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Review of “The Institution of Property,” By C. Noyes

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THE INSTITUTION OF PROPERTY. By C. Reinold Noyes. New York: Longmans, Green and Co., 1936. Pp. xiv, 645.

When the lawyer finds himself pressed by some lay Socrates to re-examine the basic assumptions of the law, he is likely to prove a truly irate Thrasymachus. Nor is his indignation always unpardonable. The lawyer too often has been affronted by unripe and slick solutions to problems to which he, and his predecessors in the calling, have given the consideration of centuries. One needs only to recall the number of psychological quacks who have offered, after a few weeks of thought, to rewrite for him his whole law of evidence, or to frame for him an entirely new system of criminal punishment. Accordingly, it is a point of duty with any reviewer to make clear that in this study, Mr. Noyes is not concocting a prescription solely for the lawyer's good. Rather the author has been led into his consideration of property law by his conviction that the study upon which he has been engaged is necessary as the first step towards a true understanding of the institution of property. In his own words:

“. . . for the purposes of its application to economics or any other social science, the necessary prelude to any systematic and realistic analysis of the structure and functioning of the institution of property, at least in its non-mechanical aspect, is an analysis of property in the law.”

It follows from this statement of purpose that the lawyer reader will not find in *The Institution of Property* the usual result of an economist's incursion into legal fields. Mr. Noyes exhibits not only an admirable degree of academic versatility but also a surprising awareness of the delicate balance between legal and economic ideas. He does not fall into the common fault of regarding the law as a mere formal reflection of economic realities. Nor has his protracted study of substantive law and of legal history led him into the lawyer's fault of seeing the legal rights in the subjects of property, to the exclusion of the economic relationships of which the law is the sanction. This is a thoughtful and provocative book which evinces the painstaking and considered research of the years which the author has given to its preparation.

At the outset, the limitations of the study are made clear. The author writes from the standpoint of the institutional economist. The full concern of that school of economic thought is with the structure and the functioning of economic institutions, loosely the static and dynamic aspects thereof. It is only with the *structure* of the institution of property that the present study is concerned. The dynamics of function are left for later treatment by the author or by those of kindred interests and qualifications who may be inspired by the study.

The book may be divided into two approximately equal parts. The first half is devoted to a consideration of the development of the institution of property in the two great systems from which our ideas of property, according to the author, have their line of descent, the Roman, and the English or feudal, systems. The purpose of this historical reference must not be taken to be that of the classical economist, that is, the discovery of so-called economic "universals." It is rather a form of discipline to equip the reader to distinguish the external forms of the modern institution from its real-

ities. In the author's mind, the "outlandish" nature of the external forms in the compared systems facilitates such critical distinction between the form and the reality of modern property.

Briefly, in his treatment of the institution of property in the Roman system, Mr. Noyes begins with a survey of the organization of early Roman society, stressing its foundation in the autonomous household with juristic concepts traceable to that establishment. The adaptation of these early concepts to the developed Roman system, "the most highly organized commercial economy of ancient times," is discussed in the excellently considered second chapter.

There is a more brief treatment of the second system, the English system of property. The primary formative factor in this system is found in the *feod*, inter-familial in its essence in contradistinction to the early Roman organization. The author, considering the contribution of the feudal system to our present institution of property, sees "as the spirit and essence of the former (*i. e.*, the English system) a concurrent and qualitative division of the various elemental relations which may exist between men with respect to the objects of property."

The second half of the book is devoted to an analysis of modern property, against the background provided by the historical materials. First is a discussion of property in current legal theory. This chapter, styled the "Modern Juristic Analysis of Property," is worthy to stand alone as a fine example of jurisprudential thought. There follows an analysis of property as considered in the decisions of American courts. Here the book bogs down, somewhat, in that this chapter is a mere collection of definitions culled from a great number of judicial opinions. The final chapters are devoted to the substance and structure of modern property and contain the integration of the preceding materials and the author's conclusions. A high quality of constructive criticism is here maintained.

Throughout, the author has given the evidences of careful preparation and sound self-criticism. The modesty of his authorship is indicated in his Foreword:

"Because the creeping nature of its expansion has led me into fields in which I had no previous training I am sure that in many respects I must have failed to observe some of the finer points of scholarship which specialists in each of these fields would naturally expect. I hope therefore that each reader will judge the work by his impression of those parts in which he finds himself also in my condition."

I doubt that Mr. Noyes intended that the area of jurisdiction of the reviewer should be similarly defined. However judging from these *terrae incognitae*, as well as from those portions of the treatment in which, as a lawyer, I feel tolerably at home, it is not difficult to recommend this structural analysis of the institution of property to all lawyers who are interested in determining the underlying nature of an institution with which they have many dealings and in the formation of which they and past craftsmen of the law have played so great a part.

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