

BOOK REVIEWS

Equity in its Relations to Common Law. By William W. Billson.
Published by The Boston Book Co., Boston. 1917. pp. xii, 234.

This work undertakes to set forth what the author believes to be the real nature of equity and its relations to common law—a subject upon which both judges and writers have differed greatly. When we come to examine the views which have obtained upon the matter, we discover two schools of thought. The point of view of one of these is stated, although without careful analysis, by Spence in his classic work upon *The Equitable Jurisdiction of the Court of Chancery*. He speaks of “that equity which is opposed to . . . law and stands in opposition to it” and adds: “the principles of Equity, or natural justice, have sometimes to be applied *in contradiction* to the positive law.” (Note to Book II, Chap. I. The italics are those of Spence.) The same view is more clearly expressed in the English Judicature Acts of 1873-1875, which consolidated the courts of common law and chancery and expressly provided: “Generally in all matters not hereinafter particularly mentioned, in which there is *any conflict or variance* between the rules of equity and the rules of the common law with reference to the same matter, *the rules of equity shall prevail.*” (Subdivision II, Section 25. The italics are those of the present writer.) As Mr. Billson points out (p. 11) the idea that the rules of equity “conflict” with the common law is, among more recent writers, expressed by Pomeroy. (Pomeroy, *Equity Jurisdiction*, 2 ed., secs. 48-54 and 427.) It seems probable—although apparently Mr. Billson thinks the contrary to have been the case—that this view was the prevailing one down to a relatively modern period.

The opposite view, as is well known, was vigorously advanced by Professor Langdell, Professor Ames, Professor Maitland, and some others, including John Adams in his *Treatise on Equity*. Professor Langdell's views will be found in 1 HARV. L. REV. 58; 13 HARV. L. REV. 673, 677; *Summary of Equity Pleading* (2d ed.) 210-211; those of Professor Ames are indicated in 1 HARV. L. REV. 9; those of Mr. Adams in his *Treatise on Equity* (8th ed.) xxiv and xxix. The following passage from Professor Langdell's writings is typical of his views:

“What has thus far been said of rights and their violation has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a *res*, which by law has no owner, is a subject of ownership, nor that a *res* belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which

by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law."

Perhaps no clearer statement of the view that there has been no conflict can be found than the following by Professor Maitland:

" . . . Perhaps you may have fancied that at all manner of points there was a *conflict* between the rules of equity and the rules of common law, or at all events a *variance*. . . . It is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfill it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needed, something that equity would require. . . .

"Let me take an instance or two in which something that may for one moment look like a conflict becomes no conflict at all when it is examined. Take the case of a trust. . . . Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. . . . The Judicature Act . . . found no conflict, *no variance even*, between the rules of the common law and the rules of equity."

This second view is undoubtedly that which has for many years been taught in a considerable number of our law schools, largely through the influence of Professor Langdell's teaching and writing. That it is unsound is the thesis of the author of the work under review. To the working out of this thesis in detail the book is devoted. At the outset the learned author laments that these questions "though long mooted, appear never to have received as systematic discussion as they deserve, considering how vitally they concern the origin, nature, functions and limitations of equity" (p. iii).

One who is familiar with the literature of the subject is surprised to find that while Mr. Billson cites many writers, none of whom discuss the question with the care which its importance demands, there is no reference to the systematic and thorough analytical discussion of the whole subject, with a wealth of concrete illustrations, which was published by Professor Hohfeld in June, 1913, in the Michigan Law Review. (11 MICH. L. REV., 537-572. A supplementary article by the same writer appeared in June, 1917, in 26 YALE LAW JOURNAL, 767, under the title, *The Conflict of Equity and Law*.) By means of a more careful analysis than the matter had previously received Professor Hohfeld demonstrated the correctness of the traditional view, and specifically defended the embodiment of that view in the above-quoted section of the English Judicature Acts. He also exposed in detail the fallacies underlying the specific arguments of Langdell and Maitland, and their followers. This demonstration took the form not

merely of a general discussion but also of a systematic analysis of a large number of concrete illustrative cases.

The present work undertakes much the same task. The general theory of the "conflict" is presented in the first part of the book (five chapters); the second part (three chapters) contains an application of the theory to particular branches of the law. The book is written in an interesting and, at times, even picturesque style; but it is less closely analytical and thorough than the prior treatment of the subject by Professor Hohfeld. The similarity of view of the two writers is strikingly shown by the following comparison of their treatment of the subject.

We find, for example, that Professor Hohfeld discusses the "*origin and development of equity*," "*the fundamental characteristics of equity*," the "*functions of equity*," and "*the limitations of the remedial functions of equity*," while Mr. Billson, in his preface, refers to "*the origin, nature, functions, and limitations of equity*." Likewise we find Professor Hohfeld referring to "*the dual system of law and equity*," Mr. Billson to "*The Law's Dualism in Rome and in England*." Professor Hohfeld quotes Maitland, Langdell (both in his *Summary of Equitable Pleading* and his *Brief Survey of Equity Jurisdiction*), and Adams, as leading examples of the more recent writers declaring that there has been no appreciable "conflict" between equitable and legal rules; Mr. Billson says: "Of its more recent expositions the more notable are by Mr. Adams in his recent work on Equity, by Professor Maitland in his lectures, and by Professor Langdell in his work on the Pleadings, and in his fragment on Jurisdiction in Equity."

After his quotations from these writers Professor Hohfeld summarizes his views as follows:

"As against the proposition of these various scholars that there is no appreciable conflict between law and equity, the thesis of the present writer is this: while a large part of the rules of equity harmonize with the various rules of law, *another large part of the rules of equity—more especially those relating to the so-called exclusive and auxiliary jurisdictions—conflict with legal rules* and, as a *matter of substance, annul or negative the latter pro tanto*. As just indicated, there is, it is believed, a very marked and constantly recurring *conflict between equitable and legal rules* relating to various jural relations; and *whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative*. Or, putting the matter in another way, the so-called *legal rule* in every such case, has, *to that extent*, only an *apparent validity* and operation as a matter of *genuine law*. Though it may represent an important stage of thought in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the *very relation* in which it suffers *direct competition* with a rule of equity, such a conflicting rule of law is, *pro tanto*, of *no greater force* than an *unconstitutional statute*." (The italics here and below are, except in one or two instances, those of the reviewer.)

Again, he says:

"THE CONFLICT OF EQUITY AND LAW: A jural relation may be exclusively equitable,—that is, one recognized and vindicated exclusively by an equity court. As regards every such case there is a conflict *pro tanto*, between some valid and *paramount* equitable rule and some *invalid and apparent* legal rule."

In his more recent article, *The Conflict of Equity and Law* (26 YALE LAW JOURNAL, 767), replying to Professor Austin W. Scott, Professor Hohfeld reiterates his

"position that while many substantive equitable rules are entirely consistent with legal rules, many other substantive equitable rules (i. e., those relating to the so-called 'exclusive jurisdiction' and 'auxiliary jurisdiction' of equity) are in conflict with *so-called* legal rules,—the latter being *pro tanto* 'repealed,' and rendered as invalid as statutes that have been repealed by a subsequently enacted constitution."

Mr. Billson puts the same matter as follows:

"His equity, although thus *ostensibly* an affirmative, independent right, reacted upon the law's actual operation as correctively as a *repeal pro tanto*, and in so doing only served the purpose for which it was contrived.

"Viewing the subject in the combined light of law and equity, discarding fictions, and *having regard to the substance of things*, it is clear that from the time when any principle of law was overgrown by an adverse equity, it was, *to the extent* of the equity, virtually *annulled* in its operation." (p. 73.)

In dealing with the "supremacy of equity over law" Professor Hohfeld puts the matter as follows:

"In cases of conflict, as distinguished from concurrence, a jural relation is *finally determined* by the equitable rule rather than by the legal.

"Since in any sovereign state, there must, in the last analysis, be but a single system of *genuine law*, since the various principles and rules of that system must be *consistent* with one another, and since, accordingly, all *genuine* jural relations must be consistent with one another, *two conflicting rules*, the one 'legal' and the other 'equitable,' *cannot be valid at the same moment of time*; one must be valid and determinative to the exclusion of the other.

"As a mere *practical* matter, the *equitable* rule would ordinarily prove 'triumphant' because of the superior coercive procedure and remedies of the court of chancery.

"The theoretical *finality* and *supremacy* of the rules recognized and sanctioned by the court of chancery may be regarded as established ever since the year 1616,—the time when the notable controversy between Lord Chief Justice COKE and Lord Chancellor ELLESMERE in relation to the power and privilege of the chancellor to issue injunctions against the 'enforcement' of common law judgments was settled by a prerogative decree of James I. upholding the chancery jurisdiction.

"While the conflict as to *ultimate* jural relations may be regarded as having been settled since the year 1616, the great indirectness and complexity of the *dual procedure* involved in vindicating such jural relations continued until, in more modern times, the law courts and equity courts were amalgamated into a single system. . . ."

"In regard to *substance* as distinguished from *form*, these changes in administration have not, for the most part, modified the *conjoint operation* of legal and equitable primary rights, or the *conjoint operation* of legal and equitable remedial rights: they have simply affected the modes by which legal and equitable rights are defined and vindicated."

Mr. Billson discusses the corresponding matters in the following words (p. 63 and p. 71):

"Such a *conflict* is of course less distracting than it sounds. For what it imports is not an absence, but only a *crude method of co-ordination*. The conflict is *not real*, in the sense that it involves any clash of different sections of State force. The *finality* of the new system is acknowledged, and its method of asserting its *supremacy* defined. . . .

"Still again, if we view the *relations* of the two systems from the *standpoint of substance*, what we see, as heretofore pointed out, is law and equity although *formally* distinct yet *practically fused* into some such *harmonious whole* as a modulated general rule and its exceptions, the *co-ordination of the two systems* being crudely effected, despite their nominal discordance and separate administration, by the *de facto finality* of equity's mandates. It thus becomes possible to mistakenly accredit to an alleged consistency of equity with law, a harmony that has really resulted from the virtual *paramountcy of equity over law*. The original and transitory clash or conflict may be lost sight of, in the substantial harmony *ensuing upon the ascendancy achieved by the equitable view*. . . ."
(p. 71.)

As a final example of the similar treatment by the two writers of the various points involved, we may notice Professor Hohfeld's words of caution in one of the supplemental notes in his original article:

"At this point, *however*, it may be necessary to *guard against misunderstanding*. When, in example 34, it is said that the legal rule is 'annulled,' *pro tanto*, by the equitable rule, this refers to the very jural relation under consideration, and to that alone. It is meant simply that, in the last analysis, Y is under a duty not to cut ornamental trees.

"As regards that particular relation, the supposed legal rule asserting the privilege is really invalid. It is, to that extent, only an apparent rule, so far as genuine law is concerned. But such 'legal rule,' though invalid, may have important connotations as to independent (and valid) legal rules governing certain other closely associated jural relations. *Thus, e. g., despite the conflict* in question and the supremacy of the equitable rule, it would *still* be the *duty of the common law judge*, in case an action at law were brought against Y, to sustain a demurrer as against a declaration alleging the true facts of the case. . . .

"Conversely, even though a legal primary right conflicts with an equitable 'no-right,' it would be *the duty of the common law judge* to overrule a demurrer to a declaration setting forth such supposed legal right and its violation, and, ultimately, to render judgment for the plaintiff; and, of course, *an execution sale based on such judgment would be valid*. . . . These independent (and valid) jural relations, though *connoted* by the original (invalid) legal right in question, must be carefully distinguished from the latter."

Similar warning against misunderstanding is given by Mr. Billson, who says:

"There are, *it is true*, several circumstances that impart to the claim [of consistency] a certain degree of *speciousness*. Thus, it must be *admitted* that *as matter strictly of common law*, a common law right was in very truth *absolutely unscathed* by limitations imposed by equity upon its use. To carry along our recent illustrations, *the same common law remedies* were at the bidding of a trustee or an enjoined judgment creditor after Chancery's interference as before, the only difference being the imprisonment he might incur by accepting them. All that he ever had was a common law right and its remedies, and *as matter of common law* he had those still. Some *color is thus lent* to the idea that equity's limitations upon the use of legal rights do not clash with or impair those rights, and are *not inconsistent* with their *continuance* and integrity." (pp. 71 and 72.)

So far as the reviewer has been able to discover, Mr. Billson does not anywhere give a strict classification of jural relations, as does Professor Hohfeld. According to the latter, as the above extracts show, all genuine jural relations fall into only two classes: (1) exclusively equitable; (2) concurrent, *i. e.*, concurrently legal and equitable. What appears to be a third class, *viz.*, "exclusively legal" substantive relations, must be excluded as involving only those so-called relations which have been repealed by the supervening and conflicting equity rules. An understanding of this true classification is essential to a correct apprehension and solution of legal problems. The older classification of Story and other leading writers on equity always was inadequate and misleading, for the reason that it took no account of equitable repeals of so-called legal rules. Mr. Billson's general discussion would, it seems clear, compel him to adopt the same classification if he were to work the matter out.

The book is attractively printed and bound, and contains the usual table of cases as well as an adequate index.

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The Argentine Civil Code, together with the Constitution and Law of Civil Registry. Translated by Frank L. Joannini. Published by The Boston Book Company, Boston. 1917. pp. lix, 732.

The Comparative Law Bureau of the American Bar Association has again attested its public service by the publication of an English translation of the Argentine Civil Code. The translator, the late Frank L. Joannini, had already rendered important service by the translation for the United States Bureau of Insular Affairs of several of the codes of our insular possessions. The translation before us evidences the valuable supervision of the committee of revision, Messrs. Eder, Kerr and Wheless. No one who has had experience in rendering into English the legal concepts embraced in the system of a civil-law country can fail to appreciate the difficulty of the translator's task, or be unduly captious in the criticism of terminology.

The work under review incorporates civil-law terms in literal translation, such as "prestation," "mandatory," "redhibitory vices," "tutorship," "benefit of inventory," "fisc," "usufruct," "paternal power," "revendication," "transaction" (for the common-law "compromise") and numerous others. Sometimes the expression is explained in a footnote, at other times the Anglo-American lawyer will be compelled to bring to the subject some prior orientation. This method, however, whatever its weakness, is preferable to any attempt at a free translation, with its efforts, inevitably misleading and inaccurate, to employ a complete common-law terminology. Considering the great difficulties involved, the translation is very creditable. Not the least commendable feature of the work is the excellent introduction by Phanor J. Eder.

A translation of the Argentine Civil Code is of more than academic interest to the American lawyer, for the economic bonds between the Anglo-American countries—especially the United States—and Argentina are growing stronger from year to year. Scientifically, the code is not the best in Latin America. It was drafted by the noted jurist Dalmacio Velez Sarsfield in 1865-68, and it was adopted by Congress in "*libro cerrado*" (as a closed book) without discussion in 1869. With but slight amendment, it is in force today. It was compiled, not as a synthesis of the historical development of a people's law, but as a structure derived from a variety of extraneous sources such as foreign codes, the studies of jurists, etc., and very largely from the draft code of Teixeira de Freitas of Brazil.

While a remarkable example of legal codification, it has not proved uniformly responsive to the practical needs of a rapidly growing community; but fortunately, a good commercial code and much judicial interpretation have been helpful in developing its usefulness. Brazil, which furnished the scholar on whose foundations Velez Sarsfield built, has finally, after years of discussion in Congress and the work of many jurists, adopted a civil code which promises to take rank among the best products of modern codification, including the codes of Germany and Switzerland. Its translation into English, now in course of preparation, is awaited with interest.

An index of one hundred pages adds materially to the practical utility of the present translation of the Argentine Code, and the physical make-up of the book is attractive. It should be heartily welcomed by the American bar.

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The Law Applied to Motor Vehicles. By Charles J. Babbitt. 2d edition by Arthur W. Blakemore. Published by John Byrne & Co., Washington. 1917. pp. cxxvi, 1262.

The author of this book rightly considers that the law is based upon fundamental principles which are not new, and that the decisions now rendered with reference to the motor vehicle merely present the old principles of jurisprudence as applied to new circumstances. The author constantly keeps this in view and leads the legal mind to basic principles, at the same time keeping his work to date by recent decisions. For example, throughout the chapter on municipal powers, the fundamental principle that the state is an interested third party through which public welfare is expressed is adhered to in the exposition of the basis of automobile legislation.

The scope of the book—by scope I refer not alone to the variety of topical subdivisions, but to the range of state decisions—is broad. The book covers all the contractual subjects of the law in their application to automobiles, citing automobile cases where possible. Likewise, municipal law, tort, and criminal responsibility are dealt with. Pleading, practice in negligence cases, evidence and damages receive a limited space. The decisions are taken from all states. Viewing the matter from a provincial point, I should say there are a sufficient number of New York cases cited to render the book valuable to the New York lawyer. The statutory basis from which the author works in his treatment of automobile legislation, namely, the Massachusetts automobile legislation, in no wise renders the book of such a sectional character as to lessen its value.

Aside from a purely legal treatment of the automobile, the book is instructive through its forceful way of impressing upon the reader the completeness with which the automobile has entered into the social, business and every-day life of all people, be they automobile owners or not. Further, it clearly impresses one with the fact that man sometimes opposes and impedes progress by subtle reasoning and skilful utilization of precedents of the law.

The leading cases used are well chosen. The book does not present a panacea for all automobile difficulties, but is a valuable addition to a lawyer's library as a first aid. Its utility is enhanced by a good index.

OSWALD PRENTISS BACKUS, JR.

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Unfair Competition. By William H. S. Stevens, Ph.D. Published by University of Chicago Press, Chicago. 1917. Pp. xi, 265.

Dr. Stevens uses the phrase constituting the title of his book in a broader sense than that usually adopted by legal text writers and legal encyclopedias. The meaning until recent years seems to have been limited, in most cases, to the marketing of goods by fraudulent methods. This book includes under unfair competition twelve methods, among which are found such practices as espionage, coercion, exclusive arrangements, operation of bogus independent concerns, engrossing machinery, etc. As many and as varied as are the examples treated, the author does not pretend to treat of all unfair methods of competition.

The various practices are illustrated chiefly by extracts from the records of government anti-trust suits. To one not thoroughly conversant with the subject, the chapters illustrating the different methods are intensely interesting, illustrating as they do the working of "shady" business.

The author agrees only partially, if at all, with the theory that free competition inevitably results in monopoly. He maintains that the creation of monopoly by combination is not countenanced in this country, and would not be possible at the present time; and, further, that monopoly by elimination—the only other possibility—could hardly take place without the employment of unfair competition. He further asserts that the maintenance of monopoly through superior efficiency is not feasible for a long period of time because of necessary changes in men and methods. If, therefore, the privilege of maintaining monopoly by unfair methods should be withdrawn, monopoly would fall of itself. The record of the Steel Trust seems to support his theory.

The book, although written by an economist from an economic rather than a legal point of view, should prove interesting to the legal profession.

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