1953

American Law of Property edited by A. James Casner

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Book Review


This seven volume treatise, written by twenty-five authors (including twenty-one law teachers and all but one of the living reporters for the Restatement of Property), was published to meet the need of modern practicing attorneys who cannot afford to own numerous specialized works in the property field. While not precisely analogous to a Great Books series, American Law of Property represents a planned effort to package for the profession a practical, analytical treatment of those property law matters "which constitute the day to day practice of lawyers throughout the country." The full significance of the tremendous task undertaken in this remarkable writing and publishing feat is implicit in the charge which was given the authors when they were commissioned to prepare segments of the work in areas to which many of them had devoted most of their professional lives:

(a) to give the reasoned treatment of each question that enables an attorney to advise or argue with confidence in the logical soundness of his position, (b) offer the most significant cases and other citations, together with the means of locating more comprehensive references, and (c) provide a critique of existing rules which may indicate the direction of change in the law and may be the deciding factor in a close case.

Within the framework of these objectives it was intended that an integrated, comprehensive text should result rather than a mere collection of monographs and that individuality in literary style and freedom of analysis should be maintained throughout. Although any unique project of this magnitude presents ample opportunity for suggested improvement, seven years of work produced a set which is in

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*Professor of Law, Harvard Law School.
1 The reporter who did not participate is Professor Richard R. B. Powell of Columbia University School of Law who is preparing his own comprehensive treatise: Powell, Real Property (1949). The count of twenty-five contributors is limited to those authors listed at p. v, Vol. I. The writers are identified in this review in connection with the description of the various parts beginning on P. 141, infra.
2 Vol. I, p. vii (Preface). This also seems to have been one of the principal criteria for determining omissions.
4 Seven other reviews have come to the writer's attention as of July, 1953, and while all are essentially complimentary, each reviewer specializes in his own details of criticism. These reviews may be found as follows: Tefft, 46 Law Lib. J.
the best tradition of excellent American law treatises and which comes sufficiently close to attaining its principal objectives to warrant the close attention of every member of the profession. If the work forecasts a trend in law treatise publication, the standard of excellence established in this joint effort is quite high.

The impressions formed in reviewing this new and valuable treatise fall into two broad categories: those pertaining to the scope, organization and contents of the set, and those relating to how it can be used by the practicing attorney for whom it was written. The former are described at some length in Part II of this review, while the latter present some special questions as to the way the American lawyer actually uses the books in his library.

I.

Do the research needs and habits of a busy attorney follow any predictable pattern? Will he use the scholarly analysis of an imposing group of authorities distilled into seven volumes, or has he become so dependent on the quick solution, the empirical rationalization and the authoritative local case that he consults very infrequently the crystallized statement of legal principle and theory featured in a treatise? Dean Griswold has predicted that theory will become more and more important in the law of the future, basing his estimate in part on the idea that multiplication and diversification of case authority will force lawyers and judges more and more to search for and evaluate the premises on which our logical structure of law rests. Perhaps they will turn to sound works of legal scholarship published in treatise or similar form, but is this a main research orientation of the practicing lawyer now? These questions are not asked innocently but to express doubt that enough lawyers use to full advantage the scholarly secondary authorities available to them.

Also, the writers who prepare these essential tools for practice have not been too successful in portraying the usefulness of their product. The accepted advertising technique for a manufacturer who encounters

45 (Feb. 1953); Schuyler, 39 A. B. A. J. 223 (Mar. 1953); Dunham, 53 Col. L. Rev. 440 (Mar. 1953); Nossaman, 66 Harv. L. Rev. 1338 (May 1953); Aigler, 51 Mich. L. Rev. 1107 (May 1953); Keenan, 28 St. John's L. Rev. 401 (May 1953); Sparks, 28 N.Y.U.L. Rev. 1052 (May 1953).

The work began in 1939, but was interrupted by World War II in 1941. The entire project was re-examined and resumed in 1946, and brought to publication in March 1952, with an average cut-off date of about November 1, 1951.


use-resistance in merchandising an unusual product is to train the consumer as well as to refine and improve the product. So it should be with those who write a modern law treatise. No opportunity should be lost to emphasize its value or to explain the ways in which it can be used. A campaign should be waged to secure the treatise's rightful place as one of the practitioner's most useful and valuable assets, if other research sources such as the reports, statutes, digests, encyclopedia and looseleaf services are not to pre-empt all of the shelves in a modern law office library.

There is space here to suggest only one feature of a good treatise, such as American Law of Property, which sets it apart from other sources: it is the best place to find background and perspective on any legal problem. Few lawyers can expect to develop from their own experience alone a very acute sense of perception about the myriad problems with which they are confronted in modern practice. Even if they pretend to specialization, the breadth of their understanding is only relative and they seldom consider it worth their time or effort to trace the origin of legal principles, to evaluate legal concepts by establishing their relationship to other legal and nonlegal ideas or to aid in the orderly development of legal solutions. We may wish we could indulge in the leisurely techniques of the common law lawyer, but we rarely have the time or the incentive to do so.

Without systematically consulting a good treatise, even the most experienced lawyer runs the very practical risk of a missed point, of incomplete advice, of a one-sided brief or of relying on a poorly rationalized opinion. He compounds his chief occupational hazard—the honest mistake—by solving too many problems with an inadequate appreciation of how they have been solved in other places by other people. The treatise under review was written to meet this precise need for those who have real and troublesome problems in the field of American real property law and related areas. In this sense it is a set which challenges the profession to broaden and improve its research techniques in a specialized field of law, and if this challenge is accepted, a decisive step in restoring the law treatise to its proper role in the work of the profession will have been achieved.

Although it certainly comes closer to being really useful than any other set now available, the treatise does not fully meet the need which it anticipates because it fails to capture fully the practitioner's viewpoint. In attempting to maintain an orthodox analysis and classification of legal concepts and principles so that treatment of them will be in a context with which the practicing attorney is reasonably familiar, the primary technique in the book is to adhere closely to categories
which are either traditional or well-known to the authors, and to emphasize where possible practical manifestations of doctrine. The trouble is that the law of real property is filled with established concepts, terminology and classifications which are either so historical or doctrinaire as to be known to only a few lawyers. Quite often the traditional or authoritative classification of a property problem is devoid of modern logic and bears little relation to the factual circumstance in which the lawyer will encounter it. To be completely useful to the practitioner, a property text must be designed to emphasize factual classification without distorting beyond recognition the concepts treated. Despite an apparent feeling that the practitioner prefers an analysis of the law in familiar terms, there are too few attempts throughout the set to solve this problem. The total result is a broad compromise based on giving traditional principles their usual place for treatment and merely illustrating their application in modern problem situations where possible.

Some additional comments about other aspects of the usefulness of these volumes should be made. Primary emphasis throughout the set is on concise discussion of current problems with selective rather than exhaustive citation of authority. The quality and penetration of analysis varies considerably from part to part, but the authors are not too historical or detailed in their treatment, and achieve good balance between practical and theoretical solutions. On the whole the rationalizations adopted are conservative, and while the trend of decisions and significant local rules frequently are accounted for, there is little inclination to boldly correct the law by introducing new concepts or new terminology. The general practitioner will find these volumes useful in orienting his problems and the property specialist can use them as a source of modern authoritative discussion on which to base his projection of principles. The projection will have to be of his own devising, however, for there is little effort here to extend or develop the law through analysis which is ingeniously constructive. It is hard to imagine John Chipman Gray and Albert Kales, for instance, being as restrained in their criticisms and proposals as many of these modern writers are. Perhaps the emphasis is as it should be in view of the objectives and traditional cast of the book, but one cannot help but feel that a wonderful opportunity to provide some badly needed new solutions to old problems has been lost.

Beyond those things already suggested which might have strength-

\footnote{Professor Sheldon Tefft provides interesting documentation for the reviewer's choice of words by pointing out that even the color of the binding (red) follows the tradition for books on property since Gray's Cases on Property, 46 Law Lib. J. 45, at p. 47, fn. 9 (1953).}
ended the book without distorting its basic objectives, there are few defects which warrant mention. The problem of how to integrate material on diverse subjects written by numerous people at different times and the problem of what to omit from a comprehensive text have been only partially solved. As to the first of these, frequent cross-referencing and a single index based on an alphabetical and subject listing of section headings are of great help, but do not fully compensate for the absence of careful, detailed tying together of related and impinging discussion in the text. This may be an inevitable price of collaborative effort, but, in view of the classification difficulties inherent in this field, its means that the researcher must know a good deal about the categorization of his problem and related questions before he starts to search, which is not always the case and may be the very purpose for which he consults the treatise. The fact that no unusual classifications or peculiar subject headings are used mitigates this feature of the set to some extent, and one who is reasonably familiar with the subject matter of the field, or who uses the work carefully and frequently, will find most of the valuable collateral discussion.

Conceding that the problem of what to include in such a work is insoluble, the omission of an analysis of modern legislation regulating the use of land is hard to explain. The practical orientation of the text may be sufficient to justify the elimination of laws pertaining to community planning, soil conservation, regional development, and perhaps even building codes and health ordinances, but failure to treat adequately zoning legislation and subdivision laws is less easy to rationalize. This is an area where modern community policy is highly developed and reflected in specific legislative enactments which drastically influence the private and commercial use of land. The practicing lawyer constantly encounters his "property" problems in this context and thinks of it as a separate problem area. He should not be required to translate his questions into other terms or to go outside his standard property treatise for help on them. There is no indication that this was one of the several omissions deliberately made, and it

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8 A detailed comment on the integration problem appears at 53 Col. L. Rev. 446 (1953) where Professor Allison Dunham itemizes his evaluation with respect to cross-referencing and indexing.

9 As is pointed out in discussing the scope of the set, infra, the principal difficulty centered on how to keep the law of trusts, personal property, wills, intestate succession and rights incident to the possession of land out of a comprehensive text on property. The decision to exclude all of them is frankly explained at p. ix of Vol. I, but it was only partially carried out for much of the text is applicable to problems in these areas.

10 In fact there is no reference at all to the impact of modern legislation in the explanation of objectives except that which might be inferred from the plan to give each segment authoritative and practical treatment. It seems to have been taken for granted that the pertinent statutory aspects of each problem would be
would be a valuable addition to the set if a supplement were published (which the publication plan permits) treating problems in this important segment of the field.

II

In summarizing and evaluating the contents of a work of this length it seems best to describe its scope and then to outline its organization by commenting briefly on the various parts. In subjects covered, the treatise is not as inclusive as its title might suggest. The law of real property constitutes the principal subject matter of the set, but principles in a number of closely aligned fields are covered in giving full treatment to many concepts which cut across a variety of problem areas. Thus, numerous principles in the law of personal property, trusts, wills, and intestate succession are analyzed rather thoroughly, particularly in the third of the set which deals with the law of future interests. No substantial distinction between rights in personal property and rights in real property is made in those parts pertaining to types of future estates, the Rule against Perpetuities and restraints on alienation, restrictions on accumulations, powers of appointment, construction problems and illegal conditions. Probate matters are considered in the parts dealing with title problems and wills problems are discussed in connection with class gifts, marital estates and community property. In a similar manner the spendthrift trust doctrine is brought in under restraints on the alienation of equitable interests, joint ownership of personalty is included in the analysis of concurrent ownership, and the assignment of contract rights is dealt with in treating the vendor-purchaser and the landlord-tenant relationships. The plan to make land law the basic frame of reference leads to the complete omission of certain problem areas commonly thought of as being in the broad field of property. There is no gift law analysis, and the nature of possession as a fundamental concept useful in solving all sorts of property problems is not discussed. There is an exceedingly long part on the law of mortgages, but nothing on chattel security transactions.

Perhaps the most amazing thing about the scope of subjects covered is that the work includes so much valuable treatment of problems related to but not a part of the law of real property; more, in fact, than can be found in any other real property treatise of comparable quality. This is a real accomplishment in view of the scope limitations imposed

adequately accounted for in the analysis of each section, but the point about zoning and subdivision laws is that they constitute a problem area for the modern lawyer in and of themselves.
by way of initial objectives and is attributable in part to the inclusion of a number of sections which deal with peculiar principles and relationships applicable to special types of property interests, particularly community property, oil and gas and mortgages.

The scope of analysis within each part conforms to no set pattern so that the amount of historical treatment, the extent of collateral problem discussion and the attention given pertinent legislation are controlled in large part by the inclinations of the authors. The parts on oil and gas rights and powers of appointment, for instance, have sections on federal tax problems but these problems are not considered at all in the parts on landlord and tenant, marital estates, concurrent estates, vendor and purchaser and mortgages. While one might expect the analysis of the Rule against Perpetuities to be predominately historical, just the reverse is true, and the dubious honor of over-emphasizing historical analysis probably should go to the part on marital estates. With respect to the attention given modern legislation, the tendency in nearly all parts is to confine treatment to an enumeration of states which have adopted various well-known statutes changing, correcting or clarifying the details of the common law. A few of the authors cite statutes as well as cases to demonstrate and support principles of law, and some deal adequately, though incidentally, with statutes regulating the use of land or affecting the marketability of title. In the main, however, detailed treatment of statutes is considered beyond the scope of analysis and this characteristic of the various parts carries over into the general organization of the treatise, resulting in the omission of zoning legislation previously mentioned, and only incidental treatment for modern legislation affecting such matters as dedication, easements by implication and boundary discrepancies.

The six volumes of text include twenty-seven parts with a twenty-eighth part to be added. They are arranged according to a traditional and logical sequence and their content reflects the individual preferences of the authors, the difficult issue of omissions and the fact that portions of the material had been published before in other form.\textsuperscript{11} Each volume is about of the same length and no attempt is made to group in one volume all of the parts relating to a particular phase of the work.

Part I (Historical Background)\textsuperscript{12} serves as a clear, concise introduction which traces the historical origins of Anglo-American land law, explains the history of basic concepts and reviews the reshaping of the

\textsuperscript{11} Nearly all of the material previously published is listed in the acknowledgments of the individual authors beginning at p. xi, Vol. I.

\textsuperscript{12} Lewis M. Simes, University of Michigan School of Law.
common law by American courts and legislatures. Parts 2 (Freehold Possessory Estates), 3 (Landlord and Tenant), 5 (Marriage Estates), and 6 (Concurrent Estates) are concerned primarily with the nature of estates and the rights which accrue by virtue of one's degree of ownership. There is appropriate discussion in all instances of problems connected with the creation of these estates, but the burden of treatment properly is on practical questions created by the unique common law idea that more than one distinct estate of ownership can exist in the same property at the same time. The life estate for example is examined in terms of practical problems relating to leases, mortgages, repairs, taxes, interest on encumbrances, assessments for improvements, insurance and life estates in personal property. As has been pointed out elsewhere, a slightly different terminology is used in analyzing possessory estates from that used subsequently in the discussion of future interests, but the description of basic concepts is clear and sound. The treatment of estates arising through marriage, including dower and other marital interests, seems overly historical and probably is the least useful of the sections in this group.

Part 4 (Types of Future Estates), as its name indicates, is the basic part on the law of future interests although a number of the problem areas normally classified under this heading are treated in other places. By rewriting some of the material used earlier in his excellent treatise, Professor Simes has contributed a current summary of the law which is especially valuable. Part 7 (Community Property) discusses all aspects of the civil law system of marital ownership and makes frequent comparison to common law concepts which the lawyer unfamiliar with civil law doctrine will find most helpful. Part 8 (Easements and Licenses) deals with interests in land which are less than estates but which carry with them the "ownership" of a use or privilege, and Part 9 (Covenants, Rents and Public Rights) treats together the somewhat incongruous questions of real covenants, equitable servitudes, rents, navigation rights, fishing and hunting rights on navigable streams, public highways, rights in parks, squares

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13 Russell D. Niles, New York University School of Law and William F. Walsh, formerly of New York University School of Law (deceased), with the assistance of Harold Friedman of the New York bar, formerly Research Assistant at New York University School of Law.
14 Hiram H. Lesar, University of Missouri School of Law.
15 George L. Haskins, University of Pennsylvania Law School.
16 Russell D. Niles and William F. Walsh.
17 Professor Bertel Sparks, 28 N.Y.U.L. Rev. 1052 (1953) at p. 1053.
18 Lewis M. Simes.
19 Cornelius J. Moynihan, Boston College Law School.
20 Oliver S. Rundell, University of Wisconsin Law School.
21 Russell R. Reno, University of Maryland School of Law.
and commons and rights arising by custom. The discussion in the former part is unusually formal and terminological while the analysis in the latter part is too frequently limited to a mere compilation of cases and "views". The summary of the law of real covenants is very helpful, however, because of the clarity with which it is written. Part 10 (Oil and Gas Rights) is a treatise in itself, dealing comprehensively with the law peculiar to oil and gas, and Professor Kulp combines a quite readable style with careful and critical analysis.

The next four parts involve generally the transfer of estates and the plan adopted for analysis of transfer problems seems satisfactory although it has been suggested that a failure to distinguish between sales transactions and donative transactions complicates the problem of what to include in this portion of the work about trusts, wills and personal property. Part II (Vendor-Purchaser) covers voluntary transfers: executory land contracts, options, equitable conversion, problems as to marketable title, and remedies. It gives an emphasis to the contractual aspects of a land transfer which is too often neglected in the books. Part 12 (Deeds) covers traditional problems presented in effecting an intervivos transfer by deed: essential and customary parts of the instrument; execution, delivery and capacity; description and boundary; covenants for title; and dedication. Part 13 (Transfers by Judicial or Statutory Process) largely has to do with involuntary sales of real property made under judicial process, and Part 14 (Title after Probate Action) is a comprehensive discussion of title problems arising by virtue of the death of the owner of land. The author of this part does a remarkable job of synthesizing the wide assortment of principles from many fields which govern transfer of title to land by descent or devise. His analysis results in a unique contribution to the set and serves to warn the inexperienced attorney how impossible it is to eliminate the law of wills and conflict of laws from an analysis of many "property" problems. Part 15 (Other Methods of Acquiring Title to Land) rounds out the transfer group with an analysis of adverse possession, estoppel, accretion and reclamation.

Victor H. Kulp, University of Oklahoma School of Law.

Professor Allison Dunham, 53 Col. L. Rev. 440 (1953) at p. 444.

Sidney Post Simpson, formerly of New York University School of Law, John P. Maloney, formerly of St. John’s University School of Law (both deceased), and Rufford G. Patton, Land Registration Department, Hennepin County, Minnesota, with the assistance of Harold Friedman.

Rufford G. Patton.

Thomas G. Atkinson, New York University School of Law.

Rufford G. Patton.
Part 16 (Mortgages) is a condensation of the author's Hornbook and is the longest part in the set (516 pages of text). It covers the full gamut of problems arising from the use of land in security transactions and together with Parts 17 (Priorities, Recording, Registration) and 18 (Examination of Title) constitutes Volume IV, which might be called a manual for the real estate attorney who specializes in title certification and financing transactions. The two last-named parts leave something to be desired in depth of analysis, however, because title attorneys have special need for critical evaluation of the case and statutory interpretations which govern their unusual problems rather than a mere collection of cases or the unexplained indication of the prevailing view. The first two parts of Volume V, Part 19 (Fixtures and Things on Land) and Part 20 (Waste) seem to be included primarily in the interest of completeness. The analysis in each is sound and thorough, but the author of the latter neglects waste problems which arise for the owners of contingent future interests. In fact, better integration of the material treated in this part might have resulted from an incidental discussion of it in other parts dealing with non-possessory ownership.

The last seven parts are composed of subjects which fall within the broad field of future interests, but which have come to be thought of as separate problem areas. Part 21 (Construction Problems) summarizes broad rules of construction, "vesting", gifts by implication, effect of failure of an interest, gifts over on death without issue and similar phases. Part 22 (Class Gifts) treats separately the construction law applicable to class dispositions, but this arrangement does not obscure the fact that difficulties in determining intention are essentially the same however encountered or the fact that good draftsmanship is the only real solution to most construction problems. Both parts deal with a variety of complicated problems in a skillful manner and there is a commendable effort to explain how many of the problems can be avoided. Class gift construction is an area where the desire for clear sound analysis sometimes causes the expert to use terminology which the courts are slow to adopt. This fact can complicate immeasurably the preparation of a treatise for the practicing attorney. Shall the legal

29 George E. Osborne, Stanford University Law School.
30 Rufford G. Patton.
31 Carroll G. Patton, Land Registration Department, Hennepin County, Minnesota and Rufford G. Patton.
32 Russell D. Niles and John Henry Merryman, University of Santa Clara College of Law.
33 John Henry Merryman.
34 A. James Casner, Harvard Law School and David Westfall of the Chicago Bar.
35 A. James Casner.
writer assume that his reader knows enough about the problem to find his treatment of it even though it is discussed and classified according to non-technical language suggested by sound analysis, or shall he follow traditional judicial expression which has only familiarity of usage to commend it? Fortunately the author here does not succumb to the latter approach. For example, he avoids the persistent and confusing tendency of the courts to describe the entirely different problems of determining maximum and minimum class membership in terms of the “vested” or “contingent” character of the interest.

Part 23 (Powers of Appointment)\textsuperscript{36} is a particularly full and thorough section on the modern law of powers, including federal tax problems, and features a complete discussion of the 1951 Powers of Appointment Act. Part 24 (The Common Law Rule Against Perpetuities)\textsuperscript{37} is the first of four parts which analyze those extremely complicated rules of policy which restrain one's right under our law to create remote contingent future interests, to control alienation and to provide for illegal conditions and limitations. The discussion of the common law rule is general but very clear because of the simple presentation made and the helpful table of cross-references to other classical treatments which is provided. The statutory aspects of the perpetuities problem is given special attention in Part 25 (Statutory Rules: Perpetuities and Accumulations),\textsuperscript{38} while Part 26 (Restraints upon the Alienation of Property)\textsuperscript{39} treats restraints and Part 27 (Illegal Conditions and Limitations)\textsuperscript{40} covers provisions in wills which are unenforceable as a matter of general public policy.

Finally, a twenty-eighth part will constitute the first supplement to the set, and will treat Rights Incident to Possession of Land\textsuperscript{41} in terms of freedom from trespass, freedom from nontrespassory interference (law of private nuisance), surface support and enjoyment of waters. As the subtitles suggest, this will bring into the work an analysis of some of those problems which lie partially in the torts area and partially in the property area, but which usually are classified by the property lawyer as being in his field.

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\textsuperscript{36} Charles C. Callahan, Ohio State University College of Law, and W. Barton Leach, Harvard Law School, with assistance from Charles W. Davidson, University of Iowa, and Loren E. Juhl of the Chicago bar.

\textsuperscript{37} W. Barton Leach and Owen Tudor of the Boston bar.

\textsuperscript{38} Horace E. Whiteside, Cornell Law School.

\textsuperscript{39} Merrill I. Schnebly, University of Illinois College of Law.

\textsuperscript{40} Olin L. Browder, Jr., University of Oklahoma School of Law.

\textsuperscript{41} In preparation by Clyde O. Mortz, University of Colorado School of Law.