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BOOK REVIEWS

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Titles to Real Property, Acquired Originally and by Transfer inter vivos. By Ralph W. Aigler, University of Michigan Law School. Volume 3 of Cases on the Law of Property. American Casebook Series. Published by West Publishing Co., St. Paul. 1916. Pp. xx, 953.

The point of departure in any criticism of a casebook on Property must of course be a comparison with the monumental work of the late John Chipman Gray. As Professor Aigler remarks, "the collection of cases which bears his name has played no inconsiderable part in exerting that influence" upon our property law which all agree was Professor Gray's. The comparison is a severe test for the follower in his footsteps; but upon making it we come to a realization of the vast improvement in the materials at hand to-day over those available when the Harvard professor undertook his gigantic task.

In the first place, the modern professor has at hand as a model, Gray's work, consisting of six volumes; the first edition appeared between 1888-1892, and the second edition between 1905-1908. In spite of the great amount of new American material that Aigler has drawn upon, both statutory and common law, especially from the middle west, we find a good many of the indispensable old cases and classical passages in their familiar surroundings. Thus in about thirty-five pages under Uses, where the resemblance is perhaps a little greater than in other parts of the work, we have besides the necessary parts of the Statutes of Uses and of Enrollments and passages from Bacon, Gilbert, Sanders and Leake: *Shortridge v. Lamplugh, Armstrong v. Wolsey, Lutwich v. Mitton, Roe v. Tranmer, Tyrrel's case,* and *Doe v. Passingham* in the text; while in the footnote we recognize *Same's case, Barker v. Keete, Sharington v. Strotton, Callard v. Callard, Heelis v. Blain, Witham v. Brooner, Egerton's case,* a case from *Keilwey* and *Mildmay's case,* all from Gray's text. This work, however, is not a revision of the older work such as Professor Gray's successors at Harvard have undertaken. It attempts to cover the subject matter of Gray's Books, 3, 6, 10, 12, and 13. The other eight books seem to be taken care of in other parts of the American Casebook Series. It is interesting to note the similarity in the basis of the rearrangement of matter in this and other modern casebooks. The historical order of the development of

ideas is gradually being abandoned in favor of an arrangement based on some outline of the whole subject as it is to-day. Compare Thayer's *Constitutional Law* with Hall's, or Keener's *Cases in Equity* with Boke's. Thus Gray takes us through the feudal system, manors and tenure in general into estates through livery of seisin and its various substitutes before and after the Statute of Uses and stops short of present conditions. Aigler's general outline of Original and Derivative Titles is analytical, and so are the subdivisions, excepting within the chapter on Mode of Conveyances where historical periods are very sensibly retained as a sort of echo of Gray.

This leads us to a consideration which justifies, but at the same time causes us to regret, the attempt to supersede Gray, as Langdell and others have been superseded, though not forgotten. Our property law can be understood only in the light of history. Gray had to create the historical background as he went along. To-day we have studies at our elbow, which were somewhat foreign to his vast learning even to the end. Though he quotes the great *History* in his second edition, to him Maitland, the dean of legal historians, was an antiquarian rather than a jurist (*Nature and Sources of the Law,* 1909, p. 54). It is true that the year after the publication of Gray's first volume we find Maitland, while explaining why the history of English law had not been written, still boasting of how much more material students of his day have than was available when Mr. Reeve had set to work; but his whole catalogue becomes insignificant in the light of his own contributions which we now enjoy. When Gray was doing his work, Bracton's Englishry was just being proved by Maitland in his Introduction to the *Notebook*. He had not yet explained the Beatitude of Seisin. The *History* which was to be produced seven years later by coöperation with Pollock was not yet planned. The outlook of the times, as represented for example in Digby, was essentially Blackstonianism instructed by Kemble and Palgrave and spiced perhaps with a little questioning introduced by Holmes. Vinogradoff had not yet opened up the study of village life and the early manor to Englishmen, nor explained folkland and bocland. The Selden Society in England and the great law school journals in America were just beginning. Very few of the Select Essays in Anglo-American Legal History had been written—very few could have been written. The modern professor is relieved of the necessity of sketching his own historical background, but he may be expected to make good use of all

of this new material. Aigler's footnotes have a few references to it. Maitland is permitted to explain the mystery of seisin and his ideas of "possessoriness" very perceptibly influence the compiler's point of view. But history could have been exploited to explain a great deal more. The omission of the chapter on Tenure—pardonable, no doubt, in a work called *Titles*—causes a failure to place the whole subject in its historic setting. The feudal framework of real property law is nowhere explained, and the forces that gradually made of it a mere framework are of course neglected. The tremendous influence exerted on real property by the mediæval Englishman's inability to deal with abstractions, the factor that made it seem proper even in the fourteenth century to convey an advowson by delivering the handle of the church door, is not called in to clear up difficulties. How possession came to be nine points of the law we are not shown. And lastly, the influence of adjective law on the substantive law of later times is neglected. In short, the compiler's object is to teach the law of property as it is, and not to explain it in the light of legal development nor to reflect light on the sources and nature of the law.

The compilation of Gray was, after all, material to illustrate lectures of a very broad scope. The present book endeavors to make a particular subject clear to the student as he goes along. What Professor Aigler says is true: that the student cannot be expected to gather any coherent ideas as to Uses before the Statute, from the fragmentary extracts printed in Gray. Gray would probably have admitted this charge and still have considered fragmentary extracts more useful in his particular work than the admirable explanatory statement by Aigler (pp. 232-236). But we must not forget the first words of Gray's preface: "This collection of Cases is prepared for the convenience of students in the Law School of Harvard University"—a sort of warning that other schools must use the book at their peril. Gray's personality is to go along with the book. Professor Aigler, however, does not expect to accompany his book to the hands of every user. He must sacrifice something for the sake of clarity. Gray's volumes have been handy paraphernalia for the teacher who sought to initiate the neophyte into the mystery of the law. Aigler's book, though a better instrument for the teaching of the rules of Property, is ill-adapted for this more subtle work—but after all, this is not the primary function of a casebook on Property.

NATHAN ISAACS.

A Treatise on Federal Impeachments. By Alex. Simpson, Jr., LL.D., of the Philadelphia Bar. Published by The Law Association of Philadelphia. 1916. Pp. 230.

In this modest work of 226 pages we have a careful account of the development in the constitutional convention of 1787 of the clauses in our national organic law touching impeachment, a review of the principles governing impeachment trials, and, in a valuable appendix, a catalogue of English and American impeachment cases, together with suggestions as to rules of procedure for the United States Senate when trying causes of this nature. What is the true character of the Senate in impeachment trials? That it is in a strictly judicial capacity, and no other, that the Senate must act when called upon to consider an impeachment laid before it by the House of Representatives, cannot now be doubted; indeed the constitutional requirement of a fresh oath to be taken before proceeding to trial points, at least, in such a direction, and, while the course of opinion has not been uniform in the matter, no reasonable doubt can now exist that the constitution-framers of 1787 intended to follow British parliamentary traditions and confer upon the Upper House of our national legislature all the powers of a High Court of Impeachment, following the characterization of Blackstone then already familiar to statesmen as well as students of law. In the recent impeachment (and acquittal) of Judge Swayne (1905) the Senate, by a vote of 45 to 28, determined, our author tells us, "that the respondent's voluntary statements, made before a Committee of the House of Representatives, could not be used against him on the trial of the impeachment because of the Fifth Amendment and of section 859 of the Revised Statutes, which provides: "No testimony given by a witness before either House, or before a Committee of either House of Congress, shall be used in evidence in any criminal proceeding against him in any court except in a prosecution for perjury in giving such testimony."

Impeachment has been resorted to but nine times in our national forum; the initial case, that of William Blount in 1797, was dismissed on the ground that Senator Blount, accused of promoting filibustering expeditions in the Floridas, was not a civil officer within the constitutional clause relating to impeachments. In the remaining eight instances, we find three convictions and five acquittals. Whether the constitutionally pro-

vided method is, in fact, desirable or effective, may well be thought to be among the unsettled problems of our governmental plan. Mr. Simpson has given us, however, a valuable contribution to the subject and is to be congratulated. We commend the volume to every student of American institutions.

GORDON E. SHERMAN.

The Law of Interstate Commerce, and its Federal Regulation. By Frederick N. Judson. Third Edition. Published by Flood & Co., Chicago. 1916. Pp. v, 1066.

Judson on Interstate Commerce, notwithstanding the numerous books upon the same subject issued since the first edition, published in 1905, has continued to be regarded as a first rate practical hand-book upon the Federal Act. The rapidity of the growth of this law, both by statute and judicial exposition, amply justifies three editions in eleven years. Since the second edition, published in 1912, the number of cases involving the construction of the various acts, as shown by the citations, has increased by one half. Federal control of interstate commerce has been greatly extended by the Cummings Amendment to the Carmack Amendment, March 4, 1915; the Federal Anti-Trust Act, Oct. 15, 1915; the Federal Trade Commission Act, Sept. 26, 1914; the Webb-Kenyon Act, March 1, 1913; the Arbitration Act, July 15, 1913. The power, so briefly stated in the constitution "to regulate commerce * * * among the several states," has, directly or indirectly, brought substantially the entire commerce and industry of the country under federal control. The several states, in the field not yet interpreted to be within reach of the interstate commerce claim, are more and more applying the theory of the interstate commerce act to intrastate control, even to the extent of adopting whole clauses of the Federal Act. Since the publication of this book in 1916, the eight hour act, known as the Adamson Act, approved September 3 and 5, 1916, has extended federal control over hours of labor and rates of wages. The constitutionality of this act was established by the U. S. Supreme Court. Recently also, the Supreme Court has established the validity of the Webb-Kenyon act, above referred to. The Child Labor Act, approved Sept. 1, 1916, still further extends the control of Congress in the line of economic regulation. With the rapid development now going on in this field of

law, text books rapidly become obselete, new matter must be added, old matter must be rejected or rewritten. The present third edition is most welcome, however soon a new edition may be required.

E. B. GAGER.

A Treatise on the Law of Telegraph and Telephone Companies, Including Electric Law. Second edition. By S. Walter Jones. Published by Vernon Law Book Company, Kansas City, Mo. 1916. Pp. xxiv, 1065.

In the first edition of Mr. Jones' work, published ten years ago, no reference was made in the title to electric law, but no change is made in the present edition in the plan and scope of the work. In the first edition, as well as in the second, there was some discussion of the question arising out of the construction, insulation, and maintenance of electric wires, the relative duties and liabilities of companies using parallel or intersecting wires carrying currents of different powers; and of injuries to persons and property, caused by the electric current by electric railway and electric light companies; but the main subject of the work is the law governing the organization of telegraph and telephone companies, and the construction and operation of their lines, and the duties and liabilities of these companies. The scope of the work is, therefore, more limited than that of Joseph C. and Howard Joyce, under the title *Electric Law* published in 1900. The earlier work of Redfield on *Telegraph Companies, Their Rights and Duties,* 1869, was published before the telephone was invented. *Keasby on Electric Wires in Streets and Highways,* published in 1892 and enlarged in 1900, was in the nature of a monograph on the law governing the use of the highways for electric wires, and especially those of the newly invented electric railways.

In the ten years that have passed since the publication of the first edition of Mr. Jones' work there has been a great increase in the number of the decisions in the courts of our own country alone on every branch of the law affecting telegraph and telephone companies, and Mr. Jones has diligently collected and arranged them, using them as illustrations of the statements of the text, or as showing the development of the law. Many new paragraphs and some new chapters have been inserted, and some

chapters have been rewritten. The copious notes of the new edition have made the book a digest brought down to date, classified by states as well as by subjects in almost every topic of the work. In the rapid accumulation of decided cases it is important that the decisions should be classified by states, because the development of the law must be studied first in the jurisdiction in which it is applied, and then the cases elsewhere may be used by way of illustration or correction, for otherwise the student will be lost in a wilderness of special instances; but in a work intended as a handbook of the practitioner in the law applicable to a particular branch of business, it is desirable that all the cases should be cited and that the rules generally established should be stated with references to the authorities.

A suggestion was made in the first edition that some of the accepted definitions of the telegraph might have to be modified in view of the then recent experiments in wireless telegraphy, and in the present edition the application of the law to this mode of communication has been the subject of practical discussion. Some reference is made in the work to the controversy between the street railways and the telephone companies as to which of the two must take measures to avoid the disastrous effect on the telephone of the induction of the powerful current of the street railway. There was in this controversy an interesting question over the application of the doctrine of *Fletcher v. Rylands.* The doctrine was invoked in England in *National Telephone Co. v. Baker* [1893] 2 Ch. 186, and in a later case arising in the Cape of Good Hope; but it was rejected by the United States Circuit Court in *Cumberland Telegraph Co. v. United States Electric Co.* (1890) 42 Fed. 273.

There is scant allusion in the present work to this interesting question involving the basis of liability in tort. The purpose of the book is rather to furnish a statement of the existing law governing the construction, organization, and operation of telegraph and telephone companies, and their liability to persons dealing with them or injured by them. There is some discussion of franchises and taxation, but not much examination of the recent controversy over franchises as the subject of taxation.

EDW. Q. KEASBY.