St. John's Law Review

Volume 11, April 1937, Number 2 Article 31

The Institution of Property (Book Review)

William F. Walsh

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Do the years relent? Brandeis, at eighty, has not surrendered in his struggle against "bigness" when it cannot justify its existence by carrying a greater tax burden or by producing at a smaller unit cost. Nor has his interest in the "small man" diminished. In his dissenting opinion in *Ligget Co.* v. *Lee*,[3] he again sets forth his articles of faith:

> "Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State * * *. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving 'corporate system' with the feudal system; and to lead other men of insight and experience to assert that this 'master institution of civilised life' is committing it to the rule of a plutocracy."

All these matters have been chronicled by Mr. Lief fully and faithfully. The subject, however, seems treated in a "Who's Who" biographic manner. There is no real attempt at critical incisiveness, nor is there an appraisal of the contributions of the great liberal leader. Perhaps time only can unfold what Brandeis really contributed to the weave of permanence.

NATHAN PROBST, JR.*

THE INSTITUTION OF PROPERTY. By C. Reynold Noyes. New York: Longmans, Green & Co., 1936, pp. xiv, 645.

We have heard and read much in recent years of the functional approach to the study of law,—that economics, for example, should be studied in connection with the study of law, more particularly the study of the law applying to industry and commerce. In this work, a leading economist who is not a lawyer finds that the study of the law of property as it has developed historically, as well as an analytical understanding of its principles, are both essential as an approach to the study of economics. Every student of the law of property should read this book. Nowhere else in anything like the same compass can

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[3] 288 U. S. 517, 564–565, 53 Sup. Ct. 481 (1933).

* Professor of Law, St. John's University School of Law.

one find so much of genuine worth and aid to a serious student in this field. If an economist can so successfully treat of one of the most difficult and important fields of the law, one wonders how successful a legal scholar would be in attempting a similar service in the field of economics,—where even the ablest seem to be so entirely at sea.

The introduction explains the modern institutional approach to the study of economics, and the importance of the study of the institution of property as established by law in the study of economics. The first two chapters contain a valuable and very interesting account of the organization of early Roman society and the development of the Roman law of property. This is followed by a short chapter on the development of the feudal system of property law in England from the Norman Conquest down through the thirteenth century. The description of the process by which the feudal system developed on the continent during the centuries preceding, after the Roman system had been lost in the destruction of Roman civilization, is a most enlightening and helpful summary of a chapter in legal history which is left in an obscure state by the usual treatment of that development. It is disappointing that the history of property law in the Anglo-Saxon period is not included in this chapter. The development of bookland as the forerunner of the imposing of feudalism in England by William the Conqueror, and the relation of folkland to the subsequent socage tenure are important in their relation to the nature of ownership of land in both periods.

As a matter of emphasis, more stress should have been put on the nature of the ownership of the freehold tenant in fee. From the standpoint of modern ownership, in which we are primarily interested, we find ownership existing in the feudal tenant, not the lord; the interests of the lord and king were limited to incorporeal rights of lordship with corresponding duties which were primarily incidents of feudalism as a system of government, local and national. The right of inheritance in the heirs of the freehold tenant, existing as far back as we can go in Anglo-Saxon England, established that the freehold tenant was in fact owner of an estate in fee, a result entirely consistent with the manorial rights of the lord and the theoretical ultimate title in the king. The author has followed statements by Pollock and Maitland, Holdsworth and Digby, which statements seem to imply that the system of estates of the English law was a development taking place when feudalism lost its original feudal character and a feud became a fee. It is true, of course, that the terminology of this system of estates was new in the thirteenth century, but that the institution "estate for life," "estate in fee," existed for centuries before cannot be doubted. The student of Anglo-American legal history will read this chapter with lively interest and genuine profit. The entire work is beautifully written. It is simple, clear, unstilted in style, proving as Maitland and very few others have done, that a law book may also be good literature. A good example of the spontaneity and originality of treatment which characterize this work is found on page 250 in explaining why the common law of the king's court was not applied to villein tenants who were governed by the customs of the manor: "In effect, to extend the field of common law into the relations between the lord and his villeins would have seemed in that day like substituting law for factory rules between employer and employee in ours."

Lack of space forbids a discussion of many questions, in this chapter, on which different views have been taken. The author follows the outstanding authorities. Those familiar with my book on Anglo-American legal history will readily discover where my views are not entirely in accord with the author.

This study of the history of the development of the law of property in feudal England contrasted with the Roman institution is followed by a chapter on the modern juristic analysis of property—of dominium and ownership, and the relation of ownership to possession. To the student of law, this chapter is probably the most interesting and valuable. The views of Blackstone, Austin, Holland, Maitland, Salmond and Pound are paraded with dexterity and dispatch, with many an enlightening comment. The Hohfeldian analysis of ownership into the "bundle" of rights, powers, privileges, immunities and no-rights of which we have heard so much and use so little, receives rather more than due emphasis. Approval of the Property Restatement's adoption of this analysis is expressed, though it is probable that the verbosity and clumsiness of style which seem to be necessary incidents of that adoption will hamper the general usefulness of the Restatement more than any other of the negative elements which seem inseparable from formal statements of fixed rules of law, whether in statutes or in restatements; it is a skeleton divorced from the development of those principles and authorities which are the flesh, blood and spirit of the law.

The law of property has been, is, and always will be the law of its ownership. Juristic analysis which attempts to cast out the legal terms which have grown up through the centuries, turns its back on legal history and spells its own doom. Genuine understanding of law can be gained only by a study of its origin and growth. Nevertheless an excursion into the clouds of juristic fancy, followed by a safe return to earth and to the law as it actually is, a gradual development of the centuries as a resultant of human needs, is a valuable experience for any student of the law, and it would be very difficult to find anywhere a more effective and interesting summary of modern juristic thought than in this short chapter.

The last two chapters, constituting about one-third of the book, are made up of a study of the nature and limits of property in the United States as expressed in a selection of representative cases cited in an appendix, with very cogent criticisms of terms used, either expressly or by implication. The author seems to have difficulty in understanding the easement of light, air and access which is appurtenant to land on a public street or highway and the mutual easement existing between riparian owners along the banks of a stream. His statement[1] that a true easement can arise only by grant or prescription is simply not true; a mistake found in the teaching of some of our law schools but not in the cases, except for occasional rather recent dicta which may probably be traced to the teachings and writings of these schools.

The use by the courts of many legal terms, as used in cases cited in the appendix, establish that in the field of law as in every field of human activity, the same terms are sometimes used to mean different things, the context establishing the meaning intended in each case. Outside of the sciences and the language thereof, this must always be true. Every attempt to substitute more

[1] P. 361.

precise terms in law has always failed. Legal terms are the legal tender of the law, to be used and applied as lawyers and judges understand them.

The author's review of the rights which are included within the concept of property, particularly his treatment of the doubtful questions of what is and what is not property, so important in the fields of equity and constitutional law, is far more valuable and significant than his criticisms of legal terms in common use and the occasional misuse of those terms in opinions by the courts as cited in the appendix. It would require a volume to adequately answer these criticisms. It is enough to say that in the great majority of cases cited the terms used carry very exact meanings, in the light of the context, to the average lawyer and judge. Nevertheless it is good for students of the law to consider the possible meanings which a student of economics may attach to legal phrases. Definitions and disputed meanings of mere words and phrases, so important to scientists, are very much less important to legal scholarship. The law teacher and writer has little difficulty in expounding legal principles with the use of the legal vocabulary which has been handed on to him. His interest is in the substance of the subject, not in mere definitions and possible double meanings of terms actually understood in practical use.

WILLIAM F. WALSH.*

CASES ON FUTURE INTERESTS. By Albert M. Kales. Second edition. By Horace E. Whiteside. St. Paul: West Publishing Co., 1936, pp. xvi, 781.

This book is a second edition, prepared by Professor Whiteside of Cornell, of a casebook of Professor Kales which appeared in 1917. Professor Kales was a student and successor at Harvard Law School of Professor Gray, and quite naturally was greatly influenced by his preceptor and predecessor. One particular in which Kales follows Gray is in the large percentage of English (as opposed to American) cases found in the collection.[1]

Probably no subject in the undergraduate curriculum offers such a wide difference of opinion as to the best method of treatment, from a pedagogical standpoint, as a course on real property in general, and future interests in particular. Professor Walsh tells us that most of the modern New York law of future estates consists in the application of the rule against perpetuities.[2] About thirty per cent of the present work is devoted to that subject. The nature and location of the law school may have a lot to do with the way a course in future interests is handled. This involves the complicated and controversial question of the extent to which cases and statutes of other jurisdictions should be referred to. Assuming that the chief aim of law schools is to fit their students for the practice of the law in the jurisdictions in which they

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* Professor of Law, New York University School of Law.

[1] See note 6, *infra*.
[2] WALSH, FUTURE ESTATES IN NEW YORK (1931) 68, 76, 77.