Michigan Law Review

Volume 19 | Issue 4

1921

Book Reviews

Edward S. Rogers

John Barker Waite
University of Michigan Law School

BOOK REVIEWS

PATENT LAW, by John Barker Waite, Professor of Law in the University of Michigan Law School. Princeton University Press, 1920.

This is a good book on what was once described by Justice Story as "the metaphysics of the law."

When it is realized that an invention is not "an art, machine, or composition of matter"—these may be material embodiments of it—but that the invention itself is an intangible thing, an idea, a mental concept, which existed in the mind of the inventor before it was put in tangible form, and may co-exist in tangible forms not physically resembling each other, it is easy to see what opportunity this subject offers for ingenious as well as amusing speculation, as, for example, whether a jail is an art, a machine, or a composition of matter,[1] or whether the gift to the inventor's fiancée of a set of corsets is a public use.[2]

The successful practitioner must be able to analyze his client's invention and find out what there is about it that is new—what, in fact, the invention is. He must patiently pursue, overtake, and be able to recognize the intangible and elusive thing that has been created and which never existed before, and he must be able to describe it so that a judge, who as often as not cannot drive a nail, can understand it.

In no other branch of law is the human element, both of court and counsel, so important and so uncertain, and this accounts, more than anything else, for the apparently irreconcilable conflict of decisions.

There are very few legal principles that are at all disputed. The whole patent system is based on one or two lines in the Constitution and some short and simple statutory provisions. The trouble is that the courts are dealing with imponderables and some men perceive them better than others.

Decided cases are of little use as a guide. No two cases are alike; considering the subject matter, they cannot be. It is an absurdity to try to find rules for the decision of the instant case from cases which have gone before.

Precedents may indicate factors which have influenced courts, in certain instances, to find invention or the lack of it; but it is quite irrational to try to formulate rules of thumb for determining this question. Books which make this pretense are misleading. It is the conspicuous merit of Mr. Waite's book that he attempts no such impossibility. His discussion of the meaning and characteristics of invention in Chapter II is excellent, and when this matter is understood the troublesome part of patent cases is at least perceived, because invention, anticipation, and infringement are all the same question. The answer depends on the ability to discover, discern, and describe a mental concept. Finding that mental concept to be new, there is invention; finding it in the earlier knowledge, there is anticipation; finding

[1] Jacobs v. Baker, 7 Wall. 295.

[2] Egbert v Lippmann, 104 U. S. 333.

it in the patentee's claims, not in the earlier knowledge and in a later device, there is infringement.

There is not the same opportunity for close reasoning and accurate statement in the other parts of the book as there is in the treatment of invention, but always the subject is discussed with sense and discrimination and with a clarity which, in law books, and particularly in books on this subject, is as refreshing as it is uncommon.

This book is readable. There is a conspicuous absence of the trade patter—the argot of the so-called patent lawyer, which seems to be the usual thing in most discussions of patent questions, as if the subject itself were not sufficiently esoteric, but needs, in addition, a jargon of its own to make it the more obscure. One does not have to learn a new language to read this book. It is clearly expressed in good English. It has none of the professional cant of the practitioner whose door is adorned with the sign, "Patents, Trademarks, Copyrights, and Corporations." And it is free from the curious and irritating mannerisms which deface some books on patent law, such as Walker's affection for the word "relevant," which is a good enough word, but a book which uses it to the exclusion of others equally good is apt to be tiresome.

Mr. Waite's book contains one glaring mistake. The preface states:

> "Although the book is as complete in its field and as thorough as I could make it, it is written primarily for others than patent practitioners. They, presumably, being already trained specialists in this subject, have no longer any need for discussion and exposition of principles."

There never was a greater error than the implication which this paragraph contains. The presumption that patent practitioners are trained specialists who have no need for a discussion and exposition of principles is amiable but mistaken. The average patent practitioner is usually a person who has grafted a limited specialty on an imperfect education, who cultivates a constricted outlook, an uncouth speech and a mysterious manner. No one needs an introduction to principles more seriously than he, and a study of this book would do him a world of good.

Chicago, Ill. EDWARD S. ROGERS.

CONTRACTS IN ENGINEERING, by James Irwin Tucker, B.S., LL.B., Director of the School of Civil Engineering, University of Oklahoma. 2d Ed. New York, 1920. McGraw-Hill Book Co. Pp. xii, 331.

This single volume is not in any sense a complete presentation of law on any subject, of course, but is an effort to give to engineers "substantial information upon many legal matters." It is in form a text-book. Each general topic is followed by pages of questions upon its subject matter. The work covers not only general principles of contracts but also "Agency, Tort and Independent Contractor," "Real Property," "Contracts of Association," "Contracts of Sale and Transportation," and "Negotiable Paper." An "Appendix" carries miscellaneous juristic information. As it is a condensed

presentation of general rules and principles, rather than an elucidation of complex problems, the author very properly omits, as a rule, references to authority

The reviewer confesses to a prejudice against works of this general type which purport to give some knowledge of *law*. Experience in practice has not led him to believe that a little knowledge of law may not be dangerous, even though its possessor be warned, as the author does warn his readers, that the services of legal counsel cannot completely be dispensed with. Whenever the author discusses abstract principles of law, rather than concrete applications, it is well done. Nevertheless, the reviewer has a feeling that he understood it all only because he was already conversant with the matter. He suspects that four out of five laymen, after studying the section on "consideration," would fail to realize that while a detriment suffered in reciprocation of a promise is consideration for it, detriment suffered in mere reliance upon the promise is not. This is no criticism of the author's presentation, but merely comment upon the inherent defects of any such book.

But, after all, the man who draws his own contracts, like "the jolly testator who writes his own will," makes business for lawyers more because he does not anticipate the possibilities for dispute, or, having anticipated them, does not express himself definitely in regard to them, than because he does not understand the principles of law. To quote from the book, "Attorneys say that probably seventy-five per cent of the litigation in court at the present moment is due to the fact that some one, either a lawyer or a layman, has at some stage of the proceedings failed to state with exactness and clarity just what was intended in a writing or in an oral declaration." To correct this source of litigation and trouble is essentially, one may deduce, the aim of the book. To this end, one of the best chapters in it, from the point of view of a lawyer, is the one entitled "Engineering Contract Writing." The author begins by scotching the common idea that a contract must be framed in technical legal language to be effective. Undoubtedly, much uncertainty in laymen's contracts is due to the use of misunderstood technical terms. Incidentally, the same thing might be said, with considerable accuracy, of lawyers' contracts. Having thus urged the use of plain and definite English, the chapter then suggests a very comprehensive list of possible sources of dispute in engineering contracts—e. g., the insufficiency of specifications, time elements, methods of measurement and valuation, extras, risks, and the like.

It is in the suggestion of such non-legal points as these that the book would seem to be most valuable. Nevertheless, its suggestions as to legal rules are not without real worth. That one is not legally safe in believing another's statements about a third person seems mere common sense. But it is worth the time of reading to have it brought home that A cannot make C pay for work which A did on orders from B, merely because B himself stated that he was the agent of C.

This type of information, also, is clearly and inclusively presented, and the book as a whole is the best one of its type that the reviewer knows of.

JOHN BARKER WAITE.