Marquette Law Review

Volume 26
Issue 4 *June 1942*

Article 15

1942

Book Review: Restatement of the Law of Security

Maxwell H. Herriott

BOOK REVIEWS

Restatement of the Law of Security. American Law Institute, St. Paul, Minn. 1941. Pp. xxiv, 596. $6.

This is the sixteenth volume of the Restatement series. The committee to restate the Law of Security was appointed in the fall of 1935, and completed its work in the spring of 1941. Of particular interest to the Wisconsin Bar is the fact that a member of the committee was Mr. Justice John D. Wickhem of our Supreme Court.

As the title indicates, a "functional approach" was employed in this volume. In other words, the object of the legal transaction denominates the classification rather than a step in or method of evidencing the transaction, such as, pledge, mortgage or surety bond.

As succinctly noted, "Security is an interest in chattels, in land, or in the obligation of a third party. A security interest must be the result of a transaction that gives recourse against a particular chattel or land or against a third party on an obligation." The volume does not deal with real estate mortgages.

The security resulting from an interest in chattels is dealt with under the general heading of "Pledges and Possessory Liens." The Restatement points out that bailment in the case of pledges is one made with the intent of creating the security, whereas, though possession is essential, it is the *retention* of the possession, regardless of the original intent of the bailor, which is the characistic of the lien.

Security identified as an interest in the obligation of a third party is discussed under the head of "Suretyship." In addition to a careful analysis of the nature and creation of suretyship, considerable space is given to consideration of specific types, for example, third party beneficiaries in construction contracts (i.e., materialmen), official bonds and judicial bonds (i.e., bonds in judicial proceedings). This reflects not only the work of scholars but of a committee interested in practical employment of the Restatement.

The sections of the Restatement dealing with suretyship are of particular interest because in recent year the increased use of surety bonds has been enormous. The execution of a bond by an incorporated surety company is for practical purposes a prerequisite for myriads of transactions, such as holding of public offices, the performance of public contracts, the probate of estates, the administration of estates by guardians, receivers, trustees, etc., and the perfection of appeals. This has led to an interesting development in the law which is reflected in the Restatement. Special rules are made applicable to the "compensated surety," defined by the Restatement in Section 82 (i) as one "who engages in the business of executing surety contracts for a compensation called a premium, which is determined by a computation of risks *on an actuarial* basis." This classification cuts across the customary division of gratuitous and compensated sureties.

An interesting question is treated in the Restatement in Sec. 128, where the effect on the surety of variation in the performance of the original contract is discussed. Theoretically, at common law any variation of the original contract created a new contract, wherefore at common law the surety was said to be released. The guaranteed contract was deemed discharged by consensual act of the principal and his creditor. In the field of insurance, however, it is the risk which is the real subject matter. True, the risk is evidenced by the contract, and variation in performance of the contract may release the insurer, but only when

the risk is materially increased. This insurance rule has been applied to surety contracts. The Restatement specifies in Section 128 that to obtain a release of a compensated surety there must be a material increase in risk. It further states that if the damages traceable to a variation in risk can be ascertained, adjustment should be allowed, not a complete release. Is not the application of this insurance rule to surety contracts merely an application of the old rule of damages first enunciated in *Hadley* v. *Baxendale* (9 Ex. 341)? Applying such rules to a compensated surety and not to other sureties would appear to be merely a specific instance of the rule that for breach of contract there may be recovered only damages arising from circumstances reasonably within the contemplation of the parties.

It is very gratifying to observe the particularity with which the terms employed in the Restatement, such as that of "compensated surety," are defined and, as so defined, used throughout the volume. The value of the work is increased by its reference to other volumes in the Restatement series and the incorporation by reference, where possible, of definitions of terms employed in the other volumes.

MAXWELL H. HERRIOTT.*

In and Out of Court. By Francis X. Busch. Chicago, De Paul University Press, 1942. Pp. xii, 306. $3.

Lawyers are and should be interested in the personalities and history of their profession. Many books have been published in the last few years, apparently to satisfy this interest; *In and Out of Court* takes its place in the field with the lighter books, such as Bellamy Partridge's "Country Lawyer." The new tale deals with the experiences of the author in an active midwest trial practice, centering around the early 1900's, and is composed largely of vignettes of trials, strange cases and humorous incidents. The author also relates his impressions of personalities of the bench and bar in Illinois, such as Judge Joseph E. Gary, Judge Kenesaw Mountain Landis, Clarence Darrow and John P. Altgeld.

The book should provoke the recollections of older lawyers, and the interest of younger practitioners. *In and Out of Court* is not without its lessons—new men will be reminded of what they were told in law school, and what they may already have experienced in court, by chapters such as "You Can Never Tell About a Jury" and "The Ever Present Element of Surprise." Caricature sketches nicely illustrate the author's narration.

In and Out of Court is the type of book one likes to see in a lawyer's waiting-room. Each chapter is its own little story, and ten minutes reading will tell it. The book is diverting; it is light and interesting.

PAUL NOELKE.*

International Legislation, Volume VII. Edited by Manley O. Hudson. Washington, Carnegie Endowment for International Peace, 1941. Pp. xlix, 1026. $4.

This "collection of texts of multipartite international instruments of general interest," concluded during the years 1935 through 1937, is a continuation of similar publications which have collected like documents signed since 1919. The present volume contains 140 instruments, usually given in one of the original

*Professor of law, Marquette University.