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## Leach: Property Law Indicted

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## RECENT BOOKS

### BOOK REVIEWS

PROPERTY LAW INDICTED. By *W. Barton Leach*. Lawrence: The University of Kansas Press. 1967. Pp. 92. \$2.25.

That the institution of property is a collection of irrelevant antiquities is an old refrain among "nonproperty" critics. The arresting title of this book may set such mouths to watering. On the other hand, when a distinguished property scholar proclaims such a thesis, the faithful may be led to fear the worst. These hopes and fears may not prove to be justified. No one has seriously proposed to scrap the traditional system or offer a substitute. Neither does Barton Leach. Nor is there any reference here to the growing awareness of the emergence of new kinds of property or of new or neglected needs, to which the traditional property structure may be irrelevant. Rather, the author stands within the system and lays about him with both broad sword and rapier against a variety of functional deficiencies.

This volume, consisting of less than one hundred pages, is the published report of several lectures in the Stephens Lecture Series at the University of Kansas. The lecturer treated this as an occasion, not for a systematic analysis of a basic legal institution, but for a call to arms. Ever since Professor Leach turned the world of perpetuity specialists upside down with his pleas for reform, he has been playing the role of prophet of law reform. The Leachian style is well suited to such a role. Witty, anecdotal, informal, with a light and airy touch, his points are best made by his flair for hidden notes of human interest and color which can invest the pedestrian records of much legal business with an aspect of the ridiculous. In addition, we are treated again to some of those impudent verses, written by his former students, with which he has felt impelled to decorate so much that he has written.

The obstacles to property law reform are cited as the influence of Blackstone *et al.*, the Restatement of Property (for not including the "ought" with the "is"), and the "retrospectivity bugaboo." The last of these is regarded simply as an obstacle to a primary duty in courts to overrule bad case law, which would be facilitated by resorting in property cases to the new expedient of "prospective-overruling only."

I find the extended plea for a judicial duty to overrule a little surprising, not because such a duty is really subject to challenge, but because I had supposed that it was now fully embraced. The balance between the need for an adaptable law on the one hand and the reliability of accepted practices on the other is always a challenge

to the statesmanship of judges, especially in this field. But I had supposed that in our time we had been freed of any slavish devotion to precedent, even in the law of property. Apparently the author is concerned about some specific areas where the duty to move ahead has not yet been perceived or conceded and which may not easily commend themselves to the attention of legislatures.

Nor am I sure about the depressing effect of the ghost of Blackstone and his American disciple, Chancellor Kent. The effect, if any, is indirect, for it surely has been a long time since anybody has bothered to read a word of either. The doctrine that property law is a fine, artificial, tightly-knit structure, the integrity of which must be preserved above all else, may have been orthodoxy in Blackstone's time, and for reasons peculiar to that time, but it was not the mood of those who so ingeniously evolved the historic structure of estates in a sensitive response to the needs of their time. Nor, I am persuaded, is it the basic mood of our time. One can cite as many instances where property doctrine has been adapted, distorted, or ignored in response to current pressures as Professor Leach cites to the contrary. The effect of such expediencies has not always been salutary. As many instances can be cited of the deterioration as of the stagnation of doctrine. It is also obvious that a large part of the American law of property stands almost wholly outside the inherited system, and is even now being evolved or enacted with such unfettered ingenuity and wisdom as our modern lawmakers have been able to muster. Such, for example, are the still fluid efforts to apportion or regulate the use of land, as distinct from the forms or transmission of ownership. Nor is it discreditable that so much of the old structure remains. It remains because it was ingeniously evolved into a system of such comprehensiveness and flexibility that it can be made to serve the very different needs of our time. It remains, in other words, because it is essentially organic and functional. The author inveighs against those who have failed to perceive this and who have become doctrinaire in their use of doctrine. The quest for certainty and for simple or at least predictable answers to complex problems is a phenomenon which appears in every age, and has profound psychological or emotional sources. "The Medes-and-Persians syndrome" is an appropriate Leachian label. Maybe Blackstone's sin lies in his having invested it with an aura of doctrinal respectability. But the phenomenon will persist when all the sayings of Blackstone and company have been wholly forgotten.

It may also be true that Professor Leach's zeal to cut loose or move ahead may have led him to positions which for reputable reasons may be regarded as untenable by many of his brethren who will otherwise embrace his basic thesis. His specific proposals for reform, therefore, deserve our primary attention. Among a variety of specific

points of attack, such as the worthier title doctrine, the evasion of marital property rights, the inadequacy of anti-lapse statutes, and the misuse of rules of construction, all of which lie within the area of family gift transactions, I would identify three main problems which draw the author's fire, all but one of which lie within this same area.

The first seems to be derived from the distressing misuse by draftsmen of the arsenal of dispositive devices: tools which were designed to produce flexible property arrangements are improperly utilized or ignored in schemes of rigid dead-hand control. The most obvious solution to this problem is more enlightened and proficient draftsmanship. But the author is impatient with courts which are unwilling to sever or loosen these tentacles of the dead. He goes so far as to suggest a general enlargement of the narrow powers of courts to reform dispositive provisions *cy pres*, not merely where they have foundered, but also where, under changed circumstances, they may have become harsh, inequitable, or capricious. And if courts are unwilling to assume such responsibility, he would somehow confer it by statute, thereby putting to rest, once and for all, the old saw that a "court has no power to make a new will for the testator."

Such a proposal may seem extravagant and may appear to cut us loose from all moorings. I am not so shocked as others may be, however, for once I publicly asserted something similar. Yet I did not go so far but only mentioned existing signs in legislation and adjudication that we were moving in that direction. Maybe the trend can and should be accelerated. Maybe the best way to proceed is to focus on certain specific manifestations of the problem. Maybe, for example, considerable enlargement of the courts' existing power to authorize deviations from the terms of a trust is in order. But on what basis do we get courts to do this, or how does one frame general legislation to enlarge in significant but discriminating ways the scope of existing judicial discretion? We still must proceed with more subtlety than to proclaim the proposition that courts should be empowered generally to decide what disposition of a man's estate is for the best interests of his intended beneficiaries, the proper objects of his bounty, or the community.

The scandal of American title law and practice next draws the author's fire. This scandal lies not in the fact that private companies have risen massively to indemnify buyers of land against the risks to which they are subject, nor even in the fact that bar groups are now getting on the title insurance bandwagon. Rather, it lies in the fact that the risks insured against, for a price, are themselves the creatures of the law, the primary purpose of which should have been to render land transactions simple, expeditious, and safe. This is an enormous and complicated problem, and the author cannot do it

full justice in the setting of the present book. He does propose an attractively simple expedient which combines an easily-administered scheme of title registration with a statute of limitation to bar all claims antedating the registration. Title registration is an old story, and the proposed variant is not original with the author, nor does he claim that it is. Any such system, to be effective, must be made compulsory, and it was the constitutional obstacles to that feature which blocked the efforts over a half-century ago to move in this direction. Despite the more enlightened views which have since emerged concerning the constitutional safeguards of property rights, and despite the fact that the present proposal might seem to avoid the old constitutional objections, there are recent signs that we still have cause for concern in this regard. Apart from this, the proposal may be too late. There are now at stake powerful interests other than those of title law practitioners.

Finally, and inevitably, we come to perpetuities. Here the lecturer suggested that his hearers might steal silently away, for he was about to tell an old story. But the reader would be better advised to read on through these few pages, not merely because they come from the high priest of perpetuity reformers, but because they comprise an excellent capsule summary of the case for perpetuity reform and of the history of specific perpetuity law amendments. There is still no real sentiment for eliminating the formidable obstacle to dead-hand control of family wealth known as the rule against perpetuities. The purpose of all the amendments is to mitigate its harshness. A number of the more specific proposals have not proved controversial. Apart from these, however, there has been much disagreement. The opposition cannot fairly be attributed to Blackstonian dogmatism, but to reasonable doubts about the practicability of the proposals, as well as the belief that a perpetuity disaster can be avoided by any reasonably informed and competent draftsman. It is worth noting that, although the author's name has been identified with the controversial "wait-and-see doctrine," he here states his preference for the more simple expedient of authorizing courts to reform *cy pres* those dispositions which violate the rule.

Professor Leach has grown fond of citing Professor Bordwell's epithet that he (Leach) was "somewhat of a legal Billy Graham." The characterization requires interpretation. It surely cannot be construed to denote a preacher of any old-time religion. But if it means a latter-day prophet who is committed to calling all property sinners to repent, then our author may well wear the label, and not without honor.

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