

1988

The Law of Easements and Licenses in Land

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Recommended Citation

Richard. H. Helmholz, "The Law of Easements and Licenses in Land," 41 Vanderbilt Law Review 1357 (1988).

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BOOK REVIEW

THE LAW OF EASEMENTS AND LICENSES IN LAND. By Jon W. Bruce† and James W. Ely, Jr.†† Boston, Massachusetts: Warren, Gorham & Lamont, 1988. Pp. xix, 457. \$84.00

*Reviewed by R. H. Helmholtz**

A distinguished commentator, Professor A.W.B. Simpson, recently observed that the legal treatise seems to be going the way of the dinosaur and the dodo bird.¹ To him, and indeed to other thoughtful observers,² the treatise's characteristic form appears to have outlived its natural span, or at least lost its reason for existence among serious academic writers. The treatise's focus on a particular and specialized area of the law and its inevitable concentration on the doctrinal analysis of appellate cases now appear quite out of date to these observers, something perhaps worthwhile in a simpler and more complacent era, but which one can no longer think profitable. In its place, stand other disciplines thought to be more useful in understanding how law works: statistics, economics, philosophy, history, even literary criticism. Rejecting the seemingly confining and pointless parsing of cases, members of the academy have come to prefer newer charms and loftier perspectives.

The appearance of *The Law of Easements and Licenses in Land*³ therefore brings one up short. Devoted to a specialized area of the law, centered around doctrinal analysis, based on recent American case law, and written by two academics of reputation and ability, this treatise flies in the face of these trends in legal scholarship. It may of course be

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1. See Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).

2. See, e.g., L. FRIEDMAN, A HISTORY OF AMERICAN LAW 581-82 (1973); Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

3. J. BRUCE & J. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND (1988) [hereinafter *Treatise*].

a "throwback." Perhaps it is nothing more than one of those counter examples that can be produced in almost any area of the social sciences, but which does not seriously challenge the accuracy of the proposition being advanced. On the other hand, it may also be that the recent observers are mistaken about the direction of legal scholarship. To make a judgment, I thought it would be appropriate to compare the reasons commentators have given for the decline of the treatise writing tradition with the evidence found in this volume. The results, though neither profound nor startling, confirm several of Professor Simpson's observations, but they also suggest that there may yet be life in the tradition.

REASONS ASSIGNED FOR DECLINE OF THE TREATISE

Three basic reasons have been advanced for the declining fortunes of the specialized legal treatise among academic writers. First, there has been an explosion in the number of cases reported in this country, and an accompanying invention of better research tools for dealing with them: WESTLAW, LEXIS, and the like. The argument concludes that the mass of case law produced by American courts is now so daunting that no one can hope to master it. This explosion, together with new machines that make access to the case law instantly available to practitioners, has rendered the legal treatise less necessary than it once was.

Second, in most areas of the law, and certainly in traditional areas like the law of easements and licenses, scholars already have dealt with the material coherently and comprehensively. No one likes merely to rearrange what others have done. The natural desire for originality has driven academics, at least academics at our national law schools, to prospect farther afield; hence the greater interest in legal theory and in what lawyers once considered to be marginal disciplines like economics and history.

Third, the widespread acceptance of the teachings of the Realist Movement has caused a loss of faith in the worth of studying appellate decisions. Few believe any longer that the outcome of litigation follows by a process of formal deduction from the application of legal principles to the facts of a particular case, and some believe that legal doctrine is little more than a fig leaf, covering the political and social preferences of the adjudicators. To the Realists, a legal treatise has come to seem, and in fact to be, an irrelevance. This Review examines and evaluates these three reasons.

1. *The Mass of American Cases and the Treatise*

Although admittedly concerning a relatively small corner of American jurisprudence, the contents of this treatise surely support the pro-