Fordham Law Review

Volume 11 | Issue 3 Article 8

1942

Book Reviews

Fordham Law Review

Decisions of this type are partly responsible for the chaotic condition of this field of the law.

In the field of criminal law there may exist compelling and obvious reasons for excluding the plea of ignorance of the law.[30] However, the broad and arbitrary generalization laid down in the *Bilbie* case as an unalterable principle appears not to have deserved the acceptance which it has received in civil litigation. Writers in legal periodicals have for some time urged that this principle be revised by a statute similar to the one which was enacted.[31] There have been, and there will continue to arise, situations in which no relief should be granted to one who has mistaken the law. The new legislation was not intended to affect such cases,[32] but will, it is hoped, furnish an opportunity for the exercise of the judicial function in its highest form in a field where it most appropriately can operate.

BOOK REVIEWS

THE RULE AGAINST PERPETUITIES. By John Chipman Gray. Fourth Edition. Edited by Roland Gray. Boston: Little, Brown & Company. 1942. pp. xcv, 895. $12.50.

A new edition of a legal classic is necessarily an event. Holdsworth tells us more than once[1] that of the books since Blackstone's *Commentaries* which have almost achieved the rank of a book of authority, Professor John Chipman Gray's *The Rule Against Perpetuities* shares with Dicey's *Conflict of Laws* and a very few others this rare distinction. The first edition appeared in 1886; and Professor Gray during his lifetime published two further editions, the third one appearing in 1915 shortly before his death. Now, some twenty-seven years after the last edition (which is out of print) there is a demand for a new edition. Some 1300 new cases on perpetuities have been reported since 1915. Professor Gray's son, Roland Gray, Esq., has responded to the call.

There are many obvious handicaps involved in being the child of a great lawyer or a great law professor. One thinks almost inevitably of Telemachus and the bow of Ulysses. Lord St. Leonards was probably the greatest property lawyer that England ever produced; and in the litigation over his lost will (including some eight codicils)[2] it appeared that the erudite author of Sugden on *Vendors* and *Powers* was wont to divert his ample leisure in his advanced years of retirement by rewriting

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said: "I cannot see any good sense in the distinction of granting relief against mistakes of fact, and refusing it in cases of acknowledged mistakes of law. Both, in my judgment, ought to be placed on the same footing. *If the principles of justice require relief in the one case, they equally do in the other.*" *Id.* at 423. (Italics inserted.)

30. State v. Boyett, 32 N. C. 336 (1849); People v. Weed, 29 Hun. 638 (N. Y. 2d Dep't 1883).

31. Comment (1935) 4 FORDHAM L. REV. 466; Comment (1931) 45 HARV. L. REV. 336.

32. See note 6 *supra*.

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1. HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY (1928) 28, 187; 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926) 215.

2. Sugden v. Lord St. Leonards [1876] 1 P. D. 154.

his will and codicils quite frequently. His daughter was his secretary; and the learned justice who wrote the decision which is still authoritative on the question of proving part of a lost will told the world what a great "privilege" it was for a daughter to live in such intimate association with such a profound jurist; and what rare good fortune it was for her to be *permitted* to see in action at close range the titanic intellect which had produced so many legal masterpieces, both on and off the bench. Today we perhaps would consider that "privilege" was hardly the *mot juste;* and that domestic table talk and chit-chat anent the typical family settlement, powers of appointment, contingencies, etc., would hardly seem to be at all common in the case of the average contemporaneous English (or even American) daughter. We are not advised as to whether or not Professor Gray, like Lord St. Leonards, enlivened the daily dinner hour with some well-chosen and guarded remarks on the subject of perpetuities.

The editor of the present edition is so modest that it approaches the painful. Nowhere does he mention the fact that he is Professor Gray's son. We learn from the publishers that he graduated from Harvard Law School shortly before the turn of the century; we know, therefore, that he must have been a student of his father; and that he is a practising lawyer. We know that he helped his father in the preparation of the third edition.[3] In the preface the present editor, although stating that he has re-written several portions of the original work where it seemed to him that his father's words no longer expressed the law, is nevertheless so very generous in giving praise to others that one might easily gather the impression that Mr. Roland Gray's work was largely of a minor nature. And yet the portions of his father's work which he had to re-write cover very difficult and important portions of the law.[4] The present reviewer is confident that these new portions will be found worthy of his father; and higher praise is impossible.

It would be futile to attempt to summarize the book; it is too well known. It will be required reading for every teacher of the law of future interests; and practicing lawyers who handle trusts and estates will naturally find the work indispensable.

New York lawyers will be especially interested in the portions of the work which deal with the quaint two-lives rule by which the 1830 Reviewers of the Empire State hoped to make the law of future estates "simple, uniform and intelligible".[5] Professor Gray's criticism of the New York statutes[6] was directed at two points: first, the test of the suspension of the power of alienation, instead of that of remoteness of vesting;[7] and, second, the limitation to two lives under which, in the words of Professor William F. Walsh, limitations which are perfectly natural and which

3. P. xii, note 4.

4. P. vi. The new portions include the subjects of possibility of reverter in the United States; Conflict of Laws; powers of sale; foreign law and the statute *Quia Emptores.*

5. FOWLER, REAL PROPERTY (3d ed. 1909) 1181 *et seq.* contains the Report of N. Y. Revisers.

6. Sections 748-750, pp. 682-688.

7. *Ibid.* See also p. xi, note 3 wherein Professor Gray, in the preface to the first edition of 1886, says that when he began to collect the authorities, he did not clearly apprehend that the Rule against Perpetuities had no direct connection with restraints on alienation; but as he went on he decided to make a separate book on the subject—RESTRAINTS ON ALIENATION OF PROPERTY (1883).

are perfectly valid if made for only two children become entirely invalid if made for three beneficiaries; so that if a man is so imprudent as to have more than two children, he must be very careful in selecting the lawyer who draws his will.[8] Professor Gray points out that the common law rule of lives in being ". . . is a natural limit. The Rule strikes down only unusual provisions. But the limit of two lives, fixed by the New York Statute, is an arbitrary limit. It cuts through and defeats the most ordinary provisions. To allow future estates, and yet to confine them within bounds so purely arbitrary, would seem to be an invitation to litigation. And so the event has proved."[9]

Professor Gray then made his famous statement, ". . . in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York."[10] Details of the enormous amount of litigation then follow. The present editor completes the citation of the reported litigation since 1914, a short time prior to the publication of the third edition. "Between the years 1914 and 1941 there have been over three hundred and thirty cases more, making a total of over eight hundred cases."[11]

For some reason which the present reviewer has never been able to understand. it has been argued seriously by more than one able lawyer that there has not been very much recent litigation on perpetuities in New York because very few cases have been decided in the Court of Appeals since Professor Gray's death in 1915.[12] This argument ignores litigation in the reports of the lower courts, including the Surrogate's Court, the Supreme Court and the Appellate Division; and it ignores unreported litigaton. Title company lawyers and lawyers with extensive estate practice will testify that numerous perpetuity cases arise and result in compromises of various sorts because of the uncertainty of the law. It is often impossible to advise a client with any confidence as to whether or not a particular provision violates the rule. Often one's troubles are only beginning, for the further and frequently more difficult question remains as to whether the court will accelerate remainders or declare an intestacy. Such controversies do not necessarily get in the reports. The present editor very ably pays his respects to this Court of Appeals argument.[13]

In 1931 the present reviewer drafted two bills which would have substantially re-enacted the common law rule in New York for both real and personal property. The legislature passed the measures, but Governor Roosevelt vetoed them, among other reasons, on the ground that there was no popular demand for the bills, and because the Committee on Legislation of the Association of the Bar of the City of New York disapproved of them in a report in which the outstanding argument was that "the growth and development of New York as a great state has taken place *while* it [the present two-lives rule] has been in effect."[14]

8. WALSH, FUTURE ESTATES IN NEW YORK (1931) Preface and §§ 15, 25 and 36.

9. Section 749, p. 687.

10. Section 750, p. 687.

11. *Ibid.*

12. See p. 687, note 3.

13. *Ibid.*

14. FIFTH AND FINAL REPORT OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES ON THE PROPOSAL TO CHANGE THE RULE OF NEW YORK STATE REGULATING PERPETUITIES, LEGIS. DOC. (1933) No. 55, pp. 7-18. (Italics added.) This report contains the bills, Governor Roosevelt's veto message, and the report of Dean Carlos C. Alden, counsel to the Commission, as well as the Bar Association report.

The present editor gives a good bibliography of the various articles in recent years attacking the two-lives rule,[15] but makes an important omission—a splendid study prepared for the New York State Law Revision Commission by Professor Whiteside of Cornell and Professor Powell of Columbia. Apart from the arguments (in my humble opinion, unanswerable) for repealing the present statutes, the study is an excellent and useful summary of the present law.[16]

In the account of the Michigan statutes, the present editor might have added a few sentences to show how the statutes of that state, though copied from New York, have been interpreted in some decisions so that even in the case of an owner of Michigan real estate the two-lives rule presents no hardship to even a moderately experienced draftsman. One case held that the survivor of five children is only one of the two statutory lives.[17] It has been held that the statute does not apply to personal property, and therefore real estate could be transferred to a holding company and the stock of the holding company tied up in an appropriate limitation, since the common law rule has been held still to apply to personalty.[18] Finally, a testator can direct his real estate to be sold, and under the doctrine of equitable conversion this provision makes the land personalty for perpetuity purposes, and the common law rule applies, even though in fact no sale is ever made.[19] If a New York lawyer had only one of these three Michigan decisions available, what troubles and complications could be avoided!

Professor Gray told us in the preface to another work[20] that he is an analytical jurist. His work on perpetuities reveals him also as a master of the historical method. At his death in 1915 the country was just about beginning to feel the effects of Dean Pound's articles on sociological jurisprudence.[21] Since Professor Gray's death we have seen the rise of a school of realists whose fetish appears to be facts.[22] While the present editor apparently does not practice law in New York and hence probably looks upon our statutory two-lives rule with a calm disinterestedness, it is submitted that a few facts along the lines of the realist or functional approach would be both interesting and valuable. Mortality tables, which were but

15. P. 688, note 4. Included therein is a review by the present reviewer of the Report of the New York Decedent Estate Commission, Book Review (1933) 46 HARV. L. REV. 1218, but no mention is made of Russell, *Proposed Changes in the New York Rule Against Perpetuities* (1930) 6 ST. JOHN'S L. REV. 50, 54, which refers to an article by Professor Maurice Finklestein on the 30 cases which went to the New York Court of Appeals between 1915 (the date of the 3rd edition of the present work) and 1931, the date of the article. Finklestein, *Notes on the New York Rule Against Suspension of the Power of Alienation* (1930) 5 ST. JOHN'S L. REV. 1.

16. N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1936) No. 65, pp. 489-608.

17. Felt v. Methodist Educational Adv., 247 Mich. 168, 225 N. W. 545 (1929).

18. Toms v. Williams, 41 Mich. 552, 562, 2 N. W. 814 (1879).

19. Appendix I, p. 789, note 5 citing Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N. W. 976.

20. GRAY, THE NATURE AND SOURCES OF THE LAW (1909).

21. Pound, *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 HARV. L. REV. 591, (1912) 25 HARV. L. REV. 140, 489.

22. "It may well be that Realists, immersed in the ruthless pursuit of facts and the grim realities of life, are too close to their favored philosophy to observe its defects in operation." Kennedy, *A Review of Legal Realism* (1940) 9 FORDHAM L. REV. 362, 364.

beginning to be used in 1830, show that the survivor of the five Dionne quintuplets, for example, has a life expectancy but little more than the expectancy of two of the sisters.[23] The duration of the average trust administered by the Mississippi Valley Trust Company of Missouri is about 12 years;[24] and about ten years ago the present reviewer requested some lawyers in New York City to make an examination of the number of beneficiaries involved in the ordinary trust and the average was under five — about 4.25 each. Many of these trusts were in whole or in part for elderly or middle-aged mothers, sisters and wives, as well as for young children; and the addition of these mature lives to those of young children does not increase the theoretical expectancy by any material extent. The 1830 Revisers were so intent upon preventing abnormal wills like that involved in the English case of *Cadell v. Palmer*,[25] then pending before the English courts and not finally decided by the House of Lords until 1833, that, in the words of Professor Gray, they devised an arbitrary rule which "cuts through and defeats the most ordinary provisions", whereas the common law rule "strikes down only unusual provisions".[26] The question presented is whether statutes should be passed for the unusual case, or for the usual one.

While the new edition of this masterpiece will interest lawyers all over the country, it will be of especial value to New York professors and practitioners.

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FINANCING THE WAR. Philadelphia, Pa.: Tax Institute. 1942. pp. iii, 366. $2.50.

"Myself when young did eagerly frequent
Doctor and Saint, and heard great Argument
About it and about: but evermore
Came out by the same Door as in I went."[1]

A symposium on an exceedingly complex and recondite subject creates a similar confused impression on the reader. The eighteen articles, by as many different economists, present almost as many views of the fiscal dangers to be anticipated and the methods the authors would recommend for encountering them. For the "reader satisfaction" mentioned in the foreword, it was necessary that the discussion be in general terms and without an undue demand on his powers of concentration or analysis. He must be a difficult man to please who cannot find much to agree with in so many excellent articles. As Sir Anthony Absolute remarked to Mrs.

23. See Russell, *Proposed Changes in the New York Rule Against Perpetuities* (1930) 6 ST. JOHN'S L. REV. 50, 59 for a discussion of these mortality figures.

24. These figures were given to the reviewer by one of the trust officers of this institution in a letter which I have filed away upon entering military service in September, 1942.

25. 1 Cl. & F. 372, 6 Eng. Rep. R. 956 (1832-1833).

26. See notes 6 and 7 *supra*.

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1. Rubáiyat of Omar Khayyám of Naishápur.

Malaprop, "I must confess that you are a truly moderate and polite arguer, for almost every third word you say is on my side of the question."

It is a commonly accepted view, and the participants in this symposium agree, that inflation is an unqualified evil, and that the paramount objective in any system of financing the war should be its avoidance. That depends upon the point of view. The equanimity, if not satisfaction, with which many—indeed most—of the people of the country view its approach would seem to indicate the existence of a contrary opinion. Recipients of $70.00 and $80.00 a week wages in war plants, market garden farmers enjoying 110% parity, or all without price ceilings, and other similar groups, entertain a different philosophy much more valid as applied to them.

The relative changes of groups and individuals within the economic pattern of society are greatly accelerated by war conditions. There is apt to be distortion proportionate to the inflation. Debtors win, creditors lose: dealers in credits lose, dealers in concrete objects win. Certain wage earners get large shares, others less. Since the government spends its money in wartime in a way which does not aid the production of consumers goods, any of the new money not recaptured in taxes simply serves to swell the available supply of money and credit and correspondingly reduces the value of existing credits held by individuals.

Were it possible in practice to recover in taxes the precise sums spent by the government for its war needs, of course no inflation would result and no change in the relative position of the people would occur. While this is impossible to effect, some of the authors would appear to be satisfied if price increases could be prevented by heavy taxation accompanied with strict price controls and rationing. Secretary Morgenthau is of the same mind, advocating the raising of two thirds of the cost of the war by taxation. But as the real evil is the dislodging of individuals and groups from the position they have gained relative to others in the economic class structure, the remedy advocated would seem suited merely to conceal the inflation—not prevent it. There is some evidence that such changes would not be displeasing to the administration.

The increase in the income of certain groups caused by the government's war expenditures is the source of the anticipated dislocation. Simply raising the income tax rates and lowering the exemptions is a futile method of procedure; it serves rather to preserve and increase the impairment of the previously existing social pattern. Had the increases of income alone, occasioned by the war expenditures, been taxed at heavy progressive rates, a minimum of change in the relative economic positions would have resulted. But as at least 60% or 70% of the war spending is in wages and salaries, the likelihood of any such tax is remote indeed.

In a capitalistic society, large incomes have supplied practically all the savings. The system of taxation adopted by the United States, therefore, tends to reduce markedly the amount of borrowing which can be made from savings, and forces a resort to credit expansion.

The experience of the last war is not conducive to hope that Mr. Morgenthau's expectations will be even closely approached. In that war loans supplied from two-thirds to four-fifths of the fiscal cost. Yet the United States entered that war with less than one billion of national debt and the total cost was about 36 billions. It enters this with a debt of 50 billions and an expected cost of upward of 200 billions. As Charles Cortez Abbott points out in a most interesting chapter, the entire amount of debt in the United States in 1939—federal, state, local, corporate, in form of mortgages, consumer credits or otherwise—is estimated by the Depart-

ment of Commerce to be about 160 billions. The already existing federal debt, in view of the non-productive expenditure of the greater part of it, constitutes a very heavy burden upon existing production. Thus it seems unlikely that the taxes levied to pay for this war can be proportionally as productive as were those of the last one. On the contrary, a diminishing proportional return is to be expected, resulting in a greatly increased borrowing based almost solely on credit expansion.

When the last war began, most of the large nations involved were on the gold standard. Though specie payment was soon suspended in many countries, the attempt to operate within the limitations of the gold standard tended to prevent as rapid and excessive inflation as now seems probable. Nevertheless, all nations involved suffered more or less; the German currency finally became worthless and that of France depreciated to one-sixth. The greater the proportion of war expenditures to the previously existing wealth, the more severe the inflation and subsequent depreciation. Under present conditions, the possibilities of credit expansion are practically limitless. As a result each country is in a position to appropriate the wealth and production of its citizens to any extent that may be necessary. Inflationary loans and expenditures, coupled with rationing and price-fixing, supply the necessary machinery. In Germany the ownership of all stocks has been transferred to the government in exchange for non-transferable and presently non-redeemable bonds, and price-fixing is so extreme that even vacant real estate was added to the list recently.

Just how far price fixing and rationing can be successful as inflation curbs depends on many uncertain factors, such as the total war expenditures, the period of time involved and political and psychological conditions. The American people are self indulgent, trained in bootlegging, indifferent to laws (an average of 1000 new laws yearly are made in New York State alone), and are particularly skilled in the use of influence, both singly and in groups, upon government and officials. The disgraceful scenes of the first "gas" registration afford a fair index of what is to be expected. When the war first broke out, the President said that it would not be necessary for certain groups, at least, to sacrifice any of the advantages they had gained, and he subsequently opposed sales taxes on the ground that they tended to restrict consumption. While the approaching elimination of consumption has modified this attitude, its effect upon the enforcement of price fixing and rationing is bound to be significant.

While inflation seems inevitable, it might be best to embrace it as a necessary evil. Many economists believe that, in the long run, credit expansion is an indispensible factor in financing a war. The resultant boom creates an eagerness to aid in the effort necessary to produce the war materials, and makes it much easier, on the whole, to carry the fiscal costs of war.

Inflation, almost perforce, must take up much of the slack created by the failure of the tax machinery to respond rapidly to the fiscal emergency of the war. The Treasury has prevented the adoption of Mr. Ruml's plan for collecting the income tax contemporaneously with its receipt. The present system of collecting it a year after its receipt is not only inadequate and inflationary, but, as Professor Harley L. Lutz points out in an article which advocates most convincingly a plan very similar to Mr. Ruml's, is unfair as a kind of retroactive taxation. As he puts it: "Retroactive increase of the rates on income is the very dregs of fiscal morality."

Most of the articles in the book advocate persuasively and lucidly various fiscal schemes which their authors believe would retard inflation. A very few describe existing plans of price control. One of these is entitled *How England Is Avoiding*

Inflation, by Brinley Thomas of the British Embassy. In spite of the apparently tremendous war expenditures made by Great Britain, the cost of living has not been permitted to rise above one-third. He ascribes this in part to the lend-lease aid of the United States and also to "the joint operation of spontaneous and governmental curbs on civilian consumption". It is not stated how much is spontaneous and how much governmental. In Germany we suppose it to be in the proportion of 10% to 90%, but Mr. Thomas implies it to be the opposite in Great Britain for he says: "It is the very essence of a democratic government that it can achieve this difficult goal by appealing to the sense of responsibility of free citizens."

Particular mention should be made of the first article in the book, by Robert Warren of Princeton University on *Function & Scope of War Finance.* This contains a most enjoyable and clear exposition of his subject, in which his views are presented in a way both novel and easily understood. Professor Warren would cut the Gordian knot by abolishing the price system entirely, which in effect has been done, he says, in Germany. Total war seems to demand a new system of finance. That happens to be the system which is used also in Russia and to a great degree in all other totalitarian states. It may be the best thing, but most of us hope that the cost of the war and the consequent inflation will not be so enormous as to explode the credit system under which we presently operate.

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