

Michigan Law Review

Volume 1 | Issue 4

1903

Recent Legal Literature

Harry B. Hutchins

University of Michigan Law School

Robert E. Bunker

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Harry B. Hutchins & Robert E. Bunker, *Recent Legal Literature*, 1 MICH. L. REV. 339 (1903).

Available at: <https://repository.law.umich.edu/mlr/vol1/iss4/5>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

RECENT LEGAL LITERATURE

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY. By Emory Washburn, formerly Professor of Law in Harvard University. Sixth Edition, revised and edited by John Wurts, Professor of the Law of Real Property in the Yale Law School. In three volumes. Little, Brown & Co., Boston, 1902.

The modern changes in industrial and business methods and the opening of new avenues of activity, so characteristic of our times, are necessarily having an influence upon the law. Not that the new in our jurisprudence is supplanting the old to any considerable extent, so far as fundamental principles are concerned, or that the old precedents are no longer regarded; but our new and extending commercial relations, and particularly our new ways of doing things, are bringing continually before the courts for adjustment situations that are novel and that demand an original application of principles. The new application of established doctrines to changed and changing conditions is now so frequent that the practitioner must always be on the alert for the latest expression of judicial opinion upon the subject that he has in hand. Under ordinary conditions, an occasional restatement of the law in the form of treatises and encyclopedias has been demanded, but under the present conditions of rapid change and development, a frequent restatement has become a necessity. Usually such restatements serve the profession best, if in the form of an original work, for by the recasting of the subject and a discussion of it from the modern point of view, the present application of the principles can, as a rule, be more clearly and logically shown than by editorial changes and additions. And yet, in some departments of the law, where the effects of present activity and development have been less marked, and where we have treatises of acknowledged merit that have attained the rank of authorities, the careful editor who, by modernizing the text and by judicious annotations, makes the book a working tool for the lawyer and student of to-day, serves the profession perhaps quite as well as he would by the more ambitious work of authorship. Certainly Professor Wurts is to be congratulated upon having made an edition of a well-known treatise that is superior in many respects to any of the former editions, and that in the main will serve well the purpose for which it was intended.

Since 1860, when the first volume appeared, Mr. Washburn's work on Real Property has been regarded as the standard American treatise upon the subject. It supplied a real need, and was at once recognized as accurate and comprehensive. The work has a place in every well selected law library, is taken as the basis for instruction in the subject in many of our law schools, and has served as a pattern and guide to subsequent authors. Its frequent

citation in the opinions of courts of last resort is perhaps the best testimonial to its merits. But the original work was defective in some important particulars, as is the present edition. The defect was and is due, however, more to the nature of the subject than to any lack of ability or care in author or editor. To attempt, within the limits of two or three volumes, a work upon real property that discusses the entire law of the subject, as it exists and is applied in the different states, would be a discouraging and probably an unprofitable task. While the fundamental principles are the same in every part of the country, the statutory changes in the different states have been so many and so varied in character, that any extended consideration of them in a general work of limited extent is liable to be misleading and confusing. The strength of the treatise in its original and in its present form, is found in its analysis and consideration of the general doctrines of the law of real property; its weakness, in the attempt to give a comprehensive notion of statutory changes and additions in the different states. The disappointment of the reader in endeavoring to ascertain from the work what the statutory modifications have been in any particular state, is increased by the fact that in some cases the latest revision or compilation is not cited. For example, Howell's Statutes are cited in referring to statutory provisions in Michigan, instead of the Compiled Laws of 1897, the compilation now in general use. So, also, in Kansas, Minnesota and Oregon, there are later authorized compilations than the ones cited.

The present edition of the work, notwithstanding some defects, is distinctly meritorious. Many changes have been made in the text, particularly in that of the first volume, and, as a rule, these changes will commend themselves to the reader as improvements. Ambiguous passages have been made clear, redundances pruned, mistakes corrected, and paragraphs of merit added. In one case, at least, an entire chapter, that upon homestead rights, has been rewritten, and in the process so reduced in extent that it occupies only about one-third of the space given to the subject in the fifth edition. While the chapter in its present form contains a reasonably comprehensive outline of the subject, and is, perhaps, sufficiently thorough in its treatment for the purposes of the law student, it will not probably prove to be of very much aid to the practitioner, as it is in no respect exhaustive. Monographic notes upon the subject in some of the series of collected cases are of greater practical value. In some instances the statement of a proposition is so made that it fails to take into account qualifying conditions, and therefore is liable to mislead. For example, in § 545 it is said that "mere intention to make a home * * * is not enough to impress the homestead character. The use as a home must coexist with the intention that it shall be a home." This is sound as a general proposition, and is sustained by the early cases that are cited in the note, among them being the case of *Coolidge v. Wells*, 20 Mich. 79, but it has been modified in subsequent cases in Michigan and in other states to which no reference is made. Thus in *Reske v. Reske*, 51 Mich. 541 it was held that a lot purchased by a man in contemplation of marriage, and with the intention of making it a homestead was exempt even before any dwelling was erected thereon, it appearing that the lot had been enclosed, improved, and used by the man and his wife after their marriage with the purpose of making it their home as soon as their means

would admit of their erecting a dwelling-house. In the subsequent case of *Deville v. Widoe*, 64 Mich. 593, this court held that "a city lot purchased with the intention of making it a homestead for the purchaser and his family will be exempt from levy and sale on execution from the time of purchase, even though unimproved and without a dwelling thereon, if the purchaser encloses it and uses and occupies it with the constant purpose of making it his home, and uses the proceeds thereof, and such means as he can procure, within a reasonable time, to erect a house thereon for his family, provided it does not exceed in quantity and value the constitutional limit." In *Mills v. Hobbs*, 76 Mich. 122, the court held that; "present intention of occupancy as a homestead, with present action to carry the intention into effect, constitutes a homestead in law." *Josman v. Rice*, 121 Mich. 270; *Mason v. Horton*, 67 Vt. 266, 48 Am. St. Rep. 817; *Cameron v. Gebhard*, 85 Tex. 610, and *Scofield v. Hopkins*, 61 Wis. 370, are also cases that qualify the doctrine of the text. While these cases do not abrogate the general doctrine stated in the section to which reference is made, yet they modify it in an important particular, and might be of great value to the practitioner. A somewhat careful reading of this chapter has led the writer to the conclusion that possibly too much has been sacrificed to brevity of treatment.

In his preface the editor states that "in citing authorities, great care has been used to include all the important decisions made since the last edition to the work, which are in point." Many additional cases are given, but the work in this direction, although fairly thorough, is not so exhaustive as one would perhaps expect after reading the prefatory note. The text in most cases is amply sustained by authority, but for a thorough examination of some of the subjects, the investigator would have to go outside the notes for many important recent cases.

It is to be regretted that the editor did not see fit to include a chapter on the so-called Torrens System. It has come to be a subject of so much importance that it would seem to be worthy of notice in a general work on real property.

In appearance this edition is all that the most critical could ask. The placing of words in heavy type at the beginning of each paragraph that suggest the subject of it, is a change that will be appreciated by the reader. It is perhaps a mistake that the original paging was not preserved for convenience in reference. Taken as a whole, the edition is a credit both to the editor and the publishers.

H. B. HUTCHINS

A TREATISE ON GUARANTY INSURANCE; Including therein as Subsidiary Branches the law of Fidelity, Commercial and Judicial Insurance. Covering all Forms of Compensated Suretyship, such as Official and Private Fidelity Bonds, Building Bonds, Credit Bonds, Credit and Title Insurances. By Thomas Gold Frost, Ph. D. Boston: Little, Brown & Co.

Guaranty insurance has become an important factor in business within the past few years. As a specific subject, it is a comparatively recent claimant for judicial consideration. In origin and aims, it is suretyship for hire, or, as the author of this treatise terms it, compensated suretyship. The rules and prin-

ciples of the subject have been undergoing development in the courts for the past twelve or fifteen years. The result of that development, the author of this treatise undertakes to state in a volume of something over five hundred pages, well arranged, excellently printed and carefully indexed.

The law of guaranty insurance is yet unsettled. This fact, alone, not to mention the present and prospective importance of the subject growing out of the constant and increasing demand for security in public and private undertakings which may be purchased as a commodity and not begged as a favor, insures a hearty welcome, from lawyers, judges, business men and fiduciaries, of such a work as Mr. Frost has prepared.

The work before us exhibits some evidence of hasty preparation and carelessness of expression. There is some evidence, too, of extreme views and unwarranted conclusions.

The author dwells with particular emphasis upon the point that guaranty insurance is indemnity, not guaranty, that the contract is a contract of insurance, not a contract of suretyship, and is to be construed and enforced accordingly.

Another point which the author affirms with equal emphasis is that the contract, being a contract of insurance and not a contract of suretyship, is not within the Statute of Frauds. In another place (Sec. 136) he points out that "*contract insurance*," which according to his classification is a division of guaranty insurance, is suretyship pure and simple, and that the courts so far have shown no disposition to treat it otherwise. The lack of harmony in the decisions to which the author refers, is attributable no doubt, to the difference in the contracts under consideration at the time. When the contract is an insurance policy in form, it is so in effect; when it is a guaranty or indemnity bond in form it is so in effect. It is not apparent why the contract of a corporation assuming the obligations of suretyship should be construed differently from the contract of an individual assuming identical obligations, or why the contract of one is not within the Statute of Frauds, but the contract of the other is within it. Nor do we understand that any such distinction exists, even though the one is compensated suretyship and the other gratuitous. *United States v. Nat'l Surety Co.*, 92 Fed. R. 549.

In stating what is peculiar to Guaranty Insurance, the author discusses, by way of comparison, many principles of law which are elementary, and which are fully and finally settled. In this particular his text is padded with matter irrelevant to the precise subject under discussion. Such matter might have been eliminated without detriment to the work.

The work as a whole will be an efficient aid to those who have occasion to make a thorough investigation of the subject of Guaranty Insurance and its subsidiary branches.

ROB'T E. BUNKER