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REVIEWS

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THE LAW OF FUTURE INTERESTS. By Lewis M. Simes.[1] St. Paul: West Publishing Co., 1936. Vol. I, pp. xv, 527.; Vol. II, pp. xv, 556; Vol. III, xv, 583. $25.00.

THE WRITER who enters upon the field of future interests in land is well advised to walk delicately, as did Agag before Samuel. He may well feel the earth tremble beneath his feet, for the mighty have walked that way. Immediately before him went Gray, the exquisite scholar of glowing intellectual integrity, and Kales exultant in the joy of combat. Across the water in the home land of the common law went Challis, Williams, Sugden, Preston and Fearne and a host of others whose keen minds and exact scholarship have adorned this page of the law, clear down to Bacon, the incredible Coke, and Littleton. Yet Simes' huge work—for, alas! it is in three volumes—is different from the treatises of all these luminous authors. It could have sprung only from American soil. One is tempted to say it could have been written only beyond the Alleghany Mountains, and not on the Atlantic seaboard, now only four days distant from the land where Fearne loved and sang the glories of the Common Law. But for all that, this admirable work deserves an equal place on the same shelf with those of the great sages of the law, the shelf nearest to the heart and the reaching hand of any lawyer concerned with the law of real estate. And yet it is very unlike any of these predecessor works; unlike in style, in its treatment of precedents, in its approach to the problems that clutter the field, in its awareness, apparent in almost every paragraph, that the ways of America are not the ways of England.

We lawyers are disposed to prize excellence in style, the right choice of words, too little. Having before us the shocking example of what can be accomplished by the use of bad language, of unfamiliar words of uncertain meaning, in darkening an already obscure subject, afforded by the recently completed Restatement of the Law of Property by the American Law Institute, we are the more grateful to Professor Simes for preserving his sense of values in choosing the words he should use, and that, as he says in his preface, "He has thought it preferable to redefine the old terms with care and to use them in the belief that more real understanding of his meaning will be transmitted to the reader than if brand new words, unhampered by confusing connotations, were employed." Hence when he wishes to refer to that remarkable and elusive property interest which has for nearly four centuries been called a "contingent remainder," he calls it just that, and not a "remainder subject to a condition precedent." It is quite true, of course, that all words and phrases are tricky things, slippery as eels and apt to change their meanings right before your eyes, and the phrase "contingent remainder," even when examined on a background of

1. Professor of Law, University of Michigan.

centuries of judicial construction, is nearly as uncertain of meaning as, say, the word "electron" or "ether," but for all that it has a far more clearly defined connotation than the elusive phrase "condition precedent." So we are even more grateful for his discarding the uncertain and undiscriminating phrase "power of termination" which the American Law Institute has endeavored to substitute for the familiar "right of entry" of the common law literature, which Professor Simes retains. It may be true that the person who has a right of entry no longer makes entry, but neither is a daughter any longer the milker of the family cow. But no one suggests that we discard the word because in these effete days our daughters milk not, neither do they spin.

Professor Simes makes free use of Hohfeld's admirable system of legal analysis whenever it serves to make his meaning clearer, but the Hohfeld terminology is used sparingly. His practice in this respect is well illustrated in the same section in which he defines "right of entry." One admires his self-restraint, for it is painful to read dissertations whose every paragraph drips with redundant "rights, powers, privileges and immunities."

Passing from mere verbalism, it is pleasing to note that our author's style of writing is like his scholarship, wholly unpretentious. Indeed, despite the abstruse quality of his subject, we may say that it is simple, and crystal clear. If the reader shakes his head over any of his sentences, it is because he finds it difficult to accept, and not because it is difficult to understand, his meaning.

In commenting on the style in which it is written, one finds it interesting to contrast this work with that of Gray and Kales, the outstanding American authorities in this field. Gray's style is also clear, and crisp withal, but his sentences are instinct with remote and scholarly emotion. They show his zeal for righteousness, his intense desire that truth shall prevail and be defended from attack, whether such attacks come from Kales, his one-time pupil, or from his "learned friends" across the water. They also show his abiding love of the English common law, his deep faith in the wisdom that lies embedded in the common law precedents, however antiquated the conditions to which they refer or black the letters in which they are reported. Throughout Kales' writing glows the heat of combat. His hand may hold only a pen, but in his mind he wields a broad sword. A sound scholar, a keen thinker, his real reward was found in the joy of battle. Not so Simes. He is no crusader. He has no cause to defend. He has no divinely inspired truth to which he would convert the world, whether or no. He shows no disposition to smite the heathen, to overthrow the wicked or even to expose the ignorance of those who differ from him. This seems to make out his writing to be dull; but it isn't. Rather is it the writing of a scholar of balanced judgment, of keen but serenely poised mind, who looks about him, sees things as they are in the cornfields and the factories of America, and turning with scant reluctance from the English precedents, he records and interprets the dealings of American legislatures and courts with existing American conditions. And all this he does so thoroughly, so realistically—to use a sadly abused word—and so simply that it is really not dull, but thrilling.

As already stated, this is an American treatise on the American law of future interests. As a work on the English law, it would scarcely be deemed adequate. Of course so well grounded a scholar would not neglect the English sources from which so much of our law has sprung, and the reader finds all the leading English cases cited, and many of them analyzed and critically discussed. Occasionally he leaves room for regret that this process was not carried further. For example, problems arising out of the English practice making gifts of chattels (heirlooms), to accompany lands settled in tail "so long as the rules of law will permit" are very inadequately considered,[2] while no reference whatever is made to the most interesting recent decision on the question, *Portman v. Portman*,[3] which we do find cited in notes to remote passages dealing with different and less interesting points. It is very true that the matter in hand and the ruling of the House of Lords in *Portman v. Portman* possess little significance for American lawyers, since we do not have settled lands, and have very few heirlooms. They might have been wholly omitted with little loss to the work. But if considered at all, they should have been treated more critically.

But such trifling blemishes are few. Most of the important English doctrines are treated fairly and adequately, and with insight that is notable. But the preponderant attention to American law is gauged by the fact that, by a rough estimate based on a partial count, less than ten per cent of the eight thousand cited cases are English. Further evidence of the modern quality of the work is found in the obvious fact that a very large proportion of the American cases cited are of relatively recent decision. One would guess that over one-half of them bear date within the current century. This, however, should cause no surprise, since future interests nearly all arise out of some kind of family settlements. The family settlement presupposes accumulation of property; and property accumulations are not functions of a pioneer society.

Professor Simes' admirable simplicity of style occasionally slips into a too easy colloquialism, as when he speaks of the abolition of "Shelley's Case,"[4] whereas he means the rule in that famous case; or when he says "one contingency may be held valid, etc,"[5] when he means that "the gift on one contingency may be held valid." Such petty slips only a little mar the pleasure of one's reading. But it is a more serious matter when the author's scholarship, which, as previously indicated, is broad, humane and easy rather than acute and critical, on rare occasions, tends to become too easy. Thus, for example, the peculiar rule long established in the English courts, and known, for lack of a better descriptive phrase, as the doctrine of fraud on a power, has only recently assumed importance in this country with increasing accumulations of wealth. By far the most important American case involving this doctrine is *Chenowith v. Bullitt*,[6] but the

2. Section 459.
3. [1922] 2 A.C. 473.
4. Section 84, p. 146.
5. Section 521, p. 391.
6. 224 Ky. 698, 6 S. W. (2d) 1061 (1928).

reader seeks in vain for any reference to it in the section[7] in which the subject is discussed, although the case is cited elsewhere on another point. The treatment is otherwise too summary, making no critical distinction between frauds on a power and excessive exercise of it.[8]

Too much cannot be said in praise of the wide knowledge and broad understanding exhibited in the author's presentation of the rule of perpetuities as merely one phase of the general policy of the law to prevent unreasonable restraints upon the alienation of property, rather than as a rule apart, revealed from on High to Lord Nottingham in the decision of the famous *Duke of Norfolk's Case*[9] and applicable only to the vesting of contingent future interests, as Gray would have it; but it is believed that he misunderstood and needlessly rejected Professor Bryant Smith's brilliant explanation of what has been regarded as the anomalous application of the rule to the so-called honorary or indestructible trusts, which, it is said, are present vested interests.[10] The peculiarity of these trusts is said to be that there are no *cestuis que trust* who can enforce them, and Gray contended that on that account they were void.[11] Professor Bryant Smith's contention is that the real *cestuis que trust* are the heirs at law or next of kin, who hold the equitable title to the property subject to be defeated by the trustee's purely optional exercise of his power to carry out the donor's instructions. If such be the contention, Professor Simes' objections to it fall to the ground and we have a much desired simplification of a rule that is complex enough at best.

Again it seems that Professor Simes lies down too easily before the absurdity of the English rule epitomized in *Rider v. Ford*,[12] in which it was held that of two alternative options to the lessee in a lease for more than twenty-one years, one to purchase the fee, and the other to purchase a term of ninety-nine years, the former was obnoxious to the rule of perpetuities, while the latter was not. The much more reasonable decision arrived at in the American cases, such as *Keogh v. Peck*[13] is quite clearly brought within the recognized scope of the rule.[14]

But to make such petty criticisms of such a great work is much like objecting to the fly-specks on a statue of heroic size. The work is monumental in its compass, admirable in its execution. Professor Simes, by his huge undertaking, splendidly achieved, has laid the legal profession, and especially all teachers and students of this confused and difficult branch of the law, under a lasting debt of gratitude.

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7. Section 290.

8. See (1936) 46 YALE L. J. 344.

9. 3 Ch. Cas. 1 (1682).

10. Smith, *Honorary Trusts and the Rule Against Perpetuities* (1930) 30 COL. L. REV. 60.

11. GRAY, RULE AGAINST PERPETUITIES (3d ed. 1915) § 898.

12. L. R. (1923) 1 Ch. 541.

13. 316 Ill. 318, 147 N. E. 266 (1928).

14. See Comment (1925) 35 YALE L. J. 213. This Comment was evidently overlooked by the author as no reference to it has been found.

One regrets to say that the form in which the work is published is equally unworthy of the character of the treatise and of the famous publishing house that puts it out. It is bound in three volumes, when two would have served far better. The index is grossly inadequate, and in the printing some of the dearest traditions of legal publication have been violated, such for example, as the practice of always first giving the official citation of cases. Here the unofficial citations are first given. It is quite aside from the point to say that these are but traditions. Such is the stuff that makes the law.

W. R. VANCE†

New Haven, Conn.

THE NINE OLD MEN. By Drew Pearson and Robert S. Allen. New York: Doubleday, Doran & Company, 1936. Pp. 325. $2.50.

IT MAY well excite wonder that a scholarly journal should deem it appropriate to notice a book like this. Perhaps it is because the subject is an important one. Perhaps it is because shabby gossip is so likely to have a wide appeal that the book itself may seem to be important because of the number of its readers. Unfortunately the number of readers is not likely to be curtailed by advance warning that the book is vulgar in language, vulgar in tone and innuendo, and guilty of enough inaccuracies to be unreliable in general even though much of what it tattles may be true. When truth and distortion and error are intermingled, even a large percentage of truth is not a sufficient saving grace. The authors themselves did not hear the remarks of the Justices which they quote. They did not have dictaphones concealed within each robe. They are gossips at second hand or at some greater remove. Their handling of oral tradition can hardly claim confidence when they prove themselves so peccable in dealing with historical facts.

The one historical chapter is called "The Lord High Executioners." It contains a plenitude of error. It is not true that the Constitutional Convention rejected a proposal for judicial review as established by *Marbury v. Madison*. The proposal in the Convention to include the Justices in a council of revision was quite different. Some who opposed it did so on the ground that the Court would have its say after statutes were enacted. It is well known that the members of the Convention were divided upon this point. It is gross error to say that this rejection of the proposed council of revision and the grant of the veto power to the President "indicated that there was no doubt whatsoever in the minds of the founding fathers that the Supreme Court was given no power to pass upon the constitutionality of acts of Congress." It is silly to sum up Marshall's argument in *Marbury v. Madison* by saying that "Therefore the entire Judiciary Act of 1789 was unconstitutional." Had this been true, the Supreme Court would have deprived itself of its whole appellate power until there was a legislative regrant.

†Professor of Law, Yale University.

It is not true that Chief Justice Black in *Sharpless v. The Mayor* reaffirmed the view of Chief Justice Gibson in *Eakin v. Raub*. The latter Pennsylvania jurist declared only that laws not prohibited by the state constitution may not be declared unconstitutional on the ground that they violate the spirit of the constitution. He said: "I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us." Cases in the Pennsylvania Supreme Court may naturally be somewhat remote from the direct concern of two journalists. Perhaps they heard about them from others who chanced to be in error. Yet he who hath eyes to see hath a way of checking denied to him who hath only ears to hear.

The legal result of *Luther v. Borden* was not that "Rhode Island and its insurrectionists were forced to settle their dispute between themselves." There was a point of Presidential recognition that the authors fail to note. It must be carelessness and not ignorance that makes the authors say of the Dred Scott case that "Chief Justice Taney held up the final verdict until after the inauguration of James Polk, newly elected Democratic President, in March 1857", for elsewhere they give a different family name to the incoming chief executive. It is more difficult to explain what made them say in connection with the Dred Scott case that "Justice Grier was so senile that Charles Evans Hughes tells how a committee of his fellow justices eventually asked him to retire." The Dred Scott case was decided in 1857. "Eventually" came in 1870 after the first Legal Tender Cases. Many men are not senile thirteen years before they become so. In speaking of changes in the Court after 1876, the authors say that "Justices Strong, Clifford, Swayne and Hunt, all remnants of the Civil War days and inheritors of the Jacksonian states' rights theory, either died or resigned." Clifford was appointed in 1858; Swayne in 1861; Strong in 1870; and Hunt in 1872.

How little the authors know of the Constitution or of constitutional law is evident from their comment on the Fourteenth Amendment. They quote the second sentence of Section 1 and add that "On these half-dozen lines, the Supreme Court was to build the all-dominant power it exercises today." Still referring to "these lines," they continue:

> "Instead of protecting the Negro race, they have been used to ensure long and gruelling factory hours for both white and colored, to block legislation which would preserve wage standards for both white and colored, to continue the employment of children, both white and colored, to delay the adoption of an income tax against the representatives of wealth and property, and to crush every important social and economic reform attempted by federal and state governments in the last half century."

In so far as this statement applies to state action, its accuracy is a matter of judgment. The beginning words "No State shall make or enforce" should, however, have warned the authors that the Amendment does not forbid any federal action. It was not the Fourteenth Amendment that was invoked to defeat the federal income tax or national efforts to restrict the employment of children. The only relationship of the Fourteenth Amendment to Con-

gressional action is that it confers some power to enforce prohibitions against state action. That this power has been judicially restricted more than the Radical Republicans desired, may be conceded. This, however, does not save the authors from a bad blunder on a most elementary matter.

Messrs. Pearson and Allen may of course have a passion for accuracy and a capacity for achieving it as purveyors of gossip that they lack as reporters of law and history. This can hardly be a matter of proof. If assumed, it must be assumed on faith. The tone and attitude of their gossip chapters is close enough to the tone and attitude of their pseudo-scholarship to make one doubt whether unreliability stops at scholarship's edge. Nowhere in the book is there any display of those qualities of mind that inevitably command confidence. There is abundant display of qualities of mind that inevitably compel rejection or suspicion. Even some of the gossip can be checked. Justices no longer wear frock coats. Harry Shulman's given name is not Henry; his family name is not spelled Schulman; and he is not a former student of Mr. Justice Stone. John Dickinson was not an ancestor of John Dickinson. Such mistakes do not greatly matter in themselves. They do not greatly concern the function of the Supreme Court and the merits of its performance. Untrue trivialities are little more trivial than true ones. Had the authors escaped error, they would still be devoid of merit. Greeks bearing such gifts must be feared by the Justices whom they praise. Justices whom they slur and belittle must prefer that such gifts, if they must needs come, should come from such Greeks.

THOMAS REED POWELL†

Cambridge, Mass.

AN INTRODUCTORY SURVEY OF THE SOURCES AND LITERATURE OF SCOTS LAW. By Various Authors. Edinburgh: The Stair Society, 1936. Pp. xv, 486.

"THE inaugural volume which the Stair Society now presents to its members contains the first comprehensive survey of the sources of Scots Law which has ever been essayed." This survey consists of a collection of thirty-eight monographs on as many different subjects, by various authors. Thirteen of these articles have to do with "native sources"; eight with "non-native sources"; six with "indirect sources"—a heading not self-explanatory, but including charters, cartularies, Vatican archives, brocards, notarial protocol books, style books, and Scottish legal periodicals; eleven with "special subjects,"—among which are found admiralty and maritime law, the law of nations, heraldic law, peerage law, and "udal" law—this latter having reference to the law which came to the Orkneys and Shetlands with Norse emigrants as early as the seventh or eighth century.

Each of the monographs has been constructed on the same lines: (1) list of sources or repositories, (2) commentary, (3) literature, frequently with (4) an appendix. This scheme has had the result of producing a series

†Professor of Law, Harvard University.

of excellent critical bibliographies, some of them on subjects in regard to which very little writing has as yet been done. "The special value of the present compilation is that for the first time it furnishes . . . those . . . who are interested in the history of Scots Law with a reasonably complete guide, well documented and equipped with useful bibliographies." But the work as a whole is considerably more than a set of bibliographies. In sum total there is a really large amount of historical information on Scots law. And this in spite of the brevity of the individual monographs. For none of them is long; some of them are noticeably short, the average length being only twelve pages. This brevity is deliberate and in keeping with the general editorial plan, which was, as pointed out in the introduction, not to attempt to make the work either exhaustive or final. As the title indicates, the book as a whole is a preliminary survey of many fields, with breadth, rather than depth, the object.

One can not but wonder why such a survey has not been made long before this. It was certainly not because of any paucity of material; that is sufficiently abundant—if not very old. It can hardly be called early; rather, one is immediately impressed by the comparative lateness of the source material for the "native sources" group of monographs. The dates of even the earliest fields[1] are late when compared with those in English legal history where the extant plea rolls go back in practically unbroken line to 1194 and the extant financial records are even older. The English Year Books are themselves comparatively late—1292 to 1535, but the bulk of these Scotch records are from a period subsequent to the Year Books. In other words, the extant native source material for Scots law, when compared with the same sort of material for English law, is quite recent.

One of the older of the Scotch sources which has been "treated as an authentic repository of old Scots law by many of our leading writers, and employed as a more or less reliable and authoritative source throughout the whole of the early formative period of Scottish legal principles and institutions"[2] is the Regiam Maiestatem, a fourteenth century version of the first English law treatise, that of Glanvill which had been written toward the end of the twelfth century. This adoption by the early Scotch lawyers of an English common law book has never been altogether explained. They may have been attracted by the definitiveness and orderliness of Glanvill's law as contrasted with their own. For, "it was comparatively late before Scotland had any general or definite body of native customs which could be appealed to as constituting the common law—until the Constitution of the Court of Session in 1532 the administration of justice was in the hands of many local tribunals whose judges acted largely according to their own discretion . . . The absence of any record of the decisions of the various courts and the differences in their practice prevented the growth of any considerable body of common law."[3]

1. *I.e.* FINANCIAL AND ADMINISTRATIVE RECORDS 1264–1724; BURGH COURT RECORDS, 1319–1834; SHERIFF AND OTHER LOCAL COURT RECORDS, 1385–1935.

2. P. 80.

3. P. 250.

Among the subjects in the first group is that of "Practicks, 1469–1700." This title, for most American readers, at least, needs a word of explanation. Meaning first simply something done or practiced in the past, that is, a precedent, the term came to be used in the technical sense of a decision. Thus in 1634 a case was decided "conform to a Practick betwixt (A and B), 1630, which was produced and alledged." As now applied, "Practicks" designates not only that type of book made up of notes on decisions, but also that which constitutes a digest or encyclopedia of law. These books were common in the sixteenth and seventeenth centuries, at least a dozen of each type—by as many different writers—being noted in the list of sources.

A Scotch background would seem to be desirable, if not essential, for a thorough understanding of the subject matter in many of these articles; their real significance can hardly be grasped by one not conversant with the history of Scots law. But this is not to be said of all the articles. Some of the topics discussed are of wide and general interest, and capable of being understood by one who has had no training in Scotch law. This is true of most of the subjects in Group II, which includes "Roman Law," "Canon Law," "The Influence of English Law," "The Law Merchant," and "The Law of Nature"—to mention these especially. The story of the influence of all, or of any, of these—brief as the tale is—will make interesting reading for many whose own particular fields lie quite outside that of Scots law *per se*.

Now that the Stair Society has broken the ground, we may be fairly confident that other books on Scottish legal history will follow. Though the plan on which this initial survey has been constructed has not been conducive to exhaustive treatment of the subjects discussed, it can hardly fail to stimulate further research leading to final and definitive scholarship on many points that are barely touched upon in these preliminary studies.

GEORGE E. WOODBINE†

New Haven, Conn.

INTERNATIONAL LEGISLATION, VOL. V, 1929–1931. Edited by Manley O. Hudson,[1] with the collaboration of Ruth E. Bacon. Washington: Carnegie Endowment for International Peace, 1936. Pp. xi, 1180.

AFTER a silence of five years, Mr. Hudson has resumed his series devoted to the reproduction of the great multipartite treaties which concern either public or private international law. It is to be hoped that his inclusion of several documents having dates in 1932 and thus beyond his time limitation as stated on the title page does not indicate a termination of this series, for such volumes have a definite value for the small library which does not include either Marten's *Nouveau recueil général de traités* or the League of Nations *Treaty Series*.

†Professor of History, Yale University.

1. Professor of International Law, Harvard University.

The welcome extended the earlier volumes has already decisively indicated the merit of the system used in reproducing the various documents. The listing of texts by number, chronological order and subject matter and the index are mechanical features which make such collections a really efficient tool, and which deserve a second greeting. This volume is also the richer for a more expansive use of bibliography.

The solution of great traffic problems, whether the instrument is an automobile or a ship, and of the questions concerning commercial paper, are examples of these important multipartite treaties, which so often escape attention and which Mr. Hudson has brought together in such convenient form. Although the treaties on such economic and commercial problems have undoubted importance and their collection is desirable, it is particularly fortunate that, although he felt called upon to explain and justify their inclusion, Mr. Hudson has gathered into one volume the documents on reparations, which ordinarily are scattered. The same felicitous judgment was shown in the inclusion of the 1930 Hague codification treaties.

PHOEBE MORRISON†

New Haven, Conn.

†Assistant in Research, Yale Law School.