

In Search of a Villain*

Property Law Indicted. W. BARTON LEACH. University of Kansas Press, Lawrence, 1967. Pp. xiv, 94. \$2.25.

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From his place as a one-man grand jury, Professor Leach indicts property law of a series of misdemeanors. His charges hardly reach the level of felony. Indeed the bill of particulars makes it appear that the offender is really only subject to petty offense jurisdiction. Professor Leach does not look to the heart of property law for his allegations, but rather chips away at the ornaments on the fringes.

The indictment was originally prepared as the Stephens Lecture at the University of Kansas. The substance appears unchanged—prepared for the ear, not the eye—but the Professor has added footnotes to his text. As Dean Logan of Kansas writes in a brief introduction, “Connoisseurs of Leachiana frequently run through the footnotes before bothering with the text.”¹ The footnotes provide an interesting addition with anecdotes² and poetry.³ The burden of the Professor’s message remains in the text.

Professor Leach concentrates his attack on a few of the seemingly absurd rules of property law. He attacks—certainly not for the first time⁴—the more unreal parts of the Rule Against Perpetuities, the narrow interpretation of wills and trusts, and the current conveyancing system in the United States. He has a two-fold plan of action for reform: (1) the promotion, drafting, and passage of remedial legislation, and (2) the judicial overruling of certain “bad” decisions of the past.

It is a peculiarity of the American legal system that legislative change cannot affect the already-vested rights of individuals.⁵ A property right

* But not of a Villein.

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¹ *Foreword* at iii.

² See P. 67 n.83, for his exposition of *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508. This is the case of the Indian prince who was revived by a rainstorm which extinguished the flames of his own funeral pyre. He wandered for twelve years with a band of mendicant holy men before returning to reclaim his property.

³ See P. 6 n.7 for a poem about *Raymond Syndicate v. Gutentag*, 177 Mass. 562 (1901), and P. 72 n.89 for a poem about *Jee v. Audley*, 1 Cox 324 (1787).

⁴ His previous articles on the subject are collected in W.B. LEACH & J. LOGAN, *CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING* 835 n.1 (1961).

⁵ Thus, a judge who decides that some ancient doctrine is absurd and “not a part of the law” is not depriving the beneficiary who would have taken under the rule of any-

recognized as fundamental by our English forebears is now sanctified against all incursion. Hence, any property statute must be prospective only. If a decision is to be made immediately effective, it must be a judicial and not a legislative one. Only the courts can correct some of their self-inflicted wounds of the past. The legislature can act to prevent the wounds from continuing into the future.

Professor Leach gives the academic a light role in his scheme for change. The scholar can spend some of his time drafting reform legislation for adoption by his state legislature. Hopefully, his dean or promotion committee will recognize this diligent draftsmanship as "publication," for it is "worth a half-dozen abstruse articles in learned journals which gather dust in university libraries."⁶

The legislature, the bar, and the courts all have a significant role to play in the reform of property law. But Professor Leach unfortunately understates both the culpability of his brethren of the chair and the potential for reform which lies in their hands.

If a professor of contract, tort, or criminal law were to suggest the use of Blackstone's *Commentaries* as the basic text for an elementary course in their fields of interest, his colleagues would quietly begin searching the statutes under "Lunacy," subtitle "Proceedings for Commitment." If a professor of property, on the other hand, were to make the same suggestion, it might be received with some greater tolerance. The law of contract, tort, and crime have undergone substantial changes in the past two centuries. The distinction between trespass and case, as well as the niceties of assumpsit, are matters of legal history, not of current law. In the field of property, however, there has been no such substantial reexamination of the basis of the doctrines. We retain the essential structure which Blackstone gave us. The intervening two centuries have been a period of accretion and consolidation, but not of fundamental reexamination of the core of the doctrines.

Now Professor Leach tells us that Blackstone is bad. Indeed, Blackstone is the first defendant in the indictment which he delivers to the reader.⁷ But Blackstone can't be all bad, because Leach seems to want to preserve the Blackstonian system, while tinkering with its details. The tinkering will help solve problems which have been seen to arise

thing, since the judge only speaks the law. A legislature which makes the same decision is depriving the beneficiary of property without due process of law. Perhaps some judicial statesmen should rethink *that* distinction, as well. (*Quaere*: does the rule in *Shelley v. Kraemer*, 334 U.S. 1 (1948), make judicial restatement of the law as much "state action" for the purposes of the Fourteenth Amendment as legislative revision?)

⁶ P. 85.

⁷ The full caption of the indictment is "The People v. Blackstone, Kent, Gray, and Stare Decisis (Accessories: Pontius Pilate and the Laws of the Medes and the Persians)."

in particular cases, but it will not make the basic doctrines of the law of property any more relevant to modern society or its framework any more appropriate to a nonfeudal system.

The real villain of property law is not the legislator who fails to pass reformatory statutes. He probably acts either out of ignorance or confusion.⁸ Nor does the judge who perpetuates an absurd feudal principle into the modern age have the necessary intent to be convicted as an accessory under this indictment.⁹ The real villain is the academic who teaches property law as the unchanged and nearly ossified structure which students generally perceive.

Property law is by its very nature conservative, since it deals primarily with the protection of vested rights and interests. Even with the constitutional limitations on "taking" of property, it need not be inflexible. Like Professor Leach, I am "not even a Democrat."¹⁰ I agree fully that property interests, in some generic sense, must be protected. I do not agree that there is a fundamental sanctity in a system of definitions and a structure of organization which proceeds directly from the requirements of a feudal society. I do not wish to reform property law in order to make it easier for property interests to be defeated. I do want to reform property law so that it is basically comprehensible. Unless it is, it faces greater dangers of more substantial revision.

There are essentially four potential approaches to teaching the law of property: pedagogical, logical, historical, and functional. Property, as taught, has been a vehicle for the three former, more than for the latter.

⁸ Since Professor Leach refers repeatedly to his Kansan hosts, let me take a Kansas example. K.S.A. § 58-502 abolishes estates tail by stating in part: "Every instrument . . . disposing of property which but for this section would create an estate tail shall create a life estate in the first taker and a remainder in fee in the next taker." The statute does not clearly say whether the remainder vests at the time of the first taking or at the time of the termination of the life estate. The two interpretations would produce different results if there are children born (or if children die) during the tenure of the life tenant. See also K.S.A. § 58-505, which abolishes the Rule in Wild's Case with similar imprecision. In *Waite v. Schmidt*, 173 Kan. 353, 245 P.2d 975 (1952), the Kansas Supreme Court opted for a vested remainder in the heirs of the body on the date of the original grant. Under this interpretation, if the grantee had no children living at the date he took his life estate, the grantor would presumably take a fee simple in reversion.

The legislative action makes only one thing clear. The Kansas legislators thought that entailed estates were inappropriate in their state. The absence of litigation on the issue makes it clear that entailed estates have not only been abolished, they have become irrelevant to a modern society. Patchwork legislation apparently makes it necessary to teach the entailed estate in order to understand the statutory provision.

⁹ Professor Leach suggests, for instance, that such an indictment would be appropriate in the case of Judge Cardozo, for his introduction of the Doctrine of Worthier Title as a rule of construction in the law of personalty. P. 55.

¹⁰ He makes this worthy disclaimer on p. 31.

The foremost use for most property courses apparently has been as a vehicle for the inculcation of legal analytic skills. As policy rationales have crept into criminal law, tort, contract, and even civil procedure, property has been the course which maintained "pure analysis" despite the floodtide of change. The "pure analysis" of the common law is vital to legal education. Only through careful examination of precedents can we obtain such magnificent works as Professor Leach's own.¹¹ Case analysis must be taught somewhere in the law school curriculum. It is only a pity that in property, which is most in need of fundamental reexamination, thought should be primarily directed to the old formalities.

The property course can also introduce the student to a complete¹² logical system, in which the interrelationship of rules can be demonstrated and the effect of inarticulated hypotheses, either major or minor, can be minimized. The first defendant in this indictment, Sir William Blackstone, confessed in his *Commentaries* that "the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law."¹³ Property can be used as a vehicle to introduce the student to, and to force the student to master, niceness and abstruseness in the law. It thus provides the same test of his intellectual prowess which Roman law provides in the English universities. I would suggest that Roman law is more appropriate to this task, precisely because it is clearly not applicable to modern society. The student is not placed in the dilemma of his logic conflicting with common sense.

As an historical course, property offers many advantages. Whatever the merits of Sir Henry Maine's specific hypothesis that the law has changed from status to contract,¹⁴ the property course could easily introduce students to the idea that the law must and does keep pace with societal change. Legal history, as taught in the light of property courses, tends, however, to be merely the inculcation of miscellaneous trivia, justified by the fact that such trivia can occasionally win cases. The historical property course can be related to the underlying philosophy which the law represents. Comparative study of the rights of the property owner (inter-temporal as well as inter-systemic) can serve to illustrate the dependence of law upon the foundation of relevance within the current political society. This kind of study would be most

11 W.B. LEACH & J. LOGAN, *CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING* (1961); J. MORRIS & W.B. LEACH, *THE RULE AGAINST PERPETUITIES* (2d ed. 1962); and A.J. CASNER & W.B. LEACH, *CASES AND TEXT ON PROPERTY* (1964), to mention only a few of the more significant volumes.

12 If not "complete."

13 2 W. BLACKSTONE, *COMMENTARIES* 163 (17th ed. 1830). Since the defendant did not receive a *Miranda* warning, this evidence should not be admitted at his trial.

14 H. MAINE, *ANCIENT LAW* 170 (8th ed. 1880).

dangerous for property law in the context of modern society, for everyone (except possibly a property lawyer) knows that feudalism is dead!

The fourth approach to property law is "functional." Professor Leach claims that this approach originated at Harvard under Dean Pound and has subsequently been renamed at Yale.¹⁵ He also suggests that it is an approach of the past, having given way to the kind of careful, minute technical change which he proposes. The paternity of the child is not a matter of much importance but its continued viability is. The concept of property does serve a particular and important role in any society. The particular rules which develop for the governance of property have relationships to the function which the proprietorial institution serves in the social system. The system may be slow in adjusting the rule of the institution to its modern requirements. It can develop by the promulgation of particular rules to meet situations in which the old rules no longer apply. Or it can develop by fundamentally reexamining the requirements of the system. Property law could start the process with an examination of the role which property plays in the social system. This can extend to teaching concepts and techniques as well as to substantive rules. Is Blackacre a useful concept for teaching rules to students for whom agricultural images may be wholly foreign? Are the agricultural overtones of much of property law really applicable in the urban setting? Are the notions of permanence of the proprietary interest useful in a society in which more than one-half of the population changed residence within a five year period?¹⁶ Is it at all useful to talk about leases except in the context of the "standard form" agreement? How far can society permit the doctrines of future interests to tie up urban land? Can we devise new systems of ownership to make private "urban renewal" possible, despite the objection of one property owner? For any of these questions to be asked or answered, property law must be more than a mere recitation of the currently established rules, with whatever embellishments may be added. Neither the student nor the ex-student, now sitting on the bench, can answer them simply by reference to an existing legal system. He must deal with the more fundamental issues of the function of property and of property law in modern society. The law teacher should provide him with a context in which to decide these fundamental issues.

In 1458, Chief Justice Fortescue could tell a suitor: "Sir, the law

¹⁵ P. 29-31.

¹⁶ U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 34-35 (1967). Of 159,004,000 persons age five and over in 1960, only 79,331,000 lived in the same house as in 1955. Between March 1964 and March 1965, 20.7% of the population moved. In the following year, 19.8% moved.

is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason, *but by study and labor one can find it, and if any such form or course be used or has been used against reason, it is not bad to amend it, . . .*"¹⁷ Surely the modern teacher of the law must apply the same study and reason which Fortescue demanded of his contemporaries. If the law is grounded in a reason totally alien to modern society, then fundamental reexamination—not just tinkering with details—is required.

This juror would vote for conviction on the indictment presented by Professor Leach. But I am tempted to intimate that the prosecutor should also lay an information against the complaining witness and several dozen others as accessories to this crime in helping to perpetuate an archaic system through failure to suggest and provide alternatives and to subject property law to a penetrating and thorough critical reexamination.

¹⁷ Y.B. 36 Hen. 6, f. 25b-26 (1458). Leach, on p. 2, sets forth all of the quotation except that set in italics, thus seemingly reversing the meaning. (The translation of the portion in italics is mine; the translation of that in Roman type is as given by Professor Leach.)