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Review of “The Law of Real Property, Volume V,” By Richard R. Powell

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BOOK REVIEWS

THE LAW OF REAL PROPERTY, VOLUME V. By Professor Richard R. Powell, Dwight Professor of Law, Columbia University. New York: Matthew Bender & Co., Inc., 1956. Pp. xi, 1003. \$18.50.

Volume V of Professor Powell's treatise on the law of real property discusses the general topic which the author labels "relations between owners of permissible interests in land" and a part of the general topic referred to by the author as "relations between the owner of a permissible interest in land and the community." The former topic is broken down into chapters on waste, fixtures, apportionment of income between successive owners, apportionment of benefits and burdens between successive owners, promises respecting the use of land, party walls, fences, lateral and subjacent support, nuisance, and the law of waters. Chapters forming a part of the latter topic are constitutional protections and statutory enlargements of property interests, the common-law rule against perpetuities, the New York rule against perpetuities, other statutory variations of the rule against perpetuities, and accumulations.

The preceding four volumes of this treatise have been uniformly well received by the members of the legal profession. The first two volumes, in particular, have been the subject matter for many book reviews. All of the reviewers are in agreement that in these volumes Professor Powell once again demonstrates what the legal profession had known before the learned professor set out on this formidable task—that he is one of the outstanding legal scholars, if not the most outstanding legal scholar, in this country on the law of real property. It is perhaps unfortunate that most of the reviewers have been teachers in the field of real property. The result has been that the preceding volumes, for the most part, have not been analyzed in the light of the function which they were primarily intended to serve—that of aiding the lawyer who is confronted with a specific legal problem in some area of the law of real property—but rather as to how well the author has treated the subject matter which he discusses in the light of what the reviewer believes to be the function of a treatise on the law of real property. The reviewers themselves have disagreed as to the material which has been presented and as to the manner of its presentation.¹

Before discussing the utility of Volume V to the practicing attorney, this reviewer would like to comment upon certain beliefs expressed by Judge J. Warren Madden in his review of Volume I of this treatise.² Judge Madden ventured the opinion that the law of real property is so static that the writings of "the country's master" in this field are of little utility. He concludes with the following words:

But when it comes to writing books for practitioners of property law, who want the law set down for them, when the writer has set it down he is through. And that fact does not leave room for a very great difference between the book of a master and that of a lesser writer.

This reviewer believes not only that a practicing attorney expects more out of a property treatise than merely having the law set down for him, but that Volume V refutes Judge Madden's last statement. While the law of real property does not change as rapidly as other areas of the law, it is not static—it is

1. Compare Ritchie, Book Review, 63 HARV. L. REV. 732, 733 (1950), with Madden, Book Review, 17 U. CHI. L. REV. 560, 561-62 (1950).

2. Madden, *supra* note 1, at 560-62.

constantly changing. This change is well illustrated by Professor Powell's treatment of the law of waters which makes it apparent that there is a definite over-all trend toward rules of law which insure a more beneficial use of water than does the natural flow theory of stream waters or surface waters, or the unrestricted privilege theory of percolating waters. Even the supposedly impregnable common-law rule against perpetuities has been modified in certain respects by recently enacted legislation in Pennsylvania, Massachusetts, Connecticut, and Maine. It may well be wishful thinking, but this reviewer believes that it is not entirely improbable that future changes in various areas of the law of real property may be shaped by the writings of one of the most learned writers in the field. If Professor Powell's treatise can serve this purpose it cannot be said to be of little utility. The question of whether the particular volume being reviewed herein adequately points up the areas of the law of real property which are in need of reform will be discussed in another part of this review.

The primary virtues of Volume V of Professor Powell's treatise are fourfold. To a great extent these virtues are also found in the earlier volumes of this work.

First, each chapter contains an excellent introductory paragraph stating the manner in which the author plans to deal with the subject matter of the chapter and some general principles and comments about the particular area of the law under discussion. Thus, the reader is able to familiarize himself quickly with the over-all organization of a particular chapter and with those principles which form a necessary background for the more detailed discussion of the subject matter in the ensuing paragraphs. The introductory paragraphs illustrate the keen organizational ability possessed by the author and, when combined with the excellent index prepared by Dr. Miles O. Price, make it easy for the reader to locate that part of a specific chapter in which he is interested. Professor Powell's organizational ability has resulted in an organization of the volume which will enable the reader to locate the discussion of the particular problem with which he is concerned and place it in its proper setting more rapidly than if he were using one of the other real property treatises. But, more important, this ability occasionally results in simplifying the task of the lawyer in analyzing the substantive law itself by making him aware of the variables involved in his particular problem and by treating these variables separately.³

Secondly, the volume is very tightly written. The author seldom oversimplifies the particular subject matter which he is discussing. The chapter on waste affords an excellent example of this virtue. The author, after discussing the variables in conduct which may constitute waste, goes on to analyze the subject matter in terms of the specific land interests held by the two contending parties. Thus, the reader is made aware that principles which apply between a vested remainderman and a life tenant do not necessarily apply when the contending parties are the holders of a fee simple determinable and a possibility of reverter.⁴

A third virtue is the author's emphasis on the importance of statutes. This is a rare quality which is seldom found with any consistency in a real property treatise. One need only glance through the footnotes in the chapters on fences and the law of appropriation to become aware of this stress on statutory material. In fact, in one place the author seems to have gone into too much detail in analyz-

3. See, *e.g.*, the author's discussion of promises respecting the use of land in chapter 60.

4. Compare this approach with the less useful approach found in 5 AMERICAN LAW OF PROPERTY §§ 20.1-23 (Casner ed. 1952).

ing relevant statutes.⁵ The analysis, while it certainly points up the different ways in which various states have dealt with railroad right-of-way fences, is of little practical utility to the practicing attorney or to any other member of the legal profession.

The emphasis on statutory law creates a distinct problem, which the reader should recognize, with regard to the publication of the periodical supplements to the volumes of this treatise. It is relatively easy to prepare the supplements of new case law. This is done by reading the recent cases relating to real property law as they are published in the advance sheets. Such an approach with statutes, however, is of little utility. The only accurate way to locate new statutory material is to search for it in the statutes themselves. It would seem that no real effort has been made to do this in the cumulative supplements which now form a part of the treatise. An example of this defect is found in the 1956 cumulative supplement to Volume 4 which, in its supplementation to paragraph 510, does not include any reference to the recently enacted "pour-over" legislation in Indiana, Illinois, and Wisconsin. It is submitted that the stress on statutes is laudable, but that it also brings with it a responsibility to search for recently enacted legislation. Unless stress is placed upon this responsibility in the preparation of future cumulative supplements one of the important virtues of the treatise will be gradually diminished through the passage of time.

The fourth primary virtue of the volume is that within the space limitations imposed by the author himself this volume achieves a desirable balance between the necessary case documentation of the textual material and a critical analysis by the author of particular rules of law. An attorney confronted with a particular problem is searching for five things: (a) citations to cases discussing his problem, (b) a statement of the rules of law which have in the past been applied to his problem, (c) a statement as to the general acceptance or rejection of these rules of law, (d) a statement of the general trend of the law in the particular area involved, and (e) a discussion of the desirability of the rules of law which may be applied. The author is generally successful in meeting all of these needs. His inadequacies, when they occur, are almost always found in his failure to discuss the desirability of particular rules of law in areas which Judge Madden might properly refer to as being almost "static," such as party walls and fences. On the other hand, his treatment of the desirability of particular rules of law in the chapters on promises respecting the use of land, the law of waters, the common-law rule against perpetuities, and the New York rule against perpetuities is excellent. This reviewer believes that particularly in these chapters, and to a lesser extent in other chapters, Professor Powell admirably demonstrates that there are many areas of the law of real property which are in need of change if the law is to achieve its end of promoting the general welfare of the society in which it functions, and thus refutes Judge Madden's statement that there is little difference in a real property treatise "of a master and that of a lesser writer." The author's discussion of the New York rule against perpetuities is the outstanding chapter of this volume and illustrates how a strict rule of law can do much to frustrate the reasonable desires of residents of that state. It is to be hoped that the publication of this chapter may aid in the push for reform in this area of New York law.

The author has done a meritorious job in selecting the particular material to be discussed in the various chapters of this volume. The restriction of space naturally imposes a limitation, but the only important omission would seem to

5. See ¶ 695 discussing public utility right-of-way fences.

be in the discussion of California water law. The subject is a complex one because of the interplay of appropriative and riparian rights. Professor Powell's treatment of this subject is inadequate. A lawyer interested in this area of the law would do well to read the recent case of *Rank v. (Krug) United States*.⁶ This reviewer was also disappointed by the failure of the author to discuss specifically the common-law rule against perpetuities in terms of the problems which are raised for an attorney attempting to draft a trust instrument or a will containing a trust. Some limited discussion of perpetuities "cut-off" clauses in the drafting of inter vivos and testamentary trusts would have been useful. Space which was devoted to constitutional protections and statutory enlargements of property interests could have been used more effectively in a discussion of these matters.

This reviewer also believes that the organization of the material discussed in paragraph 679 dealing with building development plans could have been improved. It is submitted that the paragraph would have been clearer if the author had first stated what results flow from the existence of a building plan, thus stressing its importance, and had then gone on to deal with its factual existence or non-existence. It is also felt that the author failed to emphasize the trend in this area of the law toward the use of the theory of mutual equitable easements to support the devolution of both the burden and benefit of a promise regardless of whether a prior purchaser from a common grantor is attempting to enforce the promise against a subsequent purchaser from the same grantor or whether the subsequent purchaser is attempting to enforce the promise against a prior purchaser.

The legal profession is indeed fortunate that in recent years two excellent treatises have been written on the law of real property—the American Law of Property and Powell on Real Property. Either treatise would form an excellent addition to any law library. Since few attorneys can justify the purchase of both treatises, a choice between them may have to be made. An earlier comparison between the treatises has been difficult because of the fact that Professor Powell's treatise is being published as each volume is written, and even at this time one volume remains to be completed. A sufficient amount of his treatise is now available, however, for a comparison to be made. The specific comparisons which are made herein will be limited to material which is presented by him in Volume V.

The subject matter of Professor Powell's Volume V is found in Volume VI-A, in part of Volume II, in part of Volume V, and in part of Volume VI of the American Law of Property treatise. The material covered by Professor Martz in Volume VI-A is, in most respects, presented in more detail and more analytically by Professor Powell. Professor Martz, particularly in his treatment of the law of waters, tends to oversimplify his subject matter by the use of broad generalizations which are not properly qualified. Professor Reno's treatment of covenants running with the land at law, and equitable servitudes, labors under the difficulty of being for the most part only a reuse of material which he previously published and which is now somewhat antedated. In contrast, Professor Powell's treatment of these subjects is up-to-date and contains useful citations to many more recent cases. The treatment given the law of fixtures in each treatise is excellent, and there is little to choose from between the analyses of Dean Niles and Professor Powell. Professor Merryman, in discussing the law of waste, overemphasizes the obvious importance of the intention of the parties who created

6. 142 F. Supp. 1 (S.D. Cal. 1956).

the dual interest in the same land and fails to emphasize the importance of the specific land interests held by the two contending parties. Neither of these comments is applicable to Professor Powell's treatment of the law of waste.

The treatises illustrate two possible approaches which may be used in discussing the common-law rule against perpetuities. The organization of the subject matter in each of these treatises is the same; however, their manner of presentation is different. Professor Leach and Mr. Tudor have stressed the case approach. This approach is particularly useful to the practitioner who has little or no familiarity with the common-law rule, but is of less utility to a practitioner already having a good basic knowledge of the rule. The practitioner will find Professor Powell's treatise more helpful since the author seems to have assumed that his reader already possesses a certain amount of familiarity with the rule, and has attempted to deal with the subject matter in keeping with such an assumption.

This reviewer believes that Professor Powell's treatise is the more useful one to the practicing attorney not only in its treatment of the subject matter found in Volume V, but in its treatment of the law of real property as a whole because of its better organization and integration, its broader scope, its greater emphasis on statutory materials, and its superior indexing. All of these virtues are readily apparent to any reader of Volume V.

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