

PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT. Selected Cases and Other Materials on the Law of Real Property. An Introduction. By Myres Smith McDougal* and David Haber.** Charlottesville: The Michie Casebook Corporation, 1948. Pp. viii, 1213. \$9.50.

"To make a superb inventory of Augean stables is not to cleanse them." With this thundering denunciation and its implied fiat to reform, Professor McDougal, in 1942, disposed of Volume III of American Law Institute's *Restatement of the Law of Property*.¹ Professors McDougal and Haber now have made an equally superb and more inclusive inventory of some areas of the stables, and have rearranged the contents.

The authors have collected, edited and organized reported cases, critical writings analyzing legal concepts, and analyses of data from the social and physical sciences, the impact of which on the formulation of legal policy the authors believe should be recognized.² Each item of material in the book is footnoted with painstaking care, not only with case citations, but also with carefully selected references to notes, comments and articles representing a distillation of the work and scholarship of others.

The book is divided into three parts. The first section analyzes and breaks down into their components the concepts which we call *property* and *ownership*, indicating how social controls may be applied to determine what is "property." The second part is devoted to what is designated as "land (resource) allocation by private volition," giving examples of classes of claims, the administrative procedures for establishing and maintaining them, and some possibilities of their disposition. The third part, about two-thirds of the book, is dedicated to land planning and development on local, state, regional and world levels.

A reader's comparison of the second and third parts

* William K. Townsend Professor of Law, Yale University.

** Assistant Professor of Law, Yale University.

1. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*. 55 HARV. L. REV. 1077, 1115 (1942).

2. For example, see Comment: Cooke, *Physical and Functional Relationships, Headwater Control and Use* (1936), reprinted at p. 983, and citations throughout of numerous non-legal articles on topics usually classified in the fields of the social and physical sciences.

of the book reveals the fallacy of the classification of law into "private" law and "public" law. There is but one system of law as it applies to property. The difference between private and public law is one of degree. The law presently imposes fewer or less rigid social controls in some areas of human conduct than in others. The clamor for more "public" law is a demand for more or different social controls over the individual's power to engage in certain conduct, or to acquire, have and dispose of resources. The cry for a return to "private" law is a demand for less or different social controls over the individual's power to act, or to acquire, have or dispose of resources. A regulation of land use by a zoning law or ordinance (under delegated authority), or a control of atomic energy becomes as much a part of the law of property as the regulation of nuisances, or of riparian rights. The authors' recognition that a system of law cannot be classified into "private" and "public" regulation is a distinct contribution to the present practicing and teaching profession.

The same consideration enters the disputes over law curricula. Too frequently, the question of *how* law should be taught is merged with the question *what* law should be taught. That law should be taught as a policy science may be only a fusion of "how" into "what."

While recognizing the fallacy of the classification of law into public and private the authors have, nevertheless, contributed to the perpetuation of it. The second part of their book they designate as "land (resource) allocation by private volition." The materials they include in the section indicate that the conflict in the exercise of individual volitions was decided under a system of law. Developments of controls permitting individual disposition of resources by means of wills and trusts, which constitute a major part of present policy problems in property law are minimized, as are their backgrounds. What was designated as "private" volition was, in fact, what that system of law permitted one individual to do. One can only infer that the authors believe and hope to convey the conviction that the individual "bundle of rights" should be reduced materially. With such a belief, so stated, I can agree.

It is logically inescapable that the reasoning behind the second part of the book must be projected into the third

section. The earlier chapters of the third section amplify the areas of confusion created by a system of law permitting what is considered as too much flexibility of choice of conduct in the individual. There follow examples of modern subjection or subordination of individual choice of the person to what is considered the best interests of the local community. The examples given on local community planning, however, exhibit the same weaknesses in allowing local community "volition" as were admirably shown in permitting private individual "volition." If the exercise of individual "volition" is not in harmony with the best interests of the local community, then the exercise of local community "volition" may not be in harmony with the best interests of the state. The exercise of state "volition" may not be, and frequently is not, in the best interests of the region. The exercise of a regional "volition," either under state compacts or by Congressional authority (which may not be real regional volition) may not be in the best interest of the nation.

These things, however, are only matters of internal (local) concern. Perhaps, with adequate training in policy science in the law, these problems can and will be solved, on a national basis. The most important problem remains. If these problems are solved on a national basis, is that solution consonant with the best interests of the citizens of international regions or of the entire world? That which may be the best allocation for the interests of those who live in the United States of America may be a quite selfish allocation if one considers the presently hopeless outlook of the millions of Asia. In any truly comprehensive planning, for example, the effect of immigration laws on resource allocation must be re-examined as those laws amount to restrictive covenants on a world scale. Good planning will require some rather restrictive control of births to avoid an imbalance in allocation of resources among peoples. Even in One World, an uncontrolled human production might be ultimately disastrous, because the resources to be allocated are not infinite. With consummate skill and subtle organization, the authors point out the existence of these ultimate problems, even though not attempting a complete inventory of them.

Considering the book as a proposed introduction for untrained students to secure some understanding of and an

ability to evaluate the concepts of a system of law as it applies to property, it should lead them to become not only legal statesmen but legal craftsmen as well. To be effective lawyers they should understand the relationship of presently accepted concepts with the facts out of which they arose, before deciding whether those concepts are now applicable, or should be revised or discarded. Many, if not most, of those who will graduate from our law schools will begin the practice of their profession in smaller county seat communities. Of these, some will become judges of the highest judicial tribunals of their states, or even justices of the Supreme Court; some will achieve high posts in the executive and legislative branches of the state and federal governments; some may be representatives deciding policy on an international level; most of them will continue in the application of our system of law, whatever it may be, where they started. All will have important functions to perform.

Whether the function be to change, amplify or administer the system of law, an understanding of both the universals and the particulars of that system might be helpful. The authors have produced a great critical analysis of a system of law to be used by students who have little comprehension of the particulars of that which is being analyzed. These students might even assume that such an understanding was neither necessary nor desirable. May one reasonably suggest that lawyers would be better equipped in the future to supervise change if they understood that which their new policies were replacing, if for no other reason than to avoid past error?

The book is one of the most stimulating works of its kind which has been published. It could be studied with profit by every graduate law student, practicing lawyer, judge, legislator with law training, and by every law teacher. As either an introduction to the study of property law, or as an introduction to legal theory and method, I am not yet convinced of its ultimate values.

Even Augean stable boys might profit by a better understanding of the stable's contents.

Leon H. Wallace†

† Professor of Law, Indiana University.