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BOOK REVIEWS

Anson's Principles of the English Law of Contract, 22d ed. By A. G. Guest. London: Oxford University Press, 1964. Pp. xliv, 635. $8.00.

This edition of *Anson,* which has by now become a classic of English legal literature, follows traditional lines in its conception and construction. By and large, standard treatises purporting to deal comprehensively with a branch of the law of England are directed toward two ends. One end is to provide assistance to busy practitioners. The other is possibly the more important—to provide guidance to law students by a systematic, unspecialized treatment of the field. The table of contents bears witness to the significance of the latter of these ends in the construction of this book. Assuming the attainability of these ends, the book must be adjudged to be successful—lucidly written, systematically arranged, it appears to be an excellently articulated outline of the "English Law of Contract."[1] Criticism directed toward errors of omission or misstatements of the law do not invalidate the premise, implying as they do that the possibility exists that the law *can* be accurately stated.[2]

It is the premise itself, however, which must be called into question. It is uncertain whether it is ever possible to propound "the law," and further, whether it is desirable to attempt the effort.

In a letter to the editor of the *Yale Law Journal,* Professor Arthur Corbin wrote:

> . . . [P]lease insert the word "Working" before *Rules of Contract Law.* It was on the Title Page of my original manuscript, but was deleted without my consent by the Publisher. No doubt, he thought that a Rule is a Rule is a Rule. Later, the Publisher added the word "Working" to the Title Page at my request; and now the Company calls special attention in its advertising to the fact that my Rules are "Working Rules." The truth is that *all* rules of law and human society are no more than tentative working rules, based on human experience, necessarily chang-

[1] See Scott, Book Review, 76 L.Q. REV. 450 (1960), where the work is described as "a statement of the simple principles of the English law on the subject."

[2] See *id.* at 451-52, for examples of such criticism.

> ing in form and substance as human experience, varies in the evolutionary process of life.[3]

The burden of Professor Corbin's comment is that it is beyond the realm of feasibility to state fully the condition of the law.[4] Hence, Corbin's stress on the provisional nature of any legal principle or rule, together with the concomitant warning to all approaching his books seeking evidence—"*all* rules of law . . . are no more than tentative working rules."[5]

This solution to the dilemma of the legal treatise-writer is only hinted at by the English practice of limiting the statement of the law to that as existing at a fixed date.[6] Clearly, this practice has two objectives: first, to warn that there may have been subsequent developments in the law; and second to prevent the continuing flow of statutes, citations, and decisions from overwhelming the author.

It is dubious, however, whether this strategem can be truly successful. If the book is to serve as more than a historical record of the law, as it was at a point in time, it must be designed to serve as a guide or tool for the student or practitioner. It thereby acquires certain responsibilities, which cannot be evaded for long if the book is to continue to have value. Among these responsibilities are the discerning and denoting of trends and the identification of patterns and movements in society which will ultimately effect changes in the law. Thus a law book must provide something more than a conveniently formulated statement of law or legal principles. It must aid in understanding the origin, evolution and scope of these principles, and it should suggest critiques of the principles, criteria for evaluation, alternative solutions or approaches, and techniques for achieving change, when necessary. In sum, it should assist in equipping the student to "do law," in Judge Friendly's phrase.

Judged from this perspective, *Anson on Contracts* appears to provide a liberal education in legal conceptions and reasoning rather than to furnish a guide to the practice of the profession of law. If it is to retain any utility, however, it ought surely to reflect

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[3] *Bibliography of the Published Writings of Arthur Linton Corbin,* 74 YALE L.J. 311 n.1 (1964).

[4] The question whether it is possible to restate the law is another issue entirely.

[5] *Bibliography of the Published Writings of Arthur Linton Corbin, supra* note 3.

[6] ANSON, ENGLISH LAW OF CONTRACTS vi (22d ed. Guest 1964).

current realities, rather than to depict a somewhat formalistic view of traditional conceptualism.

In the current edition of *Anson,* Mr. A. G. Guest, has observed that: "The changing economic framework, the growth of the standard form contract, and the complexity of modern commercial relations call for a new approach to the entire question of the sanctity of contractual agreements."[7] It is regrettable that Mr. Guest, in updating the work, stopped where he did, rather than adopting "a new approach" to the difficult task of writing a contracts textbook.

Twenty-eight pages of *Anson* are devoted to the problems arising out of "standard form" agreement, as well as "contracts of adhesion." These terms are treated as synonymous, although they are distinct, albeit interrelated, concepts.[8]

The policy underlying the labelling of certain arrangements as "adhesory" is to introduce a justification for the application of techniques of judicial control. The paradigm case of an "adhesory" agreement is the economic giant compelling his dealer, a man of limited resources, to accept more goods than the dealer can possibly dispose of.[9] In situations where economically disparate parties are involved, the courts have felt that social interest requires that the stronger party should not flex his muscles too violently at the expense of the weaker.[10] This is a policy decision of major dimensions. It is a reflection on a problem which has preoccupied American political life for generations. In Professor Dawson's words, "In law, as in politics, the control of economic power has emerged as the central problem of modern times."[11]

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[7] Guest, Book Review, 76 L.Q. REV. 143, 144 (1960).

[8] Professors Kessler and Llewellyn have pointed out the policy factors leading to the emergence of standard form contracts: they provide a technique to control business risks (Kessler, *Contracts of Cohesion,* 43 COL. L. REV. 629, 631 (1943)); they expedite the administrative details of contract formation in a busy corporation (Llewellyn, Book Review, 52 HARV. L. REV. 700, 701 (1939)); and they are a "means of excluding or controlling the irrational fact or in litigation," (Kessler, *supra* at 632). But they never treated them as synonymous with 'contracts of adhesion.' Kessler describes their interrelationship in his conclusion: "standardized contracts are frequently contracts of adhesion." *Ibid.*

[9] *E.g.* Bushwick-Decatur Motors, Inc. v. Ford Motor Co., 116 F.2d 675, 677 (2d Cir. 1940). See also Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract,* 66 YALE L.J. 1135 (1957).

[10] Dalzell, *Duress by Economic Pressure II,* 20 N.C.L. REV. 341, 362 (1942).

[11] Dawson, *Economic Duress and Fair Exchange in French and German Law,* 11 TUL. L. REV. 345 (1937). See Dalzell, *Duress by Economic Pres-*

The problem is not new. As Professor Dalzell has pointed out, "some economic measures have for centuries been treated in our courts as requiring restraint."[12] The difference today is one of degree, not kind.

As will be discussed later, England has confronted problems of a similar nature. One might, therefore, expect a standard treatise on contracts to develop the nature and extent of the problem in some detail. The sole reference to this complex problem is the bald statement that "he [the individual] has no alternative but to accept; he does not negotiate, but merely adheres. In some respects, therefore, it would be more correct to regard the relationship which arises not as one of contract at all, but as one of status."[13] The desirability or undesirability of this state of affairs is not dealt with. Further, it is not altogether clear whether Mr. Guest is suggesting that relief from this situation is to be sought outside contract doctrine; and if so, what devices are relevant and effective. The inference that contract theory is inadequate is supported by a reading of the following passage: "Nevertheless the Courts have been forced to apply to this situation the ordinary principles of the law of contract which are not entirely capable of providing a just solution for a transaction in which freedom of contract notoriously exists on one side only." There is no indication as to why this is so, or what alternatives are available.

Professor Kessler provides an insight into this problem:

> But apparently the realization of the deepgoing antinomies in the structure of our system of contract is too painful an experience to be permitted to rise to the full level of our consciousness. Consequently, courts have made great efforts to protect the weaker contracting party and still keep "the elementary rules" of the law of contracts intact. As a result, our common law of standardized contracts is highly contradictory and confusing, and the potentialities inherent in the common law system for coping with contracts of adhesion have not been fully developed.[14]

The English courts, compelled to grapple with the problem of adhesory relationships, have evolved various techniques to safeguard against coercive behavior on the part of economically power-

sure I, 20 N.C.L. REV. 237 (1942). See also BERLE, POWER WITHOUT PROPERTY 77-116 (Harvest Book ed. 1959).

[12] Dalzell, *supra* note 12.

[13] ANSON, *op. cit. supra* note 6, at 141.

[14] See Kessler, *supra* note 9, at 633.

ful parties. The best known of these devices is the "fundamental breach" doctrine. This doctrine was evolved to cover contracts containing comprehensive exemption clauses,[15] and where performance by the exempted party is defective, or nonexistent. In practice, the courts ignore the exemption clause, measure performance against promise, and, if satisfied as to its desirability, will permit rescission, and award damages.[16] The policy underlying the doctrine is unmistakably one of restricting the acceptable limits on the use of economic power.

The hard question, the question confronting the courts in every case, is to determine whether the exercise of economic power in the suit at bar is or is not permissible. Over a period of time, the contours of permissible conduct will emerge from such determinations, providing guidelines for conformity. Economic strength is not coercive per se. There are positive values in large-scale economic organization, primarily the quantity, quality and variety of products available in the marketplace. A higher standard of living is the direct consequence of economic organization on a large scale. Again, it is undesirable to prevent all parties at all times from driving a hard bargain. On the other hand, certain practices have traditionally been regarded as unfair, *e.g.,* fraud, duress, misrepresentation, and as the ingenuity of the human mind devises further practices, the law has kept apace—hence the doctrine of fundamental breach.

In England, as in the United States, the judges have addressed themselves to maintaining an equilibrium in contractual relationships.[17] Yet the policy underlying equality in bargaining has never been made explicit. The twentieth century has seen a steady movement in the direction of "the restoration of a rough equality in the economic and social conflicts, by recognizing group pressure as

[15] In Yeoman Credit Ltd. v. Apps, [1962] 2 Q.B. 508, the contract provided that "No warranty whatsoever is given by the owner as to the age, state or quality of the goods or as to the fitness for any purpose and any implied warranties and conditions are hereby expressly excluded." *Id.* at 510. The car, "by reason of an accumulation of unapparent defects, was in an unusable, unroadworthy and unsafe condition . . . ." *Id.* at 508-09. The court allowed damages of £100.

[16] See Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach,* 50 VA. L. REV. 1178, 1193-99 (1964).

[17] The earliest expression of this attitude in England is Parker v. South E. Ry., [1877] 2 C.P.D. 416. See also John Lee & Son (Grantham) Ltd. v. Railway Executive [1949] 2 All E. R. 581. For the United States development, see Dawson, *Economic Duress—An Essay in Perspective,* 45 MICH. L. REV. 253 at 280-81 (1947).

legitimate,"[18] not only by sanctioning collective bargaining[19] but also by limiting the change of choices open to economic power-centers.[20] What societal values ultimately underlie this change of policy decisions, both in England and the United States? After all, it is not all that long ago that the courts directed their energies towards supporting efforts to acquire economic power.[21]

It has been suggested, with regard to the American experience, that:

> The equality implied in the acceptance of free enterprise is obviously not equality of business success but rather a practicable equality of opportunity for development of one's economic capacities. [This in turn] . . . points up the problem [which is] . . . keeping not the freedom of individual opportunity and the freedom of association for joint economic endeavour in some sort of equilibrium, lest the one essential undermine the other.[22]

The problem confronting the courts in contracts disputes is not a major social issue on a mass scale, but rather recognizing the potential for abuse that exists by virtue of "the gap between the formal equality of parties free to make contracts as they wish, and the actual inequality and lack of freedom cause by slack differences of economic bargaining power."[23]

In sum, the twentieth century experience in commerce and politics, economics and diplomacy, call not only for a rethinking of attitudes towards the concept and scope of contracts, but also towards the writing of works on the subject. Mr. Guest has brought *Anson* a long way from the original point of departure. Possibly, however, a created emphasis on the facts of economic life and their implications for the law would provide more adequate equipment

[18] FRIEDMANN, LAW IN A CHANGING SOCIETY, 96 (Pelican Books ed. 1964).

[19] England: Trade Union Act, 1871, 34 & 35 Vict., c. 31. U.S.A. National Labor Relations Act (Wagner Act) § 1, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1964). Norris-LaGuardia Act § 1, 47 Stat. 70 (1932), 29 U.S.C. §§ 101 (1964).

[20] England: Monopolies and Restrictive Practices Commission Act, 1953, 1 & 2 Eliz. II, c. 51. U.S.A.: Sherman Anti-Trust Act § 1, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964). Clayton Act § 1, 38 Stat. 730 (1914), 15 U.S.C. § 12 (1964). Federal Trade Commission Act § 1, 38 Stat. 717 (1914), 15 U.S.C. § 41 (1964).

[21] Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915). See KESSLER & SHARP, CASES ON CONTRACTS 6-9 (1953).

[22] KAPLAN, BIG ENTERPRISE IN A COMPETITIVE SYSTEM 40-41 (Brookings Inst. 1954).

[23] *Ibid.*

for students, who must cope with an increasingly more complex world when they enter practice.

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The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962. By Martin Anderson. Cambridge, Mass.: The M.I.T. Press, 1964. Pp. xiv, 272. $5.95.

In the fifteen years since the Housing Act of 1949 around $4 billion dollars of federal expenditures have been committed to urban renewal projects in various United States cities. The Housing Act of 1965 has recently authorized an additional $2.4 billion for this purpose. Despite the magnitude of these expenditures and the passions the program has generated among its supporters and critics, until now there has never been a thorough evaluation of the effects of urban renewal. Happily, Anderson's book goes a long way toward filling this void. In it, the author presents by far the most complete and detailed set of data available on the extent and effects of urban renewal through 1962 and subjects these data to careful scrutiny. He concludes that urban renewal has not yet done much to accomplish the goal of a decent home and suitable living environment for every American which the act of 1949 established, and that urban renewal is not likely to do so in the future. This book has already aroused considerable ire on the part of supporters of urban renewal and is likely to continue to do so. In my judgment, however, this is an important book and deserves the careful and impartial consideration of everyone with a sincere interest in solving urban problems. While dealing with many technical economic questions, the book is clearly written and demands little background in economics of the reader.

After a brief introductory chapter summarizing his case against urban renewal, Anderson devotes two chapters to a description of how urban renewal programs operate and their growth from their beginnings until 1962. In Chapter 5, the average length of time for completion of an urban renewal project is estimated at about twelve years. There follow three chapters on the composition of new building in renewal areas, the role of the private developer in urban renewal and his probable gain, and the sources of financing

of renewal projects. In the last chapter Anderson rightly criticizes official estimates of $3.65 of private funds for every dollar of government "seed money," and suggests that, even under very optimistic assumptions, not over one dollar of private funds is likely to come forth for each dollar of governmental funds. The latter is the case because a substantial fraction of funds for private residential construction are obtained from FHA insured mortgages purchased by FNMA soon after completion of construction. Even as late as the end of 1962, over one-quarter of such FNMA purchases were delinquent.

In other chapters the author discusses the prospect for rehabilitation as opposed to demolition, the effect of renewal programs on the property tax receipts of municipal governments, and the constitutionality of renewal programs. The last topic will probably be of special interest to readers of this *Review,* but in my opinion it is a relatively minor question in appraising urban renewal programs, and neither Anderson is nor am I especially qualified to discuss it.

The two most important chapters of the book are chapters 4 and 13. In the former, which deals mainly with the impact of renewal on the housing stock of the renewal area, Anderson argues that renewal's major effect has been to reduce the housing opportunities of the poor. He argues, justifiably I think, that up to March 31, 1961, renewal programs had demolished 126,000 low rent homes, of which about one-fifth were in standard condition, and replaced them with 3,000 public housing units and 25,000 privately owned dwellings. Most of the latter were apartment units, and, in 1962, for the 8,000 or so FHA-insured units located in renewal areas, the median monthly rental was $195.

Now supporters of renewal programs usually argue that low-income households displaced by renewal projects are relocated in better-quality housing, and official reports typically assert that this has been the case. Anderson points out, however, that private evaluations of relocation suggest that, along with paying greater rentals than prior to relocation, a much higher proportion of displaced households are relocated in substandard housing than official reports indicate.[1] Indeed, Anderson is the only writer I am aware of who

[1] This point is brought out even more strongly in a recent article by Chester Hartman, *The Housing of Relocated Families,* 30 J. AM. INSTITUTE OF PLANNERS 266 (1964). Hartman's paper also suggests that official reports

asks the relevant questions about relocation, namely, if good-quality housing is available at comparable rentals, why were the poorer-quality dwellings inhabited in the first place and why must they be demolished to rehouse their lower-income residents in better dwellings. Anderson is fully correct in implying that there are no satisfactory answers to these questions.

In Chapter 13 Anderson discusses changes in U.S. housing from 1940 to 1960. He correctly points out that, contrary to statements by proponents of renewal, the quality of the U.S. housing stock has improved markedly since prior to World War II. While much of the improvement has been due to new construction, analysis of the components of housing inventory change from 1950 to 1960 strongly suggests that previously existing units have shared in the over-all improvement. In this chapter Anderson also demonstrates that the frequent assertion that the middle income groups are disappearing from U.S. cities is without foundation and that non-white housing quality also improved greatly during the fifties.

Anderson is certainly correct that the short-run impact of renewal programs as they have operated to date has been to reduce the housing opportunities of the poor. The long-run effect would be different, however, if, as some have argued, the relative supply curve of poor-quality housing were perfectly elastic. Under this latter assumption the best that could be said of renewal, apart from any public housing built, would be that it produced no change in the housing of low-income households. However, I would expect that, because certain types of structures such as older, multi-family ones can be converted to poor-quality housing more easily and cheaply than others, renewal would reduce the housing opportunities of the poor even in the long-run, though by less so than in the short-run.

Despite their adverse effects on low-income families, if too much poor-quality housing has been produced relative to the low-income demand for it because of external diseconomies or market imperfections, current renewal programs might still be justifiable on grounds of economic efficiency. This is an important point and Anderson fails to consider it. My own work[2] suggests, though, that

greatly exaggerate the proportion of dwellings substandard prior to renewal. *Id.* at 281.

[2] I have recently summarized this in "Slums and Poverty," a paper presented at the Conference on the Economic Problems of Housing in April, 1965, sponsored by the International Economics Association and to be published in the conference proceedings.

slums result mostly from the low-income demand for poor-quality housing and that there is virtually no evidence for the alternative hypothesis I have sketched out two sentences earlier. Thus, while I think Anderson has overlooked two important questions in his evaluation, I would agree with his conclusions regarding the desirability of continuing renewal programs.

I am also inclined to disagree with Anderson on his analysis of the relations between renewal programs and the tax receipts of municipal governments. He emphasizes a point which is generally overlooked, namely that, because of growth in renewal programs and the long lag between demolition of old buildings and replacing them with new ones, the effect of renewal programs so far has probably been to reduce property tax receipts of cities as a whole. But, because of the low rate of interest at which municipal governments can borrow resulting from the exemption for federal tax purposes of interest on municipal bonds, the long delay in and of itself need not mean that renewal programs increase the tax burden on the rest of the city. Using Anderson's figures on the Boston West-End project, including the official estimate of eventual tax receipts, and an interest rate of 3 per cent per year compounded continuously, the project costs the city of Boston about $23.5 million. Of this total about $5.3 million is the city's share of the net project cost and the remainder the present value of the foregone tax receipts from demolished structures. Even assuming that the last 20 per cent or so of construction is not completed until twelve years after the start of the project, as Anderson does, the present value of officially estimated tax receipts from the renewal area was slightly less than $33 million at the start of the project. Anderson is, of course, correct that a significant part of the new construction would have occurred elsewhere in the same city or in other cities and that official estimates of tax receipts when renewal is completed may be overly optimistic.

More importantly, however, I would argue that the effect of renewal on local property tax receipts is almost wholly irrelevant in appraising the program. If renewal is economically inefficient, as I believe it is, then the tax receipt increase is smaller than it could have been if the resources used for renewal had been devoted to more productive uses. If, to the contrary, renewal could be shown to be economically efficient, then, even if local property tax col-

lections were to be reduced by it, incomes would have increased sufficiently elsewhere in the economy to permit greater total receipts to cities than prior to renewal. If anything, in this part of his discussion Anderson concedes too much to renewal by implicitly granting that one of its allegedly beneficial effects is relevant for appraising it.

Two major issues, given only peripheral attention in the discussion of tax receipts of local governments, are the effects of renewal upon the values of surrounding properties and upon the level of expenditures for municipal services. By raising the values of good-quality dwellings adjacent to the renewal area, the federal-city subsidy to renewal programs may be partly offset. A good argument can be made, I believe, for the proposition that renewal largely changes the location at which the external effects of slums are felt. In some renewal areas, of course, certain highly specialized types of properties, such as that of universities or hospitals, may exist. Unless the latter is true, or unless renewal reduces the perimeter of the slum area, the external effects of slums need not be reduced in the aggregate.[3]

With respect to the effects of renewal on municipal expenditures, such programs probably reduce the proportion of dwellings which are especially susceptible to fire and hence expenditures for a given level of fire protection. While expenditures for police, health and welfare purposes are probably disproportionately high in slum areas, there is as yet no convincing evidence that these are the results of housing quality *per se* rather than some associated factor such as income of the area's residents or the area's population density. And, to the extent that renewal merely results in crowding a given number of low-income families into fewer dwellings, it is by no means obvious the effects of renewal are to reduce the expenditures for local governmental services. For these reasons I do not believe that a more thorough consideration of these omitted aspects should lead one to modify Anderson's conclusions on the desirability renewal programs.

Lest my remarks in the last few paragraphs mislead, I believe that Anderson's theoretical and empirical analysis is generally of high quality and is marred by only a few errors and omissions.

[3] *Cf.* Martin J. Bailey, *Note on the Economics of Residential Zoning and Urban Renewal,* 35 LAND ECONOMICS 288 (1959).

I also find little evidence in the book of a lack of scholarly objectivity on Anderson's part, as has been charged by some public officials connected with renewal programs and in some reviews I have seen. The book's concluding chapter, which contains a point-by-point refutation of the beliefs of supporters of renewal programs, unfortunately lends a specious credence to such charges. I believe, however, that a careful reading of the body of the book is more than sufficient to dismiss the charge of a lack of objectivity.

Throughout the book Anderson is careful to describe his sources of data, to point out their limitations for the purpose for which he wants to use them, and to indicate any manipulations he has performed on them. In most instances where data on a specific point are lacking and Anderson constructs his own estimate, he is careful to describe the basis for the estimate and warn the reader that it is a rough one. Likewise, in many instances where he must estimate unknown magnitudes, he chooses an estimate which is favorable to renewal for his evaluation. There are also several instances where, in analyzing his data, Anderson is careful to point out that unfavorable results to date may reflect the newness of the program and to note improvements in later over earlier years. In short, I suspect that those who have charged a lack of objectivity really do so because they do not like Anderson's conclusions. In so readily dismissing his evidence, I suggest that if any lack of objectivity exists, it is to be found in Anderson's critics.

In collecting, presenting and analyzing the most comprehensive body of data on urban renewal programs which has yet appeared, Anderson's book is a highly significant scholarly contribution to the field of housing and housing policy. His many text tables and the 19 pages of tables in Appendix A should be an excellent source of data for many years. Even though his conclusions are and will be unpopular with many scholars and laymen, I find them to be carefully arrived at and basically sound. Although as I have indicated I do not wholly agree with Anderson's evaluation of renewal, I completely agree that urban renewal in its present form has little to recommend it and should be abolished. While all the evidence needed for a firm evaluation is not yet available, there is a strong presumption that renewal is both wasteful of resources and reduces the housing opportunities of the poor. I also agree with Anderson, though he does little to demonstrate this proposition, that the re-

sponse of the private market to rising income levels has produced striking improvement in the U.S. housing stock in the recent past, even that occupied by lower-income and minority groups. It does not follow, however, that no governmental programs designed to improve the housing of lower-income households should replace the present urban renewal program. Measures taken to raise the incomes of the lowest income groups would, I believe, lead to an even more rapid relative improvement in U.S. housing quality than the Census data presented by Anderson indicate in fact took place from 1940 to 1960.

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