Vanderbilt Law Review

Volume 2
Issue 3 *Issue 3 - April 1949*

Article 17

4-1949

Book Reviews

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BOOK REVIEWS

THE RATIONAL BASIS OF CONTRACTS AND RELATED PROBLEMS IN LEGAL ANALYSIS. By Merton L. Ferson. Brooklyn: The Foundation Press, Inc., 1949. Pp. i-ix, 1-330. $4.00

In 291 pages of text Dean Ferson has given us twelve delightfully written essays devoted to theoretical analysis of most of the problems and practical application of most of the doctrine covered in the conventional course in contracts. It will make an excellent companion volume for a casebook and it does not attempt to replace a detailed treatise. Although it is addressed particularly to law students to whom it will give a sense of perspective and continuity, teachers and practitioners will find it easy but stimulating reading. Chapters 1-4, inclusive, 7, 9 and 11, are reprinted from earlier publications of Dean Ferson in the *Cornell Law Review.* Chapter 8, "The Rule in Foakes v. Beer," is reprinted from his well known article in 31 *Yale Law Journal,* and Chapter 12, "Agency to Make Representations," previously appeared in the *Vanderbilt Law Review.* To complete the book and give it unity he has added chapters on "Death of Offeror Pending Acceptance," "The Evolution of Simple Contracts," and "Voidable Contracts." The volume does not purport to be a hornbook or even a substitute for one but absence of detailed factual statement and voluminous citations is decidedly refreshing. In objective and tone it reminds me more of Thayer's *Preliminary Treatise on Evidence.*

Dean Ferson attempts to do two things: (1) to reduce a number of everyday commercial transactions, beginning with gifts and progressing through exchanges, unilateral and bilateral contracts, the creation of powers, etc., to simple terms and common denominators; (2) by noting the elements of similarity to arrive at conclusions about controverted legal problems that are both practical and consistent. In both attempts he is persuasive and I think, successful. One illustration (there are others) will suffice. Dean Ferson does not like the rule stemming from *Foakes v. Beer,* "that payment by the debtor of a less sum than the whole amount of the debt will not extinguish the debt, although the creditor expressly agree to receive it in full and give a receipt or writing to that effect. . . ." Dislike for the rule is shared by many practical businessmen and most teachers of contracts. But unlike many who accepted at face value the court's reason for the rule ("it rests mainly upon a want of consideration for the promise [of discharge] given") and then sought to get around it either by exception, enlarged definition of consideration or a frontal attack on the entire consideration doctrine, Dean Ferson concentrated

his fire on the reason. The groundwork is laid in the very first chapter in his analysis of gifts where the non-contractual nature of the transaction is obvious. The transition to exchanges is simple and readily understandable. "But exchanges do not create obligation and therefore are not contracts" (p. 21). Ferson concludes that cases like *Foakes v. Beer* really involve not contract but exchange (payment of a sum of money for a chose in action) and that, therefore, they should be at least "spared from the consideration requirement." I found both the argument and its presentation charmingly persuasive.

Other questions, troublesome particularly to beginning students, crossed offers (pp. 90-99), effect of offeror's death on an outstanding offer (c. 5), formation of bilateral contracts concluded by correspondence (pp. 135-42), rights of third party beneficiaries (pp. 143-52), receive careful analysis and suggested solutions. The chapter on "Voidable Contracts" treats a number of commonly recurring problems, infant's contracts, fraud in the inducement, subsequent promises after the statute of limitations has run and after discharge in bankruptcy. There are concepts here basic in the commercial field, and having common features whether encountered in the course in contracts, sales, or debtor's estates. The basic course in consensual relations is the proper place to see them in perspective and the book will aid materially in doing it. The acid test of a book like this is whether it can achieve simplicity and symmetry without resultant generalizations that are at best useless and at worst misleading and dangerous. Dean Ferson's treatment happily achieves the former. Throughout the book there is a good bit of legal history and much philosophy and jurisprudence. The latter is made more than ordinarily palatable for first year students by a simplicity of style and language (an outstanding characteristic of the book) and a context of extreme practicality.

While the basic distinctions between promise and condition are made, I regret that there is no essay dealing intensively with problems traditionally covered under the heading of performance and breach of contract. The omission does not mar an excellent book, for everything could not be included. It does, however, make me hope that Dean Ferson will some time deal with these problems as effectively as he has with the others.

HAROLD SHEPHERD*

BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW. By Frederick K. Beutel. Cincinnati: The W. H. Anderson Company. Seventh Edition, 1948. Pp. xiii, 1628. $15.00.

This is the reappearance of an old friend. It is the seventh edition of the volume originally prepared by Professor Joseph Doddridge Brannan, and

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could have been labeled just that; but Dean Beutel has made such extensive contributions that the new name is not out of order. This book is an annotated statute, and in view of the fact that it has been adopted in fifty-four jurisdictions [1] it is probably entitled to first place in the realm of statutory annotations. The original volume was a notable contribution, and there have since appeared two revisions by Brannan himself, one by Professor Zechariah Chafee, Jr., and this is the third by Dean Beutel.

Seven editions in forty years proclaim the widespread demand for this compilation of authorities under the Negotiable Instruments Law. The growth of the book is significant. Omitting preliminary pages in Roman numerals the volumes have grown as follows: 250 pages in the first edition in 1908, 330 in the second in 1911, 622 in the third in 1919, 1041 in the fourth in 1926, 1322 in the fifth in 1932, 1442 in the sixth in 1938, and 1628 in the seventh in 1948.

The original effort to include every case decided under the Act has long since been abandoned in favor of a plan of selective annotations. This is desirable because the subject would be smothered if every case which merely cited the Act, or restated the language therein, had to be included. There have been other omissions, however, to make room for new material and keep the work within the limits of a single volume; and some of these deletions have been unfortunate. The enlightening Ames-Brewster-McKeehan discussion of the Act, which had been carried through three editions, was omitted from the fourth. And the English cases contained in all former editions have been omitted from the seventh. What has been added is more important than what has been left out, but it is a matter of regret that there was not room for those two useful items.

Part One of the book has two sections. The first covers the history and interpretation of the law of negotiable instruments, while the second sets out the text of the uniform statute and the Commissioner's Notes, with extensive cross references from one section to another. Part Two is the annotated statute, and Part Three is made up of various tables and lists.

The most important addition has been the inclusion of outstanding decisions handed down since 1938, but the most obvious change is the appearance of a new section in Part One—a brief history of the development of the law and a discussion of interpretation.[2] This is interesting although not all will agree with everything to be found at this point. Dean Beutel is at

1. Forty-eight states and Alaska, Canal Zone, District of Columbia, Hawaii, Philippine Islands, and Puerto Rico.

2. Dean Beutel had a few pages on interpretation in each of his previous editions. See pp. 81-86 in the fifth, and 98-106 in the sixth. His section on history and interpretation in the present edition covers 109 pages, with pp. 80-109 being devoted to interpretation.

heart a civilian.[3] He says, for example, that the basic reason for the doctrine of *stare decisis* "ceases to exist as soon as the law is reduced to writing." [4] In his view a case decided under the statute is not *law* but merely the court's idea at the moment of what the statute means.[5] To the extent that he would like to substitute civil law technique for that of the common law he is no doubt doomed to failure, but in the effort to prove his point he has directed attention to numerous faulty decisions.[6]

It is puzzling why one so inclined to belittle the importance of cases under the Act should have undertaken this task of annotation. However that may be, he has done an excellent job. This book is a "must" for every law office.

ROLLIN M. PERKINS*

SOCIAL MEANING OF LEGAL CONCEPTS—No. 1, INHERITANCE OF PROPERTY AND THE POWER OF TESTAMENTARY DISPOSITION. Edited by Edward N. Cahn. New York: New York University School of Law, 1948. Pp. vi, 90. $1.50.

In 1948 a conference was held at New York University to consider the educational problem of the relation of law to the social sciences. The plan adopted was to choose annually a specific legal concept and then have, as here, several specialists from among the various social sciences, each of whom would "let the light of his learning play upon this fundamental legal concept of great social concern." (p. vi). The result of this display of pyrotechnics is a blend of fantasy and frustration.

The "Social Meaning of Legal Concepts" must be taken to connote the social background that one ought to have in mind when he considers a specific legal concept. In this first effort, the specific legal concept is the inheritance of property and the power of testamentary disposition. Before considering the findings of the four specialists concerning this concept, it should be mentioned that a preliminary problem in the social sciences is methodology. How does the investigator establish the facts of a social science? Prior to the modern insistence upon testing hypotheses by experience, the spinning of *a priori* cobwebs produced the social contract and other curiosities. It might be thought that these modern scholars would have indicated with some pre-

3. Beutel, *The Necessity of a New Technique of Interpreting the N. I. L.—The Civil Law Analogy,* 6 TULANE L. REV. 1 (1931).
4. Pp. 101-2.
5. He does not state his view as bluntly as this, but it is implicit in his distinction between "the law itself" and "mere interpretation." P. 102.
6. Pp. 80-109.

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cision their methods in determining what properly belongs in the social background of the legal concept under discussion. This they did not do.

The first specialist was an anthropologist. His task was that of comparing human behaviour in various cultures with respect to this single legal concept. The result of such investigations should be, as he says, to break down "parochial myopia." Studies of primitive cultures make it possible to examine cultural institutions without vestigial veneers intruding. His conclusion is that the specific forms of succession and testamentary disposition are "influenced and molded by developments in other phases of culture." (p. 26).

An economist, as the second specialist, announced that he would attempt "an appraisal in terms of the social consequences of the legal concept or institution under review." (p. 27). As an economist, however, he had to point out that his interest in inheritance was "largely concerned with the effects of inheritance upon the distribution of wealth and income and upon its production." (pp. 30-31). The most important effect of inheritance is that it produces and perpetuates inequality, by preventing distribution according to merit and opportunity. In this sense it may promote social discord or may seriously affect the incentive to produce. The evaluation of this effect of inequality upon productiveness in terms of various economic theories is somewhat vitiated by the confession of the writer that there is little quantitative evidence upon which to base any opinion; and further, what little there is, indicates that inherited wealth has played only a minor role "in shaping the Ameriean economy and the distribution of its wealth and opportunities." (p. 47). Moreover, even this minor role is declining in importance due to the general acceptance of the graduated inheritance tax and the operation of the income tax before the death of the testator. The major reason for the lack of importance of inheritance among private individuals, so far as the production of the economy is concerned, is that the "aggregates of wealth used for productive purposes are largely the property of corporations." (p. 51). Transfers among individuals have no effect upon these accumulations, the use of which is largely determined by corporate managers who do not own the assets of the corporations.

A sociologist then indicated that his field is concerned with the interrelations among the institutions within a culture. The assumption being that there are always such interrelations, the proposition that comes easily that "the specialized law of property devolution serves . . . both to reflect social needs and to resolve them." (p. 56). Our contemporary culture reflects a shift from the landed estate of feudal society, which must for power's sake be kept intact to a "money nexus" which today forms the key to all relations of society and man. This shift made easy the changeover in the principle of distribution from primogeniture to equality among the surviving heirs. This in turn reflects the "democratization of the family and society." While

no data are supplied, the writer avers that "The principle of equitable distribution of estates to descendants has played some considerable part in an inclination of our families to keep their size small enough to insure a fair patrimony to each." (p. 67). Further, the abolition of primogeniture removed the ancient duty imposed upon the heir to provide for the dependent of the family. Actually, the "property system and its devolution cannot be held responsible, of course, for all this familial disorganization. The difficulty appears to be rooted more deeply in an urban industrialism which has made the family a less useful institution." (p. 71).

Both the economist and the sociologist were frank to admit that their ultimate data were value judgments. It was therefore fitting that a teacher of ethics had the final word in this discussion. Final is an understatement. He flatly declares that aside from objects of sentimental value—trophies and keepsakes—"the inheritance of property which has a controlling influence on our basic human relations ought to be abolished." (p. 89). In the first place, most of the "workers" are unaffected by the laws of inheritance because they fail to accumulate enough either to devise or to bequeath. For those whose economic status is such as permits the creation of inheritable estates, the interest in providing for their families after death is based upon a sound ethical motive of providing for those who need protection. But it also affords a vent for the ego as expressed by conditions in the will. Moreover, inheritance has a harmful effect upon the legatees by sapping their incentive to produce. A more desirable standard of social equality suggests that the state has an obligation to provide for all those who need protection. This will open the way for removing this unhealthy form of perpetuating social inequality and stunting individual growth.

Some comment is called for as to the significance of these essays, for if the above is a fair statement of the views of these four specialists, what now must an experienced probate lawyer think? Has he devoted his life to an unethical task of little significance and that little on the decline? There is presumably no intention that these four statements are to be considered as a harmony with one another. But even if they are only intended as the opinions of four experts, because of the absolutist tones and the lack of empirical basis in the expression of these opinions, the value of making them becomes questionable, even as an educational gesture to serve as a starting point of investigation. In the introduction to the booklet, Dean Vanderbilt of New York University indicates that these views were commented upon by outstanding judges and lawyers. It is suggested that in the succeeding efforts of these conferences, a transcript of these comments be appended to the original statement. The views of these specialists on the social meaning of this particular legal concept, if left standing alone, will not have the