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BOOK REVIEW

THE LAW OF EASEMENTS AND LICENSES IN LAND. By Jon W. Bruce† and James W. Ely, Jr.†† Boston, Massachusetts: Warren, Gorham & Lamont, 1988. Pp. xix, 457. $84.00

*Reviewed by R. H. Helmholz**

A distinguished commentator, Professor A.W.B. Simpson, recently observed that the legal treatise seems to be going the way of the dinosaur and the dodo bird.[1] To him, and indeed to other thoughtful observers,[2] the treatise's characteristic form appears to have outlived its natural span, or at least lost its reason for existence among serious academic writers. The treatise's focus on a particular and specialized area of the law and its inevitable concentration on the doctrinal analysis of appellate cases now appear quite out of date to these observers, something perhaps worthwhile in a simpler and more complacent era, but which one can no longer think profitable. In its place, stand other disciplines thought to be more useful in understanding how law works: statistics, economics, philosophy, history, even literary criticism. Rejecting the seemingly confining and pointless parsing of cases, members of the academy have come to prefer newer charms and loftier perspectives.

The appearance of *The Law of Easements and Licenses in Land*[3] therefore brings one up short. Devoted to a specialized area of the law, centered around doctrinal analysis, based on recent American case law, and written by two academics of reputation and ability, this treatise flies in the face of these trends in legal scholarship. It may of course be

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1. *See* Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).

2. *See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 581-82 (1973); Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

3. J. BRUCE & J. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND (1988) [hereinafter *Treatise*].

a "throwback." Perhaps it is nothing more than one of those counter examples that can be produced in almost any area of the social sciences, but which does not seriously challenge the accuracy of the proposition being advanced. On the other hand, it may also be that the recent observers are mistaken about the direction of legal scholarship. To make a judgment, I thought it would be appropriate to compare the reasons commentators have given for the decline of the treatise writing tradition with the evidence found in this volume. The results, though neither profound nor startling, confirm several of Professor Simpson's observations, but they also suggest that there may yet be life in the tradition.

Reasons Assigned for Decline of the Treatise

Three basic reasons have been advanced for the declining fortunes of the specialized legal treatise among academic writers. First, there has been an explosion in the number of cases reported in this country, and an accompanying invention of better research tools for dealing with them: WESTLAW, LEXIS, and the like. The argument concludes that the mass of case law produced by American courts is now so daunting that no one can hope to master it. This explosion, together with new machines that make access to the case law instantly available to practitioners, has rendered the legal treatise less necessary than it once was.

Second, in most areas of the law, and certainly in traditional areas like the law of easements and licenses, scholars already have dealt with the material coherently and comprehensively. No one likes merely to rearrange what others have done. The natural desire for originality has driven academics, at least academics at our national law schools, to prospect farther afield; hence the greater interest in legal theory and in what lawyers once considered to be marginal disciplines like economics and history.

Third, the widespread acceptance of the teachings of the Realist Movement has caused a loss of faith in the worth of studying appellate decisions. Few believe any longer that the outcome of litigation follows by a process of formal deduction from the application of legal principles to the facts of a particular case, and some believe that legal doctrine is little more than a fig leaf, covering the political and social preferences of the adjudicators. To the Realists, a legal treatise has come to seem, and in fact to be, an irrelevance. This Review examines and evaluates these three reasons.

1. *The Mass of American Cases and the Treatise*

Although admittedly concerning a relatively small corner of American jurisprudence, the contents of this treatise surely support the pro-

position that an abundance of recent case law is readily available for use and comment. More than half of its slightly more than 450 pages is occupied by footnotes, which predominantly consist of recently decided American cases. A random glance at recent advance sheets or at the *Decennial Digests* amply confirms this finding. Appellate decisions on licenses and easements fill many pages of contemporary state reports.

The authors have examined much of this mass; they have not been content with a few illustrative or leading cases. To discover the current state of decisional law they have cast their nets widely, and the result is a large and impressive compilation of decisions. They may occasionally have gone too far. They provide ten cases, for example, with full citation and illustrative quotations taking up fully half a page, to prove the well-established rule that a license is not treated as an interest in land.[4] Some might consider this a case of "overkill." In their defense, however, it might equally be said that they are here quietly refuting the position taken by the important *Restatement of Property*. They may well have thought some accumulation of authorities necessary.

The essential point made by other commentators is not simply that a formidable mass of case law exists, but that modern research tools make the work devoted to digesting it unnecessary. This treatise gives reason for hesitation. LEXIS and its competitors will produce the cases found in this treatise, and more. Clever or persistent use of LEXIS may even classify them after a fashion. But it will not tell us what the cases mean, nor analyze them for us.

This treatise shows how much the law of easements and licenses stands in need of intelligent analysis. For example, deciding whether or not a grant of land for a stated and specific purpose (as for a right-of-way or a park) amounts to the grant of a fee or an easement has troubled courts for many years. No doubt uncertainties will persist. When the deed does not say expressly, it will always be hard to determine which purpose the grantor intended. One needs intelligent analysis as a first step in the process of interpretation. The authors of the *Treatise* have responded to this need by devoting several pages to elucidation of the factors that point in one direction or the other.[5] They do not purport to "solve" the problem. That would be impossible. They do provide, however, an intelligent user's guide to the existing terrain, and their footnotes demonstrate the usefulness of this guide. More often than not, the only commentary on one or another aspect of a persistent problem in the law of easements turns out to be an *American Law Reports* annotation—helpful to be sure, but no substitute for full analyti-

4. *Id.* ¶ 10.01, at 10-2 to -3.
5. *Id.* ¶ 1.06[1]-[2], at 1-39 to -47.

cal treatment. This treatise demonstrates how much room, in fact how much need, there is for legal scholarship, in spite of the invention of new and mechanical tools of research.

2. *Novelty, Legal Theory, and the Treatise*

Professors Bruce and Ely have organized this treatise along traditional lines. They have not sought novelty for its own sake, and if "nonlegal" thinking holds any charms for them, they have concealed their interests in its pages. For instance, they make no attempt to integrate the available literature from law and economics into their treatment of solar easements.[6] Nor is any place made for economic analysis in their discussion of easements in airspace near airports.[7] And although Professor Ely is himself an accomplished legal historian,[8] the *Treatise* does not make any special use of historical insights. The common law of ancient lights, for example, makes a "cameo" appearance as historical background for the unwillingness of American judges to grant prescriptive easements of light and air, but the authors do not think it has any particular relevance for modern problems.[9]

Nor do the authors have much time for refined speculation or jurisprudential theory. For example, a few years ago, *Southern California Law Review* published a symposium issue devoted to the possibility that much of the long-standing confusion in the area might be ended by the creation of a new and harmonized law of easements and servitudes.[10] The issue attracted some attention at the time, and the authors of the *Treatise* take note of the symposium and of its proposal. But they think that such harmonization is "not likely to occur in the near future."[11] In consequence, they say no more about it.

What the *Treatise* provides instead is a serviceable summary of the law of easements and licenses as found in current case law. It begins with definitions: easements are distinguished from profits *a prendre*, licenses, leases, and grants of fee interests in land. The authors both ex-

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6. There is no mention, for example, of Williams, *Solar Access and Property Rights: A Maverick Analysis*, 11 CONN. L. REV. 430 (1979), in the discussion of solar energy easements. *See Treatise, supra* note 3, ¶ 11.04.

7. *Treatise, supra* note 3, ¶ 5.10[6]. There is such literature. *See* Baxter & Altree, *Legal Aspects of Airport Noise*, 15 J. L. & ECON. 1 (1972).

8. *See, e.g.*, AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (D. Bodenhamer & J. Ely ed. 1984) (known to readers of these pages from Herbert A. Johnson's review in 37 VAND. L. REV. 1455 (1984)).

9. *Treatise, supra* note 3, ¶ 5.10[1]. On the doctrine, see Pfeiffer, *Ancient Lights: Legal Protection of Access to Solar Energy*, 68 A.B.A. J. 288 (1982).

10. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982); Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982).

11. *Treatise, supra* note 3, ¶ 1.07, at 1-51.

plain and illustrate the traditional division between easements appurtenant and easements in gross. The authors then cover at length the creation of easements (express, by implication or necessity, and prescriptive). The *Treatise* next moves systematically through the permissible uses of easements, dealing with matters like maintenance of rights and permissible changes in the extent of use. It then discusses problems associated with the transferability and termination of easements. Toward the end, there is a shorter section devoted to licenses, and the final chapter takes up what the authors call "evolving and prospective issues." By this phrase they mean new and currently controversial types of easements: easements for purposes of historic preservation, access to public beaches, scenic conservation, cable television, and wind, sun or air. The authors illustrate each of these subjects by appropriate case law or commentary, and where possible they rationalize these subjects in terms of current social policies.

The *Treatise* thus casts doubt upon Professor Simpson's initial observation that academics at national law schools are no longer interested in the study and orderly presentation of existing case law. At the same time, perusal of its contents confirms the truth of his observation that a gap exists between the work of the courts and the interest in theoretical jurisprudence now seen among legal scholars. The authors chose to deal with the existing case law, and as a by-product of this choice, they stayed away from theoretical or "nonlegal" thinking about the subject.

This often wide and always evident gap between much current scholarship and case law cannot be an ideal state of affairs. No doubt there always will be some distance between the concerns of law practice and those of the academy. It is nonetheless true that discourse between judges, practicing lawyers, and law professors is possible. It might also be useful. Scholarship, even theoretical scholarship, *can* draw conclusions from the results of actual litigation.[12] And judicial opinions *can* make use of insights drawn partly from theoretical writing and from other disciplines.[13] This treatise shows that within this area of property law this interchange has not occurred.

3. *Legal Realism, Cynicism, and the Treatise*

The third reason given for the decline of the treatise tradition in modern American history is a decline in the perceived value of pure

12. *See, e.g.*, Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 97-109 (1986).

13. *See, e.g.*, Hall v. City of Santa Barbara, 797 F.2d 1493, 1498 (9th Cir. 1986) (opinion by Kozinski, J., making use of published work by Profs. Richard Epstein, Frank Michelman, Lawrence Blume, and Daniel Rubinfeld).

legal reasoning. This disillusionment is the heritage of the American Legal Realists.[14] They taught us to think that the treatise was an irrelevance because treatises inevitably pretend that cases are decided by the deductive application of legal rules. In some ways, the publication of this treatise supports that observation. The authors claim, exaggerating very little, that theirs is the first comprehensive American treatise devoted solely to the law of easements and licenses to appear in the twentieth century.[15] That is a long hiatus. In England, where the Realist Movement never took hold, the history of publication of the standard work on the law of easements has been the reverse. Works on this subject have continued to appear, and Gale's classic treatise on the law of easements, first published in the middle of the last century, has been continually revised and republished. In this century it has reached its fifteenth edition.[16]

On the other hand, the authors themselves exhibit few signs of disenchantment with doctrinal analysis. To have thought this venture worth undertaking, they must have perceived normative value in it. Their lack of interest in empirical research or in purely theoretical analysis, discussed above, gives evidence of the same attitude. Plainly, not *all* modern law teachers at *all* national law schools have Legal Realism in their bones. Bruce and Ely think that by "grinding through a few of these decisions" one comes to perceive a pattern to the case law.[17] They have done a good deal of "grinding" as a result. They take what appellate decisions say seriously, mining them for the telling quotation,[18] and discussing at length those cases that have become leading authorities.[19] They treat the decisions of courts as illustrations of generally applicable rules and as worthy of a scholar's attention for that reason.

This technique does not mean that the authors of the *Treatise*

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14. *See generally* L. KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 74-94 (1973); Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

15. *Treatise*, *supra* note 3, at v; *see* L. JONES, A TREATISE ON THE LAW OF EASEMENTS (1898); E. WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES (4th ed. 1885); *see also* C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH THE LAND" INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS (2d ed. 1947) (dealing with a special aspect of the subject and cannot be termed comprehensive). There have, on the other hand, been many treatments of the subject within more general works on real property.

16. S. MAURICE, GALE ON EASEMENTS (15th ed. 1986); *see also* J. GODDARD & N. GODDARD, A TREATISE ON THE LAW OF EASEMENTS (7th ed. 1910); S. NEWCOMEE, LAW OF EASEMENTS (1952); R. PARRY & A. HOWES, THE LAW OF EASEMENTS (3d ed. 1925).

17. *Treatise*, *supra* note 3, ¶ 1.03[3], at 1-15.

18. *E.g.*, *id.* ¶ 4.02[1], at 4-7 to -8 (quoting Bob Daniels & Sons v. Weaver, 106 Idaho 535, 538, 681 P.2d 1010, 1013 (Ct. App. 1984)).

19. *E.g.*, *Treatise*, *supra* note 3, ¶ 8.03[1], at 8-6 (discussing and noting that courts have generally followed Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646 (1938)).

have no ideas of their own, or that they follow the cases slavishly. For example, they think that the invention of an "implied reciprocal negative easement," used by some American courts to denote a restrictive covenant implied by equity, has been an unhappy event. It has obfuscated the useful distinction between easements and real covenants.[20] They believe, contrary to the view adopted by a number of American courts and also by the *American Law of Property*,[21] that an attempt to assign a license, though ineffective, does not work a forfeiture of the license.[22] They conclude, contrary to the position taken by the *Restatement of Property*, that the failure of many courts to "distinguish between easements of necessity and easements implied from quasi-easements" has had unfortunate results.[23] They applaud the reasoning found in a recent case from the Supreme Court of Georgia recognizing that the holder of a profit *a prendre* enjoys a true interest in the land, even while they disapprove of the Georgia court's consequent holding that the profit could not be abandoned.[24]

The authors on occasion may have exaggerated slightly in favor of their own view. They state as settled law that the mental state of the claimant is irrelevant in determining whether or not he or she has established an easement by prescription.[25] There are certainly cases that so hold, but there are equally cases that hold the contrary.[26] It does seem inherently unlikely to suppose that judges and juries pay no attention whatsoever to what one person knew or thought at the time he was making use of another's property. The authors' view is hard to square, for instance, with the many cases that have denied prescriptive easements on the grounds that the use was simply a matter of "neighborly accommodation."[27] Moreover, the line between acquiescence and permission by the owner of the property is such a fine one that in many cases it must be next to impossible to disregard all evidence of the par-

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20. *Treatise*, *supra* note 3, ¶ 1.07, at 1-52.

21. 2 AMERICAN LAW OF PROPERTY § 8.77, at 287 (A. Casner ed. 1952).

22. *Treatise*, *supra* note 3, ¶ 10.04, at 10-10 to -11.

23. *Id.* ¶ 4.01[3], at 4-6 (stating that "[t]he RESTATEMENT OF PROPERTY adds to the confusion in this area by rejecting the common-law approach to the implied easement issue").

24. *Id.* ¶ 1.04, at 1-33 to -34.

25. *Id.* ¶ 5.03[4], at 5-17 to -18.

26. *See, e.g.*, Massey v. Price, 252 Ark. 617, 480 S.W.2d 337 (1972); Berry v. Sbragia, 76 Cal. App. 3d 876, 143 Cal. Rptr. 318 (1978); French v. Sorensen, 113 Idaho 950, 751 P.2d 98 (1988). I have not made a detailed study of prescriptive easement cases on this subject; it may be that such cases are in a minority. The limited study I have made shows that courts do not require exactly the same sort of claim of right for establishment of a prescriptive easement that one finds in adverse possession cases. *See* Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983).

27. *See, e.g.*, Chaconas v. Meyers, 465 A.2d 379 (D.C. 1983); Pastore v. Zlatniski, 122 A.D.2d 840, 505 N.Y.S.2d 903 (1986); Crites v. Koch, 49 Wash. App. 171, 741 P.2d. 1005 (1987).

ties' subjective intent.[28] In the parallel though by no means identical area of adverse possession, even the commentator who began by taking the position held by these authors has apparently come to believe that the subjective intent of adverse possessors plays some role in the decision of actual cases.[29]

On the whole, however, such occasions are rare in the *Treatise*. For the most part, the authors provide judicious summaries of the current state of American decisional law. This holds true even when the cases differ among themselves. The question, for example, of whether or not the bona fide purchaser of land takes free of an existing prescriptive easement of which he has no notice has produced a conflict in the cases. The authors both state and are fair to the opposing views.[30] When generalization about the cases proves impossible, as it has for instance in determining what events will suffice to trigger the forfeiture of a defeasible easement, the authors candidly admit the impasse.[31] If any criticism can be made of their effort, it is that they have not in every instance gone far enough in analyzing the cases. More complete and patient analysis might well show even more about the operative facts in the cases and might permit the authors to draw clearer conclusions about the directions the law ought to take. This, however, is a counsel of perfection. It does not detract from the considerable achievement of these two authors. It merely reiterates the point made earlier that the law of easements and licenses affords ample room for further research.

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28. Permission by the owner of the servient estate will defeat the claim, whereas mere acquiescence will not, and may in some jurisdictions actually be required. *See, e.g.*, Pace v. Carter, 390 A.2d 505 (Me. 1978); Pettus v. Keeling, 232 Va. 483, 352 S.E.2d 321 (1987); Smith v. Breen, 26 Wash. App. 802, 614 P.2d 671 (1980). The authors argue that acquiescence "should play no role" in deciding disputes over prescriptive easements, but they acknowledge that the case law is mostly against them. *Treatise*, *supra* note 3, ¶ 5.08.

29. *See* Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U.L.Q. 1167, 1172 (1986). The dispute between Professor Cunningham and myself therefore narrows slightly to the question of exactly what role subjective intent has played in the decided cases. Professor Cunningham's *Rejoinder* does not state exactly what affirmative role he believes the cases show subjective intent has played, though he clearly thinks that good or bad faith has not been part of it. Regrettably, the analysis of cases found in the *Rejoinder* is seriously misleading. As with the author's prior work, it attempts unconvincingly to "explain away" the cases that treat the adverse possessor's knowledge of the true state of title as a crucial element in meeting the claim of right requirement necessary to establish adverse possession. Readers interested in this controversy, which the Autbors of the *Treatise* euphemistically describe as "lively," *Treatise*, *supra* note 3, ¶ 5.03[4], at 5-18 n.28, should take note of one recent case: ITT Rayonier, Inc. v. Bell, 752 P.2d 398 (Wash. App. 1988), an unfortunate but probably inevitable sequel to Chaplin v. Sanders, 100 Wash. 2d 853, 676 P.2d 431 (1984), discussed in Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U.L.Q. 65, 106 (1986).

30. *Treatise*, *supra* note 3, ¶ 5.04, at 5-22.

31. *Id.* ¶ 9.02[1], at 9-8 to -9.

CONCLUSION

Looking back at Professor Simpson's observations in the light of evidence found in the *Treatise*, I believe that any conclusion about their accuracy must be mixed. Certainly the small size of the sample precludes any very sweeping conclusion. Nonetheless, this examination has clearly produced much evidence that supports his initial observations. That this is the first American treatise on easements to appear in this century shows that the tradition has been (at best) dormant for a very long time. Moreover, the *Treatise* shows that there *is* a mass of case law, and some of it produces rules that are sufficiently confusing or contradictory to cause commentators to lose heart. Finally, a gap between much of recent academic scholarship on the subject and the concerns of case law clearly does exist. Academics and practitioners have been going their quite separate ways, at least in this corner of the law.

This said, the *Treatise* demonstrates that the reasons given for the decline of treatise writing among American academics do not tell the whole story. This is not a simple "throwback" to an age of naïveté. Developments within the law of easements and licenses are taking place, and sense needs to be made of them. The burgeoning case law will also permit, and may even welcome, sophisticated research projects. It cannot be true to say that LEXIS now occupies the field. This treatise gives reason to hope that the treatise writing tradition will enjoy a more vigorous future among academic writers than it currently does, and also that the first edition of this example of the species will not be the last.