

REVIEWS

CASES AND MATERIALS ON THE LAW OF DEBTORS' ESTATES. Second Edition. By Wesley A. Sturges. St. Paul: West Publishing Co. 1937. Pp. xv, 1008. \$6.00.

IN THESE days with dictators declaring that might makes right while students are taught that judges decide cases the way they want to and not in accordance with external law, the quest for objectivity should be the more zealously pursued, even in a book review. But, frankly, the task here seems more than usually hopeless. The reader is presumably entitled to comment which tells him more about the book than about the commentator, but this time there is no way of giving the reader his due. He may proceed to read pursuant to an express warranty of defective quality.

If he takes the wiser course of examining Professor Sturges' work independently, he will either acquire or confirm knowledge that the subject of creditors' rights and debtors' estates has many aspects and bewildering ramifications. The brevity of the book is deceptive. Keen editing has reduced the number and length of the cases to a point where cases and "materials", exclusive of appendices, together amount to less than 840 pages, but any number of footnotes contain provocative questions, each fit for a twenty page section or for a lively class-room hour. Depression legislation, especially Section 77B of the Bankruptcy Act, compelled the author to abandon the limits of his field as outlined in the preface to his first edition.

As no ordinary class can spend the two years that might cover the ground staked out in this thin volume, the problem of selection becomes overwhelming. One solution, to shut the eyes to all but the largest type, can hardly be the design of the author. The teacher is thrown back on his own standard of values, which brings us back to the already lamented subjective element.

Statutes loom larger in practice than in law school, and this lack of balance should be restored so far as may be when opportunity offers. Neither the fact nor its reasons require amplification. Lack of uniformity is an obstacle to the study of statutes and the advantages of overcoming this obstacle have not been sufficient to lead the better law schools to confine instruction to the law of a single state. Federal statutes are not open to this objection, but many of them, such as those governing Indian affairs, admiralty and patents, relate to specialties for which there is little room in the law school course of the average student. With a few exceptions, such as internal revenue, the bankruptcy statute is among the most important of the acts of Congress worth careful consideration in the class-room. Its place in a long stream of legislation in an expanding field with continuous traditions does not detract from its significance. Its loose draftsmanship affords every variety of decision. Sometimes the Act is held to mean what it says, sometimes the opposite, and even when it contradicts itself the criteria of choice are frequently instructive. For these and other reasons bankruptcy has strong claims to a place in the field here considered probably disproportionate to its economic importance.

A modern curriculum can hardly afford a course of this nature which neglects the corporation, however, and the subject of the liquidation of corporate affairs can hardly be explored without becoming inextricably involved in resuscitation and in reorganization verging into the mere procrastination of the "umbrella" receivership. The fact that the most important corporate reorganizations are being and will doubtless continue to be achieved under legislation annexed to the Bankruptcy Act and abounding with cross-references to it makes Section 77B a hybrid which cannot escape attention. Although its statutory morphology comes chiefly from the bankruptcy side of the family, it is imbued with the character and the spirit of the equity receivership. The equity receivership thus unavoidably claims attention as a parent of 77B, if not in its own right. A course in this field might thus have three main parts, bankruptcy, equity receivership and 77B, the last viewed partly as an individual exercise in statutory construction and partly as the offspring of the first two parts. Assignments for the benefit of creditors and common law compositions would be pushed into the background and would receive little more treatment than that accorded them in an old-fashioned bankruptcy course.

Mr. Sturges obviously follows a radically different plan. The book is divided into four parts designated as such. The first part, comprising several chapters, introduces the various methods of liquidation, extension, and reorganization. Something over a hundred pages are included in the first chapter on compositions and assignments for the benefit of creditors; the receivership chapter occupies something less than a hundred pages; about sixty pages relate to adjudication in bankruptcy and fifty pages to compositions, debtor relief and corporate reorganization—mostly matters arising under the various aspects of the depression legislation. The only points of corporate reorganization here considered are those relating to the filing of the petition, chiefly the question of filing in good faith.

After a part relating to the displacement of compositions, assignments and receiverships by proceedings under the bankruptcy law, the work then proceeds to Part III, Administration, the heart of any course to be given in this field. Here such topics as the continuation of business and the collection of assets are treated as functional problems of the administration without a separation of the cases according to the types of proceedings in which the cases arise. The fourth part deals with discharges in bankruptcy.

Experience in teaching from this book has developed two subjective conclusions, almost equally surprising. First, that "functional approach" really means something, and second, that it definitely is not helpful. Abstractly, it might be only a new name for undoubted truths of ancient verity, such as the truth that the law in the books and the law in action are far from identical. Long unquestioned doctrine declares that what the cases do is more important than what they say. One must not rest content with what he finds within the eight corners of the law book, but must endeavor to criticize the actual working of the law more than the abstract logic of the opinions, which may or may not be of importance. What I have been accustomed to style the "functional follow-through" involves an indispensable reference to reality which, *a priori*, might not lose its utility if it came at the

outset. Whatever may be the official signification of functional *approach*, however, it would seem descriptive of a plan of arrangement which treats as a chapter heading the functional concept of "continuation of the business" without separate sections devoted to assignments for the benefit of creditors, equity receiverships, and 77B proceedings. Mr. Sturges would be the last to proclaim any novel virtue in his general method. The ironical fact seems to be, however, that it might be better to make empty proclamations than to achieve solid accomplishment in this direction. For the achieved intellectual feat of putting authorities from diverse proceedings in suggestive contrast seems operative in the direction of retarding the student's grasp of what it is all about.

A topic such as the collection of assets of the bankrupt's estate can be developed in lively fashion by cases arising under the Bankruptcy Act. To find such cases mixed in with cases of receivers and assignees for the benefit of creditors presents an interesting exercise for the teacher, but the constant switching from one technical background to another materially slows the pace. More action could take place on the stage if so much class-room time were not consumed in shifting the scenery. The arrangement is not required or suggested by the needs of practice, for, by the time questions of collection of assets arise, the lawyer usually finds himself either in a bankruptcy proceeding, or in something else, and concerned with the law of that particular proceeding.

In the nature of things much must depend upon the arrangement of subject matter in the individual teacher's mind. Difficulty in adjusting to a new arrangement relates to loss of time in repeating cases past and anticipating cases to come. One can scarcely avoid the inference, however, that a course under the author must be a treat. Perhaps there are others who can use his tool almost as well as he. Surely no one who is interested in the field should deprive himself of the stimulation to be derived from reading this very suggestive work. It displays not only rare originality but care and precision in matters of detail.

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YEAR BOOKS OF RICHARD II. 11 Richard II. 1387-1388. Ed. for the Ames Foundation by Isobel D. Thornley. London, 1937. Pp. lxii, 351.

THIS IS the third of the Year Books published by the Ames Foundation. In format and in its broader characteristics it follows its predecessor already reviewed in this Journal.¹ In content it also agrees along general lines with that predecessor, at least as far as the matter taken from the Year Book manuscripts is concerned. Though none of the cases is of striking importance, there are many that are interesting. Personal actions constitute approximately

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1. Book Review (1930) 39 YALE L. J. 1225.

one-half of the entries. There are, among others, six actions of account—each case furnished with its plea roll counterpart—five of debt, four of replevin, and seventeen of trespass. All of these are run-of-the-mill type of cases which add nothing new to our stock of fundamental information regarding these actions, though the frequency with which they occur in these pages makes one realize anew their practical utility for litigants at the end of the fourteenth century. One little case of another kind—which as far as we know is unique—is interesting because it shows the procedure used to rectify a mistake which had been made owing to the fact that two different men had the same name, and proceedings in outlawry had been instituted against the wrong man. One can not but wonder why the numerous cases of exact similarity of names in medieval England did not more often lead to mistakes of this sort.

The most valuable part of this volume from the point of view of the historian, legal or other, is unquestionably the extracts from the plea rolls. Of the seventy-nine cases reported in the Year Book manuscripts for this regnal year, all but seventeen have been identified, by the editor, on the corresponding plea roll. This is a good percentage. It might be supposed, when a case occurs in a Year Book for any given year, that that case would be certain to be found on the plea rolls for the same year, especially as the latter presumably contain all the cases tried, while the Year Books are made up of selected cases only. Actually it is not always possible to find on the roll the case reported in the Year Book. This is sometimes due to the fact that the report in the Year Book is of too indefinite a nature to make identification possible. But frequently also, at least in the case of the earlier Year Books, a manuscript Year Book of allegedly a certain year, may, as the result of successive copyings and the addition of interpolations, contain cases which do not belong to that year at all. Thus, to point out a fact which as far as we know has not been noticed before, most of the cases found in the Rolls Series Year Book 30–31 Ed. I (1302), pp. 497–526, will be found again, though not in at all the same order of arrangement, in the Selden Society Year Book 1 Eyre of Kent (1313–14), pp. 102–134. And this is only one of many instances which might be cited. It would be interesting to know for just what reason some twenty percent of the cases in this particular Year Book of Richard II can not be found on the roll. That these cases are “anonymous” tells us nothing. All, or practically all, of the other cases in the volume would be anonymous if the plea roll did not give us the names of the parties—which the Year Book consistently omits. One effect of the presence of these unidentified cases in this Year Book text is very noticeable: we get a vivid realization of how little the average report in the Year Book has to offer us until it is amplified, explained, and corrected by the account in the roll.

Not that we would deny to the Year Book reports a certain historical value. Nothing approaches them in furnishing us with a picture of the lawyers of these early days in action. If the plea rolls were not now available the Year Books would assume first place as contemporary documents for the study of the general legal history of their own times—just as for long periods they were of pre-eminent importance to practicing lawyers because the plea

rolls were not to be had. But today the plea rolls are accessible, and for all we can now see will continue indefinitely to be so; while they are thus available the Year Book can not expect to maintain its earlier position, but must be content to occupy one of decidedly secondary importance. The very circumstances of differences in origin make this inevitable. No pains were spared to make the roll a careful and accurate account, for a more or less remote posterity, of all the important facts in a case as far as the court itself was concerned. It was official, authentic, and authoritative, and in these respects corresponded to our official reports of today. The Year Books, on the other hand, were developed to fill a very special and very technical need in a very narrow field—a knowledge of the intricacies of contemporary pleading. They were concerned with furnishing the practicing lawyer help in the actual arguing of cases, to the exclusion of almost all else. As private, and apparently also commercial, compilations, they were non-official; they carried no guarantee of either care or authenticity, as the discrepancies in numerous different reports of the same case in some of the Year Books show. Consequently when roll and Year Book disagree, it is the latter which must give way.

Even in the heyday of the Year Book this superior authority of the roll was clearly recognized. Thus in 1537 there was cited in the King's Bench a case from the Year Book of 22 Edward IV as proof that a particular kind of royal pardon was not good. "And on account of that case the judges were doubtful, and sent by Baker, Attorney General, who went to the common pleas and asked the advice of the judges of the king's bench, who ordered the precedents [*i.e.*, the plea rolls] to be searched; and such pardon was allowed in the same year . . . and so the case is misreported [*i.e.*, in the Year Book] and contrary to the record; wherefore without further argument the aforesaid pardon was allowed also."²

This unquestioned authority of the roll over the Year Book, which causes the roll to be accepted as ultimate evidence, without any recourse to the Year Book for supplementary or supporting material—and which makes any modern editor feel that he can not edit a Year Book text without giving us also, whenever that is possible, the corresponding extract from the roll—is illustrated in this volume by the commentary on a case from Easter term, a case of detinue of charter, which has occupied "an important place in the early history of contingent remainders and is well known to historians in that connection."³ The manuscripts of the Year Book either omit all reference to the judgment, or say that it was in favor of the defendant. But the roll states clearly and unequivocally that the plaintiff recovered his charter and his damages. As the judges of 1537 before him, the general editor, who has contributed a commentary on selected cases, accepts without hesitation the account in the roll as against the Year Book—"from the plea roll we now know that judgment was actually given for the plaintiff" . . . "now that the true decision is known from the record" . . . ⁴

2. Bellengham's Case [K.B.] 1 Dyer 34 (1537).

3. P. 283-288, xlviii.

4. P. xlviii-xlix, and n. 1.

This acknowledgment of the supreme authority of the plea rolls, by the general editor of a series of Year Books, comes at an opportune time. The Year Books were neglected for many generations; it is well that they have come into their own again; but it would be far from well if the present enthusiasm for them were to obscure the fact of the greater usefulness and dependability of the plea rolls, not only for the purposes of history in general, but also for the history of our law as such.

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GOVERNMENT REGULATION OF TRANSPORTATION. By Emory R. Johnson. New York: D. Appleton-Century Co., Inc., 1938. Pp. xiv, 680. \$5.00.

DR. JOHNSON¹ has been recognized for more than a generation as an outstanding authority upon matters connected with American transportation. His long series of useful and authoritative works he now climaxes with a general discussion of the whole subject of government regulation of the agencies of transportation in the United States. In a sense it is a continuation of his previous studies, and possibly was so intended. Certainly the emphasis is upon the recent and the present as related to the future, rather than upon the more distant past. The conspectus appears at a time when it is useful both as a collection of basic factual matter and as a stimulus to discussion of our transportation policy.

The subject is treated in two related aspects: (1) the historical past and the present as currently observed, and (2) the policies which the past and present indicate to be sound and desirable for the future. We are given a necessarily condensed but adequate historical narrative of the genesis of Federal and State regulation of the four great classes of transportation agencies: carriers by railway, highway, waterway, and airway. Pipe lines are not overlooked, but are dismissed for the present. This leads to a deduction in logically disposed categories of the principles which underlie regulatory legislation and administration.

In the first aspect instanced, the contribution made by the author is in the assembly and concentration from a boundless mass of material of that which is helpful in our choice of future policies, which is presently more important than mere restatement of the historical past. While this is not a law-book, the practitioner and the administrator will profit greatly by diligent assimilation of this background material, so essential to intelligent use of the law and legal precedents as instruments for carrying public policy into execution. For students of economic theory and of the history of governmental institutions this work affords a comprehensive and up-to-date survey of the whole wide field.

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The second aspect applies the factual matter and the deductions made therefrom as aids in the solution of what is one of the most troublesome and difficult social and economic situations of our time. Into the conclusions put forth Dr. Johnson has made use of his ripe experience, and has fortified them by the facts that he has marshaled. The treatment of the subject, and the conclusions reached, are orthodox.

Dr. Johnson has no quick-working panacea to propose. He recognizes well the seriousness of the present situation, which he attributes to the cumulative effect of a long-continued and initially abrupt decline in traffic just as the largely unregulated competitors of the rails became more efficient. His long-range program is clearly put, and well rounded. It is capable of easy translation into action. These considerations, coupled with the recognized high standing of the proponent, entitle his proposals to careful attention.

Government ownership and operation he lays aside as an undesirable basic policy, at least for the present. Solution of the pressing real financial problems will depend upon a number of yet undetermined factors. Among these are a revival of business, the avoidance of unduly burdensome labor or other legislation affecting carriers; the bringing of air- and water-carriers within the scope of the general principles of regulation applied to railways and highway carriers; and some immediate temporary financial assistance for the rails. Consolidations he would leave to be worked out naturally around the strong railways, and not regionally; to be made voluntarily and not compulsorily, but with some aid through the power of eminent domain; and always subject to approval to insure compatibility with the public interest, but not to be limited by a requirement of conformance with a preconceived and formal plan of grouping.

The objectives of government regulation which Dr. Johnson deduces are, foremost, the provision of adequate facilities and service; then increased efficiency and economy in each class of service; cooperation and coordination of transportation agencies; and the equitable adjustment of relations between the carriers themselves, with the public, and with their employees. These ideal objectives can be attained only by frank recognition of the essentially interrelated nature of rail, water, road, and air transport agencies as parts of a single transportation system for the service of the nation. The ultimate objective, which is stated again and again, is to discover and maintain such relations among all these types of carriers and among the carriers of each type as will enable each to render the service it can most efficiently and economically perform.

We may summarize the statement of the controlling principles of government regulation. It should be constructive, not merely corrective; impartial; flexible. Direct action by the legislature of a rigid character should be avoided by prescription of flexible administrative standards and provision of suitable and adaptable administrative machinery. When suitable regulatory legislation has been enacted, the legislature owes the duty of refraining from subsequent action which will diminish the effectiveness of the delegated administrative discretionary power. Administration should be unhampered by legislative and political influence, and should keep itself free from bureau-

cratic rigidity and red tape.² Regulation should take on a positive character by establishing conditions that will stimulate private enterprise. Laws and regulations should not be retained after they have become needless or meaningless.³ A considerable area of regulatory power now may be safely assigned to the carriers themselves, through their recognized associations, for self-discipline and self-improvement without formal or direct regulation by governmental agencies.

To work out of these principles, the proposal is that the general character of regulation applied to rail and highway carriers be extended (with necessary variations in detail) to include the water and air carriers within its scope. The subjects so to be treated include fixation of rates, control of financial structures, construction and abandonment of plant and service, prescription of service standards, adjustment of labor relations, and the fair balancing of inter-carrier and inter-systems-of-carriers relations. The principles now being applied in the rail and motor carrier fields would be assimilated in this broadened system of regulation, in the interest of consistency and unity of administration. Intensive regulation of the charges of air carriers may well be postponed awaiting further experience to show what adjustments should be made. Regulatory administration of these subjects would be committed to the Interstate Commerce Commission, except certain promotional services which could be left where they now are, and except as to labor relations, as to which the general soundness of the existing policy is questioned by the author.

This is the character of regulation which has often been suggested. In time it may be adopted as a whole, and already it has been accepted in part. The proposal follows lines previously outlined by the Commission and by the Federal Coordinator of Transportation, as well as by many other students of the regulatory system. In theory the plan is unassailable. There are objections which have been raised, based upon a forecast as to what may be expected from the system if put to work. There are recognized difficulties inherent in the imposition of diverse tasks of such magnitude upon a single administrative tribunal. As to the basic policy involved, the objection is often raised that the result must be to diminish the degree of competition between the different transportation agencies which public policy now demands. It is felt by many that a uniform, non-competitive basis for service and rates will operate to the detriment of the public service and the pocket-books of the users of the service.

Dr. Johnson feels that the experience of the Commission would suggest administrative methods for avoiding the difficulties pointed out, and the remaining criticisms he would not accept as valid. His ultimate aim is the evolution of a coordinated system of transportation charges for rail, motor, and water carriers—eventually, for air carriers—stabilized so as to permit

2. The author commends the organization of the Interstate Commerce Commission in the latter respect.

3. The suggestion for a formal review, each decade, of the outstanding regulatory laws and rulings with a view to elimination of the deadwood, is the weakest spot in his program. Legislatively, it is hazardous; administratively, the process is continuous.

greater emphasis on the cost of service factor as controlling in the fixation of rates, with simpler rate structures and classifications, and less difficult and more constructively helpful regulation made possible. Rate regulation may then be based on a complete business cycle, but accompanied by a greater degree of control over financing. Coordination in rates and services, he believes, would not lessen helpful competition, since each class of transportation agency and the carriers within each class would have the ever-present incentive to provide more attractive service as a means of increasing business, and to make operations more efficient and economical as a means of increasing its net returns. Each carrier would thereby secure the traffic it can handle most economically and efficiently, while the country's transportation services as a whole would be performed in the best possible manner and at a minimum cost.

Little fault may be found with these abstract objectives. Difficulties appear when we come to apply general statements of this character. Each of these principles can be opposed plausibly, and their application will be resisted strenuously. They will deprive many individuals and localities of competitive advantages they now hold. Some difficulties are due to the uncrystallized state of our political and economic objectives, others are inevitable because of the generality of the language in which legislatures state their standards. The term "coordination" sounds well, but carries with it many possible conflicting meanings. According to the point of view or advantage of the user, it describes courses of action which are exact opposites. And if each kind of carrier is to be given for its own that traffic which it can handle best and most cheaply, it will thereby be assured a monopoly of that traffic, and *eo converso*, will be disabled from competing for marginal traffic which it can not handle as economically and efficiently as some other form of carriers. Here are potentialities which should be explored before acceptance of a new axiom. However, these doubts do not go to the main features of the plan outlined, and probably the results of trial-and-error methods will resolve uncertainties.

Wide and careful selection of factual material, clear, orderly arrangement, and frank, informed, and sane discussion make this work a timely and significant contribution. It illuminates the immediate subject, and throws light upon other vital projects for social and economic control by government regulation of other important and yet largely unregulated businesses.

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RESTATEMENT OF THE LAW OF PROPERTY, Volumes I and II, As Adopted by the American Law Institute. St. Paul: American Law Institute Publishers. 1936. Pp. lxi, 1179, Ap. 104.

WHENEVER another volume is issued in the American Law Institute's monumental serial, "Restatement of the Law", two modes of criticism are available. One may attack or commend the new work accordingly as he approves or disapproves the basic methods and aims of the entire Restatement. Or one may consider rather the degree of skill with which these methods were followed and the degree to which these aims were achieved.

Judging by the first two volumes, the Restatement of Property should go far to illustrate the fundamental soundness of the Institute's program. The purpose of the American Law Institute in entering upon a restatement of the common law is set forth in an introduction to these volumes, as it has been in earlier publications of the series. The problem which occasioned the project was the growing mass of judicial decisions, existing to a large degree in particularized and poorly integrated lines of precedent, in which the logical connection between related problems was inevitably lost from sight. Inevitably, because the law grows by the decision of particular cases, it is seldom that the court deciding a particular case can consider its relation to connected or analogous lines of precedent not constituting direct authority in the question at bar. The resultant confusion has led many legal scholars to a belief in the superiority of statutory codes over a confused and incoherent common law. It led the American Law Institute rather to a valiant attempt to produce order and coherence in a common law system. The whole Restatement may be condemned by anyone who believes that its purpose is unworthy or hopeless of accomplishment. The work of any Restatement Committee and Reporter must in all fairness be judged by its adaptation to purposes predetermined by the Institute.

From the point of view of the practicing attorney, there are three ways in which a legal publication (other than a decided case) can be used. It may be offered to a court as direct evidence of the law on a certain point, as is commonly done with certain classic treatises. It may serve as a "case finder." Or it may be used for a whetstone upon which the lawyer can sharpen the edges of his own legal knowledge.

The Restatement of Property, like its companion works, includes no citations, and is therefore useless as a "case finder", and this has been made the basis of criticism. If this criticism is sound, it is directed at the Institute, not the Reporter and Committee. But is it sound? There already exists *Corpus Juris*, with annotations to date, and a new edition now appearing. Case law from the foundation of the country to January 1, 1938, is accumulated and well indexed and digested in the American Digest system. The Ruling Case Law, L.R.A., A.L.R. system is very satisfactory. So far as the Restatement volumes are accompanied by local annotations they may be regarded as a new case finding system, but for this purpose they are at best a slight addition to a well occupied field. Such an objective would poorly justify the tremendous expenditure of expert labor necessary to produce the basic work to which the annotations are made.

Whether the Restatements can be used as direct authority before the courts rests with the courts themselves. There may be a certain arrogance in the assertion contained in the introduction: "The accuracy of the statements of law made rests on the authority of the Institute." But the best opinion of legal scholars, checked and rechecked, goes into these statements. Although not every man whose opinion is worthy of respect has taken part in the Restatement of Property, no one can deny the distinction of the Committee nor the fact that it represents no group or clique, but a broad cross-section of sound knowledge. If authority can be found outside of judicial precedent, it is here. Could this authority be increased by padding the work with footnotes listing cases? On the contrary, to do this would be to abdicate the authority asserted, and remit the courts to the mass of incoherent precedent which the Restatement seeks to avoid. For the moment the Institute seeks to buttress its text with judicial precedent the practicing attorney and the court, accustomed to the case system, will ignore the text and rely on the citations. The Restatement would become a case finding work, an inferior competitor of the annotated reports and digests.

The great use which this reviewer has found for the Restatements, and particularly the Restatement on Property, is to sharpen legal analysis. Many lawyers complain that as time passes they know less and less law. Not in all ways, of course. Specific problems are encountered, mastered, and an accumulation of new, specific information remains. But the clarity of outline possessed by legal theory in law school dims with the passage of time. Every time one returns to a field of the law not encountered every day, effort must be made to regain the lost sharpness and accuracy of distinction. Nowhere is this more true than in the field of property, especially in future interests. The technique of the Restatement meets this need admirably. Highly analytical, possessed of an outline and organization which make it virtually impossible to overlook the relationship of connected problems, and equipped with comment and illustration which convert a code into a text, the Restatement is ideal to reeducate the lawyer into the scholar. Then, when the map of the field is again clear, one can turn to the cases with some understanding.

In using the Restatement of Property to clarify and supplement his understanding of some problem of property law, the average lawyer may be hampered a little at first by a strange terminology. The determinable fee has become a fee subject to a special limitation, and is lumped with the fee simple subject to a right of entry for condition broken and the fee simple subject to springing or shifting uses or devises under a single heading—"estates in fee simple defeasible". The right of entry becomes a power of termination, and vested and contingent remainders disappear altogether, their place being taken by a quadruple classification of remainders. It is unfortunate to make such changes except in case of necessity because they make the text appear unfamiliar to the attorney or judge. However, the sections covering the legal incidents and protection of remainders demonstrate the reason for the reclassification of remainders; one of the classes carved out of the group of remainders commonly regarded as vested has more in common with the contingent remainder (now "remainder subject to a condition precedent")

than it has with remainders absolutely vested. If this is true, clearly the orthodox classification, designed for use with the Rule against Perpetuities, is not adequate for a restatement of the entire law of property. Perhaps other changes in old-fashioned terminology are equally well justified.

The Reporter and his Committee deserve a vote of thanks for the excellent comments, particularly the occasional "rationales" and for the introduction to Division III, dealing with Future Interests. Part of this material may carry explanation so far as to constitute some deviation from the authoritarian plan of the Restatements generally. If it does, any such deviation should be not excused, but applauded. Without weakening the presentation as a statement of principle, it reconciles and accustoms the user to some strangeness of nomenclature and organization, and makes black type rules quickly understandable and hence useful to the practicing lawyer. Where supporting the rules stated with citation of precedents would only weaken the Restatement for the purpose for which it was designed, explanation of the reason behind a rule serves at once to strengthen its authority and to define its scope.

Apparently the question whether existing law or socially desirable law should be restated has not yet wholly been laid to rest. In the main where vestigial principles which have outworn their reason still clog the law, this Restatement follows authority with a regretful comment, but some exceptions appear. On the question of destructibility of contingent remainders, for example, the common law is stated to be that destructibility exists no more. This statement appears to be based on the fact that many states have changed the old rule by statute, that it is often avoided by policies of interpretation, and that where it still exists it is most unfortunate.¹ Perhaps this is the best treatment in a work written in the hope of clarifying future development of the law, but it seems more than "Restatement."

Although the volume containing principles of construction of future interests has not yet appeared, a method of approach is foreshadowed which may prove unfortunate. The problem can best be set out by an example. In § 18 and again in § 113 a distinction is made between a conveyance by A "to B for the life of B unless A sooner terminates this estate" and a conveyance by A "to B until A terminates this estate." The rule laid down is that the former limitation produces a life estate, subject to a special limitation terminating it at A's will, while the latter creates no freehold, but an estate at the will of A. The basis stated for this distinction is that the first limitation manifests A's intent to grant a life estate, and the second does not. After consideration of the form of limitation which will create a life estate, the Restatement goes on to consider the legal characteristics of such an estate, which are in many respects different from those of an estate at will. The inference certainly is that the conveyance to B for life unless A sooner terminates will have the characteristics of a life estate, while the conveyance to B until A terminates will not, *and that this is because A so intended*. This position is not tenable unless one assumes that A thought in terms

1. See § 240.

of estates as defined in the American Law Institute's Restatement when he made his conveyance, so that he either did or did not intend to create a "life estate". In all probability he was not thinking about "life estates" or "estates at will," "freeholds" or "chattels real." He used the language in either limitation to define one of B's rights, the duration of his interest, and for no other purpose. For this purpose the two phrases have an identical effect. How can their verbal differences be used to determine A's intent concerning entirely different problems, other characteristics of the interest granted?

Too much of the law of construction of deeds and wills is predicated on two false assumptions: that an estate in land is a definite thing, like a shoe, and that a testator or grantor thinks in terms of estates, and can therefore be presumed to have intended to give either a life estate terminable at will or a tenancy at will, either a remainder subject to a condition precedent or a remainder subject to a condition subsequent. If an estate is "a bundle of rights, like a bundle of sticks," to use a common classroom simile, the ordinary property owner doesn't think in terms of the lawyer's name for the bundle; he thinks in terms of the individual sticks. It follows that his actual intent about one right cannot be determined by analyzing the language he used in granting another. If the full consideration of rules of construction to be included in Volume III proceeds on this basis, it will not add clarity to the law.

This is criticism of Volumes I and II of the Property Restatement primarily on the basis of what may prove to be wrong with Volume III. As for the published volumes, they do the job which was set for the Restatements, and do it excellently. They are clear, well organized, well indexed and highly usable. If the courts, growing more familiar with the work of the Institute, will accord these volumes the respect they deserve as direct evidence of the law, and if the bar will present them as such, they should attain their stated objective of helping to clarify the confused and confusing mass of the common law. In any case they will be of invaluable help to the attorney or judge who will use their analysis of property concepts and problems to clarify his own thinking.

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ECONOMIC ESSAYS. By Charles Jesse Bullock. Cambridge, Mass.: Harvard University Press, 1936, pp. xiii, 550.

AFTER thirty-one years as a member of the Economics Department of Harvard University, Professor Bullock recently retired from active teaching. This event was made, by a group of his former students and other friends, the occasion for the present memorial volume of his writings. Professor Bullock has long occupied a distinguished place among American economists,

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and since he began to give his major attention to the subject of public finance he has stood at the very front of the scholars engaged in this field. A prolific writer, Professor Bullock has nevertheless few books to his credit; his publications have mostly appeared in the learned journals and the published proceedings of scientific and technical associations and conferences. The significance of the present book is that it brings together in convenient form a splendid collection of scholarly essays that were not formerly easily available.

Not all of Professor Bullock's writings are here included. The editorial committee found the material too abundant for that. Selection had to be resorted to, with the result that we have here twenty-three essays, arranged in three groups; the first deals with general economic principles and history, the second is in the field of taxation, while the third contains some of the results of Professor Bullock's recent excursions into the ancient history of public finance, especially among the Greeks. Finally there is a complete bibliography of Professor Bullock's writings, containing more than a hundred titles.

Adequate comment on the subject matter of these various essays is obviously out of the question within the limits of this review. Those students of economics and taxation who have already read these essays as they have severally appeared will know that here is a rich storehouse. Others will congratulate themselves that there is now available in convenient form so many of the best essays of a distinguished economist, a forceful writer, and one whose influence on the trend of events, particularly in the field of taxation, has been profound.

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