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Book Reviews

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BOOK REVIEWS

HANDBOOK OF THE LAW OF CONTRACTS. By *Laurence P. Simpson.*† Pp. xix, 510. West Publishing Co., St. Paul, Minn. 1965. $8.50.

PRINCIPLES OF THE LAW OF CONTRACTS. By *Grover C. Grismore.* Revised Edition by *John E. Murray, Jr.*†† Pp. lv, 528. The Bobbs-Merrill Company, Indianapolis, 1965. $13.00.

The one-volume contracts text is principally directed to a market of first-year law students. They are rarely specified as study materials by contracts teachers; the case method supposes that the students will use original materials, the reported cases themselves, though the modern casebook is composed of severely edited cases, pointed questions and notes designed to develop "the issue," and excerpted statutory and textual material.

The purpose of the case method is not the imparting of information. Some information is needed as the subject matter on which the method operates, but the method entirely dominates the information. If this were not so, legal educators would have much to answer for in the way of wasting the valuable time and effort of their students. It is hard to imagine a less efficient way of imparting information.

But the student, or anyway the first-year student, does not know what he is supposed to be doing. There is no conspiracy to dissemble the objectives of the case method. Numberless verbalizations of these objectives have been attempted. These attempts succeed where success is measured by agreement among those in the know, those who administer the case method, those who have been trained under it, and even those who have merely survived it. But they fail with the first-year student. They have for him the utility of a blackboard swimming lesson.

The student is perhaps told what the object of his first year's work is to be. Surely he is not told to imbibe all the information he can and spit it back at examination time. He may be told that he is to learn to make a noise like a lawyer, or the loftiness of his goals may be explained to him in language elegant or extravagant. But he doesn't believe it.

When the teacher purports to disclose his own utilities, his object is to deceive. The student knows this from high school and from college. "Study regularly. You can't get by with cramming here." "You will have to read everything on the reading list." "There is no royal road to [the speaker's subject]." "I will know if you attempt to use Lamb's Tales

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[the Book Review Digest, Plot Outlines of a Hundred Novels]." There need be no animosity behind this incredulousness. It is the teacher's duty to say these things. It is the student's to withhold belief, to find out, to gain access to a reliable source of information (upperclassmen, irrespective of rank, or perhaps rank is inversely related to reliability—it is inversely related to generality and confidence of assertion). I do not object to this attitude on the part of students in any way. Skepticism is a high virtue in a student. So is the instinct of economy which prompts him to look for the easier, and therefore better, way. If he is told he is going to have to think, he does think. He thinks where to find a book with the answers in it so as to short circuit the necessity to think.

What I do object to, or more accurately what I conceive to be the problem, is the student's philosophy, and particularly his epistemology. Things are to know, not to decide. There, the world of fact, truth, science, is. On the world of fact is imposed a taxonomy which is itself also true. These facts can be stored in a mental bank. The man whose bank is full is an educated man. There is also the world of value, of the good and the beautiful. *De gustibus*. One man's value judgment is as good as another's. The world of value is but a subsidiary world, governed by the world of fact where fact is available. If value must be studied, then the lead of opinion should be transmuted into the gold of fact.

This philosophy is the product of training. The reader will recall his own dismay at discovering that snakes and worms were not even distant relatives. A biological classification based on backbones rather than squirminess is *more useful* to the biologist but not to the child who perceives the desired charm or repugnancy in both kinds of wiggling creatures. Neither classification is *true*. But it is presented as fact to the student of elementary biology, accepted as fact, and spit back as fact on the biology examination. This technique is adequate through college. It constitutes the student's epistemology, even when he doesn't know what the word means.

The student who enters law school with this outlook encounters anarchy. It is up to the jury to decide whether cigarettes cause lung cancer, the medical experts having elaborately disagreed. That one widow has been denied compensation because the plane accident was not caused by negligent pilot error, imputable to the defendant airline, does not prevent another widow from recovering because the accident was so caused. Lines must be fitted to points which seem to be random points, and no one to bless and sanctify, no one to say that the line the student draws is the right line, not the teacher, not the judge, no one.

This disorder cannot be. Truth does not behave in this fashion. For some purpose of his own, some purpose he is dissimulating, the teacher is withholding the information which would rationalize the materials under

study rather than trying to impart it. The teacher is an earnest fellow and no doubt genuinely believes that chaos is some higher kind of order. But he is wrong. The student should be getting information, orderly information. He has always got information, and that is why he has been academically successful up to now. Where to get it? A book. There has to be a book with the truth in it.

What is the instructor to do? Most contracts teachers want the students to read the assigned materials, to think about them, and to prepare an abstract of them. The value of the abstract lies in its production and not in its possession, of course. If abstracts were to have rather than to make, the instructor could write a set of canned briefs of a quality at least equal to those supplied by the American Case Digest Company, and reap monopoly profits. That the instructor does not do this is evidence, at least, that he thinks the cases *in extenso* (or as edited in the casebook) have a value to the student which even the instructor's own abstracts would not. This should be obvious to the student. But, again, the student does not know what he is supposed to be doing, he imagines it to be different from what it is, he does not believe the instructor or accept his statement of utilities, so help he must have. Cans, of course. And a book. A book with the truth in it.

The instructor must now consider the consequences of the availability of short treatises purporting to explain the law of contracts, of which the two here reviewed are of greatest current interest. What shall the instructor's attitude be toward these handbooks of contract?

Some instructors, purists, urge the students to read nothing but the assigned casebook materials and perhaps an outside article. This is fine if the students will do as they are told. There will be no distractions from the case method. Its goals will be reached, though at considerable cost in pressure on the students. But there is a hazard that the students will cast about for help and will use inferior "study aids," digests, cans and outlines. These supply information in assimilable form. The students are satisfied that, by use of the study aids, they are acquiring information. But information is not the goal. The students betray themselves.

Other instructors accept the treatise as an auxiliary teaching device. The students of these instructors are urged or even required to read the texts. This approach has the admirable virtue of consuming all the time the student might spend on study aids the instructor regards as inferior. It relieves the necessity for the periodic wrap-ups most instructors provide. I believe the number who do this is small.

Most contracts instructors just live with the treatises. When the students say they have read and thought and abstracted, and outlined and reviewed, but would still like some collateral reading, these instruc-

tors are dismayed. If the students suppose that "brownie points" are to be earned by asking for such collateral reading, they are mistaken. But, pressed, these instructors will admit that one or another text is not a bad book and may be useful for purely auxiliary purposes and not as a crutch. *Simpson* and *Murray* are the principal candidates for such mention.

It is my contention that these books are useful to the extent that they provide accurate, though necessarily general, broad-brush, information and, negatively, to the extent that they do not interfere with the objectives of the case method. And I would urge that the principal objective of the case method is the intellectual autonomy of the students who have, hitherto, aspired only to sit at the feet of Authority and lave in wisdom. It is the purpose of this review to assess these books against such an index.

First, *Simpson* and *Murray* have many similarities. They run to something over five hundred pages each, are extensively documented with case references, treat the subject in what has come to be the conventional order, are reasonably well bound and printed, are supplied by reputable publishers, and are easy enough on the eyes, with perhaps an edge to *Simpson* here. Their indexes are, almost inevitably, less than adequate, but this is compensated by excellent tables of contents and tables of cases. *Murray* supplies a table of references to the Uniform Commercial Code. His index is fourteen pages, his table of contents thirteen, and his table of cases thirty-four. *Simpson's* index is twelve pages, his table of contents nine, and his table of cases thirty-four. Each carries forward an earlier treatise. *Simpson's* is the second edition of the 1954 *Simpson*. *Murray* has reworked the 1947 treatise of the late Professor Grismore of Michigan.

They are much alike, then, but they are also very different books. I make the following judgments: *Simpson* is a bad book which presents the law of contracts as something to be learned by methods already familiar to the first-year students, and avowedly simplifies the law in order to do this; *Murray* is a good book, within limitations the author of a single-volume text on so large a topic must accept, and gently turns the inquiring student back to the main job of analyzing particular cases. But let the authors speak for themselves.

Professor Simpson defends himself, in his preface, from a charge that he creates "a misleading illusion of certainty," and that "the law of contracts is not so simple as [he leads the reader] to believe." He says, "If this is so, surely this is a more desirable alternative than to befog every topic with so many qualifications as finally to make it apparent that nothing at all of affirmative nature has been said. I assume that the duty of a writer is to get what he writes read. If read, it might be helpful; if

not read, it certainly cannot be."[1] Is it better, then, to teach something that isn't so than to teach nothing at all? I protest. Learning that it isn't easy is a vital part of first-year training. I am amazed that an able and respectable member of my profession sets out so casually to corrupt the pink young minds of his readers.

Professor Murray's preface, significantly, is dated a few months before Professor Simpson's, but it might well have been written as a response. He says:

> The success of the first edition of this book was due to the fulfillment of its stated purpose: to present a clear and concise picture of contract law with sufficient explanation to enable the reader to understand some of the underlying philosophy of the subject. The objective of the book remains unchanged with this edition. Too often a relatively brief treatment of a large subject is content to state so-called "rules" of law with little discussion of their underlying assumptions. The law student often clings to such a work because therein he finds the momentary security to which he is often addicted. He attempts to remember rather than to understand, forgetting the admonition of Lord Coke, "But if by your studie and industrie you make not the reason of the law your owne, it is not possible for you long to retaine it in your memorie." The second edition, like the first, does not indulge an illusion of certainty. Neither does it pretend to compete with the monumental treatises of Professor Corbin or the late Professor Williston which were most influential in this edition as indeed they must be in any small or large exploration of contract law. These works are cited with much less frugality in this edition.[2]

Consider the respective treatments given the distinction between an accord executory and a substituted contract. The reader who does not guess the author of each paragraph may consult the note.

> A liability for breach of contract or in tort may be discharged by the parties making and performing a new agreement in lieu of the old obligation. The making of the agreement is called an accord, which today is recognized as an ordinary bilateral contract; the performance of the agreement is called the satisfaction. An agreement to discharge a prior contract entered into before breach is a substitute contract; an agreement to discharge an existing liability under a prior contract, entered into after breach of it, is an accord. The distinction is important,

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1. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS ix. (1965).
2. MURRAY, JR., PRINCIPLES OF THE LAW OF CONTRACTS iii. (1965).

> because an accord and satisfaction was in the early common law a very technical thing.[3]
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> . . . It is now the law that a later, unperformed agreement, be it a technical accord or a substitute contract, if it embody the essential requisites of an informal contract, is legally enforceable. Moreover, such an agreement will operate to discharge the prior obligations of the parties in accordance with their intention in that regard. It it appears that it was their intention that the original obligation should be discharged the moment the new contract was consummated and prior to its performance, that will be its effect. On the other hand, where the intention appears to be to discharge the prior duty only when the new contract is performed, then the old obligation continues to exist along with the new contract. Since it is deemed unlikely that an obligee would ordinarily wish merely to exchange one cause of action for another, it is generally held to be the presumption that it was their intention that the old obligation should be discharged only on performance of the new, in the absence of affirmative evidence of a contrary intention. At least this is generally recognized to be so when the later agreement amounts to a technical accord. . . .[4]

The second, it is submitted, is a substantially accurate, though general, statement of the relevant law. The first states a rule whose only virtue is ease of application. That the promisor was in default under the earlier contract tends to show that the creditor was unwilling to accept another promise in exchange for discharge of the earlier. It does not establish it. Many cases find a substituted contract in such circumstances, usually where third party rights are affected by the new contract.

Many similar examples might be set forth if space permitted. They would accumulate evidence that *Murray* and *Simpson* are very different books. The reader has guessed that I prefer Professor Murray's approach to the law of contracts and would rather my students used it. It is a better tool for learning contracts, assuming a tool of this kind is to be used at all. But Professor Simpson's book will be popular with the students, I am sure, and perhaps deservedly popular with those whose immediate concern is more to pass contracts than to learn contracts. Certainly it will find a good market among those whose appetite for information is large and who would rather it were palatable than nutritious. Professor Murray's book deserves to do well. The instructors will prefer it and will urge it on the students, reluctantly, because no text can avoid short-circuiting the case method, or gladly, because it is a good book. May it prosper.

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3. SIMPSON, *op. cit. supra* note 1, at 419-20.

4. MURRAY, JR., *op. cit supra* note 2, at 341-42.

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AN ESTATE PLANNER'S HANDBOOK. By *James F. Farr.*† Pp. 663. Little, Brown and Company, Boston, Mass., 1966. $15.00

Many textbooks on Estate Planning are so pedantic, voluminous and artfully technical that aside from the author few really understand the contents. This book by *Mr. Farr* dares to be different and discusses Estate Planning in proper perspective, taking a refreshingly sensible approach to that subject. If you are looking for clever loopholes in the tax laws or new Estate Planning theories to dazzle clients this book is not for you. *Mr. Farr*'s efforts are directed not only to the neophyte estate planner, but to the "old pro" as well. The young practitioner must come to grips not only with the technical information that *Mr. Farr* offers in an unusually understandable manner (which the old pro may have in his kit bag from years of experience), but of even more importance the philosophic side of Estate Planning—solving problems. This latter side of Estate Planning sometimes falls by the wayside and the experienced practitioner can gain much from this treatise to help him reappraise and reconsider the real purposes of Estate Planning, thereby placing it in its proper perspective. How many times does the older practitioner, with his thorough knowledge of the tax laws, lose sight of solving the human problems facing his client, and devise a plan solely on the basis of minimizing taxes, with little if any thought given to the impact the tax plan might have upon the family; giving no consideration to what might happen to a business interest being subject to powers of appointment, the improvidence of a beneficiary or the possible impact of a wife's remarriage. As *Mr. Farr* so graphically states: ". . . Young lawyers, trust officers and insurance men may here, it is hoped, obtain the 'feel' of the Estate Planning operation; will know what questions to ask, and why; will become better acquainted with some of the newer types of instruments and arrangements; and will conclude at last that the saving of taxes is so relatively small a part of the transaction and so comparatively uninteresting that to over emphasize it is to spoil the dignity and interest of one of the most absorbing legal transactions in the world . . ."[1]

This quotation from *Mr. Farr*'s book reminds me of a friend of my father's who was a confirmed bachelor. His scorn of the female sex was sincere and at times vehement. He had, however, sometime in the early 1950's read somewhere of that magnificant tax deduction with sex appeal, "the Marital Deduction." He became so obsessed with this tax deduction that he could not enjoy should his present status continue, and he finally married. He and his wife dutifully participated in a miserable life together, and when death did them mercifully part it was discovered that his Will had a defective marital formula and the deduction was lost.

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1. FARR, AN ESTATE PLANNER'S HANDBOOK (1966), at 4.

The Estate Planner losing sight of the realities of life and the desires of the clients properly channeled can and often does cause results no less absurd. I think one of the between-the-lines comments which best summarizes *Mr. Farr's* philosophy on Estate Planning is in relation to the perpetuities savings clauses. He indicates that some draftsmen always insert a perpetuity savings but "the best drafting, of course, is done so that the clause is unnecessary."[2]

The role of the lawyer in Estate Planning is graphically pointed out. The lawyer should make use of the services of other members of the "Estate Planning Team." Emphasis was placed upon who should captain the "Team." Since Estate Planning is essentially a legal transaction calling for the lawyer's special knowledge and skill and since the lawyer himself is freed from self-interest which accompanies the life insurance underwriter, who has a product to sell; and the trust officer, who has an interest in obtaining a continuing fiduciary account; the lawyer becomes the logical choice. The lawyer indeed has a duty to keep the Wills he has drawn under review and to bring his clients in to re-chart and re-analyze the plans. This, says the author, is by no means an infraction of ethical restraint, but is the lawyer's sound duty.[3]

Mr. Farr points out to the practitioner that Estate Planning does not belong exclusively to the wealthy and sophisticated. The average man with the average estate and average personal problems is every bit as much a candidate for the tools of the Estate Planner. The preservation of an average man's estate to the end that the benefit for his loved-ones will be maximized, and the danger of dissipation by waste or unnecessary taxes minimized, provides the Planner an excellent opportunity to render a valuable service which a one or two page Will does not accomplish. Guidelines are graphically drawn to provide the young practitioner with matters relative to the use of a Testamentary Trust to consider for his clients. He discusses the virtues and defects as well as the appropriate use of settlement options on life insurance, with a very helpful and excellent description of the more common options in standard policies, including the ways and practicalities of the arrangement of insurance in trust, by option or outright.

So your client has a business interest. What are you, the Estate Planner, going to do with that? The chapter on Business and Business Insurance Trusts contains an excellent digest of some of the many problems with which a family is faced upon the death of the business owner, whether they arise from a sole proprietorship, partnership interest, or stock in a close corporation. *Mr. Farr* details means and methods of countering these problems, not the least of which is arriving at a valu-

2. FARR, *op. cit. supra* note 1, at 148.
3. FARR, *op. cit. supra* note 1, at 8.

ation of the business interest which is fair to the family and also to the purchaser of that interest and, further, a means of payment that is fair to both, considering the ability of the surviving purchaser to pay for the interest over a relatively short period of time, as well as providing the family with dollars to meet their new needs.

With utmost clarity, the attention of the practitioner is focused upon the uses of Trusts, including the Life Insurance Trust, the Business Insurance Trust, the Testamentary Trust and Inter-Vivos Trust; with check lists accompanying the description of the various Trusts, indicating matters which should be considered, appropriate questions which should be asked, together with the technical aspects of the planning explained in understandable terms. *Mr. Farr* goes so far as to suggest the client himself be allowed to share in the mechanical act of assemblying facts through appropriate guidance. Some of the matters which the Planner will want the client to reveal in the assembly of facts include adoptions, marriages, divorces, and weaknesses or peculiarities of family members, as well as the usual asset structure.

In his description of the Inter-Vivos Trust, the author makes clear what this vehicle can accomplish and what it cannot accomplish, what it is designed to do and the inherent dangers of its indiscriminate use. This is particularly true of his treatment of the Inter-Vivos Irrevocable Trust. As the author puts it: "if any single mistake could be cited as the chief troublemaker in Estate Planning, it probably would turn out to be ill-advised absolute transfers, either outright or in trust, of life insurance policies and real and personal property of proved earning capacity."[4] Quite often in an effort to display his knowledge of tax law, an Estate Planner will suggest Irrevocable Trusts which frequently do not accomplish the desired end from a family point of view, nor result in the tax savings anticipated. There is something awesome about anything which can never be changed or undone. Will the client's situation possibly change in future years to make a mockery of what once seemed desirable? Mischief can occur even in gifts to minors, whether under the Uniform Gifts to Minors Act or via a trust qualifying for the Gift Tax annual exclusion.[5] As frequently happens, the author points out, the child receives property at an immature age or the parent finds personal need of the property but, alas, cannot get it back. Many instances prove the fact that the Irrevocable Trust when not judiciously used can create havoc. In a 1962 Pennsylvania case a blind man was induced to create three Irrevocable Trusts, he being told that 1: these Trusts would provide income for himself and his wife for life; 2: would remove these assets from his estate for Federal Estate Tax purposes; and 3: would cause an

4. FARR, *op. cit. supra* note 1, at 98.
5. INT. REV. CODE OF 1954, § 2053(c).

equal distribution of the estate between the families of his son and daughter. After he executed the Agreements, the Settlor employed other counsel and found to his dismay that he was wrong on all counts. Fortunately, the Court in this case permitted the Trusts to be revoked on the basis of a mistake of law and of fact.[6] In another case, a 21 year old person created a 10 year Irrevocable Trust while on active duty in the Navy to manage a fund of approximately $120,000. The settlor testified that he thought the Trust was merely a Custodian or Agency Agreement and could be stopped at any time after he left the Navy. The attorney who drafted the Agreement asserted that the document was drawn in this manner to save Capital Gains Tax (which was not in fact the case). There too, the Court permitted a termination.[7] Not all Settlors of Irrevocable Trusts are so fortunate.

I think the only weakness in the book is the description of the methods to obtain the Marital Deduction. *Mr. Farr* describes the use of various formulas and non-formula clauses particularly in view of Revenue Procedure 64-19.[8] He lists the advantages and disadvantages of each type, but does not seem to come to any definite conclusion as to which of the several approaches might gain more advantages than another. It tends to lead one to the conclusion reached by a friend of mine in law school, who was of the opinion that the best form of operating a business enterprise was the sole proprietorship. This conclusion was reached after an enumeration of the advantages and disadvantages created by a partnership arrangement versus the corporate form. All he could see was all the pluses of each offset by all of the minuses, thereby creating a stand-off. It would have been helpful if *Mr. Farr* had weighted the pluses and minuses for more insight into the interrelationship of what a spouse will receive from a quantative and qualitative point of view, outlining what problems are caused by one formula over another. The author indicates the possibility of capital gain in the straight pecuniary formula (which in my opinion is more illusory than real due to the stepped-up cost basis), and then the real ripsaw of the fractional share formula, which stifles post-death planning. It might have been noted also that the fractional share tends to increase the Marital portion and add to it assets which are more dynamic in nature and, therefore, increase the likelihood of larger than necessary Federal Estate Taxes at the surviving spouse's death. Although it is true, as *Mr. Farr* points out, that in a straight pecuniary formula a substantially larger amount would be allocated to the Marital share in the event of a falling market, I think the occurrences are, however, somewhat reduced in fact, since in a declining market the

6. Fisher Trust, 12 Fiduc. Rep. 313 (1962).

7. Moffet Trust, 13 Fiduc. Rep. 100 (1962).

8. Rev. Proc. 64-19, 1964 INT. REV. BULL. (Part 1) at 682.

Executor would in all probability have chosen the alternate valuation date for Federal Estate Tax purposes thus minimizing the problem.

In conclusion, it should be restated, that this book is excellent and certainly deserves a place of prominence on the shelves of the lawyer's office.

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