

Cases and Materials on the Law of Property. By Ralph W. Aigler, Harry A. Bigelow, and Richard R. Powell. Second Edition by Ralph W. Aigler, Allan F. Smith, and Sheldon Tefft. St. Paul: West Publishing Co., 1951. Two volumes: Pp. xliii, 1170; xxxvi, 516.

Pedagogical and curricular considerations, the editors state in their preface, have prompted this revision. The competition for time in the crowded curriculum of the law school, the necessity for training in the case system, and a middle-of-the-road approach to the historical development of property law seem to be the motivating considerations. This reviewer is in complete accord with the editors on the desirability of use of the case system for students in the first half of their law course and with the propriety of a middle-of-the-road approach to the historical development, but substantial doubt is harbored whether this edition will prove more time saving than its predecessor.

While the number of pages has been reduced from the first edition by about 300, the number of time-consuming ideas presented has not been reduced, certain additional topics are included, and development of some others is more extensive. The space saving is accomplished by four principal devices: shorter excerpts of some cases, coverage of the points of omitted cases in text treatment, abbreviation of footnotes by fewer quotations from cases and using summaries or mere citations, and reduction of some cases from principal case status to problem or footnote position. If the user of this revised collection adopts the method of covering a given number of pages per class hour, then the time saving will be realized, but if the method is to proceed by ideas, concepts or rules there will be no saving. On the other hand, the sequence of the cases in the chapter on "Waste" probably will permit a faster, more orderly development of those concepts, and the separation of the covenants running with the fee from those running with a leasehold should facilitate coverage.

It is no surprise to discover that most of what has occurred in the past decade is reflected in this revision. Besides using some twenty principal cases decided within the last ten years or so, the editors cite more than two hundred additional such cases in the footnotes and refer to more than two hundred recent statutes, books and law review articles, notes or comments. Mention can also be made of a single page summary of "Clouds" (section 4, chapter 3, part 5) and textual treatment of marketable title acts.

It is difficult to improve on a good thing, so great changes cannot fairly be expected in this edition. The move toward Dean Fraser's position by placing the chapters on adverse possession of chattels and of land in immediate sequence will give beginning students a better perspective. Adding the five-case chapter on the "Physical Extent of Property in Land" is also helpful. The editors of this edition do not favor their readers with identification of their respective assignments, as they did in the first, but it is reasonably clear that Professor Powell's ideas as to presentation were not fully persuasive to his successor. In the material on estates the Restatement of Property occupies a more subordinate posi-

tion, and in the material on rights in the land of another (denominated in part 5, volume 2), "The Use and Development of Land," there is more substitution of cases and reorganization of material than elsewhere in the book.

The difficulty of coordination of effort of three editors, each probably with definite beliefs as to method, is more apparent in this edition than in the first. Separately stated problems are common in the personal property material, though it may be questioned whether their immediate value will continue during long use of the book as inheritance of class notes extends through several law school generations. Textual notes, summaries and introductions are frequent in the personal property and conveyancing or titles materials but are almost non-existent in "The Use and Development of Land" (volume 2, part 5). The deletion from the chapter on "Waters" of the excerpt from Kinyon and McClure, "Interference with Surface Waters,"¹ emphasizes the difference. That article comprised most of the section on surface waters in the first edition. Substituted therefor in this edition are six cases. The chapter is now 15 pages longer and in so far as this may be the cause of the greater length it seems of doubtful advantage. A tidbit in the realm of coordination is the appearance of *Suydam v. Jackson*² in the chapter on "Waste" as well as the section on landlord and tenant, without any cross references. For the most part the substitution of cases has at least not injured the book, and while the necessity for a change is not always apparent, to insist that there should have been no change would be mere quibbling.

A more serious problem still exists, however. The editors, in both editions, believe that a large-unit, first-year course in property is essential. It is too much to expect that another property teacher would disagree, but whether this unit is too large remains an open question. So long as law schools are cursed with the common problem in American education of teaching the average student instead of only the most able, it will be necessary to pace a class with some regard for the mastery of the material by the majority of the class. This is particularly true in a professional school whose graduates' incompetence is a burden on the public generally rather than just on the graduates. It may be that schools privileged to be highly selective get students who can handle this much material in the first year, though this reviewer is skeptical, unless the professor of property law is successful in demanding more class hours than the time schedule assigns or otherwise secures from the student a disproportionate amount of his time as compared with that allotted to other courses. If not all of this material can be effectively handled in the first year, can some of it be postponed to a later time in the second or third year? The answer of course is yes, although the first edition seems better adapted to such procedure than the second, but this merely poses the problem of whether material designed for first year use is wisely used in a course taken by advanced students. The answer to this would appear to be probably not.

¹ 24 Minn. L. Rev. 891 (1940).

² 54 N.Y. 450 (1873).

A more skeletal presentation of the property law in the first year in some parts, with more of the skeleton exposed in others, would furnish a solution to the time problem. In areas where there is a probability that a considerable number of the students will not take elective courses (if they are available), the coverage could be more complete. Particularly this would include more future interests material than appears in either the first or second edition of this book. This appears to be the only major deficiency, although it may be only a matter of preference.³ A later course in the curriculum could then develop those areas merely introduced in the first year course and augment the coverage of others.

Lawyers are more likely to be counselors in this area than advocates, and consequently need to be aware of the types of problems which may arise and which can be avoided. In smaller communities the lawyer continues to be the professional jack-of-all-trades and still handles all aspects of many land transactions, even though in more populous areas the specialization has led to widespread use of title insurance and employment of real estate brokers who do more than merely find the buyer who is ready, willing and able to perform. So long as it is probable that a considerable number of the graduates will practice in these smaller communities it is desirable that some effort be made to give them some ability to handle such problems immediately rather than leave it all to the practical experience they acquire at the expense, frequently, of their clients. In recent years members of the bar have occasionally expressed themselves that law schools do not train students to practise law, and have even gone so far as to suggest (in principle, though not in words) that the trade school approach is essential. The professional teacher may well not be qualified to conduct a trade school study even if he were to agree that it would be desirable, but conversely the professional teacher can easily disregard the practical applications of his theory. Here, too, a middle-of-the-road approach furnishes a better answer. In the second or preferably the third year curriculum a property course built around the typical problems of a land transaction can cover theoretical and practical problems of greater refinement than the skeletal course of the first year, can incorporate relevant considerations from other courses in the curriculum, and can explore areas not elsewhere presented which are important in land transaction problems. The core of such coverage would be in the conveyancing-recording materials, but the total coverage would present the relationships and problems beginning with the first employment of the real estate broker, on through the earnest money agreements, installment contracts, deeds, and recording, to methods of protecting the goal sought (for example title insurance). Attention to some of the recurring difficulties at the time of closing a transaction would furnish the opportunity to explore land taxation (usually otherwise omitted), types of hazard insurance coverage, drafting problems to assure availability of the land for a particular contemplated use, etc. Knowledge probably previously acquired by the students would be applied from agency, con-

³ Consult Professor Kirkwood's review of the first edition, 30 *Cornell L.Q.* 124 (1944).

tract and equity courses—and quickly. The graduate then out on his own would at least have a running start toward mastery of his client's problems in the property area. The further advantage of this approach lies in the cross fertilization of several areas of law in the process of studying a common business practice. For full effectiveness in a reasonably limited time such a course should be located in the latter part of the curriculum. This does not propose a trade school approach or a disregard of theoretical fundamentals, but it does propose a purposeful attention to the practical application and organization of the training and *knowledge* made available and acquired in the law school. In addition this pattern can provide ample opportunity to consider the adequacy of contemporary practices.

The editors in this second edition make occasional reference to inadequacies of the present procedures and current attempts to solve the problems. As valuable as any are the references to curative acts, title standards, and marketable title acts (chapter 9 of part 4). Additional suggestions by the editors of possible solutions, tried and untried, might well result in more ultimate progress in property law.

And now for some odds and ends: The chapter on Nuisance is expanded—this seems to meet a need if the topic is avoided in Torts or Equity; depending on other courses in the curriculum its omission could be perfectly feasible. The loss of *Pickering v. Moore*⁴ and its confusion of manure will be noticed. It was usually interesting to observe whether students could handle the case in a lawyer-like manner. Burial of *Jasperson v. Scharnikow*⁵ in a footnote gains this reviewer's complete approval because the appealing quality of the judge's naïve statement that the idea of "acquiring title by larceny does not go in this country" has caused too much misunderstanding already. That some jurisdictions are still burdened with the Rule in Shelley's Case could stand a bit of emphasis.

Belief that the different approach suggested above could be more profitable does not imply a belief of lack of quality in this book; on the contrary, this reviewer believes this to be a *good* book, following predecessors of high quality.

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Classical Roman Law. By Fritz Schulz. Oxford: The Clarendon Press, 1951. Pp. xii, 650. \$8.50.

The "classical" period, as Romanists call it, of Roman jurisprudence was the time of the great lawyers who produced that unique treasure of legal literature on which, in the sixth century A.D., Justinian's compilers drew for the purpose of putting together the Digest, i.e., the central part of the great codification known as the *Corpus Iuris Civilis*. Chronologically, it coincided with the principate or

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⁴ 67 N.H. 533, 32 Atl. 328 (1893).

⁵ 150 Fed. 571 (1907).