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Review of "Handbook on Equity," By Henry McClintock

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which involve multiple classes of stock, such a statement is too general to be helpful. It becomes largely a question of balancing the interests of two or more classes of shareholders as to participations in assets, dividends and voting to ascertain whether the greater equities are disturbed by granting or denying the preemptive right. While Mr. Stevens later suggests the balancing of equities, his treatment stops short of a satisfying rationalization.

Perhaps no one appreciated the limitations of a Hornbook more than the author of this one himself. Viewing it as a whole, however, the pretensions of his preface seem far too modest. We would commend it as one of the best works available for the purposes not only of a student but also of a lawyer who would refresh himself on chapters of the law and its development.

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HANDBOOK ON EQUITY (Hornbook Series). By Henry L. McClintock. St. Paul: West Publishing Co. 1936. pp. xix, 421.

The writer who attempts to compress Equity into a Hornbook has an unenviable task. Out of materials that are notoriously spongy and plastic, his job is to produce a skeleton whose bones are hard, clean-cut, and easily traceable. Professor McClintock is to be congratulated on the skill with which he has succeeded in constructing such a skeleton while yet revealing in judicious measure the organic marrow hidden in the bones. Smaller by more than 250 pages than its predecessor in the Hornbook series—the long familiar but sadly outdated Eaton, *On Equity*—his book is nevertheless more comprehensive and competent for elementary students. The reason for this lies partly in his elimination of the extensive discussion of trusts and mortgages—subjects which fattened many an earlier work on Equity but which have long been separately treated in law school curricula. It lies also and perhaps chiefly in the more adroit economy with which the author of the present volume has handled such difficult and controversial topics as mutuality in specific performance, inadequacy of legal remedy, property as a limitation on the exercise of injunctive power, etc.

Of the few defects—inevitable in a work of Hornbook limitations—which the present reviewer has noted in Professor McClintock's treatise, there is one which is here singled out for special mention, both because it affords the reviewer an opportunity to correct an error into which authoritative writers on Equity have fallen in recent years, and also because the case involved in the error happens to be a Missouri case, whose significance has not been given sufficient attention. If this review serves no other purpose, the writer hopes that the following observations will at least help to avoid a repetition of the error in future works on Equity.

One of the most controversial problems in modern equity is the extent to which an injunction will issue to restrain a nuisance which also involves a violation of the criminal law. Perhaps the best known case on this subject is that of *Commonwealth v. McGovern,* decided by the Kentucky Court of

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Appeals in 1903.[1] That case held that while an injunction was proper to restrain the owners and managers of the premises where an illegal prize-fight was about to be conducted, it could not be issued against the prize-fighter himself or any other individuals who had no proprietary connection with the premises. The distinction was based on the ancient dogma of property involvement as a prerequisite to injunctive relief. Citing this case —and only this case—Professor McClintock makes the unqualified statement that "the injunction should be allowed only against illegal use of the property and not extended to a prohibition against acts by the defendant which are not related to the use of property."[2] The reader is thus left with the impression that there is neither authority nor reason for an injunction in such circumstances that will bind the principals engaged in the proposed criminal act, as well as the persons having a property interest in the premises where the act is to be committed.

It so happens that a few years after the decision in the McGovern case, the Missouri Supreme Court in the case of *State ex rel. Crow v. Canty*[3] had before it a situation strikingly similar to that in the Kentucky case, except that the criminal nuisance involved was bull-fighting instead of prize-fighting. The lengthy opinion of Judge Woodson follows the distinction laid down in the McGovern case. Unfortunately, Woodson's opinion was reported before the opinion of Judge Lamm, which, though much briefer, happens to be the majority opinion on this particular point, Judges Valiant and Graves both agreeing with Lamm in a divisional court of four judges. Professor Cook of Yale seems to have been the first to misread the case. Annotating the *McGovern* case in the first edition of his familiar case-book on Equity, he wrote that "the Supreme Court of Missouri enjoined the use of property for a bull fight, but refused to enjoin the principals."[4] The error is repeated in his latest case-books.[5] Following Cook, Professor Walsh in his excellent treatise *On Equity*, published in 1930, also states that the Missouri court "refused to enjoin the principals."[6] Professor McClintock in his Hornbook fails to make any note of the case whatsoever.

The consistency with which these recent equity commentators have given prominence to the conservative view of the Kentucky case while either ignoring or misreading the Missouri case is all the more surprising when it is observed that on most of the controversial problems in equity their position is ordinarily on the progressive rather than the conservative side. Indeed, on the particular point here involved, Professor Walsh does not hesitate to state that "there sems to be no good reason * * * why the principals to a threatened nuisance, as in the prize fight and bull fight cases, should not be enjoined from taking part in such an exhibition in any place within

1. 116 Ky. 225, 75 S. W. 261 (1903).
2. P. 286.
3. 207 Mo. 439, 105 S. W. 1078 (1907).
4. One volume edition, pub. 1926, p. 325, footnote.
5. 2d Edition, 3-volume case-book (1932), vol. I, p. 446, footnote; 2d Edition, 1-volume case-book (1932) p. 298, footnote.
6. p. 203, footnote.

the state."[7] Surely, the modern student of elementary equity, whether in Missouri or elsewhere, ought not to be left with the antiquated property distinction of *Commonwealth v. McGovern*, untempered at least by the humorous but trenchant remarks of Judge Lamm:

> "Equity should not bother itself to pick and choose between the lot—make fish of one and fowl of the other—but treat them as it finds them, viz.: bound together in a bundle as members of one body, 'hail fellow, well met'—birds of a feather—voluntarily united in a joint violation of law in maintaining a public nuisance, and hence, not divided by that law for the purpose of injunctive restraint. * * * It is argued there is no precedent. If that were so, it ought not to avail anything. The day of making precedents is not passed. If there be no precedent, the time has come to make one."[8]

Equity writers in the future please note!

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CASES AND MATERIALS ON CONFLICT OF LAWS. By Elliott E. Cheatham, Noel T. Dowling, and Herbert E. Goodrich. Chicago: The Foundation Press, 1936. pp. xliv, 1148.

The jealous eagerness of virtually every law teacher for an increased allotment of classroom time to his particular course is perhaps equalled in intensity only by the imperialistic appetite of an expansionist nation. Certain it is that the appearance of this case book in Conflict of Laws has aggravated the desire of the present reviewer to have four or five hours for the presentation of the problems of this dynamic subject. Designed for use *in toto* in a longer course, the book includes materials of fundamental importance in the formation of basic theory which, in a three hour course, must be omitted or passed over briefly by the unsatisfactory lecture route. It is with deep regret that the reviewer finds that he must omit from his class agenda the consideration of such materials as those dealing with the civil law principles of jurisdiction and choice of law and with international law as a source of Conflicts rules.

Professors Cheatham, Dowling, and Goodrich have produced a source book in line with the current tendency to modify the case book method by the inclusion of textual material, particularly as a means of introduction to problems of complexity. The alteration of the case book style is not carried as far as in Professor Carnahan's original and well-edited *Cases and Materials on Conflict of Laws*, but the editors have recognized the importance of condensation. Certain cases are carefully edited and many are briefed to virtual shorthand statement of principle. The notes to the cases given in full are admirably done and serve the double function of providing supplementary material and of keeping before the student the relationship between various parts of the book.

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7. p. 203.
8. State ex rel. Crow v. Canty, l. c. 462.

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