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BOOK REVIEWS

CASES AND MATERIALS ON TRIALS, JUDGMENTS AND APPEALS

By Thurman W. Arnold and Fleming James, Jr., both of the Yale Law School. West Publishing Co., 1936.

The editors declare their aim to be to cover the legal principles "used as argumentative devices" in matters of procedure which become most frequently the subject of controversy. It is to provide the trial attorney with the tools of his trade. "It is the belief of the writers that the use of legal formulae by opposing counsel in procedural situations has not been given sufficient attention in law school curricula." These "legal formulae" constitute the "arsenal of offensive and defensive weapons" used in litigation. As long as the courts continue to dispose of cases on what the layman calls "legal technicalities", it behooves teachers to see that their students are as well armed as their opponents may be.

Chapter 1 is entitled: "The Mystical Conception of a Court." Referring to the decision of the U. S. Supreme Court in the Perry case, holding that Congress could not compel the acceptance of devalued dollars in payment of a government gold bond, it is said: "It thus happens that the historical landmarks in the building up of an independent judiciary are cases in which a sermon has been preached against the government in an opinion which decided the case in favor of the government."

The material in this book is taken from many sources other than law books. That in the first chapter discloses the popular attitude toward the courts and explains the "persistence of technicalities and the resistance to practical reform." Matter is quoted from "The New Republic", a Georgia newspaper's account of how a judge stopped a lynching, addresses before the American Bar Association, etc.

Chapter 2 covers such interesting matters as de facto courts, collateral and direct attack on judgments, res judicata, stare decisis, advisory opinions and declaratory judgments.

Chapter 3 discusses the commencement of a suit and discloses the variety of "suits without service" of process, when service may be made upon a "fictitious agent", the conclusiveness of a sheriff's return, etc.

Other chapters are devoted to the place of trial, the seizure of property before and after judgment, devices to discover the other fellow's case before trial, devices for limiting the jury's function and appeals.

New York cases predominate. There are practically no Pennsylvania cases reported and very few even mentioned in the footnotes. The Pennsylvania student, familiar with our own practice, will, however, find in this book much interesting data which will enable him to feel that our practice is as effective and expeditious as that in the most progressive of our sister states.

J. P. McKeehan

THE INSTITUTION OF PROPERTY

By C. Reinold Noyes. N. Y., Longmans, Green and Co., 1936. Pp. xiv, 645.

This book is a study of the development, substance and arrangement of the system of property in modern Anglo-American law. The author is a well known economist and the work was prepared over a long period of years with the aid of advice and criticism from the members of the faculties of law and other disciplines in several of the leading universities.

The first part of the book deals with the development of the institution of property in the two principal sources of our legal heritage: Roman law and English feudal law. This historical interpretation is supported by etymological studies which should be of interest to historians, philologists and anthropologists. Some additional material on the etymology of early terminology will be found in an appendix.

The second part deals with the current authoritative analysis of the law of property in modern jurisprudence and in the decisions of American courts.

The third part contains the author's conclusions, both developmental and analytical, on the basis of the data assembled in the previous parts.

The author's definition of property is: "Any protected right or bundle of rights (interest, or 'thing') with direct or indirect regard to any external object (i.e. other than the person himself) which is material or quasi-material (i.e. a protected process) and which the then and there organization of society permits to be made the object of that form of control, either private or public, which is connoted by the legal concepts of occupying, possessing or using." Contrast with this the following definition of property by a federal judge, "Property is everything which has an exchangeable value."

Speaking of the classification of property made by him, the author states, "It distinguishes direct interests in objects from interests in funds. It distinguishes these direct interests in objects according to the nature of the objects, according to the physical relation to this object, according to the de jure possession of the object, and finally, according to the duration of the interest. It distinguishes interests in funds, according to their descent, as dominant or pre-dominant. As to the former it separates the beneficial (primarily) from the administrative (primarily); and in each class it classifies according to certain traditional and more or less distinct types of funds. As to the latter it grades the interests according to their stage of development and according to the character of the steps upon which their development is predicated. It is not a periodic system. But for the purpose for which it was intended—that is, the clarification of the structure of property for use in economic analysis—it may serve. At any rate it permits of unlimited interpolation of new forms because it abandons the notion of standardization of interests into any fixed categories according to archaic nomenclature; it eliminates the completely obsolete concept of ownership; and it relegates to its

properly secondary position the perhaps obsolescing distinction between property and contract."

The publishers believe that the interpretation of Noyes may well have a revolutionary influence upon some of the theories of jurisprudence, political science, economics, sociology and even anthropology. Of such hopes we confess ourself unable to intelligently estimate their probability or improbability.

The normal law student or practicing lawyer will never read this work. For those rare individuals interested in jurisprudential problems and theories, this book will prove an exceedingly interesting volume.

Harold S. Irwin

JUSTICE OLIVER WENDELL HOLMES, HIS BOOK NOTICES, LETTERS AND PAPERS

Edited by Harry C. Shriver, New York; Central Book Company, 1936 Pp. xiii, 280.

The publication and reception of this book attest the greatness of Justice Holmes. People are not interested in the flotsam and jetsam of the writings of mediocre men. But this book, which consists of what Holmes himself would have called "little fragments of my fleece that I have left upon the hedges of my life," fulfilling the prediction of Justice Stone's introduction, "engages the interest and stimulates the thought of the reader whether lawyer or layman."

The book consists of a preface by the editor; an introduction by Justice Stone; early book notices written for the American Law Review by Holmes; uncollected papers of Holmes; letters by Holmes to Dr. Wu; and an appendix.

Many of the items in this book were written more than a half of a century ago and it is interesting to compare the ideas expressed therein with modern conceptions.

When, in 1870, Holmes said, "It is arranged in a series of rules, numbered consecutively, each expressing a general principle. Each rule is illustrated by concisely stated cases, making its application and extent clear and is qualified by exceptions arranged in the form of subordinate rules," and expressed his lack of satisfaction with that form of law writing, he was speaking of Dicey on Parties, and not of the Restatement. When in 1870 and 1871, he said that "methods which are commonly called practical are in truth the most impractical and destructive of sound legal thinking," and congratulated an author because he "planted himself upon concepts of legal significance" and not upon facts merely of dramatic significance, as e.g., railroads or telegraphs, the functional approach had not yet become a pedagogical fetish and Leon Green's case book on torts had not been published.

When he said, in 1871, that he did "not perceive the excuse for making this book so expensive," he was not speaking of Bogart on Trusts, but of Bump on Bankruptcy; and when in 1871 he referred to "the curious spectacle of the Supreme Court reversing the determination of Congress on a point of political economy," he was referring to Hepburn v. Griswold, and not to the recent decision in the A.A.A. case.

Many persons will find comfort in his reference in 1871 to "the diminution of the sense of responsibility on the part of judges in disregarding the legislative will," and will concur with his thought that if the will of majority is unmistakable and the majority is strong enough . . . the courts must yield." But who at present will be found to share his thought that "torts is not a proper subject for a law book" or that "the defects of the law at the present day (1870) are chiefly defects of form."

The letters which the book contains were written by Holmes, while he was a member of the Supreme Court, to Dr. John C. H. Wu, a distinguished legal scholar of Shanghai, and are of comparatively recent date. They are replete with indications of Holmes' philosophy of life and his ideas of jurisprudence, and furnish abundant evidence of the extent of his culture, the vigor of his intellect and the kindliness of his nature.

After reading this book you will say of Holmes, as Holmes said of Brandeis, "There goes a really good man and a great judge".

W. H. Hitchler.

RESTATEMENT OF THE LAW OF PROPERTY

By The American Law Institute. St. Paul, American Law Institute Publishers, 1936. 2 vols., Pp, lxi, liii, 1179, Ap. 82.

It is not the purpose of this review to engage in any criticism or commendation of the work of the American Law Institute in promulgating the Restatement of the Law. Such reviews have been numerous, able, brilliant, and leave little to be said on the general subject.

The present volumes on the law of Property cover but a small fragment of the property law. Volume 1 covers general matters of terminology and the creation and general characteristics of freehold estates. The restated rules are confined to the rules of real property and do not include the rules of personal property. Volume 2 deals with future interests both in land and in things other than land. This volume does not purport to cover the whole of the law of future interests. It contains an excellent historical introduction; differentiates the various types of future interests; states their characteristics such as transferability;

covers the rules as to protection of the future interest in re judicial actions, waste by the owner of the present interest, acts of third persons; the effect of the Statute of Limitations and rules of prescription on future interests; and the effect of the failure at inception or subsequent termination of a prior interest on a succeeding future interest.

Printed in appendices to the two volumes will be found helpful monographs on Dower and Curtesy as Derivative Estates; Implication of Cross Remainders in Deeds; Severability of a Power of Termination; Ineffectiveness of an Ultimate Executory Interest; and Aspects of the law of Acceleration and Sequestration. The first and last of these articles will be interesting to Pennsylvanians since they contain a discussion of several Pennsylvania decisions.

The restaters have adopted the Hohfeldian terminology for stating the rules of property law. In our opinion, this will reduce the utility of the Property Restatement as a practical working tool in practice. Many of the rules are couched in language other than that used by the courts for centuries past and will require much translation to fit the Restatement rules into the language used by the courts. This rejection of terms used since feudal times for stating rules of property must inevitably result in confusion and accomplishes no worthwhile results. For example, the Restatement simply must reject the time hallowed term "Right of Entry" and change it into a "Power of Termination." The justification for this change is supposed to lie in the fact that the interest is not a "right" (as that term is used in the Restatement, hundreds of courts to the contrary notwithstanding) and is a "power" (as that term is used in the Restatement). The Restatement also rejects the familiar terms "contingent remainder", "base fee", "qualified fee", etc. Hence lawyers, before using the Restatement, must make use of the dictionary provided by the Restatement in its opening chapter and consistently use such dictionary for translating the Restatement into the terms used by the decisions. This practice may make the Restatement a much more valuable work, but we doubt it.

The work will be found extremely helpful as a source of information in regard to the more commonly enacted statutes on real property. Much statutory law has been restated as part of the general common law of the United States. In other instances common statutory law has been rejected and extreme care will be necessary in the use of the rules to determine whether the rule is a statutory or decisional one. The Rule in Shelly's Case is restated as part of our common law altho rejected by at least thirty-three states.

At times the Restatement assumes the role of a prophet or predicter of things to come. In Section 151 it adopts the English statutory law on the disposition of an estate pur autre vie (altho, of course, this term is not used in the Restatement) when the owner thereof dies intestate. The Reporter states, "This result does not rest upon proof that these English statutes form part of the

law of a state, but rather upon the position that these statutes merely declare a result which would have been reached in due time if the problem had been allowed to be litigated under an evolving common law." Fortunately Pennsylvania has a statute producing the result of Section 151 and lawyers need not go into court prepared to prove the reliability of the restaters as prophets.

The Restatement should prove an excellent text book on the Law of Property. It will be of little value to Pennsylvanians until the annotated decisions of this state are issued. Thereafter on points not yet decided in Pennsylvania, the Restatement will be helpful in shaping decisions. But textual statements unsupported by the decisions on which such rules were based, will carry little weight with courts disposed to rely on actual decisions as authority. The authors have stated in reference to the monographs before mentioned, "Upon fine points, however, it is desirable to put before the profession the raw material from which the Restatement has 'distilled' its rules of law in order that the matrix of these rules so distilled can be more readily apprehended." This same thing could be said with equal validity as to all the points covered by the Restatement.

We might question whether the Property Restatement will be as decisive and influential as the Reporter anticipates. In regard to one rule of law, it was said, "An attempt to formulate these matters in the form of definite rules at this time might well crystallize the law in a manner which would hinder progress." The Restatement of Property should prove at least helpful, if not all important, in crystallization of the law of Property.

Harold S. Irwin