REVIEWS


This casebook is far from being a neutral anthology of the sayings of the judges arranged under conventional headings. It is rather a rich critique of the law of contracts which makes its points by a skillful arrangement of cases and extrajudicial writings, and by a number of essays and many notes and questions by the editors. In their separate, earlier contributions to the literature the editors have given their views on various fundamental issues of contract law. While this volume reflects and reinforces those conceptions, it is faithful to its purpose as a teaching instrument: the argument is conducted without any note of stridency, and the student is not stripped of the wherewithal for attacking the editors' ideas.

In the days when casebooks consisted merely of cases, with the editor preserving a kind of vatic silence, it was sometimes a difficult intellectual exercise for the student to piece out the editor's theory of organization if it varied from the obvious. The student is put to no such trouble here, for the editors wear their heart on their sleeve. The plan of the book is suggested by the fact that it makes a grand division between "Contract and the Free Enterprise System" (Part I, 680 pages) and "Irregularity, Inequality, and Imperfect Competition" (Part II, 100 pages). And an excellent editorial introduction tells the student all; all, that is to say, except the answers to the baffling problems raised by the separate chapters in each part.

Professors Kessler and Sharp believe that it is only an invitation to confusion to attempt to state or explain the present law of contracts in terms of a "few fundamental principles uniformly applicable throughout the whole field." In this reaction against a monistic view of contract, their insight corresponds to that of the realist or functionalist school—a school, now less vocal than it used or ought to be, which taught irreverent habits of analysis and developed to an art the penchant for peering through the formal dress of opinions to the half-concealed structure beneath. Understanding comes, the editors assert, "through an awareness of the different functions fulfilled by the various kinds of contract in our society." But it is a question on what level the study of functions will be pursued, and how much of an ideal or normative element will be recognized. Dean Havighurst in his stimulating casebook goes immediately to various groups of contracts such as employment contracts, contracts for building and construction, and so forth. Our editors are rather interested in examin-

1. P. 1.
2. Ibid.
ing what in general were the functions of the institution of contract in the
period of the maturing of our law, and what were the ideals which propelled
the institution and were at the same time generated by it. They then proceed
to the present day and to the play of doctrine upon various contract situations,
some factually related, others not. This is functionalism of a kind, and it does
not belie itself even though it is applied on rather high levels of abstraction.

Contract was the factotum of laissez-faire capitalism and the polity that ac-
companied it, an all-purpose tool efficient in ordering commercial affairs,
plausible in explaining representative government itself as a social compact.
And the ideal of freedom of contract, standing at the confluence of streams of
philosophic, economic, political, and religious thought, was the mightiest of the
symbols that served truly a society of equal competing enterprisers. It was
widely believed that the highest material prosperity would come of bargains
between men, each freely seeking his own advantage, just as the greatest meas-
ure of good would be attained through the selfish seeking of individual pleasure.
This optimistic creed gave shape to the major doctrines of our law of contracts.
The law need only lend sanction to the matched wills of free men, thus making
expectations reasonably secure and enabling the wheels to go round. The job
of the courts was essentially to interpret, to expound the true meaning of
joined volitions.

Even in those days, undeviating adherence to all the implications of freedom
of contract would have made the law unworkable. It has been wisely said that
we owe a great debt to the empiricism and lack of clear thinking of judges which
have saved us from some of the logical consequences of their professed prin-
ciples. To every theme its countertheme: so, for example, the law did strike
down some agreements, quite explicitly, for reasons of public policy which were
evidently felt to transcend the very policy of freedom of contract. The same
office was performed by the doctrine of consideration, although this censoring
role was not often openly avowed. In these and other ways a modicum of
social control was exercised over free bargaining. And room was also left for
play in the joints by some convenient survivals from earlier times, and by the
usual amount of judicial self-deception and manipulation of words. It was,
after all, not hard to relate decisions reached on other grounds to the supposed
intent of the parties.

If one is to judge from judicial talk, the modern law of contracts is to no
small extent still in the grip of ideas that were given more or less systematic
formulation a century and more ago. Mr. Justice Pitney's opinion in Coppage
v. State of Kansas 4 is a reminder of the dominance of those ideas in the
American courts in the early 1900's; and the latest advance sheets will show
that they persist as a factor today. So great indeed is the plasticity of words
that the old canons of contract law, somewhat refurbished here and there, can
be used to attain a large measure of substantial justice in the vastly changed
economic and social conditions of our day. Legislation, administrative rule, and

4. 236 U.S. 1 (1915).
judicial initiative, not to speak of the work of modern systematizers, have come in at various places to change the canons. Yet, especially in those areas of our economy where the old protagonists, the enterprisers of equal strength, have disappeared, contract law tends more than occasionally to work out wrong, and to furnish the wrong reasons even when it works out right. Tensions are being felt all along the line as the facts of modern life collide with a supposedly single law which still maintains a strong verbal continuity with the past.

It is the editors’ thesis that some of the deepest antinomies of our law of contracts result from clashes of the polar forces of free volition and social control. Free volition predominates, but does not by any means hold absolute sway, in the larger part of our law; social control is moving into ascendancy in the sphere where imperfect competition and unequal bargaining power have become evident, or where patterns of trade clearly deprive a party of any real choice of terms. Social control tends to qualify private autonomy where the lawgiver apprehends that contract has become an instrument of sovereignty or oppression. If courts have been less than eager to step in with controls, it may be in part because they doubt that the litigative process is the right agent to do the job, or because they are uncertain that with all good intentions they can improve on the total results of the play of a market, even an imperfect one.5

The arrangement of the book underlines the thesis; but to avoid misdescription I should say here that the editors do not make a fetish of it. Their very pluralistic attitude prevents this. As a result, the book is balanced and well rounded.

To speak first of Part II, there are chapters on anti-trust and similar controls, automobile merchandising as a case study in contracts of adhesion, “Contract and Labor,” and “Status and Contract in Insurance.” The editors face more than the usual problems of compression and elision since their large design demands inclusion of materials unfamiliar to the ordinary course in contracts. Nevertheless, I am not sure that the problems drawn from the anti-trust field can be effectively handled, even for the immediately relevant purpose, with the meager materials that are provided. It is regrettable, too, that with all the concern over standardized contracts, no full length present-day examples are included. The chapter on the automobile dealer’s “agency” contract could have been made livelier. Yet Part II makes its points well enough. One sees how the old countertheme of control is here becoming central, and how ancient ideas are made to do service in a new setting. If the tendency in some areas is from contract to status, as Professor Kessler has elsewhere stated,6 then contract can remember its origins in tort, and controls can be drawn from that source. For example, tort notions can be used in those excruciating cases of excessive delay in handling applications for insurance. Again, in a variety of situations where the letter of a standardized contract written by the stronger party would prevent a recovery against him that is thought to be just, it is plausible to fall

back on a matrix idea of contract, protection of reasonable expectation—expectation created not by the terms of the contract itself but by the "typical life situation." Properly tamed, the standardized contract makes a vast affirmative contribution in efficiently channelling business activities and decently distributing risks.

The nineteen chapters of Part I, dealing with the more "normal" applications of contract law where the principle of volition remains dominant, are extensive in coverage and generally discerning in method. Substantially all the conventional topics of a contracts treatise, except fraud and misrepresentation, come in for treatment, although not in a wholly conventional order. It is perhaps only churlish to say that the chapter on specific performance seems too skimpy for comfort, and that I would have welcomed more material on measures of damage and courses of action open to a party on another's default. I have a feeling, too, that a first-year course in contracts ought to do something more definite in bringing in relevant parts of the N. I. L. and the Sales and Bankruptcy Acts—the latter Act is pretty much missing in a twenty page section on financing through the assignment of accounts receivable. But I fear I must refer to some unknown expert in the hydraulic and cutting department the question of how the valuable material that is included could be further condensed to make room for other things.

Teaching method appears to be sacrificed to editorial systematics in Part I by plumping a rather elaborate account of the development of remedies for breach of promise into the first chapter. This is followed by a chapter on the "Domain of Contract," dealing with constitutional problems (Home Building & Loan Assn. v. Blaisdell 8 appears here in a cruelly truncated version), which is soon followed by a difficult chapter on "Contract and Tort" starting with Winterbottom v. Wright.9 Teachers who do not have the editors' formula for making all this go down with raw recruits are likely to be repelled by this initial array. I would suggest feeding this material in at much later points. Even so, the constitutional law will be pretty indigestible unless students are taking a separate course in that subject at the same time.

Part I, in ranging over the whole field, fulfills rather better than Part II the editors' purpose of exhibiting both the plural functions and plural conflicting ideals of the institution of contract, and of explaining the consequent turbulence in various parts of the law. By laying sustained emphasis on the ideals that are at war, the book outlines sharply the choices of policy that are being made. Some characteristic headings will suggest the style of Part I: "The Basic Ideals of an Individualistic Law of Contracts"; "Freedom of Contract and the Ideal of Reciprocity"; "Bargain Principle v. Reliance Principle"; "Re-adjustment of a Going Business Deal: Over-Generalizations and Over-Corrections"; "The Ideal of Security of Transactions and the Objective Theory of Contracts"; "Freedom of Contract and the Control of Contractual Risks";

7. Id. at 637, n.27, citing K. N. Llewellyn.
8. 290 U.S. 398 (1934).

The method will give focus to the student’s thinking and quicken his sense of where the law is heading. Quarrels like that over the “firm offer” are seen as struggles between the drive to secure reasonable expectations and the impulse to demand equality or reciprocity.10 Cases of unilateral mistake, as in the accident release field, show a relaxation of the anxiety over “objectivity” where no important purpose would be served by maintaining the security of transactions.11 Third party beneficiary doctrines are resultant of forces derived from the interest of the immediate contracting parties in freedom of contract and from the perceived values of securing the third party’s reasonable expectations and promoting the liquidity of contractual obligations. The moral often to be drawn when such contests are laid bare against variant facts is that solutions cast in sweeping terms would be unwise. Again the student is shown the several ends which the now multiform sprawling doctrines of consideration are serving, and he is made to face the problem of reshaping this entire branch of law in ways that will direct attention to the issues of policy rather than hide them. (If consideration is reduced to size with an eye to Continental techniques, duress may have to be redefined: in this light, the problem of Foakes v. Beer 12 appears to be harder than critics of that case think it is.) The limits of the notion that courts do not make contracts for the parties are convincingly shown in the fields of the implied contract, conditions, supervening impossibility, and elsewhere. Where the parties’ intention as to the event which has occurred is not discernible, courts might well recognize that their job is creative rather than merely interpretative, and consider more frankly what is the fair thing to do. One of the striking effects of Part I is again to show the student that contract and tort are becoming more or less a continuum. One clear sign is the extension of the principle of Section 90 of the Restatement; another sign is the use of “reliance” damages to mediate in hard cases between no recovery and full expectancy recovery. If one recalls that “in Anglo-American history a promise is an accidental and not an essential element in contracts,” and if one begins to view contract broadly as “that part of our legal burdens that we bring upon ourselves,”13 the interrelation of contract and tort becomes evident. A functional method does not inhibit but actually suggests tentative hypotheses linking the two fields. I have sought to indicate by scattered examples that Part I is provocative and notably good in leading into the tender growing parts of the law.

It remains to say that the case selection is on the whole judicious and interesting. The student faces plenty of difficult cases and is constantly challenged not

12. 9 App. Cas. 605 (1884).
13. COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 102 (1951).
only to do sweaty work in distinguishing particular matched decisions but also to find underlying harmonies and discordances in general doctrine. The editors' basic approach calls for the use of many old cases; these are not inserted for their antiquarian interest, but serve rather to demonstrate that the rational study of doctrine often depends on the use of an historical method. I would have wanted the editors' questions to force the student more often to parse words in agreements and to advise definite steps in tangled fact situations that respect no boundaries, not even those set up in these chapters. But something, after all, must be left to the initiative and taste of the individual teacher.

Professors Kessler and Sharp have produced a first-rate book. Its flaws, as I see them, are minor and more than offset by its cogent pattern and its wealth of imaginative suggestion.

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Many people consider Soviet law a mere facade which scarcely conceals the operative realities of political dictatorship and terror. This view finds support in the writings of those scholars who have focused attention upon Communist Party control of legal doctrine, upon the lack of independence of the Soviet judiciary, upon the power of the security police, upon the use of judicial trials for propaganda purposes, and so forth.

Professor Hazard's book—the fruit of his nearly two decades of experience with Soviet law—takes a quite different view. He treats Soviet law as an independent source of power for the Soviet leadership, an important technique of political and social engineering which is relatively isolated from other techniques such as police pressure and propaganda. He gives primary attention to property, contracts, criminal law, cooperatives (including collective farm law), labor law, patent and copyright law, social insurance, family law, and international law. Although he devotes a chapter to the one-party system and to the restrictions upon civil liberties, and a page or two to the Ministry of Internal Affairs, he presents these subjects as more or less peripheral. He does not discuss the removability of judges and their subjection to Party pressures; the famous "purge trials" of 1936 to 1938 are mentioned only once, in connection with the elimination of factions within the Communist Party.

These omissions are not due to any lack of awareness by the author of the importance of non-legal and illegal controls in Soviet society, but rather to his conviction that Soviet law has a reality of its own. This reality he demonstrates most effectively through the use of cases decided by the Soviet courts. The book is built almost entirely around such cases, of which there are over

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