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## Book Review: A TREATISE ON THE LAW OF CONTRACTS. by Samuel Williston. Third Edition by Walter H.E. Jaeger

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# BOOK REVIEW

A TREATISE ON THE LAW OF CONTRACTS. By *Samuel Williston*.

Third Edition by *Walter H. E. Jaeger*. Vols. 1-5. Baker, Voorhis & Co., Mount Kisco, N.Y., 1957-1961. \$20 per volume.

One of the few treatises which are authoritative in themselves instead of being merely reference books and sources from which authorities may be derived.<sup>1</sup>

This brief, but highly significant quotation, accurately sets forth the firm and lofty position this great work has attained in the critical estimation of the American bench and bar. Will Doctor Jaeger's current revision of this classical treatise enable it to maintain its dominant position in the field of contract law? Definitely yes, in your reviewer's opinion. Although understandably not wholly without flaws, Dr. Jaeger's patient and inspired scholarship has not only modernized but improved the original work. This reviewer's comments will be grouped under five headings, as follows: shortcomings; improvements and innovations; intellectual independence; the judicial quotation technique; and practitioner or philosopher.

## SHORTCOMINGS

The work is voluminous. This is regrettable, but likewise inevitable. American courts of last resort are pouring out opinions at a prodigious rate. Although, perhaps, a majority deal with some aspect of contract law, fortunately all of these cases do not generate new, or materially qualify old, principles of contract law. Nevertheless, the bulk of significant cases is tremendous and their selective inclusion in a modern treatise is accordingly imperative. Twenty-eight out of the proposed sixty-one chapters<sup>2</sup> of the current revision of this great

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1. *Blanken v. Bechtel Properties, Inc.*, 194 F. Supp. 638, 640 (D.C. D.C. 1961) *aff'd per curiam*, 299 F.2d 928 (D.C. Cir. 1962).

2. Volumes One to Five, inclusive, have now been published. They run to approximately five thousand pages, or an average of one thousand pages per volume. The completed work will probably exceed twelve thousand pages. The twenty-eight chapter headings in Volumes One through Five are worthy of enumeration. They are, in numerical order: Definition of Terms; Requisites of informal contracts; Making of offers; Duration and termination of offers; Ac-

treatise have now appeared in print, and the publishers estimate that the finished work will run to fourteen volumes.

A substantial contribution to the size of the treatise is its inclusion of many topics closely related to, and necessary for the reader's understanding of, contract law. Major attention is devoted to contracts of agents and fiduciaries, the statute of frauds, rules of interpretation and construction, the parol evidence rule, sales, insurance law, and real estate transactions. Less detailed and often incidental treatment is given such topics as the law of infants, labor law, administration of decedents' estates, trusts, guardianship, suretyship, mortgages, judgments, creditors' rights, and partnership and joint ventures. In future chapters we are told to expect detailed treatment of equitable estoppel, forfeitures, rescission, restitution, and specific performance, together with incidental study of bailments, negotiable instruments, damages, restraint of trade, bankruptcy and arbitration. Inclusion of all this related material necessarily adds both to the bulk and to the utility of the treatise. As stated by Doctor Jaeger in his Preface to Volume One: "The editor has striven without stint to continue in the true Williston tradition and to make this treatise not only the leading authority on contracts, but a compact library on the ever-expanding range of subjects involving contractual relations."

The technical shortcomings in the new edition are few. The worst, in your reviewer's opinion, is the total absence of point citations except where necessarily reproduced in an exact quotation. Point cites are a great help to the user. Their use saves time and avoids frustration. Moreover, they stamp a citation as complete and in accordance with longstanding traditions of scholarly excellence and carefulness. Another technical shortcoming is the absence of case dates. Their deliberate omission is doubtless due to the publisher's belief that case dates "date" a treatise and impair its sale as the treatise adds years to its age. This reminds one of the determined efforts of many mem-

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ceptance of offers; Consideration; Promises without assent or consideration; Formation of formal contracts; Capacity of parties; Infants; Insane and intoxicated persons; Married women, corporations and others; Contracts of agents and fiduciaries; Joint duties and rights under contracts; Contracts for the benefit of third persons; Assignment of contracts; The Statute of Frauds—promises to answer for the debt of another, contracts in consideration of marriage; Contracts or sales of any interest in lands, contracts not to be performed within a year; Contracts for the sale of goods; Effect of failing to comply with statutory formalities; Satisfaction of the statute by acceptance and receipt or part payment; Satisfaction of the statute by a memorandum in writing; Interpretation and construction of contracts, the parol evidence rule; Usage and custom; Express conditions; Waiver, prevention or repudiation as excuses for nonperformance; Excuses for nonperformance of conditions or promises in various kinds of contracts; Excuses for nonperformance of conditions in insurance policies; and Excuse of conditions and promises which would cause a forfeiture or penalty.

bers of the fair sex to conceal their true age. The reader is left to judge for himself the success of efforts of this nature. Certainly the absence of case year dates handicaps the careful brief-writer in tracing the history of a chain of authority.

### IMPROVEMENTS AND INNOVATIONS

The new edition contains many improvements and a few innovations, some of major and others of minor importance. Professor Williston's characteristically long paragraphs are broken down into smaller and more convenient idea units. This simple improvement is conducive to a surprisingly large increase in readability and understanding. Almost usurping the function of "Words and Phrases," the Third Edition in Chapter 22, Interpretation and Construction of Contracts, §609B, presents case citations for cases discussing, defining and applying the meaning of no less than three hundred ninety-nine words and phrases, ranging from "absolute assignment" to "written instrument."<sup>3</sup> We hasten to add that the work nevertheless avoids very satisfactorily the prevailing tendency of law book writers to produce merely elaborate "case finders" instead of analytical treatises.

Jaeger has substantially expanded his treatment of several topics of steadily increasing importance, notably: contractual relations in the field of labor law; subscriptions, charitable contributions and estoppel; contracts for the benefit of third parties; and manufacturers' implied warranties. The trend under the last-named topic to supersede the decaying doctrine of lack of privity between the manufacturer and the ultimate purchaser with the modern doctrine of implied warranty of fitness for the contemplated and intended use is particularly satisfying. In fact, Jaeger's careful delineation of trends and deviations from ancient rules, supported with apt illustrations, is one of his outstanding contributions. The other, in your reviewer's opinion, is his frank recognition of the primary importance of statute law today in extending, curtailing, modifying or superseding the old common law rules. His realism is refreshing and greatly to be commended. During the writer's law school days, cases turning on a point of statute law were usually ignored or contemptuously dismissed as temerarious intrusions upon the sacred domain of the common law. Closely related to the stress upon statutory changes in the law is Doctor Jaeger's innovation in the form of tables of statutory changes.<sup>4</sup> These compact gold mines of information are the

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3. There are 420 footnotes in this section alone.

4. The statutory tables referred to are as follows: §§ 219A, Table of Statutory Provisions on Seal; 269A, Table of Statutory Provisions affecting Capacity [of married women to contract]; 310A, Table of statutes Authorizing Executors

busy lawyer's dream. The writer is also aware that they are likewise the publisher's headache because of the research time and great expense involved in their production.

### INTELLECTUAL INDEPENDENCE

Despite his recognition of the limited role of a reviser and editor of the work of another, Doctor Jaeger does not hesitate to display his intellectual independence where, in his opinion, such independence is required. For instance, he has not slavishly followed the Restatement of Contracts where its accuracy is found to be questionable, although yielding it the great deference which it clearly merits.<sup>5</sup> Where its attempted "restatement" of the law has not been adopted or followed by the more recent cases, or where fresh exceptions have been carved out by the adjudicated cases, he has very properly stressed case authority rather than Restatement logic. A comparison between Restatement of Contracts, §65, and Williston, §82A, Acceptance by Telephone or Teletype, well illustrates this commendable characteristic. As your reviewer pointed out many years ago,<sup>6</sup> "Authority is divided as to when and where negotiations by telephone are completed. It is too early to predict final victory for either view." It is still too early; the battle continues!

Nor does Jaeger hesitate to differ with other acknowledged authorities upon occasion, as in § 632, note 1, where he takes careful

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or Administrators to Continue Decedent's Business; 312A, Statutory Modification of Personal Liability of Trustees; 314A, Table of Veterans' Guardianship Statutes; 336A, Table of Statutory Changes in Joint Obligations; 344A, Table of Statutes Modifying the Rule of Survivorship; 489A, Table of Statutes Requiring Agent's Authority to Be in Writing; 506B, Statute of Frauds—Table of Statutory Modifications; 526A, Table of Statutes—Statute of Frauds, Void or Voidable? and 567B, Statute of Frauds: The Note or Memorandum.

5. The Revised Edition (1936-1938) was largely launched to support the Restatement of Contracts; the following appears in the Preface to that edition: "It is well known that the American Law Institute's Restatement of the Law of Contracts is largely based upon the original edition of this book, its author having been the Reporter of the Restatement . . . they [the author of the first edition, Professor Williston, and his collaborator on the revised edition, Professor Thompson] have made it a primary purpose in their undertaking to provide such an exposition of the decisions and reasons supporting the rules of the Restatement as might fairly take the place of the treatise which was originally planned as a part of the Institute's publication. To this end, the presentation of the law in the revised treatise has been carefully collated with the Restatement, the various sections of which are referred to, wherever appropriate, throughout the text and notes. The distinctive contributions of the Restatement are pointed out and evaluated and the position of the Restatement on all controversial subjects defined and supported."

6. CONWAY, *OUTLINE OF CONTRACTS*, 2d ed., p. 66.

and well-reasoned exception to Wigmore's pronouncement that the parol evidence rule is not a single rule but actually is four rules closely related to one another.<sup>7</sup>

### THE JUDICIAL QUOTATION TECHNIQUE

Jaeger's most notable and conspicuous departure from Professor Williston's normally terse style of presentation is found in his vastly increased use of extracts from pertinent judicial opinions. Selected cases are frequently introduced by elaborate and picturesque descriptions of the material facts, often in the words of the court itself. And in text as well as in footnotes we find copious and extensive *verbatim* judicial quotations relating to the propositions of law involved in decision after decision. I call this the "judicial quotation technique."

Some commentators will doubtless disapprove of this departure from the "normal" treatise style, or at least disapprove of such constant and repeated use as is found in this Third Edition. One obvious argument sure to be raised is that this technique is extremely prodigal of space, thereby unduly expanding the length of the treatise,—specifically, from nine volumes to an estimated fourteen. Another adverse comment may well be that the busy lawyer looks primarily for the ultimate distillation of the rule of law involved under a given topic (at which accomplishment Williston himself was a past master), and only after that to the footnotes thereunder to discover the pertinent case or cases from his own jurisdiction and to verify the "weight of authority" upon the point. Such stylistic forays, in other words, however readable and admittedly informative upon the particular case under the reviser's scalpel, often hinder rather than help the hurried searcher in coming to grips with his particular problem.

Against these possible objections to the judicial quotation technique it should first be pointed out that by far the major portion of the expansion in physical size of the treatise is due to the reviser's conscientious incorporation of all significant, pertinent cases decided by courts of last resort since the appearance of the Second or Revised Edition. Entirely new sections, readily identifiable by the affix "A," "B," or "C" placed immediately following the section numeral, have also contributed substantially to the increase in physical size.<sup>8</sup>

The second anticipated criticism possibly has some merit. Some users of the treatise may feel annoyed at having to work through so much illustrative material before reaching their objective. On the

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7. Another example is afforded by § 69B where issue is taken as to the date when corporation subscriptions become effective.

8. There are almost 150 of these new sections in the first five volumes.

other hand, the less hurried and more thorough user will find his comprehension sharpened and deepened by a reading of such *verbatim* extracts, even if only as background for his particular problem. Moreover, generous quotations permit the user to determine with great certainty whether or not the cited and quoted case is actually in point and merits a reading in full. Lacking time to look up and read in full all cases cited to his point, the judicial quotation technique probably constitutes the next best method of assuring accuracy and understanding. The present reviewer has often heard Professor Jaeger stress the value of becoming familiar with "the actual language of the judges."<sup>9</sup> In graduate classes, as well as in the preparation of a definitive treatise such as the one under review, your reviewer casts his vote with Professor Jaeger. Only in the area of undergraduate legal instruction would he stress, instead, the neophyte law student's ability to paraphrase in his own words the rule or rules of law announced in the opinion. Otherwise it is impossible (before examination papers are read!) to know whether the glib response of the student in language lifted bodily from the opinion under discussion stamps him as a discerning scholar or as an uncomprehending parrot.

#### PRACTITIONER OR PHILOSOPHER

Williston was — and is<sup>10</sup> — a realist in the common understanding of that term. "He always keeps his feet on the ground," observed an older lawyer to me some years ago, "and you don't have to be a philosopher to follow him." Looking back to the days when he sat in Professor Williston's class in contracts, your reviewer would add to this observation the recollection that Williston invariably chose simple, uncomplicated illustrations and direct and uncomplicated suppositious cases. I shall never forget his old horse, Dobbin, his "yellow canary bird," or the man to whom I promised ten dollars if he would "spade my garden." Especially vivid in my memory is the enjoyment of my classmates and myself on a particular morning when, with twinkling eyes but the solemnity of a judge, he assured one tense and unbelieving young dissenter that "a dollar yellow canary bird is magnificent consideration for a promise to pay one hundred dollars."

This simple, direct, almost "folksy" approach was not affectation. Williston used it because he thought best and taught best in simple

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9. In emphasizing this concept Jaeger has distinguished predecessors, of course. E.g., Lord Coke urged law students and practitioners alike "*pretere fontes*,"—to seek the fountains of learning, i.e., the original sources.

10. He is now 101 years old and at this writing is living in retirement in Cambridge, Massachusetts.

terms. As might be expected, his written style was similar. Like Wigmore, Williston was not satisfied to state merely what the cases held; he probed deeply for the basic concept that squared both with logic and with the adjudicated cases upon the point. Having to his satisfaction found and announced it, he was never hesitant about branding a maverick decision (the delight of the reformer and theorist) as unsupportable and not to be followed by the careful reader. I am deeply pleased to observe that Walter Jaeger has carried on in this—to me—great tradition. Williston's superb treatise was and still is primarily and purposely a working tool for the practicing lawyer and judge.

Not everyone approves of this hard-boiled, realistic approach. A distinguished teacher, brilliant legal philosopher, and valued acquaintance of the present reviewer in writing a review of the 1938 or Revised (second) Edition of Williston's treatise, summarized his divergence from Williston's views as follows:

To me it seems clear that the future of American law in general, and of the law of contracts in particular, lies not along the lines of an ever more rigidly controlled and 'scientifically' accurate statement of the law of the cases,<sup>11</sup> but in a philosophic reexamination of basic premises. This philosophic inquiry will inevitably distract attention somewhat from the task of stating 'the existing law,' and will concentrate attention on the forces which have made law in the past and are making it for the future. In this study of forces which operate across time, the illusory present instant will tend to disappear, and with it, the law that merely 'is.'<sup>12</sup>

There speaks the philosopher! Perhaps he is correct in an ultimate sense. But can you conceive of the dismay of a practicing attorney seeking help from a treatise conceived and presented in such terms?

As a corollary, Fuller would shape his legal rules according to an enlightened view of public policy rather than according to logic and *stare decisis*. Every man (or at least every treatise writer) should be a philosopher-king in the sense of Plato's Republic, and should create law from the pinnacle of his own superior understanding of what is best for all! To quote Fuller once more:

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11. The viewpoint of the extreme segment of the realistic school of thought is best expressed, perhaps, in another review of the second edition: Walter W. Cook, "Williston on Contracts: Revised Edition," 33 ILL. L. REV. 497 (1938).

12. Fuller, "Williston on Contracts, Revised Edition," 18 N.C.L. REV. 1 at 14 (1939).

*Where we spoke of 'logic' carrying the burden alone when 'policy' fails, Williston generally invokes 'policy' only when 'logic,' operating on certain inherited 'fundamental conceptions,' fails to yield a satisfactory answer.<sup>13</sup>*

But is not this practice, which Williston is correctly accused of following, precisely what every cautious and thoughtful judge does, viz., follow logic and guiding precedents as far as they will carry him and only then venture to indulge in interstitial judicial legislation based upon his concepts of desirable social policy?<sup>14</sup> Would not any other approach give us a government of men rather than a government of law? The experience of Anglo-Saxon men from Runnymede to the present day confirms it. Samuel Williston is in good company.

PAUL R. CONWAY\*

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13. *Id.* at 10.

14. In this connection, § 615A. Agreements Affected by Public Policy, and § 626. Secondary Rules: Contracts Affecting a Public Interest. The new edition of Williston contain[s.] many illustrations.

\* Member of the New York and federal Supreme Court Bars, recently Professor of Law at The American University, Washington, D.C.; author of OUTLINE OF CONTRACTS.