

Book Reviews: Review of A Treatise on the Law of Contracts. Third Edition. By Samuel Williston. Revised by Walter H. E. Jaeger

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The two booklets are refreshing to read. They contain arguments and points made by men whose backgrounds and involvements accustomed them to "call a spade a spade." The task of translating political issues into legal ones, and ultimately transforming the polycentric political world into a monocentric legal and institutional one, is an eminently practical task. If this task will be shirked by those who know what must be done, it will be done by others whom only God can forgive or understand. While it is not true that ill-will is so disproportionately divided, or that no common ground exists between those concerned (the test-ban treaty is an example), at least there *are* men who know that the Rule of Law is always preferable to the rule of men; and even Communists are coming around to see that the Hobbesian solution of the crude rule of some men, however therapeutic to some for some of the time, is hell for most of the people most of the time. The problem of peace can be tackled, if it can be, by an effective global legitimization of the Rule of Law, and its realization requires that men have persistence, endurance, courage, and magnanimity. The Hammarskjöld Forums are an encouraging and laudable step in the right direction.

VICTOR ZITTA**

A Treatise on the Law of Contracts. Third Edition. By Samuel Williston. Revised by Walter H. E. Jaeger.* Mount Kisco: Voorhis & Co., Inc. 1957-1963. Vols. 7; pp. xxii, 826; xv, 1095; xii, 937; ix, 1167; xii, 903; ix, 727; viii, 1047. \$20 per vol.

In the realm of music, the work of the symphonic synthesist, the recapitulator in wholly orchestral terms of a great operatic statement, is similar in many regards to the work of the reviser of a great and classic treatise in the domain of the law: the symphonic synthesist must attempt to give new life to the work by reforming its principal themes in the musical idiom of the day, which he does by rendering the main ideas in a new union with linking material which, together, while avoiding any alteration of the original thought, result in a new rendition which is consonant with the older statement and wholly identifiable with it, yet which radiates with new brilliance the grandeur of the original. In like manner, the reviser of a classic statement of the law, one with the symphonic compass of Williston's treatise on contracts or Wigmore's treatise on evidence, essays the task of reorganizing the principal themes of the master and of adding new strains to these themes so to frame a modern statement of the law which, while current and up-to-date, will avoid any alteration of the original statement that would make the revision a mere masquerader in the garments and

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suits of the original. It is in the skilful and artistic handling of the re-statement of a theme, modified and varied where necessary to suit the current need, completed by invention where a bridge was necessary, but sustaining the authentic mode of the original, that the measure of the art of the reviser must be taken; and in this the reviser of *Williston on Contracts* excels.

There are fewer personal revisions of the major treatises of the law than one would expect to find when one contemplates the qualities required for the most effective form of revision. Most prominent among these, of course, are the accumulated learning of the years intervening between vision and revision and the associative and analytical powers of the author. Like command decision, these qualities are seldom found in their highest form in the agglomerate mind of a committee, however experienced the individual member may be. Scholarship, like love, attains perfection only after many years of exclusive and intimate awareness of its object and of experimentation in its ways. Because there have been so few personal revisions of great treatises in the law, each such effort may be read as a lesson in the ways of revision, and Jaeger's work in revising *Williston* is a lesson from a great master.

The ultimate purposes of the reviser, what might be called his philosophy of revision, will surely determine every phase of his *modus operandi*; and in Jaeger's case there seems to be one clear and impelling motive to insure that the work done under his hand will be a useful and valuable tool for judges and lawyers. That the work will thereby become an authoritative guide to a student of the law is a happy consequence of this seemingly fundamental motive. It is the lawyers' and judges' need to know the law of contracts as it is today that seems to have dictated to the reviser that his first large aim should have been the modernizing of the work so that its statements, by the stamp of currency they bear, would remain the acceptable coin of the realm.

The task of modernizing is itself a composite function, one of the chief labors of which is the incorporation of new decisions and statutes into the body of the work. The first part of this labor is the citation of important cases from every jurisdiction in the appropriate place in each section in which the case has pertinence, and this has been plentifully done.¹ The more important part of the task, however, is the analysis of new doctrines of law which have been propounded in cases and statutes since the time of the latest revision of the treatise. An example of this kind of work may be found in section 378 A. This is an entirely new section and deals with the extension of the applicability of the

¹ This task is not one for a technician, any more than is the preparation of any other part of the treatise, because it is for the practitioner and court frequently the way to binding precedent and for the student sometimes the only means of understanding a doctrine that is not discussed by a court in terms that are elementary enough for the student to grasp.

doctrine of undetermined third party beneficiary to cases involving warranty of fitness for certain uses of manufactured products. This application of the third party beneficiary concept is an innovation of the years between the revisions of the treatise and, being a subject of great potential, it is accorded full consideration by the reviser, both in a complete textual analysis and in a comprehensive coverage of cases of importance from many jurisdictions. Dozens of pithy extracts from such cases follow the text and give substance to it. Even though this section is entirely new, it follows the pattern of the base section and accords with the general analysis of undetermined third party beneficiary laid down there by Williston himself in the first writing.

Outstanding examples of the incorporation of statutory material in the new revision may be seen in the tables of state statutory material which have been included in the sections on seals,² capacity of married women,³ contractual liability of trustees,⁴ contracts of veterans' guardians,⁵ statute of frauds,⁶ the memorandum under the statute of frauds,⁷ and the obligation to pay rent after destruction of premises.⁸ These tables are useful not only to one seeking knowledge of the rule in a particular state, but to anyone seeking a comparison of treatments.

The duty created by the publication explosion of the past thirty years that the reviser examine and incorporate references to the best periodical pieces dealing with the thousand topics of concern in the treatise has been discharged by Jaeger in a way that demonstrates the scrupulous care of the responsible scholar: out of the hundreds of periodical index citations that might have been included in the footnotes to almost any of the sections in the work, only those, examination will reveal, which by their authority or merit will be of assistance to the court or the attorney have been noted to these busy persons.

Part of the task of the reviser in bringing the treatise up to date is in making whatever adjustment in statements of doctrine which seem to be warranted by the criticisms of succeeding scholars and the disinclination of courts to follow them. This task requires keen judgment as to the correctness or error of the original view and great discretion in the revision of the statements made. A case in which both of these talents are demonstrated may be seen in the handling of the attack made by Wigmore upon Williston's view of the parol evidence rule.

When a doctrinal issue has ceased to have the pertinence in the law which once it had, it is only meet that less space be devoted to it than once it may rightly have commanded; and it then becomes incumbent

² 1 WILLISTON, CONTRACTS §219A (3d ed. Jaeger rev. 1957).

³ 2 *id.* §269A (3d ed. Jaeger rev. 1958).

⁴ 2 *id.* §312A (3d ed. Jaeger rev. 1958).

⁵ 2 *id.* §314A (3d ed. Jaeger rev. 1958).

⁶ 3 *id.* §506B (3d ed. Jaeger rev. 1959).

⁷ 4 *id.* §567B (3d ed. Jaeger rev. 1960).

⁸ 7 *id.* §944A (3d ed. Jaeger rev. 1963).

upon the reviser to judge that such is the case and to award the space allotment accordingly. The reverse is quite as true. Jaeger's treatment of the former situation may be observed in the paragraphs comprising section 103 of the new text. In Williston's original text, seven lengthy subsections were devoted to an analysis and rationalization of the question of the test of consideration in a bilateral contract, including a detailed description of the positions taken by several noted scholars of the day regarding this question. Professor Jaeger has reduced these rather discursive paragraphs to one compact section in which the issue is carefully analyzed. The value to the scholar of the longer treatment is not lost, however, because an outline of the arguments is given in a long footnote.⁹

Not least among the many duties of the reviser are the adjustment of such small and helpful particulars as these: the breaking up of blocks of footnotes into more readable units; the alteration of locutions of an earlier age which not only date the work, but tend to perplex the reader; and the location of the section number at the outer corner of each page rather than at the inner corner. These and other additions which have been noted, such as the inclusion of helpful extracts from cases, make the treatise a much more useful tool to the judge and practicing attorney.¹⁰

One of the burdens of the reviser which requires the greatest sensitivity and most subtle artistry is the task of making the revised edition of a great treatise conform more closely to modern concepts of excellence for its genre. In this area Jaeger has shown rare finesse of judgment and keenness of vision, for in many ways he has almost imperceptibly altered the work, but has done so with the effect of making it more modern in its tenor. An excellent example of this may be found in the countless instances in which Jaeger has changed a statement which had the imperative character of a dictate into a not any less authoritative but far more acceptable statement of what the courts generally do or what rule they are apt to follow.¹¹

⁹ Another example of the reviser's art may be found in §103. Jaeger has removed a Faulknerian sentence that appeared on page 332 of the second edition to a footnote, in this way losing no content, but vastly improving the reader's chances of obtaining a clear notion from the text.

¹⁰ Jaeger's own amazing reputation as a successful practitioner might suggest the reason for his apparent insistence, which he notes himself in the preface to the third edition and which is clear throughout the text, that the treatise serve the bench and bar in the best way possible.

¹¹ Two examples may be seen in close proximity on page 360 of the second edition, wherein the pontifical statement, "These decisions cannot be supported," appears and has on page 407 of the third edition been changed to: "These decisions are not generally followed"; and on page 360 of the second edition, the statement, "the first interpretation should not be given by the courts," has been likewise softened on page 412 of the third edition to: "the second interpretation is preferred by the courts." The first statement in this group was original Williston and the second was the work of the reviser of the second edition.

One suspects that perhaps the strongest temptation that might occur to the reviser of a treatise would be the temptation to rewrite the entire document and thereby to recreate it in one's own image. To succumb to the temptation usually is to seal the fate of the treatise, because it takes a discerning purchaser very little time to detect that what he has bought is a new treatise which will surely not be judged by its cover by anyone. Jaeger has exercised the greatest restraint in this regard, and it is possibly in this single phenomenon that his genius as a reviser may be judged because, while he has modernized the entire treatise, he has yet preserved the full sense and spirit of Samuel Williston. In preserving this authenticity, Jaeger has done homage to Williston and has given him great honor; and in this act of homage perhaps lies Jaeger's own greatest honor.

The fame of great conductors, like that of great teachers, is very ephemeral; and yet the fame of Stokowski will live for many years because of the creative work he has done in the symphonic synthesis of the work of Wagner. In like manner, one may confidently expect the fame of Professor Jaeger to outlive its normal expectancy because of the creative work he has done in the revision of *Williston on Contracts*.

ROBERT J. O'CONNELL**

Probate Practice in Wisconsin. By Eugene M. Heartle. Chicago: Callaghan & Co. 1964. Pp. 228. \$15.00

As the years pass, it seems that the practice of law is becoming more and more of a technical science. To the lay public, the lawyer's life may be a continuous series of dramatic courtroom battles, but in fact the mainstream of legal practitioners more likely spend their time preparing and reviewing the countless forms and similar documents required to get their client a tax clearance, workmen's compensation payment, or other such service.

Nowhere in the panorama of law is this more true than in the specific area of probate practice. In order to probate a "routine" estate in Wisconsin requires the preparation and filing of approximately thirty-eight separate forms with the probate court. A failure on the part of the attorney either to file or to properly complete any one of the many and varied forms means that the estate will not be closed, the personal representative will not be discharged, and the attorney will not receive his fee.

One wonders if it was the commanding tone of some of the statements in §140 which lead Arthur Linton Corbin to breathe the fire of the statement in his own §110: "Its problem is not merely to determine mechanically, or logically, whether the agreement falls within Professor Wiseacre's statement of the doctrine of consideration. . . ." 1 CORBIN, CONTRACTS §110, at 494 (1950). Jaeger's sensible comment appears in 1 WILLISTON, *op. cit. supra* note 2, at 618 n. 6.

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