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The Institution of Property

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BOOK REVIEWS

The Institution of Property. By C. Reinold Noyes. New York: Longmans, Green Co., 1936. Pp. xvi, 645. $7.50.

This book owes its existence to an economist's desire for a more accurate insight into the facts of contemporary economic life than, in his opinion, present economic science is able to present. He charges that up to now economics has not got much beyond an oversimplified mechanics of the production and distribution of tangible goods and services, based on an analysis of such few elements as land, labor, capital, and, more recently, enterprise. The actual facts, he feels, are more complicated, and the economic structure of society cannot be understood without an insight into "the social abstractions which lie between the concrete persons and the concrete objects," into "the arrangements, the practices and the rules of society which become the most influential realities." And again: "The business world thinks in terms of 'rights' almost more than it does in terms of men and far more than it does in terms of goods. The chips in the economic game today are not so much the physical goods and actual services that are almost exclusively considered in economic textbooks, as they are that elaboration of legal relations which we call property."

Thus, Mr. Noyes has undertaken to inquire into the nature, the forms, and the functioning of these relations, to find out what they are and how they work. The present voluminous book is devoted entirely to the first part of this task, the "anatomy" of the legal institution called property. Another volume will follow, devoted to the description of the dynamics of its functioning.

In the final result the structure of property is visualized by Mr. Noyes as a complicated network of relations woven between the material (and certain quasi-material) objects to be used, enjoyed, and administrated upon and the human beings by whom these objects are used, enjoyed, and controlled. Between them threads go back and forth, indicating different modes of use, enjoyment, and control, and never connecting the people and the goods, but always leading through "funds," *i.e.*, points of concentration corresponding to aggregates of relations. Each individual who shares in some respect in the enjoyment of the goods of the world has a personal "fund" of his own, from which, in the most simple form of the structure, relations may go immediately to the material objects. More frequently, however, the connection goes through some other "impersonal" fund (called in legal language corporation, or partnership, or foundation, or trust fund), from which, in turn, the threads run to the material objects, frequently, however, again not directly but through other impersonal funds. The structure becomes more complicated by the fact that beneficial use of and control over an object (or a relation finally leading to an object) may belong to different personal or impersonal funds of the same level. Finally, the relation which is legally called debt or claim appears as a particular kind of relation between funds, giving one fund an indirect share in the values constituting the other fund. The description of this intricate framework of relations occupies the last two chapters of the book.[1]

[1] Cc. 6–7, pp. 413–537; app. 3, pp. 594–615.

Its major part, however, is devoted to laying the foundations for these insights and quite particularly to an inquiry into the puzzling problem of how it is possible that such an institutionalized arrangement of society is still denominated by the term "property," which ordinarily means a material object in its aspect of "belonging to someone." To find its solution, Mr. Noyes goes a long-winded way of historical discussion. He finds it in the structure of society of early, even pre-historic Rome, to the description of which the first two chapters of the book are given.[2] Under the state of our historical sources, any description of the society of those times must necessarily be to a large extent based on conjecture. Mr. Noyes' penetrating mind is not satisfied with merely following the hypotheses established by the Romanist historians. He ventures upon new interpretations of the source material drawing heavily on etymology.[3] Philological research is firmly established among the historians as a legitimate tool of historical exploration. How successfully it can be handled in legal history has been shown, for instance, by Amira[4] whose epochal discoveries in early Germanic laws were due to his rare combination of thorough philological training with painstaking scholarship in law and history. The evaluation of Mr. Noyes' efforts in these fields rests with the experts. A good many, at least, of his explorations seem to fit quite well into the picture of early Roman or pre-Roman society as it has been drawn by well recognized authorities. To a large extent, Mr. Noyes had to follow, of course, the teachings of the professional historians, and he frequently follows rather uncritically Jhering and Bonfante. It is true the latter, in particular, has built upon the scattered historical fragments a comprehensive systematical description of earliest Roman law and society, which answers the fundamental elements of a good scientific hypothesis, namely that it offers an intrinsically probable explanation for the greatest number of the data known to us. It should not be overlooked, however, that there are some among our historical data which do not fit into Bonfante's system.[5] This is no proof, of course, that his basic views of the structure of the Roman family and the Roman state are wrong, but it should warn us that they are not established with absolute certainty and that they are far from being generally accepted among the Romanists. At any rate, however, Mr. Noyes' chapters on property in ancient Rome and its development from pre-property, are a contribution to the discussion of these puzzling and fundamental problems to which legal historians and sociologists will have to pay serious attention.

It appears from Mr. Noyes' discussions that the concept of property as it was developed in Rome was thoroughly adequate to the social and economic structure of its time, just as the concepts of mediaeval English law of property appear as appropriate expressions of the economic and social phenomena of the feudal age. The discussion of the latter in the third chapter,[6] is followed by the development of the author's main thesis, namely that neither set of terms is an adequate vehicle for expressing the social and economic realities of Twentieth Century America. While the more flexible concepts of the feudal level with their relational undertone appear to him as at least ap-

[2] Pp. 27–220.

[3] His etymological theories are developed in detail in app. I, pp. 539–82.

[4] See especially, his Grundriss des Germanischen Rechts, Paul's Grundriss der Germanschen Philologie (1913).

[5] See Rabel, Die Erbrechtstheorie Bonfantes, 50 Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte, Rom. Abt. 295.

[6] Pp. 221–84.

proaching the reality that, today, property interests are relations between men, such absolutistic concepts of Roman origin as title or ownership, or the distinction between rights in rem and rights in personam are deemed utterly incapable of expressing the actual economic facts. It is only after this criticism of the concepts used in present American law[7] that Mr. Noyes develops his own theory of the substance and structure of modern property.

Reviewers will, and indeed have already criticized this principal part of Mr. Noyes' book, not for its eventual intrinsic faults, but as unnecessary and superfluous.[8] Indeed, in a period where the very use of legal concepts is under attack, an author who, without even noticing these discussions, sets out on the task of substituting a new set of concepts for an old one may appear to be hopelessly out of touch with the spirit of the time. Yet, it may be asked who renders the greater service to the development of the law, those lawyers who undertake to banish all concepts from its realm by debunking them as atavistic creations of human minds craving for security in an unstable world, or the economist who, one might almost say, innocently, presents the lawyers with a new system of concepts. Undoubtedly the present attack on legal concepts has its principal cause in that very insufficiency of the concepts presently used to express the phenomena of modern social life. There is no doubt that the use of inadequate concepts may lead to inadequate results. When intricate realities of corporate finance, of complicated trusts, of interlocking corporation directorates, or even of such comparatively simpler situations as creditor's rights are expressed in terms developed for the society of pre-historic Rome, the problems and concepts actually involved may indeed be obscured. Conceptual nihilism is not the only possible conclusion, however, to be drawn from a discontent with the concepts used up to now. Another possibility is the conscious attempt to develop new concepts from the realities of modern life, just as the old ones were developed from the realities of ancient and mediaeval life. Such concepts ought to express the conflicting interests of present life.

How they ought to be formulated has been widely discussed in Germany, especially by Philipp Heck,[9] who has also made the first extensive application of this method to concrete legal problems; and he has done so for the very branch of law Mr. Noyes is concerned with, the law of property.[10] Some familiarity with these writings and with the extensive French discussions on the rôle of concepts in the law[11] might have enabled Mr. Noyes to serve the great purpose of demonstrating to those American lawyers who have felt the insufficiency of the present concepts that the proper way out lies not in the destruction of all concepts but in the conscious creation of a new system. Then, the concrete illustration of the possibilities of such a method which he presents in the main part of his book might have been a more convincing proof of the unavoidability of concepts in the law than all general discussions on the rôle of concepts in law. As the book stands, he lays himself open to the reproach of overestimating the rôle of concepts. True though it is that many a court has been led astray by inadequate con-

[7] Cc: 4–5, pp. 285–412; apps. 2–3, pp. 583–615.

[8] See especially, Sturges' review, 25 Geo. L. J. 497 (1937).

[9] Begriffsbildung und Interessenjurisprudenz (1932).

[10] Grundriss des Sachenrechts (1930); Grundriss des Schuldrechts (1929).

[11] See especially Gény, Méthode d'interprétation et sources en droit privé positif (1899); Gény, Science et technique en droit privé (1914–15); and Perreau, Technique de la jurisprudence en droit privé (1923).

cepts, concepts, when used properly, are but tools which do in no way determine the results in legal decisions. They, the results, are determined by considerations of legal policies, but concepts are the indispensable means of thinking and communication. Bad concepts may render the task unnecessarily difficult; they are dangerous only when they become the masters of legal reasoning instead of tools. But equally true is it that good concepts, like all good tools in any trade, facilitate sound results.

His lack of familiarity with the methodological discussions which are stirring up legal thought in France, Germany, Italy, the United States and other countries is not the only point where one wishes the author might have paid greater attention to the work done by predecessors in the numerous fields of learning touched by him. He could have shown, for instance, that a good many ideas, which in his book appear as mere speculation, are borne out by historical facts. While he makes extensive use of historical research on the origin of ownership in corporeal things, he neglects entirely Amira's, Gierke's and others' momentous discoveries on the early history of the creditor-debtor[12] relation which he could easily have put to good use in his own analysis of the nature of creditors' rights. Other suggestive ideas and clarifying observations might he have found in the writings of those authors who have attempted before him to define the rôle of property law in social life, for instance in such books as Ferdinand Lassalle's "System der erworbenen Rechte,"[13] Karl Menger's "Das bürgerliche Recht und die besizlosen Volksklassen,"[14] or Karl Renner's "Die Rechtsinstitute des Privatrechts und ihre soziale Funktion,"[15] and particularly in the work of the scholar whom we owe the most penetrating analysis of the social-economic impact of legal institutions, Max Weber.[16] Creative imagination and piercing analysis are the forces by which progress in learning is achieved. They will not reach their fullest effects, however, when earlier achievements are not put to full use. We cannot and we must not always start all over again.

It may be supposed that the author would also have modified some of his opinions if he had familiarized himself with recent legal developments in foreign countries, and he would also have found that a good many of the constructive ideas of his own have already been put to work abroad. The concept of "fund," for instance, which plays such an essential rôle in Mr. Noyes' relational system, has found extensive attention, refinement and application in modern German law. His analysis of juristic personality

[12] Amira, Nordgermanisches Obligationenrecht (1882–95); Gierke, Schuld und Haftung (1910); Hazeltine, The Gage of Land in Mediaeval England, 3 Selected Essays on Anglo-American Legal History 646 (1909); Huebner, History of Germanic Private Law 463 (1918); on occurrence of analogous phenomena in Greek and early Roman law, see Partsch, Griechisches Bürgschaftsrecht (1909); Rabel, Grundzüge des römischen Privatrechts, 1 Holtzendorff-Kohler's Enzyklopaedie der Rechtswissenschaft 453 (1913); Koschaker, Babylonisch-assyrisches Bürgschaftsrecht (1911).

[13] System of Vested Rights (1861).

[14] Private Law and the Unmoneyed Classes (1890).

[15] The Social Function of the Institutions of Private Laws (1929).

[16] See especially his chapter on Rechtssoziologie (Sociology of Law) in *Wirtschaft und Gesellschaft* (1925). Other important studies he might also have profitably consulted are: Duguit, Les Transformations générales du droit privé depuis le Code Napoléon (1920); Hedemann, Die Fortschritte des Zivilrechts im 19. Jahrhundert, 2: Die Entwicklung des Bodenrechts (1930–35); and quite especially Vinding Kruse's great treatise on Property, Ejendomsrätten (1931) translated by Larsen, Das Eigentumsrecht (1931, '35, '36).

comes very close to ideas which have been most recently developed by Kelsen,[17] whose works could also have furnished him many valuable suggestions. On the other hand, his critique of the Roman concept of "ownership" as contrasted to the more flexible tenures, estates, and equities of English law brings him, at times, into the neighborhood of those neo-German pseudo-scientific politicians and fanatics who have debased to cheap slogans Gierke's pathetic panegyrics of Germanic law and Oswald Spengler's antithesis of the "static" Roman and the "dynamic" Germanic law. That just a few years ago England has modified her law of real property in such a way as almost to replace the venerable old common concepts by the Romanistic concept of "ownership,"[18] is a fact which could furnish some subject for thought. The least it indicates is that even today this clear-cut concept serves the useful economic purpose of rendering real estate transactions certain and reliable.

A deep-going unrest is stirring up the world of western civilization to its roots. The statement that we live in a period of transition has become a commonplace. The social system which found its classical expression in the Nineteenth Century is in the middle of a process of transformation, which has caused, in almost all countries, a process of legal change. Not only are details being elaborated or changed, but the very foundations of our legal systems are scrutinized. In some countries, where social problems were more pressing than in the United States, this movement started earlier, has already passed the stage of criticism, and has reached the stage of constructive creativeness. Mr. Noyes' book seems to indicate that the United States has now also entered on this phase. In spite of a good many shortcomings, it is an impressive piece of creative work.

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Cases on the Law of Sales. By George Gleason Bogert and William Everett Britton. Chicago: The Foundation Press, Inc., 1936. Pp. 1171. $7.00.

While teaching techniques in the Law of Sales may differ, it certainly is true that the more recent casebook editors in the field have made an honest endeavor to give the student a picture of what is actually happening in the market place. The latest acquisition to the collection, Bogert and Britton's Cases on Sales, or its recent predecessor, Vold's edition of Woodward's Cases on Sales, may have little in common (at least as far as arrangement of material is concerned) with Llewellyn's Cases and Materials on Sales, published in 1930. But all of these books—and they do not by any means exhaust the list—are not only different in degree but almost different in kind (certainly this is true of Llewellyn) from the earlier collections of teaching materials. These case books all do something which the earlier books did not do. They remove the principles of sales law from the abstract realm of "title chasing" to the every-day world of shipping office, department store, bank or waterfront.

Take, for example, a typical case book published about twenty-five years ago when

[17] Allgemeine Staatslehre (1925); The Pure Theory of Law, 50 L.Q. Rev. 474–96 (1934). As to other modern theories of juristic personality see Enneccerus, Lehrbuch des bürgerlichen Rechts, Allgemeiner Teil 288 (Nipperdey's 13th ed).

[18] Law of Property Act, (1925) 15 Geo. V, c. 20; see Bordwell, English Property Reform and Its American Aspects, 37 Yale L. J. 1, 179 (1927).