Book Reviews

North Carolina Law Review

BOOK REVIEWS

Cases and Material on the Law of Property. By Howard R. Williams. Brooklyn: Foundation Press. 1954. Pp. xxv, 658.

The "law of real property" is a somewhat amorphous field covering a variety of diverse but mutually interrelated problems and spilling over at numerous points into other areas such as municipal law, torts, contracts and the like. Nonetheless, it has had, at least until recently, a conventionalized pedagogical content and law teachers for the most part have felt that they possessed a general understanding as to the subject matter which it embraces. No such understanding currently prevails, however, as to how this content should be imparted to students. This was not always so. Styles in teaching real property law in general can be said to fall into three principle periods. The first antedated the case method and was marked by the lumping of all or virtually all property topics in a single course. The textbook and lecture method was employed, the approach was entirely doctrinal and the limits upon subject matter were normally those imposed by the content of conventional texts such as Washburn, Minor, and Tiedeman. In a one or possibly two year curriculum this was all the attention which could be devoted to the subject. With the advent of the case system and the increase in time allotted to legal study to three years the property curriculum was expanded and compartmentalized and we find a more or less conventional pattern of courses appearing, generally embracing "rights in land," "conveyances" or "titles," "future interests," "wills" and "trusts." Although this change affected the formal organization of courses and the method of instruction it was marked by no alteration in the basic premise that law should be taught as doctrine. Furthermore, as course offerings in most law schools continued to be small, with limited opportunity to elect between subjects, most students were of necessity exposed to virtually all property courses and received a reasonably comprehensive education in that field. The third period, in which we now find ourselves, has been marked by a breakdown in conventional concepts, by dissatisfaction with accepted methodologies and by widespread experimentation. This has been but one facet of a wider movement in the entire law teaching world, characterized by a massive expansion in the formal content of curricula and in the concepts as to the ends of legal instruction. In this process the property offerings, like other older, more conventional core subjects, have found themselves ground between the irresistible force of the demand for

increasing breadth and the immoveable object of rigid temporal limitations. It has been insisted that entirely new course subject matter, such as urban redevelopment and estate planning, be given recognition; that attention be transferred from doctrine to broad questions of policy and the interrelation of legal doctrine with social, political and economic phenomena; that "skills" be imparted; that there be no impairment in traditional instruction as to legal theory; and, that simultaneously the hours allotted to proper study be drastically reduced at the demands of the teachers of the newer public law courses. This general ferment and the mutually incompatible demands which it has produced, while they have resulted in numerous alterations in conventional methods of teaching property law, have not as yet caused any crystallization of opinion as to the direction which these changes should take. As a consequence, in recent years we have seen experiments attempted on a wide scale but without any general consensus as to the methodological premises motivating them or the ends which they should seek to achieve. Despite this confusion, certain trends have become apparent. In a number of cases what has been attempted has been a mere regrouping of conventional course material for the purpose of attaining greater coherance and efficiency.[1] In other cases an effort has been made, within limited areas, to provide for more functional instruction, geared to the actual practices of present-day society.[2] There has also been at least one effort to completely re-evaluate property doctrine in terms of the general social context in which it operates.[3] However, the least radical but most widespread innovations of recent years have been made in connection with so-called "introductory" courses. These courses have been motivated by diverse considerations. In some cases a primary intent has been to effect a merger of real and personal property law topics, not only for purposes of economy but to give the student an understanding of the close correlation between problems in these two fields. In other cases change has been effected with the idea that some introduction to the general principles of real property law and, in particular, to its historical development and the "calculus of estates," is desirable before the student plunges into the law of conveyancing and future interests. Another consideration has been the desire to

[1] Typical examples are Powell's *Cases on Trusts & Estates* (1932-33); Simes' two volumes on *Cases on Trusts & Successions* (1942), and *Cases on Fiduciary Administration* (1941); and Ritchie, Alford & Effland's *Cases on Decedents' Estates & Trusts* (1955). Both editions of Aigler Bigelow, and Powell's *Cases on Property* (1942 & 1951) are, for practical purposes, merely handy and up-to-date editions of Bigelow's *Cases on Rights in Land* (2nd ed. 1934 and 3rd ed. 1945), Powell's *Cases on Possessory Estates* (1943) and Aiglers' *Cases on Titles* (2nd ed. 1932 and 3rd ed. 1942), combined in a single work.

[2] Handler's *Cases on Vendor and Purchaser* (1933); Dunham's *Modern Real Estate Transactions* (1952).

[3] McDougal and Haber, *Property, Wealth and Land* (1948).

give coverage to certain topics, such as marital rights, the relation of landlord and tenant and the like, which do not fit readily into the conventional hierachy of courses. However, I suspect that the most important reason arises from the proliferation of course material already referred to. Not only has the amount of required property law been drastically reduced but the upper-class student, faced with a bewildering number of electives, will probably be exposed to only limited property instruction in addition to that which is mandatory. For this reason many introductory courses have been framed with the avowed intention of giving a minimum understanding of property problems to students who will not pursue the subject further.

As a consequence of this lack of agreement as to the purpose of the introductory course the content of currently published casebooks to be employed in such course shows considerable variation. One device has been to engraft upon all or part of the materials conventionally contained in the course on rights in land, a section devoted to the history of property law, and the system of estates.[4] Another is to cover the system of estates separately.[5] A third approach has been to give a broad but excessively thin coverage of such subjects as rights in land, conveyances, future interests and perhaps wills, with or without the incorporation of materials relating to the law of personal property.[6]

This general lack of agreement as to what criteria should govern the organization and content of real property curricula makes the task of reviewing a new casebook in this field exceptionally difficult. Not only is the reviewer without any conventional point of reference upon which to anchor his conclusions but, in fairness to the casebook editor, he must consider not merely the merits of the immediate materials subject to review but their relation to the remainder of a presupposed offering of related courses. On the one hand he is in danger of expressing an excessively harsh judgment based upon a legitimate difference in opinion arising not out of the merits of the particular casebook but out of underlying concepts as to the organization and purpose of property instruction. On the other, he may very well abandon his critical facility in an effort to deal justly. For this reason it is only proper to consider as separate and distinct the problems of the method employed and the ends achieved within the limits imposed upon the

[4] Powell, *Cases on Possessory Estates* (1943); Skofield, *Cases on Real Property* (1948) (with some materials on future interest.)

[5] Brown, *Cases on Property* (1941).

[6] Martin, *Cases on Real Property* (1943); Walsh & Niles, *Cases on Property* (1941). (The ultimate coverage of the second edition by Million, currently appearing piecemeal, has not yet been determined.) Fraser's *Cases On Real Property* (1932 and 1941). (The third edition, [1954], has been formally divided into two books in one volume, the first edited by Taintor dealing with personal property and the second, edited by Fraser, dealing with real property.)

editor by his own premises and the organization of the curriculum in his particular school.

Professor Williams is a member of the law faculty at Columbia University and this casebook is designed to meet the specific needs of that institution. As he states in his preface, Columbia offers a second semester, three hour course in "property"; a second year, six hour course in "trusts and future interests"; a third year, three hour course in "modern real estate transactions"; a third year, two hour course in "administration of trusts"; and seminars in "urban redevelopment," "community property" and "oil and gas." Of these, only the first or introductory course is required and for from 10% to 20% of those who graduate it will be the only instruction which they will receive in property law. For 25% to 35% this course will be supplemented by one additional property course. The casebook now under consideration was created for purposes of instruction in the introductory course. "This collection was designed, in part, therefore," says the editor, "to provide at least minimal understanding of the nature of the institution of property which any competent and educated lawyer should have and a sufficient familiarity with the concepts and terminology of the law of property that a student who has taken only this course in property may, after graduation and admission to the bar, educate himself expeditiously when necessary to handle the affairs of clients. On the other hand, since most of the students studying these materials will continue advanced study of the law of property in one or more advanced course, this collection was designed to lay the foundation stones for such further study with a minimum duplication of coverage." The organization of the materials with which the editor seeks to attain these ends is closely modeled on that of Powell's *Possessory Estates,* of which this casebook is the obvious successor. All of the chapters contained in the parent work, except those on "Lateral and Subjacent Support" "Interference with Enjoyment—Nuisance" and "Water" are found in the work under review and the only chapters which have been added are those at the beginning and end, the former on "The Institution of Property" and the latter on "Land Use Control and the Changing Character of 'Property.'" Also like the parent work, it makes no effort to incorporate materials on personal property or on adverse posssesion of real property. The failure to include materials on adverse possession is particularly noteworthy in view of the fact that Dunham's *Cases on Modern Real Estate Transactions,* the vehicle employed in the course on real estate transactions at Columbia, does not cover this subject matter either and apparently the student will graduate without having become aware of the subtleties of this intricate and important problem. Similarly this subject of "natural rights" to water

and support seems to have been eliminated from the Columbia curriculum and the subject of easements is relegated to cursory treatment as a method of private control of land use. The first fifty-five pages of this casebook, devoted, as already pointed out, to the "Institution of Property" and embracing textual materials on property as a social, political and jural institution, unquestionably are the most challenging found in the volume and will elicit considerable professional dispute as to their appropriateness. On the one hand, it will be contended that they help to meet the demand for materials which will assist the student to correlate legal doctrine with other phenomena in his environment. On the other, some teachers will contend that they are teaching in a post-graduate professional school, that it is not their obligation to make up for the deficiencies of modern liberal education in undergraduate colleges and that it is undesirable to further attenuate a course which already has been watered down excessively. It should also be pointed out that this section will present peculiar teaching problems for the ordinary instructor whose only training has been along doctrinal lines. In order to teach the theory of property (as distinct from the theory of property law) he will be compelled to master de novo a much larger volume of materials than are contained in this casebook and will enter into a field which, until now, has been entirely foreign to him. As a consequence, the ordinary property teacher attempting to employ these materials will find himself either enormously stimulated or enormously exhausted, according to his temperament.

Immediately following the introductory chapter are two chapters on "Historical Background" and "The Estate in Fee Simple." Following the modern trend the editor has treated this subject matter largely by text and it may shock the traditional minded to discover no more than seven cases in the first 156 pages. There follow more or less conventional chapters on "The Struggle for Alienability," "Estates for Life," "Non-Freehold Estates," "Non-Possessory Future Interests at Common Law," "Equitable Estates and the Statute of Uses," "Concurrent Ownership," "Waste," "Distribution of Benefits and Burdens as Between Owners of Present and Future Interests," and, finally, the chapter on "Land Use Controls and the Changing Character of 'Property.'" Although these headings are familiar to the user of Powell's *Possessory Estates* the newer collection is noteworthy throughout for the greater reliance placed upon text material and the proportionate reduction in the number of cases employed.

Professor Williams' high abilities are too well known to the profession to require comment and a general evaluation of this book is that it is a scholarly and competent effort to make Powell's *Possessory Estates* a more useable and up-to-date work. It will be useful not only

at Columbia but at other law schools having similar curriculum organization. However, to me it seems to have the underlying deficiency that what the editor has sought to achieve is basically impractical and impossible. This calls for the re-examination of certain fundamental questions as to how law schools should attempt to teach property law and, in particular, whether "a minimal understanding of the nature of the institution of property" should be attempted in three semester hours.

Property law, in its broadest sense, embraces three general topics: the technical rules of law, or "noises" which courts make; the administrative practices of conveyancers and other property specialists; and the relation between doctrine and practice on the one hand and the general environment on the other. Of these three the first is a requisite to an adequate understanding of the last two. Admitted that learning in the esoteric subtleties of formal doctrine in many cases blinds the initiated to broader problems, any effective practical understanding of property questions must rest upon a sophisticated knowledge of the governing legal rules. The traditional property curriculum was designed to meet this need. During the past twenty or thirty years this traditional curriculum has been subject to continuous fragmentation and attenuation. At the one extreme has been seen the reduction of required property work to a watered-down, lick-and-a-promise minimum, as evidenced by the so-called introductory courses, and at the other emphasis upon such "glamour" courses as urban redevelopment and estate planning has tended to distract attention from elementary theory. As a consequence few law students graduate from a modern law school with the tools necessary to attack practical problems in this field. An underestimate of the technical understanding required for a working knowledge of this most technical subject can result only in incompetency which will be injurious to both the student and to society. It seems to me that what is required is a return to the unitary concept of property law. This will entail a recognition of a certain core of doctrine essential to a minimum understanding of the subject. I believe that this basic material can probably be taught much more efficiently than is now the case, that it will be necessary to abandon most of the traditional course labels and that a complete reorganization along functional lines is desirable. This does not, however, affect the principle that it must be taught comprehensively as doctrine, if taught at all. Such a reorganization will not only insure minimum coverage but will allow the more efficient coverage of doctrine within appropriate frames of reference. For example, materials on the Statute of Uses will be taken up in connection with problems of conveyancing and the system of estates with questions as to permissible future interests. The

effect of such an organization would be to eliminate the need for the kind of casebook which Professor Williams has presented to us. The objection may be made that no such core of subject matter can be taught in less than twelve semester hours, and that it is no longer possible to allocate so large a part of the curriculum to a single subject. If the second assumption is accepted (and in many schools it is not) the answer is to remove property from the list of required subjects but to insist that no credit will be given unless the student elects the entire basic course.[7] In addition to this basic course there should also be available, for those students who desire to follow the subject matter further, courses dealing with the functional problems of real estate practice and with the relation of property law to general problems in society. This would enable the student to come, for example, to the course in urban redevelopment with a sophisticated understanding of the difficulties presented by the configuration of interests denominated rights of reverter, rights of entry and covenants running with the land, or to the course dealing with conveyancing procedures with some understanding of the problems raised by the long continuation of interests in land.

The modern trend has been to underestimate the importance of property doctrine, to attenuate instruction by a reduction in the number of hours devoted to the subject while at the same time greatly increasing the field of inquiry. Although these alterations have been carried out with the best of intentions, I seriously doubt the results achieved have justified the efforts which have been expended. Certainly the tendency to deny the importance of technical doctrine has achieved only a dilution of understanding and a tendency toward uninformed do-goodism. It is high time that property teachers began to insist upon the importance and intricacy of their subject. If property law is to be taught at all, it should be taught well. If it is to be taught well the introductory course has no place in the curriculum.

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[7] The most sweeping experiment which has been attempted along these lines has been at Harvard, where students are now required to take a minimum of twelve hours of property organized along functional lines. Leach, *Property Taught in Two Packages,* 1 J. OF LEGAL ED. 28 (1948). The casebook created specifically for use in the first year, Casner, and Leach's *Cases on Property* (1st Standard Ed. 1950), contains radical innovations and seems to me to contain many of the usual "bugs" found in such innovating materials. While it has done much toward integrating functional materials is has done so at the cost of serious reduction in coverage of doctrine.

Modern Trials. By Melvin M. Belli. Indianapolis: Bobbs-Merrill Company, Inc. Three volumes. 1955. $50.00. Pp. 2,763.

This treatise is a new and different treatment of the subject of a modern trial. While most of the books in a lawyer's library concern themselves with the opinions of courts of last resort as to the substantive law, this work concerns itself not only with the substantive law but with the equally important field of the practical aspect of a modern trial.

The author is an eminently successful trial attorney of the San Francisco Bar. If he was not the originator of, he is one of the leading exponents of new dramatic ways of demonstrating to a jury the facts concerning a personal injury case.

Drawing from his own vast experience and the experience of many of his colleagues from all over the country as well as eminent medical doctors who have participated in many medico-legal trials, the author does a masterful job of describing in detail the method for handling personal injuries cases from the initial contact with the the client, the investigation of the facts, the formulation of a legal theory, pleading the case, the various phases of the trial and finally the appellate argument.

The introduction is by Roscoe Pound, Dean Emeritus of the Harvard Law School. Dean Pound succinctly points up the place of the trial lawyer who handles personal injury litigation in the increasingly diversified field of law. He emphasizes the problems today that exist when so many new and complicated machines are the instruments producing the injury.

In his opening chapter, the author briefly surveys the role of the trial lawyer and his relationships with his client, the court and society in general. Following this, Mr. Belli takes up the investigation of a case. This chapter is filled with "bread and butter" suggestions and ideas for those members of the bar who must ferret out the facts and collect evidence. In addition to the methods of discovery available under the Federal Rules and state statutes, the author points out many sources of obtaining pictures, eyewitnesses and actual instrumentalities of the injury itself.

After the facts are collected, the next question is "Have I a Case." In approximately 400 pages the author presents a most thorough and interesting analysis and survey of the law of torts. He not only includes the common law actions and defenses, but also discusses at length the increasingly more numerous statutory rights of action. The author anticipates the problem of the lawyer representing the plaintiff who has a "crippled case." Such theories as rescue doctrines, last clear

chance, wanton or wilful misconduct, res ipsa loquitur are explained and interestingly applied to actual cases. Extremely helpful are the numerous citations to cases which have ruled on the points under discussion. Included in this chapter are discussions of actions arising under workmen's compensation acts (including third party actions), Federal Tort Claims Act, Federal Employers' Liability Act, the Jones Act, and the various statutes and treaties applying to aviation crashes and injuries.

Along with a discussion of the substantive law, the author examines the method and quantum of proof necessary under each theory. The various presumptions and probabilities arising from proof of certain facts are discussed both as to the facts necessary to prove the claim and the evidence to prove the damages.

The chapter on medical evidence is thorough and exhaustive. It is in this field, perhaps, that the attorney who handles only a few personal injury cases is the most perplexed. The vocabulary of the physician and the diversity of medical opinion is bewildering to most attorneys. By the use of actual case histories and medical reports, the author explains the most complicated injuries including brain injuries, whiplash injury, herniated intervebral discs, cancer and its relation to trama. The text is rendered doubly useful by the copious use of footnotes citing cases where controversial medical issues have been decided.

The methods of obtaining, studying and understanding medical and hospital reports is treated more than adequately. A glossary of medical terms and a bibliography of leading medical texts and books which the attorney seeking to prepare himself for the trial of a personal injury case will find most useful is included in the back of the last volume.

When one realizes that based on national averages nine out of ten personal injury cases are settled before an actual jury trial, the chapter on settlement methods assumes a great importance. The author, a leading exponent of "full disclosure," suggests the brochure method of settlement. Starting with the premise that an attorney representing the plaintiff has a claim he is trying to sell and the defendant's attorney wants to buy the claim, the brochure is nothing more than the adoption of business methods to present your claim or sales item in its best light. Also discussed under this chapter is the manner and means of evaluating a claim. This is discussed from the point of view of the plaintiff as well as the insurance company or defendant.

For the one case that cannot be settled and must be tried, the sections devoted to trial will prove most helpful. The first section deals with the jury, and its selection. Although the substantive law govern-

ing this procedure will vary in the different states, the comments on types of jurors and investigation of the jury panel will be useful to all.

The following section is on the use of the blackboard in the trial. The author points out convincingly that the use of this ancient teaching device is most helpful in the trial of a law suit.

Suggested are ways of using the blackboard to instruct or educate the jury as to how the accident happened and the computation of damages arising therefrom. After reading this section, one is impressed with the fact that a jury should be shown as well as told.

Along with the use of the blackboard, demonstrative evidence is recommended as a trial aid. The author is known for his success in this field and approximately two-thirds of his second volume is devoted to the various techniques of demonstrative evidence. Whole chapters are used to discuss the use of experiments, models, pictures, and exhibition of the person. Especially well done is the section on medical demonstrative evidence. Here is the field where the average juror needs to be shown. In addition to the oral testimony, the author suggests the use of medical charts, diagrams, skeletons, surgical instruments, X-rays and a multitude of other charts, drawings, and graphs. A reading of this section will demonstrate to the average lawyer that he has not fully utilized the demonstrative medical evidence available to him.

Witness examinations, jury argument and jury instructions are discussed in interesting detail. A complete section is given to the use of demonstrative evidence in the appellate court and another section concerns the use of demonstrative evidence in criminal trials.

In these volumes, Mr. Belli has brought together ideas and suggestions which every attorney who represents litigants in personal injury actions should be familiar with. His style and presentation stimulates and challenges the reader. The entire work is presented in a most readable and interesting manner. A pioneer in obtaining "the adequate award," Mr. Belli generously shares his techniques and procedures with any member of the bench and bar who will take the time to read and study this most worthwhile work.

In the words of Dean Pound in his excellent introduction:

> "What is set forth most thoroughly and deserves careful study by all lawyers, not merely trial lawyers and practitioners in personal injury cases, is the technique of demonstrative evidence and demonstrative methods of presentation to make clear and intelligible the facts and inferences in case of complicated or confused circumstances and occurrences, complicated machinery or apparatus, and items of loss or damage proper to be con-

sidered. The author is a master of this mode of presenting cases, and the fulness of exposition of the technique in application to all manner of cases, and of the legal questions and course of decisions upon the method as a whole and details of its application are a contribution to the administration of justice."

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