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The Law of Real Property, Volume 1, by Richard R. Powell (1949)

Harry M. Cross

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BOOK REVIEWS

THE LAW OF REAL PROPERTY, Volume I, by Richard R. Powell. New York: Matthew Bender & Company, 1949. Pp. xiii + 792.

Students of property law, regardless of their principal occupation, undoubtedly will welcome this fresh study of the problems which are their common concern. Despite the appearance in recent years of editions of standard texts in this field, it is true that there has been no recent *new* treatise with the exception of Walsh's *Commentaries on the Law of Real Property*. It is not uncommon to find, for example, that the second edition of Tiffany's treatise is purposely used rather than the later edition because the second edition was the last which had the personal attention of that author. Satisfactory as the later works may be, the need for a comprehensive study of the current situation has become increasingly acute. Walsh's *Commentaries*, in three volumes, is valuable, but it is what the name implies—commentaries—and for many purposes of both the legal scholar and the practicing lawyer, therefore, inadequate. The publishers have been fortunate in securing an author with the skill of Professor Powell, long-time Professor of Columbia University School of Law, Reporter for the *Restatement of the Law of Property*, editor of numerous case books in this field, writer of many law review articles, draftsman of more than one important statute, and respected counsel to other lawyers.

It is impossible to appraise the whole of this treatise, which will include five volumes, with only the first being published, but there are sufficient clues in the published volume to indicate the quality of the whole work. This is a modern book: witness, for example, the discussion of *Oyama v. California*, 332 U.S. 633 (1948) in paragraph 106 on page 393. In the preface Professor Powell states the three guiding stresses in his study to be upon (1) integration of the whole subject, (2) current problems in the perspective of the trends of evolution, and (3) the tremendous importance of the statutes. The emphasis on the cases of the last twenty-five years and current statutes carries inherently a danger of relatively short usefulness for the whole treatise, and some who insist that a purely historical approach to property law problems can alone give the sound answer might insist that the emphasis vitiates the book's value. Neither short usefulness nor small utility can properly be charged to this first volume nor probably to the whole treatise when it appears. The author recognizes that a sound analysis of present law depends on a familiarity with its historical developments and in this perspective he proposes to use the recent decisions and current statutes. A purely historical approach frequently overlooks important current factors moulding the law. Certainly Professor Powell in his approach does not make this error. Compare his comment in footnote 70 on page 236 referring to "distinctly anachronistic" Illinois future interests law: "This is particularly true with respect to the law of future interests, as to which Albert Kales' great knowledge of the early English law, helped the supreme court of Illinois to reincarnate much which has been elsewhere left decently interred."

This first volume can prove of substantial usefulness in many respects. A comprehensive index covering pages 687 to 792 is not the least useful feature of the volume. Certainly the volume will be a fruitful source for citation to pertinent statutes and cases on capacity to hold and deal with interests in land, the topic of Part II, which comprises nearly the whole second half of this volume. The discussion in both Part II and Part I in many respects is to be characterized as "source book" rather than

"answer book" style. Probably this is inevitable in view of the coverage of the first volume, but even here there are many places where more than a mere accumulation of statutes and cases is presented, and enough to assure that in the more appropriate places in discussions in later volumes readers will receive extensive help from the wide experience of the author.

The extent of participation in land transactions for the ordinary lawyer probably will not require extensive use of some of the material in Part II where, in the first paragraph, the author points out the "normal" participant in the land transaction as follows. the citizen-resident-non-Indian-adult-unmarried-competent-unconvicted natural person. So many "property" rules assume the participation of this hyphenated normality! On the other hand, and more important, a good many of the lawyers' problems will call for use of material in this part. Chapter 6, the initial chapter of Part II, is concerned with natural persons and more particularly aliens, Indians, married persons, infants, mental incompetents and felons. The other chapters analyze other "abnormal" participants. Chapter 7, natural persons as unincorporated groups (nonprofit and profit unincorporated associations, joint stock companies, business trusts, partnerships), Chapter 8, private corporations, Chapter 9, fiduciaries, and Chapter 10, governmental instrumentalities.

In this part particularly, but also throughout the book, it is somewhat surprising to notice the number of situations for which there appears to be neither statute nor case law in the state of Washington. It may be that the lack of reference to such Washington authority is oversight on the part of the author and his assistants, but the more probable explanation is the lack of such authority. The extensive reference to Washington law in many places (and, of course, to the law in other jurisdictions) buttresses the belief that oversight is not the explanation.

In Part I, entitled Introduction, there is discussion in some 366 pages of general historical development of property concepts, a short presentation of various theories of the nature of the property, an extended review of the beginning of American land law, and a statement of the basic terminology to be used in the treatise.

The discussion of the beginning of American land law promises to be of far more usefulness than the mere title would indicate, for here in a clear picture can be found the significance of "the reception of the common law," which is the common heritage of most American jurisdictions. The Washington situation in this respect is discussed in the ten pages of paragraphs 87 and 88, each other part of the United States having a similar discussion. A preliminary check of appropriate paragraphs will go far to clarify the validity of use of a case in any jurisdiction as persuasive authority on the common law in this state under our statute, REM. REV. STAT. § 143 [P.P.C. 6, 18-1]. The statutes adopting the common law as the rule of decision in the various jurisdictions are more or less uniform. It is, unfortunately, too simple to say that the common law is the same in all American jurisdictions. Careful counsel may well win cases because of this circumstance alone. Much of the material in the first part makes interesting reading even as a pastime and further can assist in developing a perspective on property problems adequate to fully comprehend their technical nature.

It is no surprise, considering Professor Powell's previous endeavors, to find that in Chapter 5 the basic terminology outlined is that used in the *Restatement of Property*. Those who are critical of that terminology will continue to be critical, though it is probable that their relative percentage will decrease as the recent, current and future generation of law students achieve prominence at the bar. The mere graduation into the profession of students exposed to this terminology will not in itself result in full acceptance or use of it. There continues to be the problem of the particular idiosyncrasies of each professor who, although he may refer to the *Restatement* terminology.

may nevertheless not fully adopt it in the conduct of his courses; and the further complication that so long as earlier cases must be read and comprehended, the confusing variance in use of particular terms and use of different terms meaning the same thing will pose barriers to the acceptance of any vocabulary. Nevertheless, preciseness is essential to clarity in transmission of thought and the approval of this particular terminology by the advisers to the reporter and by the American Law Institute in adopting the *Restatement of Property* justifies its use here. Readers unfamiliar with the preciseness of that terminology may well have to pause to be sure the meaning of statements is clear, but this is nothing new inasmuch as the present texts call for the same careful reading.

It is all too commonly thought that because of antiquity of many of the property rules their application is fixed and lacking in flexibility. No one thoughtfully reading and accepting in any degree the discussion in this first volume can continue in that erroneous belief. Paragraph 12 helps make this point clear in the discussion of variations from place to place at the same time. Paragraph 13, discussing new property rights, also indicates the eternal flux in this, as in any other, area of law. But in this paragraph the author seems to overlook his third guiding stress when he pins the responsibility on lawyers and judges for moulding the institution of property. The "tremendous importance of statutes" fully calls for placing some of the responsibility on the legislators.

The author's call for property statesmen to devote unselfish thought to the guidance of change in property should not go unheeded, and in paragraph 15 his test of goodness, to measure the validity of proposed changes, recognizes the developing belief that untrammelled private property cannot but infringe upon the similar right in others. Expression of thoughts such as these can go far toward giving the lawyer a perspective on the present and prospective nature of property in this country which will assure its continuance as an institution protected in the greatest practicable degree in an enlightened community.

On the whole then, this first volume of Powell on Real Property is an excellent book. This reviewer has little, if anything, with which to quarrel and looks forward with pleasant anticipation to the later volumes, not with the expectation of such complete arrangement with the author, but with the expectation that the value of the later volumes to the profession will be even greater and will adequately fulfill the need expressed in the first paragraph for a new study in this basic area of law.

HARRY M. CROSS*

*Professor of Law, University of Washington.