

Michigan Law Review

Volume 73 | Issue 3

1975

Cases and Materials on Property: An Introduction to the Concept and the Institution

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Recommended Citation

Lillian R. BeVier, *Cases and Materials on Property: An Introduction to the Concept and the Institution*, 73 MICH. L. REV. 620 (1975).

Available at: <https://repository.law.umich.edu/mlr/vol73/iss3/7>

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RECENT BOOKS

BOOK REVIEWS

CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION. By *Charles Donahue, Jr., Thomas E. Kauper, and Peter W. Martin*. St. Paul: West. 1974. Pp. lxiii, 1501. \$22.50.

The title of their casebook—*Property: An Introduction to the Concept and the Institution*—suggests the formidable task that Professors Donahue, Kauper, and Martin have set themselves. It is a task they have performed with enthusiasm, and the book they have produced is positively exuberant, overflowing with intellectual vitality and excitement. There are certain pedagogical advantages to be gained from intellectual enthusiasm, not least of which is that it is so often contagious.

Apart from the task of arousing intellectual energy, however, there are three distinct but related problems that confront the writer of a first-year casebook on property. The first is how to impose thematic unity upon the disparate legal questions that inhere in the property course.¹ The solution of this problem is not markedly advanced by the fact that one can describe, in an admittedly general but nevertheless accurate manner, the substantive content of the usual property course as the legal relationship among persons with respect to things. The very generality of the description is necessary to its accuracy, which perhaps indicates that both the concepts and the social realities investigated in the course are so multifarious that only when very broadly conceived can they be seen to have a logical connection with one another. Possession of wild animals and gifts of personal property, for example, are two topics that are often covered in the “personal property” aspect of the course. These topics both deal with the legal relationships of persons to things; in a conceptual sense they are somewhat unified by a common concern about “dominion and control.” Apart from that bond, however, there is little obvious logical relationship between them. More importantly, the social realities to which the law of these two topics is addressed apparently raise different policy questions.

A similar lack of logical connection characterizes the topics covered in the real property segment of the course. Again, the social phenomena that call upon the law for resolution raise policy questions that are more apparently different than obviously similar. Apart from being somehow “about” people and their relationship to Blackacre, what has the law of estates in land to do with the law of nuisance, that of adverse possession with that of zoning, that of

1. See Tarlock, Book Review, 21 *STAN. L. REV.* 1266, 1276 (1969).

recording acts and title insurance with that of waste, that of landlord and tenant relationships with that of conveyancing?

Thus, the first task of a writer on property is to find the hidden thread that binds these topics together—or rather to weave a pattern into which they all comfortably fit. This organized pattern or principle will reflect an author's pedagogical priorities. For example, an author might unify his book simply by making it responsive to curricular needs as he perceives them.² Or he might impose a pattern on the material by taking a consistently functional or problem approach,³ instead of a conceptual one. Or he might organize his material around one or another of the social processes—land development,⁴ for example—with which the usual property course is only partially concerned. The point is that an organizational principle must be embraced, a unifying theme chosen.

The second issue that the writer of a first-year property casebook must face is the choice of topics to be covered. There is no uniformity of view about the curricular needs that the course ought to meet.⁵ The answer may be dictated by the author's choice of unifying theme; a number of books, for example, have sought thematic unity simply by adopting a unique and coherent view of the topics that should be covered.⁶ But the choice of unifying theme will not always imply the topics to be covered and, in any event, the issue of coverage must be resolved.

The third problem that confronts the author is how to accomplish the most basic tasks of the first year—the elucidation of doctrinal concepts and the development of the analytical skills that are the first requisites to practicing law. Are cases and statutes, presented in the traditional format, to be the principal vehicles for conveying substantive information and encouraging analytical effort? Or is the problem method more effective? How much textual exposition of doctrine should be offered? How much historical material should be presented? What kinds of questions should be integrated into the materials? By whatever organizing principle is chosen to guide the arrangement and presentation of materials, by whatever criteria one selects the topics to be covered, there is no escape from the necessity to confront the relevant legal doctrine. And surely the development of analytical skills so informs the function of the first year that it must be an implicit aspect of nearly every choice made by first-year casebook writers.

2. *E.g.*, C. BERGER, *LAND OWNERSHIP AND USE* (1968).

3. *E.g.*, E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (1974).

4. *E.g.*, G. LEFCOE, *LAND DEVELOPMENT LAW* (1966).

5. *See, e.g.*, Cribbet, *Property in the First Year*, 18 *J. LEGAL ED.* 55 (1965); Jacob, *Book Review*, 20 *J. LEGAL ED.* 373 (1968); Meyers, *Book Review*, 116 *U. PA. L. REV.* 742 (1968).

6. *E.g.*, C. BERGER, *supra* note 2.

Turning to the manner in which this book has resolved these three problems, let us look first at the question of thematic unity. As Professors Donahue, Kauper, and Martin see it, "the tendency has been to use the commercial transactions in land as the organizing theme for the first-year [property] course" (p. xix). They view that tendency with alarm, for they see it as placing "too much emphasis on commercial land transactions and not enough on property generally, on property as a legal idea and as a set of legal institutions" (p. xix). Emphasis on commercial land transactions seems to them to foster the misleading idea "that property consists of a series of detailed and usually incomprehensible rules . . ." (p. xix). They purport to adopt instead the organizing principle that "the first property course . . . must be a survey course in which unity is provided by developing the theme of the concept and institution of property in as many of its manifestations as can be covered in the time allowed, without sacrificing depth and subtlety" (p. xix).

The book is faithful to, and to an extent unified by, its purpose to survey a broad range of property law. Moreover, the intellectual atmosphere of the book is generally characterized more by the pursuit of abstractions that inhere in a "conceptual" approach than by an effort to discern the practical operation of legal rules. These features give the book a certain methodological consistency, but they do not make the book a thematic whole. Moreover, they contribute little by way of a cure for the book's major defect, which is its failure to achieve a focused thematic unity in terms of the concept of property.

It might well be useful—and it is undoubtedly possible—to organize a first-year property course around a sustained effort to develop a unified series of systematic generalizations about property law. Such an effort would indeed encompass significantly more than the presentation of "a series of detailed and usually incomprehensible rules," *qua* rules. It would, by its effort to formulate systematic generalizations about the rules, put integrative force behind "the concept and institution" of property.

Economic analysis offers an example of one very promising means by which conceptual coherence could be imposed upon the subject of property. "The institution of private property, after all, serves as a linchpin of our economic organization,"⁷ and the goal of efficient resource allocation is surely one in terms of which much of the law of private property—if not, indeed, the very creation of private rights in property⁸—can be systematically organized, understood, and evaluated.⁹ The concept of economic efficiency has been

7. B. ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* (1975).

8. See Demsetz, *Toward a Theory of Property Rights*, 79 *AM. ECON. REV.* 347 (1967).

9. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 10-40 (1973).

criticized for its tendency to lead one to see the world in one-dimensional terms.¹⁰ But it seems to me that the efficiency notion has the important potential for permitting generalizations to proceed in a context in which, precisely because a conceptual framework is provided, it is possible to identify and isolate for analytical purposes other values that compete with efficiency for recognition and implementation. The fault of this book, however, is not that it fails to use economic analysis as its organizing principle, but that it fails to adopt *any* organizing principle.

That the book fails in this regard seems traceable to two of its principal aspects. First, it does not pursue a consistent view of "the concept and institution of property." Second, thematic attention has not even been concentrated on "property," the authors having chosen to develop a number of related themes as well.

Instead of providing an overriding framework for a conceptual view of property, the book offers a smorgasbord of ideas about and approaches to property rules and rights. Chapter II, for example, purports to deal with property in an "abstract form" and to "seek a definition of what is property" (p. xv). In section 1, the authors try to move "toward a definition of property" (p. 155) by comparing property rights and civil rights, at least to the extent that distinctions between the two emerge from such constitutional cases as *Shelley v. Kraemer*,¹¹ *Bell v. Maryland*,¹² *State v. Shack*,¹³ and *Jones v. Alfred H. Mayer Co.*¹⁴ The section seems ultimately to conclude that property can be defined so as to focus on the right to exclude (p. 218). The chapter then slides almost imperceptibly from the descriptive effort to a normative one: It labels as "both classic and farsighted" (p. 220) an excerpt from the writings of Morris Cohen that exhorts us not to "overlook the actual fact that dominion over things is also *imperium* over our fellow human beings" (p. 221, emphasis original), and describes as "seminal" the distinction "between property for use and property for power" (p. 222). The authors assert that "[w]hen we get to the distinction between property for use and property for power . . . we are getting to the point of trying to decide what the courts and other authoritative bodies *ought* to protect" (p. 223, emphasis original). Why this distinction gets us to the point of addressing the "oughts" of property law, or how it helps to resolve normative issues, are questions that the authors leave not only unanswered but unasked. Instead, the authors

10. See Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

11. 334 U.S. 1 (1948).

12. 378 U.S. 226 (1964).

13. 58 N.J. 297, 277 A.2d 369 (1971).

14. 392 U.S. 409 (1968).

point to the undeniable need "to find some outside idea or combination of ideas which may serve as a rationale for according 'property' protection to some interests and not to others" (p. 223). They purport to begin their search for this idea in the second section of the chapter, which they announce as being an exploration of "some of the traditional justifications for property and . . . some of the situations in which application of those justifications is at stake" (p. 223). Before they turn to the traditional justifications for property, however, the authors summarize, by way of a note entitled, "Regulation of Property in Land," "the policies which guide, or ought to guide, the formation of property rules in the absence of such broader considerations as civil rights" (p. 223). But the summary is only a description of the myriad of legal problems with which the property course is concerned. The policy considerations that the summary claims to reveal seem to call for ad hoc and episodic solutions, rather than a principled analysis guided by an embracing concept of property.

Thus, even in the chapter the authors devote to property as an abstract form, they adopt no framework within which abstractions about property might usefully proceed. Neither the vague but suggestive dichotomy between "property for use" and "property for power," nor any one or all of the "traditional justifications for property," nor "the analytic framework for organizing the various types of property rules" emerges as the conceptual foundation for the book's study of property. Nor is there, explicitly or implicitly, the suggestion that such a foundation ought to be laid, that an effort to understand and evaluate the institution of property in terms of an overriding generalization would be useful.

The call for the kind of thematic unity that this book fails to provide does not imply a simplistic, one-dimensional view of the world. What is implicit is the notion that analytical rigor and critical insight are not encouraged by a constant shifting of conceptual perspectives. Because the book provides no overriding conceptual framework, its descriptive efforts bear an uncomfortable resemblance to a recitation of "detailed and usually incomprehensible rules," and its normative efforts have a discouraging tendency to degenerate into ad hoc value judgments.

The second aspect of the book's failure to achieve thematic unity concerns the failure to concentrate on property *qua* property. In the two Prefaces to the book, one addressed to the student, the other to the teacher, the authors make explicit their intention to develop themes apart from the concept and institution of property. To the student, the authors suggest that

[t]he following list of questions indicates some of the salient themes of this book:

- (1) What is property? Why should this particular interest be afforded the peculiar constitutional protections granted "property" rights?
- (2) A right is only as good as the means by which a court will enforce it. What alternative remedies are available to vindicate this right and what effect will the existence of these remedies have on the behavior of the possessor of the right?
- (3) Property law is the law of wealth or lack of it. What economic forces is the law protecting or thwarting?
- (4) To what extent does the personal situation of the parties (bad guys vs. good guys) control the result in a given case? To what extent should it? [P. xvi.]

To the teacher, the authors suggest that

a principal, even primary, purpose of a first-year course is to introduce the student to legal method. . . . In addition, we think it desirable that the first-year student begin studying and thinking about certain aspects of the law which we hope he will continue to study and think about all his life: the way law develops; the role of the lawyer as advocate, adviser and policy-maker; the relationship between law and society; and the differences between the Anglo-American and other legal systems. [P. xxi.]

These questions are certainly not irrelevant, and the educational aims not unworthy. Moreover, they are pursued with noticeable, often infectious, enthusiasm. The problem with this dispersal of thematic attention lies rather in the fact that the very real intellectual effort that the book generates is spread too thin, over too large a slice of legal life. It is one thing to hope that first-year students will come to appreciate that the law is characterized by the continual interaction of seemingly disparate doctrines, the constant presence of systematic and jurisprudential issues, an unending variety of analytical approaches, and an inevitable confrontation with moral and ethical questions. It is quite another thing usefully to capture all of this extraordinary richness in one book that purports to be concerned principally with the concept and institution of property.

That the themes and topics that compete for a student's attention in this book are almost incredibly varied and broad-ranging is perhaps indicated by a summary of one typical chapter. The first chapter of the book is entitled, "Establishing the Distinction between Meus and Tuus." Its 154 pages are divided into five sections. The first four sections—on possession and wild animals, legal consequences of the label "possession," bailment, and adverse possession—cover fairly conventional, introductory doctrinal and legal ground. The fifth section, called, "Getting a Perspective on Pos-

session," contains 13 pages of "some philosophy, some history, some comparative law, and some analysis" (p. 142), principally in the form of excerpts from and questions on the views of Pollock and Maitland, Blackstone, Maine, and Holmes.

In the first four sections, cases combined with the authors' provocative questions and pointed textual notes present excellent opportunities for developing nascent analytical skills and elucidating legal doctrine. In addition, there is a substantial amount of textual material and numerous questions that raise significant jurisprudential issues. A list of some of the topics covered by the supplementary textual notes hints at the breadth of concerns that the student is invited to consider in connection with the principal cases: The notes cover, *inter alia*, forms, writs, and procedural matters; the reception into the American legal system of the English common law; the reporting of cases; double jeopardy and government appeals; property crimes; game laws; the history of English actions to recover personal property; actions to recover personal property; actions to recover real property; burden of proof and presumptions; Hohfeldian analysis; prescriptive easements; and adverse possession of chattels.

The questions that are integrated into the supplementary notes cover equally broad ground—to recount even a substantial number of them would tiresomely prolong this review. It may suggest the typically ambitious character of the inquiries to note that a two-column summary of double jeopardy, which appears in the first chapter of this property casebook, is followed by two paragraphs of questions in which the student is asked to judge the constitutionality of an Ohio statute that permits the state to appeal a criminal case for the purpose of establishing the law at issue, to compare that statute with the Federal Criminal Appeals Act, to evaluate the two statutes "in the light of the notion that judges should only decide 'live' cases," and to probe the issue of whether the separate trial of defendants is an administrative abuse of the criminal process by the prosecutor's office (p. 24)! However provocative such questions may be, however informative the supplementary notes, it is my view that they pose insurmountable obstacles to the achievement of the focused attention and depth of understanding indicative of a book upon which thematic unity has been successfully imposed.

With respect to the second issue that first-year casebook writers must resolve, subject-matter inclusion, this book successfully surveys a significant amount of property law. The authors have included some material on nearly all of the topics conceivably relevant to the burgeoning property course: from possession of wild animals to future interests and the rule against perpetuities, from gifts of personal property to public control of land use and the basics of

water law and oil and gas law. Substantial coverage is given to landlord and tenant law, with modern developments well integrated into the materials, as well as to private use rights comprehended in the law of nuisance, covenants, and easements. Commercial aspects of real estate development—vendor and purchaser rights, mortgages and other financing devices, recording acts and title protection—are telescoped into a short but remarkably thorough concluding chapter.

Those who believe that the commercial aspects of property law are either the appropriate organizing theme for the course or at least the proper focus of significant analytical concern will be unsatisfied with the book's coverage. This is as it should be; the authors' rejection of such an emphasis was deliberate and integral to their view of the proper aims of the course. This review will not dwell further on the question whether the authors are correct in their choice of emphasis: Those who think they are wrong are likely to dismiss the book from serious consideration anyway, and those who think they are right will no doubt be more concerned with the book's execution of its premises. Suffice it to say that the authors have achieved their aim to present materials covering many manifestations of property law in a context that deemphasizes but does not omit commercial aspects of land development. Within this context the book offers the opportunity to satisfy a wide variety of topical preferences.

The third issue that faces casebook writers, that of performing the twin tasks of doctrinal elucidation and analytical training, is resolved in a manner significantly different from that of other books in the field. The authors have not relied solely on traditional casebook materials. Although cases are used to sound major doctrinal themes and to offer significant opportunities for analysis, they probably comprise less than half of the book's contents. Extensive background materials appear in many forms. The authors have written extensive textual notes; they have reprinted often lengthy excerpts from the expository and analytical writings of others; they have included many statutes, uniform acts, and samples of pertinent documents. Integrated into these background materials is a multitude of questions that seek to evoke analysis of or to exhort critical thought about the problems that the materials raise. Critical thought is further encouraged by the occasional appearance of a "problem" that raises analytical points analogous to those covered by the materials.

The notes are reasonably successful in imparting information about historical development and doctrinal content. Additionally, they generate a sense of immediacy and relevance by placing legal problems in their contemporary setting and noting the direction

of and often the impetus for legal change. The notes provide the principal vehicle by which the authors execute their design to "survey" property law; they explore the surface of a broad area rather than probe in depth a more narrow field. Of course, the risk of acquiring knowledge by survey is superficiality. Superficial knowledge may have the merit of not being "no knowledge," but superficial *legal* knowledge has the potential for mischief when administered in large doses to would-be lawyers. The authors seem aware of this risk, and provide constant warnings that their coverage, while inclusive, is not intended to be comprehensive.

The far more troublesome aspect of the supplementary materials concerns the questions that are so liberally scattered throughout. The authors describe the questions as being designed to make the material "self-teaching" (pp. xxi, xxii), but the attempted integration of critical inquiry with textual and documentary exposition in my view fails to evoke productive analytical effort. In part this failure may be attributed simply to a lack of stylistic consistency. Sentences that end with question marks pervade the book. Some are in fact real questions, in the sense that they suggest areas for reflection and analysis. Many more, however, seem designed as topic sentences indicating the subject matter of the textual paragraphs that follow. Students engaged in self-teaching may well be excused for failing to pause and reflect over the "real" questions, because they assume that the questions will be "answered" later in the text.

The failure to evoke analytical effort, however, is not wholly susceptible to stylistic cure. In the first place, even the most specific and well-focused questions are unlikely to induce the active intellectual participation necessary to nurture analytical skill when based upon textual exposition and abstract discussion. Second, the questions canvass too broad a range of concerns, from the most specific to the most general. And there are too many of them. They reflect the book's basic failure to sustain thematic unity, the result of which in this context is the dilution of intellectual effort. Third, some of the questions are so incredibly difficult, and call upon such a vast body of legal knowledge and jurisprudential insight, that it is almost impossible to take seriously their invitation to thoughtful consideration by beginning law students. Is it likely, for example, that a first-year student—one who has just grappled with the intricacies of *Shelley v. Kraemer*,¹⁵ *Bell v. Maryland*,¹⁶ *State v. Shack*,¹⁷ and *Jones v. Alfred H. Mayer Co.*¹⁸ and been presented with a five-

15. 334 U.S. 1 (1948).

16. 378 U.S. 226 (1964).

17. 58 N.J. 297, 277 A.2d 369 (1971).

18. 392 U.S. 409 (1968).

page excerpt from title VIII of the Civil Rights Act¹⁹ and a textual exposition of *Reitman v. Mulkey*²⁰ and its progeny—will be either equipped or inclined to expend meaningful intellectual effort on the following three questions:

(a) On the basis of these cases try to determine what is and is not constitutionally permissible for a state to do in the fair housing area?

(b) What ought to be the respective roles of private parties, courts, administrative bodies, and legislatures in the fair housing area?

(c) Are there grounds for discrimination not covered by federal legislation which a state could and should prohibit, for example, sex, presence of children in household, status as welfare recipient, age?
[P. 217.]

Admittedly, there is no one right way to approach any subject in the law school curriculum, and property is no exception. Some will find that the chief merit of this book lies in the very scope and variety of issues that it presents. These authors have put rich resources of knowledge, critical insight, and analytical skills at our disposal; and they have done so with vitality and with an infectious perception of the intricacy and complexity of property law and the legal system. It seems doubly unfortunate, therefore, to have to conclude as I do that the book's basic failure to provide an embracing conceptual pattern turns out to be a fundamental flaw. Without such a pattern, the promise offered by the richness and variety of the materials is not fully realized.

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19. 42 U.S.C. §§ 3601-19 (1970).

20. 387 U.S. 369 (1967).