

BOOK REVIEWS

The Rule against Perpetuities. By John Chipman Gray. Fourth Edition by Roland Gray.* Boston: Little Brown & Co., 1942. Pp. xcv, 895. \$12.50.

The fourth edition of the book which for over fifty years has been the outstanding authority upon the rule against perpetuities is now before the public. Mr. Roland Gray, the editor of the new edition, states in his preface that since the publication of the third edition in 1915 more than 1,300 new cases have been decided upon questions embraced in the subject matter of this treatise. The literature upon various aspects of this subject has been extensive. The incorporation of this material, in some cases by citation merely, in others by quotation or integration, and the textual changes made by the editor have produced a volume of 833 pages of text as compared with 663 pages in the third edition. Part of the differences, however, is accounted for by the larger type of the new edition. The physical make-up of the book is attractive, and it is in some ways a more easily handled tool than the third edition.

The problem of combining new matter, whether new material or new points of view, with the old always raises a question of some difficulty. Mr. Gray has adopted the plan of making a single text with no indication, save by footnotes relating to the more important alterations, as to how much is the text of the author and how much that of the present editor. The result is a flowing unified text that is easy to follow; and perhaps in view of the fact that many of the changes are merely formal, the method adopted is the best. To one who has communed long with the text of Professor Gray, however, there is a certain nostalgic regret that it has been necessary to blend out of immediate certainty of recognition the respective contributions of the author and the editor.

Two other textual characteristics are worth noting. The use of black letter headings both for the sections and for paragraphs inside the sections where there is something of a change of subject matter, add to the usability of the volume. On the other hand, the failure in the citation of a case to give the year in which it was decided, save as that is given, as in the modern English reports, by the form of volume numbering, is a matter in which the practice of the third edition might well have been departed from.

The most interesting part of the examination of the new edition is a comparison of the positions taken therein on certain questions in the law of future interests that have been the subject of discussion.

One of Professor Gray's most vigorously argued and tenaciously held contentions was that, as a consequence of the Statute of Quia Emptores, a fee simple subject to a special limitation creating a possibility of reverter in the grantor was impossible. In Section 39 of the third edition, Professor Gray stated categorically: "In the other [than Pennsylvania] States there is either no tenure at all, or, where there is tenure, there is no good reason to doubt the existence of the Statute Quia Emptores. In neither case can there be any possibility of reverter." To this position Professor Gray admitted pragmatically one exception, viz., where the fee was held by a trustee upon a determi-

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nable trust which when ended became a resulting trust in the grantor. In such case he conceded that the legal title might also be held to revert in the grantor.¹

On both these fundamentals, viz., that in the lack of tenure there can be no reverter, and that the only justifiable qualification of this rule is in the case of the resulting trust on a fee, the editor of the present edition disagrees. He points out² that, whatever it may be called, the "going back" of the subject matter of property after the determination of limited interests in situations where there is no "tenure" does undoubtedly exist in our law, and that the courts have paid scant heed to consideration of theories of tenure or the older English land law in general in handling these problems.

These conclusions seem to me sound, both historically and analytically. Pragmatically, there is a regrettable aspect to the conclusion which may in time grow to be of importance. It may be put categorically thus: 1) A possibility of reverter after a fee simple exists in our law. 2) This interest is not subject to the rule against perpetuities. 3) The distinct tendency is to regard this interest as assignable.³ Then a conveyance of Blackacre by A to B and his heirs "so long as the land is not used for business purposes and when it is so used then to C and his heirs" gives C nothing. But if the limitation to C be omitted in the conveyance to B, and on the day after the conveyance to B is made in this new form, A conveys to C all his right, title, and interest in Blackacre, C has, as the assignee of a possibility of reverter, the interest that he could not get under an executory limitation. The need for legislation to take care of such a possibility is apparent.

The discussion of the subject of determinable fees is continued, as in the third edition, in Appendix E and also in a new Appendix N. This latter appendix is devoted to a contention of the late Professor William R. Vance⁴ that Quia Emptores did not exclude the existence of other tenurial obligations between the holder of the determinable estate and his immediate grantor. A careful examination of several cases, a critical examination of the case relied on by Professor Vance, and an emphasizing of the differentiation between feudal and contractual obligations is a fine example of a scholarly and convincing argument. I noticed no discussion of Professor Richard R. Powell's article on the same subject,⁵ which, though reaching the same conclusion as did Professor Vance, based the contention partly upon the provision of Quia Emptores (that it applies only to lands held *in Feodo simpliciter* not *in Feodo simplice*) and partly upon authority.

In the law of Powers, a definite change of position is taken in the fourth edition on the question of the powers of a trustee to sell where, although all interests will vest within the period of the rule, the exercise of the power may, under its terms, take place after the expiration of a period greater than that measured by lives in being and twenty-one years from the time of its creation. Professor Gray⁶ stated and approved the English rule that such powers of sale were bad if they could be exercised beyond the period of the rule, pointing out by way of pragmatic mitigation that such powers would

¹ Gray, *The Rule against Perpetuities* § 41a (3d ed. 1915).

² *Ibid.*, § 39 n. 1, § 41.1, n. 2 (4th ed. 1942).

³ Compare 2 Rest. Property § 159 (1936).

⁴ *Rights of Reverter and the Statute Quia Emptores*, 36 Yale L.J. 593 (1927).

⁵ *Determinable Fees*, 23 Col. L. Rev. 207 (1923).

⁶ *The Rule against Perpetuities* §§ 487, 493 (3d ed. 1915).

normally either terminate or at least be terminable (Sec. 490) within the period of the rule (Sec. 500), with the result that they would not come within the operation thereof. The suggestion that they should be sustained because they increased rather than impeded the alienability of the subject matter, he was unwilling to accept as valid.⁷ After the publication of the third edition in 1915, three cases, one English, *Re Allott*⁸ one Australian, *Davis v. Samuel*,⁹ and one American, *Melvin v. Hoffman*,¹⁰ considered the question. The American case sustained the power, even though it clearly could have been exercised at a time more than a life in being and twenty-one years beyond the date of its creation. There has also been a very considerable amount of magazine discussion upon the question.¹¹ Mr. Roland Gray gives his approval to the Missouri point of view¹² and supports his position essentially upon the ground already referred to and rejected in the third edition, viz. that such a power in fact increases the mobility of property. This conclusion seems both realistic and socially desirable.

The subject of honorary trusts also receives a different treatment in the fourth edition. Professor Gray, in the third edition, stood firmly upon the proposition that, putting all trusts for public charitable purposes out of the picture, all trusts implied one or more persons as beneficiaries on whose behalf the trust could be enforced; that consequently where the trust was to erect a monument or to care for a favorite dog, the trust was intrinsically invalid. This invalidity was entirely independent of any question of the rule against perpetuities or any analogous doctrine. Even assuming that objections of the latter kind could not effectively be raised, the trust was nevertheless bad for the reason stated, i.e., lack of a personal beneficiary. To reach this result Professor Gray had to dissent from decisions or dicta (none too clear in their reasoning) in a considerable number of cases. This he did.¹³ The suggestion that such gifts might be upheld upon the theory that the devisee had a power closely akin to a power of appointment, and that this latter power is not intrinsically bad even though there be no one who can compel the exercise of it, he expressly rejected.¹⁴

Mr. Roland Gray, in the fourth edition, recognizes that the weight of decision and dicta is so strongly in favor of the validity of such gifts when they do not violate the rule against perpetuities or analogous principles, that he feels that it must be conceded that they represent the American law on this point. He apparently does not personally like this position, partly for theoretical, partly for practical reasons.¹⁵

Personally, I have never been able to see the objection to such bequests in devises. By hypothesis they are not in such terms as to violate the rule against perpetuities as to the creation of remote interests or as to the possible exercise of the power. The "trustee" is not going to be able to keep the property for his own benefit; the heirs or residuary devisees will see to that. Unless the organization of the "trust" is too vague for one reason or another to be workable, or unless the purpose or the operation of it is anti-social, it seems hard to find any substantial reason why the court should balk the testator's plan.

⁷ *Ibid.*, § 489.

⁹ 28 N.S.W. 1 (1928).

⁸ [1924] 2 Ch. (C.A.) 498.

¹⁰ 290 Mo. 464, 235 S.W. 107 (1921).

¹¹ Gray, *The Rule against Perpetuities* § 509.18, n. 5 (4th ed. 1942).

¹² *Ibid.*, § 509.18.

¹⁴ *Ibid.*, § 909a.

¹³ *Ibid.*, §§ 894-909 (3d ed. 1915).

¹⁵ *Ibid.* (4th ed. 1942).

It is not necessary, even though it would be interesting, to discuss further the variations and agreements of the two editions. In general it is enough to say that this new edition is a scholarly and usable work, and that neither the instructor nor the practitioner in the important field of law with which it deals can afford to work without it.

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The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence.† By K. N. Llewellyn‡ and E. Adamson Hoebel.§ Norman: University of Oklahoma Press, 1941. Pp. ix, 360. \$3.00.

Karl Llewellyn and Adamson Hoebel are bold men. They set out to capture the law-ways of a folk far removed in culture, economy, intellectual climate—and fifty-three full cases, with scraps of material from about as many others, are all they have to go on. The reach is not bad; for, few as they are, the cases present tension and conflict in almost every aspect of tribal life. The span of time, 1820–1880, will do; it is long enough to capture a flux which one can chart by the instances. But at no point of stress do the cases come thick and fast enough to give sharp edges to any type of judgment. Worst of all, not one is a case of official record; the whole docket has to be accepted on the basis of hearsay. A more conventional pair of scholars would have obeyed the proprieties and have thrown up the job.

But not these pioneer adventurers. A neophyte, stumped at interpretation, seeks more and more materials until he is smothered beneath the heap. A canny craftsman devises techniques for drawing forth significance from the scanty stuff at hand. It is a superb workmanship which makes this venture possible and endows its result with quality. Llewellyn is a lawyer who sees in his subject, not a brooding omnipresence to be brought down from the skies for dialectics only, but a going institution shaped to the needs of its society. Hoebel is an anthropologist who understands that any item turned up in field work draws its meaning from uses dictated by the impinging culture. Where the one discipline is stopped, the other may provide a hunch; where the one plunges recklessly ahead, the other is there to impose a check. And where either alone is impotent, the two together may provide a fresh set of tools.

Men less wise about their crafts would have been balked by the hearsay. The authors tapped the stream of decision not as cases came, but nearly sixty years after the last doom was spoken. The judgments were passed on by word of mouth; along the way many minds and tongues could intrude to corrupt the unwritten text. Yet, the materials used are hardly less reliable than cases of record. Literacy is unable to insure the integrity of utterance; it has contrived no device by which meaning can be insu-

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† [Since the materials reviewed represent the cooperative effort of a lawyer and an anthropologist, and since the results of such a collaboration seem to be of more than momentary interest, it seemed an interesting project to get in a later review the reaction of a lawyer to materials already reviewed by an anthropologist. See the review by Robert Redfield, Dean of the Division of the Social Sciences, University of Chicago, 9 Univ. Chi. L. Rev. 366 (1942).—**EDITORS.**]

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