

## REVIEWS

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CASES AND MATERIALS ON PROPERTY. By John Cribbet, William Fritz and Corwin Johnson. Brooklyn: The Foundation Press, Inc., 1960. Pp. xxii, 1198. \$13.00.

A NEW first year property book, now receiving generally enthusiastic reviews,<sup>1</sup> has been brought out by three well-known scholars, Professors Cribbet, Fritz, and Johnson. In their treatment of the subject of property, the authors disclose two rather clear premises. The first is that the "new look in law school curricula"<sup>2</sup> is here to stay. By this phrase they mean that those of us who teach property must abandon the position we have long held as students of perhaps the dominant area of Anglo-American law<sup>3</sup> in face of the demands of other and frequently newer law school subjects. It is certainly true that our colleagues on a majority of law faculties have voted to cut down the property side of the regular three-year course, confronting us with package plans and streamlined syllabi.<sup>4</sup> As we earlier dropped bailments, now we must relinquish something else, say wild animals, or accession and confusion, or fixtures.

It is also true that most of the younger men who are entering teaching do not wish to develop careers in property. For them, it seems to lack the excitement of anti-trust, public control of business, or international law. And oddly

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1. Professor Smith of Cleveland-Marshall writes: "It is an excellent work on real property; well adapted to today's 'speeded up' law school curricula and admirably suited to preparing the law school student for the real property problems he will encounter in his practice." Smith, Book Review, 9 CLEV.-MAR. L. REV. 593, 594 (1960); Professor Meyers of Columbia states that these authors have "consolidated the reform initiated by Casner and Leach"; that the book "surpasses its ancestors Casner and Leach, thus substantiating the 19th century belief that evolution is ever upward to a higher species." Meyers, Book Review, 46 CORNELL L.Q. 377, 378, 379 (1961); Professor Rapacz of De Paul writes: "The three authors have good reason to take pride in their joint product." Rapacz, Book Review, 10 DE PAUL L. REV. 226, 229 (1960).

2. P. ix.

3. "That the English land law . . . has most profoundly affected the economic development and class stratification of English society, and has exerted great influence on the political transformations of that country are facts so trite that one hesitates even to mention them. That free land has been a similarly powerful influence in the history of our own country is equally certain." Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 695-96 (1938). "Estates and trusts have been considered the two outstanding contributions of the English-speaking world to jurisprudence." Bordwell, Book Review, 1 J. LEGAL ED. 326, 327 (1948).

4. *Report of the Curriculum Committee*, in ASSOCIATION OF AMERICAN LAW SCHOOLS, PROCEEDINGS 56, 63 (1960). The first major property scholar to acquiesce in the idea of a package plan was Professor W. Barton Leach, who developed his own solution, Leach, *Property Law Taught in Two Packages*, 1 J. LEGAL ED. 28 (1948).

enough, despite the conflicting views of the nature of property that badly divide elements in the world community, few of the host of foreign students now attending American law schools wander into property classes.<sup>5</sup> These bleak considerations apparently discourage scholars preparing new course materials from attempting to restore the subject of property to its 19th century grandeur.

The second premise of these authors is that property is a generic term for a group of well-known categories, some eleven in number. These are described as "facets" and consist of "personal property, estates, landlord and tenant, titles (or conveyances), vendor and purchaser, incorporeal interests (rights in land), wills, trusts, future interests, mortgages, oil and gas."<sup>6</sup> The authors have chosen to emphasize the first six of these items, regrettably leaving to the teacher the task of finding the chain that links them together.

The topics chosen embrace substantially the same material covered by Professors Casner and Leach<sup>7</sup> and by Professors Aigler, Bigelow, and Powell,<sup>8</sup> although the three books differ in points of emphasis. Within the "new look," these major designers are remarkably consistent and thoroughly professional. They strike me as having in mind a student who needs to be prepared for real estate practice in a medium-sized city (recognizing, of course, his dependence on a good abstract company). They have produced standard works, and it is difficult to choose among them or to say which is best.

Although I have not taught the two-volume work of Aigler-Bigelow-Powell (or its second edition), it appears to have the broadest and most thorough coverage of the three books.

The Casner-Leach book is without peer for wit and trenchant case analysis. Students enjoy the challenge of its brilliant notes and problems, especially those concerning the older land law on the Statute of Uses and those on future interests. By ruthlessly eliminating philosophical and sociological considerations, Professors Casner and Leach excel in the legal positivist tradition. Of less importance, but of interest to a number of teachers, is the retention by Professors Leach and Casner of the wild animal cases, relegated to a note by Professors Cribbet, Fritz, and Johnson. Instead the latter authors have developed a very thorough treatment of the law of finders and an especially attractive group of cases on gifts, including *Foster v. Reiss*,<sup>9</sup> a New Jersey

5. Except for its merits as a method of introducing students to the case system, there is little content in a first-year property course as traditionally taught to which foreign students can relate. In the book by Professor McDougal and Haber the final chapter, Resource Planning and Development in the World Community, indicates what can be done in this direction, but this provocative essay suffers from the fault of having no cases in it to illustrate its highly developed theory. MCDUGAL & HABER, PROPERTY, WEALTH, LAND 1166-1203 (1948).

6. P. ix.

7. CASNER & LEACH, CASES ON PROPERTY (1st ed. 1950).

8. AIGLER, SMITH & TEFFT, CASES AND MATERIALS ON PROPERTY (2d ed. 1951).

9. 18 N.J. 41, 112 A.2d 553 (1955). In a note executed before a serious operation, decedent gave certain property to her husband, who took possession of the chattels; the

decision with its excellent opinions by Chief Justice Vanderbilt for the majority and Justice Jacobs in dissent. In presenting an adequate number of cases in small areas of the law, all three books permit teachers of first-year property to introduce students to the case system with little handicap.

The Cribbet-Fritz-Johnson book is broader-gauged in one of its important portions—the treatment of incorporeal interests in Part Seven, Section 1. The chapter headings of this section suggest an outline that might have been brilliantly developed for the entire book. Here the authors, principally Professor Johnson,<sup>10</sup> have divided this subject, chiefly easements and covenants, into four problems: 1) problems involving the *creation* of these interests; 2) problems involving the *transfer* of these interests, primarily the problem of interests that run with the land; 3) problems involving the *scope* of these interests, essentially a question of interpreting the relationship between the holders of dominant and servient estates; and 4) problems involving the *termination* of these interests. This excellent presentation is of course a variation of a more elaborate six division categorization<sup>11</sup> appearing in the book by Professors McDougal and Haber.<sup>12</sup> In many respects the simplified scheme of the newer book is superior to that of the McDougal-Haber plan. Take, for example, the interesting case of *State ex rel. Wells v. City of Dunbar*<sup>13</sup> which involves the destruction by the city of covenants without compensation through the condemnation of the servient estate. The Cribbet-Fritz-Johnson book places this case quite appropriately under *Termination*. The McDougal-Haber book, though published prior to the *Wells* case, would most likely have placed it under an additional category, *Subjection to the Claims of the Community*.

The advantage of such a system, whether in longer or shorter form, is that it assists the student and the teacher to avoid what Professor Moffatt Hancock describes as the fallacy of the transplanted category<sup>14</sup>—the tendency to give one word or one concept similar meanings in quite different contexts. When case material is divided into frequently recurring fact situations, it is easier for the students to see a case as it relates to time, person, and event rather than to an ambiguously formulated verbal norm.<sup>15</sup> These basic categories constructed from factual patterns are less likely to clog and to confuse the development of law than are categories based on doctrine, such as possession, ownership, rights

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wife died without emerging from her coma. The majority ruled that the note did not establish *donatio causa mortis*, since there was no delivery of the chattels.

10. P. x.

11. The Aigler, Bigelow and Powell book, *op. cit. supra* note 8, has a similar and shorter outline.

12. *Op. cit. supra* note 5.

13. 142 W. Va. 332, 95 S.E.2d 457 (1956).

14. Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959).

15. As Professor Philbrick so well put it: "... the concept of property never has been, is not, and never can be of definite content. . . . No scholar has ever dealt in more than a rudimentary way with its mutations from age to age." Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 696 (1938).

by implication, and indeed a good deal of the canon. It is regrettable that neither the McDougal-Haber nor the Cribbet-Fritz-Johnson book extends this type of analysis to problems other than covenants and easements. Future interests and zoning ordinances, for example, are restrictions on the use of land which might wisely be subsumed within the framework erected for the study of incorporeal interests. Since the book is very likely to move swiftly into a second edition, it is hoped that the authors will develop this theme more fully.

An additional feature of the book suggests that the authors may be willing to give more attention to the philosophical implications of property in subsequent editions. I refer to the first chapter, which includes several interesting statements regarding the nature of property as a social institution in our time and in the past as well. But the idea of elucidating the present through some analysis of the institution of property was not carried out; it remained inchoate. The impression remains that the authors felt it necessary to get as much "law" before the students as possible so that they would be prepared for the rigors of employment in a law firm.

The shift in emphasis that I urge is to set forth a single goal: to give the students an understanding that the institution of property affects a number of important values in our lives. We must then assume on faith that if this point is made the students will be able to recognize the concept of property in a myriad of settings and, as a necessary consequence, will be able to practice law better than those who have been taught a series of unrelated problems, however numerous and important. Assuming that the paramount purpose of such a casebook should be to suggest the many institutional facets of property through the case method, with emphasis on the doctrines and practices of the courts and other decision making agencies, then extensive coverage can neither be expected nor attempted. A few topics will have to be selected for intensive study, and these few topics must suggest the range and diversity of property in the 20th-century. If *Pierson v. Post*,<sup>16</sup> for example, is taken as a starter, the problem which that case poses, that of the original acquisition of ownership, should be followed by a case such as *Elliff v. Texon Drilling Co.*,<sup>17</sup> which discusses the problem of original acquisition of ownership in the context of the modern industry of oil and gas. Further, the same problem should be explained through a discussion of *Missouri v. Holland*<sup>18</sup> to indicate how local problems of property may tie in with national and international considerations. If this

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16. 3 Caines 175 (N.Y. Sup. Ct. 1805) (pursuit of a fox gives no property right as against one who actually killed the wild animal).

17. 146 Tex. 575, 210 S.W.2d 558 (1948). The negligence of a party drilling an oil well on his own land caused an explosion and fire which wasted the entire reservoir. The negligent party was held liable to owners of other land over the reservoir to the extent of the value of oil and gas estimated to have been in place under each tract.

18. 252 U.S. 416 (1920). A treaty between the United States and Great Britain (Canada) provided for joint control over certain migratory birds. Regulations of the federal government enacted pursuant to the treaty infringed no right which a state might have in the wild animals within its borders.

discussion proves fruitful, two cases from the International Court of Justice, usually but erroneously referred to as international law cases, can be studied: *Case of Certain Norwegian Loans*<sup>19</sup> and the *Interhandel Case*.<sup>20</sup> Finally, this line of inquiry might conclude with the opinion in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery*,<sup>21</sup> which poses the old question of who owns what and also raises problems of conflict of laws.

Perhaps a dozen problems of this sort<sup>22</sup> would be enough for a first-year course; and for such an approach, the first chapter of the McDougal-Haber book offers an excellent beginning.<sup>23</sup> Admittedly, the students would have learned little about the details of a mortgage, the execution of a will, the particularities of zoning ordinances, and the methods of financing a supermarket. But they would have learned how the decision makers use and have used established doctrines to solve *wealth* disputes in a variety of important and recurring factual contexts, picking up a good deal of know-how along the way. I feel this is enough to achieve in a first-year course and that nothing less than this will equip the student to think intelligently about the institution of property throughout his legal career.

The more adventurous may try an additional challenge: to teach the students how decision makers have employed property doctrines to solve problems of

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19. [1957] I.C.J. Rep. 9. Action by the French Government on gold clause bonds issued to its citizens by Norway before World War I. Payment in gold was suspended during periods of instalments, and changed to payment in Bank of Norway notes without unilateral declaration of the Norwegian government.

20. [1959] I.C.J. Rep. 6. Property of Interhandel, a Swiss company found in the United States was seized by the United States during World War II under the Trading with the Enemy Act. The Swiss government sued to recover this property on the ground that the assets of Interhandel were neutral, not enemy, property.

21. 111 F. Supp. 435 (1953), *aff'd as modified sub nom.* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Brownell, 225 F.2d 532 (1955), *cert. denied*, 350 U.S. 937 (1956). District court ordered foreign corporation to produce documents in control of various people associated with the corporation. Interhandel, a Swiss corporation, alleged that it did not own the documents, and that Swiss law prohibited the producing of them in any court.

22. For example, in the context of dead hand control, a difficult technical case such as *Abbott v. Holway*, 72 Mo. 298 (1881) can be used effectively for at least three classroom sessions to demonstrate the historical development of present and future estates and interests not only as they apply to waste but as to a variety of other hypothetical situations. To this case can be added a modern decision on the spendthrift trust to illustrate the degree the community should permit the preservation of the life estate as well as the remainder.

23. A few cases would have to be added to that chapter to supply depth. For example, after the materials on Pittsburgh Athletic Co. v. KOV Broadcasting Co., International News Serv. v. Associated Press, and Associated Press v. United States, McDUGAL & HABER, PROPERTY, WEALTH, LAND 32-41 (1948), good use can be made of two fine opinions by Justice Greenberg of the New York Supreme Court; Metropolitan Opera Ass'n v. Wagoner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 1183 (Sup. Ct. 1950) and Dior v. Milton, 9 Misc. 2d 1125, 155 N.Y.S.2d 443 (Sup. Ct. 1956). These opinions demonstrate that the answer to a question of unfair competition requires a definition of property, however vague the concept may be.

liberty, rather than wealth.<sup>24</sup> *The Girard College*<sup>25</sup> case would be a good starter. Persons interested in civil rights and disappointed with the present pace of desegregation might be surprised at how well the institution of property can be utilized to augment as well as to diminish human dignity. In any case, Zechariah Chafee, Jr. was right when he described property as "the hardest of the first-year subjects."<sup>26</sup> It is a subject that is patiently waiting a renaissance and we should be grateful to Professors Cribbet, Fritz, and Johnson for their commitment.

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THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION. By Lewis M. Simes, assisted by Clarence B. Taylor. Ann Arbor: University of Michigan Law School, 1960. Pp. xxv, 421. \$5.00.

THE legal profession has often been accused of being successful in thwarting progress. Charles Dickens' ridicule of the practices of lawyers is considered justifiable by many even today. No matter how hard we try to ignore the charges, upon occasion we detect what seems to be a slight degree of earnestness in the spoofing of our less well-bred clients or acquaintances.

Reasonably enough, many of the criticisms of the bar's practices derive from the layman's observance of the impracticalities connected with real estate transactions.<sup>1</sup> Among other things, the layman is here exposed to the title search. Depending on the jurisdiction, he may learn that a proper conveyance of real estate may require checking tens of documents in as many as ten or twenty different sets of public records, that on the next sale or security transaction a nearly duplicate search is required, and that despite the most careful search, the record title holder may not be able to uphold his title against another. An even more unfortunate impression on the layman is made by the bill for "closing costs" which is often five per cent of the value of the real estate and may be as much as ten per cent. Is it not a little surprising that we have escaped a revolution in which laymen demand the same ease and safety in transferring

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24. In Professor Philbrick's great article, *supra* note 15, he argues for the separation of the concepts of property and liberty so that each can be developed by a "socially responsive policy." *Id.* at 732. Assuming the distinction between property and liberty can and should be made, we should ponder the propriety of treating them differently in accordance with a double standard. See Judge Learned Hand's discussion in Stone, *Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946).

25. A private charitable educational institution, bequeathed in trust to the city of Philadelphia, prohibited by the terms of its creation the admission of Negro children. Although the restriction was the private wish of the benefactor, when administered by the city, it violated the 14th amendment.

26. Chafee, *Edward Henry Warren*, 58 HARV. L. REV. 1109, 1113 (1945).

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1. For an enlightening one-page description of the layman's eye view of a real estate closing, see Atkinson, *The Other Side of the Coin*, Title News, April 1959, p. 20.