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Book Reviews

Book Review/Commentary. *THE LAWYERS*. By Martin Mayer. New York: Harper & Row, 1967. Pp. XVIII, 586. Cloth: \$8.95.

Reviewed by HON. HAROLD LEVENTHAL*

Martin Mayer, having stretched a wide canvas, has succeeded in capturing a recognizable portrait of *THE LAWYERS*, warts and all. His book, too, is not without blemish. It is not a great book, but it is a good book. And it should appeal to a substantial number of the country's 300,000 lawyers, as well as to the many whose livelihood or interest is interwoven with lawyers.

Some spots are shallow, a quality that is probably inevitable for a wide-ranging report that tries to present in one volume so large a slice of life and society. I would venture that lawyers would dub as "only fair," or perhaps even "inadequate," the chapter or passage on their particular category or specialty. Yet even they would likely find illuminating the sections dealing with other kinds of law and lawyers. And in the home library, the volume should enlighten the lawyer's wife and family; enlighten and interest, for the style is anecdotal and lively, and is indeed brisk and candid, to borrow the terms used to describe the tone of the conversation that the author has been told prevails in the law department stores on Wall Street.

The author concludes, as you might expect, that there is good and bad to report of lawyers. The reader may ask, "Are his shadows and highlights in sound proportions?" I do not intend to address myself to that question as such. But I think it right and useful to present as an introductory comment that I think the book embodies a conscientious effort by the author to reach a lay assessment after having steeped himself for several years both in what lawyers have written and in what they have told him.

The references to written research are grouped in the back of the book, and the main text is not "pimpled," to use Mayer's expressive phrase, with obtrusive footnote numbers. What dominates the book are the underlying interviews that are probably what primarily shaped its message. In short, Mr. Mayer has dug into lawyers

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in much the way they would prepare a case for submission. Since he seems to have chosen his sources well, and probably has a gift for elicitation, he gives us a considerable number of worthwhile observations and quotations.

For a sample, let us see what he does with chapter 7, "PI and Other Wrongs," a topic probably not beset by strong policy preconceptions, at least as far as the author is concerned. He sketches the economic framework: personal injury work is estimated to account for 25 percent or more of the \$4 billion paid annually in lawyer's fees. It is particularly the bread and butter of individual lawyers. An earlier chapter, incidentally, gives not only the economic statistic that solo practitioners average less than lawyers practicing in a firm, but also the sociological datum that Jews and Catholics are more likely to be solo practitioners, and that Negroes are rarely anything else.

He focuses on the uniquely American system of contingent fees for lawyers who establish fault. Accepting that a plaintiff's bar thus motivated does more for victims than was done in the past, he is chagrined by the disadvantages of the system: some recover too much, while too many victims are uncompensated. Courts are clogged, and the resulting delay, backlog, and waiting around have degraded the citizen's view of judicial administration. There is corruption of "a good fraction" of the bar and medical profession. Yet he fears that lawyers' narrow self-interest probably dooms reform from within, and notes that it has even spilled over, for example, into objections to tax-supported neighborhood law offices.

His treatment is not exhaustive. Thus, it discusses the compulsory insurance proposals without detailing the objections of insurers or grappling in depth with total economic costs. It is largely derivative and not earthshaking, but it should enhance the perspective of the general public and serve a useful purpose.

The author's preface tells us that when he turned to this book from *THE SCHOOLS*, he knew that he was in the big leagues, and that, indeed, he found it so in terms of contacts with first-rate minds working on first-rate problems. But there is more to it than that: there is the inevitable intertwining of Law and Lawyers with Influence and Power. Lawyers implement the Law, and the Law is a means for society to further its purposes. The rule of law, however, embraces a law that provides both continuity and adaptation to the changes taking place in society, that is, the external changes of technological advance and the internal changes in citizens' goals and expectations.

The author has several vantage points from which to examine how lawyers work and how their work is changing. I shall refer to three.

The first two are in the big leagues by any standard, Wall Street and Washington, D.C. Mr. Mayer reveals an appreciation of the skills required of the counsel who protect corporations, partly I dare say because of his way with words and respect for them. He recalls (pp. 49, 551) David Riesman's wry observation that the law student whose imagination has been captured by the opinions of Holmes and Brandeis "is unlikely even to know the names of the brilliantly daring and inventive corporate and government lawyers who helped build our modern industrial society and its governmental stimuli and curbs."

While the New York law firms and their workings are not described with the particular authority and quiet drama that can be commanded by Louis Auchincloss, a meaningful picture emerges. The range of work is duly noted: the SEC boilerplates; the special features of government contracts; the large antitrust case, and so on. The most successful corporation lawyer has a feeling not only of relevance but of priorities and the capacity of his client in relation to the demands of public policy. The capacity for focused intelligence, and clarity in expression, likewise gives this lawyer a function in politics or on the board of an educational institution or charity. "Whatever else it may be, the large law firm is a civic asset." (p. 338)

How and where is the balance to be struck for the corporate lawyer? In 1934 Justice Stone reflected that the corporate lawyer's work has so changed that he must normally limit himself to corporate affairs and no longer is rounded out either by his clients or by his reflections. "At its best the changed system has brought to the command of the business world loyalty and a superb proficiency and technical skill. At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestation."¹ The intervening years have not diminished the need to specialize. There is no reason to suppose that Justice Stone would voice a different verdict today on the existence of the extremes, and there is no way to quantify the net balance then or now.

There are fixers in corporate law just as there are medical charlatans. There will always be lawyers ready to cater to the tough-talking tycoon who says, "I don't want you to tell me what to do, I just want to know how to do it." What is to be hoped is that there is and will be improvement as times increasingly provide a blend of principle, enlightened self-interest, and greater independence on the part of counsel. The businessman too, will probably increasingly reflect not necessarily greater morality but greater understanding of the qualities that provide the best advice.

Just as the most successful lawyer is the one who is broad-gauged rather than technical, I think the lawyer who can give the soundest advice is the one who is able and ready to add a voice of conscience, thus acting as chancellor to the king.

This is a problem that pervades the domain of lawyers, as Mr. Mayer takes note. There are lawyers who would scoff in principle at a colleague who genuflects to the command of business, yet themselves override professional independence and principle to obtain a favorable disposition for clients who they think merit extra devotion because they are indigent or deprived.

Reverting to the corporate law office, the problems of ethics and reevaluation of purpose may account in part, along with the more familiar problems of the "rat race" in the canyons, to produce one of the most interesting aspects of the current condition, the search for talent. Even the domain of trusts and estates, once used to house the barely adequate socialite, increasingly calls for tax skills. And the firms who in my days at law school had the cream of the crop and could beckon as they willed have had to mount recruitment campaigns and dangle inducements of

1. H.F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6 (1934).

higher salaries and enticing perquisites. Doubtless my readers are fully aware of the raise recently announced by the Cravath firm and others, to a \$15,000 starting salary!

To me, the chapter captioned "Business in Washington" is less felicitous, possibly because it is the scene that I know best. Private lawyers in Washington are given generally high marks, not only for their skill, but also for their efforts in obtaining compliance; both are often attributable to prior government service. There is no problem here.

The administrative agencies and their lawyers, on the other hand, are bludgeoned with comment that is deservedly scathing as to their shortcomings, but generally, with the exception of the NLRB and SEC, bypasses any reference to the kind and amount of hard and useful work done.

To Mr. Mayer, the essence of administrative action is the exercise of discretion, and the essence of the rule of law invoked by bench and bar is the compulsion to eliminate discretion. (p. 350) The chaos of the agencies is largely attributable to the failure of Congress to provide "intelligible principles" in the legislation delegating authority to the agencies, a failure that permits arbitrary and inconsistent actions. (p. 375) He approves as shrewd Lee Loevinger's observation that most agencies develop an institutional bias which favors (a) extending the agency's power and authority, but (b) avoiding political controversy where possible. And Mr. Mayer adds: "Any coherent statement of rules and agency policy invites political controversy; arbitrary actions extend real power and authority." (p. 376) Therefore, by implication, the agencies avoid coherent statements and take arbitrary actions (extending their power).

The NLRB marks an exception because "the rule-making power has been permitted to atrophy, decisions have been solidly rested on opinions stating interpretations of the law, and when the direction changes, the change has been openly admitted." (p. 377) The courts can exercise no control because substantial evidence can usually be found to support anonymous opinions. But it is hard to see how needed reform will pick up a head of steam—say, by evolution of the Administrative Conference into an administrative court on the French model, that will really protect citizens' rights—because businessmen are adaptable, Congress prefers the freedom to influence decisions, and lawyers find income in confusion. (p. 378)

To comment on this adequately would protract an overlong review. There is some truth, perhaps much truth, in it. But is it the whole truth, or fairly balanced? I am a few years removed from, and do not purport to offer a current evaluation of, the action on the firing line. But I suggest that a rounded picture of law and lawyers in Washington should include the elements of a rule of law for Administrative Agencies already in being.

Members of the agencies not only are from both parties, but they also reflect a wide span of interests, so that there is a strong power to dissent and expose hanky-panky. A statute that is broad at the start gets filled in by administration, and an attendant rule of equality of treatment. There are doctrines requiring standards and findings, from which the agency's reasoning may be discerned. Courts are

ready to apply them. Competitive and contrary-minded interests have been given standing to intervene and appeal. There is increasing use of rule-making, including policy regulations. A case-by-case approach may be less, rather than more, desirable than rule-making, in terms of assuring uniformity of approach within the agency. There are programs for reduction of cumbersome procedures that have resulted in achievements.

Curiously, Mr. Mayer fails to give us any indication of how the life of the lawyer in Washington has been changed by or interacts with the institution of the Hearing Examiner. This is, after all, the significant residue of the study begun 30 years ago by the Attorney General's Committee on Administrative Procedure, a prestigious committee that was entrusted to Walter Gellhorn's capable hands and that had the benefit of a wide-ranging study of administrative procedures, taken agency by agency. Some critics of the administrative process at that time offered proposals that would have over-judicialized agencies to the point of paralysis. The chief reform wrought by the compromise, crystallized in the Administrative Procedure Act of 1946, is the elevation of the status and tenure of the Hearing Examiner to provide a quasi-judicial voice with certain qualities of tenure and objectivity, to apply legal rules (including agency standards), and to make decisions subject to review by the agency heads.

Mr. Mayer's only reference to the Hearing Examiner comes in connection with Louis Hector's 1959 memorandum to President Eisenhower on the CAB. This described, *inter alia*, how a Hearing Examiner worked two years on a report for allocation of air routes in the midwest that was ultimately worthless because he did not know that the Board had already concluded that a town with a reasonable chance of producing five passengers per day should be given the opportunity to do so by inclusion in a route. There is, undoubtedly, less scope and need for the examiner in large route certificate cases, involving legislative facts and policy judgments, than most regulatory matters. Indeed, the Act permits the Board to omit the examiner's report in case of imperative necessity. And there was nothing to prohibit the Board's declaration of its policy as soon as it had been determined.

If there are occasional horrible examples of how the Hearing Examiner institution runs athwart of the agency's operation, this problem is neither inherent nor irremediable. And in another huge and seemingly insoluble matter, a Hearing Examiner played an important role in expediting procedures, focusing issues, and initiating substantive recommendations that the agency heads generally approved as sound and fruitful.²

That the Hearing Examiner institution has improved the general quality of the regulatory agency process in Washington seems clear to me, though I would not know how to begin to quantify the benefit. That it has not provided the millenium is likewise clear. But we must be concerned with the direction of our craft as well as its present location on the chart. The Hearing Examiner's decision, though not

2. See The Natural Gas Area Rate Proceedings of the Federal Power Commission; Leventhal, *Reviewing the Permian Basin Area Gas Price Hearings*, 1964 PUB. UTIL. FORT. 3.

binding on the agency heads, is not without importance. It cannot be reversed without a reasoned indication reflecting that the Examiner's views have been considered and why they have been rejected.³ And the most cynical lawyer in Washington feels he has a leg up when and if his client has a favorable report from the Examiner. (Mr. Mayer does take notice of the way the views of the Staff, or a middle-rank lawyer or official, have a built-in momentum that may lead them to emerge as the agency position.)

Again, Mr. Mayer refers to the poor performance of the FCC in allocation of frequencies (as is true of the CAB in picking winners of air routes), and gives evidence of having harkened to Judge Friendly's strictures. But here is no reference to the FCC's Policy Statement on Comparative Broadcast Hearings,⁴ or to its establishment, after finally securing statutory authority in 1961, of an intermediate Review Board structured between the Examiner and the agency. Assessment of the work of the Review Boards is not easy, but they must be recognized as representing a serious effort to implement the difficult function of delineating criteria and standards, to reducing the extent of individual matters requiring attention of the Commissioners, and hopefully, to reducing noxious pressures on the Commissioners, enhancing their capacity for policy deliberation and meaningful industry regulation.

Thus, the pattern is far more complex than Mr. Mayer's tapestry. And while it would be naive to blink at the vast problems, they are in large part the problems of a free democracy that seeks an ordered resolution of conflicts of interest. Perhaps I am an incurable optimist, but I do not subscribe to the thesis that implacable conflicts and tensions have frustrated our evolution toward agencies under the rule of law, given reasonable discretion and latitude, working with reasonably expeditious procedures, yet subject to the requirements of applying standards and stating reasons.

One regrets the delay in energizing the Administrative Conference, but one must approve the diligent search for a qualified director, young and energetic enough to take on this post and its difficulties. An Administrative Conference ably led provides its own head of steam to generate both needed reforms and support for those reforms.

Discussion of criminal justice is always of interest to the lay public—and law students—and Mr. Mayer's treatment is spirited. Representation of criminals calls on lawyers' traditional function of trial capability. But since the police and prosecutor try to screen out doubtful cases, for the most part the role of defense counsel lies, apart from an occasional instance of establishing a meritorious defense, in keeping the system honest and taking on the function of negotiation and plea bargaining. Yet there are cases to be tried and prepared, and in one interesting passage, the author relates how necessary lessons are learned by young lawyers coming to Legal Aid seminars.

Let me turn now to the exclusionary rules that have unfolded in Supreme Court

3. *Oil, Chem. & Atomic Workers v. NLRB*, 362 F.2d 943 (1966); *Retail Store Employees v. NLRB*, 360 F.2d 494 (1965).

4. 1 F.C.C.2d 393 (1965).

decisions in recent years. At this late date, there is no need in a law review to dilate on their importance in changing the real law that governs the lowly, and in attempting to equate the standards of justice for rich and poor. They account for much of the current work of the intermediate appellate courts, and call on them for the most soul-searching and painstaking reflection. Mr. Mayer takes stock of these developments, and gives some indication of empathizing with the underlying attitudes. Yet his view is that full application of appellate rulings are inhibited by attitudes of police and trial judges. More than that, he is skeptical whether these reflect an intelligent and efficient way to control the police. He is concerned lest wholesale elimination of the questioning of suspects as a means of learning facts may result in a widening of general police surveillance. So he argues instead for expansion of police supervision by an analog of the Home Secretary, by an ombudsman-type official, or by a modified and strengthened prosecution.

He treats other matters: the depressing juvenile courts and the kind of judges needed therein; the paucity of tailored sentencing; and the injustice of a system that gives some a sporting chance of escape through the adversary process and slugs the others hard. He tells of the bail reform movement spurred by the Vera Foundation, and of the value of increased fact-finding in setting bail. He also asks whether the country cannot provide a fair system of preventive detention, with review, lest the armed robber caught in the act be needlessly released to victimize society.

Mr. Mayer's book reads on different levels. It is at its best taken as a description of how lawyers are and what they do, and is a well-placed narrative of considerable breadth that reflects diligence and attentiveness to sources. There is a letdown when it essays a critical role and becomes a commentary not so much about lawyers, but about law, appraising what the law is and should be becoming, and what lawyers will and should be doing in the future. In some aspects, we gain the advantage of the perspective of a common sense nonlawyer. Of course, he is right to think in these terms. There can be no meaningful description of a social institution without a point of view, and his perspective of a nonlawyer stressing "common sense" is often refreshing and useful.

I have already mentioned some points he makes concerning the handling of criminal matters. Let me add at least a reference to his feeling that the test of criminal responsibility should not be focused either on *mens rea* or on deterrence, and that it would make sense to skirt the debate between free will and determinist approaches by adopting the suggestion of the British Medical Association looking toward a judgment of "guilty with diminished responsibility"—an approach rejected by British lawyers except as justifying reduction of the charge from murder to manslaughter.

The difficulty is that these matters are complex and his treatment is necessarily cursory, giving an impression—I hope erroneous—that the thought is on the surface, and may reflect a lack of depth perception. Take, for example, Mr. Mayer's point that there should be no bail for a man caught red-handed in an armed robbery, and that if this requires a constitutional amendment, let it come. Surely he cannot mean that we should become a government that punishes without trial. Has he

pondered the difficulties of setting limits on the "punitive detention" he advocates (after stating it exists in Sweden)? Should there be a difference between a first offender and a recidivist? Cannot the risks of crime-while-on-bail be mitigated without opening our constitutional guarantees to know-nothing devastation? Has he taken into account the provisions of the bail reform law that give the judge flexibility to order a limited day-time release?

Very likely this is a matter of taste and style. I might not ever have noted the point, much less included it in a review, if he had only put forward such views as a suggestion for consideration, rather than a quick, dispositive pronouncement on issues that have engaged the reflection of men concerned about directions in the law. I reiterate that in many respects I have taken note of what he says—not as answers, but as food for thought.

I close by particularly commending chapter 3, "The Law Schools—Where the Lawyers Come From." This was the first chapter I read—in *Harper's*—and I was impressed by it, so that I was willing to accept the Law Review's request that I review the book.

Here are some thoughts that stay with me. The teaching in law school is more intense and intelligent than that of any other academic institution. A student becomes different in law school—thinking in terms of disputes and resolving them; becoming more argumentative, aggressive, hostile, and developing more logical procedures. He grasps the hard notion that there is good law on both sides. But law schools are increasingly oriented (Yale faster than Harvard) to the implications of teaching law as an expression of policy rather than as an independent process and technique.

The man who gravitates to the law is inherently power oriented—but that also includes the idealist, reformer and rebel. The best students, at least, get not only "impenetrable self-confidence" and an assured career at the bar, but also a preparation for public service and for impact on policy-making within the community. The late Professor Harold Solomon of the University of Southern California talked of lawyers as either plumbers, engineers, or physicists—the physicist being the "last generalist in a fragmented society" who can pull the expertise together and shape a program. On the other hand, when students get out into the real world of the lawyer they are often disillusioned; maybe they should be given a chance to become disillusioned before, rather than after they leave law school.

I leave on this note. The future of a profession, like any organization, is shaped by those who come into it. I have seen a fair number: the students in my seminar; the new lawyers I encountered in practice; during the past few years, the students I hear in moot courts at the pinnacle of preparation; the students I interview; and those selected as law clerks by myself and my colleagues. Well, they're great—in terms of intelligence, tough-mindedness, resourcefulness, and motivation (including that of idealism). They are a skewed sample, perhaps. And I, too, am concerned about those who become disillusioned. Perhaps it is just that their time will come later, assuming they have the inner resources.

If I correctly gauge the law schools, law reviews, and law students, the nation

has good reason to believe that the next edition will find that The Lawyers have increasingly and fruitfully managed to combine furtherance of personal careers with effective devotion to community and public service.

PROPERTY LAW INDICTED! By W. Barton Leach. Lawrence: The University of Kansas Press, 1967. Pp. 94. \$2.25.

Those with only a slight interest in property law might be tempted to disregard this little book. Some, intrigued by the title, might read it merely to watch this "monstrously complex and mysterious body of law"¹ being pilloried by one of its leading scholars. But others will probably feel that the title merely promises them an opportunity to regularize their own, privately returned verdict and pass over the book in favor of other, more vital material. If this happens, it will be a shame. For this interesting and very readable book (it is based on a series of lectures given by Professor Leach at the University of Kansas and preserves much of the informality of the spoken word) is more concerned with law reform than with the defects, criminal or civil, of property law. Professor Leach's main thesis is that the members of the legal profession have an obligation to leave the law better than they found it, to contribute to its growth and development, to question and evaluate its "settled" rules in the light of today's needs and to work for their change when they are found to be outmoded and unfair.

To the judge who responds to this obligation, Professor Leach promises a place of honor, possibly fame, in the history of Anglo-American jurisprudence. He argues, moreover, that the recent Supreme Court decision² holding that the *Escobedo* and *Miranda* rules should not be applied retroactively indicates a way around one of the most serious obstacles that had heretofore existed to reform by judicial action, and thus should encourage judges to be more active in their task of modernizing the law and making it more responsive to the demands of justice. By using the device of prospective overruling, they can relieve themselves of undue concern about the unsettling effect their novel decisions might have on prior transactions. This is an interesting thought and there is much merit to it. But, it is submitted, that courts should feel the need to use the tactic of prospective overruling only infrequently.

Though there undoubtedly is a need, especially in the property field, for stability and predictability,³ the need has at times been overemphasized. Several years

1. See T. BERGIN & P. HASKELL, PREFACE TO *ESTATES IN LAND AND FUTURE INTERESTS* 2 (1966).

2. *Johnson v. New Jersey*, 384 U.S. 719 (1966).

3. We have all marvelled at the wisdom of the English Chancellors who when creating the right of curtesy in equitable estates refused to recognize the right of dower, for this would have upset the title to much of the land in England. See 2 A. SCOTT, *TRUSTS* § 144 (3d ed. 1967).

ago, a Minnesota court refused to permit a widow to include certain Totten trusts established by her husband before his death in his estate for the purpose of determining the size of her forced share.⁴ The court acknowledged the merit of her arguments and said that though it could not adopt them immediately, it would "feel free" to do so in later cases involving the estates of persons who might die after the close of the next session of the legislature unless the legislature had by then adopted a statute on the matter. Think of how depressing this Pyrrhic victory must have been to counsel; it probably will be a long while before he decides to litigate another case in which precedent is against him. But, more to the point, it is difficult to believe that any great injustice would have been done had the court upset this scheme for reducing the widow's forced heirship claim. Concededly, the decedent and other Minnesotans might have relied upon the holdings of earlier cases when planning their estates. But this hardly gives them a right to insist that an unjust rule be perpetuated. One who relies on such a rule simply because it is written in prior cases should realize that he is assuming a risk and he has no legitimate complaint if the hazard overtakes him.⁵

The opportunities of a judge to contribute through his decisions to legal reform are limited by the cases presented to him. While stressing that practitioners, when deciding whether or not to recommend suit, must always be guided by the best interests of their clients and cannot merely be "do-gooders" in the cause of legal reform, Professor Leach promises them a fair degree of success in arguing against outmoded, though "settled" rules. Certainly he is right when he says that we are "in an 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." (p. 91.)

Judicial innovation is not, of course, the only source of legal reform; much is the product of legislative action. But legislators are generally preoccupied with governmental and other matters of concern to large segments of the voter population. They have little time, and frequently less inclination, to consider and remedy defects in the area of private law. Here, Professor Leach feels, law teachers incur a special obligation. They are in a uniquely favorable position to know the need for reform in these matters and to suggest and promote it in the legislature. And to the teacher who shoulders this responsibility, he promises not only the satisfaction that comes from having undertaken a noble task but also some relief from the "publish or perish" rule. He expresses the opinion that most university administrators now "recognize that a statute, drafted and sponsored by a law school professor and successfully pushed through the state legislature, is worth a half-dozen abstruse articles in learned journals which gather dust in university libraries." (p. 85.)

Professor Leach does devote a fair amount of time to discussing various prob-

4. *In re Jeruzal's Estate*, 269 Minn. 183, 130 N.W.2d 473 (1964).

5. "It is still possible for men to plan their affairs with adequate certainty, even though they are subject to review by courts anxious to do the most perfect justice according to the present state of moral knowledge." Comment, *Equity: System or Process?* 45 GEO. L.J. 213, 219 (1956).

lems in the property area and suggesting changes: permitting encroachments on corpus for the benefit of life tenants, restricting testamentary freedom to prevent capricious disinheritance, freer use of the cy pres power and its application to private trusts, greater protection for surviving spouses in their forced heirship claims, abolition of the Worthier Title doctrine, expanding anti-lapse statutes, restricting the preference for vested interests in property, establishing a system of title registration for land, and removing the traps from the Rule Against Perpetuities. His treatment of these matters is interesting throughout and never becomes too technical for the general reader. This, indeed, might be considered a defect by the specialist. But, as indicated above, the book is more concerned with the need for, and the methods of, law reform than with the defects of the law of property.

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