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Book Reviews

SUBSIDIARIES AND AFFILIATED CORPORATIONS—A STUDY IN STOCKHOLDERS' LIABILITY.

By ELVIN R. LATTY. CHICAGO: FOUNDATION PRESS, 1936. pp. xxvii, 225.

This is a book for which the profession has been waiting. It is indispensable to the counsellor, the advocate or the judge who has to wrestle with those ancient, puzzling, and much abused twin problems known as "the corporate entity" and "piercing the corporate veil." It is the clearest analysis I have ever seen of the nature of the true problems masked under those labels. Its treatment of the cases is at once lawyerlike in the best tradition of the craft—sharp, shrewd, and well-arranged—and jurisprudential in the best tradition of realism, cutting through words and formulas to the meat of the matter, and seeking both explanation and justification of decisions where, in any confused field, they are really to be found: to-wit, in the facts of the situation and the needs of the situation. Altogether, an admirable job. It will take its place on the *eight-inch* shelf of really worthwhile books on American corporation law. Particularly to be noted is Latty's skill in suggesting to the practicing lawyer (by way of his jurisprudential analysis) new and unsuspected—and *eminently persuasive*—ways of bringing precedents to bear, and of getting rid of his adversary's authorities. Latty never loses sight of that surest test of a theory intended for use in court: can it be made not only persuasive, but compelling, *to the court*? His theories can be; and will be.

The book is not for casual reading. It requires to be studied. It repays the study. It does call for patience. The style is at times verbose—though repetition can be excused when the job is to get unfamiliar ideas across to a profession which does not love the unfamiliar even when the unfamiliar offers help and comfort. And Latty's climax, his last chapter, is so long delayed that one gets a bit irritated at having each successive chapter fail to bring it. I recommend reading the last chapter immediately after the first, and then settling down to the bulk of the book.

The thesis is this: that the supposed conflict in rule and confusion in tendency about when the "corporate entity" will insulate a stockholder (corporate or other) from liability on corporate obligation, and when, on the other hand, the well-known veil will be "pierced," is really a conflict and confusion only in language; (though it has occasional untoward results in the decisions.) Look at the facts, the issues, and the results, and you get a substantial harmony of actual outcome, and one largely consonant with sense in the circumstances. The difficulty is that this sense in the results is hidden under verbal formulas which obscure; and, further, that these formulas in themselves give precisely *no* guidance to judge or lawyer as to what will or should happen next. Few indeed are the cases in which such well-known "tests" as "complete domination," "alter ego," "mere instrumentality" are not satisfied equally, whether or not the court cuts through to collect from the stockholder. "Tests" which prove to be applicable equally when they are applied and

when they are not, are signposts pointing North and South at once; they offer little guidance. I do not say "no guidance," because a tiny trifle they do offer. Each of the formulas suggests a policy which our law and our economy have approved. The "entity" formula calls to mind that the gathering of capital or encouragement of enterprise by providing limited liability is not a thing we frown on. The "mere cat's paw" formula suggests that the corporate device can be, and in our experience has been, turned to uses which look more like deception of creditors than like encouragement of legitimate enterprise. Some first indications of guidance, then, the two formulas call up to mind; but then their utility for decision or for prediction ceases. For *either* formula is equally available, in any case doubtful enough to get litigated, and nothing in either formula or in their combination tells us when to choose which, or when to expect a court to choose which. The formulas do indeed serve a further minor function; they set the manner of discourse; they put into the mouth of counsel on either side the language in which his argument is to be clothed; they afford the verbal tools of accepted rhetoric for use in court. On one side, counsel will vociferate about an independent entity authorized and created by the law itself; on the other side, the air will hum with imputations of fraud upon the public by the sham and pretense that the formal entity is independent. But as Latty shows, corporations are not *de facto* independent of their stockholders; and cannot be; and should not be. They exist to be "controlled." Some one must run even a legal entity. It would be a sad world for stockholders if they were not controlled (indeed, it has been, where the corporation has gotten away from the bulk of the stockholders.)

The truth is, then, that a corporation is not *merely* a group of real men who have organized to do some type of business; nor *merely* the *de facto* acting unity created by their having *de facto* organized into cooperative action; nor is it *merely* a legal form for doing business with limited liability; nor is it *merely* an artificial legal creation which courts can deal with as if it were a single unity. It is in fact *all* of these at once. And the key to dealing with it intelligently is to keep remembering that fact, and the purpose of its existence. On these lines Latty's analysis proceeds.

I cannot attempt to set forth in full the keen dissection of the cases which characterizes the book from start to finish. I give only enough illustrations to bring out that character.

Take, for instance, the difference between tort creditors and contract creditors; and again, take the difference between informed and less informed contract creditors. If bankers engage to lend to a subsidiary without insisting on the guarantee of the parent (or to a closely held corporation without insisting on the endorsement of the major stockholder), wherein should their rights differ from those of bankers who lend to a business trust under express negation of the personal responsibility of the trustees and cestuis? They have elected to limit their claims to a limited body of assets. They were not only of age, but in a business calling for experience and judgment in just such matters. Short of fraud and the like, where is their complaint? I am not so clear that this reasoning carries over comfortably to the small investor who buys securities from an underwriting syndicate. And Latty begins to have doubts about various types of merchandising or building creditor. Certainly, how-

ever, no doubt at all can exist that one run down by the subsidiary's negligently driven truck has made no such engagement to limit his rights thus—and the case for cutting through grows stronger. "The great majority of cases denying such liability are contract cases." But, urges Latty, why allow cutting through, even here, if the subsidiary's assets have been set and allowed to stand at an amount adequate, in the line of business concerned, to carry on the line of business with its normal run of risks? As long as limited liability remains a policy we approve, so long liability *which is not sought to be limited beyond reason* must remain limited—at the expense even of this injured plaintiff. (The road to helping him lies in a different style of handling automobile injuries.) In such a picture the imposition of liability on the stockholder in the "milking" cases becomes almost inevitable; there the current assets are depleted too fast, which is as bad as failure to provide the subsidiary with adequate capital at the outset.

Again, the body of cases which, however they talk, involve in reality no problem of creditors' cutting through at all, are carefully severed out and discussed under their own true issues—with resulting illumination. So those involving the Clayton or Elkins Acts, or attempts to secure jurisdiction over a parent by way of a subsidiary, or fraudulent conveyances, or the attempted use of a subsidiary to evade a contract of the parent. Not the least interesting discussion is that which brings normal principles of tort and agency to bear, and marks off from parents' liability for a subsidiary those cases in which one corporation is liable *together with* another, either because of joint tortfeasance (participation) or as a principal by whose own direction the wrong was committed.

Such lines of cleavage and analysis would be exciting enough, in their clarification of the sticky hogwash which defaces the books on "corporate entity" and "veil-piercing," even if they rested purely in theory. But they do not rest in pure theory. They present a theory which makes the cases talk sense instead of muddle. *They line up the decisions as no other attack has even begun to line them up.* Once more we learn the ancient lesson that when highly intelligent and trained men persist for years in talking nonsense, it is because an issue has been badly posed; posed too broadly and generally, so that there is enough truth on each side to convey the feeling of righteousness and the indignation of advocacy, and the will to win; but posed so broadly and generally, too, that all arguments overshoot the mark. Latty, by stripping the issue down to its bare, bald reality, makes it one which any lawyer can talk sense about: *when, and where*, in this generally accepted and acceptable institution of limited liability, does the good thing get to be too much of a "good" thing—for the stockholder? That will not depend upon whether the stockholder controls. It will depend upon what he or they have done with their control—or on whether the complainant has not barred himself from claiming grievance. And Latty shows that, to a surprising percentage, the courts have *felt* their way through into sense, in terms of the true issue, though they have talked nonsense enough in the process to sometimes fool their own successors. Thus, once more, the realistic method of attacking a legal problem has proved its value: Legal doctrine lags behind judicial instinct, here as so often, because lawyers and legal scholars pay too little

attention to what courts are *doing*, too lop-sidedly much to what courts *say* in the process of their doing. No one—certainly not Latty—would regard what courts say as not worth the most careful study. But when that careful study fails to bring clarity, it is time to get down to facts, issue, and result, and seek clarity. Rarely will one fail to find it, then.

Latty has found it.¹ Every corporation lawyer needs this book.

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BY PACIFIC MEANS. BY MANLEY O. HUDSON. NEW HAVEN: YALE UNIVERSITY PRESS, 1935. pp. vi, 200.

When we reflect that it is supposed to have taken humanity several centuries to discover that it was foolish to continue to carry stones in one end of the grain bag while the same was being transported, and when we recall that Mark Twain once reminded us that it also took several centuries for some to give up the belief in infant damnation, it should be no occasion for discouragement when we learn from the author that it was not until the middle of the nineteenth century that any worthwhile peace movement of a wide scope occurred.

The book, which includes the text of four lectures given by the author in 1935 at the Fletcher School of Law and Diplomacy, is divided into the following main divisions:

- I. The Law of Pacific Settlement Prior to 1914;
- II. Pacific Settlement Through the League of Nations;
- III. Pacific Settlement Through the Permanent Court of International Justice;
- IV. Treaties on Pacific Settlement since 1920.

Strange as it may seem, the inspiration for these brilliant lectures came to the author while he sat in the gallery of the United States Senate listening to the debate concerning the Permanent Court of International Justice. As he heard eminent voices on the floor expressing pride in the agencies of pacific settlement

1. I have a few minor quarrels. For instance, the closely held "personal" corporation comes in for repeated mention; and its distinction from the "investment" or "publicly held" corporation, as from the latter corporation's subsidiary, is repeatedly noted. Yet had the three been more rigorously severed in the author's thinking, the book would have illumined two dark fields instead of one. I cannot help but feel that the author's failure to castigate adequately the outrageous part of the *Salomon* case rests in part on failure to keep these distinctions *constantly* in mind. Given limited liability as an institution, the one-man corporation can claim its protection with relative decency, and with some resulting social benefit. There are difficult situations, to be sure, as so often under any institution; not all creditors, for instance, distinguish the proprietor's reputation from that of his company. But where the *Salomon* case junks all functional justification is when the proprietor is permitted to enforce a mortgage—in insolvency—on the corporate assets. Even good faith plus a demonstrable fresh advance should not protect such a mortgage. The least one can ask of a person claiming to venture only a fixed part of his fortune is that outside creditors who are limited to that part get first benefit of that part.

originating before the War and belittling all advances since made, he became convinced "that emphasis is needed on the 'pacific means' by which sixty-three nations of the world have agreed to seek the settlement of their disputes 'of whatever nature or of whatever origin they may be'" (p. 4).

The outstanding success of the Alabama Claims Arbitration in 1872 contributed to the revival of peace movements in the latter part of the nineteenth century. Notable efforts prior to 1914 were the two Peace Conferences at the Hague in 1899 and 1907 resulting in codifying the pre-existing law as to the methods of dealing with international disputes and in systematizing "a procedure for the organization and conduct of International arbitration." Forty-five states now belong to one or the other of said Conventions.

The effectiveness of the Hague Convention was greatly reduced by what the author designates as a "weasel phrase;" the provision intimating an agreement between the nations to have recourse to mediation before an appeal to arms, was to operate only "as far as circumstances allow." However, provision was made that the offer of good offices or mediation by a nation not involved in the dispute could never be regarded "as an unfriendly act" (p. 7).

The Permanent Court of Arbitration was also created at the first Hague conference, consisting of four members from each of the forty-five interested nations. Few (possibly only one) of the cases since coming before the Permanent Court of Arbitration "relate directly to situations in which the continuance of peace was endangered, . . . but many of the cases . . . removed sources of friction which might have festered." Many citizens of the United States in urging the adequacy of the Court of Arbitration for the present day international disputes seem to overlook the fact that in order to have a decision by that court the disputing nations have to "agree upon the statement of the question to be arbitrated and upon the composition of the tribunal to which it would be referred." It cannot, therefore, be regarded as an effective instrument for "obligatory settlement" (p. 15).

The situation during the period 1914-20 is splendidly phrased by the author as follows:

"The magnificent Peace Palace at the Hague in which the Permanent Court of Arbitration has its seat, had not been open for a year when the clouds of 1914 began to rain their havoc upon a distraught Europe, caught unaware. The Hague tradition proved too fragile to prevent the storm, and as the world marched on toward Armageddon its gaze turned away from the Peace Conferences of 1899 and 1907. A sacrifice of ten million lives created a necessity for a new beginning, and for a time after 1918, a stricken, subdued, and exhausted world seemed willing to abandon the dogmas of nationalism for the ideal of a world order" (p. 19).

Being the product of a war-weary world the Covenant of the League of Nations contains a larger measure of international agreement than was possible at any time before or since. And while the birth most likely could not have occurred at any other time in history, yet, because of the many new complexities resulting from the War, "tremendous handicaps" surrounded its birth and many still persist. Yet it "stands out as the highwater mark in the history of efforts to provide for the pacific settlement of international disputes" (p. 21). In 1935 fifty-nine states

were members, and since 1920 more than eighty-five sessions of its Council have been held; and while many successes are among its achievements, it has also suffered defeats. The author has great confidence in the League's usefulness over a long period of time and considers the keeping alive of the Assembly and the Council of the League of greater interest than the current success of these agencies, and we are to infer that much lasting good is bound to result from the constant re-occurrences of these collective meetings.

The two main purposes of the League are "to promote international cooperation and to achieve international peace and security," and the "heart of the covenant" is expressed in Article Eleven as follows: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League" (p. 24). This truth seems to have been a new discovery. At least prior to the World War, many nations acted apparently oblivious to the fundamental principles underlying this declaration.

Members of the League are bound to submit to arbitration, judicial settlement or inquiry "any dispute likely to lead to a rupture," and further agree not "to resort to war until three months after the award . . . or the judicial decision, or the report by the Council" (pp. 28, 29).

If the disputants themselves misjudge the rupturing possibilities of the dispute, members of the League still have the "friendly right" to bring the situation before the League and thereby set in operation many conciliatory activities. And even if the League does not have the power or having the power does not use it to compel conciliation, yet judging from the past functioning of the League, no one will deny that even disobedient or recalcitrant members are severely exposed to peaceful ways. Such facilities for exposure did not exist before.

Many of the more than sixty disputes which have come before the League, are interestingly reviewed by the author. While there have been sad and disappointing failures to prevent war, yet on the whole the results obtained give ample ground for an optimistic outlook as to the League's future usefulness. It is predicted that,

"the Covenant will live not as so much black ink on white paper," but "in ever changing conceptions and ever growing institutions which respond to the needs of international society" (p. 45).

And in warning us against despair from delay we are reminded that, "It took two centuries to enthrone the idea of the King's peace in medieval England" (p. 46).

The Permanent Court of International Justice popularly known as the World Court, after a generation or more of effort, was created by the statute annexed to the Protocol of Signature of December 16, 1920, signed by forty-nine states. While it is administratively connected with the League, it does not exist under the Covenant of the League but under the above Statute adopted by an independent international document and functions in complete judicial independence. Sixty-one states maintain the Court. Out of the seventy-two nations of the world, only Costa Rica, Egypt, Sandi Arabi, United States and a few small states like Iceland and Liechtenstein

do not share in its support. But its facilities are open even to the non-conforming states should they signal for aid.¹

With the League already in existence it was easy for the Nations creating the court to reach an agreement that the Judges of the Court should be elected by a majority vote of each of the League's two bodies.

One of the complex problems in the Court's creation and continuance involved the question of the Court's jurisdiction. The Court was established upon the principle that its jurisdiction depended upon the consent of the parties before it and one of the provisions of the Statute is the so-called optional clause "under which states desiring to do so might declare either when they accepted the Statute or later, that between themselves the court would be competent at the request of a single party (State) to adjudicate any dispute falling into the categories which Article Thirteen of the Covenant had declared 'generally suitable for submission to arbitration.'" Up to 1921 only ten states had thus given the court obligatory jurisdiction. But by 1933 forty-two states had thus conferred obligatory jurisdiction. And there are now more than 475 treaties or conventions listed with the Court containing some provision for reference of disputes to the Court.

One of the surprising developments of the Court has been the growth and usefulness of its advisory jurisdiction, in giving advisory opinions to the Council or Assembly of the League. Advisory opinions are not binding. The Court, however, arrives at its advisory opinions by the use of all the safeguards usually present in judicial action, and "The result of this development has been a frequent resort to this jurisdiction of the Court, and almost half of its time has been given to requests which have emanated from the Council of the League of Nations. Such is the confidence in the methods followed by the Court that the opinions given have commanded great respect" (p. 57).

Notable among the advisory opinions are those involving a dispute between Great Britain and France concerning certain nationality decrees issued by the French authorities in Tunis and in the French Zone of Morocco and in the boundary dispute between Czechoslovakia and Poland in the Jaworzina district, in both of which cases the advisory opinions resulted in settlement of the disputes.

Striking examples of the effectiveness of the Court's opinions in contentious cases are the Free Zone case involving a dispute between France and Switzerland and the Eastern Greenland case involving a dispute between Denmark and

1. In this connection the writer deems it appropriate to state that although the United States is not a signatory to the Court Protocol, yet it has been signally honored in having some of its most distinguished citizens elected as Judges of the Court and now has the very high and distinct honor of having one of its citizens, the distinguished author, Dr. Manley O. Hudson, serving as one of the Judges of the Court. And the high esteem in which the author is held by the Nations of the World is measured by the extraordinary fact that he was placed in nomination before the elective body by the votes of the greatest number of states (40) ever given a nominee for this high office, and later at the election, he received a majority of the Council of the League, and in the Assembly of the League, he received the votes of 48 Nations out of the 53 Nations voting.

Norway. In each of these cases the losing parties promptly complied with the Court's opinion. At no time has the Court's authority been flouted and its prestige has been one of constant growth. The fact that the Court exists and is available, in and of itself, produces an "invisible influence" for good, operating at all times as an encouragement to settlement of disputes.

We are told that the creation of the Court will go down in history "as one of the principal achievements in these post-war years in the field of international relations," and that it is "most improbable that our international community will ever again be willing to be without some such agency" (p. 72).

Prior to 1920 few treaties, providing for arbitration of disputes, had been made. Since that time many treaties have been made seeking to encourage arbitration of international disputes. And while for the most part many of these treaties have gone little beyond rendering "lip service" to the cause of arbitration, yet within the last fifteen years marked progress has been made and among many of the newer treaties the tendency toward obligatory arbitration is becoming more marked. Some of the nations, including the United States, however, have not adopted treaty style embracing compulsory conciliation of that type of dispute most apt to lead to war.

One of the most noteworthy of recent treaties is the Briand-Kellogg Pact known as the "Pact of Paris" signed at Paris, August 27, 1928, Article Two of which reads as follows:

"The High Contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means" (p. 154).

Sixty-three nations have signed this Pact. The weakness of this treaty is that by its terms it is not connected with the use of specific instrumentalities of peaceful settlement. The author, however, regards it "as a binding undertaking behind which rests the compulsive force of international law," and in conclusion states:

"Holding this view, I have undertaken with you a series of explorations to determine how far the obligation of the Briand-Kellogg Pact can be said to be implemented by the present-day law of pacific settlement. The object of these lectures has been to describe and to enumerate the pacific means which are now available to the parties to that instrument for seeking the settlement of their disputes or conflicts, in order that they may not be driven to violate their obligation. I think we can say that we have found perhaps not adequate but at any rate numerous and various means which are at the disposal of States for this purpose. If you share this view, then we are able to say that Article 2 of the Briand-Kellogg Pact is not a shot in the air; its force is not destroyed by its generality; avenues are in front of us by traveling along which States may respect their obligation. In other words, the Pact is, to this extent, implemented" (p. 93).

The book is so tersely and brilliantly written that I have found it difficult, and in fact impossible, to reduce the same to any worth while review. It should be widely read, and it is my opinion that no present day law graduate should be permitted to go forth to the world until he has satisfied his Dean that he has

read and studied this book, together with the text of the Covenants, Treaties, Statutes and Protocols referred to in the text and conveniently printed in full in the appendix.

St. Louis, Missouri.

FRED L. WILLIAMS

HOLMES, JUSTICE OLIVER WENDELL. HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS. EDITED AND ANNOTATED BY HARRY C. SHRIVER. NEW YORK: CENTRAL BOOK COMPANY, 1936. pp. xiii, 280.

This is a precious book. In the first place it seems appropriate that this reviewer of the book should give a brief description of its contents. The volume is divided into three parts. Part one contains the early book reviews of Justice Holmes; part two, some uncollected papers; and part three, Justice Holmes' letters to Dr. Wu. It also contains a delightful introduction by Justice Harlan F. Stone,¹ a friend, colleague and admirer of Justice Holmes, and a valuable appendix containing the bibliography of his works and of selected articles and a bibliography of articles and books relating to the great American jurist.

This small volume is a worthy companion to the three great works of Holmes, *The Common Law* (1881), *Speeches* (1890) and *Collected Legal Papers* (1920). Justice Stone in his introduction aptly refers to the character of the two latter volumes by using the language of Justice Holmes himself, who said of his expressions preserved between their covers, that they are "little fragments of my fleece that I have left upon the hedges of my life." The present volume preserves for posterity additional fragments that too are priceless.

Perhaps at this point this review should terminate. Certainly it is not easy for the reviewer to give a suggestion of the rare qualities of the materials that make up the contents of this delightful book. The early book reviews and notices that appear in part one were written by Mr. Holmes in the early seventies when he was editor of the *American Law Review*.² His realistic philosophy of law³ which

1. In a brilliant address, *The Common Law in the United States*, delivered at Harvard Law School in 1936 (50 HARV. L. REV. 4, 20), Justice Stone paid high tribute to Justice Holmes saying: "As we examine the periods when the common law has made its greatest progress, we realize that this is in fact nothing more than the method which, consciously or unconsciously, the great judges have employed. It is the judicial process which distinguished the work of Mansfield, Marshall, Kent, and Holmes, and which has placed them among the outstanding judicial figures of the past two hundred years."

2. John D. Lawson, formerly Dean of the Law School of the University of Missouri, was the editor of the *American Law Review*, beginning in 1909, for many years.

3. Justice Holmes in letters to Dr. Wu written in 1923 said: "I hope that your interest in philosophy (and philosophy wisely understood is the greatest interest there is) will not lead you too far from the concrete. My notion of the philosophic movement is simply to see the universal in the particular, which perhaps is a commonplace, but is the best of commonplaces if you realize that every particular is as good as any other to illustrate it, subject only to the qualification, that some

guided his judicial⁴ action makes its appearance in these early writings. In a review of *The Science of Legal Judgment* by Ram (1871) Mr. Holmes said: "A treatise on the sources of the law which shall strike half way between the somewhat latitudinarian theorizing of Seigny and the too narrow exclusiveness of Austin, will form a chapter of jurisprudence which is not yet written, and which is worthy of the ambition of an aspiring mind to write. Mr. Ram flew lower and was content to pick up the fragments let fall here and there by the judges" (p. 6). Justice Holmes' long life on the bench ((1883-1931) no doubt prevented this great American legal scholar from writing such a book.

His book reviews dealt with law books of various kinds. In the review of the book, *Outlines of Roman Law* by Green, an English barrister, he wrote in 1873: "We have several times expressed our opinion that to study the Institutes is not the easiest way to learn either law or jurisprudence, and that anyone intending to be a

can see it in one, some in another matter more readily, according to their faculties. The artist sees the line of growth in a tree, the business man an opportunity in a muddle, the lawyer a principle in a lot of dramatic detail. Great as is my respect for Stammler I am a little afraid that he may tend to keep you too remote from daily facts" (p. 164). "Of course you could *read into* the past whatever you like. But if you are going to study law I shouldn't spend much more time on the generalities. After such interests as have occupied you, details are apt to seem sordid and uninteresting, but a horse must eat hay as well as oats and it is in trans-figuring details that a man shows his power. I can't help believing that you will enrich yourself more intellectually by studying the practical aspects of the law than by attempting to see it *sub specie aeternitatis*" (p. 166).

Dean Pound in 1921 said of him (34 HARV. L. REV. 452), "While it was still the fashion to thrash over the barren straw of the controversy as to the nature and definition of law, he was looking at the legal order functionally. As early as 1895 he had given up the ideas of jurisprudence as a self-sufficient science, of law as something to be measured by itself or judged by a critique derived from itself, and of legal rules and doctrines as resting on their own basis."

Justice Cardozo, at the time on the New York Court of Appeals, in 1930 wrote (44 HARV. L. REV. 682): "Little side-remarks and comments, falling from his lips incidentally and casually, thrown off by the way in the discussion of a larger theme, have in them stuff sufficient for a treatise or a library. Who else has been able to pack a whole philosophy of legal method into a fragment of a paragraph, as in those reverberating sentences on the opening page of his lectures on *The Common Law*, written in comparative youth a half century ago? One can not renounce the joy of quoting them, familiar though they are. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. The student of juristic method, bewildered in a maze of precedents, feels the thrill of a new apocalypse in the flash of this revealing insight. Here is the text to be unfolded. All that is to come will be development and commentary."

4. In *Southern Pacific Company v. Jensen*, 244 U. S. 205, 222 (1916), he said, it will be recalled, in the dissenting opinion, "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact."

lawyer ought to acquire a habit of thinking in terms of his own system before dallying with another. It is not true that fundamental principles are more clearly brought out in the Roman than in the English law" (p. 130).

There are many delightful bits of law and wisdom in part two of the book which, as has been stated, contains some of his uncollected papers. His tribute to his life long friend, John Chipman Gray, and his Recollections of Chief Justice Fuller reveal a phase of his character, his capacity for great friendships, that, of course, is not to be found in his judicial opinions. The author also prints in this portion of the book Justice Holmes' only radio address, which was delivered upon the occasion of the celebration by his friends on his ninetieth birthday anniversary, an address that will never be forgotten by the thousands of his admirers who heard it. He ended his brief message with this striking quotation from a Latin poet, "Death plucks my ears and says Live—I am coming" (p. 142). Surely only a man of great spiritual and mental proportions would have adopted and uttered that stately sentiment. There also are printed his letters of resignation as an Associate Justice of the Supreme Court of the United States, which the author entitles "The Bow to the Inevitable," and his letter to his associates on the bench on the occasion of his resignation.

Perhaps part three of this book is the most delightful. Here there appear about fifty letters written by Justice Holmes to Mr. John C. H. Wu over a period of about eleven years. Mr. Wu at the date of the first letter was a Chinese student doing graduate work in law at the University of Michigan. At that time he was about twenty-two years of age. During this period, Mr. Holmes was a Justice of the Supreme Court of the United States, carrying more than his share of the heavy burdens of that great office. The letters were published by Wu⁵ in 1935 in the *T'ien Hsia Monthly*. It is believed that they appear here for the first time in an American publication.

The contents of these personal messages by the master to a brilliant student of law and philosophy cannot be described adequately by this reviewer. They must be read to be appreciated. They can be praised and they are praised. They are rare bits of writing. They are gems and no devotee of this great man can possibly afford not to read them. I am sure that the reader of these letters will regret the absence from the volume of young Wu's letters of Justice Holmes. While one may understandingly read the published letters, it is believed that they would have been even more interesting had Wu's letters also been printed.

Many phases of intellectual life are alluded to in these interesting letters. They also contain many items of sound advice to the young Oriental legal scholar, helpful and inspiring to young or old legal scholars in any land. In the first letter printed, written in April, 1921, the earnest young scholar was told by his venerable mentor, "One cannot jump at once to great ends. Therefore, I hope you will not shirk the

5. Dr. John C. Wu was formerly Judge of the Shanghai Provisional Court and Principal of the Comparative Law School of China.

details and drudgery that life offers⁶ but will master them as the first step to bigger things. One must be a soldier before one can be a general" (p. 151). As the correspondence between Justice Holmes and Mr. Wu progressed it became evident to the former that the younger Chinese was not a beginner in the study of law and philosophy, though he was, as has been stated, young in years, but a brilliant student who already had accomplished much. The letters that follow contain allusions to law, literature, philosophy, politics, religion, in fact to all the important intellectual things that interested the great American scholar and jurist. Much of his philosophy appears in these letters. In one he wrote, "I do not believe or know anything about absolute truth" (p. 165). In them also is revealed personal qualities of the great man. One letter shows his kindness and courtesy when he informed his young Chinese friend about the availability of rooms at a Washington club when the young man had planned a visit to Washington. Mr. Holmes wrote, "Please write to let me know at once also whether you would prefer a \$2.00 or \$2.50 room if one can be had" (p. 171). In several of the letters he referred to the fact that he did not read the newspapers. However, considering his great labors on the bench, his reading took a wide range and was most intensive, as the letters also reveal. Many times in his letters he speaks of his age and expresses some apprehension that the end of his judicial labors may be near. In 1923 he wrote, "I am idling and trying to store up strength as I am not as strong as I was and as I want to try another year on the Bench" (p. 166). When his young friend in one letter complained of "this miserable world," Justice Holmes replied, "I imagine that you are at the time of life when the staying power of your enthusiasm will be most tried. For me at least there came moments when faith waivered. But there is the great lesson and the great triumph if you keep the fire burning until, by and by, out of the mass of sordid details⁶ there comes some result, be it some new generalization or be it a transcending spiritual repose. I am working away as usual" (p. 176). No more should be said of these letters. Indeed, they must be read to be fully appreciated.

No review of this book is at all adequate without mention being made of the excellent annotations by the editor, Mr. H. C. Shriver, a member of the bar of the District of Columbia. Throughout the book there are valuable footnote references and comments, terse in style and informative. For example, there are brief sketches of the leading writers in philosophy and jurisprudence mentioned by Justice Holmes with a brief characterization of the nature of their writings. In the review by Holmes of Holland's *Essays upon the Form of the Law*, the editor in a footnote gives the date of the birth and the death of Sir Thomas Erskine Holland, states his professorship and says of him that, "He is regarded as an analytical jurist" (p. 41). References like this, and there are literally hundreds of them, appear throughout the pages of

6. Chief Justice Hughes wrote these words of Justice Holmes on the occasion of his ninetieth birthday (44 HARV. L. REV. 677), "The extraordinary thing is that he never seems to be bored by the unending and familiar task. For nearly fifty years he has been hearing arguments and deciding cases, but to each case he brings an undiminished interest and unflagging zeal."

this book. While no doubt the footnote as to Holland will not be needed by great numbers of the readers of this volume, yet there are references to many other important writers on law and philosophy⁷ and references to texts⁸ and decisions which will be of great aid to the average reader in obtaining the fullest enjoyment of these pages.

This book is destined to be widely read by law students and members of the legal profession and others interested in the fine writing of the foremost American scholars. It is a valuable addition to American literature.

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J. P. McBAINE

TRADE-MARK PROTECTION AND UNFAIR TRADING. BY WALTER J. DERENBERG, WITH FOREWORD BY EDWARD S. ROGERS. ALBANY: MATTHEW BENDER & COMPANY, 1936. pp. 1075.

This is not just another textbook. It is unique in its origination and exceedingly meritorious in content.

Our American and English law of trade-marks is not a heritage from the time of the Year Books. It is amazingly recent in origin and development.¹ Nor, as in the case of some European and most Latin American systems, is it founded upon the proposition that a trade-mark is property in the absolute, created by, or pursuant to, legislative fiat as in the case of patents or copyrights. With us a trade-mark does not exist as property in and of itself, but only as an *incident to* property, viz., a business. The trade-mark does not exist, and is not assignable, except as an incident to the goodwill of the business with which it is used.² And whatever rights there are in trade-marks exist basically not upon any statutory grant but in the non-statutory substantive law. The Federal Trade Mark Registration Act³ does not, in the main, *create* substantiative rights but essentially only affords an additional forum—the Federal Courts—for the protection and enforcement, at the instance of registrants thereunder, of substantive rights otherwise existing.⁴

Dr. Derenberg, of European birth and education, after completing his scholastic education at the University of Hamburg, Germany, and Gray's Inn, London, and admission to the Bar in Germany in 1928, came to New York to study this field of

7. For examples: Numa Denis Fustel de Coulanges (32); Jeremy Bentham (34); C. C. Langdell (89); Herbert Spencer (106); Henri Louis Bergson (155); Benedetto Croce (156).

8. Mirror of Justices (15).

1. See Fathchild, *Statutory Unfair Competition* (1936) 1 Mo. L. REV. 20, 21, and *Static and Dynamic Concepts of the Law of Unfair Competition*, *id.* at 299, 301.

2. *Du Pont Company v. Masland*, 244 U. S. 100, 102 (1917); *United Drug Co. v. Rectanus*, 248 U. S. 90, 97 (1918).

3. 15 U. S. C. A. § 81.

4. *United States Printing & Lithograph Co. v. Griggs-Cooper & Co.*, 279 U. S. 156 (1929); *Beckwith v. Commissioner of Patents*, 252 U. S. 538, 543 (1920).

our law for purposes of comparative exposition to continental lawyers. While here, he became associated with the office of the United States Trade Mark Association. In 1930 he was delegated as a member of the Bar of Germany to participate in the sessions of the Trade Mark Committees of the International Law Association which met in New York in that year. In 1931 he returned to Germany as Assistant Legal Advisor to the Berlin Chamber of Commerce. The results of this research were then developed into a book published in Germany in 1931, giving to the continental lawyers an analytical and comparative exposition of our American law of trade-marks and unfair competition.⁵ The book was well received—leading American reviewers recommending that it be translated for our own use.⁶ In 1933 Dr. Derenberg became Assistant Secretary of the United States Trade Mark Association and shortly thereafter lecturer on Industrial Property Law at New York University School of Law.

In the present book Dr. Derenberg has given us more than a translation of his German publication. It is an originally constructed treatise on the American law of trade-marks, registered and unregistered, and the immediately related subject-matters.

Particularly in this field of the law is the mechanistic application of precedent fatal. Dr. Derenberg is aware of that and makes the reader definitely aware of that. Nevertheless, an analytic perspective is given which leaves the reader with a sense of comprehension and not confusion. Thus, while the decisions are not presented as so many ponderous solids to be pyramided in the construction of an historical oddity, neither are they lightly tossed about in gusts of scholasticism. The trends of development are analytically portrayed; criticism, when made, is respectful and intelligent; and the reader is given a synthesis of these trends and criticisms which makes the book an intensely practical compendium for the judiciary, practitioners and law faculty alike. An appendix setting forth, principally, the statutes, federal and state, and the international conventions pertinent to the subject-matter add to the practical value of the volume.

The work and its author are justly entitled to a position of authoritative recognition in this field of our law.

Chicago, Ill.

IRVIN H. FATHCHILD

A PANORAMA OF THE WORLD'S LEGAL SYSTEMS, LIBRARY EDITION. BY JOHN HENRY WIGMORE. WASHINGTON, D. C.: WASHINGTON LAW BOOK COMPANY, 1936. pp. 1206.

Eight years after its original appearance in a three-volume edition, handsomely bound, autographed by the author, resplendent with colored pictures, illustrated by

5. WARENZEICHEN UND WETTBEWERBSRECHT IN DEN VEREINIGTEN STAATEN VON AMERIKA, Berlin, 1931.

6. Book Reviews: Morgan, 45 HARV. L. REV. 954; Schiller, 32, COL. L. REV. 160; Schechter, 80 PA. L. REV. 148.

charts, graphs, photographic reproductions of inscriptions in stone and in clay tablets as well as of ancient manuscripts on parchment or papyrus, embellished by reproductions of title pages of famous first editions, likenesses of men famous in the law, and pictures of law buildings, ancient and modern, Dean Wigmore's *Panorama* is now being offered to the public in this new form.

"In this one-volume Library Edition," says the author, "the text and the pictures are substantially the same (except that none are colored) as in the three-volume de luxe edition of 1928. But the text has been amplified by some paragraphs on Ethiopia, Mongolia, Nepal, and Tibet, and by the addition of several hundred citations of recent books and articles (in English) in the reading lists at the end of each chapter. And several new pictures (mostly not before published) have been added for Ethiopia, Tibet, and other countries" (viii).

A thorough scholar, a great master of those departments of the law which he has made his own special field, endowed with a mind stored with legal learning remarkable both for its vast comprehensiveness and its accuracy, possessing extraordinary analytical power, deep insight into the philosophic bases of law, and a true historian's appreciation of the development of legal institutions and of the interplay of the forces that have given shape to them, Professor Wigmore has set for himself the task of presenting in brief compass, not, primarily, the facts of the various legal systems he discusses, nor chiefly, the development of the legal institutions of the various systems, but the comparative development of the various legal systems throughout their whole history. And according to this objective, the work must be judged. There would be no room in its twelve hundred and six pages for a satisfactory presentation, e. g., of the Anglo-American legal system, the common law as we call it—the *Anglican* system as Professor Wigmore, indulging his penchant for improvement of existing terminology, has preferred to style it. The same is true of ancient Roman law, of canon law, of Germanic law, of modern Roman or civil law—Romanesque law in Professor Wigmore's terminology. It would be quite out of consonance with the aim and scope of the book to include such presentations. To accuse the book of being sketchy and superficial on the ground that it lacks them would be quite beside the mark. It seems to this reviewer that the book must be judged according to its professed aims and purposes,—to present the development of the various systems in their main outlines; to throw into bold relief the salient features of the law in each stage of its development, and to compare them with those of the corresponding stages in the other systems.

And this is what Professor Wigmore has done. His method of presentation is simple and direct, but graphic and dramatic withal. Let us take for example his chapter on the law of Greece, i. e., chiefly, the law of Ancient Athens. He describes very clearly and in broad outline the characteristic features of the administration of justice in Homeric times. In the Homeric description of the scenes depicted on the shield of Achilles, he says, "We see the democratic type of justice precisely as in the primitive Germanic period, one thousand years later; the parties plead their cause before the assembly of freemen; the chief presides as umpire;

then the wise ELDERS,¹ skilled in the law, propose various judgments; then the freemen acclaim the best one and thus decide the case" (p. 289). On the same page appears the following paragraph, concisely setting forth another characteristic of Greek law:

"The spirit of Greek justice, however, in classical times, was not theocratic, as in the earlier Oriental systems already described, but was secular; and civil officials, not priests, administered it."

Then follows a discussion of the administration of justice in the period beginning with the legislation of Solon, in which it is pointed out that the administration of justice was not in the hands of magistrates, judges, and professional lawyers, but in the hands of non-professionals. The way this system worked in actual practice is illustrated by the trial of Socrates. The procedure of civil litigation is shown by an account of a famous trial about 100 B. C. on the island of Cos. (p. 314 *et seq.*) The most important element to be considered in the Athenian procedure is the jury-system and the method of trial. This is brought before the reader by a lengthy quotation from Aristotle's Constitution of Athens, containing the account of the Athenian jury system, and by an extract from Lucian's humorous skit, "The Double Indictment." This kind of administration of justice is characterized and its effects upon the development of law is succinctly set forth on pages 310 *et seq.* Again he presents one of the "private orations" of Demosthenes. A private oration is a speech written by a "speech-writer" for a client, who committed the speech to memory and delivered it at the trial as if it were his own, for at that time a litigant could not be represented by counsel. From all of this we get a very vivid picture of the administration of justice in both criminal (or political) and private cases. We see the multitudinous 'dicasts' or jurymen, sitting as triers both of fact and of law, not guided by judicial directions, deciding all questions without any collective deliberation, simply by casting a ballot into an urn, thereby rendering a judgment from which there is no appeal. We see the parties litigant standing before these multitudes of their fellow-citizens, pleading their causes in person, it is true, but in the words of a highly trained orator who is skilled in all the tricks of persuading and misleading a multitude. We hear the sophistic argumentation under a legal system which knows no rules of law, has no established precedents, but only statutes, the only interpretation of which is that which the 'dicasts' choose to put upon them in the instant case under the influence of the persuasiveness of the orator. We hear the bald, unblushing appeals to passion and prejudice, and we marvel at the fact that communal life was possible under such an administration of justice. And we understand why this highly gifted race developed no enduring system of law, why "Greek law now interests only the historian and the philologist" (p. 368).

As to the effect of this system, the author quotes the words of Aristotle: "The democracy has made itself master of everything, and administers everything by its votes in the assembly and in the law courts, in which it holds the supreme power"

1. The capitals are the reviewer's.

(p. 312). And again of a modern critic, Mr. William Forsyth: "They [precedents] could not be invoked authoritatively to restrain the predatory instincts of the jurors when the Athenian people, as in B. C. 410-405, had become embittered against its citizens of wealth and standing by injury, suspicion, and misery (p. 314).

"The consequences were, accordingly, deplorable. A set of acrid politicians and sycophants, headed by Epigenes, Demophantus, and Cleigenes encompassed the exile, disfranchisement, or judicial murder of many persons. Others they blackmailed by threat of indictment. . . . It was in this Athens that Plato became of age to consider the plan and purpose of his life, and of it he was probably thinking when long afterwards he wrote that there was in it 'but a very small remnant of honest followers of wisdom.' These he thought 'might be compared to a man who has fallen among wild beasts: he will not be one of them, but he is too unaided to make head against them; and before he can do any good to society or his friends, he will be overwhelmed and perish miserably.'"

If comparative law, like history, is to serve as the revered teacher of mankind, let modern statesmen and politicians study the course of unrestrained democracy, i. e., of unrestrained popular majorities.

But the picture of Greek law is not unrelieved blackness. On page 337 *et seq.* the author presents selected portions of the laws of Gortyna (about 400 B. C.), a law of Solon's, and an enactment of B. C. 300. These selections show that the Greeks, within an incredibly short time, developed remarkable skill in legislative draftsmanship. That they developed equal, nay, much greater skill in the art of drafting transactional documents is shown by the specimens given on pages 346-358. The presentation of this concrete material is followed in each case by a terse summing up of the salient features of the documents presented, by an illuminating trenchant critical estimate of the inferences to be drawn from them as to the nature and development of the law of the period.

And this reviewer would submit that it is in these brief characterizations no less than in the apt selection of documents that the real value of the work lies. These summaries are not hastily drawn inferences and unsupported generalizations. They are result of penetrating analysis based on an accurate knowledge of the history of the period and its law as well as of legal institutions and legal history in general, which enables the author to arrive at a reliable critical estimate.

In substantially the same manner, the author has treated the remaining systems of his Panorama. The systems chosen for discussion are: the Egyptian, the Mesopotamian (Babylon and Assyria), the Hebrew, the Chinese, the Hindu, the Greek, the Roman, the Japanese, the Mohammedan, the Keltic, the Slavic, the Germanic, the Maritime, the Papal (or Canon), the Romanesque (meaning the modern Roman or Civil), and the Anglican (meaning the Anglo-American).

One would not, perhaps, call this a scientific treatise on comparative law. Perhaps the presentations are too sketchy. This, however, is true: it contains the materials for comparative legal study. The avowed object of the author is to stimulate among the brethren of the law, especially among the common-law lawyers,

an interest in comparative study of law. And by this he means not only a study of other legal systems "as facts" as he puts it, or merely a comparative study of legal doctrines and institutions with a view to improving our own systems of law by availing ourselves of the experience of others, but a comparative study of legal systems as wholes, a study of their origins, their life histories, the forces that cause them to survive or perish. There is no doubt in the mind of this reviewer that the book is admirably adapted to the accomplishment of this purpose. He hopes that the book will find its way into every law office, into every high school, college, university, and public library of the United States. In the last paragraph of the Preface to the present edition, Professor Wigmore says: "May this volume contribute to a better understanding of other peoples, and thus help towards greater intelligence and mutual toleration in world affairs!" In this '*pium desiderium*' this reviewer joins. There is much need among us for greater intelligence and mutual toleration. There is nothing more dangerous than the idea, hugged close to one's heart, that one's own way of managing public affairs, one's own institutions, are much superior to those of other nations. Too much self laudation does not make for international friendship and mutual toleration.

The author sets great store by the illustrations that adorn the pages of this book. And this reviewer by no means is insensible to the measure of interest, enjoyment, and profit that they contribute to its value. It is true, for some time it has been possible to capture the popular imagination much more readily by an appeal to the eye than an appeal to the mind. An excavation, e. g., of an ancient Greek city is more valuable as a news item than a book shedding a new light upon Platonic philosophy. And one instinctively rebels against that sort of thing. Nevertheless, it is true that the things of the mind are intimately connected with the concrete things of the time and the place. A glance at a picture of the Roman forum, of a basilica, of the Parthenon, of the Pnyx, or of Westminster Hall adds an indefinable something to the beholder's knowledge and understanding of the events that transpire there. These pictures of buildings, of great men of the law, of legal records and documents not only stimulate the reader's interest but convey something to him that could not be conveyed in any other way.

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A TREATISE ON THE LAW OF PERSONAL PROPERTY. BY RAY ANDREWS BROWN.
CHICAGO: CALLAGHAN AND Co. 1936. pp. lxxx, 722.

In the organization of its material, this text book follows the tradition set by the standard case books in the field. After a short introductory chapter, the author takes up, in this order, the acquisition and loss of property rights by occupancy, possession of wild animals, finding, adverse possession under statutes of limitation, accession, confusion and gift, with a light touch upon rights acquired through sale. This takes up about 225 pages (a third of which is devoted to gifts). The next 400 pages are devoted to various situations concerning what can roughly be termed incidents of divided property rights, viz. bailments (including the bailment

aspects of carriers and inn-keepers), liens and pledges. Fixtures and implements, eighty pages, fill out the rest of the text of the book.

The material of the various chapters is extremely well organized. A student supplementing his class-room work by its reading cannot fail to be aware of a continuity and unity that may well otherwise escape him. The author's treatment of even difficult points is set out with a clarity that would be hard to improve, although in this respect section 136, dealing with the effects of tortious conversion by the pledgee, is not so clear as some of the rest of the work.

It is pleasing to find in the author a distrust of some of the concepts he is working with. Thus, at the very beginning of his chapter on Bailments, he intimates that "bailment or no bailment" is a false posing of issues: "It might be well, therefore, if we could abandon the search for the definitions and elements of bailment, and confine ourselves to a consideration of the various rights and duties which arise when one person has possession of goods, which belongs to another" (p. 226). In the same vein, the author states: "Apparently, then, the delivery of a locked receptacle is for one purpose a bailment of the contents and for another purpose is not" (p. 234). Still again, referring to cases considering the duty of care of goods by an involuntary bailee: "It is submitted that in both of these cases the courts proceed wrongly in endeavoring to decide the question by asking whether or not there is bailment" (p. 362). The reviewer agrees most heartily. A disheartening feature of this phase of the law is the useless dragging-in of the bailment concept to confuse the situation and befog the issue—as if there were some magic quality in the word "bailment" which gives insight into legal problems. For instance, to prevent evasion of inheritance taxes, statutes often forbid safe-deposit companies, upon the death of their customer, to let the personal representative or joint survivor of the decedent get the contents of the deposit box without notifying the tax officials of the time and place of the intended opening of the box; and violation subjects the safe-deposit companies to fine and payment of the tax. Such statutes have been attacked as unconstitutional by the companies. And nearly every time the court has seen fit to approach the problem thus: is this a bailment or no bailment? But bailment has nothing to do with it. Is not the safe deposit company in strategic position to prevent access to the box? Again, suppose a purchaser of goods, erroneously insisting that title has not passed to him, tries to return the goods; the seller refuses to take them back; the buyer leaves them in a corner on the floor of seller's premises; the seller simply leaves them alone for several years; finally they are destroyed by moths; the buyer (having finally paid the purchase price) sues the seller for negligence in failing to take proper care of the goods. This resolves itself into whether there was a duty upon the defendant to take reasonable care. Well, what determines in tort law when you have a duty or not? Answer that and you begin to have a solution to the problem. But that's hard to answer in tort law. So, it's made to *look easy* by calling the transaction a bailment or not a bailment. The author, though he does not emphasize the point, has done a real service to practicing lawyers as well as to law students in warning them against the danger of false

issues, not only as to bailments but also as to fixtures (p. 630), emblements (pp. 690-691) and other concepts.

As the author points out in his Preface, this book is designed primarily for law students. More particularly, it seems designed, to judge from the organization of the material, for those studying the traditional course in Personal Property from one of the standard case-books. In many law schools, this course will probably continue to be taught as such instead of having the material covered therein re-organized and parcelled out in other subjects—if for no other reason than the difficulty of finding a suitable substitute for beginning law students. Consequently Professor Brown's book is assured of welcome reception by both law teachers and students. It has been extremely difficult for law teachers in the past to suggest a satisfactory book to supplement the class-room discussion. This book is the answer.

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ELVIN R. LATTY

CASES AND MATERIALS ON TRIALS, JUDGMENTS AND APPEALS. BY THURMAN W. ARNOLD AND FLEMING JAMES, JR. ST. PAUL: WEST PUBLISHING CO., 1936. pp. xxvii, 869.

If you like to see in their appropriate places the use of such words or expressions as "the ritual of the courts," "current formulae," "cherished ideas" of the past, "ceremonial requirements," "the phenomenon," "symmetrical ideology," "theological difficulties" of the law, "equitable formulae," "argumentive technique," "devices of the law," "ancient conceptions," "doctrinaire cases," "useless formalities," "pragmatic criteria," "sentimental attractiveness," "interesting survivals," "symbolic traps," "mystical ideas," and "mystical attitudes," you will find them all, and more, nicely placed in this new volume by Thurman W. Arnold and Fleming James, Jr. This terminology is representative of the approach to the subject which in some places is new in its development and in others is but the invention of a new set of quasi-legalistic appellations and a rearranged fashionable classification for the pre-existing legalistic terminology and the more simple chronological arrangement of the usual topics covered in the common subject of trial and appellate practice. The war paint and attractive feathers with which the subject is decorated, together with the beating of the drums of dissatisfaction with things as they are, may have the effect of engaging stimulating reactions in the new bloods in the law. The book is good growing food for law students. It is well seasoned for those who enjoy devouring the sweets of criticism. It satisfies the basic need for knowing trial and appellate practice as it is. The latter point is stressed by the editors, who state that "much of the material in this book deals with underlying attitudes and phobias which the writers consider must be understood and taken into account by the trial attorney. In studying them there is no thought of either criticism or praise. This does not mean we are opposed to legal reform. It only means that we consider the attitude of detached observation more suitable for purposes of *understanding* the situation, whether that understanding be used for general reform or for the narrower objective of advancing the cause of a particular client" (p. vi).

The arrangement of this book and the inclusion of so much subject matter not ordinarily presented in a casebook on trial and appellate practice give rise to many questions. Would not a more simple and orderly presentation of the development of a trial, from its commencement to its conclusion, with emphasis upon the troublesome problems with which courts and lawyers must constantly deal, be a more effective treatment of the subject? Does the arrangement adopted give the law student a clear-cut picture of the trial problem? Will the student learn a great deal about trials in general, without comprehending the significance of what he learns as it relates to a particular trial? Does the book try to do too much, to cover the whole field in omnibus, rather than the specific problem of trial practice? It may be legitimately asked: What is left for the other related courses? It steals some of the nicest materials from the course of Jurisprudence, robs choice morsels from the course of Federal Jurisdiction and Procedure, trespasses into the area of Constitutional Law, excludes the need of teaching a large part of Conflict of Laws in a separate course, and digs deep into the essentials of Administrative Law. Is this material, which is specifically a part of these other courses, better transferred to the already crowded course of trial practice? There is, to a considerable extent, a sound basis for this expansion, because a comprehensive understanding of trial practice involves all of these subjects. Indeed, it might be claimed that trial practice should include most of the courses of the law school; why teach any others? A division of this subject matter has heretofore been regarded beneficial, and has not, if properly taught, prevented an appreciation of the interrelationship of different courses. If the book should be used as intended, in the first year of law study, the students might wonder, without total absence of rationality, why two more years should be spent in the law school. True it is that the subject of trials, judgments and appeals is associated with Conflicts, Constitutional Law, Federal Jurisdiction, Equity, Administrative Law, Pleading, and if well taught can not escape inclusion of some of the exciting problems of Jurisprudence. This is the first casebook on the subject, however, which more or less definitely tries to do the whole job at once. As trials deal with the application of substantive law, it might be claimed that the whole study of law should be included in an enlarged three-year study of trial practice, in all of its applications and ramifications. Conceding that the trial practice course might encompass a much wider field than it does, it is quite possible that in attempting to do so much the true goal of such a course is missed, and many matters worthy of more complete treatment in trial practice are underemphasized or omitted. A relational comprehension of Federal Jurisdiction and Procedure, Administrative proceedings, and trial practice in law and equity is important. It is, however, not necessary to go into each of those fields in detail in the trial practice course in order to appreciate their differences and overlapping, or the possibilities in each of the respective fields.

A study of the system of trials from the commencement of a case through appeal offers more than may be covered in the time ordinarily allowed for the course. With the recent emphasis on discovery before trial, declaratory judgments, executions and auxiliary proceedings, and the problem of submission of law cases to

juries, the subject is already overcrowded. I daresay that if the editors of this book were also teaching the other subjects which they have included, they would not have incorporated so much outside material. Furthermore, it is quite reasonable to leave for Federal Jurisdiction and for Administrative Law the task of distinguishing their fields from others and of showing their availability for the handling of legal problems. The merger of all trials and hearings of all kinds, wherever found, is surely a vigorous attempt to handle the entire matter with one stroke. Would a piecemeal process be better? It is not believed that this is as effective as taking each major subject independently, and in the treatment of each correlating it with the whole field. The use of this book would require the reorganization of a considerable part of the regular law school curriculum, or cause unreasonable duplication in other courses.

Without intending to fall into the ritual of damning a book with criticism, and closing by sweetening it with words of praise, I think it must be said that the use of materials as well as cases, the inclusion of new types of materials, the writing of chapter introductions and comprehensive approaches to the different subjects considered, the footnotes and references, and the selection of cases are excellent. The modernistic expressions of the various formulae, rituals, conceptions, techniques and ideologies, reflect our present-day evaluating process in trial practice problems. They are now common language in the classroom in discussing trial practice problems presented in other types of casebooks, and are evidenced in practically all present-day law review writing. Arnold and James bring this approach into casebook form. Those who feel that too many fields have been included will undoubtedly regret that the type of treatment given could not have been developed for the usual subject matter of the trial practice course. Some may feel that the treatment of this phase of the book is over-done. The editors have realized the significance and need of thorough trial practice training in the law school, and of the demand upon the law graduate to understand and be able to use the offensive and defensive weapons employed in litigation. They state that "the difference between the point of view of this book and that of most casebooks is the same difference in approach to a legal problem which exists between the appellate court judge and the trial attorney." The trial attorney's interest "must center not in the social or legal problem, but on the strategy of the suit" (p. vi). Although the book is critical in character, it nevertheless shows the law as it is, and emphasizes resourcefulness in selecting the available existing means to attain the legal end. Some of the cases are used to show the mistakes and errors which have caused lawyers to fall into the traps of the present system of trials. These cases are not used, as often, with the idea of eliminating a chance for mistakes by reform procedure, but of escaping them through an understanding of how to use effectively the procedure as it is. Indeed, some of the procedure assailed by the reformer is objectionable only to those who do not know how to use it.

Trial practice is believed by the reviewer to be more appropriate for the third year of law study than for the first. This casebook is adapted for either place, although it is used by the editors in the first year. To study the instruments of

procedure in as complete a form as presented in this casebook, before studying the substantive law subjects, is analogous to the study of surgery before the medical student is grounded in anatomy. In the third year, students are thinking in terms of practice, and the problems are appreciated and remembered in a way that would not be possible in earlier stages. Upon this, however, there is a reasonable difference of opinion. The time when a book is to be used to a considerable extent determines its subject matter. Some of the material here included would be unnecessary later, when students have become familiar with it through other courses.

In the face of the criticism which has been presented, the editors are to be commended upon the thoroughness of their work, the interesting or even exciting use of cases and materials, and the valuable emphasis which they have placed upon procedure as a course of law school study. The reviewer, however, would have preferred to have less mysticism in revealing the already mystical problem of courts and trials.

Iowa Law School

MASON LADD

CASES ON FUTURE INTERESTS. BY ALBERT M. KALES. SECOND EDITION BY HORACE E. WHITESIDE. ST. PAUL: WEST PUBLISHING COMPANY, 1936. pp. xvi, 781.

A great deal of water has gone over the dam since 1918 when Albert M. Kales brought out the first abridged edition of his *Cases on Future Interests*. Much has been said and written about methods of law teaching and the inclusion of non-legal subject matters in the law curriculum. A different type of classroom book usually known as "Cases and Materials," has made its appearance. Against this background of change, Prof. Whiteside has brought out a second edition of Kales' *Cases* which is just that: a second edition of the same book. It reflects great credit both on the fundamental soundness of the original work and on the good judgment of the editor, that the new edition need make no apology for its appearance, but on the contrary is extremely well adapted to fill a presently existing need.

The preface to the first edition states that the abridged work was designed for use in a two hour, one semester course. Such a course would be hopelessly overloaded by much of the material contained, for example, in Leach's *Cases and Materials on Future Interest*, or in Powell's two volume work (even excluding the subjects of Trusts and Wills). Prof. Whiteside's *Cases* gives the minimal essentials of the classic course on Future Interests briefly enough for the time limit set, with an excellent balance between the old and new cases, but (save for footnote references) without the inclusion of other materials.

The outline of the first edition has been followed almost exactly and the teacher will find comparatively few strangers among the cases discussed. Out of some seventy cases not embodied in the first edition, twenty-two are found either in Leach's *Cases and Materials* or in Powell's one volume case book, while others are either in Powell's two volume combined case book or in Kales' longer edition. The footnotes are considerable more complete than in the old edition, including statutory,

text and law review citations, together with problems related to the principal case which should make for a convenient and "teachable" book.

Excellent judgment was shown in the selection of points on which new cases were substituted. In fields where the modern rules can hardly be understood apart from the historical development, such as the "Rule against Perpetuities," the old cases remain with insignificant changes. But where the impingement of old rules upon new conditions and new types of property settlement is the matter of greatest interest, as with the rules of construction governing class gifts, gifts over, and the vesting and divesting of interests, there is a much greater admixture of recent cases.¹

If this section at times gives rise to the suspicion that certain new cases have been substituted for the old for no reason other than later date, so be it. The rules are equally well illustrated by the more recent opinions and the student is shown, what he might otherwise doubt, that in legal practice problems of future interests did not disappear with the death of the great John Chipman Gray.

Two beneficial changes in organization are the inclusion of a chapter on statutory modifications of the "Rule against Perpetuities" and the elimination of that chapter which in the first edition made cursory examination of "limitations to classes" a hundred and fifty pages before the more lengthy discussion of the interpretation of class gifts. There are other sections of the book in which the earlier edition has been closely followed, when in this reviewer's opinion more departure would have been preferable. For example, one hundred fourteen pages of case material are devoted to powers, and although several new cases have been added, the treatment is little changed. Here might have been an excellent place for cutting, or for the substitution of text for cases. The space thus saved could well be devoted to some consideration of the value, incidents and legal protection of the various future interests, problems which bring the law into closer touch with reality.

Another defect in arrangement is the separation of rules limiting the duration and protection of equitable interests into two sections, one under the "Rule against Perpetuities" and the other under "Restraints on Alienation." Prof. Whiteside's new cases, even more clearly than those in the old edition, show that the distinction between the two sections is in the language of the opinions and not in the problems decided. If these cases are to be handled as a part of this course at all, rather than in Trusts, they should at least be handled as a unit.

But criticism along this line must lead to debate about the proper organization and content of the future interests course and the value of the traditional casebook. Such topics are beyond the scope of this review. As to this book, it is enough to say that the editor marked out his task, held himself within its limits, and did it well.

Chicago, Ill.

GEORGE F. JAMES, JR.

1. Although the material on these points covers less than one-sixth of the book, about a third of the new cases are here included.

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