The work is compiled on the theory that the principle "that one person shall not unjustly enrich himself at the expense of another", is the foundation of the great bulk of quasi contracts. The principle is borrowed from equity and enforced through the legal fiction of a promise. The editor, however, keeps clearly before the student by way of illustrative cases this principle and the resulting obligation. In his table of cases Professor Woodruff includes the cases cited in his annotations. This is a good thing to do. It is very helpful to the practitioner. In this way the annotations become briefs of cases on a case in hand.

Both works are excellent in those things which make a book useful; its table of contents, table of cases and index. J. C. KNOWLTON.

A TREATISE ON THE LAW OF AGENCY. By William Lawrence Clark and Henry H. Skyles. St. Paul: Keefe-Davidson Company, 1905. Two volumes, pp. liv, 2178.

This is the most exhaustive treatise for the use of the practitioner on the law of agency. It is published in two volumes for convenience in handling, not because of any natural division of the subject. The work has been well and thoroughly done, and the result is a treatise that must be of much value to the profession. It is so long since the appearance of Mr. Mechem's standard work on the subject that the appearance of such a book as the present volumes is very timely.

While it would be too much to say that Clark and Skyles is likely to become a classic, it is equally true that the work is far from mediocre. Every phase of the subject has been discussed with fullness and accuracy, the language is clear and concise, and distinctions are for the most part made without too much refinement and with discrimination. Needless refinements that have obtained currency in legal opinions of courts of last resort cannot be ignored by text-writers, however desirable it may seem to escape such useless discriminations and misleading names of things that exist chiefly in the judicial imagination. And yet one may hope for the disappearance of some of these under the influence of this practical age. Our authors, for example, like other writers on the subject, attempt to define *universal agents* that are "sometimes said to exist," adding "it is no doubt possible for such an agency to exist, but instances of it are very rare". Their quotation following this statement shows that there is much doubt whether such an agency can exist. It seems to require the principal to divest himself of all control over his own property after which it is difficult to see how he could ever again take it to himself. Almost equally fanciful is the distinction attempted between the authority of general and special agents. The authors truly say "the distinction is highly unsatisfactory." The fact is the act of the agent in general, binds the principal if it is in the scope of his authority, and does not bind him if it is not. Whether the agent be called general or special is of no consequence beyond this, and can give no aid in determining the principal's liability. As names for general, more general and less general authority the terms general, universal and special agents might be useful enough, but as applied to classes of agents subject to different legal rules they are misleading and without legal warrant. It is as difficult to determine when a special agent shades off into a general agent as to tell when a kitten becomes a cat, and more so, for one can be certain that a very young puss is a kitten, while he can never be sure any agent is special. Every definition of a special agent is ambiguous, and it may be doubted whether a special agent is really an agent at all. He seems rather to be a servant with very limited power.

Occasionally the authors are over nice when even the courts have not been. Of this their discussion of the definition of agency furnishes illustration. Notwithstanding their attempted distinctions it may be confidently affirmed that agency is a *contractual relation* always, resting on a contract or a quasi-contract. It exists only by consent of the parties, or by what the law regards as equivalent to such assent. It might be better to say that agency is "the legal relation founded upon the express or implied contract of the

parties or arising by operation of law," instead of "created by law," but in any case it is a contractual relation in its origin and in its purposes, and it would be well to say so unequivocally, explaining away rather than emphasizing apparent exceptions.

In general the recent cases have been cited, but occasionally statements are made in reliance on old cases, that should be modified in accordance with the manifest tendency of legal opinion. Not one late case is cited as authority for the rule that the agent's authority must be under seal if he is to execute for his principal a sealed instrument. Under the present attitude of the law it is believed the old rule, if upheld in form in many jurisdictions, is not in spirit. The modern tendency to relegate the necessity of a seal to acts of corporations and public officials should be noticed. In the notes cases are not uniformly arranged alphabetically by states as some recent writers urge they should be, but when the citations are extended they are often so arranged, and with advantage to the reader who wishes to know the weight of authority.

Few instances are noted in which disputed points are not stated in accord with the weight of authority, after a clear and intelligent attempt to make such explanations of apparent discrepancies as are not real ones. Sometimes, however, it may be doubted if correct conclusions have been drawn in such cases. In discussing the liability of banks taking paper for collection for defaults of correspondent banks, the text states that "the majority of courts" hold that the bank is not liable for such defaults of correspondents. It is believed the clear weight of authority is the other way. Nearly all the cases cited as making the majority were decided before the United States Supreme Court in *Exchange Bank* v. *Third Nat. Bank*, 112 U. S. 289, lent the weight of the federal courts to the rule that holds a collecting bank liable just as any other collecting agent is liable for defaults of correspondents. The effect of that decision and of the majority of decisions since, it is believed, is to establish the rule there laid down in the majority of the states. The text later expresses its own preference for this view, and other texts on agency have done the same.

The work covers not only the general principles of agency, but also at some length a treatment of special classes of agents, such as attorneys, brokers, factors, auctioneers, masters of vessels, etc. Of most of the books in any field it can be said they are but additions, good or bad, to the present books in that field. Of this it is not too much to say it is a real contribution to the subject.

EDWIN C. GODDARD.

---

A TREATISE ON THE LAW OF CRIMES. By Wm. L. Clark and Wm. L. Marshall; Second Edition, by Herschel B. Lazell. St. Paul: Keefe-Davidson Co., 1905. pp. xxxiv, 906.

The first edition of this work was in two volumes, and it is believed that the decision of the publishers to publish in one volume will meet the approval of the profession generally. The present edition is not otherwise materially changed from the first, except in being brought down to date. Mr. Clark

is well known by his numerous texts on law to be a clear and forcible writer; and we understand that he did most of the work on the original edition. In this work he was considerably handicapped by the fact that another publisher had a copyright of his original text, Clark's Criminal Law, and it must have taken no little pains on his part to avoid repeating himself; yet he seems to have performed the feat very well, though at times the form of expression seems somewhat awkward. The lawyer who wants a ready reference handbook on criminal law, in small compass, without discussion of the unusual questions, nor a very exhaustive collection of the decisions on any point, will find this book well suited to his use. The text, tables, and index make over 900 pages, regular law book size. J. R. ROOD.

---

LINCOLN THE LAWYER, by Frederick Trevor Hill, of the New York Bar. Published in the *Century Magazine* beginning December, 1905. Chapters I–V, December issue; chapters VI–IX, January issue.

Mr. Hill proposes to bring to light in these papers much that has been neglected by other biographers concerning Lincoln's professional career. The chapters published in the *Century* for December and January indicate that the author has independently investigated Lincoln's early life and has not been satisfied to accept as true stories which have little basis in fact and are innately improbable. A recent biographer, for example, tells us that Lincoln's "ambition to become a lawyer was inspired by a copy of the Revised Statutes of Indiana which accidentally fell into his hands when he was a mere boy in the swampy forests of the southern section of that state". Mr. Hill shows that there is good reason to doubt the accuracy of this story. It is perhaps impossible now to distinguish in every instance the fact from the fiction concerning Lincoln, but Mr. Hill has evidently availed himself of almost every possible source of information in his search for the truth. He sets the matter out in a most attractive style, and one's interest in his narrative is increased by the accompanying illustrations and the reproductions of original documents.

These papers will undoubtedly be, as they deserve to be, widely read; and one salutary effect that they will produce will certainly be to satisfy the reader, be he layman or lawyer, that it is possible for one to be both an honest man and a great lawyer, or, perhaps we should say, that it is only possible to be in reality the latter by being at the same time the former.