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Book Review: How High Is Up

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HOW HIGH IS UP

BY DAVID LOTH AND MORRIS L. ERNST

Indianapolis: Bobbs-Merrill Co., Inc., 1964. Pp. ix, 275. \$4.50.

The central problem of the growth and development of the common law has always been how to strike a balance between stability and change. The task of the common law judge which causes the greatest difficulty is that of applying established principles and precedents to new problems. Those judges who are remembered by history, who provide grist for the "casebook" mills which unlock the mysteries of legal logic for generation after generation of law students, are the ones most adept at fitting "the law" to the new problems of society. We neither salute nor condemn the judge who routinely judges; rather, we save our ammunition for the judge who innovates.

This pragmatic quality of the common law in solving the problems of today with the law of yesterday through the fits and starts of the bold judge is taxed to the utmost in times of rapid scientific advancement and technological progress. The intense casuistry of the common law, which must needs wait for the right case and the right judge, which tentatively gropes for a tentative solution for the new value conflicts, makes the common law lag far behind the needs of a modern technological society. What tends to happen when the common law lags too far behind the scientific and social realities is that society grows impatient with the common law approach and legislates. Then, of course, the common law reasserts at least a modicum of authority in interpreting the statute and occasionally invalidates the statute to preserve the superior values of "freedom" or "property."

The above comments illustrate what the book, *How High Is Up*, is ultimately about. The authors have attempted to show the layman how law adapts to change.¹ The technique used is to take several modern problems which have created or are creating legal difficulties and show how legal principles and precedents have been applied to solution of the problems. In general, the authors have done a fine job of selection and presentation thus making the book interesting for the lawyer as well as the layman.

In the first chapter, titled "How High Is Up," the authors explore the legal problems caused by the Air Age and Space Age in-

¹ The anthropomorphic implications are those of the authors; I would phrase the problem as how lawyers, judges and legislators adapt the law to the changing needs of society.

terference with the Old Age (or, perhaps, age old) concepts of property law. The starting point, quite properly, is the case of *United States v. Causby*² which dealt with the ownership of air space and a taking of that property right by low and frequent overflights. The *Causby* case is, of course, only a starting point and the authors have skilfully used that litigation to develop discussions of aviation nuisances such as noise, fumes and vibrations, sky piracy, new modes of air transportation, and sovereignty over space.

A natural follow-up to the first chapter title is that of the second chapter, "And How Deep Is Down." This chapter is one of the weakest in the book dealing as it does with a rather unusual and limited legal problem—subterranean property rights of landowners in relation to natural gas storage. The authors point out that the first aquifer gas reservoir was developed in 1946 and that today about 15 reservoirs are scattered over nine states. The natural legal device for handling the reservoir arrangement is a negotiated lease between landowner and gas storage company. The real problem, however, is what legal principles will govern the inevitable future litigations as some landowners refuse to lease underground storage space.

One of the best chapters in the book is the third, "Let the Seller Beware," which deals with the twentieth century revolution in the law of products liability. The authors tell the story of *MacPherson v. Buick Motor Co.*³ and *Ryan v. Progressive Grocery Stores*⁴ to illustrate Cardozo's revolution in changing *caveat emptor* to *caveat vendor*. Then follows an extended discussion of the implied warranty of fitness cases as applied to blood transfusions, Salk polio vaccine, and cigarettes and lung cancer. Finally, the problem of marketing new and possibly dangerous drugs is considered.

² 328 U.S. 256 (1946).

³ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁴ 255 N.Y. 388, 175 N.E. 105 (1931).

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Atomic energy, the subject matter of the fourth chapter, is likened by the authors to a genie in a bottle which, upon release, is capable of great good or great harm. Tort liability for radiation damage, location of nuclear reactors, and control of atomic testing are the problems considered.

The fifth and sixth chapters deal with some of the basic concepts of property law and tort law as challenged by two modern and emerging technological wonders—climate control and sonic booms. The few cases which have already been decided are placed in context with the larger and yet unanswered questions.

Chapter seven compares the development of the right of privacy and the attendant tort liability for invasions of the right with the more recent development of a right of publicity and the commercial exploitation of the names of famous people. The case used to illustrate the problem is *O'Brien v. Pabst Sales Co.*,⁵ a fascinating litigation involving the unconsented use of a strict teetotaler football star's picture on a beer company calendar. A number of other equally interesting cases are reviewed and placed in context.

Chapter eight, "The Modern Judgment of Solomon," is concerned with the tremendous legal problems caused by attempting to reconcile the established concepts of family law and distribution of property with the growing use of artificial insemination. The authors use American, Canadian and English cases to illustrate the widely divergent solutions that judges and lawyers have so far offered.

The ninth chapter, "Shifting Boundaries of Freedom," is, I think, the least satisfactory in the book. The authors have tried to coalesce three different problems into an amalgam showing how law accommodates individual eccentricities and societal needs. Unfortunately, the three problems do not hold together very well. The problems caused by chemical pesticides, flood plain legislation, and aesthetic zoning could have each been the subject of a separate chapter.

The final chapter deals with the use of scientific devices to ascertain truth in judicial proceedings. In addition to the often considered status of polygraph results as competent evidence, the authors discuss the related problems of "truth serum," blood alcohol tests and hypnotism. At the end of this chapter, the authors make a point that lawyers often overlook:

The unsung hero of the lawsuits is the determined litigant, the stubborn, outraged, patient, perhaps greedy fellow who goes all out for his rights and defends yours and mine

⁵ 124 F.2d 167 (5th Cir. 1941), cert. denied 315 U.S. 823 (1942).

in the process. Aviation would not be the servant of progress it has become without the chicken farmer Causby. How could Cardozo have made his revolution if Mr. MacPherson had been willing to let Buick tell him, "Let the buyer beware"? Surely, win, lose or draw, Dr. Stover and Ben Hogan, the rancher Rounsaville and the resort owner Slutsky, E. F. Peterson et al. and Electrical Union have fought the battle of freedom for each of us. I would like to see the Bench and the Bar lead us in a standing ovation to all of them.⁶

As I've indicated before, this book should be worth while for lawyers as well as laymen because the problems are stated accurately and the legal issues handled in a very competent fashion. Morris L. Ernst's contributions are unfortunately rather minimal, taking the form of letters to David Loth at the end of each chapter.⁷

My one objection to the book, which does not at all detract from its readability, is that the lay reader may get the erroneous impression that the law (and especially the common law) is the only institution in society that can handle the types of problems presented. Law is only one facet of human existence and societal experience and although Americans rush to the law like jackals to the carcass other institutions may be just as, if not more, capable of solving the problem of individuality in an age of galloping technology.

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⁶ P. 271.

⁷ Although the greatest portion of the book is written by David Loth, a layman, it is extremely well written. The only description of Mr. Loth offered by the publisher is that he has written many books, is a teacher, and lives in Nyack, New York. For many years I have had a well-written book by a David Loth in my library — "The Brownings: A Victorian Idyll" (N.Y., Tudor Press, 1929). I assume the same Mr. Loth authored both books.

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