Book Reviews

North Carolina Law Review

BOOK REVIEWS

Paradoxes of Legal Science, by Benjamin N. Cardozo. Columbia University Press, New York City. 1928. Pp. 142.

To the generation of lawyers of an elder day, especially those brought up on Coke and Blackstone and under the influence of that master of the common law, Chief Justice Pearson, this book would appear to be startling if not revolutionary.

In their opinion, the grounds of which have, perhaps, been formulated best by Sir Henry Sumner Maine in his interesting book, *Ancient Law,* the present law was, and is, the product of Custom, Equity and Legislation.

Their general view of the development of the law was, roughly speaking, when the judges had decided that no further writs than those already used should be issued, even though the situation was new and natural justice demanded redress, the party applied to the King and he generally referred the matter to the Chancellor, and the system of Equity was built up and followed substantially the course of development of the common law. After a while the Chancellor declined to extend the principles of Equity to meet a new situation, though, as before, justice seemed to demand it. In such a case, the party was remediless. Then, if the matter seemed to be of sufficient public interest and was of a serious nature, the legislative branch of the government was called upon and passed an act changing the law and providing for a new rule.

In the opinion of those lawyers of an older day, this was entirely satisfactory, because they thought the function of the legislature was to *make* laws and that of the judges to *declare* them.

This view was common and held by many great lawyers. (See the instructive article on "Public Policy in the English Common Law," by Dr. Percy H. Winfield, *Harvard Law Review* for November, 1928.)

And it is submitted that this was, and is, an entirely reasonable view to take; for, in the first place, changes in the law ought to be prospective and not retroactive, as they necessarily would be if made by the judges, because they undertake to say, not what the law should be, but what it always had been, whereas, the legislature establishes a rule for the future; secondly, and as a practical matter, it is of the utmost importance, especially in a highly developed indus-

trial and commercial civilization, that the law should be known or be ascertainable by study and reflection so as to guide citizens in their operations and to enable their legal advisers to predict with tolerable accuracy what the decisions of the court will be in a given state of facts. Nothing would tend to paralyze business effort more than uncertainty in the law.

This is admitted by Chief Judge Cardozo himself, who says, speaking of the methods of the judges: "If a code does not escape the need of supplementing its mandates by reference to the norms of morals, we may be sure that the same instrument of growth in the hands of common law judges will be used with greater freedom. The whole system which they develop has been built on the assumption that it is an expression of the *mores*. What has once been settled by a precedent will not be unsettled over night, *for certainty and uniformity are gains not lightly to be sacrificed.* Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement."

An examination of the reports and a little reflection will show that the courts do in fact—and always have—legislated under the guise of applying established principles to a new state of facts under the guidance—consciously or unconsciously—of history, logic and conceptions of social welfare. Did space permit this could be easily illustrated by numerous cases.

But the courts moved slowly and hesitantly. Dr. Winfield, in the Article referred to, reminds us that in the celebrated case of *Edgerton v. Brownlow,* 4 H. L. Cas. 1, the judges, who were summoned to advise the Lords, differed greatly on what is Public Policy and what is its proper place in affecting the decisions of the Courts, (see pp. 88-89) and he observes: "If any general line of thought is traceable in the dissentient judgments, it is that public policy is a tool of the legislature and not of the judicature. The lawyers—some of them great lawyers—who felt this certainly had some grounds for their attitude. Case law had become so abundant and Parliamentary legislation so plentiful and so much more likely to reflect public opinion since the Reform Act of 1832, that there seemed to be few gaps that required filling up in our law, and even so Parliament seemed much better fitted to stop them than was the bench."

In these latter days, however, the fact that courts have, and do, legislate is recognized and applauded by many students of the law—mostly professors—who long for a more symmetrical system of

jurisprudence and are not hampered by the difficulties of an active practice.

Among these students there is perhaps no more bold and original thinker than Chief Judge Cardozo, of the New York Court of Appeals, who has developed his view of the method of the judicial process in his previous book, "Nature of the Judicial Process," and in the present book. We know no more arresting and thought provoking book on that subject than this.

Perhaps the most interesting discussion in the book are the portions which undertake to show that a development of clearer ideas of social justice and public expediency justify the Supreme Court of the United States in sustaining legislation whose purpose is to effectuate such changes in the law. Undoubtedly, lawyers, legislators and students will differ greatly upon the question whether public policy or social betterment justifies a change which curtails rather seriously the liberties of individuals, and we commend this little book to the careful attention of those who are astonished at some of the opinions of Mr. Justice Holmes of the Supreme Court.

GEORGE ROUNTREE.

Wilmington, N. C.

HANDBOOK OF THE LAW OF CODE PLEADING. By Charles E. Clark. St. Paul, Minn.: West Publishing Co., 1928. Pp. viii, 581.

A book review should serve the purpose of Claude Washburn's preface to his charming little volume of Opinions: it should afford " a swift and almost painless means of determining whether it is worth while to borrow the book." This means that it should include a brief exposition of the contents of the book. Professor Clark begins with an introductory chapter the most valuable part of which consists of a discussion of the functions of pleading and the course of future pleading reform. He next treats the code action, paying special attention to the effect of the provisions which abolish forms of action and destroy the distinction between actions at law and suits in equity, and considering the complications caused by the right to trial by jury. After dealing, under "parties," chiefly with the requirement that the action shall be brought in the name of the real party in interest, he devotes two chapters to the complaint. In the one he expounds the principles generally applicable, with illuminating comment upon the illusory distinctions between law, fact and evidence, the practicability of pleading truthfully, and the dubious doc-

trine of theory of pleading. In the other he takes up the requisites of the complaint in particular actions, and herein he handles the declaratory judgment. Joinder of parties, and joinder of causes of action he next examines, showing the inevitable interrelation between them. In this connection he also canvasses the related topic of splitting a cause of action. In the chapter on demurrers and motions, after an orthodox exposition of the current law, he advocates abolition of demurrers as in the English system. In the last four chapters he covers answer, counterclaim, reply, and amendment and aider. The book ends with a short but usable index. It lacks a table of cases. The text is well documented, but on most points no attempt has been made to present an exhaustive citation of cases. There is ample reference to legal periodical literature and other pertinent writings. In this respect the author has done so much as to cause real regret that he has not done more. How helpful it would have been to have had a single bibliography of authorities, and if this had included with each citation, a sentence or two indicating Professor Clark's evaluation of the content, character and quality of the article or treatise, its helpfulness would have been multiplied.

Enough has been said to demonstrate that this is no mere horizontal digest, compiled from a collection of headnotes conveniently furnished by a well-meaning publisher. Even a cursory reading of the black-letter summaries shows how thoroughly the author realizes the impossibility of stating the law as it is, divorced from its history and unrelated to its possible future. A more detailed study of the text reveals the pleasing fact that his ability to distinguish the "good reasons" of an opinion from the "real reasons" for a decision does not prevent him from appreciating that what the court says it is doing is only less important than what it is actually doing. It is a good book for the law teacher and law student because it provokes thought about current questions in pleading. It is a good book for the practitioner because it indicates the present condition of the law and enables him to comprehend its real significance by informing him how it got there and why it ought not to stop there. It is by all odds the best book on Code Pleading. It is written with sanity and with a sensible objective. It makes no effort to attain an unattainable certainty. It puts every procedural problem in its proper place. It is built upon a truth which most practitioners and some law teachers would like to forget, namely, that "it is not a misfortune for a code of procedure to require revision: it is its nature."

All this is not to say that the present reviewer agrees with the author on all points. Indeed some chapters contain alluring invitations to controversy. But acceptance of them would shed no light upon the pending issue, "whether it is worth while to borrow the book."

E. M. MORGAN.

Cambridge, Mass.

RESTATEMENT OF THE LAW OF CONTRACTS. Official Draft. Chapters 1-7, Sections 1-177. The American Law Institute, Philadelphia, 1928. Pp. 304.

This volume constitutes about one-half of what will ultimately be a restatement of the entire law of Contracts. It has been in the making for a little more than five years. Because much of the second half has already gone far beyond the preliminary draft stage, it is probable that the whole will appear within the next two or three years.

That part now available[1] in official form embraces the topics of meaning of terms, formation of contracts, offer and acceptance, consideration, seals, joint contracts, third-party beneficiaries, and assignments. It consists of four types of material: the text or Restatement proper, comments upon and illustrations of the purport of the text, and an appendix of explanatory notes. These, exclusive of the introduction, table of contents and index, cover only 265 pages of fairly large type.

While the actual writing has been done by Professor Williston, of Harvard, assisted by a number of advisors, including Professors Corbin of Yale, McGovney of California, Page of Wisconsin, Oliphant of Columbia, Ferson of Cincinnati, Thompson of Cornell, and McCurdy of Harvard, a very considerable number of judges and attorneys have participated, individually by mailed criticism and suggestion, and as members of the Council of the Institute and of the Institute itself, before which bodies the various drafts have repeatedly come for discussion, amendment and approval.[2]

[1] $2.50 a copy from the Executive Office of The American Law Institute, 3400 Chestnut Street, Philadelphia.

[2] For interesting statements of the way in which the Restatement was prepared and of the difficulties encountered, see the introduction to the volume itself, and two articles by Professor Corbin: *The Restatement of the Law of Contracts*, 14 Am. Bar Ass'n. Jour. 602 (November, 1928); and *Problems in the Restatement of the Law of Contracts, ibid.*, 652 (December, 1928).

The text of the Restatement is not a slavish description of the effect of the decided cases. Rather, it is the result of an effort to state for the more frequently recurring situations what the Institute believes would be the result reached by an open-minded court in a well considered opinion. Sometimes, therefore, as in section 84 (d), which makes the consideration good even though its giver is then bound to furnish it by contract with a third person, the Restatement has adopted the view of the minority of American jurisdictions. On the other hand, where the cases have afforded little or no assistance, a distinctly new position has occasionally been taken. Two examples are section 65, governing acceptance by telephone, and section 39, on when a rejection by mail or by wire is effective. An interesting innovation of still another sort is made in section 90, which states the doctrine of promissory estoppel in broader scope than is usual, yet limits its operation in two important particulars. One of the most distinct departures from the traditional point of view is found in the treatment of consideration, in sections 75-94. The test of consideration is given negatively, instead of affirmatively. Instead of indicating what must appear to make a sufficient consideration, the situations are listed where the consideration is not sufficient. Thus the terms "detriment" and "benefit" are noticeably absent. This follows the extension of the notion of consideration prevailing in unilateral contracts to bilateral transactions, and the couching of the whole idea in terms of that bargained for and given in exchange for the promise. On the whole, 54 out of the 177 sections here presented, are the subject of explanation or justification, largely on the basis of practical workability, in the appendix.

These explanatory notes, it is understood, take the place of the originally contemplated accompanying treatise. They carry many references to cases, legal periodicals, and to the draftman's own invaluable treatise on Contracts.

As an accurately expressed generalization of basic principle, the work will long deserve from the legal profession the recognition due the most carefully prepared persuasive authority available.

Not the least useful aspect of the Restatement, however, will be its stimulating effect upon the further study of contract law. Mr. Victor Morawetz, of New York, a member of the Council of the Institute two years ago published privately a 167 page *Essay on the*

Elements of a Contract,[3] apparently to show what could be done by way of a restatement based upon a plan rather different from that adopted for the work under review. There is reason to believe that a treatise on Contracts now in preparation by a member of Professor Williston's advisory committee, will not infrequently give voice to a view opposed to the corresponding part of the Restatement. And in a number of the states, *e.g.*, in Illinois, Louisiana, New York, North Carolina and Pennsylvania, local annotations and commentaries are now being written, largely by members of law faculties, in coöperation with bar association committees, seeking to determine the exact relation between the provisions of the Restatement and the contract decisions in that jurisdiction. An example of what may be found when one takes an orthodox part of the Restatement and compares it with the North Carolina cases in that field is printed among the Editorial Notes in this issue at page 173. The entire North Carolina commentary on the Official Draft will be published late this spring.

M. T. VAN HECKE.

Chapel Hill, N. C.

TRADE ASSOCIATIONS: THE LEGAL ASPECTS. By Benjamin S. Kirsch. New York: Central Book Co., 1928. Pp. 271.

Business men used to get together to restrain trade, boost prices and mulct the people; today they organize trade associations to study the science of business economics and share the blessings of such learning with the public. Mr. Kirsch drifts into substantially this tone at times (see e.g. pp. 12-13, 35) but while he is frankly favorable to the associations, it would be unfair to leave the impression that he is a propogandist, for he recognizes the possible dangers of these new-style, cultured octopi if their activities are not clearly limited. The book has some of the repetitions to be expected from piecing into one work several law review articles, and Mr. Kirsch's style is not rapid—a fact brought home most forcibly by comparison when excerpts from other writers (as e.g. Jones, p. 106; Foth, p. 215) are introducted into the text.

From the practising lawyer's point of view moreover, the work would hardly serve as a ready reference of "the law," for in it are cited and discussed indiscriminately, court and trade commission de-

[3] Columbia University Press, New York (1926).

cisions, opinions of the attorney general, and speeches of prominent persons before chambers of commerce, conventions, etc. But what it loses as a legal quick-lunch by this circumstance it gains for the more deliberate seeker—student or practitioner—who desires to know what business conditions brought about the formation of trade associations and what actual good may be expected from them as compensation for their restraining features (see e. g. chapter IX dealing with standardization of methods and of product). Mr. Kirsch gathers material from an astonishingly wide group of sources.[1] He cites apparently all of the pertinent federal cases and many from his own jurisdiction though he occasionally overlooks some interesting ones from the provinces.[2] His chapters on Cost Accounting Methods, Patent Interchange, and Foreign Trade especially, seem to contain material of much practical value to the business man and his adviser. No serious misstatements of law are to be expected in a work dealing with a field where economics plays so large a part, and the reviewer finds no part of the text which he would thus describe, although he occasionally differs with the author on some argument presented.

It might, for example, be publicly harmful for trade associations bureaus to add ratings and recommendations to their credit reports and the courts may be correct in disapproving such expansion of service. It is not a perfect answer to point out as does the author (p. 119) that independent mercantile agencies may do that very thing. An independent editor of a current trade journal might advise producers against expanding their output. The bureau of the producers' association should not do that.

The get up of the book is good; of typographical errors there are almost none. But for convenience's sake the chapter titles should be run at the top of the right hand pages instead of the general title of the book, and the parallel West citations should be uniformly given.

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[1] No notice is taken, however, of the enlarged practices of Clearing House Associations whose present regulations concerning forms, methods, interest, exchange and safekeeping charges, and inspection of each bank by all, present interesting comparisons. See Chi. Clrg. Hse. Assn., Arts. of Assn., May 1, 1927, §§16, 17, 21, 24 and various resolutions following. See also W. R. Morehouse (V. P. Security T. & S. Bk., Los Angeles), "Three Evils of Competition," 17 Am. Bkrs. Assn. Jnl. 365 (1924).

[2] State v. Ind. Mfrs. of Dairy Products, 144 N. E. 423 (Ind. App. 1923); State v. Boeckeler Lbr. Co., 301 Mo. 445, 256 S. W. 175 (1923)—St. L. Lumber Exchange Case.