Boston College Law Review

Volume 2 | Issue 1 Article 42

10-1-1960

# Williston: Treatise on the Law of Contracts, Third Edition, Vols. I and 2

Michael Leo Looney

# BOOK REVIEWS

**A Treatise on the Law of Contracts.** By Samuel Williston, Third Edition by Walter H. E. Jaeger. Vols. 1 and 2. Mount Kisco, N.Y.: Baker, Voorhis and Co. 1959. Pp. xxii, 826; pp. xv, 1095. $20 each.

If, as has been said, the law of contracts is "the keystone of our civil law,"[1] then the Williston treatise is indeed the keystone of our law of contracts. In the forty years since the original edition appeared, it has gained a pre-eminent place in that field. Quoted or cited by the courts of the United States, Great Britain, and its Dominions as well, it has become the standard authority. We begin our research on any question of contract law with Williston. The preparation of a new edition of such a monumental work is fraught with difficulties and is at best a thankless job. Endless painstaking and patient research coupled with meticulous attention to detail are prime requisites to success in such a venture. The task of the author-editor becomes doubly difficult for his work must meet the high standard established by the original edition, and at the same time be comprehensive in its coverage of the quarter century since the second edition appeared. This entails analyzing and sifting countless cases that the courts of more than fifty jurisdictions have been "grinding out." Also, in line with the suggestions for changes and innovations intended to increase the usefulness of the treatise made by members of the judiciary and practising lawyers generally, as adverted to in the preface, hundreds of legal periodicals would have to be examined for articles, comments, notes and recent decisions which might prove useful to the profession.

In my examination of these first two volumes of the new Williston, I have been primarily concerned with what would interest the reader, presumably a member of the legal profession. Were I the reader, I should hope to find in any given review the answers to the following questions: What has been retained in the new edition? What are the principal changes? What additions have been made? Has the treatise become more useful to the practising attorney? In short, this review will seek to evaluate these innovations and alterations.

The Williston text and its conceptual content have been largely retained. Thus, adhering to Willistonian precept, the author takes a justifiable swipe at that misbegotten and misleading expression "sometimes unrealistically described as a 'meeting of the minds.' "[2] The general plan remains the same and, fortunately for us who have used the former editions (and who among practising lawyers hasn't?), chapter headings and section numbers have not been changed. This makes possible the continued use of the index and its annual supplement since they are keyed to sections. It will also be of service to the courts when they quote or cite the third edition of this authoritative work since they have become accustomed to referring to the earlier editions

[1] Seitz, Book Review, 56 Mich. L. Rev. 676 (1958).

[2] Williston, The Law of Contracts § 1, at 2 (3rd ed. 1957).

by section, rather than page numbers. Cases constituting judicial precedents have been retained, as have statutory references.

What significant changes has Jaeger wrought? While there has been adherence to the Williston text, this has been far from slavish. Changes in content have been dictated by changes in the law, changes in style by the increasing tempo of our lives. In former times, when there was more leisure and less emphasis on "do it now," a somewhat involved sentence structure was no deterrent to the avidly probing lawyer in quest of a solution to his problem. Today, a certain impatience manifests itself with a style that is ponderous and, at times, difficult to penetrate. Suffice it to say that the author-editor has not sacrificed the Williston content, but by means of shorter sentences, better paragraphing and some rearrangement, succeeded in presenting a more facilely comprehensible text.

A prime example of comprehensive revision is chapter 6 dealing with "Consideration," a topic dear to the heart of the practising lawyer. Here we find the first substantial expansion and modification in size and content. These are so far-reaching that one might almost consider this a wholly new chapter; it is probably the most useful in volume 1. Section 103, which formerly had an extensive discussion and evaluation of the views of earlier writers on the subject of legal detriment and benefit in eight subsections,[3] has now been condensed into one section. Much of the former theoretical discussion has been relegated to the footnotes and largely replaced by up-to-the-minute cases. The discussion of these cases is of inestimable value to the practitioner to whom they constitute a vital part of his stock in trade. Output and requirements contracts are given thorough consideration in line with their growing importance in commerce and industry.[4] Most of the confusion surrounding the use of the term "mutuality" is dispelled in Section 105A, "Mutuality of Obligation," wherein the author points out that the confusion has resulted from the use of the term mutuality in three different ways: mutuality of assent, mutuality of obligation and mutuality of remedies. If the writers would clearly indicate in which sense the expression was being used, most of the confusion could be obviated.

One significant change that may meet with criticism in some quarters is the decrease in emphasis on the Restatement of the Law of Contracts. In the preface to the prior edition, Professors Williston and Thompson state that they have made it a "primary purpose in their undertaking to provide such an exposition of the decisions and reasons supporting the rules of the Restatement as might fairly take the place of the Treatise which was originally planned as a part of the [American Law] Institute's publication." In the new edition, quotations from the Restatement and references thereto are largely relegated to the footnotes. As the Restatement has achieved wide acceptance, it is probable that the author-editor did not deem it necessary to continue the use of the Treatise as a launching device. Furthermore, a num-

[3] Id. §§ 103-103G (rev. ed. 1936).
[4] Id. § 104A, "Bilateral 'Requirement' and 'Output' Contracts" (3rd ed. 1957).
[5] Id. § 115C.

ber of the new cases he has introduced quote or cite the Restatement and this is indicated.

In the treatment of the Civil Law there is a change in emphasis. Instead of occasional references to the Continental codes and systems of law, cases from Louisiana and Quebec and references to their codes are incorporated in the new edition. This seems logical enough, especially as the references to the Civil Law in the previous edition were rather sketchy and of little if any value to the attorney practising in a common law jurisdiction. It is conceivable that this may occasion adverse comment from a few academicians devoted to a superficial adherence to comparative law, but this reviewer considers that the space thus saved has been used to much better advantage by the introduction of new sections dealing with some of the newer manifestations of the common law or its statutory modifications.

The greatest change in Volume 2 occurs in chapter 13 which is devoted to joint duties and rights based on contracts. Many sections have been combined, others rearranged. On the whole, the new arrangement seems more logical, especially as the original section numbers still appear with cross references to the sections with which they have been combined or merged. New sections that have been added will be discussed in a subsequent part of this review.

As to the footnotes: Here is an area of the greatest improvement. The old page-after-page, unbroken phalanx of citations, unrelieved even by paragraphs, has gone for good. In its place, we have terse characterizations, brief digests and succinct quotations from the courts' opinions. The lawyer is immediately advised of the nature of the case and its value to him in the preparation of his brief. No longer need he examine a seemingly endless array of cases to determine whether finally there is one in point; he can now tell at a glance. On the mechanical side, the use of bold-face type for the footnote numbers is a welcome change, especially for those of us for whom the printed word is getting smaller (in spite of bifocals) as the years go by. By way of parenthetical observation, it seems as though some publishers cherish the fond illusion that lawyers must have indestructible eyes needing no assistance from the graphic arts.

But it is in the "what's new" department that we find Jaeger's principal contribution. Of the material that has been added, certain sections require special mention. Thus, the treatment of forbearance has been expanded by the addition of several new sections in the chapter on consideration; it is the best that has come to my attention. Other sections that have been added to this chapter include: "Consideration and Tax Statutes,"[5] "Lack of and Failure of Consideration Distinguished,"[6] "Undertakings to Create Benefits by Will,"[7] and "Promise of Payment or Payment of Debt not Sufficient Consideration."[8]

The material on options, considered by some as barely adequate in the

[6] Id. § 119A.
[7] Id. § 119B.
[8] Id. § 120.

preceding editions, has been greatly augmented by the addition of new sections containing the recent cases. In conformity with the changing times, we find "Acceptance by Telephone or Teletype,"[9] "Carriage of Goods by Land, Sea and Air,"[10] and "Subscription and Allotment of Shares in New Company."[11] Stipulations are treated as agreements not requiring consideration and are given individual treatment.[12]

The author's treatment of statutory modifications of the common law by the use of tables is well illustrated by Section 219A dealing with the current status of the seal, and statutes of limitations, citations being given to code or statute. Similar tables are set out, dealing with the contractual capacity of married women,[13] the authority of executors or administrators to continue a decedent's business,[14] and the statutory modification of the personal liability of trustees.[15] One of the most significant of these tabulations deals with Veterans' Guardianship Statutes.[16] This is invaluable to us since there are nearly 30 million people who are classified as veterans. Undoubtedly, their problems involving contract law will increase enormously with the passage of time and litigation may be expected to reflect this increase. Statutory changes in joint obligations are tabulated in Section 336A, and those modifying the rule of survivorship in Section 344A. The great advantage of these tables is that they enable the busy lawyer to see at a glance what, if any, changes have been made in the common law of any given jurisdiction by legislative enactment. Members of the bar may be especially interested to learn that the new edition does justice to the Uniform Commercial Code, it being quoted or cited wherever apposite.

In dealing with the contracts of agents and fiduciaries, the author-editor has greatly expanded the treatment of apparent agency and agency by estoppel.[17] As the decisions in this area are in hopeless conflict and considerable confusion has attended them, this extended treatment is fully warranted, especially if it results in clarification of the basic concepts. In the same chapter, in recognition of the growing importance of labor relations and the agreements which underlie them, Jaeger has added two substantial sections on labor organizations.

Very early in Chapter 13 entitled "Joint Duties and Rights Under Contract" appears a series of entirely new sections dealing with a "case law hybrid of recent origin and undetermined connotation,"[18] the *joint venture*.[19] To embark upon this trail-blazing venture required a certain temerity; yet,

[9] Id. § 82A.
[10] Id. § 90BB.
[11] Id. § 69B.
[12] Id. § 204A.
[13] Id. § 269A.
[14] Id. § 310A.
[15] Id. § 312A.
[16] Id. § 314A.
[17] Id. §§ 277, 277A, 277B, 277C, at 204-253.
[18] Porter v. Cooke, 127 F.2d 853 (5th Cir. 1942), cert. denied, 317 U.S. 670 (1942), rehearing denied, 317 U.S. 710 (1942).

it seems to me that the eight sections devoted to the development of this concept will prove of real value to our profession as well as to the business community. There has been much controversy as to the nature of these business associations, some writers contending that it is nought but a special type of partnership.[20] However, the author-editor demonstrates by careful analysis of the case law that the courts have definitely rejected this contention and declared the joint venture to be *sui generis*, and perhaps, even *sui juris*.[21] He has, in the language used by the courts, drawn certain distinctions which seemed tenable to the latter and used in distinguishing between joint ventures and partnerships.[22]

The final chapter (Volume 2) is devoted to third party beneficiaries. The subject is developed along traditional lines—creditor beneficiary, donee beneficiary, and then various others, more or less related to the two principal classes. The Massachusetts rule is treated under "Relief Under Strict Doctrine of Privity of Contract."[23] Here the English cases are also to be found, as well as the familiar creditor's bill and statutory remedies for beneficiaries under life insurance policies. As there are a variety of statutes which deal with one phase or another of the third party principle, the author has included a comprehensive discussion of the Uniform Commercial Code and other statutes with a summary in a comprehensive table showing the variants.[24]

In what may be the most controversial of the new sections, "Recovery by Undertermined Beneficiary on Warranty,"[25] Jaeger takes the position that the third party beneficiary principle should be applied in actions on product warranties. Since the decision in *Winterbottom v. Wright*,[26] where a casual dictum of the English court led our jurists into the error of a curious privity requirement although that case did not even involve a manufacturer, a "general rule" was gradually developed. However, as one court has observed, the exceptions to this "rule" have grown and grown "until, in all truth—much like the boa constrictor swallowing itself—the exceptions devoured the rule."[27] Logic and some well-reasoned cases are on the author's side when he says,

> It seems curious that where third party beneficiaries have been recognized for so many decades in so many fields, there should be so much reluctance to recognize them in their most important aspect; ofttimes, in a matter of life or death.[28]

---

19 Williston, op. cit. supra note 2, §§ 318 et seq.

20 Nichols, Joint Ventures, 36 Va. L. Rev. 425 (1950).

21 Williston, op. cit. supra note 2, § 318B, especially at 592.

22 Rae v. Cameron, 112 Mont. 159, 114 P.2d 1060 (1941); McRoberts v. Phelps, 391 Pa. 591, 138 A.2d 439 (1958).

23 Williston, op. cit. supra note 2, § 360.

24 Id. § 367.

25 Id. § 378A.

26 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

27 Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W.2d 873 (1958).

28 Williston, op. cit. supra note 2, § 378A at 976.

Referring to the same problem, the Massachusetts Supreme Judicial Court had this to say:

> The time has come for us to recognize that that asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere.[29]

In any case, the author-editor suggests a feasible and logical solution; in the interest of the ultimate consumer, it should be generally followed.

Finally, another fertile field for the application of the third party principle is encountered in labor relations. This the author covers in a section entitled "Collective Labor Agreements."[30] Dwelling on the case law resulting from the federal legislation, he emphasizes the opinions in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*[31] and *United Textile Workers of America v. Lincoln Mills of Alabama*[32] to the effect that personal rights of employees must be sought in the enforcement by state courts. He writes, as to these personal rights, or as the Chief Justice of the United States describes them, these "uniquely personal rights":

> The Westinghouse and Lincoln Mills cases have left the federal courts somewhat baffled; some intriguing questions have presented themselves: What are 'personal' (described in a concurring opinion in the Westinghouse case as 'uniquely personal') rights of an employee, as distinguished from union rights? What is the theory of enforcement of individual rights by an aggrieved employee? Is he a third party beneficiary, or are the terms of the collective labor agreement embodied in the terms of his employment contract? What is the result if the state does not recognize third party beneficiaries?[33]

Resolution of these questions will undoubtedly prove a fruitful source of litigation, especially when regarded in conjunction with the problems created by the Landrum-Griffin legislation.[34]

In restrospect, it must be said that the new edition of Williston is an unsurpassed partner for the practitioner, not merely in contract law, but in all the related fields of sales, negotiable instruments, suretyship and guaranty, contracts of carriage by land, sea and air, bailments and a host of others. New sections and attractive footnotes greet the eye. The inclusion of cases decided by the courts (speaking the language of Williston) during the past two decades greatly enhance the utility of Jaeger's work. All in all, the new

---

[29] Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

[30] Williston, op. cit. supra note 2, § 379A.

[31] 348 U.S. 437 (1955).

[32] 353 U.S. 448 (1957).

[33] Williston, op. cit. supra note 2, § 379A, at 1001.

[34] Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. 1959).

edition is worthy of the master himself. We of the legal profession owe Walter Jaeger a lasting debt of gratitude for a job well done.

MICHAEL LEO LOONEY
*Of the District of Columbia, New York and Massachusetts Bars*

**Conflict of Interest and Federal Service.** By the Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws. Cambridge: Harvard University Press, 1960, pp. xvi, 336. $5.50.

Ever since it was pronounced by the Highest Authority[1] there has probably been little disposition to quarrel with the proposition that, "No man can serve two masters." But, even in the God-and-mammon context in which it was originally stated, the principle has been one whose applicability in specific factual situations is frequently most difficult to determine.

That the principle has applicability in contexts other than the theological has been underscored in recent years by widespread publicity over "five-percenters," influence peddlers, gifts to government officials, investment portfolios of nominees to Cabinet and sub-Cabinet positions, and the like. That some government servants have improperly (in the ethical sense) served two masters, there can be no doubt. But where the line between propriety and impropriety (in the legal sense) is drawn is a matter of at least considerable uncertainty; where it should be drawn is a matter of more than the semantics of the Scriptural text.

With characteristic concern for the public interest the Association of the Bar of the City of New York in 1955 established a special committee of distinguished lawyers,[2] with a staff under the direction of two university professors,[3] to make a study and report on the federal conflict of interest laws. This volume is the result.[4]

At the outset, the Committee wisely eschews the function of providing remedies for all the shortcomings of the operations of government. It confines its concern to the activities of employees and ex-employees in the executive branch, and in this category its study is limited to the matter of

---

[1] Matthew, 6:24. The parallel recital in Luke, 16:13 occurs immediately after the Parable of the Unjust Steward. Luke, 16:1-9.

[2] Roswell B. Perkins (Chairman) of New York; Howard F. Burns, of Cleveland; Charles A. Coolidge, of Boston; Paul M. Herzog, of New York; Alexander C. Hoagland, Jr., of New York; Everett L. Hollis, of New York; Charles A. Horsky, of Washington; John V. Lindsay, John E. Lockwood and Samuel I. Rosenman, all of New York.

[3] Professor Bayless Manning, of Yale University Law School, Staff Director, and Professor Marver H. Bernstein, of Princeton University, Associate Staff Director.

[4] A companion volume embodying the Committee's research into, and evaluation of, the existing conflict-of-interest laws is scheduled for publication in 1961.