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Cases on the Law of Personal Property (Book Review)

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BOOK REVIEWS

Editor—FLORENCE S. HERMAN

CASES ON THE LAW OF PERSONAL PROPERTY. By Walter B. Kennedy. New York: Law Book Company, Inc., 1932, pp. XI, 469.

This volume of cases stands out in the good company of a limited number of case books of real worth which have come to us this year. The outline in the main is similar to that of the case books of Gray, Warren and Bigelow, but the treatment of the subject-matter is in many respects different.

The book is built around the development of the concepts of possession and ownership. The approach is quite orthodox and the author disclaims any conscious purpose or effort at the functional approach.¹ The volume is conveniently divided into three books. Book I consists of 41 pages and deals with property as an institution and its classifications, of which 22 pages are given to material showing the nature and kind of personal property; Book II contains 261 pages, being the largest of the three, and contains material having to do with the law of possession; Book III, consisting of 151 pages, is devoted to the acquisition of legal title. The three books comprising the entire volume contain 174 principal cases for study which are supplemented by 52 cases in footnotes, many of which are discussed. In addition, most of the topics which follow a well-arranged topical outline are introduced by paragraphs written by the author, together with excerpts from other well-known authors to explain and elucidate the cases which follow. Many of these paragraphs intersperse the cases and some are used as footnotes. These notes, together with many questions raised by the author, are provocative and designed to stimulate the student to prepare for class discussion of the cases. This is in conformity with the modern building of case books, and we believe is a distinct pedagogic contribution and an attractive feature of the book.

The author claims the book to be "conventional in form and content,"² but we note with pleasure that the first ten pages contain excerpts from the writings of Kent, Pound, Cardozo and the author himself,³ which intersperse such cases as *Mum v. Illinois*, *People ex rel. Durham v. La Fetra*, together with many notes and citations from law reviews and other periodicals, all designed for the creation and comparison of ideas concerning "natural law" and sociological jurisprudence in the minds of the students. The cases and notes illustrative of both philosophies are frequently placed in apposition. This interesting treatment is intriguing to the reviewer. Realizing that the decision is the thing (both to litigants and society) by thus placing in apposition cases from various jurisdictions decided in accordance with both philosophies, Professor Kennedy further stimulates thought as to how decisions are made. Herein the law teacher and student may find a large amount of material arranged in a scientific ensemble within a small compass. From the above description of the book it is

¹ Preface at p. V.

² Preface at p. V.

³ P. 3 *et seq.*

clear that Professor Kennedy has given us a volume intended to develop large concepts for the purpose of creating true legal-mindedness of the student. A question may be raised as to whether or not this is the point—to study law as a science of jurisprudence.⁴ The reviewer believes that it is, and is in accord with this approach; and if the lawyer is to be something more than a mere “journeyman” he must begin at some time during the age of his legal mind to think of other things than of mere rules and cases. The criticism has been made that provocative footnotes and questions and excerpts from leading text-books tend to “give way” too much. If it is true that the law must be dug out of the cases why make a mystery out of it? To develop the inquiring mind in the average student usually requires some stimulus.

Other parts of the book which deserve commendation are the chapters on possession. The author appears at his best in treating this formidable concept, and, as the student goes from one fact situation and social relation to another, he soon must appreciate how slippery is the word “possession.” Herein the author renders more than lip service to Holmes. We note with pleasure such old friends as *Pierson v. Post*,⁵ *Young v. Hichens*,⁶ *Swift v. Gifford*,⁷ *Geer v. Connecticut*,⁸ *McKee v. Gratz*,⁹ together with the provocative footnotes and questions following them so arranged that the students are being prepared for an intelligent reading and discussion of the common law of possession found in the works of Holmes, Pollock and Wright, and elsewhere.¹⁰

Under the title head of Lost, Mislaid, and Abandoned Property appear *Armory v. Delamare*,¹¹ and many others that mark and shape the course of the stream of the law in that field, including *Danielson v. Roberts*.¹² But we wonder why the author failed to mention *Ferguson v. Ray*,¹³ which was decided a few months after the *Danielson* case by the same Court. The *Ferguson* decision under its facts held that gold quartz was not “lost” and lying beneath the earth’s surface, even though placed there by someone else, but was in the possession and property of the owner of the land. In the *Danielson* case the buried coins were found by an employee of the owner of the land and yet the Court held that the employer was entitled to possession. It has been suggested that these two decisions are inconsistent.¹⁴ Later cases in Oregon have followed the *Danielson* decision.¹⁵ The distinction between the two is made in the later decision of *Roberson v. Ellis*.¹⁶ The *Daniel* and the *Ferguson* cases might be the basis for discussion as to whether the decision in the *Danielson* case was “pragmatic” or in line with settled principles of property law. As the *Danielson* case is undoubtedly law in its jurisdiction and in accord with that in many other

⁴ See WILLISTON, SOME MODERN TENDENCIES IN THE LAW, p. 116.

⁵ P. note 47.

⁶ P. 48.

⁷ P. 50.

⁸ P. 52.

⁹ P. 57.

¹⁰ P. 67.

¹¹ P. 133.

¹² P. 140.

¹³ 44 Ore. 557, 77 Pac. 600 (1904).

¹⁴ 1 L. R. A. (N. S.) 477.

¹⁵ 35 L. R. A. (N. S.) 979.

¹⁶ 58 Ore. 219, 114 Pac. 100 (1911).

states, Professor Kennedy is not subject to the criticism of having failed to record and digest in a footnote all other decisions on the rules involved.

On the other hand, the author includes *Siegel v. Spear & Co.*¹⁷ in his chapter on Gratuitous Bailments. The prior cases and notes develop very well the nature of that relation, and the rights and liabilities involved thereon. However, since the doctrine of promissory estoppel has apparently found an abiding place in the law of contract¹⁸ and the gratuitous bailment relation, and this case more particularly through the doctrine of consideration of trust, have been important steps taken to reach that result it is well to consider this case at this place in the book. The student of property who may at the same time be studying contract and tort should have the advantage of studying the case from the viewpoint of all those categories.¹⁹

The reviewer feels that more material pointing out the theory and fact situations in acquiring title by estoppel could have been given to advantage. The cases under the topic "Forfeiture" point out how personal property may be forfeited under the provisions of certain federal statutes, such as the Volstead Act. It might have been well to show in footnotes how the Federal Government has made use of the Internal Revenue Law and Customs Law to enforce the Volstead Act and the Eighteenth Amendment.²⁰

In many of the cases the author has restated the facts, presenting those that are material, in a short, clear statement. This is a time-saving method and conserves the energy of the student for a more fruitful study of the case, and is to be commended in a case book to be used by a first-year student. The danger, of course, is that in the editing a material fact may be omitted or overlooked. The reviewer has not been able to find any such instances in this book. In other cases where the facts are spread throughout the opinion, we note that the author has been careful to select cases in which the facts are easily found in the opinion. Also, wherever the author has found it advisable to elide portions of the opinion as not pertinent, or unimportant, he has uniformly pointed out the omission. Many of the cases present fact situations that have color and interest—and this is an added attraction to the book, which justifies the use of many decisions from the lower New York courts. On the other hand, the book is national "in its scope," in that the author has drawn freely from material from all jurisdictions in this country and England. Each case is numbered, which is a convenience when it becomes necessary, in a discussion to refer back to and locate cases already discussed.

There is enough material in this book to cover a course of one year in length of two hours a week, but the book is so planned that a teacher could readily use it in a course in which the same number of hours is given in one semester. After all, the test of any case book is the use of it in a classroom. From an examination of this book it appeals to me as one that I would like to use. Enough has been said to point out that this case book has been carefully

¹⁷ P. 210.

¹⁸ RESTATEMENT OF THE LAW OF CONTRACT §90.

¹⁹ Williston holds that the liability of gratuitous bailee should be classified as a tort. See 1 WILLISTON, CONTRACTS §138.

²⁰ *U. S. v. Buick*, 300 Fed. 584 (D. C. S. D. Calif. 1924); *U. S. v. White Truck*, 4 F. (2d) 413 (D. C. W. D. Wash. 1925).

planned and painstakingly prepared by a scholarly teacher who has brought to his task the experience of many years of successful teaching of the law of Property.

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THE JUSTICES OF THE PEACE COURTS OF HAMILTON COUNTY, OHIO. By Paul F. Douglass. Baltimore: The Johns Hopkins Press, 1932, pp. VI, 118.

COMPARATIVE JUDICIAL CRIMINAL STATISTICS: OHIO AND MARYLAND. By L. C. Marshall. Baltimore: The Johns Hopkins Press, 1932, pp. VIII, 83.

Both monographs published under the supervision of the Institute of Law of Johns Hopkins University.

It is regrettable that these two monographs will have but a limited circulation. Their influence would be greater, their effect more fortunate, if they could at least reach the desks of the editors of our daily newspapers so that these editors might be induced to read them.

During the last decade it has become increasingly clear to lawyers connected with criminal causes, that once a criminal case is sent to the jury, the verdict in most instances is "guilty." Nevertheless, the current public idea is that a conviction by a jury is rare because of obsolete rules which unduly hamper prosecution. Newspapers have been suggesting such possible remedies, as that the guarantee against self-incrimination be withdrawn, that the majority verdict be substituted in place of the unanimous jury verdict, that three trial judges, rather than a jury, should pass on the issue of the defendant's guilt. In the state of Ohio, according to Mr. Marshall, only in 2.6 per cent of those cases tried were the defendants freed by acquittal after trial; and there is nothing in Mr. Douglass' statement which would indicate that it is the purported frustration of successful prosecution under the existing legal system which contains the explanation for the unfortunate condition existent in the administration of the criminal law.

The invaluable data that these two scholars have gathered and collated compels the conclusion that factors other than those that now appeal to the popular mind must be found to explain the so-called crime wave. It is urged that public attention be directed to fact-finders, and that their statistics should displace the irresponsible and unscientific opinions of rhetoric artists.

That crime may be prevalent in the United States the reviewer will admit, but the law is competent to deal with the young man who turns robber or murderer. When a community is thoroughly aroused by newspaper clamor, a jury will often say "guilty" despite unsubstantial evidence; a trial judge will impose a long term of imprisonment, or even the death penalty; in due course, an appellate court will affirm without opinion, especially without opinion if real errors on the part of the trial court are urged and established by the appellant.

It is submitted by the reviewer that it is not the boy robber who shames the administration of justice; rather it is the glorified racketeer who operates