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Criminal Law, Administration and Public Order

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to have unrestricted operation in conflict of laws, and the author's proposal to restrict it only by the conception of public policy is too vague to serve as more than a stopgap until more definite restrictions can be developed.⁸

There are matters of contract law, however, on which the intention of the parties may well be dominant. These are the matters which determine the scope and content of the contractual obligation and which the parties had the power to determine for themselves. They include, for example, whether there are warranties, who shall run the risk of loss from the action of third parties, and what will justify termination. If the parties could have dealt with them explicitly in detail, there is no reason why they may not deal with them indirectly by reference to a particular system of law. This is no more than filling gaps in the contractual plan. It is a different thing, especially when the parties are of unequal bargaining power, to seek to escape from protective rules which prevent the making of a contract at all, as rules about capacity. And if the normally applicable rules on the content of the contractual obligation do not merely fill a gap in the contractual plan but are protective and mandatory, as rules on the limitation of liability of carriers, they too should not be evaded by the facile device of an expressed intent to use another law.

In torts the author would give more weight to the law of the place where the injury was suffered than would some other writers who have considered the subject.⁹

The chapters on corporations and kindred organizations were most helpful to me in the analysis of the types of legal persons and the varieties of unincorporated associations; in the discussion of the law governing corporate activities; and in the reminder that, where the common law uses the contacts of place of incorporation and doing business, the civil law is apt to use center of administration and the establishment of a place of business.

I feel like expressing appreciation as well as congratulations to the University of Michigan and the foundations which made possible the necessary research to produce this latest addition to the Michigan Legal Studies, and to Messrs. James, Long, Sirene, Hancock, Coffey and others in the University of Michigan Law School and elsewhere who aided Dr. Rabel and to whom the author states his indebtedness.

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CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER. By George H. Dession. Charlottesville: Michie Casebook Corporation, 1948. Pp. viii, 1081. \$8.75.

In reviewing a casebook the reviewer is necessarily more closely confined to an analysis of the material and its arrangement than in a review of, say, a textbook, where it is possible to trace the wide sweep of the subject's development. This review will, therefore, consist, in the main, of an examination, chapter by chapter, of the contents of Mr. Dession's book, followed by some brief general comments.

Chapter I deals with the broad problem, what sort or sorts of conduct

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8. For a criticism of the wide use of public policy in conflict of laws, see Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938).

9. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*. 19 Tulane L. Rev. 165 (1944). Cf. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 182-187 (1937).

deemed socially undesirable should be placed within the purview of criminal law. The editor takes for granted the inclusion of all the usual attacks on personal and property safety, and addresses himself to the borderline material, much of it very recent in development. Thus, for example, birth control and combinations in restraint of trade both find places here. In other words, the chapter deals with what Mannheim in his recent study¹ has called the "values" that criminal law protects. Like Mannheim, Mr. Dession brings out the fact that these values tend to change far more from generation to generation than a short-range view would indicate. Blasphemy has lost its "value"; wild-cat stock issuance has gained one. It is interesting to note that (if the selection of cases is a criterion) Mr. Dession does not share Mannheim's exaggerated fear of "white-collar" crime. At any rate the chapter contains no case on tax-evasion—a matter that, to the European author, apparently seems almost the wave of the future.

Chapter II takes up various disagreeable or otherwise unwanted experiences to which the individual is subjected, and examines to what extent they may be justified either (a) as further punishments or collateral consequences of a conviction, or (b) as devices of social protection against one not regarded as a criminal. Thus, as part of the former group, there is valuable material on the consequences of being placed on probation, a court's power to impose fines and to implement them by imprisonment and the severer treatment of recidivists. One would expect at this point to find a discussion of "cruel and unusual punishment" and of the degree to which we are tied down by that constitutional limitation to a set and narrow range of punishment and rehabilitative treatment. The entire absence of such discussion seems unfortunate. The second category (devices of social protection against non-criminals) discusses, besides the obvious illustration of commitment to a reformatory by a juvenile court, the imposition of quarantine regulations, the confiscation of property used in committing a crime, the exclusion of the Nisei from the Pacific Coast during the recent war, compulsory sterilization laws, and—especially interesting—the "sexual psychopathic person" statutes recently enacted by a number of states.

Chapter III in its opening section takes up the policy considerations involved in determining whether the criminal law should or should not concern itself with various sorts of conduct. It deals with such questions as the extent to which the criminality of homicide or physical violence should be affected by motives of self-preservation. Other policy problems brought up in this section are the degree of definiteness which statutes should be required to attain (*e.g.*, their use of such terms as "disorderly conduct," "vagrancy," *etc.*) and the conflict between criminal law and freedom of speech and publication. The final two sections of this chapter deal briefly with the purposes of punishment, vengeance, deterrence, rehabilitation, *etc.* In the reviewer's opinion not only are they injected at an unexpected moment, but also they should either have received more than sixteen pages or been left out altogether.

Following Part II which is entitled "The Initiation of Proceedings" and which contains, among other things, a discussion of jurisdiction and venue problems the editor abruptly interrupts the development of procedure, in order, in Part III, to devote some 400 pages to substantive law. To avoid producing two casebooks bound in one volume the author chose to split the one topic and insert the other in the cleft. Thus he "integrates" the two subjects—the way oil and water are integrated when poured together. Since these are

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1. CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION (1946).

fundamentally different topics which just won't mix, it makes little difference where the split occurs. Mr. Dession's choice would seem as good (or as bad) as any other. By passing over Part III temporarily, one finds exactly as he would wish and expect, that, having just finished with the prosecuting attorney (Chapter VII), he is now (Chapter XIII) introduced to defense counsel, with no 400 page gap blurring the sequence. The chapter not only has adequate material dealing with the very live question of what is contained within the constitutional right to have counsel; it also contains admirable selections on the duties of defense counsel and on the limits set by proper professional ethics.

Chapter XIV on "Proceedings before Magistrates" seems seriously inadequate. It contains only three cases. One disposes of summary proceedings and another of the whole field of bail. That leaves only one case on preliminary examination.² Students of criminal procedure are pretty well agreed that a major source of our troubles lies in the inadequate attention that we have been giving to this stage—one through which practically every criminal proceeding must pass and which turns out to be the final one in so high a proportion of them. It is a matter for surprise and regret that Mr. Dession appears so fully to support its rejection from real consideration.

Chapter XV, on "Indictment and Information" has no case material, but only the Federal Rules and comment on them and the text of an information in a Sherman Act violation with comment. It is a relief to find that Mr. Dession has swept out the lumber of indictment minutiae.

Chapter XVI, "Arraignment and Preliminaries to Trial," really deserves only the latter half of its title. It contains interesting selections on extradition, suppression prior to indictment of an involuntary confession, subpoenas, discovery and inspection; but unfortunately, there is little or nothing on the meaning or scope of the various pleas or on motions to quash.

Chapter XVII covers the whole topic of Trial, from the selection of the jury to the reception of the verdict. In an extreme form it raises a question that, to some extent, will occur to the teachers throughout the book. In its forty-eight pages there are only two cases.³ One of these deals with the legality of blue-ribbon juries, the other with comment on the defendant's failure to take the stand. They can scarcely be regarded as "covering" the whole field of trial. Of course there is much to be said for narrowing and intensifying the field of discussion, but surely Mr. Dession has here carried matters much too far. It is scant comfort that the notes refer to many other subjects⁴ falling within the trial area. It still remains true that this is not a casebook in them. Incidentally the entire chapter (Chapter XVIII) on Judgment and Appeal—two rather sizable topics—contains only one case.

We now return to Part III, which contains five chapters on substantive law. The first of these deals with certain general principles and concepts, such as the meaning of act, motive, causation, parties, attempt, *etc.* In it Mr.

2. Even this case is only doubtfully in point (to say the least), as it deals, not with the examination, but with whether a plea of guilty, *after* indictment and later withdrawn with the permission of the court, might be shown as an admission, at the trial. It is difficult to see how a discussion of preliminary examination can be founded on it as its basis. It should be added that there is a half-page note on defense counsel at this stage.

3. Ten of the forty-eight pages are used for the Federal Rules and brief notes. One of the cases takes up twenty-one pages, the other, seventeen.

4. The half page of notes at the end of the chapter deals with comment on the evidence by the judge, return of verdict, multiple defendants, conviction of lesser offense, hung juries, the giving of instructions, jury as the judge of the law, sealed verdicts, unanimity, *etc.*

Dession appears to have brought together a large amount of highly stimulating material. Particularly noteworthy are the pages dealing with conspiracy and with prior proceedings as a possible bar to later ones. Again the question may be raised whether the cases are not too few and too long, with too much space given to notes presenting text material.

The remaining four chapters on substantive offenses require little comment. They appear, in the main, to be very well constructed. An occasional doubt does suggest itself: is it wise to *begin* the treatment of larceny with the *Carrier's Case*? It seems most strange to develop the complex superstructure before the foundations are laid. Do treason and sedition really merit thirty-six pages, in view of all the crimes that must be omitted almost entirely? True, right now they loom large in our thoughts, but may we not hope that this is a passing phase?

In conclusion a few general comments will be made. Mr. Dession has elected to lean heavily on very recent material. Of the (approximately) 144 cases sixty-nine are dated 1930 or later. In a subject in which state law still supposedly plays a major part, it is surprising to find that over 500 pages of the total of 1052 fall in the federal category. While Mr. Dession in his preface gives his reasons for this choice, it seems to be carried to an extreme, especially when, for instance, in the twenty-two pages of the chapter on Judgment and Appeal exactly twenty-two lines are assigned to state material. And while the Federal Rules are of course important, it is a pity that the rare references to the American Law Institute's Code are uniformly limited to two or three lines merely stating that pertinent state decisions are collected under such and such a section.

As to mechanical matters, the book has a good index—a feature too often treated carelessly in casebooks. On the other hand it has two marks against it: there is a complete absence of running heads at the top of the pages. Instead, from beginning to end the name of the book unhelpfully appears. And, in a book dealing with criminal law, what justification is there for a table of cases alphabetized by the plaintiff's name ("State," "People," *etc.*, *etc.*) instead of by that of the defendant? The inconvenience appears particularly clearly in the English cases, which may be found under "Rex," "Regina," "King," "Queen" and "The Queen."

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