

"conservatism." From such institutional matters Mr. Kirk proceeds to subtler aims: we must assure a professor that he is not a servant but "a learned man invested with the dignity of a high profession"; we must invest our colleges and universities with a sense of purpose, not a social purpose but rather "the elevation of the reason of the human person for the human person's own sake—the proposition that the higher imagination is better than the sensate triumph—the proposition that the fear of God, not the mastery over man and nature, is the object of learning." And so on, including "honor outweighs success."

There is a sad lack of dignity in an Academy which stands resolutely upon the refined isolation of "Bearers of the Word." Of course we are fumbling along as a community in trying to remove education from the preserve of a small number of privileged people. Of course we have not seen clearly how to work out the problem Plato set—how to define the different stages of education—to define what all must have in distinction from that appropriate to the specially gifted. Of course our teaching of citizens must be rational and objective and passionate after Truth. But to find help in these matters we need less contemptuous scolding like that of Mr. Kirk and more seriously constructive thought. We need to know how guarantees of free thought as well as of sanctity of contract may help resist invasions of academic freedom. We need to know how government can help support education while leaving it free to conduct its proper function. The heart of academic freedom is not isolation from a "servile multitude." Rather, it is the ability to lead and develop the thinking power of a free people.

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The Law of Decedents' Estates, 2d ed. By Max Rheinstein. Indianapolis: The Bobbs-Merrill Company, 1955. Pp. xv, 875. \$10.00.

Cases and Materials on Decedents' Estates and Trusts. By John Ritchie, Neill H. Alford, Jr., and Richard W. Effland. Brooklyn: The Foundation Press, 1955. Pp. xlvi, 1113. \$10.00.

Modern probate law is tooled for the delicate handling of unusual situations. It is too complicated to be a satisfactory social instrument for the handling of the ordinary estate. The complexities of probate administration are primarily occasioned by the retention of old English requirements, the social justification of which has long since vanished. Nowhere in the United States today do the statutes contemplate a simple procedure for the administration of the estate of a man of moderate means. As a consequence the bond salesman through the scheme of survivorship in co-tenancies, the insurance

salesman with the third party beneficiary, and the retirement trust with its future interest, are usurping the role of the probate lawyer in dealing with the "common man."

With the post-depression increase in national wealth, the long-stagnant body of probate law has begun to stir. The Model Probate Code, drafted at the instance of Professor Atkinson under the auspices of the American Bar Association, has apparently been abandoned on the doorstep. But at least eight states in the past ten years have revised their probate codes, and further action seems imminent. The law schools likewise are evincing a new interest in the field. But both the code draftsmen and the law teachers and writers are unfortunately attracted by the glamour of great fortunes and their energies seem directed more toward estate planning to avoid succession taxes than to the simplification of administration of estates. Two new casebooks, the second edition of Professor Rheinstein's "The Law of Decedents' Estates" and "Cases and Materials on Decedents' Estates and Trusts" by Professors Ritchie, Alford, and Effland, illustrate the current trend and its noted weaknesses.

These casebooks are alike in that the authors decline to worship at the shrine of Langdell. Rheinstein is particularly daring in making his own views available to the students. The material in the work of Ritchie, Alford, and Effland on descent and wills is also largely deliberative in form, and cases are used principally as illustrating possible solutions.

This writer agrees that after a law student has learned the technique of analyzing court opinions, the case method of study should be used only to a limited extent in most courses. A case may be studied to determine the concepts basic to each general phase of the field of law. But most of the time of student and instructor is better devoted to the more productive study and discussion of the extensive text and law journal material available.

The approach taken by the two works is otherwise different. Of the various methods of transmission of property, Rheinstein confines himself to a limited discussion of intestate descent and to more extensive treatment of testamentary disposition. He gives a substantial amount of time to the mechanics of administration of estates, a field that has been largely neglected by legal writers since the time of Woerner. Ritchie, Alford, and Effland give most of their attention to substantive law. Of the five fields of post mortem alienation, they cover four: descent, wills, future interests, and trusts. Neither work attempts to do more than wet its toes amid the breakers of survivorship in co-tenancies.

Professor Rheinstein's comments are, as befits a student of comparative law, spiced with a trace of mysticism. His initial discussion deals with social policy that has shaped the various rules of descent and the extent to which the title holder has been permitted to divert property out of the stream of descent through the medium of a will. A light touch is applied to historical develop-

ment as an influencing factor. The details of descent (the practical differences between the forced, the pretermitted, and the designated heir) are not accorded minute attention. Passing to the formalities of execution of wills, the author adopts a more earthy approach, and the student is invited to try his hand at practical solutions of problems attendant upon draftsmanship. The author does not, unfortunately, undertake to criticize the nonsensical formalities which the statute of Victoria created, and which the legislatures and even the Model Code have so slavishly followed.

The cases used are followed by collateral questions, the answers to which are to be found in the cases cited. This tool is of service to the teacher who assigns special projects, or in drafting examination questions. It benefits the diligent student but ordinarily fails to excite more than a ripple of curiosity in the sluggard. The cases employed are a pleasing selection of legal landmarks with emphasis on the more modern opinions. Extensive reference is made to leading law journal articles, and in a few instances short quotations are taken therefrom. One would like to have seen somewhat more comment from Professor Rheinstein on the conflict of laws aspect of execution and revocation and the question of the effective dates of such acts. As new probate codes are adopted, the problems of the effective date of such legal changes are becoming of increasing importance to the practitioner as well as to the student. The author places more emphasis on undue influence, fraud and mistake than on the role of mental capacity. The practitioner finds the reverse to be true.

It is in the consideration of treatment of dubious provisions of the will that the author best displays his talents. Professor Rheinstein is an ardent advocate of the doctrine that the intent of the testator deserves something more than lip service. To the delight of the jury and of the trial practitioner, he urges that the court should first "interpret" the will to ascertain the testator's intent, stepping into the testator's shoes amid the surroundings as they were at the time the will was made. Only if this fails would the author permit the will to be "construed" according to theories which have been developed throughout the years by the courts as to the meaning the ordinary individual would give to the testator's words. This method would give first rank to pure rules of law where such rules operate to defeat the testator's intent. In the second position would come collateral evidence, and finally "rules of construction." The chief objection to this philosophy is that it breeds nuisance litigation and darkens clouds on title. It will be viewed with horror by the executor, the title examiner, and all those whose pole star is certainty of title. If, however, extension of the freedom of individual rights in testamentary acts is desired, the author's approach promises to come closer to ascertaining the intent of the testator, if he ever had any intent as to the circumstance which arose.

Approximately one-third of the work is given to probate practice. It is surprising that this field has been so neglected by the teaching profession. It is

true that in the large city law factories to which law teachers are turning more and more for guidance in moulding their curricula, probate, like bankruptcy, practice has fallen into the hands of specialists. But there are many law schools whose graduates, unlike those of more celebrated educational institutions, do not step into apprenticeships in large law firms. To these neophytes who must depend on their law school training for their legal foundations, grounding in probate procedure is as essential as the development of skills in civil, criminal, and equity practice.

The author fails to point up sharply to the student that "assets of the estate" is a fluid concept. Property may belong to the estate for purposes of federal estate tax calculation, of state succession taxes, of the rights of surviving spouses, of payment of debts, and of distribution to beneficiaries. Some property may be an "asset of the estate" though it did not belong to the deceased at his death—i.e., if conveyed in fraud of creditors—and property belonging to the testator at his death may not be an asset of the estate for any purposes, as for instance, life estates or fees defeasible on death. Neither does the author's casual treatment of liens entirely satisfy this writer. These minor aberrations aside, Professor Rheinstein's discussion of probate procedure is the only authoritative condensed discussion available to the student today.

Professor Rheinstein's philosophical approach to the law provides a unique and ideal background for the student's understanding of the practical problems involved, and permits the instructor to devote his time to guiding class discussion toward the strength and weakness of the law of the parent jurisdiction. Those who are not wedded to the case method will find it a most satisfactory pedagogical vehicle.

The combined work of Professors Ritchie, Alford, and Effland is, as the authors state, prepared for a four hour course. It is so happily divided, however, that it can be separated into three distinct segments: Decedents' Estates, Trusts, and Future Interests. Were the materials devoted to insurance and to co-tenancies more complete, it might be said that the casebook is on the substantive law of estate planning.

The task which the authors have assigned to themselves is indeed a difficult one. Powell alone in the writing field has set a similar goal. Its success presumes a thorough and unusual grounding of the student in the fundamentals of property. Taken individually, the courses require a minimum of eight hours of classroom instruction. Concentrating them into four hours creates a dish so rich that digestion can be accomplished only by means of careful tutorial assistance to alert students devoting more than the usual amount of time to pre-classroom study. Such concentration is required where law school curricula are stuffed with courses dealing with remote corners of the ever-expanding legal universe—sometimes to the neglect of fundamental subjects, the understanding of which is a *sine qua non* to the education of any specialist. Thus,

while the necessity of such concentration as the authors accomplish is recognized, its practice, even with the skillful workmanship displayed, is to be deplored.

The authors do, correctly, it seems, appreciate the similarity of the three fields invaded by them and the duplication of effort which inevitably results if they are separately treated. In their elimination of repetition in these areas, they are wholly successful. The authors plan to supplement the course by a two hour procedure course in Fiduciary Administration and a two hour office practice course in Estate Planning. The total amount of time to be allotted, therefore, is not far short, if at all, of that which this writer believes essential in estate training—particularly if the principles of ownership are mastered in the property course.

The opening material on descent takes the form of a well drawn discussion of the historical development of the law and an outline of the legal jargon employed.

The authors' treatment of wills deals with execution, revocation, and contests. It is concise, and the student and instructor are furnished with ample reading suggestions which local statutes can supplement. Only in the segment on interpretation and construction does the approach border on the perfunctory. The material on the testator's right to make a will under the title "Grounds for Contest" is particularly well selected.

In trusts and future interests, greater reliance is had upon the case study approach, with brief introductory remarks. One might wish that the style used in the decedents' section had been followed more closely, and that the authors had pointed out in more detail the conflicts among authorities and commented thereon rather than relying on the Restatement as Holy Writ. The Restatement handling of controversial problems in property law has by no means received universal acceptance. And its devotees tend too often to substitute the role of missionary for that of teacher.

The cases presented for consideration as trust material are well selected, and if class time is devoted principally to discussion of the problems involved and to collateral materials rather than to the traditional case discussion, the student will obtain an adequate foundation in the law of trusts.

Approximately two hundred pages are given to future interests. Here perhaps is the most controversial portion of the work. Anyone who has entered the jungle either as instructor or student knows the extreme hardships and the slow pace with which it is explored. Future interest problems are not encountered as trumpeting elephants, but as snakes lying beside the trail to sink their fangs into the heels of the unwary. The study of future interests is one to which the case method is ideally suited. It is not enough that the student be told that there exist such things as defeasible fees, the rule in *Wild's Case* or the rule on convenience in class gifts. He must be trained to discover for him-

self where such problems arise in given sets of facts. The instructor, therefore, must presume that the student has had a thorough earlier grounding in estates in land and their counterparts in personal property, and must devote his time to fact analysis.

Accepting this presumption, the reader is presented with a well summarized and highly concentrated analysis of mechanical types of future interests. There follows light treatment of many of the standard problems in the future interest field, examination of contingent and vested interests being omitted. Interpolated in this matter is mention of the power of the court as a medium of construction, reference to types of legacies, ademption, accession, accretion, and exoneration, abatement, and increase. Although the comments of the author are succinct, the space allotted is not sufficient to do more than acquaint the student with the nomenclature.

The work concludes with a chapter on fiduciary administration with cases supplemented by a few comments pointing out some of the principal questions that face the trustee in the administration of the trust estate—an area where statutory guidance is largely lacking, and a field again neglected by the writers and teachers.

The comments expressed herein are critical of the pedagogical philosophy that makes a task of this condensed nature necessary, not of the book itself. The authors have performed a most difficult assignment in correlating materials with a minimum of irregularity in three fields that can be blended more easily in the abstract than the concrete. Where curriculum difficulties require a playing down of the property field, the work of Professors Ritchie, Alford, and Effland gives a highly satisfactory, indeed, perhaps the only solution to the problem.

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