

Property Law Indicted

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BOOK REVIEWS

Property Law Indicted! W. BARTON LEACH. Lawrence: The University of Kansas Press. 1967. Pp. xii, 94. \$2.25.

Here is a book that will quicken the pulse of every Bull Mooser still alive in the Republic. It isn't every day, after all, that Professor W. Barton Leach sounds the tocsin for reform with an "indictment" of the law of property. This is pretty heady stuff indeed, so much so that the author of these lectures pauses to assure us, lest we jump to the wrong conclusion, that he is "no wild-eyed communist or radical."¹ Forewarned as we are, then, let's brace ourselves for the shock as we examine this searing indictment.

First, we must examine the author's opening address to the jury in this case of the "People v. Blackstone, Kent, Gray, and Stare Decisis."² Modeling himself after Harry Truman, the prosecutor gives 'em hell in the opening speech, charging that these sundry villains have insinuated into the intellectual veins of the entire law fraternity a malignant disease, to wit, the rule syndrome.³ Proof that the disease is rampant is quickly gleaned from the fact that Holmes proved to be a pretty poor property lawyer and the otherwise magnificent Cardozo penned that awful clinker, *Doctor v. Hughes*.⁴ As if this was not bad enough, the American Law Institute's *Restatement of Property* turned out to be an intellectual disaster of major proportions.

What precisely are the symptoms of this intellectual bubonic plague which the accused stand charged with spreading? With a fine sense of the dramatic, the prosecutor not once, but twice, recites an admission made by Blackstone: "The law of Real Property in this country [England, of course] is formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link

¹ P. 31.

² The book's subtitle.

³ Professor Leach must be happy to know that he can find allies in the Beatles. On the album *Sgt. Pepper's Lonely Hearts Club Band*, MAS 2653, SMAS 2653 (Capitol 1967), the anthem of the teeny-bopper set, the following refrain can be heard:

I used to get mad at my school
The teachers that taught me weren't cool
You're holding me down, turning me round
Filling me up with your rules.

Lennon & McCartney, "Getting Better," on *id.* at side 1, band 4. It might not be a bad idea, as a matter of fact, if law students burst into this song every time an instructor said: "Now, the rule in New York is . . ."

⁴ 225 N.Y. 305, 122 N.E. 221 (1919).

of the chain endangers the dissolution of the whole."⁵ Once let into the bloodstream, the disease has been fatal. Witness the following death rattle uttered by one of the victims:

Appellants ask this Court to explicitly and expressly overrule the long established law of this State. This we decline to do. Such action would be fraught with great danger in this type of case where titles to property, held by bequests and devises, are involved. A change of the established law by judicial decision is retrospective. It makes the law at the time of prior decisions, as it is declared in the last decision, as to all transactions that can be reached by it.⁶

Great balls of fire, this is pretty dreadful! The villains have persuaded the bench and bar that law is not merely a system of rules, but eternal verities as well. To change a rule today means overruling retrospectively the old rule and undoing every single transaction conducted in accordance with the old rule. Clearly then, at least in the law of property, change is perforce unthinkable. We are stuck with the law as it "was frozen at the coronation of Richard I on September 3, 1189."⁷ The scoundrels surely should be hanged, drawn, and quartered—and slowly at that!

Lest we all commit hara-kiri contemplating the utter horror of it all, the prosecutor relieves our tension with another flourish of the dramatic. A cure has been found which reverses the inexorable logic of rule to eternal rule. Lo and behold, the brethren on the United States Supreme Court, dealing with a criminal case, have unwittingly, but nonetheless unerringly, invented an antidote.

We hold that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago.⁸

Just as we are reduced to sighs of relief, the prosecutor rises to new heights of eloquence as he drives home his point. "In summary, it is now clear that any court can change bad law into good without looking over its shoulder at the possible repercussions on prior transactions, by the device of prospective-only overruling."⁹ Pandemonium ensues in the jury box, and the fate of the accused is sealed.

Strangely enough, after this magnificent opening, the trial turns

⁵ Pp. 2, 7 (brackets in LEACH at 2).

⁶ P. 14, quoting *Fox v. Snow*, 6 N.J. 12, 76 A.2d 877 (1950) (per curiam).

⁷ P. 15.

⁸ Pp. 14-15, quoting *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966) (italics by the Court; omitted in LEACH).

⁹ P. 24.

into a dreary résumé of the various intellectual calamities attributable to the virus spread by the accused. Take, for example, the plight of Earl Mountbatten of Burma, late Viceroy of India, and still *éminence grise* of the English Establishment.¹⁰ The poor fellow was luckless enough to marry Edwina Ashley, who had been the recipient of one-half the income of a residuary trust of seven and one-half million pounds. This meant that her gross income had once been 565 thousand dollars a year. She could not, however, anticipate or assign future income according to some old case law designed to protect women from n'er-do-wells and themselves. Edwina's income had already been cut by taxes attributable to the Great War to something like 200 thousand dollars a year. After World War Two, taxes wrought further havoc with the poor woman, particularly in light of the fall in value of the pound sterling. Indeed, by war's end she was receiving the equivalent of a scant fifteen thousand dollars a year. Did the judges come to the rescue and change the old rules? Afflicted as they were by the rule syndrome, they did not.

Fortunately, the Mountbattens had friends in Parliament and, after a distressing and undignified wrangle in the House of Lords, . . . a bill was passed which enabled Lady Mountbatten and persons in like circumstances to anticipate their income and thus make a rearrangement of the trust which was practical.¹¹

Or take the case of the "dear old lady in New York"¹² who created a testamentary trust of one and one-half million dollars, the income of which went to a niece for life with the principal to pass to the niece's children after her demise. The niece was a recent widow with five children, all of them in "private schools, college, or law school."¹³ After taxes her net income was only thirty thousand dollars a year. Calamity of calamities, the schooling of her kids cost fifteen thousand dollars a year. This left her only fifteen thousand dollars to live on, though she had been "brought up in a mode of life which involves the expenditures of \$50,000-\$60,000 a year."¹⁴ Couldn't she sell one of the three cars? "But those of you who have children in the late teens or early twenties will understand the kind of resentment that will arise if cars which they have been using are taken away from them on the ground of

¹⁰ Pp. 32-35.

¹¹ P. 34. Whether the masses, like the classes, have friends in Parliament is still debatable. See D. MARSH, *THE FUTURE OF THE WELFARE STATE* (1964).

¹² Pp. 36-39.

¹³ P. 36.

¹⁴ P. 36.

'poverty.'"¹⁵ She could sell the big house to reduce her mortgage payments but that "would produce very little capital."¹⁶ Damn it all, the courts should have come to her rescue and permitted an invasion of principal, *stare decisis* notwithstanding; certainly the kindly aunt who left her all this money did not intend to upset her niece's pattern of living. "The clearest evidence of this is that the aunt devised to the niece a cooperative apartment on Park Avenue . . . and the carrying charges of this run to something around \$3000 a year."¹⁷

Not only have the judges insisted upon following old precedents to the detriment of the well-to-do, but Blackstonian decadence has pervaded the whole field of property law. The conveyancing system is cumbersome, and a Torrens system has long been needed, even if "this is asking the bar to cut its own throat."¹⁸ A cursory glance at that macabre and revolting old corpse, the Rule Against Perpetuities, proves conclusively that the disease has ruined the law. Indeed, the very failure of states other than New York to set up a Commission on the Law of Estates proves that the Blackstonian Mafia has effectively stifled any chance that the legislatures would cure the patient after the judges had been rendered *non compos mentis* by this progressive hardening of the intellectual arteries.

Once the evidence is in, the prosecutor sums up in a trice. He asserts that "we are truly in the age of judicial innovation where a strong case for right and justice has an increasingly great chance of acceptance even against a strongly entrenched line of cases."¹⁹ Ladies and gentlemen of the jury, we have reached a renaissance; can there be any other verdict on the rule mongers than that of "Guilty!"?

On the explicit message of this book, one can only agree with and applaud Professor Leach for speaking the plain truth. Indeed, the sad thing is that he may be overly optimistic. Witness this ritual-like apology recently uttered in the highest court of New York:

Whatever the rule might be if this were a case of first impression, it is certain that thousands of deeds conveying rights of way between private parties and instruments of dedication of public highways have been made on this rule, which has existed since the common law began in this State and which received its most recent expression unequivocally in this court in 1959. It has ripened into

¹⁵ P. 37.

¹⁶ P. 38.

¹⁷ P. 38.

¹⁸ P. 68.

¹⁹ P. 91.

a rule of property which cannot be changed retrospectively without altering the substance of prior land grants.²⁰

Three cheers then for Leach if his little tome convinces even one judge of the need to overhaul the rules of property by adopting the tactic of prospective overruling.

The implicit message of the book, however, is profoundly disturbing. That message, in brief, is that the challenge of property law, apart from a very cursory peek at the recording system,²¹ consists of the estate-planning problems of the well-to-do. This might have been palatable during the reign of Roosevelt I, but it is hardly a stirring war cry in this day and age. Indeed, if one were interested in the problems that concern most property owners, one's book might consist of an examination of the travails of the recording morass and a cursory glance at the estate problems of the well-to-do. As it is, the book does indeed stand as an indictment of what is wrong with the law of property: property lawyers have little to contribute to solving the real problems of the last third of the twentieth century.

Property, of course, was once the intellectual flagship of the law school's fleet of courses—witness Gray's six volume casebook.²² Reflecting the significance of property in colonial days, this emphasis was already obsolete when Gray's *magnum opus* was published. Since then, personal property in the form of bailments and bona fide purchasers has been taken over by commercial law, gifts are taught in estate planning and taxation, and carriers, if not dropped altogether, figure obliquely in regulated industries. Increasingly, the real property rump that remains is being compressed so that room may be had for the latest fad, land use planning, even at the expense of omitting such mundane and impractical topics as the actual sale of a house²³ or the search of a title.²⁴ Like an old soldier, however, property insists upon fading away slowly and is still, even in its current absurd form, dutifully served up to incoming students as a basic course. Any proper indictment of prop-

²⁰ *Heyert v. Orange & Rockland Util., Inc.*, 17 N.Y.2d 352, 363, 218 N.E.2d 263, 269, 271 N.Y.S.2d 201, 209 (1966).

²¹ Pp. 65-68.

²² J. GRAY, *CASES ON PROPERTY* (1888-92).

²³ See, e.g., C. BERGER, *LAND OWNERSHIP AND USE* (1967). Mr. Berger's book has not yet been published. His proposed table of contents fails to reveal any section that deals specifically with the problems involved in the actual sale of a house, though it indicates a strong emphasis on land use and planning developments.

²⁴ See, e.g., J. KRASNOWIECKI, *CASES ON OWNERSHIP AND DEVELOPMENT OF LAND* (1965). The author devotes only 8 pages to discussing the search of title. These discussions are scattered throughout the book at 110-12, 122-24, 434-35.

erty might begin right in the law schools, since, curriculum-wise, they still bask in the twilight of Blackstone's conception of the law's proper ordering. If law involves ordering society, thereby reflecting the society it orders, corporations ought to take the place held now by property.²⁵

Leach adverts to the need to replace the current recording system with the Torrens system. This, naturally, is an old chestnut. He admits it would cause the bar some economic hardships, but he neglects to point out that the little lawyers in suburbia, not the estate-planning crowd, would bear the brunt of the loss. A serious prosecutor might point out that the current system, admittedly a complex and time-consuming one, is deliberately maintained as a kind of respectable WPA project. Title work is a subsidy the home-owning class pays to sustain the local bar's overhead expenses. But the assumption that it is socially desirable to have a flock of lawyers around is a dubious one, at least insofar as the poor are concerned.²⁶ A Torrens system might be possible today if a public defenders' fund was substituted as the sole source of the subsidy to lawyers; but indications are that a batch of new lawyers may rise up Parkinson-like to consume these funds.²⁷ If the states were to permit the title insurance companies to merge, give them a monopoly of the title trade, and then regulate their rates as a public utility, a start might be made on this. To protect the public, however, something would still have to be done at the sales contracting stage of the proceedings, such as making the contract voidable at the option of the purchaser unless he was warned *Miranda*-like of his right to counsel.

A serious indictment of property, moreover, would damn it for-

²⁵ In fact, the whole curriculum needs to be restructured. For example, intentional torts belong with crimes and domestic relations in a study of "The Regulation of Human Behavior." Negligence and strict liability, now sloshed across torts and commercial law, belong with some insurance economics under the heading of "The Problem of Accidents." That last vestige of medieval scholasticism euphemistically called "contracts" should be cut to two hours and be offered as the introductory part of a course in sales labelled, perhaps, "Agreements: Introduction to Commercial Society." The labels are hardly sacrosanct, but they do signal the way the law might be looked at in contemporary terms.

²⁶ Apparently it is the poor who perform a service for the bar; they provide guinea pigs so that law students can play intern. *See, e.g.*, N.Y. Times, Aug. 7, 1967, at 11, col. 1.

²⁷ An interesting insight into the American mind can be obtained from *Abodeley v. County of Worcester*, 227 N.E.2d 486, 489-90 (Mass. 1967):

A brief has been filed by the Voluntary Defenders Committee, Inc. raising the issue "whether the Massachusetts Defenders Committee (or a similar defender system) should be the exclusive source of lawyers assigned to defend indigents in non-capital cases." The amicus brief argues that a public defender system is the best method

The amici (*quaere*) lost this particular round in principle but not necessarily in practice, as a careful reading of the full report will indicate.

ever as a tool designed for the haves to use against the have-nots. Zoning is rooted in the idea that values ought to be preserved, but these values more often than not turn out to be the distillation of each community's prejudices. It is about time that urban renewal was recognized as the epitome of a welfare state for the rich, providing sites for luxury high-rises at the cost of further crowding in the slums. The law of property remains a tool with which an affluent white middle-class seeks to achieve its dream of a well-ordered suburbia and a clean center city. The difficulty is that the dream is just that, a dream devoid of any sense of reality.

Rather than an indictment, property needs a coroner's inquest. If there were any life left in the old cadaver, we would now see property lawyers busy discussing land reform in Mississippi to emancipate for real the Negro sharecroppers.²⁸ A living property law might echo with calls for the condemnation of the vacant land on the borders of suburbia so that it could be fed back into the future development pattern on a rational basis. This would not necessitate taking the fee but simply taking the right to put the property to a new use. In part, at least, this could be financed by a levy of fifty per cent upon the increase in value of all land as evidenced at sale. This increase, after all, reflects the value added to land by society.²⁹ At the same time, the seizure of every twelfth house in suburbia for subsidized sale to an inhabitant of the slums might put some life into the law. Better yet, this operation could be financed by levying real property taxes upon the burgeoning lands now held by the churches, particularly since the object of the levy would further the churches' own avowed ideals.³⁰

Thus Leach indicts property better than he probably anticipated. The sad truth is, however, that if property as a villain is going to be rehabilitated, lawyers as the erstwhile leaders of society are going to have to demonstrate some capacity to lead again. Change involves poli-

²⁸ See, e.g., Louis Heren's column in *The Times*:

I have not heard of a Bill to introduce land reform in the south, although Congressmen have belatedly admitted that tens of thousands of southern Negroes may be starving. It is perhaps none of my business, but I am beginning to wonder if most Americans realize what is happening to their country.

Heren, *Police Action No Cure for Racial Violence*, *The Times* (London), Aug. 5, 1967, at 8, col. 5.

²⁹ See, e.g., Land Commission Act 1967, c. 1. The easiest introduction to this rather complicated statute is probably D. HEAP, *INTRODUCING THE LAND COMMISSION ACT 1967* (1967). See also G. SEWARD & W. SMITH, *THE LAND COMMISSION ACT 1967* (1967).

³⁰ It has been said that New York City, for example, could acquire another \$35 million a year if church holdings were taxed at current rates. Northcott, *U.S. Churches Face Clash with State*, *The Times* (London), Aug. 5, 1967, at 6, col. 6.

tics, and politics is the art of the possible.³¹ At the moment change does not appear possible. While waiting for the times to change, every lawyer must concern himself with the question: if government assumes to enter the property field as an owner-developer in earnest, what can be done to interject aesthetics into the planning equation?³² At the very least, law schools, by cooperating with schools of architecture, must face their obligation to provide their neophytes the opportunity to discover that there is such a thing as simple good taste.³³

*E. F. Roberts**

³¹ For an interesting observation on political realities, see a novel derived, in part at least, from the Suez affair, namely, W. CLARK, NUMBER 10, at 197-98 (1967): "[I]t was not a 'possible' policy and therefore not a 'right' policy. That is one thing I have learned as Prime Minister, that while the right and the possible are always identical, what is possible changes every hour."

³² There may yet be hope, since even the New York Times, the Establishment's guide to conventional wisdom, has belatedly discovered John Betjeman. Petscheck, *The Betjeman Phenomenon*, N.Y. Times, Aug. 13, 1967, § 6 (Magazine), pt. 1, at 24. His *The Planster's Vision and Slough* ought to be required reading. See J. BETJEMAN, COLLECTED POEMS 21, 120 (1959).

³³ It might help, of course, if the universities set a standard worth emulating. As it is, these custodians of our cultural heritage seem incapable of putting up a building unless it is a crossbreed of Lubyanka Prison and a Hilton Hotel.

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