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Land Ownership and Use Cases Statutes and Other Materials

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BOOK REVIEWS

Land Ownership and Use: Cases, Statutes and Other Materials. CURTIS J. BERGER. Boston and Toronto: Little, Brown and Company. 1968. Pp. xxii, 1055. $14.00.

This casebook, designed for use in a basic first-year course in the law of property, is divided, like Gaul, into three parts. The first and tiniest part is designed to give the neophyte a sense of how sweeping and slippery is the very concept "property." Excerpts from the Civil Rights Bill of 1966, and from the debates concerning it, illuminate the emotional charge latent in the assertion, "It's *my* house." Bentham is paraded about to illustrate that "property" and "law" are mutually dependent phenomena. The *Willow River Power*[1] case is then thrown into the equation to highlight the dangers of semantic confusion, conceptual booby-traps and superficial verbal analysis that await the student. Further cases ram home the palpable truth that "property" includes not merely land, but the attempt to monopolize the fruits of land, and that it encompasses personal ideas and business advantages, to say nothing of the attempt to capitalize upon the cash value of a unique personality. Counterpoint to this droll inventory of asserted bourgeois "property rights," an excerpt intended to summarize the equivalent Soviet approach is appended.

The second part of the book, labelled "Formation of Interests in Land," is itself subdivided into three sections. The first of these is really a truncated exegesis through the estate system which omits history and future interests. The second section deals with estates created "by operation of law," namely, adverse possession and marital interests. The third section is simply landlord and tenant.

The third part of the book is captioned "Allocation and Development of Land Resources." Again these materials are subdivided into three sections. The first is devoted to the lore of convenants and easements. The second deals with waste, lateral support and nuisance. The third, running from pages 591 to 1033, is nothing more nor less than a basic collection of land-use planning cases and materials.

In order quickly to get a feel for this book, let us assume that six credit hours are appropriated for the first-year course in Property. Assume further a traditional academic calendar with two semesters, and the book breaks down very easily into two major components. The first

[1] P. 23. United States v. Willow River Power Co., 324 U.S. 499 (1945).

semester can readily be devoted to a basic ramble through the traditional terrain of real property if the teacher couples the first two parts of the book with the middle section of the third part. According to my abacus, this works out to 412 pages. This leaves the class free in the second semester to tackle both private and public land-use controls, entailing some 619 pages. In short, we have on our hands a ruthlessly cut-down vehicle designed to speed through a one semester version of old-fashioned Real Property, which pulls behind it a large trailer designed to move land-use planning bag and baggage into the first-year curriculum.

The old-time property law fan, if such a creature there be, must by now be reminded of Conan Doyle's famous enigmatic clue:[2] obviously something does *not* happen during the first semester in order to clear the track for the second one. History and future interests we have already logged on the casualty report. Personal property is likewise ready for the graves registration squad. More disconcerting, however, is the list of those missing in action: sale contracts, deeds, and the recording system. Professor Berger, anticipating that these latter gaps in the ranks may cause a morale problem, explains that they have been sent back to regroup themselves in the upper-class reserves. "Conveyancing," after all, "does not belong in the first-year curriculum,"[3] because the first-year student is not up to handling the tax and finance problems inherent in modern real estate transactions.[4] Furthermore, the whole thing is better disposed of in an advanced problem-course setting where the student has a hand in simulated negotiations and drafting.

How does this book compare with its competitors? Clearly the

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2 A. C. DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 397 (1938):

"Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

3 P. ix.

4 As we have seen, Professor Berger prefers to cover land-use planning instead. Professor Bergin observes, however:

> During this current year, I have been experimenting with a third-year seminar on urban development. . . .
>
> To my chagrin, I must now report that the seminar has proven to be a hopeless bust . . . . In order to make the seminar successful, I needed solid competence as an economist and a decisional theorist, and I had neither.

Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 647 (1968).

Quaere: How much are the first-year students going to get out of land-use planning if, as I think he is, Bergin is right?

best book to set opposite Berger is the Casner and Leach classic[5] wherein the lads are inoculated with a healthy dose of personal property before they are sent on a rigorous safari through the estate jungle and are then coerced over an obstacle course constructed out of conveyancing conundrums. Apart from *Euclid*[6] and *Nectow*,[7] this opus assumes that the student will get his land-use planning elsewhere, presumably in an upper-class elective course built around either the Haar[8] or Mandelker[9] books.

If, arbitrarily, we can set the Berger book to the left and Casner and Leach to the right, the center of the stage is occupied by two other volumes. Both the Browder[10] and the Cribbet[11] books cover traditional ground *a la* Casner and Leach, but both interlard some land-use materials *a la* Berger. Indeed, Browder's double-columned Babylonian-sized monster has enough land-use material in it that, by pruning early in the course, a teacher could produce an ersatz version of the Berger approach. Suffice it to say, anyone eager to emulate Berger would be better advised to use the Berger book. As a practical matter, therefore, either the Browder or Cribbet books will serve well for anyone who wants to rehearse traditional property but who also deems it his duty to expose his students to the broad, introductory sophistries associated with contemporary land-use planning.

Sitting to the left of center is Krasnowiecki's[12] book. Apart from gifts, personal property has been exorcised in order to make room for some basic land-use materials. Unlike Berger, this book respects history and provides an extremely fascinating introduction to the estate system. Like Berger, however, conveyancing is dropped out of the property spectrum, although the last chapter, seemingly an afterthought, does cover problems associated with the sales contract. In light of the author's home base in Philadelphia, where title insurance is very strong, the absence of conveyancing may be understandable,[13] but

5 A. CASNER & W. LEACH, CASES ON PROPERTY (1st rev. ed. 1964).

6 *Id.* at 1021. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

7 CASNER & LEACH, *supra* note 5, at 1033. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

8 C. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND (1959).

9 D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT: CASES, TEXT & PROBLEMS (1966).

10 O. BROWDER, R. CUNNINGHAM & R. JULIN, BASIC PROPERTY LAW (1966).

11 J. CRIBBET, W. FRITZ & C. JOHNSON, CASES ON PROPERTY (2d ed. 1966).

12 J. KRASNOWIECKI, CASES ON OWNERSHIP AND DEVELOPMENT OF LAND (1965).

13 *See, e.g.*, Roberts, *Urban Conveyancing Techniques in America: The Story Behind Title Insurance*, 27 CONVEY. (n.s.) 240, 240-41 (1963); Payne, *A Typical House Purchase Transaction in the United States*, 30 CONVEY. (n.s.) 194, 194 n.2 (1966).

if adopted elsewhere, the book does presuppose a later course in conveyancing.

Not mentioned thus far, of course, has been Lefcoe's book.[14] Rather than attempt to put it on the same stage with the others, it is best left outside the pale. This is not to denigrate the book, much less to ignore it. Rather, the Lefcoe piece deserves special treatment in terms of the Harvard-Yale cream puff slinging game of the 1967-68 season.[15] The rules of this game were elementary. The Harvard team had to seize an object called Lefcoe, run the length of the field with it and dump it in a quagmire denominated "fudge." The Yale team had to seize the same object, run the length of the field in the opposite direction, and set it atop a pedestal labelled "clarity." Needless to say, it was a hard-fought contest highlighted by the brilliant signal calling of the respective captains Roy L. Prosterman, Harvard Law '58, and Ira Michael Heyman, Yale Law '56.

As luck would have it, Harvard won the coin toss and elected to run with the object. Clever rascals that they were, the Cambridge crowd called as their first play the old *Terminological Wizardry Play*. In an instant they shattered the Eli morale with a series of dazzling feints—"Gigantiasis,"[16] "Surveyitis,"[17] "Noncasitis,"[18] "Anticasitis,"[19] —before they smashed over center with a rousing "Antibasitis!"[20] Harvard might have gained even more yardage had not the Yale captain quickly rattled off perceptive signals, calling for the *Verbal Puffing Counter-Play*—"skill and zest,"[21] "very good,"[22] "brilliantly,"[23] and ultimately, "fascinating."[24]

Coming out of the huddle quickly, Harvard lined up for its next play. In measured staccato the attack was renewed with a call for the really rough *It's a Trot Play* with the incantation of "definitively-lay-it-out,"[25] "soporific,"[26] "recipe for baking a cake"[27] and "for the shelf

14 G. LEFCOE, LAND DEVELOPMENT LAW: CASES AND MATERIALS (1966).

15 A blistering battle of book reviews resulted from the publication of Lefcoe's work. *See* Heyman, Book Review, 77 YALE L.J. 1260 (1968); Prosterman, Book Review, 52 CORNELL L.Q. 479 (1967).

16 Prosterman, *supra* note 15, at 479.

17 *Id.* at 480.

18 *Id.* at 481.

19 *Id.* at 482.

20 *Id.* at 483.

21 Heyman, *supra* note 15, at 1260.

22 *Id.*

23 *Id.* at 1263.

24 *Id.* at 1260, 1267.

25 Prosterman, *supra* note 15, at 481.

26 *Id.*

27 *Id.*

of the practitioner."[28] For a moment it appeared that the entire Yale line was about to collapse into an embarrassed foetal-like posture, but their captain quickly recovered control by calling for the *You Missed the Point Play* with "hypotheticals are probing,"[29] "cross-references demand searching thought,"[30] "book is challenging,"[31] and ultimately, "A careful reading . . . uncovers considerable materials eminently useful to develop the desired thought-processes."[32]

Why the Lefcoe book should have precipitated such a silly and unproductive brawl is pretty much a matter of conjecture. It is as good a guess as any, however, that much of the uproar was caused by the book's direct challenge to the classic notion that the first year of law school should be devoted to case analysis and even then only to analysis of cases which contain the doctrinal lore served up as "Property Law," "Torts," or "Contracts." True enough, casebooks over the last dozen years have been injected with heavier and heavier doses of "notes" so that today's casebook either is half a hornbook or half a lot of show-off questions and citations which illustrate that the authors are grinds. Lefcoe, however, had to go off and try to create a functional book for today's market, which necessitated reflecting a *pot pourri* of urban renewal, broker's contracts, mortgage interest rates, subdivision convenants, etc., in a mix of cases, newspaper extracts, statutes and plain dishing-up of rules.

It should be borue in mind that Lefcoe's book was desigued for a school that held property back until the second semester of the first year and then ran it through the second year along with commercial law and the other boring slabs of market-oriented stuff typical of the second year. Even so, Lefcoe had invaded the first year with alien techniques and that is what caused the fireworks.

Berger's book is not another Lefcoe, although the book has already gotten a review in the provinces rehearsing the Harvard strategy used against Lefcoe.[33] Lefcoe tried, successfully or not, in one wild package to tell it like it is about property, but in so doing had to pull property back somewhat from its usual first rank as an introductory course. Berger has tried to keep property squarely in the first year by doctoring the table of contents of the whole property package, *i.e.*, moving land-use planning into the first year and kicking sales upstairs into the

28 *Id.* at 485.

29 Heyman, *supra* note 15, at 1265.

30 *Id.*

31 *Id.* at 1268.

32 *Id.* at 1264-65 n.7.

33 Bartke, Book Review, 14 WAYNE L. REV. 1030 (1968).

later years of the curriculum. Thus, the Lefcoe book raised a challenge to the merits of the whole ordering of the curriculum, where, I suspect, the Berger book allows the first-year property professor to keep his course popular by making it contemporary without going through the fuss of approaching the ubiquitous curriculum committee.

If the reader is the property department of some rural law school, then there is a great deal to be said for Berger because one can always purport to cover conveyancing later. If, however, a colleague already teaches an advanced land-use or local government law course, the Berger book may be something of a Trojan Horse designed to expedite a Pearl Harbor approach to curriculum reform. That is, by exercising the instructor's option to adopt a "basic" property book, the instructor can tear the guts out of his colleagues' courses and, better yet, leave them the option of cutting bait or fishing in the murky waters of a course dedicated to conveyancing.

What is one to make of all this? First, I submit, one must question the whole idea of reviewing casebooks on their merits because, frankly, the publishers of all of the books we have canvassed would gladly forward a free copy of their wares to any property teacher. Thus, assuming the property clan is perfectly able to compare these several books and assay their own local curricula, any point-by-point analysis of Berger's book is presumptuous. Thus, if there be any point to this kind of review, barring another Harvard-Yale game, the reviewer must try to set the Berger book in context for the non-property crowd.

Immediately I have two cynical reactions to the Berger book. First, it is becoming popular now to make law contemporary so as to appeal to the interest of the emotionally overcharged bourgeois children who now go to law school and who excuse their enlistment in the ranks of the Establishment by insisting upon studying law "as it is." I must confess that I suspect the popular, *i.e.*, contemporary, since it does include "law and order," Mayor Daley, and our love of materialism. Second, every law professor at heart wants to teach Constitutional Law and, I suspect, the last half of Berger's book is just another way of teaching it. This, however, only proves that the author of this review is "over thirty" and hence a suspect creature.

On a more realistic plane, however, I must confess that my own Slantist views cause me to abhor the Berger book, not in itself but as a symptom of modern trends. [For the benefit of the politically uninformed reading this, a Slantist is a Catholic with Marxist leanings.][34]

34 *See, e.g.*, Mulhearn, Book Review, THE CRITIC, Aug.-Sept. 1968, at 72.

The Berger book massacres history, out of which any critical faculty must be formulated, in favor of modern functionalism. Functionalism, however, by the very fact that it centers attention on the "as is" without providing any frame of reference, destroys the overall critical faculty. Thus, my gripe really boils down to this: The Berger book revels in land-use planning lore, the purely market-oriented moonshine of this republic, and almost purposefully destroys the long-range critical perspective of the student. I, for one, do not think the "as is" popularity inherent in this book justifies the sacrifice.

Let me, however, discard what most readers of this review will label political prejudice of an unacceptable sort, and return to the mainstream of conventional observation. Berger, on the idea of substituting contemporary woes for old woes, reflects the current law school craze to offer "meaningful" courses. The ghetto, the poor, ecology, etc., are now captions popping up in every respectable catalog. In this regard, the Berger approach is in the mainstream. Still, the law schools, if they are going to readjust their curricula in light of contemporary woes, are going to have to answer two fundamental questions.

First, and again the reader must pardon me for reflecting my own perverse political prejudices, are the lawyers going to continue to be the commissars of capitalism? I say this because it is my own thesis that the so-called rule-of-law syndrome is directly related to the Whig rise to power after 1688 and the ultimate supremacy of the ideology of *laissez-faire*.[35] Setting aside the New Deal mutation which saw the white

[35] *See* Fairlie, *Evolution of a Term*, THE NEW YORKER, Oct. 19, 1968, at 173. Fairlie, onetime leader writer for *The Times* and columnist in *The Spectator*, coined the term "the Establishment." Interestingly enough, he and his angry young friends had little love for what they thought was the "Whig lie."

> The whole "Establishment" that the Whigs had erected and maintained for two hundred years, and that was still perpetuated in the prevailing ideas and institutions of the country, was our enemy. The rights of property, the common law, the Established Church, the vulgar little monarchy brought from Hanover, a landed class that was irrelevant but still influential, a moneyed class that feared enterprise because that would disturb its hold on the City, a governing class that wished merely to play Box and Cox in office, and the characteristic Whig invention of semi-official bodies, such as the B.B.C., where valuable hangers-on could serve the Whig lie—all these seemed to us to be the cause of the irreligion of England, which had been tolerable while wealth and power were guarantees of spaciousness but was not now that we felt our country on the Gadarene slope.

Id. at 184.

> . . . Mr. John Raymond was intellectually the most daring among us in his insistence, night after night, that the common law had replaced religion in England and that in the secular idols erected or sustained under the common law could be found the cause of most of our evils. His vehemence against Edward Coke, for so long held up by Whig historians as the greatest common lawyer of all time and one of the founders of English liberties, was almost personal, as if Coke were still alive.

Id. at 182.

urban proletariat catapulted into the "middle class," the mainstream of America has evolved into establishmentarian capitalism, albeit now collectivized for the benefit of the managerial-elitist class in industry and government. The question, therefore, is whether the law schools are going to provide lawyers prepared to grapple with this phenomenon objectively or to produce flunkies to serve in its neo-feudal hierarchical ranks? The Berger book, with its conventional portrayal of law designed to insure lily-white surburbia and commercially viable center city, would indicate that the old wine is being poured into new bottles.

Second, assuming my prejudice that lawyers are by and large mirror-image commissars, the question is whether the Berger book reflects a real effort to rethink curricula. Again my own response borders on despair. Granted any casebook is now replete with vast servings of rules *qua* information, this book reflects the same old tripe, namely, cases, excerpts, and notes designed as offerings at the altar of the conventional dual-headed divinity of legal education—the Socratic System and the division of law into "property," "tort," "procedure," or what have you. The novelty of the book is the effort to put land-use planning into the property pigeonhole immediately. This is justified because it is "functional," *i.e.*, this is "where the action is." My gripe, therefore, is that in their current rush to become "functional," rationalized as an effort to be "with it," the law schools are bent upon divorcing themselves from their real duty to provide their products with the crucial mark of civilized man—perspective. Second, the law schools, more or less, but mostly more, are still in the best servile manner emulating Harvard circa 1898. Thus we come to the paradox inherent in this reviewer's complaints; that is, he wants to junk the whole traditional curriculum and yet he will not buy, bag and baggage, the contemporary mania to be ahistorical.

Interestingly enough, both a Catholic and a Communist must respect history and cannot immerse himself in the purely contemporary. But the ultimate irony is that the new car salesman, peddling the latest model, best reflects the current American educational scene. The lawyer, at least as I know the lawyer, interested in maintaining institutions by gradually modifying them to respond to change, seems best served by the historical tradition. Thus, I suggest the ultimate paradox: The custodians of the capitalist tradition and the training schools of its commissars are now bent upon destroying the one faculty which would enable their product properly to service the institution for which they have been trained to serve. For myself, I am not sorry

about this, but I find it difficult to respect the intelligence of my capitalist colleagues who take their reforms seriously.

As an educator devoid of politics, if such creature there be, let me add yet another *quaere*: Why should there be casebooks if you accept functionalism? Admittedly, the world does not divide into "torts," "property," or "procedure." Why not then divide the curriculum into areas based upon skills, *i.e.*, case law nitpicking, statutory gamesmanship, etc., or redesign the curriculum conceptually into "Sales: Chattels, Realty, or Stock," "Transmission of Wealth with the Least Tax Consequences," etc? The answer is that no casebooks are available to implement any totally new curricular approach which does not, by and large, reflect the contemporary pigeonholes. The answer to this, however, is simple. The publishers should begin to produce in volume inexpensive separate copies of all of the cases and key segments of the important statutes, and gear a computer system to an offset printing plant. Then let each faculty fix its own division of materials, let each member of it order a set of materials for his course by catalog number and, when the pages are delivered, let the student put them into a loose leaf notebook, and then we should really have something.

By way of conclusion, therefore, let me say that I think that Berger has done an interesting job. Beyond that, it must be the choice of each property teacher, insofar as he has freedom of choice, to select his own book. Let each of them examine Berger seriously. Beyond this, however, no one can speak to the merits or demerits of this book as a casebook. The ultimate decision is governed by each reader's view of the proper ordering of curricula, the function of law schools, and the role of lawyers. I suggest, however much we all like to insist that we are proceeding rationally, that this is not really a question of abstract choice, but rather a gut-response predetermined by our political consciousness. To some the Berger book may mark the salvation of property as a significant item in the lawyer's intellectual armory. For me the same book chalks up yet another item in the indictment of lawyers as partisans of a particular brand of ideology—establishmentarian capitalism.

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