

BOOK REVIEWS

The Law of Contracts. By Samuel Williston. New York, Baker, Voorhis & Co. 1920. In Four Volumes, Vol. I, pp. xxiii, 1155.

Professor Williston informs us in his preface that he has treated the law of contracts as it is manifested in a great many special fields, including Sales (of land and of goods), Negotiable Instruments, Agency, Bailments, Carriers, Landlord and Tenant, Insurance, Suretyship, Equity, Master and Servant, Quasi-Contract, Damages, and Evidence. Volume I is divided into three Books: Formation of Contracts; Parties to Contracts; Statute of Frauds. In the second Book he includes Capacity of Parties, Agents, Joint Contracts, Third-Party Beneficiaries, and Assignment.

This volume deserves the thoughtful and critical study of every reader. Only the best books deserve so much; and there seems little doubt that Professor Williston's four volumes will prove to be the best reference work on the subject. It goes without saying that his work is thoughtful and scholarly. In addition, he does not dodge the hard questions or gloss them over with specious distinctions. We may differ with him in his conclusions occasionally, but it will never be because he has failed to present the facts and the arguments with intellectual honesty. There is always a careful and suggestive review of the cases, with great numbers of them cited in the notes, and the critical comment always shows sound practical judgment and the benefits of long comparative study and discussion.

The reviewer's differences with the author are nearly always with respect to definition and legal analysis, rather than with respect to decisions on specific facts. Doubtless, this might indicate that no particular terminology or method of analysis is absolutely necessary to just and correct decision. But clear and definite concepts, accurate analysis into simple and invariable elements, a terminology that conveys to other minds the exact idea intended, are always exceedingly desirable and are often essential. We know that their absence frequently leads to unjust and incorrect decision, that it largely explains the existence of dispute and conflict as to the law, that it is the cause of a large part of our litigation with its consequent loss and harm to individuals and to society, and that it causes the great majority of law books to be almost worthless if not positively harmful. Many words with many senses applied to the complexities of modern life make the structure of the law a new tower of Babel. Law students must be trained to reason with simple and invariable fundamental legal conceptions, with the purpose of making rules serve human needs and desires.

Perhaps Professor Williston agrees with this. He says, "I make no apology for devoting some space to legal analysis and criticism," and the excellence of his work shows that no apology is necessary. The reviewer believes that in certain respects the author could have adopted a better analysis, and at the risk of betraying his own error will back his opinion with a few illustrations.

In the first section a contract is defined as "a promise, or set of promises, to which the law attaches legal obligation." It is only in a later chapter that he attempts to define "promise" and nowhere does he analyze or define "obligation." These terms are not self-explanatory. In section 24, it is said that "A promise from the very meaning of the word involves an undertaking to do something in the future." But what is "the very meaning of the word"? A promise is always an expression of intention and an expression is always

an *act*. Does the author really mean that the act of one person should be described as a contract? Yes, he may reply, in case it has become "binding." But to make a promise binding it is necessary that there should be an assenting act by a second person (this assenting act is frequently not a return promise, so that there is no "set of promises"). Consequently, a promissory act is not a contract when the promise is uttered, but becomes a contract later upon the act of another person. This latter act is as important as is the former; and if contract is to be defined as consisting of operative acts rather than of legal relations, the definition certainly should include *all* of the necessary operative acts. Surely by "customary legal usage," which the author invokes to sustain his definition, it takes *two* to make a contract. If so, a contract is always more than "a promise," and sometimes something other than a "set of promises." It appears that his definition of a contract as "a promise" is due to his desire to emphasize the fact that among the resulting legal relations there may be but a single duty, with its single correlative right. For such a purpose a contract may reasonably be described as "unilateral"; but if a contract consists of the operative acts of the parties, then the term "unilateral contract" is a misleading term.

The truth is that the popular connotation of the term contract is broad and indefinite enough to include the *acts* of the parties, the paper document if one is executed, and the legal relations created by the acts and the document. It is chiefly a matter of taste whether one restricts his definition to some one of these three concepts or includes them all. Having made a choice and warned his readers thereof, with his reasons, he can be further required only to be consistent.

If a contract consists of the *acts* of the parties, then so must offer and acceptance be *acts*. The author rightly says that an offer "is not merely evidence of a state of mind" and also that an offer need not be accepted the instant it is made. Yet he further says that "offer and acceptance must exist at the same time," and that "It is the only accurate way to express the matter to say that the offer continues till the acceptance." What is this that has to *exist* and that must *continue*? The *act* of the offeror certainly does not. It is the legal relation of *power* in the offeree that continues to exist. Hence, if the "offer" continues to exist, as the author says, he must define offer as a legal relation and not as an act.

The essential thing is for a writer to show clearly to every reader that the physical acts and documents are quite distinct from the legal relations they create and that they can and should always be traced through in chronological order. The offeror *acts* physically. The offeree thereupon has a *power* which he may use or not use, as he desires. The offeror is in the correlative position of *liability* to the creation of new legal relations by acceptance. These positions of the parties are *legal relations*, the names of which need not be dogmatically insisted upon, although some names are better than others, and uniformity is desirable. Next in order, the offeree uses his power, *accepts*; this too is by physical acts. Thereafter, new legal relations exist—rights and duties, privileges, powers, disabilities, immunities, in numberless combinations. Having made all this clear and identified the various separate relations, it becomes nearly immaterial what we say a "contract" is.

In section 60, the author deals with the revocation of offers of a promise for an act or series of acts. To him "theory" seems to require that the offeror shall have the power of revocation until performance by the offeree is wholly completed; "any other result involves either a violation of recognized principles of contract, or the invention of new ones." At the same time he admits that the rule may do "obvious injustice," that there will be "hardship ensuing," and that the result "seems harsh." We may be sure that in this his instinct is

better than his "theory." The history of the law consists chiefly in the destruction and modification of old theory by new practice. No doubt hard cases sometimes make bad law, but it is certain that hard cases will continue to make *new* law. In the present instance the harsh injustice can be and is being avoided by the courts. Nor does this require a violent upset in "theory." The author suggests that if we deprive the offeror of his power to revoke "he is bound by a promise for which he has not received, and may never receive, the consideration requested." But in what sense is he "bound"? It would aid the author if he distinguished here between a disability and a duty. The word "bound" should really be restricted to the latter. We can easily and fairly put upon the offeror a *disability* to revoke; this does not bind him by a *duty* to perform in accordance with his offered promise, and he will never be under such a duty unless he receives the "consideration requested." Just how far the offeree must perform before it is fair to saddle the offeror with a disability to revoke must be and is being worked out by case experiment; "obvious injustice" to either party can readily be avoided by courts who are conscious of their constructive power.

A few other brief illustrations may be grouped together. Sections 25, 61: "Every offer is a promise." That this cannot be approved see COMMENT (1920) 29 YALE LAW JOURNAL, 767. Sections 24, 70: A promise "*ex vi termini*" and "from its very nature" "imports some communication actual or constructive." But a *constructive* communication is not one. *Vis terminis* and "very nature" are dangerous witnesses that often do not survive cross-examination. One can always get out of a definition anything that he has himself put into it. Section 69b: "A notice of allotment [of shares] is in effect a promise that the applicant shall later become a shareholder." This is believed to be a fiction. The notice may be a necessary fact in order to make the applicant a shareholder, but it isn't a promise. Section 52: The author says that a rejection of an offer is analogous neither to an acceptance nor to a revocation. An independent rule should therefore be constructed so as to protect the offeror. A rejection should never *per se* prevent acceptance if the offeror does not hear of it before getting the acceptance, but it should operate as an estoppel if it is received before the acceptance even though the latter was mailed first. The *mailing* of a rejection, therefore, should not destroy the power of acceptance; it should merely limit the mode and time of its exercise. The same rule might well be applied in the case of an acceptance by mail followed by a withdrawal thereof; but the prevailing dicta at present appear to sustain Professor Williston. Section 233: "The personal *privilege* of the infant is a legal *right* which *can* be exercised against any one." Here the three concepts of privilege, right, and power are confused in a single sentence.

The discussion of Consideration is admirable. It shows clearly that in fact the courts enforce many promises for which there was no agreed equivalent given in exchange. The author makes a noble effort to determine what facts will operate to make a promise binding, and this effort is of great service to student and jurist; but the complexity of the result and the many admissions that conflict exists and that certain very large classes of cases must be regarded as "exceptional" indicate that in many twilight zones the courts must trust to instinct rather than to definition or "theory" or "established principle." The effect of this is that the doctrine of consideration (or its manifold substitutes) approaches the similarly nebulous doctrine of *causa* in the Roman law.

As soon as "detriment" is given the "technical meaning" the author gives it in section 102a, it becomes unserviceable in determining the validity of a contract. "Detriment, as used in testing the sufficiency of consideration, means legal detriment as distinguished from detriment in fact." In other words, before a detriment in fact can be legally operative as a consideration it must

be a legally operative detriment. He then says that detriment "means giving up something which the promisee had a right to keep or doing something which he had a right not to do." This rule needs much closer analysis; and it is one that many courts refuse to follow, as the author admits. In any case, why should not detriment be given its popular meaning? A detriment in fact is a sufficient consideration when so agreed, except where public policy prevents. In section 101, the author makes practically the same distinction between consideration in fact and legally operative consideration that is made above as to detriment.

With the chapter on Assignment the present reviewer has a good many differences. He does not believe that an assignment "may be most accurately looked upon as creating an irrevocable legal power of attorney to enforce the assignor's right, with authority to keep the proceeds when reduced to possession, coupled with an equitable ownership of the right prior to its collection." When an assignee sues he knows perfectly well that he is not acting as anybody's agent or attorney, that he has a right against the debtor and not merely an "authority," and that this right is enforceable in all the existing courts of law. In this chapter the author clings desperately to the distinctions between "equitable" and "legal" that have been handed down to him by comparatively recent but very respectable tradition. These distinctions he insists are "fundamental," although his own transparent honesty of presentation reduces them to the vanishing point (see sections 446a, 447). No one can deny that the Court of Chancery had as much to do with the making of the law that governs us as did the Court of King's Bench. Nor must we overlook the legislative activities of the Admiralty, the Local Courts, the Pipowder and other Merchant Courts, the Ecclesiastical Courts. The jural relations that are now created by any set of operative facts must be determined with reference to the history of all of these courts. But in large measure their law has been amalgamated into one legal system, and any relation recognized by that system is a "legal" relation. "Common law" never in its life consisted of a definite set of unchangeable rules, and as fast as a new rule was adopted it became part of the common law irrespective of its origin or history. We need to know all of the existing jural relations between an assignee and others; although he has a legal right he may not have a legal immunity for reasons once laid down by the Court of Chancery. The author sets out these jural relations with accuracy. But we did not need the adjectives "legal" and "equitable" before the *Curia Regis* split into separate courts, and common usage is making them quite unserviceable for purposes of logical analysis now that the Chancery is dead and a High Court of Justice reigns.

We shall be grateful to Professor Williston for his insistence on the essential unity of contract law. There are broad fundamental principles that should be applied alike, whether the contract deals with land or chattels, with service or bailment, with suretyship or mercantile instruments. He is right in insisting that we should not let the factual differences in these cases, with the necessarily resulting variations in legal rules, blind us to their basic harmony and similarity. The branch lines and side-tracks serving special fields should always be consciously related with and dependent on the national trunk lines of principle. Only thus is constructive codification desirable, whether legislative, judicial or professorial.

The preparation of a work of this scope and size requires immense and exhausting labor. The few matters critically considered in this review are not all that might be so considered; but all of them together bear but a small ratio to the mass of material with which even a critical and self-confident reviewer can find no fault. No difficult question in contract law should be answered without first consulting Professor Williston's work.

ARTHUR L. CORBIN.

John Archibald Campbell, Associate Justice of the United States Supreme Court, 1853-1861. By Henry G. Connor, LL.D. Boston, Houghton, Mifflin Co. 1920. pp. iii, 310.

In 1857, the leading figures in the Supreme Court of the United States were Chief Justice Taney and the two junior Associate Justices, Benjamin R. Curtis of Massachusetts and John A. Campbell of Alabama. Both of the latter, after a few years, resigned their seats. Both left behind them a high reputation for learning and philosophic insight into legal principles. Both had evinced what may be called judicial statesmanship. Both returned to practice at the bar, and with distinguished success.

Judge Connor has painted Campbell's character with a friendly hand, but does not go beyond the limits of that enthusiasm which every author of such a work is in a manner called to bring to it. It was a strong and solid character. Campbell had few elements of popularity. George Ticknor Curtis is quoted as saying of him, in his commemorative address before the bar of the Supreme Court of the United States, that "he ranks with the greatest advocates of our time, not for eloquence, not for brilliancy, not for the arts of the rhetorician, but for those solid accomplishments, for that lucid and weighty argumentation, by which a Court is instructed and aided to a right conclusion. The day of mere eloquence has passed away from this forum. What is effectual here now is clearness of statement, closeness and accuracy of reasoning, and the power to make learning useful in the attainment of judicial truth. These accomplishments were possessed by Judge Campbell in a very uncommon degree. He has lived to a great age, and in the whole of his long life there has never been a public act or utterance that is to be regretted" (pp. 284, 5).

These last words are, however, hardly reconcilable with one act, which led to his arrest and imprisonment in Fort Pulaski, in 1865. He had served during the Civil War, as Assistant Secretary of War in the government of the Confederate States. Towards the close of the war, a letter from a private individual was sent to Jefferson Davis as President of the Confederacy, in which the writer proposed "to assassinate Mr. Lincoln and other union leaders and requested an interview for the purpose of unfolding his plan" (p. 197). It found its way to the Confederate War Department, and, falling into Judge Campbell's hands, he referred it to the Adjutant General of the Confederacy "for attention," and made an endorsement upon it to that effect. Judge Campbell afterwards stated as a justification that this endorsement was made "in the regular course of the routine of the office," it being the duty of the Adjutant General "to examine and dispose of letters between parties" (p. 198). Secretary Stanton, being of opinion that this was a serious offence, sent him to Fort Pulaski for it. Justice Campbell applied to President Johnson for release as an act of amnesty, and filed with the application papers in which he urged that the endorsement was "no cause whatever" to subject him to "death or bonds." Posterity can hardly agree to the validity of the defence.

Justice Campbell practiced law for twenty years in Alabama, removing to New Orleans upon the close of the Civil War. Searches of land titles in Alabama often required an examination of old Spanish grants. This led him to the study of Spanish law and of the Roman law, on which it was founded. His removal to New Orleans brought him into a bar where a knowledge of those systems of jurisprudence was still more necessary. He had a large library, comprising the works of the leading civilians in Latin, French, and Spanish, and made good use of it, both when he was at the bar and on the bench. He enjoyed hard work. He brooded over his cases: threw himself whole heartedly into his client's position; and spared no pains to serve him well.

In his later years, he stated that his ideal of professional life was "to have six cases a year before the Supreme Court of the United States and plenty

of time to investigate and prepare for argument." He was qualified to speak of this with authority, for he had attained the goal which he desired at the age of forty-two (pp. 11, 254).

One of the great constitutional questions which he argued at the bar arose in the *Slaughter-House Cases* (1872, U. S.) 16 Wall. 36. Chief Justice Waite and Justice Gray each remarked of Campbell's presentation of his views to the Court, that it was the greatest argument he had ever listened to (p. 249). These cases turned on the true meaning of the Fourteenth Amendment to the Constitution of the United States. Here, he contended, was an immense extension of the powers of the nation, and a gift of citizenship in it, which carried most important privileges. The Court took the view that there was a dual citizenship, and that the Amendment was adopted mainly to protect the negro. Judge Connor points out that of the more than six hundred cases in which its protection has been invoked, only twenty-eight involved racial rights of the colored man (p. 233), and quotes from a North Carolina lawyer, as a not inapt statement of its effect, that it was made "for the protection of the negro, but has become the asylum of the multi-millionaire" (p. 234).

Campbell's last case in the Supreme Court he argued when over seventy. This was that of *New Hampshire v. Louisiana* (1882) 108 U. S. 76, 2 Sup. Ct. 176, which decided that one state could not sue another, without its consent, in the Supreme Court of the United States, on a private contract. His biographer rates it, and so did Campbell himself (pp. 249, 278), as the best of his professional efforts.

The book which we have thus reviewed is well constructed, and the principal events of the different periods of Campbell's life are effectively grouped.

SIMEON E. BALDWIN.

A Treatise on the Law of Inheritance Taxation. By Lafayette M. Gleason and Alexander Otis. Second Edition. Albany, Matthew Bender & Co. 1919. pp. xvii, 1138.

Law books are of two sorts. Those whose writers assume that "codes of law are a created, permanent and invariable product" and those whose writers assume that such codes "are evolutionary, relative, changing and adaptive."¹ The categories are not exclusive because the conscious or unconscious believer in the first described philosophy nevertheless frequently suggests changes and thinks of permanency and invariability as applying to what to him are basic principles.

It is perhaps natural that such writers should also employ terminology which is inexact judged by current standards.

The present work is manifestly of the first sort. Proof is found in the use of material of which the following is a sample: "An inheritance tax is not one on property but one on succession. The right to take property by devise or descent is the creature of law and not a natural right."

It is difficult to determine in what sense the word "property" is here used. Manifestly, the word "right" here means "privilege." The phrase "natural rights" is now severely criticized by scientists.²

Recast the statements are:

An inheritance tax is not a tax on the congeries of legal relations termed property in things but on the privilege extended to the heir or devisee or legatee to acquire such property in things which belonged to a person now de-

¹ Cf. Brown, *Law and Evolution* (1920) 29 YALE LAW JOURNAL, 394; Keller, *Law in Evolution* (1919) 28 *ibid.*, 769; Justice Gager (1919) *ibid.*, 617.

² *Ibid.*

ceased. This privilege is one over which the law has control and to which it may annex burdens.

The latter paraphrase may evoke the most contention but does it omit any essential elements of the quoted sentence? Because of constitutional provisions, there are certain limitations on legislative dealings with property. But this follows from the constitutional provisions and not from any "naturalness" of property. But for such provisions "property" might be dealt with as freely as "succession."

Nor does it seem that the fact that the heir or devisee acquires property in things in which a person who has died last had property is of importance in this connection. The process by which one person relinquishes and another acquires property in things is a creature of law just as is the process of succession and "property" itself for that matter. On both processes the law may place burdens. It is difficult to see on which principle stamp taxes on deeds, etc., can be differentiated from taxes on succession.

Perhaps the real distinction is between a tax on what one has, i. e., on the congeries of relations known as "property" and a charge on the privilege of obtaining something. A succession tax cannot without conforming to constitutional provisions as to property taxes be imposed on successions which have become effective before the statute is adopted, because it is then a tax on what one has. It may be laid as to future successions because no one has any privilege of acquiring property by descent or will until the owner dies. Prior to that event it is a mere possibility. Manifestly, possible privileges are within legislative control and may be prevented or burdened on coming into existence as the legislature may see fit. A father and mother may by legislation supplant brothers and sisters as heirs, etc.

Such analysis might aid to clearer thinking. It might not be essential to a study of the law in connection with the more or less routine administration of a body of statutes. For one who desires the latter, the book is excellent. It puts in handy, findable form the statutes both state and federal and the decisions of the federal courts, and those of the various state courts on the subject of inheritance taxation. Every lawyer who has inheritance tax problems to solve will do well to make Messrs. Gleason and Otis' well collated summary and digest at least the starting point of his investigation.

Just how reliable its collation of statutes is, is impossible to say without an examination of all the original material. The reviewer, being more familiar with the statutes of Connecticut, tested the collation of them and finds that, although a revision of the statutes of Connecticut went into effect in 1918, the references are to the session laws of 1915, 1917 and 1919. Further, the references to the Public Acts of 1919 are not exhaustive. Chapters 36, 115 and 152, as well as chapter 283, concern succession taxes. To criticise the omission of the comma after the word "picture" in the copy of section 3 of chapter 332, Public Acts, 1915, which apparently makes the exemption apply to "picture books" only and not to pictures and books might seem hypercritical. But it is just such things which make an examination of the original statutes necessary.

HARRISON HEWITT.