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Recent Legal Literature

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THE RULE AGAINST PERPETUITIES. By John C. Gray, Royal Professor of Law In Harvard University. Second Edition. Boston: Little, Brown, & Company, 1906. One Vol., pp. xlvii, 664.

The belated reviewer speaks with some diffidence in reviewing this book, for several reasons: the scholarship and acumen of the author are so well known to our readers that nothing we could say would add to his fame or detract from his repute; the book being reviewed has been known to the profession twenty years in the first edition and a year in the second, is everywhere recognized as a work of the highest order, and all of our readers are no doubt acquainted with it by use or report.

The principal changes in this edition from the first are in the addition of appendixes: E, on Determinable Fees; F, on Future Interests in Personal Property; G, on General and Particular Intent in Connection with the Rule against Perpetuities; H, on Gifts to Indefinite Persons for Non-Charitable Purposes; I, Conversion and the Rule against Perpetuities; and occasional paragraphs and citations throughout the text concerning late cases or interesting old cases found since publication of the first edition. The added appendixes are substantially reprints of articles contributed by Professor Gray to, and printed in, the Harvard Law Review or the Law Quarterly Review since the first edition was published; and these cover sixty pages of this edition.

In style this book differs radically from the ordinary text-book, whether written for the student or lawyer. It is neither an attempt to state the law in an elementary and simple form for easy comprehension by the student, nor is it an encyclopedic collection and digest of the adjudicated cases on the various phases of the subject as a ready reference manual for the lawyer. One seeking to learn the law on any point concerning perpetuities, or to know Professor Gray's opinion on it, and expecting to find it, at any one place in this book, is liable to be disappointed. To find any dependable answer he must generally read and draw conclusions from a whole chapter or more. The author's purpose is not to make a dogmatic statement of the law, accompanied by citation of the decisions which support his contentions, but rather to trace the law in its history and development, drawing especial attention to what has been said and decided, tending for or against his position. It goes without saying that no judge or court, no matter how learned, can be supposed to know so much about a subject as the stuudent who has made a minute and detailed study of it in all its history and from every point of view; and especially is this true of so abstruse and difficult a subject as this. Such a person we find in Professor Gray; and the profession is fortunate indeed that he has proceeded to state the law as he sees it, nothing daunted though all the courts and all the text-writers are arrayed on the other side. It may, and often does, happen that the lawyer, who studies the law with the facts of a particular case in mind, sees points and arguments that no student, without this peculiar point of view and incentive, would

discover; and it is not claimed that the student's thesis is more help to the court than the lawyer's brief, except that it is disinterested, even if prejudiced. But, aside from all question of comparative worth, this argument of the student or jurist is an additional and distinct contribution, with an individual and superior point of view; and herein lies its especial value to both court and counsel.

We are compelled to admire a striking example of our author's assurance and independence, found in his argument that a possibility of reverter is impossible. He took this position in the first edition, and the authorities were reviewed, showing a long array against him in England and America from the earliest times to the present, and only the dictum of one English judge in 1601, A. D., some doubtful inferences from a few modern English decisions, and one English text-writer to support him. When the first edition appeared, two eminent English authorities on real property law, Mr. Challis and Mr. Elphinstone, wrote magazine articles to refute him; and the courts have continued since to hold as they always had before. In the present edition, Professor Gray reasserts and further fortifies his original position without the least concession, answers his critics by showing that they are not consistent with each other, and reviews the decisions since the first edition to the present.

On this point his position can best be stated in his own language in §31, (3.) as follows: *"Possibilities of Reverter.*—These rights, as their name implies, were reversionary rights; but a reversionary right implies tenure, and the Statute *Quia Emptores* put an end to tenure between the foeffor of an estate in fee simple and the feoffee. Therefore, since the statute, there can be no possibility of reverter remaining in the feoffor upon the conveyance of a fee; or, in other words, since the statute, there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid. The distinction between a right of entry for condition broken and a possibility of reverter is this: after the statute, a foeffor, by the feoffment, substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the determination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest,—a returning of the land to the lord of whom it was held, because the tenant's estate had determined."

The terminology used in the above paragraph to point out the distinction is unfortunate. To call the right (of one who has granted subject to a condition subsequent) a right of entry for condition broken, is a misnomer, for no condition has yet been broken; and to contrast it with a possibility of reverter, is an innovation on accepted usage without notice. Courts and text-writers have always spoken of this prospective right of entry as a possibility of reverter, quite as often as they have used the term in speaking of the right of the grantor of a determinable fee; and Mr. Challis says: "Of

such possibilities there are several kinds; of which two are usually denoted by the term now under consideration: (1) the possibility that a common law fee may return to the grantor by a breach of a condition subject to which it was granted, and (2) the possibility that a common law fee, other than a fee simple, may revert to the grantor by the natural determination of the fee." CHALLIS, REAL PROPERTY, *63.

As to the merits of the argument, we think our author has his English critics considerably at disadvantage, because they are quite easily inclined to admit the correctness of his position that reversionary rights are incidents of tenure, and cannot exist without it; and on this hypothesis is built the whole superstructure of his argument. But in this country, where tenures are quite generally abolished and reversionary rights continue, some find it more difficult to accept his premises, and therefore think his conclusion does not follow. "The doctrine of reversions is said by Sir William Blackstone to have been plainly derived from the feudal constitution. It would have been more correct to have said that some of the incidents attached to a reversion were of feudal growth, such as fealty and the varying rule of descent between the cases of a reversion arising out of the original estate and one limited by the grant of a third person. Reversion, in the general sense, as being a return of the estate to the original owner, after the limited estate carved out of it had determined, must be familiar to the laws of all nations, who have admitted of private property in land." 4 KENT, COMMENTARIES, *353-4. Whether the land returns to the grantor by entry for breach of condition subsequent or by the expiration of a determinable fee, he is equally in of his former estate; and this has always been the understanding of all courts and law-writers, both English and American. The grantor retains in himself whatever he does not pass to his grantee; and it would seem that a possibility of reverter after a determinable fee could not be more obnoxious to the rule against perpetuities than a possibility of reverter reserved to have effect if a condition subsequent named in the grant is broken.

Further on, Professor Gray asserts that neither possibilities of reverter after determinable fees nor on condition subsequent should be sustained if they might come into operation later than the time allowed by the rule against perpetuities, arguing that although the persons owning the right could release it at any time, it is often very difficult to find all the many heirs that may exist after a few generations in a country where primogenature does not exist but lands descend to all issue equally. (§ 304) The same difficulty is experienced where the heirs have the title absolute and where mineral or other rights are reserved, as to which no one claims that the rule against perpetuities could operate. J. R. R.

SUPPLEMENT TO SNYDER'S INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS. By William L. Snyder. New York: Baker, Voorhis and Company, 1906, pp. xl, 178.

In July, 1904, Mr. Snyder, a member of the New York bar, published a work upon various federal acts pertaining to interstate commerce. (Reviewed in 3 MICHIGAN LAW REVIEW, p. 683.) Since that time a large number of judi-

cial decisions have been rendered, and these, together with the legislation of the Fifty-Ninth Congress, first session, have called forth the present supplementary volume. The scope of the work may be briefly indicated. In the Introduction the recent legislation bearing upon interstate commerce is reviewed, the description of its principal features being accompanied by occasional observations and explanations of considerable interest. Aside from the Introduction, about two-fifths of the book is devoted to the texts of the Amended Interstate Commerce Act, the Employers' Liability Act, the Pure Food and Meat Inspection Acts, and the Jewelers' Liability Act. The reprint of the Interstate Commerce Act has one advantage over other copies of the law, in that the typographical arrangement is such that the new provisions and the amendments may be readily detected. The balance of the book consists of brief notes of cases, involving questions of interstate commerce, decided by the federal courts between July, 1904, and August, 1906. The leading principles laid down in each case are given, and now and then some comment is offered, but the fragmentary and somewhat superficial character of this comment is a disappointment. Generally speaking, although the principles themselves are well stated, there is but little effort made to determine their place in the body of the law, or to estimate their significance in the historical development of the law of interstate commerce. Nevertheless the book will doubtless prove of value as an occasional work of reference for the practicing lawyer, and also for the student of those economic problems which are concerned with interstate commerce. H. S. S.

REPORT OF THE COMMITTEE APPOINTED AT THE CONFERENCE OF COUNSEL FOR RAILROAD COMPANIES IN LOUISVILLE, KENTUCKY, SEPTEMBER 26-27, 1906; on the Questions Arising Under the Act of Congress Known as the Employers' Liability Act, approved June 11, 1906. With appendices containing reports of the cases of *N. C. Brooks, Administratrix* v. *The Southern Pacific Company* and *Damselle Howard, Administratrix* v. *Illinois Central Railroad Company et al.;* and the text of the Employers' Liability Act. By Henry L. Stone, Chairman of the Committee and General Counsel, Louisville & Nashville R. R. Co.; George F. Brownell, Vice President and General Solicitor, Erie R. R. Co.; Robert J. Carey, General Counsel, Chicago, Indiana & Southern R. R. Co.; Alex. G. Cochran, Vice President and General Solicitor, Missouri Pacific Ry. Co., and St. Louis, Iron Mountain & Southern Ry. Co.; J. M. Dickinson, General Counsel, Illinois Central R. R. Co.; James P. Helm, General Counsel, Louisville, Henderson & St. Louis Ry. Co., and Alex. P. Humphrey, General Counsel, Southern Ry. Co., pp. 152.

This publication is interesting, and in several particulars quite unique. On the whole, the attitude of the railroads toward legislation affecting their duties and liabilities has been one of hostility, and usually there has been both an attempt in advance to prevent the passage of the legislation and an active contest in the courts afterward to have it declared unconstitutional, if pos-

sible, and, if not, then to restrict, as far as possible, its interpretation and operation. The railroads are not peculiar in this attitude, as witness the opposition of insurance corporations to legislation that has afterward been advertised by them as an element of their strength, but there can be little doubt that in many instances it has cost the railroads in money far more than has been gained by the contest. Of even greater consequence to the railroads is the fact that this spirit of opposition to every attempt to improve conditions regarded by the public as undesirable has been a large, if not controlling factor, in arousing in the public mind a feeling of perpetual irritation with the railroads that leads the public often to refuse to be just to railroad interests, and engenders an unreasoning opposition to railroad corporations on any and all questions of dispute. Signs are many that those in charge of railroad corporations are beginning to feel the desirability of a sympathetic public sentiment, and indeed the necessity of it to prevent legislation that shall not stop at proper restrictions, but shall seriously and unjustly encroach upon the equitable rights of those who have invested in railroads. Many of the foremost railroad men of the day have taken the trouble to give carefully prepared interviews to the public press and to prepare leading articles for the magazines, while from railroad sources a great amount of matter has been furnished that appears in the papers as though it were ordinary news, all to the end that the public may see things from the railroad point of view, and may be made to understand how closely general prosperity is linked with railroad prosperity.

The present publication is the result of a conference that was called with at least some purpose to take note of this information and education of the public. The Employers' Liability Act of Congress had in important particulars changed the nature of the responsibility of railroads to their employes. The railroads, instead of an individual resistance on the part of each road, or of any unconsidered resistance at all, decided upon a conference of their legal experts to determine what was the wisest course to pursue. This conference was held at Louisville, Kentucky, in September of last year. A committee was appointed to consider the matter with care, and report. This report in book form is now distributed to do its educational work. It is not an unbiased report, prepared in a judicial spirit, but rather a defendant's brief, very able, eminently fair in its attitude to the plaintiff's case, but nevertheless finding the law against him on every point, and seeking how, if any contentions against the validity of the law prove unavailing, to limit its application as far as possible.

The limits of this review forbid a discussion of the questions raised in the report. Its attitude is one of complete hostility to that construction of the Federal Constitution that would broaden its application so as to make it cover matters that clearly were not in the minds of the framers of the Constitution, for the very good reason that there were no such matters then in existence. Railroad development, of course, was unthought of in the Constitutional Convention, and many of its problems in the United States of today require treatment that could scarcely have been dreamed about by the most far-sighted of those famous representatives of the loosely connected Thirteen

Colonies of 1787. Manifestly the Constitution struck off by the brain of that great assemblage must either be amended, or stretched to meet the problems of today. That it has in the past often been stretched, where remedy by amendment seemed improbable or impossible, does not admit of a doubt. The framers of this report oppose at every point the stretching of the Constitution in matters affected by the Employers' Liability Act of 1906. Their finding, therefore, is against the constitutionality of the act at every point of trial. They find it is unconstitutional as applicable to employes engaged in intrastate as well as interstate commerce, and also to employes not engaged in commerce at all. The power the Constitution gives to Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes," it is contended, is not broad enough to cover the case of any employes not engaged in interstate commerce. Nor is the act constitutional as applying to those engaged in interstate commerce. The matters mentioned in the act have to do with the relation between master and servant; the consequences of negligence of the master; the effect of negligence on the part of the servant; the fellow servant rule; the right of a personal representative to recover; and the limits of such recovery and the method of its distribution. These, says the report, are not, any of them, or all of them, regulations of commerce at all, and many decisions of the Supreme Court on a great variety of subjects are discussed to establish the position. If this be sound interpretation, then, of course, the meat inspection law and pure food law already passed, and the child labor law now before Congress, are equally unconstitutional, and there can be no national regulation of these things; that most certainly are of national concern, and that in the opinion of many can be effectively dealt with by national action alone; except by an amendment to the Constitution. The very great difficulty attending efforts to secure such amendment is seen in the fact that since the first amendments, which were really part of the Constitution itself, the Constitution has been changed by amendment but twice in one hundred and twenty years. It is this fact, no doubt, that has caused the present tendency to stretch rather than to amend.

It is further urged by the Report that even though an act regulating liability to employes engaged in interstate commerce be held constitutional, yet this act must fail because the cases of intrastate and interstate employes are so covered by the act as to make it impossible to separate them so as to make the act constitutional in part and void in part; it is therefore entirely void. Furthermore, it is opposed to the fifth amendment as being class legislation, imposing a liability upon railroads not imposed upon other persons or corporations similarly situated.

Part II treats of the construction of the act, granting it to be valid, as changing the doctrine of contributory negligence, the assessment of the damages and the province of the jury as defined in the act. Part III of the Report attacks the validity of section 3 of the Act; Part IV deals with the question of jurisdiction; Part V with procedure; Part VI with limitation of actions, and Part VII with appeal and error. Appendix A contains abstracts of cases under the act, tried in the United States Circuit Court, one in the Western District of Kentucky, opinion by DISTRICT JUDGE EVANS, December

31, 1906; the other in the Western District of Tennessee, Western Division, opinion by DISTRICT JUDGE MCCALL, January 1, 1907. Appendix B contains the text of the Act itself.

The Report is a valuable contribution to the subject, and seems to make clear that if the courts adopt the same view of the questions involved, then there is a great field of interstate matters of vast importance to the public and to an army of employes that is beyond legislative control. Control by the individual States will never be uniform enough to be effective, and control by Congress, if this view prevails, will be unconstitutional unless the Constitution can be amended. This is one of the intensely interesting questions of the hour, and its decisions by the court of last resort will be awaited with great interest. F. C. G.

DIE KAISERLICHEN VERWALTUNGSBEAMTEN BIS AUF DIOCLETIAN. Von Otto Hirschfeld. Zweite Neugearbeitete Auflage. Berlin: Weidmansche Buchhandlung, 1905, pp. X. 514, Preis 12 M.

Almost a generation ago the author's "Studies in the Field of Roman Administrative History" was published. The present volume is a new edition of this work. The author tells us in his preface to this second edition that the materials on taxation and provincial administration, which according to his original design he had planned to put in a second part, he has now included in the one volume, and therefore the title of the work as originally planned has been dropped and his former subtitle, "The Imperial Administrative Officers," is used as indicative of the entire scope of the book now presented. The older edition has, however, been recast and in part rewritten, and the new shows a marked gain in quantity, nearly two hundred pages being added to the slightly over three hundred of the old edition.

Although our historians of the new school keep insisting that history can not repeat itself, nevertheless one can not help noting some striking parallelisms between our own national experience and that of the people of the classical world who, like us, possessed a genius for practical governmental affairs. The Roman Republic has always been held up to us as a model or as a horrible example in our constitutional life, but we have not perhaps realized that Imperial Rome has for us an even greater significance at the present time, when we seem to be entering upon a career as a republican empire, charged, whether we will or not, with the control of peoples who have yet to acquire the capacity for government, which seems to have come, in the highest measure, only to the Anglo-Saxon peoples in the modern world, as it did to the Romans in the ancient world.

The painstaking work of German scholars with inscriptional material seems likely to fill with fair adequacy the gap in our literary sources for the second half of the third century of the empire, and such a book as Hirschfeld's, which sums up the results of the work of the last half century in this field, is certainly an inspiration to the patient workers by whose efforts so complete a picture is given us of the working out of a problem of governmental policy, on the same broad lines as those along which our own administrators must move, in the prosecution of the task that is now presented to them.

The following volume, prepared by Professor Rood, has recently been published:

A DIGEST OF IMPORTANT CASES ON THE LAW OF CRIMES, compiled, edited and arranged for the use of law students. By John R. Rood, Professor of Law in the University of Michigan. Ann Arbor: George Wahr, 1906. pp. XII, 623.