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Book Review. The Law of Real Property, Vol. III by Richard R. Powell

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The author says that ¹⁹ "the decision that the liberties protected by the due process clause included those to be implied from the provisions of the First Amendment. . . was the most sweeping judicial extension of federal power over state action in the history of the republic." He also states that ²⁰ "It is within the possibilities that soon the Court will adopt the view of the present minority that due process is . . . shorthand for the text of the first eight amendments.

The book is a boon to the neophyte in constitutional law since it provides an authoritative, rapid survey of three highly important bodies of constitutional doctrine in excellent English prose. All citizens, and especially all students, should find it profitable.

*Roger Paul Peters**

THE LAW OF REAL PROPERTY. Vol. III. By Richard R. Powell.¹ Albany and New York City: Matthew Bender & Company, Inc., 1952. Pp. ix, 880. \$18.50. — It is a difficult assignment to review the third volume of a proposed five volume treatise on the law of real property, and it is even more difficult when one knows that the third volume contains only a portion (the latter chapters of subhead two through six of eight subheads) of the materials which comprise Part III of the projected five Parts. Part III, entitled "Permissible Interests in Land," according to the author represents roughly 40% of the treatise.² The materials covered in Volume Three include the closing chapters (dealing with some constructional problems) of the subhead dealing with future interests, and the subheads dealing with powers of appointment, easements, franchises and security interests.

That which is written in Volume Three must be considered in the light of the expressed purposes of the entire treatise. There is evidence of the same bitter conflict between Professor Powell, the objective scholar,³ and Professor Powell, the impatient evangelist,⁴ as has been

¹⁹ *Id.* at 73.

²⁰ *Id.* at 88.

* Professor of Law, University of Notre Dame.

¹ Dwight Professor of Law, Columbia University, and Reporter on Property for the American Law Institute.

² 1 POWELL, REAL PROPERTY 4 (1949).

³ *Id.* at 2. "The background, even of considerable remoteness in time, is essential to any real understanding of what today's rule really requires. Furthermore, statesmanship in the law of land requires perspective, a comprehension of the workings of the whole social organism, an awareness of the processes of evolution which are constantly at work in even the least regenerate of the fields of law."

⁴ *Id.* at 236. "Strict following of early English rules has made the jurisprudence of Illinois, in some particulars, distinctly anachronistic." And in the

evidenced in earlier parts of the treatise, and in certain areas of the *Restatement of the Law of Property*. The resolution of this conflict is not the suppression of the historical background and evolution, but rather the training of lawyers and the selection of judges whose scholarship will require them to reject any notion that rules of construction, devised to reach the results consistent with the facts of one period of time, should be crystallized into rules of law which are quite inappropriate to the needs of society, when applied in another period of time.

Professor Powell, with able advocacy, urges that old rules be not applied to modern situations (where the reason for the application of the rule has long since ceased to exist) in his chapters dealing with the constructional problems inherent in gifts over on death, or on death without issue, other miscellaneous construction problems, and class gifts. He relies heavily in these areas on the authority of the *Restatement of the Law of Property*, for which he was the Reporter and for which he synthesized the research of many persons which produced a work which was much more than a *restatement* of the law of property. He considers also the legal consequences of the interests of expectant distributees.

In his treatment of powers of appointment, Professor Powell, quite properly, deviates from his purpose as stated when the work on the treatise was beginning.⁵ Some time after June 28, 1951, Professor Powell realized that not even the most superficial coverage of the legal consequences of powers of appointment could be made without considering the impact of the Powers of Appointment Act of 1951.⁶ Consequently, he includes an adequate discussion of the effect of an act of federal tax legislation on the substantive law of powers.⁷ He recognizes that, for all practical purposes, this federal tax legislation has become a part of the substantive law of powers of appointment.

With the same meticulous care, Professor Powell considers the problems which arise from the recognized legal interests of easements, licenses and some franchises.

The latter chapters of Volume Three are concerned with security interests in real property. Professor Powell ably distinguishes between the voluntary security interests in the area where state policy permits

footnote keyed to this quotation it is stated: "This is particularly true with respect to the law of future interests, as to which Albert Kales' great knowledge of the early English law, helped the Supreme Court of Illinois to reincarnate much which has been elsewhere left decently interred."

⁵ Under Paragraph 4, Exclusions, *id.* at 3, Professor Powell observed, "Condemnation and *taxation* are topics which are logically within the field. Yet each of these topics is so large a field that a separate volume would be required for its proper treatment. These are fields for specialists." [Emphasis supplied.]

⁶ Pub. L. No. 58, 82d Cong., 1st Sess. (June 28, 1951).

⁷ 3 POWELL, REAL PROPERTY 328 *et seq.* (1952).

individuals to create such interests, the interests where the legislative policy of the state has defined the rights for the benefit of non-governmental creditors, and the governmental security interests (where the state, as such, has an interest).

Volume Three is only a segment of a treatise written by a great scholar of the law of real property, but a scholar, nevertheless, who is an equally great advocate for the policy decisions which he believes should be made. Volume Three is not only a pronouncement of what the law is, but also what it should be. Regardless of the ultimate decision of history, Volume Three is a part of an outstanding work, which will be one of the timeless monuments of American legal scholarship.

*Leon H. Wallace**

BOOKS RECEIVED

- ACCOUNTING FOR LAWYERS. By A. L. Shugerman. Indianapolis: The Bobbs-Merrill Company, Inc., 1952. Pp. viii, 592. \$15.00.
- *ADMINISTRATIVE AGENCIES AND THE COURTS. By Frank E. Cooper. Ann Arbor, Michigan: University of Michigan Press, 1951. Pp. xxv, 470. \$5.00.
- AMERICAN DIPLOMACY, 1900-1950. By George F. Kennan. Chicago: The University of Chicago Press, 1951. Pp. ix, 154. \$2.75.
- ARKANSAS LAWYER, THE. By Tom W. Campbell. Little Rock, Arkansas: Pioneer Publishing Company, 1952. Pp. iii, 552. \$5.50.
- *CHARLES EVANS HUGHES. By Merlo J. Pusey. Two Volumes. New York City: The Macmillan Company, 1951. Pp. xvi, vii, 829. \$15.00.
- CHURCH AND STATE IN THE UNITED STATES, CASES ON. Compiled by Mark De Wolfe Howe. Cambridge, Massachusetts: Harvard University Press, 1952. Pp. 393. \$6.00.
- *COURT AND THE CONSTITUTION, THE. By Owen J. Roberts. Cambridge, Massachusetts: Harvard University Press, 1951. Pp. 102. \$2.00.

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*Reviewed in this issue.