UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 19 | Number 3 Article 6

4-1-1941

Book Reviews

North Carolina Law Review

BOOK REVIEWS

A Short Historical Introduction to the Law of Real Property. By J. John Lawler and Gail Gates Lawler. Chicago: For the Authors by The Foundation Press. 1940. Pp. xxii, 204. $2.50.

Upon the sound premise that "Real Property Law can be understood only in the light of its historical evolution," the stated objective of the authors is to compile for first-year law students an introduction to the subject in the form of a short digest of the principal text authorities in the field. A desirable feature is unitary treatment of each concept, instead of scattered consideration throughout the book. But for such a method to succeed in a book for beginners ample cross-references are necessary, and they do not appear in sufficient numbers in this volume. A useful bibliography of text citations occurs at the end of each chapter, but since chapter two, estates in land, includes more than half of the book, it would have been a more convenient arrangement had the bibliography as to each estate occurred at the conclusion of consideration of such estate, rather than all being lumped together at the end of the disproportionately long chapter two.

As to treatment and reliability of substance, the volume contains some very good sections, but as a whole it suffers by reason of statements concerning contemporary law or legal history that seem subject to question as to accuracy or lucidity. Lack of space preventing consideration of all unsatisfactory portions of the work, only selected sections are discussed.

Section 49. As to the distinction between freehold and non-freehold estates, it is said: "The duration of freehold estates is always an uncertain period. . . . The non-freehold estates . . . always have a definite period of termination." While uncertainty of duration is true of all freeholds, definiteness of time of termination is not a characteristic of the non-freeholds, tenancy at will and at sufferance.[1]

Section 52. Speaking of the fee simple absolute, it is said "that in Glanville's time at the close of the twelfth century, the consent of the presumptive heirs was essential to the validity of a conveyance by the first taker." This assertion seems to need qualification. According to Glanville, a relatively extensive liberty of *inter vivos* conveyance of freeholds was enjoyed by an ancestor without the consent of the presumptive heirs.[2]

[1] 1 TIFFANY, REAL PROPERTY (3d ed. 1939) §25.

[2] GLANVILLE (Beames transl. 1900) 114-119, 124. Compare 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 13, 308-313; WILLIAMS, REAL PROPERTY (24th ed. 1926) 98, n. (u).

Section 62. The naive description of the rise of the Court of Chancery as depicted in the last paragraph of this section seems more misleading than enlightening. The man who came in time to be a court of equity did not gain that position just because he was the king's chaplain as seems intimated by the authors. It was because he was a great law officer of the kingdom—head of the administrative Chancery department and member of the King's Council from which his equity jurisdiction at first emanated.[3]

Section 68. It is stated that "the effect of the Statute of Enrollments was not to compel all grantees to make their holdings of title matter of record, although that very probably had been the purpose of its draftsmen. The Statute . . . applied only where one person was *seised* to the use of another." This statute required enrollment of only one type of transfer, the bargain and sale of a freehold; and the inference that the conveyance of a freehold by covenant to stand seised was within its purview is erroneous.[4]

Sections 83, 84, 85. In these three sections two different types of defeasible fees simple are treated: the fee simple determinable and the fee simple subject to a condition subsequent. It is here said that "in 1831 a conveyancer named Saunders [sic], writing on the subject of Uses and Trusts, stated it to be his opinion that the Statute of Quia Emptores had made the creation of both of these types of qualified estates in fee simple impossible." While Sanders did say that there could be no fee simple determinable since Quia Emptores, he appears to have made no such assertion with regard to the fee simple subject to a condition subsequent.[5] And although it is true, as the authors say, that Gray followed "the heresy of Saunders" he did not misstate it by including the fee simple subject to a condition subsequent as within the mischief of Quia Emptores.[6]

Section 112(b). In discussing dower in the United States, it is said that "the common law concept of dower . . . has been changed everywhere." This statement seems erroneous. An authoritative work in the field says: "Fifteen jurisdictions have substantially retained common law dower. Eight states have retained common law dower in general, but have added other more generous rights."[7]

Section 124. With regard to the twelfth century position of tenant for years who was ousted by his lessor, contradictory statements are

[3] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (4th ed. 1931) (hereinafter cited as HOLDS.) 395-405; LEADEM AND BALDWIN, SELECT CASES BEFORE THE KING'S COUNCIL (1243-1482) 35 Selden Soc. XXIII-XXV.

[4] 4 HOLDS. 427, 462; 7 *id.* 356-362.

[5] SANDERS, USES AND TRUSTS (2d Am. ed. 1835) 208-213.

[6] GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) §§31, 32. And see 1 SIMES, FUTURE INTERESTS (1936) §178.

[7] 3 VERNIER, AMERICAN FAMILY LAWS (1935) §§188, 189.

made. First, it is asserted that he cannot regain the land by legal action and then it is said that he may do so. The latter seems correct.[8]

Sections 125, 130. As to the termor's liability for meliorative waste at English law it is said that "it was decided quite early that a tenant for years could not be held liable for ameliorative waste . . . unless it was an injury from the point of view of the lessor." As late as the seventeenth century an alteration increasing the value of the property was waste.[9] It is stated that "liability of the tenant for . . . ameliorative waste . . . has been recognized in this country from the beginning of our case law." While this may be correct, there has been a tendency to recognize waste in law only where there is waste in fact; but there is some conflict among the decisions.[10]

Section 129. It is here said: "technically the American states are said to have adopted the common law as of the fourth year of James I (1607), since that was the date of the first settlement." Since the reception statutes of the several states vary as to the date from which adoption is made, the authors' statement is not entirely accurate.[11]

Section 132. Speaking of assignments and subleases by tenant for years, it is asserted that "if the tenant can assign without such consent [the lessor's] he can not only place an undesirable tenant on the premises, but he can also avoid his own responsibility for rent." This statement is erroneous if the word "tenant" includes any other person than an assignee.[12]

Section 141. As to termination of periodic tenancies, it is said that most states have statutes requiring the lessor to give advance notice—"usually ninety days of the last day of the current period." In this connection, another writer shows that "there is a wide variation among the statutes of the various states with respect to the length of notice required."[13]

Section 146. Speaking of intestate succession in the United States it is asserted that "we have abolished the distinction between heirs and next-of-kin." While this statement is correct as to the great majority of states, there are a few jurisdictions as to which it is untrue.[14]

Section 147. As to rent of non-freeholds at common law and in the United States, it is said that rent has "two entirely different aspects": in one respect it is an incorporeal hereditament, and in the other an

[8] 2 POLLOCK AND MAITLAND, *op. cit. supra* note 2, at 106.
[9] 7 HOLDS. 277.
[10] Notes (1930) 43 HARV. L. REV. 1130, (1929) 27 MICH. L. REV. 587.
[11] Pope, *The English Common Law in the United States* (1910) 24 HARV. L. REV. 6.
[12] 1 TIFFANY, LANDLORD AND TENANT (1912) §158 a, n.; Note (1937) 37 COL. L. REV. 870.
[13] Marcus, *Periodic Tenancies—Regulation by Statute* (1939) 8 FORD. L. REV. 355, 359, 363.
[14] ATKINSON, WILLS (1937) 46, n. 38.

executory obligation. Under feudal law rent was regarded only as a thing issuing out of the land and was not an obligation of contract, but in modern times the latter aspect is also recognized.[15] It is also stated that rent "arises out of the reversion." On the contrary, in legal contemplation it arises out of the particular estate in the land held by the tenant.[16]

Sections 151, 154. It is stated that "the disability to create a power of termination in a third person caused no hardship after the enactment of the Statute of Uses and the Statute of Wills. . . . Under those statutes, the grantor could effectuate his object by means of executory limitations which were freely transferable." Executory interests were not freely transferable at English common law,[17] and there are two noteworthy objections to the suggested substitutionary efficacy of the executory interest. A right of entry affords to its holder an option of termination of the subject estate, which volition does not normally exist as to an executory interest except by virtue of a conveyee's right of disclaimer; and in this country an executory interest is subject to the rule against perpetuities while a right of entry is not so subject.[18]

Section 215. The present-day conveyancing utility of "powers of appointment in the United States" seems to entitle such concept to more consideration than the three and one-half lines devoted to it.[19]

Section 259. With regard to tenancy by the entireties at common law, it is asserted that "there was only unity of possession in an estate so held." Being a species of joint tenancy, tenancy by the entireties embraces the four unities of interest, title, time and possession plus the unity of person peculiar to its existence.[20]

Conclusion: By implication at least, Lord Macnaghten has said that the Rule in Shelley's Case may be put in a nutshell but cannot be kept there.[21] The reviewer feels that an adequate historical treatment of the Anglo-American law of real property will not go into a nutshell. In about one hundred and ninety brief pages of text the authors have made a valiant effort to do the impossible—to state in digest form appropriate for first-year law students the essentials of not only the

[15] 7 HOLDS. 262-275; 1 TIFFANY, *op. cit. supra*, note 12, §§165, 171; Stone, *A Primer on Rent* (1939) 13 TULANE L. REV. 329.

[16] GILBERT, RENTS (1758) 20-27. And see Bank of Pa. v. Wise, 3 Watts 394 (Pa. 1834).

[17] 3 SIMES, *op. cit. supra* note 6, §712. And see section 209 of the volume under review in which the authors qualify this earlier statement.

[18] 2 SIMES, *op. cit. supra* note 6, §§498, 506.

[19] As to present-day utility and comparative emphasis, see LEACH, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS (2d ed. 1940) 574; SIMES, CASES AND MATERIALS ON FUTURE INTERESTS (1939) 283. However, stressing of powers of appointment in American land law is deprecated by at least one authority. Bordwell, Book Review (1939) 53 HARV. L. REV. 157, 159.

[20] 2 TIFFANY, *op. cit. supra* note 1, §§418, 430.

[21] Van Grutten v. Foxwell (1897) App. Cas. 658, 671.

English common law of land but the modern American law as well. In such an undertaking the necessity for very broad generalizations must almost inevitably invite error of detail. While a skeletal treatment may provide the mature student with a very useful index of the law of real property, the first-year student attempting to grasp the common law scheme of the land law with all its difficult archaisms, needs to have pointed out to him not only what the law is, but why it is what it is. Hence, a proper understanding of the concepts requires that they be set in a frame of the political, social, economic and intellectual conditions that gave them birth. Too often absent in the real property treatises, this appears unattainable in an abridgement.

W. BRYAN BOLICH.

School of Law
Duke University

Studies in Legal Terminology. By Erwin Hexner. Chapel Hill: The University of North Carolina Press. 1941. Pp. vi, 150. $1.50.

The title of this book is by no means indicative of the problems that constitute its principal subject-matter. That its author was clearly aware of this is apparent from the statement in the preface that "often behind what seems to be merely terminological issues are concealed vital political problems." It is, accordingly, necessary to treat this series of essays as a study in legal and political values. It is quite evident that the author is concerned with developing a theory of the essential elements of the concept "legal system" that will exclude the modern totalitarian states from the class of politically organized societies that deserve the name of Rechtsstaat. It should, however, be remarked that he is not necessarily determined to deny that they may possess a legal system, but only to establish that the concept "legal system" will require a wholly different definition from that which would fit states not organized on the totalitarian basis. This approach implies a relativistic attitude towards the delimitation of the elements entering into any given concept. It also implies that the author's defense of a concept composed of the particular elements he has chosen to treat as its essentials is ultimately based on a preference for the human and social values secured by a state possessing a legal system which meets his standard. In a real sense, therefore, is this book concerned with a theory of social values even though this is not thrust into the foreground of the argument.

The discussion proceeds by way of a gradual development of the elements essential to the concept of a legal system. The first essay is devoted to defining the place of a legal system in that complex of rule

systems through which modern societies regulate the conduct of their members. The author rightly holds that there exist many interrelations among those several rule systems and the legal system. It is quite evident that he favors a society in which there are such complementary rule systems rather than one in which all human activities are subjected to state regimentation. Having defined the place of a legal system in a politically organized society he next develops its elements. For him the concept implies a large number of legal rules, each of which derives its significance from being a part of the system. He opposes this to the view that a legal system could consist of a single unwritten rule vesting the whole governmental power of a society in a single man. Legal rules are divided into general rules consisting of abstract statements of general propositions, and individual rules, that is, adjudications. In view of the importance which the author attaches to legal certainty as an essential element in the concept of legal system, he insists that the existence of legal rules implies that they be manifested in such manner as to be actually formulated, or capable of being formulated, in human language, by such means as to render them "generally knowable." It is interesting to note that his theory as to the limits on treating the decision in an individual case as an expression of the general rule of law that may be implicit in it, derives almost wholly from his view that it is a very inadequate "sign vehicle" for conveying the meaning of general rules. Moreover, the concept of a legal system is asserted to imply also that those who are to be bound by its rules be able to determine by some means whether a rule that purports to be a legal rule is such in reality. A whole essay is devoted to discussing court systems as a mechanism through which this may be achieved. It would extend this review too far to go into any detailed discussion of the very interesting questions considered in it. These range from the theory of the separation of powers to the problem of how far, if at all, a legal system can escape the necessity of permitting its judicial and administrative organs to determine the scope of their own competence to act. Suffice it to say that he deems the concept of a legal system to imply the existence of a mechanism which is empowered by legal rules, defining its competence, to test the legality of acts that claim to be in accordance with law. While he recognizes that this is usually a system of courts, he holds that it is purely a matter of convenience whether this shall be done in all cases by a single agency or by more than one. It is at this point that he discusses the place of administrative law in a legal system.

The essay on court systems contains a very interesting analysis of the problems whether, and to what extent, individual decisions should

be permitted to function as a "sign vehicle" of a general rule of law. He connects this discussion with that of how far judicial precedents should have binding force. The view is expressed that an individual decision should be treated as a binding precedent for a future case involving similar factual situations. He doubts that the general principle implied by a previous decision should be so regarded. The basis for the difference is ultimately found in the differences of the attitudes and habits of people and judges towards these two situations. It should also be noted that the difference in the author's position with respect to these two matters is closely connected with his idea that the concept of a legal system implies that its rules be "generally knowable." However, he concludes that the question of how far courts and other public agencies should be bound by precedent is a practical one which each particular legal system must decide for itself. The concept of a legal system requires some mechanism for enabling those subject to its rules to discover what those rules are, but does not require that mechanism to conform to any particular model in respect of the influence that precedents are to possess.

The final essential element implied in the concept of a legal system is that of legal security. By this he means no more than that quality of a legal system of having its rules as certain and predictable as is permitted by the nature of the matters with which they deal. Here again the importance of having the legal rule "generally knowable" is stressed. The author correctly states that legal security is logically to be distinguished from social security, however much it may in fact contribute to the latter. The essay concludes with a discussion of the technique for achieving legal security within a legal system. This part of the book is none too clear.

It is apparent from the foregoing summary of the contents of these essays that they achieve unity because they all rest upon a common philosophy of the state and the function of a legal system therein. The author has selected as the necessary elements in the concept of a legal system those features of modern liberal states that distinguish them from their totalitarian competitors. The formal definition of a concept has been used as an instrument for elaborating his theory of the desirable state. It is a politically organized society in which ruler as well as ruled is subject to and controlled by legal rules that should be "generally knowable" as such by the ruled as well as the ruler, and in which exists a system by which the ideal of administration under and according to law may be realized in practice. The author's treatment is stimulating as well as interesting. He has avoided the dogmatism that so frequently characterizes those who deal with problems of values

under the guise of developing the formerly essential elements of a given concept.

HENRY ROTTSCHAEFER.

University of Minnesota Law School.

Law as Logic and Experience. By Max Radin. New Haven: Yale University Press. 1940. Pp. ix, 171. $2.00.

This book is more than a little puzzling until it dawns on the reader that what is before him is merely a procession of ideas just as they marched through the mind of one Max Radin. It is a Coxey's army of ideas, loosely organized. It barely escapes being a mob of ideas. Or, to change the figure, we seem to get the author's thoughts hot off his brain just as they occur to him. The book depends for coherence largely on the fact that all the ideas are about law and its administration. A reviewer should outline the central idea developed in the book reviewed. In this book there is none. It is true that the author purports to examine the place of logic and the place of experience in the law, and that he does come to a conclusion, which is that law is a technique of administering a complicated social mechanism, which technique can dispense with neither logic nor experience. Indeed, logic and experience both do not suffice; there must be added to these a sense of justice. However, the place of logic and experience in law is not an inquiry developed throughout in this book, it is simply a matter to which the author from time to time recurs. The book, as said before, is a crowd of ideas; law as logic and experience is simply a pretext for calling the crowd together in general assembly.

Perhaps it is worth mentioning that one idea in the crowd is bigger and taller than the rest, and seems to get more attention than its neighbors, measuring attention by inches of type. That is the idea that courts aim at the impossible task of reconstructing the past in order to pass judgment thereon, whereas their effort should be to make adjustments which will insure a satisfactory future.

This review has laid down the proposition that this book is a Coxey's army of ideas. We may borrow from the metaphysical jurists and add that all the rest of the review may be deduced from that one proposition. First, as to the excellence of the book. It is a good book, it is a bad book, it is a medium book. That is, the ideas are of all three kinds. To take an example of a good idea, Professor Radin says (p. 39) that of the thousands of administrative officials in the United States "many of them are either unqualifiedly judges under other titles or at various degrees of evolution into judges." Very good; but this idea is not much expounded, it is simply marching along with its fellows. Next to it (p. 38) marches a bad idea. The administrative officers "perform

a judicial function when they issue statements involving 'ought' or 'may' and when these statements are treated by those who are unmistakably judges as binding on them, even if binding to only a slight degree." This novel definition of a judicial function would seem to fit the legislative or regulation-making function of administrative officers just as well. Another good idea is to be found in Professor Radin's excellent exposition of the fact that judges in judging can never have the whole truth before them, but only a more or less imperfect and partial reproduction of events and of life past and gone. Off hand this would seem to be a highly pessimistic proposition, since, for example, no judge can by any technique ever obtain out of the past all there is to be known about any murder and murderer. Probably before any murderer could be condemned with complete justice the judge would be obliged to have at his disposal all knowledge of all things. But the fact that final justice awaits the judgment of God does not detract from the value of thorough comprehension of human justice, and this idea stated by Radin contributes to such comprehension.

Among the bad ideas in Professor Radin's troop some are quickly recognized as disreputable camp followers come from other camps. Thus we have frequently seen among the Realists the shabby idea that law is composed of the actual judgments of judges, that lawyers in stating law are only forecasting the conduct of judges, (p. 37) etc. A companion idea is that law deals only with the exceptional or marginal situations when people clash. (p. 28). On the contrary law exists largely to prevent such clashes, and largely succeeds. Thus I drive my car on the right side of the road, and I record deeds running to me; the law exists, for me, as a means of ordering my conduct so as to escape those exceptional or marginal situations which Professor Radin says are the ones with which law deals. Further, it takes a good deal of the rationalizing ostensibly abhored by Realists to boil down, let us say, the law of the road, until at the bottom of the pot we have nothing left but a prediction about the conduct of judges. However, I am not trying to convict Professor Radin of being a Realist; I merely hold that some of his ideas look like suspicious characters I have met before.

The book is livened by an almost constant play of wit, most of it of a high order; but at times the combination of jurisprudence and banter produced to the reviewer a grotesque effect which may have been traceable to the limitations of the reviewer instead of those of the book; at any rate the effect tended to disappear as he advanced in the book and became more familiar with the author's style. Unlike most of his fellow law writers Professor Radin really has a style, one which transcends mere utilitarianism. But although much of his book is written in English of excellent literary quality, there is no consistency,

even in this. There are even occasional grammatical atrocities. The search for the antecedent of "they" in line eight page sixty-two may prove to be as baffling as the search for living reality by evidence about past events, which search Professor Radin was in process of discussing.

The most frequent vice in this book is the assertion of one of many possible points of view as if it were the only possible point of view. Thus the author insists (p. 124) that courts legislate when they determine whether power to legislate exists. But if the constitution is, as it professes to be, and until recently was, the supreme law of the land, and courts in deciding between two parties to a controversy apply the highest law to the exclusion of an inconsistent inferior law, the assertion that the courts are legislating is by no means undebatable. Professor Radin's view would result in holding that courts become administrative bodies every time they determine the power of an administrative body. However, there is no satisfaction in criticising this author for such shortcomings, because the reviewer has the impression that Professor Radin is perfectly capable of seeing the ideas on the other side himself; indeed, that if those ideas had happened to cross his mind while he was writing he might have tossed them into the book somewhere.

A book consisting of ideas just as they occur to a clever and brilliant man is a good book for those who like that sort of thing. The present reviewer fears to applaud very loudly lest others less intelligent than this author be encouraged to follow his example. Instead of concluding this review with the usual note of praise I shall conclude it with a word of warning. This book is the printed version of the Storrs lectures on jurisprudence given at Yale. Writers on jurisprudence should be wary of printing their popular lectures, because giving popular lectures is likely to lure the jurist into discarding the complicated verbiage which passes for profundity in this field. Stripped of the mighty abstractions in which jurisprudential ideas are normally clothed, some of the ideas look puny and unimposing, like sheared cats.

FRANK HANFT.

Chapel Hill, N. C.