Washington University Law Review

Volume 12 | Issue 3

1927

Review of "The Elements of a Contract," By Victor Morawetz

Charles H. Luecking
St. Louis Bar Association

Book Reviews

STUDIES IN THE LAW OF TORTS. By *Francis H. Bohlen,* Langdell Professor of Law Harvard University, pp.viii and 699. Indianapolis: Bobbs-Merrill Company, 1926.

The book consists of fifteen articles by Professor Bohlen, published in various legal periodicals during the last quarter century, and dealing with various topics of more than usual interest in the Law of Torts. In the main the subjects treated are broad questions of Tort liability, such for example as "The Rule in Rylands v. Fletcher"; "The Basis of Affirmative Obligations in the Law of Tort," and "The Moral Duty to Aid Others as a Basis of Tort Liability." The author recognizes in his preface that "there is much in these articles, particularly the earlier of them, which today may seem out of date," but he also states that "if this collection has value, a part of it lies in the fact that it shows the changing view of a changing and developing subject of one who has devoted the longer part of his professional life to its study." Certainly it is not too much to say also that the author as the result of this long labor; of which these articles are the select point, has contributed to this growth and development as much as any worker in that field. The articles are familiar to all teachers of Torts, and while the subject matter has heretofore been available to those who have access to large law libraries, this volume now makes them available to others. Unfortunately, the average practitioner seldom explores the rich territory of the legal periodical, and the same is true to a less extent of the courts, particularly of trial courts. This practice might well be, and to some extent is being, changed, with resulting profit to the lawyers, the client, the court and the law. This book should assist in bringing to the attention of those not now familiar with them the most scientific and thorough researches in the law in our time.

WILEY B. RUTLEDGE.
Professor of Law,
Washington University.

THE ELEMENTS OF A CONTRACT. By *Victor Morawetz,* pp. xii and 167. Published for the author by the Columbia University Press, New York, 1926.

As a member of the American Law Institute and of its Council, Mr. Morawetz wrote this book in the hope that it might be of some value to the Institute in its preparation of a restatement of the law of contracts. In his preface the author states that what is needed is not the history and sources of the law, but an analysis of current legal conceptions and a restatement of the existing law according to fact and reason. This work is not a full and accurate statement, but an aim to classify fundamental conceptions. In most cases only general principles are stated, without mention of limitations and modifications of them. There are no authorities cited.

In the early part of the book there is a statement and discussion of the fundamental general conceptions upon which the author thinks a restatement should be based. Mr. Morawetz takes issue on several points with the proposed restatement by the Institute. It is in this respect that the book is most interesting. The author says that we must try to get away from artificial conceptions which make the law unintelligible. But throughout the whole discussion there seems to be too much argument and dissention over definitions of words used. The ultimate should be uniform and exact thought. Too fine distinctions put one in a worse position than he was before, with no advancement toward a classification or simplification. The rest of the book deals with the

formation of contracts, specification of terms of a promise, intent and understanding and an expression of such as elements of a contract, effect of error, ignorance, impossibility or illegality, and consideration. These are dealt with admirably.

The most interesting part of this work, however, is the discussion of the fundamental conceptions, in which Mr. Morawetz turns his guns in full fire against Mr. Williston, over the troublesome question of just what is a contract. Mr. Williston, who prefaced the restatement for the Institute, defines a contract as "a promise or set of promises to which the law attaches legal obligation." Mr. Morawetz says that it is very difficult to make a definition in words which are inclusive of the whole meaning of the word, as it embodies a number of different conceptions, but makes his attempt in these words, "the sense in which the word 'contract' is commonly used, in law as well as in popular usage, is that of an agreement formed by act of the parties whereby some legal obligation to be performed thereafter, commonly called a promise, is assumed by one or more of them." "Agreement" is here used as a pact or treaty, as distinguished from a meeting of minds or consensus of intent. Mr. Morawetz says a contract is not a promise as Mr. Williston thinks, for a promise does not necessarily create an obligation. He says that "contract" and "agreement" are often used interchangeably in the same sense; but that "contract" is also used in a special technical sense to describe an agreement which creates a legal obligation.

There is also some dissention as to the meaning of the word "agreement" which is responsible to a large extent for the difference in the definitions. Mr. Morawetz says it is a pact or treaty, while Mr. Williston thinks it is a mutual assent by two or more persons, and is a wider term than "contract" as it covers sales, gifts, and promises to which the law attaches no legal obligation.

This book, on the whole, is a very good one, even though there be a variation from some of the prevailing doctrines. Mr. Morawetz, himself a lawyer, gives the lawyer's viewpoint in his book. His is a scheme which tries to avoid litigation as much as possible. He might not have the reasoning and theory found in the opinions, but he has the very praiseworthy practical philosophy of the practitioner.

Perhaps it might be well in conclusion to say a few words about the American Law Institute and its work. It was founded by Act of Congress and endowed by the Carnegie Foundation, including in its membership members of State Bar Associations, Supreme Courts, and all the Class A Law Schools. Its work is to restate the Common Law in a clear, simple and comprehensive manner, so that much of the conflict in our legal system now prevalent will be removed. It is expected that the work will take about one generation, or thirty-three years to complete. Certain eminent scholars and authorities are given the positions as Reporters, who collect the law for the restatement, along with their assistants. At general meetings these proposed restatements are discussed by the members, the Council having the final vote of adoption. It is truly hoped that this organization will do well in its attempt to classify our law.

C. H. LUECKING, '28.

BRIEF MAKING AND THE USE OF LAW BOOKS. Edited by *Roger W. Cooley*, Professor of Law, University of North Dakota. With specimen pages compiled by *Lafayette S. Mercer*. pp. xxvi and 1092. St. Paul: West Publishing Co., Fifth Edition, 1926.

Legal students admit, however reluctantly, that much of the procedure of the profession is anachronistic. Nowhere has this been more true than in certain phases of legal training, particularly in teaching the student the use of the instruments of his profession. Too often has the student been left to secure this essential knowledge by the costly method of trial and error, with casual aid