Current Legal Periodicals

Leon Green and Legal Education. By CHARLES T. MCCORMICK. 43 Illinois Law Review: 5-14.

Charles T. McCormick, Dean of the School of Law, University of Texas, writes in this article of his friend and former teaching associate, Mr. Leon Green, sometime lecturer in law at the University of Texas and sometime Dean of the Faculty of Law at Northwestern University. Mr. Green is noted principally for his work as a case-book compiler and for his leadership in the field of curriculum reconversion. In both these fields he has concentrated his attention upon the task of developing the individual powers of the law student rather than upon teaching as a mass or group process. Worthy of note are Mr. Green's successes in tort law, a field in which he specialized and of which he has become an acknowledged master.

Green's insight enabled him to distinguish the line in torts between the two-party cases, where one man has injured the person or property of a second, and the three-party situations, where the defendant has injured some relationship between the plaintiff and a third person. This distinction he incorporated into the teaching of advanced tort law, and he proceeded to put particular stress on "relational interests". Under this heading he dealt with injuries to family relations, to general social relations, to political and professional relations, to trade and labour relations, and with abuses of governmental power and process. By so doing he was able to lay open a field of tort law often surreptitiously omitted from curricula, but which is nevertheless becoming daily more important.

Green's influence upon legal education was probably most noticeable in the field of curriculum revision, which he led at Northwestern during the period from 1929 to 1947, during his deanship there. Following in the steps of the illustrious Dean Wigmore, he was nevertheless able to institute many ideas distinctively his own. Most notable of these changes was the development of a relatively complete programme in public law.

At Northwestern, public law was viewed as a basic rather than a terminal subject and in consequence students in the first year were given a foundation in it similar to that given in contracts, torts and so on. This development of public-law subjects was in accord with Green's conviction that law and government are one.

Culmination of the planned curriculum revision came in 1936 when a basic plan for legal studies was instituted, the purpose of which was to remove the study of law from the constriction due to (a) a time limit for law studies of three academic years, (b) a growing demand for courses in new areas of law, and (c) the consequent growth of an elective system.

The programme was made a required rather than an elective programme and the choice of subject matter was vested in the faculty. Further, when post-war stresses necessitated academic acceleration and regular summer courses of law, Northwestern chose to incorporate the summer lecture course as a normal rather than an extraordinary course, and so was able to lengthen the school year to a total term of forty-three weeks. This gave considerable additional study time to a course already simplified by the introduction of a "Basic Concept" system expanding in later scholastic years to more advanced and particular study. Increased lecture and study hours gave room for the desired emphasis on individual instruction and individual effort in seminars, research and writing.

Mr. Green's conception of the stature and function of law students and their organizations and of the responsibilities to each other of the law school and bar are well worthy of note. Concerning the first, Green himself says, "Students having discovered that they can publish law reviews, induce their teachers to work together, compel changes in curricula, necessitate the strengthening of faculties, and make the study of law through their own teaching a living thing, have not stopped with becoming active participants in the educational process. . . . Gone are the headaches in the administrative office caused by dilatory grading of papers and countless arbitrary measures taken thoughtlessly by the professors. The students are too persuasive; the professor cannot ignore them as he can where student organization does not exist." A further value of the growth of law students to full stature, says Mr. Green, is "the truest professional spirit of give and take refined by daily clashes with fellows and faculty". From such factors and elements arise a spirit of friendly confidence between faculty and students, free from fear or formality.

As for the responsibility to each other of the bar and the law school, Mr. Green is both pointed and lucid. In his view, research and investigation are responsibilities that law school faculties should undertake. He goes even further when he says, "The school should assume those responsibilities which can be met by its faculty to much better advantage than by any other contingent of the profession". He contends that the responsibility of maintaining an adequate law school is one belonging to the state and one that the state should retain to itself so long as there is any uncertainty as to the ability of any other group or organization to provide for the school adequately. The maintenance and provision of the law school should be left to the state, however, only long enough to permit its transfer to and acceptance by the profession as a whole, when the profession is prepared to give its "attention and thought to its obligation to perpetuate an increasingly perfected profession" and to "make adequate provision for the nursery and parental roof". (G. T. HAIG)

Civilians in Enemy-occupied Territory. By CLIVE M. SCHMITTHOFF. 64 Law Quarterly Review: 405-491.

In two recent cases the question had to be determined whether civilians of non-enemy nationality, who resided in enemy-occupied territory, were "enemies" within the meaning of the legislation governing trading with the enemy. These two cases are *Boissevain* v. *Weil*, [1948] 1 All E.R. 893, and *Re Hatch*, [1948] 2 All E.R. 288, and the decisions in them appear to be in direct conflict with one another. The observations and deductions that follow may serve to clarify the situation and to aid in ascertaining whether the decisions can be reconciled and, if not, which of them contains the true principle of law.

(1) The definition of an enemy by common law and under the Trading with the Enemy Act, 1939, includes all persons residing in enemy or enemy-occupied territory except individuals whose residence cannot be described as voluntary.

(2) What amounts to involuntary residence? Is it only involuntary if the civilian was physically detained by the enemy?

(3) In both of the cases mentioned the de cuius resided in enemy territory "because he could not escape", but in *Boissevain* v. *Weil* the residence was held to be involuntary while in *Re Hatch* it was stated not to be so.

(4) Observations by Lord Wright in the *Sovfracht* case, [1943] A.C. 203, indicate that in the English conflict of laws the mere

fact of territorial occupation by the enemy does not render the residence of the civilian population living there involuntary, although the presence of the enemy by necessity entails an element of compulsion. Lord Wright stated that "enemy character depends on objective facts, not on feeling, or sentiment, or birth, or nationality. They have been described as territorial or technical enemies."

(5) "Involuntary residence" means what it says, namely "captivity". Section 1(1) of the Limitation (Enemies and War Prisoners) Act, 1945, refers to persons "detained in enemy territory" and thereby indicates that, in the contemplation of the legislator, they are the only residents in enemy-occupied territory who are not "enemies" in the technical sense.

(6) The dictum of Roxburgh J. in *Re Hatch* appears to be in accord with established authority. However, the decision of Croom-Johnson J. in *Boissevain* v. *Weil* can likewise be sustained, though on grounds different from those given by the learned judge. A difference has to be drawn between "trading with the enemy" and "trading between enemies". In *Bossevain* v. *Weil*, the action was brought after the liberation of the occupied territory and the procedural bar of trading with the enemy had ceased to operate. If the learned judge had held that at the time when the money was lent both contracting parties were "enemies" both at common law and under the Act, and that the English courts do not treat as illegal contracts concluded by two enemies who are resident in an area under the enemy control, his reasoning would have been in harmony with established principle. (G. R. MUNCH)

The Racial Covenant Cases. By TRAYTON L. LATHROP. 1948 Wisconsin Law Review: 508-527.

The question regarding racial restrictive covenants in contracts and agreements in the United States has been settled finally by the Supreme Court in three unanimous decisions. In each case the covenants provided that the property in question was restricted to the use and occupancy by white persons only. At the trials the judges directed that the negro purchasers be restricted from taking possession and divested their title.

In the Supreme Court the question resolved itself into a dispute between civil rights, as protected by the equal protection clause of the Fourteenth Amendment to the Constitution, and property rights, as protected and governed by the laws of each

State. The Supreme Court decided that, even though these covenants arose by private agreement rather than by formal state legislation, when the state judiciary was asked to enforce them they became in effect state acts and, because all state acts affecting civil or property rights are within the scope of the Fourteenth Amendment, which overrides any right of the states to enforce restrictive covenants, the covenants were invalid on constitutional grounds. The court also said, in answer to the contention that state courts stand ready to enforce agreements restricting white people as well as colored, that "equal protection of the law is not achieved through indiscriminate imposition of equalities". The court "pointed out that the fundamental purpose of the Amendment was the establishment of equality in the enjoyment of basic civil rights and that it would appear without question that the power of the state to create and enforce property interests must be exercised within the boundaries of the Fourteenth Amendment". It relied on its previous decisions that state law can be made or brought into existence by the creation of contracts by parties and that any party who voluntarily enters into a valid agreement can be forced to carry it through; it thus becomes law, enforceable by state courts.

The conclusions of the Supreme Court in these three cases are in line with its previous decisions. In a case in 1946 a private corporation sought to restrict a Jehovah Witness from distributing religious literature in the company town. The Supreme Court held that this act of prevention was prohibited by the Amendment. Justice Bradley in another case aptly summed up the feeling of the court and the effect of the Amendment on state action when he stated that the Amendment:

> . . . nullifies and makes void all state legislation, and state action of 'every kind' which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law, or which denies to any of them equal protection of the law.

It is to be noted that the conclusions of the Supreme Court are also in accord with what the framers of the Fourteenth Amendment thought the Amendment would accomplish. The general view of the Joint Committee on Reconstruction was that slavery and inequality had caused the Civil War and they sought to bring about an amendment that would do away with a dominant class in any state and thus prevent a repetition of so great a disturbance. Men, such as Representative Bringham and Thaddeus Stevens, spoke of the great need for an amend-

ment that would definitely limit the power of the states to restrict the privileges and immunities of citizens of the republic. It is evident that the framers meant that all persons should have the same right in every state "to make and enforce contracts, to sue, be parties, give evidence, inherit, purchase, lease, sell, hold and convey real and personal property".

The significance of the decisions is that the power of the State to create and give effect to property interests and restrictions must be exercised within the bounds of the Fourteenth Amendment; also, that property rights, which are within the scope of the Fourteenth Amendment, are not limited to "formal" legislative, judicial and executive action, but include private agreements as well. Chief Justice Vinson said that the "Agreements standing alone cannot be regarded as a violation of any rights guaranteed by the Amendment and that voluntary adherence to any such agreement was allowable". On looking closer at the matter, however, it would seem that when a person sells or otherwise deals with property he is exercising a state power given him and if, in exercising this power, he imposes discriminatory restrictions his action becomes state action contrary to the Amendment. Whether or not there is an agreement is irrelevant to the fact that state action exists in the exercise of property rights. Chief Justice Vinson's general statement is very wide and of course obiter to the decision but nevertheless should be clarified by the court at the next opportunity. (LORNE P. FERG)

The Proposed Commercial Code: A New Deal in Chattel Security. By J. FRANCIS IRETON. 43 Illinois Law Review: 794-818.

The Proposed Commercial Code is the joint undertaking of the American Law Institute and the National Conference of Commissioners on Uniform State Laws and is intended to be not merely a uniform declaration of existing commercial law but a new, up-to-date body of rules designed to fit the complexities of modern commercial practice. Upon completion it is to be recommended for adoption by each of the various States and, for interstate transactions, by Congress.

Mr. Ireton's article deals only with one relatively small, though important, part of the Code under the heading of "Secured Commercial Transactions", but it will be of interest to lawyers generally to know something of the framework of the

Code as a whole so that they may assess its value to commerce in perspective.

Fundamentally, the purpose of the Code is to facilitate the sale of tangible goods, which is the ultimate end of every commercial transaction. The recently completed Revised Uniform Sales Act will be incorporated into, and form the beginning of the Code and, as a necessary complement, the existing provisions of the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act, with some revision especially in matters of air commerce and trucking, will follow under the heading of "Documents of Title". The balance of the proposed Code, which is devoted to the various means of financing and securing payment for the sale of goods, is of great practical interest. Payment obligations evidenced by negotiable instruments are to be dealt with largely along the lines of the Uniform Negotiable Instruments Act, but with considerable revision with respect to cheques, under the heading of "Commercial Paper". The Code will also contain rules on certain bank operations and clarify the present uncertainties over the negotiability of bonds, debentures, and the like. But a revolutionary change both in concept and method is being attempted with regard to the problem of chattel security and it is this problem that is specifically dealt with in Mr. Ireton's article.

One of the most ambitious tasks the draftsmen have set themselves is to invent a new, simplified single lien concept which will replace the variety now normally dealt with under the rules of law relating to pledges, field storage warehousing, chattel mortgages, conditional sales, consignments, trust receipts, factors liens, assignments of accounts receivable and chattel paper. The chief difficulty appears to be to preserve flexibility. But if the probability of the success of this attempt seems slight at present, admittedly great strides are likely to be made in achieving uniformity as to technical requirements for the execution, acknowledgment and recording of existing security devices.

The development and ultimate result of the American Proposed Commercial Code will be a matter of much interest and considerable speculation to Canadian legal and commercial interests. Because of the similar division of legislative jurisdictions, the problem is a common one; a wealth of practical experience will, in any event, be available for consideration and study. (J. R. MORRISON)

The Incidence of Options to Purchase Land. By R. A. HOLLAND. 13 The Conveyancer and Property Lawyer 49.

At common law a covenant in a lease granting an option to purchase binds only the actual covenantor and his estate. If the grantor parts with the land on which the option has been granted, the assignee *prima facie* takes, subject to the equitable interest of the lessee under the option, but cannot be sued on the personal contract to which he was not a party. The privity to the original covenant remains between the parties and the lessor remains liable at common law on the covenants even though he has assigned the reversion, unless on the special terms of the contract the liability is only enforceable against the owner for the time being. Whether this is the effect of the special terms is a matter for determination on the true constructions of the covenant in each separate case.

In equity, the interest created by the grant of an option binds all who come to the land except a bona fide purchaser for value without notice and those deriving title through him. Such notice might be actual, constructive or imputed. The Land Charges Act, 1925, provides for the registration of certain interests and estates as land charges and the Law of Property Act, 1925, provides that registration under the Land Charges Act, 1925, is deemed to constitute actual notice to all persons and for all purposes. The effect of non-registration is that the option is "void against a purchaser of the land charged therewith or of any interest in such land unless the charge is registered in the appropriate register before the completion of the purchase". It is to be noted that there is nothing in the Land Charges Act or the rules made under it to say on whom the obligation is cast to register, but merely that certain results follow if registration is not effected. Undoubtedly it has been the general custom that a land charge should be registered by the person benefitting by it. In the case of an option it would then be registered by the person who is entitled to exercise it, in order to bind persons deriving title under the grantor of the option.

It was against this background that the recent case of *Wright* v. *Dean*, [1948] 2 All E.R. 415, was decided. Here the lessor had leased a cafe to a tenant and by the same instrument granted the tenant an option to purchase the freehold reversion, the option not being registered. When the lessor subsequently sold to a purchaser there was no mention of the lease in the conveyance, nor was the option mentioned. This may have been done

on the assumption that the land charge had been registered by the tenant. The purchaser, however, had express notice of the lease and of the option and it was alleged that the tenant knew of the impending sale, although neither of these notices was really relevant. When the tenant later gave notice to the purchaser that he was exercising the option, the purchaser refused to give effect to it maintaining that the unregistered option was void against him. The consequence was that the tenant gave notice to the lessor, purporting to exercise the option, and then claimed damages from the lessor for breach of his covenant to convey.

In his judgment Wynn-Parry J. referred to the Land Charges Act, 1925, and the Law of Property Act, 1925, which substituted registration for notice, and to the non-registration of the estate contract, as a result of which the equitable remedy was gone and stated that, if at the time of the exercise of the option the lessor was still bound by the contract, he would be liable in damages because he had put it out of his power to perform the contract. His Lordship continued that much stronger language than the interpretation clause in the lease would be required to bring about the result that on the parting with the reversion the lessor ceased to be a party bound by the contract and he held the defendant liable at common law after the sale of the property.

Considering the position of the lessor further, it is seen that, until the purchaser refused to convey, the lessor had no notion that the tenant had not registered the land charge. If the option had been registered, the tenant could have enforced the option against the purchaser but how was the lessor in practice to know that the option had not been registered? Must the vendor in the lessor's position search against himself before completion of the sale and, if he finds that the land charge has not been registered, register it against himself?

The official form appropriate for the registration of land charges is designed for registration by one person who is not the estate owner against that person who is the estate owner. The judgment seems to have been founded upon the fact that the lessor had put it out of his power to comply with his covenant and that he could have protected the interest of the tenant by inserting an appropriate provision in the conveyance to the purchaser, but it does not suggest that there was a duty upon the lessor to register against himself.

The usual practice of conveyancers is to include a covenant by the purchaser with the lessor, by way of indemnity only,

to observe and perform the original covenant. This would not have released the lessor from his liability nor would it have enabled the tenant to sue the purchaser directly. Nothing that the lessor could have transacted with a third person could have decreased the rights of the tenant. The way in which the lessor could have best preserved the interest of the tenant and thereby avoided a claim for damages being enforced against himself would have been to ensure that the land charge was registered before the completion of the sale. This could only be done by searching against himself and, if he had found that the land charge was not registered, effecting the registration, a step quite without precedent.

In the author's opinion there must be either an alteration in the ordinary practice of conveyancers or a statutory amendment of the law. (R. K. SHIELDS)

The Barrister Crow

A mean young crow
Stole a sack of corn,
From a poor old bird
One autumn morn.

And for twenty years,
By the best reports,
The case went on
In the Caw-Caw courts.

But to-day the parties
Of the two parts mourn,
And the barrister crows
Have the sack of corn.

(Wilson MacDonald, Caw-Caw Ballads)