

Accordingly, he asked to be allowed to rescind the contract without returning its benefits. The court denied this request, (Atkinson, J. dissenting,) laying down the general rule as applying alike to fraudulent contracts and to those of parties mentally incapable.

The court followed the general rule,—a plaintiff desiring to rescind a fraudulent contract must offer and be willing to perform such acts on his part as will restore the defendant to the position which he occupied before the transaction: Beach on Contracts, §§ 792, 793, 8 Am. and Eng. Ency. of Law, 806; *Jopling v. Dooley*, 1 Yerg. (Tenn.) 289, 24 Am. Dec. 450 (1830); *Morrow v. Rees*, 69 Pa. 368 (1871); *Wolf v. Deitzsch*, 75 Ill. 205 (1874); *Vanhiew v. Johnson*, 4 Hun, (N. Y.) 415, 6 Thomp. & C. 648 (1875); *Herman v. Hoffeneger*, 54 Cal. 161 (1880); *Cates v. Bales*, 78 Ind. 285 (1881); *Vance v. Shoyer*, 79 Ind. 380 (1881); *Balue v. Taylor*, 136 Ind. 138, 36 N. E. 269 (1893); *Bowden v. Achor*, 95 Ga. 243, 22 S. E. 254 (1894); *Duncan v. Humphries*, 58 Ill. App. 440, (Shepard, J., dissenting,) (1895); *O'Callaghan v. Lowdes*, 66 Fed. Rep. 356 (1895); *Gassett v. Glazier*, 43 N. E. 193, 165 Mass. 473, at 480 (1896). But it has been held that no restitution is required of insane persons: *Gibson v. Soper*, 6 Gray, (Mass.) 279 (1856); *Crawford v. Scovell*, 94 Pa. 48 (1880); and that the rule is satisfied if the judgment will put the parties substantially in *statu quo*: *Allerton v. Allerton*, 50 N. Y. 670 (1872); and that the fact that the parties cannot be put precisely in their original condition will not preclude a decree for rescission: *Gatling v. Newell*, 9 Ind. 572 (1857). If the goods are necessarily destroyed in discovering the fraud, no return is necessary: *Poulton v. Lattimore*, 9 B. & C. 259 (1829); *Smith v. Love*, 64 N.C. 439 (1870).

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## BOOK REVIEWS.

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COMMENTARIES UPON THE CONSTITUTION OF THE UNITED STATES HISTORICAL AND JURIDICAL WITH OBSERVATIONS UPON THE ORDINARY PROVISIONS OF STATE CONSTITUTIONS AND A COMPARISON WITH THE CONSTITUTIONS OF OTHER COUNTRIES. Three Volumes. By ROGER FOSTER, of the New York Bar. Vol. I. The Boston Book Company.

A careful and deliberate examination of this work, of which the first volume of more than seven hundred pages has been published, will satisfy the diligent student, judge or active practitioner, that it is a book of unusual merit and extraordinary value. Much was to be expected of the writer. His high and justly deserved reputation as an author of a Treatise on Federal Practice, his position as lecturer on Federal Jurisprudence at the Law School of Yale University, his inherited aptitude, as the son of a late member of the Supreme Judicial Court of Massachusetts, for the consideration of

the gravest of legal questions, his close relationship to the illustrious Roger Sherman, one of the Framers of the Federal Constitution, as well as his own keen interest as a scholar in the evolution of our national authority, and the many years of conscientious labor which he has expended upon politico-judicial problems, qualify him in an uncommon degree for the great task which he has undertaken. The partial result of his toil is before us. It is eminently satisfactory.

Mr. Foster approaches his subject in a true historical spirit. He is an original investigator. He explores and exhausts the sources and springs of information and authority. He accepts no statements at second hand. He is no slave of dogma. He brings no preconceived theories into view. He is not misled by great names or garbled extracts. He exhibits no partisanship. He strives as far as possible to ascertain the facts, and in doing so sifts the evidence with skill and discrimination. The facts, when found, are stated with boldness, irrespective of the effect such statement may have upon the favorite tenets of his readers. The reasoning that follows is calm and judicial. The result of such methods is a book remarkable for the care with which conclusions have been reached, and for breadth of view and liberality of spirit. The sciolist will probably contest many of his positions, but will have difficulty in escaping from the overwhelming effect of the original evidence exhibited in the notes to the text. These notes are as worthy of close study as the text itself. They display the wide and varied range of the author's knowledge, and attest his diligence. They are not—as is too often the case—mere random head-notes, raked together as the farmer rakes his hay in the mow-field, but are in themselves the most convincing proof of the accuracy of the text. Very frequently an examination of authorities cited *in notis* will shake the faith of the student in the power of the text-writer to generalize with accuracy, or at times will convict him of error. With Mr. Foster it is otherwise. If a statement of his challenges scrutiny, it will be found that his view is not only fully justified, but demanded by the authorities. Historic accuracy has been aimed at and reached.

The large amount of matter, including original documents not elsewhere collected into one series, as well as the attention paid to the result of recent researches into the sources of the Constitution, and the scope of the powers intended by the Framers, are striking features. If a comparison be instituted between this work and the Commentaries of Mr. Justice Story—which a writer of those days predicted would prove the most useful and imperishable of his works—or with the chapters on The Jurisprudence of the United States in Kent's Commentaries, a justification will be found for the production of Mr. Foster's book. In brief, it is thoroughly up to date. However learned and diligent Story and Kent were,—and they were incontestably both—the truth is they were too near to the causes of the events they narrate to judge with accuracy, or to

describe with fullness. No man can give a trustworthy account of a battle whose eyes are filled with the smoke of conflict. The work must be done by one of a later generation. While the pages of Story and Kent are full of the charm which belongs to contemporaneous narrative, yet the truth is that many sources of information were fast-sealed to them. Their texts give but imperfect and partial glimpses, and no amount of judicious annotation can supply what is lacking. A chart published in 1820 cannot be relied upon by the geographical student of to-day. During the past fifty years, and particularly during the past fifteen, vast storehouses of knowledge have been opened. The activity of State Historical Societies, the publication of the reports of the debates in the Federal Convention and State Conventions, and of Memoirs, the discussions of scholars upon controverted points, the discovery of documents, the diligence of collectors of autograph letters, the newly awakened zeal of grandsons and great grandsons of the statesmen of the Revolution, the printing of Diaries, the clash of magazines, the collection and tabulation of forgotten plans for the Union of the Colonies, the rescue from oblivion of the newspapers and pamphlets and broadsides of the day, as well as the impetus given to all lego-historical studies by the recent works of Stubbs, Freeman, Hannis Taylor, Holmes, Pollock and Maitland, have made necessary as well as possible Mr. Foster's work. Modern methods of investigation are not only searching but thorough. They are conducted with boldness as well as patience. They are eminently philosophical and are satisfied with nothing short of the truth, if it be attainable by methods which are human. The passions, the prejudices, the narrowness and perversity of by-gone times are often repeated in the discussions of to-day, but clearer and bolder perceptions are the result. While no man can hope to escape wholly from error, or strip himself of individual sympathy with certain leading ideas or theories of interpretation, yet it is refreshing to find a scholar of lofty aims, ample knowledge, and calmness of legal judgment devoting himself to the task of collecting and arranging all that will throw light upon the meaning and the growth of our federal relations.

The phenomena of the present can only be understood by a study of the past. Surprises doubtless are in store for those who are prone to believe nothing but good of the Fathers of the Republic. Many great names must be tarnished, many motives must be questioned, many narrow and selfish views be exposed, many shifty means laid bare, in the midst of high purposes and noble acts. But the discovery that our fathers were but human, and that many of the statesmen of the past were as cunning and unscrupulous as the politicians of to-day, does not lessen our interest in the great problem of self-government, although it may lead to a more sober view of the achievements of the past, while it cannot but strengthen the faith of those who are striving to overcome the gigantic evils of to-day.

The introductory chapter well describes the anarchy preceding the Federal Convention and the bitter hostility to its work. It summarizes very fairly the conflicting views brought to light by the labors of Professor McMaster and Dr. Frederic D. Stone, of Philadelphia, and Paul Leicester Ford, Esq., of Brooklyn. In describing the previous attempts of the colonists at union, while relying on *Preston's Documents Illustrative of American History*, it overlooks the valuable compilation of Dr. Stone, entitled *Plans for the Union of the British Colonies of North America, 1643-1776*, published by Mr. Carson, of Philadelphia, in his *History of the One-Hundredth Anniversary of the Framing of the Constitution of the United States*. It claims originality for the work of the Federal Convention, and, in our judgment, sustains this claim, after due allowance for certain prototypes and models, and after giving due weight to the fact that written Constitutions existed in all the States.

The second chapter fully discusses the nature of the Constitution and the Preamble, and treats exhaustively of Nullification, Secession, and Reconstruction. While stating dispassionately the arguments on either side, and exhibiting much interesting original matter, covering all that is of permanent value in a historical relation to questions now fortunately settled, it states with happy brevity the principles which have been established by the adjudications of the Courts, the action of Congress and the Executive, the acquiescence of the States and the arbitrament of war: "The United States are a nation. The union is not a league, and cannot be dissolved except by a revolution."

The steps by which this conclusion is reached, the various stages of the great debate over the Preamble, the original sovereignty of the States, the formation of the Constitution, the methods of State ratification, the Alien and Seditious Laws, the Virginia and Kentucky Resolutions of 1798, the Ordinances of Nullification and Secession, together with mighty utterances of conflicting champions both in the Senate and on the bench, are dwelt upon in more than two hundred and fifty pages in a manner that leaves but little to be added or desired. The conclusion is incontestable. Though legal casuists may still differ, and solace themselves with shreds of arguments which are now of no practical utility, the student who delights in tracing effects to their proper cause will find all that is necessary to enable him to form a judgment of his own, while he cannot fail to be impressed with the fairness of treatment accorded to the "lost cause." The iron logic of events is quite as potent as that of pure dialectics, and the effects of the conflicts over slavery in the territories, the necessary and inevitable growth of the war powers in the suppression of an unfounded right of secession, as well as the centripetal tendencies of our modern life, aside from the Thirteenth, Fourteenth and Fifteenth Amendments, are pointed to as clinching the conclusion. Constitutional history, as well as judicial precedents, is expounded and explained. The reader must conclude that national power is a growth, natural, necessary,

inevitable and proper; fraught with some dangers, but curing many and much more dangerous evils.

Next in the order of discussion is a consideration of the three departments of the government, and of the distribution of its powers. It has become so trite to speak of the merits of maintaining the separation of the executive, legislative and judicial functions, that many do not know the interest which attaches to the history of this classification, nor the difficulty with which it has been maintained. The President has at times defied the Supreme Court, the Supreme Court has defied the President, and the Congress has defied both. Conflicts threatening to be serious have at times interrupted the harmony of our system, and various views have been entertained as to whether there was or was not an encroachment, or whether the encroachment was permanent. Even such an authority as Professor Woodrow Wilson believes that the independence of the departments is but "the literary theory of the Constitution," and that in point of fact Congress is supreme—a view shared in by Senator Lodge, and possibly by Mr. Justice Miller. This view seems to us surprising, especially in the face of the fact that the Supreme Court has exercised the power to declare acts of Congress unconstitutional, because of conflict with the Constitution, in twenty-one separate instances, and in relation to statutes of States and Territories in one hundred and eighty-two instances, of which a list, complete up to 1888, is to be found in the Centennial Appendix to Volume 131 of the United States Reports. We are prepared to adopt the view of Mr. Foster that at the end of the century we find the three departments still retain their balance, each with its prerogatives unimpaired.

The examination made by the author into the origin of the powers of Congress, based on the proceedings in the Convention as to its composition, followed by chapters on the term of members of the House of Representatives, the Right of Suffrage, the qualifications for Senators and Representatives, the apportionment of Representatives and direct taxes, the filling of vacancies, the powers and prerogatives of the Speaker and other officers of the House, the Constitutional provision relating to the Senate and its officers—all fully illustrated and sustained by notes which in themselves provoke interest and rivet attention—is admirable.

The most notable chapter in the book is that upon Impeachment, a subject which has never before been treated with such thoroughness, and which derives new interest from the recent attempt to impeach an Ambassador representing the United States at the Court of St. James. The history of the Constitutional provision is well stated and the reasons are given for the trial of impeachments by the Senate, the selection of that tribunal having been severely condemned. The defence rests upon the views of Hamilton in the *Federalist*, and Story and William Rawle in their well-known works on the Constitution. But little could be added. The special features of the chapter, however, consist in the account of the various impeachment proceedings actually conducted against a

Senator of the United States, a Judge of the Supreme Court, several United States District Judges, of President Johnson, and of a Secretary of War. These are followed by a consideration of the persons subject to impeachment, whether during or after the expiration of their office terms, of impeachable offenses, of convictions, of the causes for which Federal officers may be removed, and of the method of procedure, and the proceedings themselves in cases of actual impeachment. The Appendix contains a succinct history of State Impeachment Trials from Colonial days to the present time, and reveals much that is curious and "caviare to the general." The diligence displayed in the collection of the material for this Appendix, and the success which has attended it, are notable. Many rare publications are referred to—some of them but little known, or long forgotten.

In conclusion, Mr. Foster has given to the student a work from which he can derive an accurate and luminous conception of the origin and growth of our constitutional jurisprudence; to the judge a reliable guide to the original authorities, and the means of sustaining a judicial judgment upon broad and well established grounds; to the statesman an opportunity of seizing in short time and in due order upon the underlying principles of our government, and to the practitioner, summoned to defend causes involving questions of national importance, an armory from which he may readily draw his weapons of defence.

*H. L. C.*

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THE FEDERAL COURTS; THEIR ORGANIZATION, JURISDICTION AND PROCEDURE. By CHARLES H. SIMONTON, United States Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co. 1896.

Judge Simonton, of the United States Circuit Court of the Fourth Circuit, has collected and revised five lectures delivered by him before the Richmond Law School, upon the Organization, Jurisdiction and Procedure of the Federal Courts. His purpose, as defined by himself, was "to take up each of these courts, and in a practical way, to ascertain its jurisdiction and explain its procedure."

His large practical experience with the questions involved peculiarly fitted him to deal with the subject, and he has stated with great clearness the rules which are to govern the practitioner in dealing with questions of jurisdiction and in framing the procedure to be followed.

After a brief examination of the effect of the common law upon his subject, the learned author describes the courts in turn, giving first the original jurisdiction of each, and then, where it exists, its appellate jurisdiction. The discussion of the removal of causes is clear and comprehensive. Procedure and practice at law and in equity are next considered, his treatment of the latter subject being very satisfactory. The criminal jurisdiction of the Federal Courts

is passed over briefly. It is of their admiralty side that the fullest statement is made, and a summary view is presented of the pleadings, practice, principles and administration of Courts of Admiralty. A more complete and yet concise treatment of that important subject is hardly possible, and it undoubtedly is the most valuable part of this work. A short review of the Court of Claims brings to a close a volume which will prove of great practical value.

A. G. D.

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A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND. By J. G. WOERNER, Author of American Law of Administration. Boston: Little, Brown & Co. 1897.

Probably this is the first work exclusively devoted to the law relating to guardians of minors and of persons of unsound mind, but the author's labor demonstrates the necessity and utility of such a book. His main object was to arrange and publish the law which "provides for the management of the property of those who are conclusively presumed, or adjudged, to be incompetent to manage it themselves." This he has done in an able manner. His former labors on *The American Law of Administration* fitted him peculiarly to treat of his present subject.

After an introductory chapter, the book is divided into two parts: I. Guardianship over Minors; II. Guardianship of Persons of Unsound Mind. Under the first he treats of the institution of guardianship over minors, of the functions of guardians, of the conversion of real estate of minors, and of the guardian's accounting. The second is divided into the procedure to establish the unsoundness of mind, the functions of guardians to persons of unsound mind, and of the close of guardianship.

Each of these titles is minutely divided, and by the aid of the very complete index, information is easily accessible.

The name of the publishers guarantees the mechanical excellence of the book.

W. B. L.

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AMERICAN RAILROAD AND CORPORATION REPORTS. Edited and Annotated by JOHN LEWIS. Vol. XII. Chicago: E. B. Myers & Co. 1896.

This useful series of reports is well known to the profession. There is but little need, therefore, for extended comment upon Volume XII. The volume is fully abreast of the standard set by its predecessors. Among the interesting cases which are reprinted in it are *Shellenberg v. Fremont, etc., Co.* (p. 27); *Union Pacific Railway Co. v. Johnston* (p. 31); *Ringwalt v. Wabash R. Co.* (p. 4); *Kentucky Wagon Mfg. Co. v. Ohio Ry. Co.* (p. 48), and *Shacht v. Ill. Central R. Co.* (p. 57)—all of which deal with questions connected with the rights and liabilities of railroads as common carriers. *Baillie v. Augusta Savings Bank* (p. 1) con-

tains a full discussion of the liability of a bank for the neglect of its correspondent in collecting a cheque. The note to the case (pp. 8-26) is a convenient collection of recent decisions. The decision of the Supreme Court of the United States, in *Town of Andes v. Ely* (p. 67), gives occasion to a note discussing the latest cases on municipal and railroad aid bonds. In *Montgomery v. Phillips* (p. 117) the Court of Errors and Appeals of New Jersey refuse to recognize the validity of an unrecorded mortgage given to one of the directors, who subsequently sought to enforce it at the expense of those who had given credit to the concern in ignorance of the existence of the encumbrance. This transaction was undoubtedly fraudulent and the decision was correct. It does not, however, necessarily involve the important question of the right of a corporation *bona fide* to prefer a director-creditor which is touched upon in the note (pp. 124-126). In *O' Bear Jewelry Co. v. Volfer* (p. 137), a bill prayed relief upon the theory that the assets of the defendant corporation constituted a trust fund of which the corporation was trustee and the complainants and other creditors *cestuis que trustent*. This contention was disposed of by the court. McClellan, J., in an able opinion, repudiated the so-called "American doctrine" that the property of an insolvent corporation is a trust fund for the benefit of creditors, and remarked that to his mind "there is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relations to the creditors of such corporation as the property of an individual or co-partnership, solvent or insolvent, sustains to the creditors of the individual or partnership and is or is not to be impressed with a trust for creditors upon the same circumstances and under the same conditions in the first case as in the latter two." This undoubtedly correct decision is rendered all the more valuable, because it seems to settle the law of Alabama on the subject by expressly overruling in straightforward fashion (so far as they were inconsistent) the earlier decisions of the same court in *Correy v. Wadsworth*, *Goodyear Rubber Co. v. Scott Co.*, and *Gibson v. Furniture Co.*

*Missouri Pacific Railway Co. v. Meeh* (p. 218) is followed (pp. 227-253) by an exhaustive note on corporations chartered by two or more states. In *Jones v. Aspen Hardware Co.* (p. 468), the Supreme Court of Colorado deals with certain questions connected with the organization of corporations under general laws. Mr. Lewis's exhaustive note upon this subject (pp. 474-522) contains a most useful discussion of the authorities.

The Index to Volumes VII-XII. contains references to both the reported cases and the notes. It is extremely full and satisfactory. The twelve volumes, as they stand, will be found most useful by any one who has occasion to investigate questions of railroad or corporation law or the kindred subjects named on the title-page.

G. W. P.