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Book Reviews

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BOOK REVIEWS

FREEDOM OF ASSOCIATION. By Charles E. Rice. New York: New York University Press, 1962. Pp. 202. $6.00. This book by Professor Rice of Fordham University Law School is a further development of his dissertation for a J.S.D. at New York University Law School.

Professor Rice discusses an interesting new notion in the law, "freedom to engage in association for the advancement of beliefs and ideas . . . ," first expressed by Justice Harlan in NAACP v. Alabama.[1] "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."[2] The aim of the book is to show how the concept "freedom of association" is needed in the contemporary legal world, and to locate its place in the "hierarchy of fundamental liberties."

After the introduction of the reader to its interesting topic, the book discusses the Jurisprudential Background of freedom of association from Plato to Maritain, and, in American Background, its constitutional historical development from pre-revolutionary days to Tocqueville. Then follow the main chapters: Freedom of Association and Religion, Freedom of Association and Livelihood, Freedom of Association and Political Parties and Pressure Groups, and Freedom of Association and Subversive Associations. The final chapter is Basic Principles of Freedom of Association in the United States, drawn from the discussion in the preceding chapters.

The text, footnotes, and bibliography indicate prodigious labor by Professor Rice, who writes well about law. And the reader will find very interesting insights into the First and Fourteenth Amendment freedoms. He writes, for instance:

> There are situations, however, in which an individual's right to do, or not to do, a particular thing becomes greater or less when he acts in association with others. A person who conscientiously objects to military service has a clearer immunity to service if his objection is a tenet of a religious group: * * * Conversely, a person's individual right to oppose the government decreases when he does so in association with others (in) subversive groups.[3]

The four main chapters are devoted to showing that religious, political and labor cases could have been decided by the Supreme Court with reference to freedom of association, instead of the traditional freedoms, with more satisfactory results in some of the cases. For example, he discusses *Reynolds v. United States*,[4] sustaining the convictions of Mormons for practicing polygamy, and implies the facility with which the decision might have been reached by reference to freedom of association: Mormons were not free to do as members of an association, what each member as an individual could not do. And he thinks that Sunday closing laws may be said to compel Jews to associate in the Sunday observance and prevent them from exercising their freedom to associate with the members of their own religious sect. Similar observations are made with respect to cases within the areas of labor and politics. The reader may or may not be persuaded that freedom of association is a more useful concept than those of the traditional freedoms for dealing with the issues in these cases.

One need not be persuaded of that nor reflect long on what Professor Rice says to see that in our swiftly changing world the town meeting connotations of assembly and petition have little meaning in reference, for instance, to the Teamsters Union, or the National Association of Manufacturers. The idea of association is a much clearer expression to describe these national far-flung groups, who meet really only through delegates in convention and whose members may never assemble. These considerations are implicit in what Justice Harlan wrote of NAACP, and it is likely that the expression "freedom of association" will appear with increasing

1 357 U.S. 449, 460 (1958).
2 *Ibid.*
3 Text at xviii.
4 98 U.S. 145 (1878).

frequency in opinions and other legal literature, discussing issues involving competing interests of rights of members of national groups and authority of government to limit exercise of the rights.

The four main chapters rest on an initial assumption that Justice Harlan discovered a separate, definitive and "essentially distinct"[5] constitutionally protected freedom. They are devoted to identifying its principles and its prominent place in the First Amendment freedoms.

I have trouble with the assumption.

It probably makes little difference whether we say freedom of association or freedom of assembly, so long as we understand what we mean. It should make a difference that when we use the one for the other we do not mean that it is *essentially* different. And not only because one is a genus and the other a species. But also because young lawmen and students should not look to the Constitution alone for basic human rights, which are prior to the Constitution. Also we ought, in the interest of relative certainty in the law, not call a new definitive right each new future expression of an old right. To do so will be to clutter up the law.

It doesn't seem to me that Justice Harlan, in the *NAACP* case, made an essential distinction between, or definitely separated, freedom of association and freedom of assembly. He used the expressions interchangeably in referring to the rights of members of the NAACP to associate for the purpose of discussing and furthering its aims. In the *NAACP* case, in referring to the right of lobbying, Justice Harlan also used the term "right to advocate" interchangeably with the right to petition. This doesn't change the nature of the right to petition.

Justice Harlan could not logically have made an essential distinction between freedom of association and freedom of assembly. When Warren and Brandeis at the turn of the century wrote their famous essay on the right of privacy of one's person,[6] logic was with them and they carved out of the general right of property a right of a different nature: one's property is essentially different from one's person. But a general essentially different freedom of association cannot logically be carved out of the freedoms of assembly or petition. They are specific freedoms of assembly or petition. They are specific freedoms of that general freedom. The words of Justice Goldberg in *Gibson v. Florida Leg. Inv. Comm.*[7] bear this out; he spoke there of "First and Fourteenth Amendment associational rights."[8] So do those of Justice Black in the same case, where he stated that the First and Fourteenth Amendments "encompass freedom of the people to associate in an infinite number of organizations including the National Association for the Advancement of Colored People. . . ."[9]

Freedom of association is as broad as the basic need of human nature for companionship. It is not only implied in, but is presupposed by, the Constitution and by the First and Fourteenth Amendment freedoms. It is as basic as freedom to talk, and under it human beings have always joined with others to speak, worship, work, advocate and subvert.

Experience teaches that freedom of association is not a separate definitive freedom. We don't just associate to promulgate ideas or beliefs. We associate to discuss or promulgate ideas about something: about worship, or work, or business, or to voice grievance about government, and so on. Consequently, when we discuss freedom of association in the concrete, it is necessary to link the general freedom with the particular purpose of the association. The assumption made at the beginning of the book appears to overlook this. The book, however, seems to recognize it in the titles it has given to the chapters: Freedom of Association and Religion, etc.

5 Description is used by Professor McKay of New York University Law School in the Foreword. Text at ix.

6 Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).

7 31 U.S.L. WEEK 4311 (U.S. March 25, 1963).

8 *Id.* at 4313.

9 *Id.* at 4317.

It seems Professor Rice has done what the Supreme Court judges have done. He has written in a new way about an old freedom and right. Each writing judge uses his own style, doing a work of art by putting something of himself in his opinions. So Justice Harlan in the *NAACP* case drew out "freedom of * * * assembly" to cover NAACP and called the traditional freedom "the freedom to engage in association for the advancement of beliefs and ideas."[10] And in the *Gibson* case Justice Goldberg said: "rights of speech, press, association and petition,"[11] while Justice Black in traditional mode wrote, "Freedoms of religion, speech, assembly and petition."[12] And in *Gideon v. Wainwright,*[13] Justice Black changed pace and, illustrating the fundamental nature of First Amendment freedoms, said: "speech, press, religion, *assembly, association,* and *petition for redress of grievances.*"[14] (Emphasis added.)

These several reasons prevent me from accepting the assumption which is the basis for the book. It follows that I cannot say that the book shows freedom of association's "position and durability in the hierarchy of fundamental liberties"[15] as a definitive and separate or "essentially distinctive"[16] freedom.

Professor Rice, in writing this book, has rendered a service toward future helpful discussion of Freedom of Association. As Professor McKay says in the Foreword: " * * * there will inevitably be disagreement over interpretation. The important thing is that the relevant arguments have been made, clearly and calmly. Professor Rice has made a real contribution to understanding in the area by indicating unmistakably the points on which discussion of the pertinent issues should center."[17]

*Roger J. Kiley**

INTRODUCTION TO THE LAW OF REAL PROPERTY. By Cornelius J. Moynihan. St. Paul: West Publishing Co. 1962. Pp. 254. $4.50. Since 1946 I have been telling my students that Professor Moynihan's *Preliminary Survey of the Law of Real Property,* which was published in 1940, was the best short textbook on the subject, and I have no reason to withhold similar approval of the basic revision which has just been published under the title "Introduction to the Law of Real Property." It is hardly necessary to mention the almost insuperable difficulties which are present in any brief survey of an important field of law. Professor Million in his review of Cribbet, *Principles of the Law of Property,*[1] has referred to "the deceptive certainty inherent in any summary," and there is no purpose in laboring a point of which Professor Moynihan was certainly aware. His penetrating discussions of certain phases of the law of real property, especially when he turns his attention to the general topic of uses,[2] demonstrates his thorough knowledge of the wider reaches of the law of real property at which a brief survey can only hint. With the warning, perhaps unnecessary, that the beginning student will not become a master of the law of real property by reading this book, it is my opinion that the author has come as close as is possible to performing the almost impossible task of surveying this branch of the law in preliminary fashion without doing more harm than good. I am still somewhat torn between the desirability of providing the student with this type of collateral reading, rather than referring him to spot references to a few

10 NAACP v. Alabama, 357 U.S. 449, 460 (1958).
11 Gibson v. Florida Leg. Inv. Comm., 31 U.S.L. WEEK 4311, 4313 (U.S. March 25, 1963).
12 *Id.* at 4317.
13 31 U.S.L. WEEK 4291 (U.S. March 18, 1963).
14 *Id.* at 4293.
15 Text at xix.
16 *Id.* at ix.
17 *Id.* at x and xi.

* Judge, United States Court of Appeals for the Seventh Circuit.

1 U. OF PA. L. REV. 261 (1962).
2 Text at 173-215.

of the topics dealt with in the classic treatises, such as the superb and definitive treatise of Professor Powell. On the whole, I think that the balance lies in favor of the short summary, which is still in more or less disrepute, but for which the late Professor Llewellyn had a word of praise more than twenty-five years ago.

The present revision follows the form of the content of the earlier edition, although certain topics, especially powers of termination, contingent remainders, and the doctrine of worthier title, are more fully developed. The author follows his discussion of each historical estate at common law with a description of its modern equivalent; an excellent method for purposes of contrast, but breaking the continuity of historical development which is perhaps more important to the student.

Benjamin Franklin's diary reveals his practice, before reaching a decision, of making a list of the arguments for and against a proposed course of conduct. I have tried out this method in evaluating the book under review, and its virtues far outweigh what I conceive to be its defects. I find numerous important topics in which the treatment is excellent and contains in several instances important contributions to the learning in this branch of law. There is an admirable discussion of the dual character of leaseholds as contracts and as interests in land.[3] There is a good simple explanation of subinfeudation,[4] and of the effect of the abolition of subinfeudation as benefitting the overlord. A nicely compressed discussion of the distinction between an assignment and a sublease appears,[5] although no reference is made to the realistic argument that if the right of re-entry were held to constitute a reversion, as it is in some states, assignments would be a virtual impossibility since such a right is retained in practically every case. There is a good discussion of the pre-1536 law of remainders.[6] The distinction between vested and contingent remainders is discussed.[7] The question of ownership of contingent remainders in favor of a person not in existence is well treated.[8] The author points out that remainders which are contingent because they are limited to persons unborn are really only the recognition by law of the possibility of a legal ownership between a person and the property arising in the future.[9] This possibility has present legal consequences, for example in limiting the rights of the owner of the prior estate to deal with the property as though no such potential interests had been created. There is a clear statement of the purpose and function of the early use in the discussion of the Statute of Uses;[10] a mild criticism might be advanced that note 5, page 176 fails to point out the device of permitting feoffees que use to appoint substitute feoffees que use for those who have died, thus eliminating the necessity for a re-enfeoffment. The discussion of the new methods of conveyancing resulting from the Statute is clearer than any I recall elsewhere.[11] A good statement of the distinction between remainders and executory interests appears,[12] to the effect that an executory interest is a divesting interest; a remainder, a successive one. The point is strongly made that the distinction between executory interests and contingent remainders is the indestructibility of the executory interest.[13] An excellent explanation of the rule of *Purefoy v. Rogers* is included;[14] a future interest which could take effect as a contingent remainder must take effect as such, or fail. The entire discussion of the Statute of Uses is admirable, as is the explanation of the origin

3 *Id.* at 70.
4 *Id.* at 22-23.
5 *Id.* at 76.
6 *Id.* at 111.
7 *Id.* at 113 et seq.
8 *Id.* at 113, 123.
9 *Id.* at 126.
10 *Id.* at 173-184.
11 *Id.* at 185 et seq.
12 *Id.* at 197.
13 *Id.* at 200.
14 *Id.* at 201.

of the modern trust,[15] usually left to passing reference. Excellent summaries of the statutory law appear at several places, for example as to concurrent estates,[16] and the destructibility rule.[17] More of such summaries would have been helpful to the student and instructor as well.

Now for what appear to me to be inadequacies in what is on the whole an admirable summary of the law of real property. I find the term "nonfreehold estates" in the discussion of introductory matters,[18] somewhat inconsistent; a more generic distinction is the availability *qua non* of real writs for the protection of possession of interests in land other than freehold interests. A more thorough documentation of the matters discussed in the first twenty-two pages of the book would be desirable; some of the beginning students may aspire to become more thorough students someday.

The discussion of the problem of "death without issue" illustrates the danger of an overly brief treatment.[19] This discussion really belongs under Future Interests in chapter 5. In the discussion of the effect of married women's emancipation statutes,[20] there is no mention of the peculiar Massachusetts rule,[21] although note 4 on page 54 sets forth the statute. The discussion of modern substitutes for dower[22] fails to mention the statutory rule in some jurisdictions which makes the distributive share of each spouse a legal lien on real property during coverture. Is the doctrine of constructive eviction really based on the doctrine of failure of consideration,[23] or is it not based on a deeper equitable doctrine of relief from hardship which underlies both concepts and is expressed in the formula of an implied covenant of quiet enjoyment? The doctrine is not applied to leases as widely as the author indicates.[24] No argument as to the merit or lack of merit of the doctrine of frustration, so important in leases, appears in the discussion of that topic in the text. There is no reference, in the discussion of the problem of the obligation of the landlord to mitigate damages when the tenant quits the premises, of the landlord's dilemma in determining whether the tenant has or has not abandoned the premises. The relation of the length of the holdover period and the Statute of Frauds is not discussed at all.[25] The validity of spendthrift provisions in trusts as affecting the alienability of the equitable interest is ignored, and the important question of the effect of the doctrine of worthier title on consents necessary in the case of statutorily revocable trusts is discussed only briefly.[26] Happily, a circular statement which appeared at page 59 of the first edition is left out.

How can there be a contingent remainder to an unborn person? The later explanation[27] is inconsistent with the better explanation of the nature of such an interest given earlier.[28] It seems particularly unfortunate that the author has not given the reader the benefit of his deep knowledge of the historical development of the law of real property with regard to the Rule against Perpetuities, which is intentionally omitted.[29] References to treatments elsewhere would have been helpful to the beginning student. The argument against the rule of *Dumpor's* Case is only hinted at, and not developed, in the text.

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15 *Id.* at 210-212.
16 *Id.* at 218.
17 *Id.* at 134-35.
18 *Id.* at 1-22.
19 *Id.* at 43.
20 *Id.* at 53.
21 Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929).
22 Text at 57.
23 *Id.* at 71.
24 *Id.* at 73. See cases cited in Corbin, Contracts § 1356, at n. 13 (1950).
25 Text at 82.
26 *Id.* at 159.
27 *Id.* at 186.
28 *Id.* at 126.
29 *Id.* at 104.

Documentation has not progressed in a notable degree beyond the date of the cases cited in the original edition of 1940. In addition to sparse documentation in the early introductory matters, it is uniformly scant and somewhat less than adequate, in the opinion at least of this reviewer. No authority is cited concerning the effect of restraints on alienation of life interests.[30] Documentation on the modern attitude toward *Dumpor's* Case is meager; only one case is cited *contra,*[31] in New York, where the question has not been authoritatively settled. To the 1949 New York case cited might be added *Northerly Corp. v. Hermett Realty Corporation.*[32] Documentation of the problem of the landlord's duty to mitigate damages is particularly scanty,[33] with no case cited since 1946. In the author's discussion of seisin,[34] he speaks of a "recent" English case which is said to recognize the existence of a fee simple determinable, decided in 1944. In the discussion of transferability of a possibility of reverter,[35] the author cites only New York law, and the *Restatement;* a reference is also made to Powell, *Real Property.*

There are a few inconsistencies. The author states that a life estate has the quality of alienability,[36] but then he says that "a life estate is not as a practicable matter a marketable commodity."[37] In the discussion of the fee tail, citation of statutes in the four states[38] said to recognize the fee tail would have been helpful. Throughout the book, much time would be saved the reader if the text of typical statutes had been set forth; a study which the student may never undertake.

I have been the target of a sufficient number of reviews to feel it necessary to add that the foregoing criticisms are stated with the desire to suggest what to me seems the possibility of still further improvement in a subsequent edition; and that the validity of those of the foregoing criticisms with which the learned author may agree does not detract from my estimate, stated at the beginning of this review, that the book is excellent, scholarly and well worth while. It should relieve the harassed instructor in the basic course in Real Property from sleepless nights in which he berates himself for failure to cover in detail topics for which time is lacking, as he would realize in his waking hours. It will give the conscientious student the opportunity for a comprehensive survey of the continuing story of the law of real property which he might otherwise never grasp.

*Ralph A. Newman**

30 *Id.* at 59.
31 *Id.* at 75, n. 6.
32 15 App. Div. 2d 888, 225 N.Y.S. 2d 327 (1962).
33 Text at 79, n. 6.
34 *Id.* at 97.
35 *Id.* at 101, n. 2.
36 *Id.* at 59.
37 *Id.* at 61.
38 *Id.* at 41.

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BOOKS RECEIVED

Constitutional Law

A Commentary On The Constitution Of The United States. Part I: The Powers of Government. Volume I: Federal and State Powers. By Bernard Schwartz.
New York: Macmillan, 1963. Pp. 470. $12.50.

A Commentary On The Constitution Of The United States. Part I: The Powers of Government, Volume II: The Powers of the President. By Bernard Schwartz.
New York: Macmillan, 1963. Pp. 497. $12.50.

Criminal Law

Organized Crime in America. By Gus Tyler.
Ann Arbor: University of Michigan Press, 1962. Pp. 421. $7.50.

Evidence

Marshalling The Evidence. By Harry Sabbath Bodin. Pleading and Practice Before Trial. By Harry Sabbath Bodin. Motion Practice and Strategy. By Leonard P. Moore.
New York: Practising Law Institute, 1962. Pp. 134. $4.00.

Rebuttal and Surrebuttal. By Harry W. Starr, Motions After Evidence. By Frederick vP. Bryan. Final Argument. By Leslie H. Vogel. Instructions To Jury. By David Diamond. Verdict and Motions After Verdict. By Frederick vP. Bryan.
New York: Practising Law Institute, 1963. Pp. 127.

Introduction To Law

Your Introduction To Law. By George G. Coughlin.
New York: Barnes & Noble, 1963. Pp. 309. $1.75.

Jurisprudence

The Lawyer in Society. By James J. Cavanaugh.
New York: Philosophical Library, 1963. Pp. 82. $3.00.

Legal Ethics

Beyond the Law. By James A. Pike.
Garden City, N.Y.: Doubleday & Co., Inc., 1963. Pp. 102. $2.95.

Property Law

Fundamentals of Land Use Law. By Harry Cohen.
University of Ala.: University of Alabama Press, 1962. Pp. 265. $10.00.

Land-Use Controls in the United States. By John Delafons.
Cambridge: Harvard University Press, 1962. Pp. 100. $3.50.

REAPPORTIONMENT

Some aspects of the problems of Reapportionment — three of five articles to be published in the LAWYER dealing with a practical approach to these problems. The remaining articles will be published in the ensuing issue.