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## BOOK REVIEWS.

PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE LAW COURTS OF THE STATE OF DELAWARE. By VICTOR B. WOOLEY. In two volumes. Star Printing Co., Wilmington, Del.

As the years roll on the tides of time bear on their surface all sorts and kinds of printed craft. Many are weak and under the stress of criticism, or from deadly neglect, become wrecks, and either sink into the waters of oblivion, or as sodden and worthless flotsam and jetsam are cast on the shore of the sea of knowledge, to be destroyed. Others are strong and valuable, and make long and repeated cruises

carrying their freight of thought and learning to successive generations of readers.

It is strange that with the ever enlarging cumulative evidence of the contagion of the *cacoethes scribendi*, such a subject as that of the above title has not been seized and exploited long ago. Mr. Wooley's excellent treatise is the only one on Delaware Practice since the creation of the Provincial Court in 1684.

The author is to be congratulated as the first who has written, for the benefit of his profession, a useful and needed book; and also written it well. It has been no light task to define and simplify and express the Legal Procedure of his State.

There is a wide field for research in the history of Actions, and for the development of ingenious conceptions, and for theses upon substantive rights; in proof of which the ability and learning of Pollock, Hare, Ames, and other legal scholars may be cited. While Mr. Wooley shows his capacity for this aspect of his subject, he has not devoted his pages to theories, but has made his statements of Practice practical.

To the lawyer who resides in another Commonwealth, two thoughts are suggested by even a cursory perusal of these volumes. The first is that the reasonable celerity with which suits ought to be pressed, is prevented in Delaware by the paucity of terms of Court, and hence of return-days of process. In New Castle County there are four regular terms per year, and in Kent and Sussex Counties, respectively, only two terms; and writs are made returnable to the first day of the next term after issue. Contrasted with Pennsylvania, especially where, as in Philadelphia, optional return-days have been added, under statutory authorization (making four in every month), this tardy conduct of the beginning of a suit may seem antiquated, and in some instances even like a denial of justice.

The second thought—and a very different one from that just mentioned—is that those concerned in the administration of the law of Delaware have escaped that legislation, in bulk or in disjointed fragments, by which established procedure has been obscured or obliterated in some other States. Happily in the jurisdiction described in this book men with a genius for drawing Acts of Assembly have not been largely, strenuously, and continuously in evidence.

Now knowledge of Practice is important; the obligation to conform to legal requirements, either of the common or statutory law, is the every day thought of all attorneys in active business. Even a judgment by confession or by default must be regularly entered, and for accuracy in such

cases Mr. Wooley gives full directions. If, however, there be a contested suit, it is carried on not by a guerilla warfare, but the attack and the defence are conducted on systematic lines. Hence instruction is provided for each step in the progress of the cause. Beginning with the Courts and their several jurisdictions we find succinct but comprehensive paragraphs and sentences through the whole course of litigation to judgment and writ of error. Forms (which are so helpful to the neophyte and even to the older lawyer) are found in appropriate places, not bunched in an appendix. The true notion of the merits of this *vade mecum* can be gained only by reading it, but the following is a further brief notice of its contents.

The division of topics is natural and logical. Thus in successive chapters are found these:—Parties to Actions, Joinder of Parties and Actions, Commencement of Actions, Proceedings between Return and Pleading; and then follow five chapters on the Pleadings, and the closing subjects of the first volume include Proceedings between Issue and Trial, (Trial by Jury, Court, Referees), Judgments and Proceedings in Error. The second volume is given to Executions and to separate treatment of the different forms of action in force in Delaware. This orderly arrangement is made possible by the retention with wise modification of the Common Law Procedure.

The changes that may be noticed do not injure the symmetry of the old Practice, but are beneficial. Some of these relate to the adoption of the affidavit of defence law of Pennsylvania, the Statutes on Mechanics Liens, (which are not too intricate for the ordinary legal mind to grasp), Interpleaders, opening Judgments, Issues from the Registers of Wills,—but there is not room in a review to name them all. On the whole there are fewer departures from the common-law than in any other of the States of the Union.

C. J. Mitchell has said (See "Hints on Practice in Appeals" 52 AM. LAW REGISTER, p. 338), that Practice "is a mass of particulars"—and again that it "involves two things,—first what to do, and secondly, how to do it." Hence it means laborious thought and attention to minute details. Mr. Wooley has bestowed great labor on this pioneer book. His citations of decisions and statutes are ample but not burdensome. His style is clear, and since (as he states in the Preface), "A large portion of the practice of the law courts in the State of Delaware is unwritten law," his work may well be called original. The book is valuable not only to "student and practitioner," but to the non-resident lawyer who is interested in comparative procedure, and it is evidently

the product of extensive practical experience, much care and study, and of general legal ability. *J. W. P.*

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TRIAL TACTICS. By ANDREW J. HIRSCHL of the Chicago Bar. Chicago: T. H. Flood & Co. 1906. Pp. vii., 264.

The author of this book does not pretend to furnish a specific insuring success in litigation to the practitioner. His purpose is to give to the young lawyer practical suggestions as to the skilful conduct of a lawsuit,—suggestions resulting from experience rather than from familiarity with legal principles. Mr. Hirschl has had a varied and active practice of nearly thirty years and from this personal experience he has no doubt discovered effective ways of meeting the problems of the advocate. Books of this kind will always attract the young lawyer, and besides proving of practical value will furnish interesting reading.

The chapters cover the various steps of litigation, and in addition to discussing methods of handling the situations which necessarily arise in the normal case, include suggestions of various strategic moves which in many instances would no doubt prove advantageous.

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THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES. From the Revolutionary War to 1861. By FRANK GEORGE FRANKLIN, Ph.D., Professor of History and Political Science in the University of the Pacific. The University of Chicago Press, Chicago. 1906. Pp. ix, 308.

For obvious reasons the subject of naturalization assumes unusual importance in the United States, and it is in recognition of this fact that this volume is offered to the public. The various naturalization acts are traced through Congress and their general purport and purpose succinctly stated. The beginnings of the opposition to immigration are outlined and the cause of such opposition examined. The book presents a readable and valuable summary of the facts in this connection. It is a satisfactory study of the course of opinion on the subject of naturalization as manifested in the discussion, reports and legislation at the central forum of American political life—the professed purpose of the author.

PROBATE REPORTS—ANNOTATED. Vol. X. Containing Recent Cases of General Value, Decided in the Courts of the Several States on Points of Probate Law. With notes and references. By WILLIAM LAWRENCE CLARK, of the New York Bar, Author of "Clark on Contracts," &c. Pp. 709. New York: Baker, Voorhis & Co. 1906.

This volume of the Probate Reports follows in general the plan of the preceding volumes. It contains a few more than a hundred cases dealing with such subjects as descent and distribution; appointment, powers, duties and liabilities of executors, administrators, guardians and testamentary trustees; formalities of execution and revocation of wills; likewise, their vesting, payment, abatement, satisfaction and ademption, etc. The feature begun in Volume IX, of this series of appending to certain of the more important cases notes referring to decisions bearing upon apposite principles is continued in the present volume. There appear also, for the first time, memoranda of recent decisions other than the cases fully reported. These are collected at the end of the volume in an appendix, and in the future will constitute a prominent part of the publication, it being announced that hereafter the cases fully reported will be accompanied by many exhaustive, monographic notes thereto, and also an annual digest of all the other decisions during the year of general application and importance on questions of probate law and practice. In the present volume only twenty-nine pages are devoted to such memoranda; but hereafter, it is designed to make such digest complete. The value of this new feature of this publication is obvious, and will commend itself to practitioners generally, particularly to those whose labors are principally in the probate courts.

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PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT. By Sir WILLIAM R. ANSON, Bart., D.C.L. Eleventh English Edition. Second American Copyright Edition, Edited with American Notes by ERNEST W. HUFFCUT, Dean of the Cornell University College of Law. Oxford University Press, American Branch, New York, Pp. li, 464.

Sir William Anson's treatise on the law of contract holds an enviable place among text-books, and its merit has won it a recognition which renders commendation unnecessary. In the present edition the author has himself revised the text

and by citation of leading recent authorities has brought the book up to date. A careful comparison of the present edition with former editions shows more than a perfunctory revision. While the author has not found it necessary to depart from the statements made by him on previous occasions, these statements are in numerous instances recast in clearer and simpler form. The selection of recent decisions is made, it is perhaps needless to say, with admirable discrimination. It does not profess, however, to be more than a selection.

In form the book is somewhat changed, the original annotations being abandoned, and in their place paragraph headings being substituted, These headings have been given with evident care, and in addition to the fact that they more readily catch the eye than the former annotations, they seem to us to be an improvement both in respect to their larger number and their contents.

Professor Huffcut has expanded the American notes to a marked degree, and has rendered a valuable service to the many American lawyers who have found in Sir William Anson's book a satisfactory analysis of the principles of contract.

With the printer's aid the material has been compressed into a book of the same size as the former American edition, and there is thus lost something of the attractive appearance of the earlier edition, which was almost a model of law-book printing. But in view of the modern tendency to expand legal treatises into series of volumes, this effort to present the subject in compact form will no doubt meet with favor.

Were it not for the fact that Anson on Contracts is an authority the merit of which is universally recognized we should with pleasure take this opportunity to refer to its many points of superiority. Under the circumstances such a discussion of the book would be, we believe, superfluous.

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PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY. By Sir FREDERICK POLLOCK, Bart. Third American from the Seventh English Edition. With Annotations and Additions by GUSTAVUS H. WALD, Late Dean of the Law School of the University of Cincinnati, and SAMUEL WILLISTON, Weld Professor of Law in Harvard University. New York: Baker, Voorhis & Co. 1906. Pp. cliv. 985.

This work and the recently published edition of Anson on Contracts, edited by Professor Huffcut, will serve better than any other two text-books on the subject to place before the

reader the contemporary views of English courts upon the subject of contracts.

To the practitioner who seldom puts text-books to any use except as guides to cases this American annotation of Pollock's book is a most valuable asset. Here he will no doubt find as much material in the form of annotation as in Professor Huffcut's new edition of Anson. The searches of these two annotators for the various flora and fauna of American contractual theories in different latitudes have probably left no contract specimen uncollected or uncatalogued that exists to-day between the Gulf of Mexico and Hudson's Bay.

This new edition of Pollock's book contains much matter written by Professor Williston which is supplemental to the last London Edition (the seventh). As this matter is inserted in the text without other warning than in the preface, the authorship of the text is capable of being misunderstood unless the preface is first read,—a task contrary to the common habit of practitioners and students. The result is that Professor Williston's original work receives whatever acceptance is usually given to Sir Frederick Pollock's views and Sir Frederick Pollock will obtain credit for a great deal that he never wrote. If, however, the members of this intellectual copartnership are satisfied with the arrangement, the rights of third parties are probably not further affected than by being put to the trouble of determining the authorship of the text where authorship is material. As an authority the author and the annotator are probably of equal weight. Professor Williston, desiring to complete the unfinished text of Sir Frederick Pollock's work, has written pp. 237 to 278, on "Contracts for the Benefit of a Third Person in the United States"; pp. 333–369, on "Repudiation of Contracts," and pp. 811–880, on "Discharge of Contracts." Whatever criticism might be made from a literary point of view as to these interjections, the only one of substantial nature is that in fairness to the reader there should be some notice given him at those points where he passes from the one author to the other. We believe, however, that the increased circulation which in its present form will be given to much of Professor Williston's work heretofore appearing only in the *Harvard Law Review* fully compensates for any objections to the style or manner in which that end is accomplished. It is to be hoped that the practitioner will not omit to use this work in conjunction with the very valuable collection of cases on contracts published in 1903–4 by Professor Williston, which is also quite fully annotated.

Before passing from the subject of the annotations and

supplements made by Professor Williston to the work of Sir Frederick Pollock, we venture to hope that Professor Williston will at some future time publish an original treatise on the subject. The annotation of Greenleaf on Evidence by Professor Wigmore produced a patch-work which impelled the annotator to write an independent treatise. Unless a similar result follows in the case of Professor Williston we shall certainly regret if as a substitute for such a work he accepted the conditional gift of the notes of the late Professor Wald and elected to appear in his present dual rôle of author of part only of the work and annotator of all.

Concerning the text of Sir Frederick Pollock's book we now desire to make some comment.

It should never be forgotten that Sir Frederick was the first modern writer on Contracts who appealed to the Year Books for light on the origin of contractual theories of English law, and if his contributions to the knowledge of the early history of assumpsit and of consideration have not been as valuable as those of later writers we must always feel that he deserves all the honor accorded to the hardy pioneer.

Had not Sir Frederick by examining the Year Books shown in his first edition that some light should be obtained from them concerning the origin of assumpsit, probably Mr. Justice Holmes, Judge Hare and Professor Ames would never have been stimulated to make those more thorough researches into the Year Books which fortunately have finally thrown some light upon the origin of the English bilateral contract.

Sir Frederick himself said of Mr. Justice Willes that from Willes he "learned to taste the Year Books", and our American scholars owe to Sir Frederick's example at least an increase of appetite.

Students seeking an introduction to the law of contracts by the aid of some text-writer do not, however, find this work sufficiently clear in style and arrangement to cause them to prefer Sir Frederick's guidance to that of either Sir William Anson or Professor Harriman or Professor Lawson. To say that the work is designed for advanced students or for active practitioners but not for beginners is to confess that the elementary principles of contract are not lucidly stated. The work is that of the theorizer, the weigher of ancient influences and tendencies, the erudite scholar learned in the law of Germany and of Rome as well as in the law of England. The author is arguing upon evidence which he assumes his reader has already heard and digested. The reader too often has never heard or comprehended the evidence, and is consequently frequently confused rather than aided. There is in

fact so much reference to Roman law, to Germanic law, to the law of Bracton, to the Continental law, that these references are of interest only to a very advanced student of contracts; certainly of no interest to the practitioner; and the tyro in trying to swim with the current is lost in some medieval eddy. The style is rather that of the philosophical speculator than that of the didactic instructor.

On the subject of the origin and development of the doctrine of Consideration in the action of Assumpsit the text from the first edition to the present has always been confusing to the beginner, and is still not wholly free from obscurity to the more experienced reader. Thus, why did the author interject into the middle of his account of the formal contracts of English law—the specialty, the written contract as required by the statute of Frauds, the contract of record—a discussion of the introduction of Assumpsit, an action brought only to enforce informal contracts? One explanation might be that the author wished to complete his narrative concerning the early writs—Debt and Covenant—but the effect on the inexperienced mind is confusing. Another reason for the awkward arrangement might be—probably is—that in his first edition the author did not associate exclusively the action of Assumpsit with Consideration. After the chapter on formal contracts follows a chapter on "Consideration."

In the original edition the author fell into the error (which as we shall hereafter show he has fully acknowledged but not in the present edition) of tracing Consideration to the "*causa*" of the Roman law. (First ed. p. 149).

The author in his first edition frankly admitted that "the history of the English doctrine is obscure, at least the present writer has found it so." (First ed. p. 149.) Our criticism is designed to point out that in view of the original confessed errors of the author—errors assuredly pardonable in a pioneer—the entire discussion of Consideration ought to have been rewritten, instead of the attempts to patch up former defective construction by taking off old shingles here and there and putting on new ones.

It is to be regretted that the American editor has not reprinted in the form of a foot-note or appendix Sir Frederick's own statement of his indebtedness to two American scholars for their researches into the history of Consideration. The importance of this note can only be understood by reading at least a portion of it:

" . . . the action of Assumpsit was a special kind of trespass on the case, an action for damages incurred by the plaintiff through

the defendant's failure in a duty voluntarily "assumed" by him; and one kind of action on the case which contributed to the development of Assumpsit was the action of deceit, founded expressly on the plaintiff's actual damage, incurred through the defendant's fraud. . . . Judge Hare in his treatise on Contracts and Mr. Ames in the *Harvard Law Review*, have insisted with much force on this aspect of the history. They have been the first to make out an organic connection between the tortious character of Assumpsit and the doctrine of Consideration in its early form.

On the whole it would appear that the quid pro quo of debt remained in strictness what it was before, but for all practical purposes was merged in the wider generalization derived from Assumpsit; and that the "detriment to the promisee" which is essential to Assumpsit was independently developed as the criterion of a duty arising, in its original conception, not from a promise at all. . . ." (Sixth London Ed. pp. 700-701.)

Thus two American scholars, Hare in 1887 and Ames in 1888, after an infinite amount of patient study of the Year Books, discovered that the English "consideration" was not the offspring of the Roman "*causa*" but that the conception resulted from the thought that if a man promised to build a house for another who promised to pay on completion, the builder's neglect to perform was such a breach of good faith that the term deceit could as well be applied to nonfeasance as to misfeasance. The fact that there was a counter-promise to pay on completion saved the promise to build from the fate of all gratuitous undertakings, but the life-giving element was not the reciprocal promise but the ethical conception of deceit—not, however, deceit in its now recognized technical meaning. But the author gives no explanation of the sense in which the term "deceit" was employed in English contract law when the bilateral contract was invented. Sir Frederick on another occasion, in the pages of the *Harvard Law Review*, fully acknowledged his indebtedness to the two writers above mentioned. In speaking of a continental theory concerning an action *de dolo* on an "informal pact" he observes:

"This offers a striking parallel to the influence of the action of deceit in forming the English doctrine of Assumpsit, which is now put beyond question by the researches of Judge Hare and Mr. Ames." (*Sixth Harvard Law Review*, p. 391.)

One might fairly suppose that the intellectual debt of Sir Frederick to his two joint creditors in America would have been noted in the Seventh London Edition (which Professor Williston has now annotated) with the same fulness in which the recognition was made in the appendix to the Sixth edition. As a matter of fact the present edition omits the entire appendix on the History of Consideration; Judge Hare's

name or book is never mentioned either in the text or notes, and Professor Ames' connection with the history of Assumpsit is inadequately stated in the notes. The same clumsy plan of discussing Assumpsit in one chapter together with the Statute of Frauds while Consideration is treated in another chapter is still followed. It is true that Professor Ames classical Essay on Assumpsit is cited in the notes, but no one in examining those notes (p. 192) would imagine that Professor Ames had done more than dispel Sir Frederick's early misconception that "consideration" was derived from the Roman "*causa*." In neither text nor notes is Professor Ames credited with more than making a "full and careful historical discussion of the whole subject which supersedes all previous researches." (p. 155, note.)

The researches made and material accumulated by American scholars would seem to demand more extended presentation and recognition than is given if the reader is entitled to be duly informed of the results of modern scholarship.

*C. D. H.*