

PROPERTY LAW TAUGHT IN TWO PACKAGES

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At Harvard, A. James Casner and I have primary responsibility for the property courses other than Trusts. After a four-year interlude in enterprises having nothing to do with law or pedagogy, we found grounds for no small dissatisfaction with a pattern and method of property instruction which had become familiar to us and to many others. For the last two years we have been experimenting with various changes of content, emphasis, and method, and we have now reached the point where we should like to place our ideas before the profession for comment and criticism. We hope for comment from (a) teachers of property law, (b) the law firms and senior lawyers who are the initial employers of many of our students, and (c) younger practicing lawyers who have recently faced the problem of adapting their training to professional tasks.

The temporarily gargantuan size of Harvard Law School—a product of the faculty's view that it could not in conscience and decency turn away any qualified veteran for whom space could be found—has had one useful by-product. It has brought it about that, in addition to the two regular wheel-horses, two younger professors, Benjamin Kaplan and Robert Amory, Jr., have been giving the property courses.¹ This has produced concurrent study of the problems by four teachers of varied background. We have had weekly meetings of two to three hours' duration, devoted to threshing out problems of the courses and evaluating various experiments. Thus the views here expressed have had the benefit of some initial testing.

But before we get down to details, it is well to consider some broader problems. How you decide issues of detail will largely be governed by your ideas as to the intellectual climate in which a law school should operate.

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¹ Of this group of four, two got their LL.B.'s at Harvard, one at Columbia, and one at Illinois. The group represents a composite practice in Massachusetts, New York, Maryland, and Illinois. In teaching experience, Casner has done a pedagogical Grand Tour encompassing Maryland, Illinois, Columbia (as a candidate for the doctorate) and Harvard; the rest have held professorships only at Harvard.

I

OBJECTIVES OF A LAW SCHOOL

The men whom we are now training must be prepared to perform two tasks during the productive years of their professional lives:

1. *To assume direction of all phases of the areas of personal conflict inherent in a complex society and economy.* They must be advisers, negotiators, advocates, judges, arbitrators—and frequently administrators and executives having a large amount of quasi-legislative power. This scope of activity would have seemed revolutionary and presumptuous to an eighteenth-century solicitor, but it has become traditional lawyers' work in our time. The number and complexity of the conflict areas increase, and *pari passu* the need increases for lawyers who can far-sightedly advise their clients, ably represent their clients' causes, and wisely administer the organizations and exercise the powers of decision through which government exercises its authority. There are a lot of big words in this paragraph, but I do not want to be understood to limit these remarks to the stratosphere of human controversy. The small issues between people who never make the headlines—the action for a broker's commission, the boundary dispute, the personal-injury claim, the troubles of a partnership in a garage business—these are a primary responsibility of ours, serving also as a training ground in which men, by doing smaller tasks well, can learn to perform greater tasks when they come.

2. *To provide a very large proportion of national leadership at all levels of authority.* Naturally, this field of activity has a tendency to overlap that of the previous paragraph; the distinction I draw lies between those tasks in which membership in the bar is a prerequisite and those in which a journalist, a stockbroker, or a haberdasher is equally eligible. It is an observable fact that, through some combination of chromosomes and professional training and experience, lawyers tend to come to the top of the barrel in the shaking and jolting of competition for authority. I think that most of us who were engaged in the war effort, military or civilian, came away with a feeling of pride in our profession. Speaking for myself, I came back to law teaching with a sense of renewed dedication derived from a fairly consistent experience of finding lawyers doing new and exacting jobs well and imaginatively—not only the jobs that were in the public eye, but such things as Alfred McCormack's organization of the Special Branch in G-2, a captain establishing a jungle rescue service in Burma, a lieutenant (j.g.) untangling an air transport mess in New Caledonia, a lieutenant-colonel exercising key logistical authority in the preparations for the Normandy invasion. The fact that the products of our law schools, in all generations, have

done and are doing a good job does not mean that they could not do a better one. Yet a word of caution is appropriate. As I read the evidence, there is no basis for a finding that legal education has failed and that practically anything would be better than what we have now. On the contrary, I believe that it has been generally successful. Everything possible should be done to increase its effectiveness, but great care should be taken to assure that novel expedients supplement existing values and do not destroy them.

The Basic Qualities of a Good Lawyer

If I were to try to describe a good lawyer in a phrase I would call him a professional in versatility. This is another way of saying that he has acquired certain abilities that enable him to operate effectively in any enterprise, familiar or unfamiliar, to diagnose its difficulties and contribute substantially to the solution of its problems. His usual field of operation is one in which the legal ingredient is large, and to this ingredient he brings professional knowledge as well as the basic abilities; but the fact that the non-legal ingredient is frequently dominant and the further fact that the situations in which his help is solicited are many and varied give him the habit of tackling new problems with confidence and skill, regardless of their nature.

My listing of the basic qualities is the following:

1. *Fact consciousness.* An insistence upon getting the facts, checking their accuracy, and sloughing off the element of conclusion and opinion.
2. *A sense of relevance.* The capacity to recognize what is relevant to the issue at hand and to cut away irrelevant facts, opinions, and emotions which can cloud the issue.
3. *Comprehensiveness.* The capacity to see all sides of a problem, all factors that bear upon it, and all possible ways of approaching it.
4. *Foresight.* The capacity to take the long view, to anticipate remote and collateral consequences, to look several moves ahead in the particular chess game that is being played.
5. *Lingual sophistication.* An immunity to being fooled by words and catch-phrases; a refusal to accept verbal solutions which merely conceal the problem.
6. *Precision and persuasiveness of speech.* That mastery of the language which involves (a) the ability to state exactly what one means, no more, no less, and (b) the ability to reach other men with one's own thought, to create in their minds the picture that is in one's own.

7. And finally, and pervading all the rest, and possibly the only one that is really basic: *self-discipline in habits of thoroughness*, an abhorrence of superficiality and approximation.

Since we are discussing the teaching of law, I have intentionally restricted the above list—an earthy and prosaic list—to abilities that a teacher can inculcate in a young man. In the course of this process the objective should be to give scope for growth in the young man of those native qualities of insight, ingenuity, imagination, and judgment which distinguish the artist from the artisan, genius from competence. The degree of this development, so far as it takes place in law school, will depend upon the inherent abilities of the student and the extent to which his teachers are men of outstanding capacity.

Then there are the qualities of character. Professors who “teach law greatly” tend to breed students with ruggedness of integrity. James Barr Ames, on all the evidence, had this radiant quality in its highest manifestation. All of us know others of more recent vintage, though it would be embarrassing to name names. There is the caricaturist’s combination of truth and overemphasis in the remark made to Holmes by the English jurist, “Here we choose judges because they are gentlemen. If they know some law, so much the better.”

No specific reference is made above to social consciousness as a basic quality of a lawyer. The issue is one of relevance. If a member of the bar litigates the validity of a covenant or condition restricting the use of land without considering the consequences to the community of this type of restriction, he will be giving his client very bad representation. On the other hand, if he draws a will for a Rockefeller or cross-examines a lying witness in a tort case while reflecting on the inequalities of the distribution of wealth, he is not likely to do the best job of which he is capable.

The Professional Knowledge of a Lawyer

In any problem where a lawyer is called upon, he must provide the law ingredient. Others may have a mastery of the economics of the business, of the various fields of expertness relevant to the issue, of the important facts of the current problem; but no one else will have a grasp of the applicable statutes, regulations, and decisions, and a sound basis for judgment as to how governmental authority will react. It therefore follows that there is some body of doctrine—legislative, administrative, and judicial—with which the working lawyer must be familiar.

I believe that this necessary amount is large and that it stretches the limits of a three-year curriculum. In practice the lawyer will quickly

outstrip his law-school learning in the fields of his specialization; but, if he is to be well rounded, this concentration of knowledge must be balanced by a distributive comprehension which he is unlikely to acquire after his law school days are done.

Law School as One Phase of Education

It is important to recognize that the law schools provide only one phase of a lawyer's education—the most important phase that will ever be compressed into as small a space of time as three years, but still only a phase. A lawyer's education begins in grade school or earlier and ends when he dies or retires. We take him from an earlier phase—college—and deliver him to the next phase—apprenticeship. Our question is: What ingredients of the totality of his equipment can we best supply to him in the three years he spends with us?

Law students work hard—probably at a level which cannot be substantially increased without danger of overloading.² If we add to the load in one way, we must reduce the load in another—either in content or in thoroughness of treatment. This applies to matters of approach and method as well as to extent of coverage; if you go at a given problem in one way you must give up another way, reduce the attention you give to the other way, or increase the time you spend on the whole thing and thereby supplant something else.³ It is a question of choosing between alternatives and the choice is a matter of judgment.

²In making this statement I am painfully conscious of that word "probably." I am not aware of any studies as to what the work-load of law students is, how it is distributed both as to time of year and as between instructors and courses, how efficiently the load is being carried, what its impact is on various types of students, and how the load could be more effectively regulated. I know that no one knows the answers to these questions at Harvard, and I have no reason to believe that we are unique. In any comparable commercial enterprise this situation would not be tolerated. Why should it be tolerated in an educational enterprise?

³To illustrate this: Casner and Leach give a section each of Property II (Wills and Future Interests). We have substantially the same reading assignments and we end up at substantially the same point. On a given case Casner is likely to probe deeply into the planning and drafting aspects, explore problems of income and estate taxation inherent in various solutions, consider whether life insurance could have provided a sounder plan, and seek to draft a provision that would accomplish the testator's purpose. On the same case Leach is likely to analyze the problem of advocacy faced by counsel for the complainant at this time in this jurisdiction, search out analogies that he should have drawn upon and didn't, consider whether there were circumstances in the case which he should have put in evidence for the purpose of giving color to ambiguous expressions in the will, explore the forensic tactics that were available and assess the merits of each. Casner will give some notice to the problem of advocacy, and Leach to the problem of planning; but if either wants to go into both thoroughly he simply has to take more time.

Direct and Indirect Training

So, then, we are training men who must assume professional responsibility for the conflict areas and provide the lawyers' share of national leadership. And we have three (or, in a few schools, four) years in which to do the best we can for them between college and their entry into the first professional stage.

It seems plain that the most direct training is not necessarily the best. For example, I should not expect anyone to advocate a course on "How to Be a National Leader" with Dale Carnegie as a guest lecturer and required reading of Elbert Hubbard's *Little Journeys to the Homes of the Great*. If the opportunities and responsibilities of leadership come to our men, it will be as a result of their proved worth at the performance of lesser tasks.

Our job is to give our men the capacity to handle problems that will be thrown at them. This means fairly direct training in handling the problems that will appear early, and a training broad enough to be helpful to them in expanding their own capacity to handle problems of progressively increasing breadth and difficulty.

Comment on "Policy Science in the World Community"

Among my friends at New Haven the current successor to Hohfeldianism, the Institutional Approach, and Realism is Policy Science in the World Community. As in the case of its immediate predecessor, its evangelical aspects are accompanied by saturation bombing of strategic targets in the Cambridge area.⁴

⁴In the *Yale Law Journal* for September, 1947, which contains an exposition of Policy Science in the World Community, the attacking force comprises one heavy article piloted by Frank, armed with both conventional and atomic expletives, and accompanied by a fighter escort of six book reviews, all by members of the Yale law faculty. Two of the reviewers—whom I shall not name for fear of subjecting them to reprisals—seem not to have caught the spirit of the occasion, but their deficiencies in this regard are fully compensated by the others. For a diversionary raid, see 1 VAND.L.REV. 5 (1947).

In reading these items of legal literature which attack my colleagues, my former colleagues (especially Frankfurter, J., who has fallen from grace since being invited to give the Dodge lectures), my School, and all our lares and penates, and in discovering that Columbia Law School (especially my colleague-in-law Llewellyn) is given the same treatment, insultingly less extensive, I feared that my brethren at New Haven had lost their sense of appreciation of the good in mankind. But no; this sense is still quite active, even if geographically concentrated:

Frank on Lasswell and McDougal: "... these sage thinkers ..."

Frank on Underhill Moore: "... an exquisitely cautious manner ..."

Frank on Corbin: "... the brilliant article by Corbin ..."

Frank on Douglas: "Mr. Justice Douglas, formerly Professor Douglas, agrees with me ..."

Rodell on Hamilton: "... world-wide sweep and search ..."

I hesitate to risk a short statement of the essence of the Policy Science in the World Community program; but the reader can do his own checking in adequately extensive authoritative materials.⁵ As I understand its classroom aspects⁶ from a reading of these materials and a forum discussion with Messrs. McDougal and Rostow and my colleague Fuller, the program comprises (a) making the student realize the full potentialities of law as a means of shaping national policies, (b) getting the student to examine these policies critically, consider what interests are furthered by them, and come to his own conclusions as to whether the policies ought to be changed and how the changes can be effected, (c) leading the student to think of himself as one who will be called upon to exercise leadership in the formulation of national policies and who therefore must feel a sense of mission in keeping himself adequately informed and prepared for the discharge of this responsibility.

These are all ideas which seem to me admirable—and familiar. In my school days, twenty-five years ago, we called it “public policy”; but if anyone prefers “national policy” and if adding “in the world com-

Rodell on Frank and McDougal: “... beautiful, stimulating, craftsmanlike jobs...”

Sturges on Yale: “The faculty of the Law School has taken cognizance of the potentialities of the release of atomic energy.”

The quotations are from the articles and book reviews above noted and the most recent Dean's Report (REPORT OF THE DEAN OF THE LAW SCHOOL, YALE UNIVERSITY 7 (1946-47)).

⁵ Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345 (1947).

⁶ The program does not deal solely, nor perhaps principally, with the education of law students. Its basic thought is that a law school must conceive of its function as being an instrumentality for solving the problems of the world community through law. This, of course, will profoundly affect the content and attitude of instruction. But the program goes well beyond this. It is:

a. *A plan for faculty and students* to develop solutions to national and international problems of the moment. The thought seems to be that, just as the great advances in the physical sciences have largely come from the university laboratories, so the great advances in the economic-sociological-political-international-legal problems ought to come from the law schools.

b. *A system of analysis* of legal materials and of values based upon national policies rather than personal rights.

c. *A terminology* drawn largely from the standard works on sociology, political science, economics, and psychology.

A by-product seems to be the practice of putting in quotation marks many of the words which courts commonly use and which have seemed to me workable tools of self-expression.

I do not know how far the conception of the law faculty as a self-appointed brain trust, the system of analysis, and the terminology are inherent in the whole program. I hope they are separable, particularly the last. Linguistic reforms and peculiarities—from Esperanto through Hohfeld to Gertrude Stein—rarely survive their inventors. They produce cults but not movements.

munity" underscores the breadth of vision that one must have, the amendments are helpful. I do not even have the objections to the term "policy science" which Jerome Frank has voiced.⁷ I breathed in the battle smoke of *Adkins v. Children's Hospital*⁸ from Frankfurter, and from him acquired a knowledge of the Brandeis-type brief—both of them items which emphasized the dynamic character of law and its capacity for furthering or crushing particular social values. As to a sense of the responsibilities of leadership, I believe that this comes naturally as a matter of simple inference from the repeatedly observed phenomenon of lawyers in top positions in the national life. For instance, in the halls which are most familiar to me, I am sure that there is a vivid sense among the students that they are sitting where Holmes, Brandeis, the Hands, Henry L. Stimson, David E. Lilienthal, and—for catholicity of outlook—Claude D. Pepper and Robert A. Taft have sat before them. In two of the three services in which they hold reserve commissions they receive their orders by authority of co-graduates. I do not think they miss the point that they are the inheritors of a great and currently manifest tradition of dynamic national leadership of varied causes. The same is surely true elsewhere.

However, agreement on principle does not necessarily produce agreement on implementation, particularly in matters of emphasis.⁹ I would offer the following comments on what I understand to be some characteristics of Policy Science in the World Community in action:

1. Courses which deal with the varied problems of one governmental or business unit—say TVA or the Atomic Energy Commission—provide valuable instrumentalities for synthesis of knowledge from varied fields and for study of legal dynamics. They are fascinating to the students, who feel that they are in the big leagues at last. The trouble lies in preventing such courses from being as superficial as a March of Time documentary. When a staff is assembled to operate AEC, men are chosen who have very broad and deep backgrounds; years of economic, administrative, scientific, and political experience go into each decision; each fractional aspect of each problem is the subject of careful analysis at lower levels of authority and discussion at higher levels. Law students do not have this background of experience, and it is a laborious task to provide an adequate substitute which will produce dis-

⁷ See Frank, *A Plea for Lawyer-Schools*, 56 *YALE L.J.* 1303, 1330 (1947).

⁸ 261 U.S. 525, 43 Sup.Ct. 394, 67 L.Ed. 785 (1923).

⁹ How a system works in daily application is very difficult to assess from the outside. Delusive generalizations, simplifications, and antitheses are all too common. One hears talk of the "Yale method" and the "Harvard method." One student of mine had the misfortune to refer to the "Seavey-Gardner method," an intimation bitterly resented by both the alleged parents. At the present time my colleague Soia Mentschikoff is conducting a course in commercial law on novel pedagogical lines. I have heard this referred to as the "Columbia method"—a tag which I hope this footnote will call to the attention of Young B. Smith.

cussion at a professional rather than a popular level. However, I am sure this can be done. Frankfurter's misnamed course in Public Utilities performed the feat with the ICC for many years by providing intensive study of individual problems—in my year the ones which stood out were the *Pipe Line Cases*¹⁰ and coal car distribution. At New Haven there is a heavy concentration on the works of my school-mate David Lilienthal—a compliment which does not escape us. The records show that Lilienthal took Frankfurter's course and did very well in it, but also that his principal intellectual diet was found in the more conventional courses. If we aim to train leaders of the Lilienthal caliber that thought might be worth considering.

2. It seems to be implicit in the Policy Science in the World Community scheme of things to bring into the law school large amounts of the non-legal social sciences, especially economics, often under the direction of non-lawyers. Everyone recognizes that economic factors are important in many legal problems and that it would be desirable for us to lead our students through enlightening courses of study in economic issues. But there is an economic factor in education too—the pocket-books of our students and their families—which restricts us to three (or four) years of contact with our students. My judgment is that *those three years* are best spent with professional lawyers and that the economic elements in the various problems are best approached through the minds of professional lawyers who have gone through the practical experience of synthesizing legal and economic ingredients. The problem should be solved, as I see it, not by importing into the law faculties extra-legal talent, but by selecting economics-conscious and economics-experienced members for inclusion in the faculty's professional personnel.¹¹ The training and experience of such faculty members in a university law school will inevitably lead them to utilize university personnel in related fields while still keeping the law school courses oriented to problems as they are faced by lawyers.

3. It also seems to be a part of the scheme to devote the first year of study to a critical examination of legal institutions, methods, and doctrine on the basis of economic, sociological, and political values. Here I am on firm ground as to what is done and contemplated, having at hand McDougal and Haber, *Property, Wealth, Land: Allocation*,

¹⁰ 234 U.S. 548, 34 Sup.Ct. 956, 58 L.Ed. 1459 (1914).

¹¹ As a practical matter this means that the law schools should pursue two policies: (a) in selecting faculty members give major importance to the type of governmental experience which has provided training in the political-economic-legal synthesis, (b) encourage faculty members to accept *temporary* governmental assignments of this type, and look upon these episodes as normal in-service training rather than as annoying interruptions of the school's teaching schedule. I am prepared to prove that these policies are being followed at Harvard, and I believe this is true elsewhere

*Planning and Development.*¹² This is a book for use in a first-year course in a field with which I am familiar. It is best described in its own Table of Contents, which is here appended.¹³ My views with reference to it may be summarized as follows:

a. I am consumed with admiration for the originality and vitality of the book. No teacher of the law of property should fail to examine it

¹² Michie Casebook Corporation, 1948.

¹³ Part I

PROPERTY AND WEALTH

Chap.

- I. Property and Wealth: Private Volition and Community Control, Federal and State, in the Use and Development of Resources

Part II

LAND (RESOURCE) ALLOCATION BY PRIVATE VOLITION

Introductory Note

Chap.

- II. How Claims are Established—Volition, Recording, Adverse Possession and Basic Reifications: Title, Fee Simple, Ownership, Possession, Land
 III. Dead Hand Volition—Possessory Estates and Future Interests
 IV. Landlord and Tenant: Caveat Consumer
 V. Concurrent Interests: Anachronism Redivivus

Part III

LAND PLANNING AND DEVELOPMENT

Chap.

- VI. Patterns of Anarchy: Planning in Retrospect
 VII. Planning and Community: Rational Action under Conditions of Interdependence
 VIII. Land Planning and Development by Private Agreement: Rights in the Land of Another
 Sec.
 1. Creation: The Semantic Confusion
 2. Protection Against Third Parties (Succession to Burden)
 3. Transfer of Benefit
 4. Relations Between the Parties
 5. Termination
 6. Subjection to the Claims of the Community
 IX. Planning and Developing Metropolitan Communities: Public Powers and Controls
 Sec.
 1. Techniques for Establishing Powers in Areas of Efficient Size
 2. Planning Laws and Subdivision Regulation: Securing Comprehensive Community Design
 3. Zoning Laws and Administration: Maintaining Community Design
 4. Tax Policies and Rational Land Use and Development
 5. Public Ownership as an Instrument of Planning and Development Policies
 6. Financing Comprehensive Community Design
 7. Quality Controls: Safeguarding Standards of Livability
 8. Price Controls: Land as a Public Utility
 9. The Problem of Administration: Integrating the Exercise of Community Powers
 X. State and Regional Planning: The Interdependencies of Land and Water and Rational Institutions
 XI. National Planning for an Efficient Physical Environment and Public Services
 XII. Resource Planning and Development in the World Community

with care; and none who examines it will fail to be enriched. Any thoughtful member of the judicial, practicing, or teaching branches of the profession will find enlightenment in the book.

b. The use of this book in a *first-year* law course strikes me as impossible unless one is prepared to forfeit those things which I think of as professional standards of treatment. The emphasis of the book is upon evaluation of our system of property on the basis of its attainment of sociological and political values.¹⁴ It is clear to me that this cannot be engaged in at a professional level unless the student has a deep knowledge of the system he is criticizing, of the interrelation of its principles, of the sources of self-correction within itself, and of how the thing actually works and is used. Understanding must precede criticism and evaluation if these are to be worth anything. My fear is that McDougal's emphasis on sociological and political evaluation will cause his students to be criticizing something they do not understand and as to which they therefore have no proper basis for expressing a judgment.¹⁵ It may also be that it is not the best way to lead a young man into thorough understanding of a system to keep saying to him, "This is silly. There is no vision. People do not know what they are doing.

¹⁴ In Part I, Chapter I, page 1, the beginning student faces the following:

Property is commonly regarded as an institution (pattern of practices), wealth as a value (goods and services), and land as a resource (potential value)...It needs no new emphasis that today, the world around, both values and property institutions are undergoing changes of ever increasing magnitude, violence, and irregularity of tempo...Any observer who seeks to comprehend these great transformations and to act in the manner most rationally designed to secure his own values, or the values of others whom he represents or with whom he identifies, must accordingly ask, and answer as best he can, questions of the following order:

What are the basic similarities and differences in capitalist and socialist societies?...

What meanings do different people in different situations attach to the word property?...

By what procedures can the tautologous uses of the word property in authoritative doctrines and practices (such as in the *Drydock* and *Pittsburgh Pirates* cases and in the Restatement below) be related to instrumental meanings in terms of values effected?...

By what specific practices and doctrines are resources allocated, planned, developed, and exploited in the United States today?...

Behind the formal facade of authority, what is the structure of real and effective control over important decisions about how resources are allocated, planned, developed and exploited?...

What are the general effects upon the production and distribution of values of the authoritative doctrines and practices about "property" in the United States today?...

What are the resources, natural and technological, of the United States today and what are their potentialities for the production of values?...

¹⁵ If the training of law reformers is an intermediate objective and law reform an ultimate objective, lack of full and practical understanding is even more damaging. The cause of reform in any field is irreparably damaged if the professionals can demonstrate that the reformers don't know what they are talking about.

The whole thing is wrong, *wrong*, WRONG!!!” I am well aware of how often impossibilities prove to be chimeras, particularly in the field of education;¹⁶ but experiments should not be tried by those who think them improbable of success. McDougal has got to try this one, not I.

In a word, in my mind the primary function of the first year of law instruction is the establishment of a high professional standard of understanding and discussion. It is a question of judgment as to how broad a field can be covered without thinning the coverage. My judgment is that the Policy Science in the World Community program seeks to cover too broad a field.

4. The program of summer study proposed at Yale for 1948¹⁷ seems to me the ideal instrumentality for accomplishing the objectives of the Policy Science in the World Community planners without risking the loss of what seem to me the basic values of a professional legal education. I wish we at Harvard had thought of it first and I hope we emulate it. Much good will come to law students from working in association with students and professors—not just professors—of the other social sciences.^{17a}

¹⁶ It was believed for years that you could not give a course in Future Interests in the second year without destroying its quality. There proved to be nothing to this at all. It was believed for years that a four-hour examination was necessary for an adequate testing of a student's mastery of a course. It has now been established that a three-hour examination is less effective by a margin so small as to be negligible. Other chimeras will die or be slain, but terribly, terribly slowly.

¹⁷ See BULLETIN OF YALE UNIVERSITY, LAW SCHOOL, ANNOUNCEMENT OF SUMMER SESSIONS FOR ADVANCED STUDY IN LAW AND ALLIED SOCIAL SCIENCES, January 15, 1948.

^{17a} I am leaving this just as originally written although, after this article was in proof, the Yale summer program was cancelled.

II

THE PROPERTY COURSES IN THE LAW CURRICULUM

Everyone knows that the property courses have got to be compressed into fewer classroom hours, absorbing less student effort than formerly. The six volumes of Gray's *Cases on Property*,¹⁸ comprising 4,415 pages, belong to a bygone age.

At the present time undergraduate property courses (excluding Trusts and such specialties as Mining Law, Water Rights, and Oil and Gas) are given variously under the following headings:

Personal Property
 Real Property
 Wills (Decedents' Estates)
 Titles (Conveyances)
 Future Interests
 Rights in Land of Another
 Vendor and Purchaser
 Landlord and Tenant
 Mortgages.

There is some overlapping between various of these, but on the whole they represent distinct entities, and conceivably all of them could be offered in any one school.

The views of those ten or a dozen instructors who have a more or less direct interest in property teaching at Harvard may be summarized as follows:

1. Graduates should have a well-rounded working knowledge of (a) commercial transactions in land and (b) the various gift transactions, inter vivos and testamentary, by which wealth is transmitted.
2. A first-year required course, three hours a week throughout the year, should deal with commercial transactions in land, including leases and mortgages.
3. A second-year required course, three hours in one semester and two hours in the other, should deal with the subjects formerly given as Wills and Future Interests.
4. Any other property instruction should be optional. Courses will be given from time to time in any aspect of property law with which, for the time being, an instructor wishes to deal. It is not expected that any other property course will be offered regularly.

¹⁸ JOHN CHIPMAN GRAY, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY* (2d ed. 1906, C. W. Sever & Co.).

III

THE FIRST-YEAR COURSE IN COMMERCIAL TRANSACTIONS IN LAND

This is the matter upon which Casner and I, greatly assisted by Kaplan and Amory, have been working almost exclusively for the last year. We find it a challenging problem in course construction, and we need all the help we can get. We are using the temporary edition (printed) of a casebook of our own.¹⁹

First as to objectives. These can be listed under (a) professional equipment and (b) basic discipline.

We hope to give the student a professional equipment which will enable him to perform the real-estate side of a general law practice. Upon leaving law school he will familiarize himself with the particularities of the law of his chosen state, chiefly in preparation for the bar examinations. If he enters a medium-to-large office he will engage in an apprenticeship proportionate to the degree of his specialization in real-estate matters. If he practices alone or nearly so he will tread cautiously and seek help often. But we will consider that we have failed if he does not feel that he has a solid grasp of the main body of real-estate law and if he does not have a sense of being on familiar ground in representing vendors, purchasers, mortgagors, mortgagees, lessors and lessees. In the many incidental ways in which real-estate problems crop up in a general practice we should expect our students to form initial judgments which would prove close to the mark when there is time to consult the authorities.

In the matter of basic training and discipline Casner and I feel that the first-year property course bears a heavy responsibility. Students come to the law schools with habits of skim-reading; they understand, reason, and use language by approximation. There are college courses in which precision of thought is required, but in most of these expression is in mathematical and chemical formulae, not in words and sentences. Students coming to law school are verbally unsophisticated, accepting and using expressions which conceal, rather than solve, a problem. The standard of performance they set for themselves is relatively low.

The property course has many advantages as an instrumentality for correcting these initial deficiencies without creating other deficiencies equally undesirable. In some areas there is one answer to a problem and only one; a student who understands the issue, masters the terminology, and thinks straight can get the answer and know that he's

¹⁹ CASNER & LEACH, *CASES ON PROPERTY* (Temp. ed. 1947, Foundation Press, Inc.).

got it with the precision of solution of a chess problem. Side by side with these areas are others where the issues are subtle and complex; the student can develop a capacity to probe through superficial mechanical solutions, of which the courts have provided a gratifying supply. Usage has sown through this field an adequate number of booby-trap terms—constructive possession, delivery, estoppel, to mention only some of the worst offenders; the student undergoes the caution-breeding experience of having one of these explode in his face. If the course is to perform its disciplinary function (a) it must be hard; it must stretch the student's abilities; (b) the problems must not be beyond the student's capacity; when the discussion is finished he must comprehend the problem fully, see where he went off (or was pushed off) the track, and believe that he can solve the next one and get it right; (c) approximation and superficiality must never be accepted.

Our final objective is to see that the course and the subject interest the student as they interest us. We are devoting our professional lives to property law because we like it. We are challenged by it and find amusing its wealth of human interest. If there is any rule that requires a property course to be dull it is our aim to violate it.

General Plan

The following is the order of treatment upon which we have tentatively fixed, with an indication in classroom hours of the time allotted to each topic:²⁰

Introduction and Basic Training:	15 hours.
(We know what we want to accomplish in these weeks:	
(a) Introduce the student to the property field in such a way that he becomes familiar with its ways of thought,	
(b) start his training in case analysis and problem solution,	
(c) refine his thinking processes. But we are still in doubt as to the best materials for the purpose.)	
'Bona Fide Purchase of Personalty:	6 hours
(When a BFP gets a better title than his vendor; what makes him a BFP; how the measure of damages is affected by the fact that he is a BFP; Factors' Acts, NIL, Sales Act, etc.)	
The Recording System:	22 hours.
(What the system is, how it works, how various doctrines of property law operate with reference to it, what defects it fails to protect against.)	

²⁰ This allocation of hours is the one we propose to use in 1948-49 after one year of experience in teaching this course. In 1947-48 we gave more hours than above indicated to the Introduction and the Development of Real Property Law and fewer hours to the Recording System. Our experience of the last year leads us to believe that the allocation of time given above is practicable.

Other Protections to Purchasers:	6 hours
a. Covenants for Title.	
b. Title Insurance.	
c. Title Registration.	
The Development of Real Property Law, 1066 to the Present:	12 hours
(Estates in land; the familiar historical review from 1066 through the Statute of Uses and the Statute of Frauds; English developments since the Revolution; the novel characteristics and trends of American property law. Instead of case reading and selections from standard authors the students are provided with specially prepared text plus problems for solution.)	
Concurrent Estates:	6 hours
Landlord and Tenant:	10 hours
Controls, Private and Public, on the Use of Land:	9 hours
(Restrictive covenants and conditions; zoning and city planning.)	
Some Rights in the Land of Another:	10 hours
(Easements; licenses; lateral and subjacent support; water rights.)	
TOTAL	96 hours

Certain Basic Elements in the Plan

In our current plan Casner and I feel that the following items are of the essence: (1) Treating the recording system early and thoroughly and adopting the point of view of the title searcher and conveyancer in investigating and evaluating a major portion of land-law doctrine; (2) de-emphasizing the historical development and estates in land other than the fee simple and the term of years, treating these matters in specially prepared text, and allocating to them less than 15 per cent of the classroom hours; (3) including a study of Landlord and Tenant with principal emphasis upon the planning, negotiating, and drafting problems of an actual commercial lease transaction set forth at length; (4) dealing with certain important matters—mortgages, adverse possession and prescription, taxation—by constant infiltration of these matters into chapters which deal primarily with some other topic; (5) including the public law of private property, principally as to restrictions on the use of land; (6) providing text specially prepared for students wherever exposition is needed, rather than relying upon selections from standard authors. I now proceed to discuss these in order.

The recording acts are the heart of the present American system of title security. We believe that many doctrines of the land law can best be understood and evaluated from the vantage point of the registry of deeds, viewing them as they are viewed by the conveyancer who must

make a recommendation to his client as to whether he should buy. So we introduce a thorough study of the recording system at the earliest practicable point in the course—and we judge this to be about the eighth week. We start the students off with a physical description of a typical registry of deeds and a narrative of the method of searching a title therein. (Some time we hope to put out a film on Title Search. Awaiting this, we advise the students to go down to the local registry, handle the records and indexes; and try their hand at tracing any title back a few steps and then checking on the various grantors in the chain.) As soon as we get into the cases we begin running into (a) significant variations in the recording statutes with their problems of statutory construction, (b) various title defects and the doctrines out of which they grow. We believe that this provides a combination of unity (the recording system) and diversity (many of the doctrines which affect titles) which covers a lot of doctrinal ground in the course of the intensive study of a most important institution. We find that many doctrines, otherwise fairly dull, acquire freshness and even dramatic qualities when considered in terms of the reliability of the record. For example,

1. Acknowledgment is an unstimulating topic in a chapter on the execution of deeds, but it acquires new meaning when it is discovered that the lack of a proper acknowledgment may prevent a deed copied into the record and indexed from being record notice to a purchaser or creditor.²¹

2. Description of the property granted, with particular reference to the time monuments are erected and changes in the location of monuments, loses theoretical incrustations and gains practical importance when considered from the point of view of a purchaser a decade later.²²

3. Estoppel by deed is, we think, more likely to stick in the student's mind if he understands the recording system and observes the enormous amount of additional labor that is potentially involved if it is held that a deed given by a person who later gets title is in the chain of title. This naturally leads to a discussion of other chain-of-title situations: late-recorded instruments, recorded deeds whose grantors acquired title by unrecorded deeds, etc.

4. Reciprocal negative easements are particularly striking in their effects upon subsequent purchasers who have to rely upon the record. They lead naturally into related problems of land developments.

The historical development, including estates in land. Our beliefs on this subject are:

²¹ *Graves v. Graves*, 6 Gray 391 (Mass. 1856).

²² *Lerned v. Morrill*, 2 N.H. 197 (1820); *Knowles v. Toothaker*, 58 Me. 172 (1870).

1. Outside of the landlord-and-tenant situations, legal future estates in land are of trifling importance to the American lawyer. Estates tail are practically unknown. Life estates are very uncommon. The student should understand the place of these estates in the stream of history and should know enough to recognize them when he sees them and not to stumble into them unwittingly. Beyond this a study of them is unprofitable. The importance of future interests lies not in the technical doctrines of the legal estates in land but in the problems of the trusts, inter vivos and testamentary, by which wealth is transmitted in gift transactions. The second-year course deals with these.

2. The historical development has always been given far too much time in the courses with which we are familiar here and elsewhere. We say this with regret because we love the old stuff, have spent much time seeking to master it, and have the comfortable realization that no court or legislature can abolish it overnight. But it is a time thief, largely by reason of the type of materials that have been furnished to the students and the use of classroom time necessary to supplement these materials. Gray offered the students *Co. Lit.*, *Blackstone*, the classic statutes, and some ancient cases; and on the whole this has set the pattern, though later collections have added varying amounts of interstitial material. We love an old volume of *Co. Lit.* with its coarse-grained, yellowed paper, its ancient type face, its meticulous marginal notes inscribed by some hand long since dead, and its flaked leather binding; but we know of few things less inspiring or lovable than *Co. Lit.* in a solid indigestible lump on a 6¾ x 10 smooth-paper page of West, Foundation, Callahan, or Michie 11-point linotype.

3. We believe this subject should be treated by text prepared with a view to use by first-year students, plus problems for class discussion. The text should aim at readability and stimulation of interest in the sweep of history rather than in its detail. The problems should be frequent—every couple of pages—and should be designed to enable the student to check up on his understanding of the preceding text. Classroom discussion should be limited to the problems and to straightening out the tangles into which the students will demonstrate that they have got themselves. There should be constant reference to present-day applications, if any, of the ancient doctrines under consideration; the aim should be to develop the historical sense without antiquarianism. Four of us have tried this method and find that it produces great saving of time, eliminates exposition by the instructor, and enhances student interest and participation. Examinations in this course have not yet been given, and we therefore have only guesses as to how well the subject matter has been mastered; but these guesses are hopeful.

4. Our material on History and Estates (except concurrent estates and landlord and tenant) comprises about 100 pages. Why not put it in six? I suppose that anyone familiar with the subject could put into six pages what any lawyer needs to know about this material so far as 99.9 per cent of his practice is concerned. My present judgment is that this would be a mistake, though I would be uncomfortable if I knew I were to be cross-examined on this matter on the Judgment Day. (Casner feels more strongly about retaining the full treatment, and our two younger colleagues even more strongly than he.) Early I read that *melior est petere fontes quam sectare rivulos*, and in a field where the present law is so intimately a product of its origins there is much to be said for the old maxim. Our young men, if they are to be able lawyers or profound judges or successful reformers, must have depth and appreciate its value and importance; and one aspect of depth is perspective, an understanding of how and why the law came to be as it is. It is a common phenomenon to find a modern court unconsciously extending an ancient rule far beyond its original scope simply because the court did not understand the limitations on the rule inherent in its history.²³ Then again there is the form of snobbishness we call culture. Just as we no longer need the knowledge of the Greek classics that was indispensable to an educated man a century ago, so it may be that a few decades hence it will be mere pendants to know that Coke was not pronounced as it is spelled, that the judicial protection of wardships and marriages left significant traces in our land law, and that the most far-reaching single reform in the English law of property was not a property measure at all but a means of bailing Henry VIII out of his financial troubles and putting land litigation back in the hands of the common-law lawyers. But my judgment is that things of this type and in this period still comprise the common professional culture of educated lawyers.

5. We put Estates in Land and the Historical Development *after* the Recording System and a good deal of current property doctrine. The reasons are two. First, we want these entering students to begin the intensive study of real property law with case law, not quasi-collegiate text. Second, if we are to escape devoting too much classroom time to Estates and History, we must not toss this stuff at the students when they are still floundering among the initial difficulties of legal terminology and analysis; our schedule gives them this difficult material in early February, when the floundering should be over and the hot breath of impending examinations should not yet have become a distracting factor. Starting with Estates and History would be more logical as to order

²³ Examples are *People v. Emery*, 314 Ill. 220, 145 N.E. 349 (1924); *Ellis v. Page*, 7 Cush. 161 (Mass. 1851).

of subject matter but less desirable pedagogically—or so we presently conclude without any deep sense of conviction.

Landlord and Tenant. We cannot justify any general course in land law which fails to include a fairly comprehensive treatment of landlord and tenant—and by “include” we mean actually deal with it at some length, not merely incorporate it in a part of the casebook which is never reached. From a slum tenancy at will to a lease of the Radio City site this subject is pervasive; it is a good bet that a considerable percentage of a young lawyer’s practice will involve landlord-and-tenant situations. The subject cannot, we think, be relegated to an elective for a few in the third year. The three important commercial documents in land transactions are the deed, the lease, and the mortgage, and they should be treated together. The problem is to get decent coverage without allowing leases to monopolize the course. We have tried to accomplish this by a combination of concentration and distribution:

1. *Concentration.* Case materials on the five most typical and frequently recurring landlord-and-tenant problems: condition of the premises, fixtures, assignment and sublease, eviction and surrender, the tenant who holds over.

2. *Distribution.* Consideration of all problems arising in the course of negotiating and drafting a commercial lease. An actual situation is selected, the student is put in the position of junior to counsel for the lessee, the negotiations are recounted, the lease is set forth at length and, in parallel columns, comments are made upon each clause. The lease has been chosen for the interest of the episode and the variety of problems raised, not for its perfection. After reading the negotiations, lease, and comments, the student finds a series of problems in which he is asked to advise his client on a course of action if various events occur. Classroom discussion is focused upon these problems.

Treatment by infiltration is the method which we consider appropriate for the following three topics:

1. *Mortgages.* A course in land transactions ought to deal with the real-estate mortgage to an extent sufficient to allow the student to know the principal doctrines of mortgage law and feel at home in handling mortgage problems. Nearly all real-estate transactions involve one or more mortgages, directly or indirectly. We have handled this subject by including mortgage cases and problems in the discussion of a considerable number of other subjects: *e. g.*, priorities between mortgagees in connection with recording, a defective foreclosure in connection with covenants for title, title *versus* lien theory in considering whether a mortgage by a joint tenant severs the tenancy. However, after trying

this, we conclude that it is not sufficient. We find that we have to spend time expounding the nature and uses of the mortgage transaction and the processes of redemption and foreclosure. This exposition is no way to use classroom time. We therefore propose to prepare a ten- to fifteen-page "Summary of Mortgages" which will provide the exposition we have found it necessary to give orally. This the student will find in an Appendix for reference; it will call attention to the various points in the cases and problems where various mortgage doctrines are involved and will therefore tend to help the student synthesize his knowledge.

2. *Adverse possession and prescription.* We insert cases and problems throughout the course which, in addition to the primary subject matter under discussion, raise issues of adverse possession, prescription, the statute of limitations on personal actions, and laches. The first case dealing with real estate in Chapter I (*Ewing v. Burnet*)²⁴ is on adverse possession; an idyllically complex case on co-ownership (*McKnight v. Basilides*)²⁵ has a trio of limitations problems; and the student meets this sort of thing at a dozen or more points in the course. The statute of limitations is treated as the omnipresent thing it is in practice, not tucked off in a separate compartment for isolated study. We are aware that this may lead to fragmentary and insufficiently systematic understanding. Perhaps we should provide a summary of the statute of limitations and its effects, as we are doing for mortgages. At the moment our inclination is not to do this, for it has seemed to us that the students grasp this subject satisfactorily on the basis of the treatment above described.

3. *Taxation.* Income, gift, estate, and real-estate taxation are increasingly important factors in determining the form of many real-estate transactions. Discussion is unnecessarily academic if the tax aspects of the problems are not considered. It seems to us, for example, that you cannot discuss tenancies by the entirety unless you consider the situations in which a client would be advised to use one, and that this in turn cannot be discussed unless you know the income, gift, and estate-tax consequences of a tenancy by the entirety as against sole ownership by the husband or wife or some other form of co-tenancy. Again, the basic choice between buying and renting property is often dictated by the deductibility of real-estate taxes and mortgage interest and the non-deductibility of rent paid for residence purposes. We believe the matter of taxation should be handled by :

²⁴ 11 Pet. 41, 9 L.Ed. 624 (U.S. 1837).

²⁵ 19 Wash.2d 391, 143 P.2d 307 (1943).

a. Giving to the student a text statement—say ten to fifteen pages—of what the principal taxes are and the broad lines of their operation. This provides a general understanding of the structure of the subject, which will suffice until the time comes for exhaustive, systematic study of taxation; the student can hang upon this structure the bits and pieces of tax lore that he picks up in this and other courses.

b. Pointing up the tax aspects of cases and problems as they are met in the course.

Public law and social controls. For better or worse, the lawyer dealing with real estate has to concern himself with these matters very little as compared with his brothers who advise business corporations or labor unions. Perhaps it will be otherwise in the future, but at the present time zoning ordinances and a few rules forbidding certain types of restraints and conditions are all the conveyancer has to contend with. These should be treated and, since they comprise an area which is expanding, should be emphasized. This we do in a part of the course on Controlling the Use of Land. But, in our view, the first-year property course is basically and primarily a private-law course dealing with the representation of private clients.

Use of classroom hours. There is a considerable amount of information that has to be provided in an introductory course in property. It is inefficient to provide this by reprinting judicial opinions or excerpts from various classic authors; these rarely are adapted to this function and never fit together. It is wasteful to provide information orally in the classroom by the pump-and-bucket process. Information should be provided by text written for the purpose, adapted to the needs of first-year students, and integrated into the course that is being given. Not always, of course, but as a general rule. Classroom hours should be devoted to case analysis, problem solution, and discussion of issues.²⁶

²⁶ A by-product of the matter referred to in note 4, *supra*, should here be noted. One of my colleagues (*C*) met a Yale student (*S*) at a function in Cambridge. *S* referred casually to the "Harvard Method." A conversation ensued which may be summarized as follows:

C: What is the Harvard Method to which you refer?

S: Straight lectures, of course.

C: How did you find us out?

S: You can't do anything else in large classes such as you have.

C: Who told you so?

S: Dean Sturges says so.

C: Will he put it in writing?

S: He has put it in writing. It's in his Dean's report for this year.

C: Have you attended a Harvard Law class?

S: No.

C: May I invite you to do so? And would you pass on the invitation to Dean Sturges?

On consulting the Dean's Report my colleague found the following sentence: "We feel that we have learned once more that the assembling of large aggregations

The Start of the Course

When Casner and I concluded that the main substance of the course would begin with the recording acts, it seemed to us clear that the immediately preceding material should be the common law of bona fide purchasers and the statutes that have modified it (other than the recording acts). Should the course start with BFP? On the whole we thought not, and we still think this would not be desirable; the material has too few of the characteristics listed below.

At the outset of the course we want material which has the following characteristics:

1. It must be cases, not discussion.
2. The cases should lend themselves to analysis as cases, not merely as exponents of doctrine. They should have procedural structure—pleadings, evidence, rulings, appellate action.
3. The cases should lend themselves to comparison on both procedural and doctrinal grounds.
4. The subject matter should be of sufficient simplicity to enable the student, working for the first time amid baffling vocabulary and habits of thought, to master it fully and thus take the first step in acquiring the habit of thoroughness.
5. The subject matter should present analytical, verbal, and doctrinal traps for the student to fall into and learn to recognize and avoid.
6. The material should advance the student in the attainment of the substantive objectives of the course. (Ay, there's the rub.)

This past year we have used for this purpose the old familiar possession material—tidied up somewhat with a new bib and tucker, but essentially the same thing that has faced a large majority of law students for decades and that is familiar to every law teacher. Our version contains:

1. The wild animal cases.
2. A dash of finders, based on *Hannah v. Peel*,²⁷ a 1945 English case with a befuddled opinion on facts growing out of a situation familiar in World War II.
3. The unconscious-possession cases.

of students into classes and courses permits very little more than collegiate lecturing upon, or diluted discussions of, subject matters wherein 'the instructor does all the talking.' " REPORT OF THE DEAN OF THE LAW SCHOOL, YALE UNIVERSITY 5 (1946-47).

²⁷ [1945] 1 K.B. 509.

4. The degree of possession required for adverse possession and the assertion of possessory remedies.
5. "Constructive possession."
6. A dash of bailments: *Cowen v. Pressprich* and related problems.
7. Remedies of a possessor who is a finder, life tenant, adverse possessor, etc.

All four of us who taught this material were affirmatively pleased with it except for this: it seemed an awfully long time before we got into consideration of the things that really count in a real-estate practice. The students were getting effective boot-training, were excited by it, and liked it. They were developing an elementary sophistication about the use and abuse of concepts, the words that conceal issues, the habits of courts. But, apart from items 4 and 7 above, there was nothing in these first weeks that was ever referred to again; the rest of it had to be written off as setting-up exercises. Perhaps this is all you can expect, but I live in the hope that equally effective material will be found that will advance the student along the road of learning some usable law. Next round I am going to cut out items 2, 3, and 6. Maybe at some later time I will find the cold courage to forsake the wild animals, dearly as I love them and well as I recognize their merits. And perhaps there are other materials, ideally adapted to these purposes, which we have not had the wit or imagination to think of.

Following the possession material and before Bona Fide Purchase we have placed seventy-five pages on Gifts of Personalty.²⁸ The obvious objection to this is that in a course on commercial transactions in land an extended discussion of gifts of personalty is incongruous. Our reasons for including it despite this objection are the following:

1. It comprises material of intermediate difficulty well suited to this position in the course.
2. It further explores the concept of possession and further demonstrates its insubstantiality as a basis for solving issues.
3. It is usable and practically important law not dealt with elsewhere. Among other things it gives the student a first view of estate and gift taxation.
4. It introduces the student to an elementary type of trust and to the effects of equity doctrine.
5. It permits contrasts to be brought out later in the course between bilateral commercial transactions and unilateral gift transactions.

²⁸ After one try-out we were unhappy about the arrangement and editing and have redone the chapter completely. The revision will be incorporated in a re-printing of the temporary edition which we will use in the fall of 1948.

I am not clear that these reasons are sufficient. On any functional basis gifts should be included in the second-year course with wills and future interests, and I am inclined to put them there. Casner prefers to keep them in the first year. We shall have to negotiate this out before October, 1948; there are practical reasons why the various first-year instructors at Harvard ought to handle this particular matter uniformly.

Pedagogical Gastronomics

A first-year course presents quite a problem in regulating the difficulty of the task assigned and the load imposed upon the student's time. If you overload you produce frustration and a habit of being satisfied with approximate understanding. If you underload you fail to give the student the opportunity of exercising his intellectual muscles and thus developing them.

There is some relationship between pedagogy and gastronomics. The intellectual meal should begin with an easily digestible and appetizing soup; the meat and potato should come in the middle; and something analogous to desert and coffee should appear at the end.

In Property I as we have constructed it the first course comprises Possession and (perhaps) Gifts. The heavy part of the meal—November to April—begins with BFP and goes through the Recording Acts, Estates in Land, the Historical Development, and Landlord and Tenant. Controlling the Use of Land provides the shortcake and demi-tasse. Then the metaphor breaks down, for in the realities of law-school life there is a period of two or three weeks at the end when the imminence of examinations inevitably reduces the amount of student preparation and participation; in this period we have placed Rights in the Land of Another, a subject which the students will have met frequently during the course on an incidental basis but which can, in this period, be pulled together and amplified.

Miscellaneous Matters

Personal Property. There are two issues: (1) What instruction ought to be given? (2) What instruction must be offered to comply with bar-entrance requirements in some states?

1. We include in our material Gifts (though we may defer it to the second year), Fixtures (in the landlord-and-tenant situation with incidental reference to others), Possession (unless some ingenious soul suggests something better to start with than those foxes, ducks, and fish), and trifles on Finders and Bailments. Nothing on Liens and Pledges, except as we talk about them incidentally in dealing with mortgages

and mechanics' liens. One problem each dealing incidentally with Accession and Confusion. We think this is enough and perhaps too much. The material, apart from Gifts, is of less practical utility than any other part of the course; and the analytical problems are not enticing. Some of it is good teething material, but in our judgment it should be passed over after the students are able to handle more solid stuff.

2. The bar requirements used to be more restrictive but are not now serious. It is believed that the foregoing program will permit a dean to give the student the necessary certification in any state.

Materials traditionally included in Equity. We have no desire to enter into the controversy as to whether a course in Equity is sound. Someone will deal with the enforcement aspects of equitable servitudes and with specific performance of contracts; and for our purposes it is immaterial whether this is covered in Equity, Judicial Remedies, or elsewhere. In Property I we want to give the students the following:

1. What a contract for the sale of land looks like, what problems it is likely to raise, and what some of its standard phrases—"marketable title," etc.—mean.

2. The basic idea of specific performance and of the type of equitable property interest that arises as a consequence. Add a corollary understanding of where equitable conversion may become important.

3. An elementary understanding of the Statute of Frauds as it relates to contracts for the sale of land, including the doctrine of part performance.

4. An understanding of the remedies for the enforcement of equitable servitudes, so far as these remedies lead counsel to approve or reject a title in which a restrictive covenant appears or to adopt or reject a restrictive covenant as a means of controlling the use of land.

In the main, we want to include equitable doctrines so far as they are used in advising clients on setting up real-estate transactions and the validity of titles; we want to exclude them so far as they are of primary use to the litigation department after a fight has developed. *A priori*, one might think the distinction would be hard to draw, but after trying it we find the line a practicable one.

Envoi

We are very much in earnest in desiring criticism and suggestion on this first-year property course. In addition to the matters above discussed, we are anxious to get recommendations as to particularly teachable cases; we are familiar with the standard items and have kept abreast of a good deal of the law-review material, but we are bound to have missed some decisions highly appropriate for class discussion.

IV

THE SECOND-YEAR COURSE ON GIFT TRANSACTIONS, INTER VIVOS AND
TESTAMENTARY

This course, supplemented by the course on Trusts, is designed to open to the student the field of practice in trusts and decedents' estates. The purpose is to equip him (a) to engage in estate planning for persons of wealth, (b) to advise legatees, beneficiaries, heirs, executors, trustees, (c) to conduct litigation in this field.

To engage in this branch of practice the student needs materials from four traditional courses: Wills, Future Interests, Trusts, and Taxation (Estate, Gift, and Income). The following comprises our plan, concurred in by our colleagues, as to the distribution and pedagogical function of these materials, with some comment:

1. The course in Trusts concerns itself with the trust concept and problems of trust administration. In the case of a testamentary or inter vivos trust of the usual family type, the course in Trusts assumes that the identity of the cestui que trust is established and that the general nature and extent of his interest has been determined; the course considers the relationships between the trustee, various cestuis, and third persons. We assume that such a course on Trust is given in the second year.

2. Wills and Administration (Decedents' Estates) seems to us generally to have been given much more time than can now be justified. We feel that two hours a week for one semester—say thirty-two hours—is the most that should be allotted; and, if Wills is combined with Future Interests as we combine it, the Wills material can be efficiently disposed of in about twenty hours. We have felt that for such a shortened treatment of this subject specially prepared materials are required.²⁹

3. We are sure that the subject unfortunately labelled "Future Interests" is a requirement for any trust practice at all and any decedents' estate practice above the level of the legal-aid type of client. Unfortunately, Future Interests is still often thought of as having to do with estates tail, strict settlements of family lands in England, executory devises, destructibility of contingent remainders, the Rule in Shelley's Case, and associated antiquities. And perhaps it is the fault of us who labor in this particular vineyard that we allow the course to continue with a name which has these connotations. The subject ought to be called "The Substance of Family Gift Transactions, Testamentary and

²⁹ The Preface to my *CASES AND TEXT ON WILLS* expands some of the ideas expressed above.

Inter Vivos," with some saving clause to indicate that outright gifts of present interests still have their uses in connection with (a) gifts of future interests made by substantial property owners and (b) dispositions by persons of small means. No one has ever explained how a student can expect to engage in a probate and trust practice for clients ranging from well-to-do to wealthy without a solid knowledge of gifts to classes, powers of appointment, the Rule against Perpetuities and its relatives, and the tricky constructional rules which we have inherited from a dead past. Failure to equip a student with this lore dooms him to the distasteful alternatives of foregoing one of the most lucrative fields of practice or stumbling around in such a practice for lack of adequate training. This is not the kind of learning you can efficiently pick up on the side or *ad hoc*. The subject is of the essence of estate planning and the draftsmanship of wills and trusts. It is also just about the best material for teaching to be found in any private-law subject.

4. It goes without saying that every student must have a systematic course in federal taxation. Usually such courses are given in the third year. Federal taxation must be constantly referred to in courses in Wills and Future Interests; but this need produce no undesirable duplication. In the probate and trust courses we deal with taxation from the estate-planning viewpoint, and on the whole this can be done without the highly detailed study which is properly characteristic of the taxation courses. In planning matters you steer well away from tax trouble, since it is quite as important to avoid litigation over a tax as it is to get a final determination that no tax is due. Hence, on the whole, the broad outlines of federal taxation are sufficient for the estate-law courses, provided a full treatment is available to the student concurrently or successively.

By way of summary, we conclude that there should be a second-year required course, which we call Property II, comprising about twenty hours of Wills and about fifty-five hours of Future Interests. The emphasis of the course is about equally on (a) estate planning and the draftsmanship of wills and trusts and (b) representation of clients, in and out of court, with reference to wills and trusts which have already come into effect. Taxation is given substantial consideration in the handling of estate-planning matters. We use two books of mine.³⁰

Twenty Hours of Wills and Administration

In determining how to teach the Wills and Administration material we have proceeded as follows: examine each topic which the student should study, try to determine the type of pedagogical treatment to

³⁰ CASES AND TEXT ON WILLS (2d ed. 1947), published by myself; CASES ON FUTURE INTERESTS (2d ed. 1940), published by The Foundation Press, Inc.

which it is adapted, experiment with that treatment; if it doesn't work try another treatment until you hit one that satisfies you. The following describes the present state of our conclusions:

1. There are several matters which present analytical problems of importance which justify traditional case-method treatment: incorporation by reference and related matters, protection of the widow under forced-share statutes, ademption, the familiar mistake cases, dependent relative revocation. These are given full treatment in the book and in class.

2. There are other matters which can be disposed of mostly by text but which have complications and pitfalls, *e.g.*, advancements, satisfaction of legacies. These troubles are pointed out in one or two illustrative cases or a few problems for brief class discussion.

3. There are still other matters which can be handled entirely by text without class discussion. Most of administration is in this category. The student is provided with problems every couple of pages to allow him to attempt practical application of the text. Then at the end of the chapter the answers to the problems are given to enable him to check the accuracy of his understanding.

4. The Rule against Perpetuities should be treated as the malevolent omnipresence that it is. It should be met early and often in such a way that students acquire the habit of suspicion about the validity of plausible-sounding limitations and learn to recognize the types of gifts which are likely to cause trouble. At some time, toward the end of the future-interests material, there should be systematic discussion of the difficult applications of the Rule and the tough cases raising issues of its philosophy and basic justification. But the Rule is most important in any lawyer's practice in its planning and drafting aspects; and training in these matters requires that it be kept constantly in mind from a very early point in the course. We handle this by including in the book a chapter which was originally published as an article entitled "Perpetuities in a Nutshell."³¹ Then we infiltrate perpetuities difficulties into hypothetical cases posed in class and in printed cases and problems which deal primarily with other topics. We direct the students to read the perpetuities chapter in the first three weeks, then to refer to it continuously as occasion requires. It soon becomes evident whether these directions are being followed.

5. The longest chapter in the book (fifty-three pages) is entitled, "Planning and Drafting a Will for a Particular Middle-Aged Man with

³¹ 51 HARV.L.REV. 638 (1938).

a Family and Considerable Wealth." This is designed to serve several purposes:

a. The class discussion of planning and drafting has a tendency to be destructive only. The decided cases provide examples of wills and trusts where the lawyer's work has been bad; so the student tends to acquire only a series of don'ts. He rarely, if ever, sees a document where the lawyer's work has been good; and if he should see such a document he has no understanding of the type of effort that went into making it good, what alternatives the draftsman faced, what traps he avoided, and what the virtues are of any particular clause. This chapter seeks to supply these deficiencies.

b. It is difficult for a student to visualize the realities of office practice for a client. He is used to meeting doctrinally related problems concerning several people; but he never concentrates on the problems of one testator or settlor long enough to catch the essential atmosphere of an attorney-client relationship. To supply this deficiency the chapter spends fifty-three pages on the problem of drawing one will for one client.

c. We hope to train men to do vacuum-cleaner jobs on problems assigned to them—little problems now, big problems later; legal problems now, national and international problems later. How do we set the standard of effort and thoroughness? Precept and exhortation are useless. Habitual insistence is necessary; but the insistence of the classroom is necessarily upon short-term tasks. Example is desirable, particularly if an example can be given which gives the flavor of the longer-term, larger-scale problems of representation of a substantial client. This chapter seeks to provide such an example.

The chapter comprises three parts. First, there is a summary in about nine pages of conferences with the client, J. Albert Thomas, exploring his family, his property, his tax situation, other resources of his wife, peculiarities of a close corporation in which he holds stock, his scheme of distribution, the selection of executors and trustees, etc. The second part is the will that is drafted for the client—as good a will as I, with the criticism of a couple of my colleagues, can produce; this appears on left-hand pages only. The third part, appearing on right-hand pages only, is a commentary on the will, clause by clause, explaining what each is intended to accomplish, what rules of law are being neutralized or extended, what alternative clauses were rejected and why. The students are told to read this chapter early in the course and become familiar with the affairs of this testator and with this will. Then when we come to a subject—*e. g.*, lapse—where the cases show some bad lawyer's work, the routine question is, "How was this handled in the will of J.

Albert Thomas?" (Naturally this client and his will have been so concocted as to raise most of the problems of the course in one way or another.) Thus, at the important points, the student has available to him three things: a discussion of the point, litigated cases showing bad lawyer's work, and an example of satisfactory lawyer's work. Since the will includes a set of trustee's powers with full commentary thereon, this chapter forms a bridge to the Trusts course.

Fifty or So Hours of Future Interests

Pedagogically speaking, two loves have I—and both of them are Future Interests. In my day I have given courses up and down the curriculum, from Torts to International Law, without finding a subject which compares with this one in the qualities that make for fruitful and exciting classroom hours. This enthusiasm is akin to the temperance of the reformed drunk, because I did not take the course in law school, but attempted in practice to do the incidental trust and will jobs that came my way (I had taken the course on Wills, and felt qualified) and was horrified, on learning something about future interests, to look back upon the crimes I had committed. I hasten to add that, happily, none of my testators had died in the meantime and I was able to apply timely corrective measures by various subterfuges designed to cover my embarrassment.

To repeat, Future Interests should deal with the substance of dispositions of American estates of typically mixed assets—stocks, bonds, cash, some real estate, an unincorporated business; it should equip the student to handle planning and drafting problems and litigation. This is the law of the economics of family security for the well-to-do and wealthy. It is the antithesis of the share-the-wealth movement, and the brethren of the left are not expected to be happy working in it.

My casebook does not fairly reflect the emphasis of treatment upon which Casner and I have come to agree. This is as follows:

1. We start with the study of an ancient pair of rules and their modern American misapplication and extension through faulty or unwise judicial work—the doctrines that devises to one's heirs produce descents and that conveyances of remainders to one's heirs produce reversions. The fact that in the very first case we consider (*Doctor v. Hughes*) as great a judge as Cardozo demonstrably did not understand an important technical phrase he was using and apparently did not realize that he was extending rather than limiting the scope of a feudal rule emphasizes the desirability of fundamental understanding.³² A

³² 225 N.Y. 305, 122 N.E. 221 (1919). Cardozo changes the ancient prohibition of law into a rule of construction; as a prohibition of law it applied only to realty;

Massachusetts case in which the court clearly did not understand what problem was before it and an Iowa case which tangles up the construction of its anti-lapse statute with the ancient rule make this chapter a chamber of horrors which ought to point a moral.

2. In a brief study of possibilities of reverter and rights of entry (which have already been considered in Property I in two places: estates in land, and devices for controlling the use of land) the *Brattle Square Church* case³³ and *Walker v. Marcellus & Otisco Lake Railway*³⁴ bring the student up against the common-law Rule against Perpetuities in comparison with its New York counterparts.³⁵ A California Appeals case, *Strong v. Shatto*,³⁶ raises (by neglect) issues of private planning and public policy inherent in covenants and conditions as to use of land for residential purposes only. The troubles of the Northwestern University Medical School in getting a hospital and keeping it running provide a study in the uses of covenants and conditions.

3. We hasten over contingent remainders and executory devises (the destructibility problem) and bow briefly before the shrine of *Shelley's Case*. On cultural grounds I want my students to know of *Pells v. Brown*³⁷ and *Perrin v. Blake*³⁸ and the swirl of controversy around them; these were world shakers in their day and in their world. *Festing v. Allen*³⁹ is cropping up continually in constructional problems and should become familiar. *Astley v. Micklethwait*⁴⁰ presents a handy review of what a mortgage is. *Aetna Life Insurance Company v. Hop-pin*⁴¹ shows Albert M. Kales performing the greatest argumentative tour de force of which I am aware. All of this together takes three to four hours; much of it can be left to reading with suggestions as to what to look for.

4. Any discussion of legal future interests in chattels personal inevitably ends up with three words: Don't do it. But in the process of

as a rule of construction there was no reason why it should not also apply to personality, and it was shortly so applied—thus increasing the applications of the rule by a factor of something like 100. Scott thinks the result in *Doctor v. Hughes* is sound on the ground that settlors who create remainders in their heirs do not really mean to give anything away. Perhaps—though I happen to disagree; but in any event the issue ought to be argued out on that ground and not put upon the basis of a rule of law designed to protect feudal lords from evasion of the ancient equivalents of estate taxes, *i. e.*, wardships and marriages. The institution which Cardozo plainly misunderstands is the English "executory trust."

³³ Proprietors of the Church in Brattle Square v. Grant, 3 Gray 142 (Mass. 1855).

³⁴ 226 N.Y. 347, 123 N.E. 736 (1919).

³⁵ N. Y. REAL PROP. LAW §§ 42, 50.

³⁶ 45 Cal.App. 29, 187 Pac. 159 (1919).

³⁷ Cro.Jac. 590, 79 Eng.Rep. 504 (K.B. 1620).

³⁸ 1 W.Bl. 672, 96 Eng.Rep. 392 (K.B. 1769).

³⁹ 12 M. & W. 279, 152 Eng.Rep. 1204 (Ex. 1843).

⁴⁰ 15 Ch.D. 59 (1880).

⁴¹ 214 Fed. 928 (C.C.A.7th 1914).

mastering this simple precept and its few permissible exceptions, we treat three cases⁴² raising the planning problems of a farmer, the owner of a country newspaper, and a testator owning money in five figures who wants to give his widow a life estate with power of dissipation and still reserve some rights in remainder to his collateral relatives. This last case, a gem from California which has been the subject of considerable student verse, raises the whole series of problems inherent in such powers in life tenants. These three cases are likely to take an hour each.

5. A chapter on vesting—including *Whitby v. Von Luedecke*,⁴³ *Edwards v. Hammond*,⁴⁴ *Clobberie's Case*⁴⁵ and its relatives, divide-and-pay-over, etc.—introduces the student to the vivisection-and-microscope technique in the construction of inadequate testamentary clauses and leads him to develop some skill in applying it after he has recovered from his revulsion at the senselessness of the distinctions. The R. A. P. appears at points carefully chosen at random, between one and two hours normally being taken up with a single six-line problem of diabolical complexity.⁴⁶ This chapter cannot be rushed.

6. Gifts to classes—what is a gift to a class and whether this is a realistic question, the effect of lapse statutes, the “rule of convenience”—is a subject of basic importance in a majority of constructional problems. It is ordinarily given full treatment (say six to eight hours). The R.A. P. comes in again, chiefly with *Kevern v. Williams*.

7. Powers of appointment ought to receive substantial treatment. The 1942 amendment of section 811(f) of the Internal Revenue Code and the discussions thereof in the profession have focused attention on the power of appointment as a desirable method of obtaining flexibility in the creation of remainder interests without incurring a tax in the second generation. It is a safe assertion that many more powers are being created now than at any time in the past. It is also a safe assertion that the professional craftsmanship in creating and exercising these powers is less than ideal. The power of appointment is due for a long and useful life. In any event, we are in for a flood of powers litigation and judicial development of powers doctrine when instruments now being drafted come into effect.

8. In addition to the text-and-infiltration treatment heretofore described, Casner and I usually give the Rule against Perpetuities six to

⁴² *Underwood v. Underwood*, 162 Ala. 553, 50 So. 305 (1909); *Seabrook v. Grimes*, 107 Md. 410, 68 Atl. 883 (1908); *Colburn v. Burlingame*, 190 Cal. 697, 214 Pac. 226 (1923).

⁴³ [1906] 1 Ch.D. 783.

⁴⁴ 3 Lev. 132, 83 Eng.Rep. 614 (C.P. 1683).

⁴⁵ 2 Vent. 342, 86 Eng.Rep. 476 (Ch. 1677).

⁴⁶ The case is *Johnson's Trustee v. Johnson*, 25 Ky.L. 2119, 79 S.W. 293 (1904).

eight hours at the end of the course. *Jee v. Audley*⁴⁷—a demonstration that small cases make bad law; it would have been properly argued if ten times as much had been involved—is worth an hour; its issues are intricate, and the development of the argument that should have been made for the daughters of Elizabeth Jee is a rewarding exercise in forensic presentation. The “unborn widow” and other trap cases should be emphasized to be avoided. *Feeney's Estate*,⁴⁸ *Cattlin v. Brown*,⁴⁹ and *Wilkinson v. Duncan*⁵⁰ are must items in the application of the Rule, with perhaps an hour being devoted to each case and related matters. The option cases—including the impossible situation they create for the courts in a state, like New York, which has no number of years in its period of perpetuities—introduce the study of the application of the Rule to interests other than estates in family settlements, a subject which comes close to Jurisprudence with a capital J. Certainly eight hours in all is not too much.

9. I wish I could say that we do much with restraints, but it is not so. We talk about *Clafin v. Clafin*⁵¹ from time to time; there are several problems dealing with restraints unduly prolonged; the students know something about restraints on land use from Property I; they get some spendthrift trusts in Trusts; but they have to fend for themselves in putting this together. We just don't have time.

V

PLANS FOR FUTURE EXPERIMENTATION

With regard to Property I my attitude and Casner's are experimental, groping, and as humble as our generally unhumble characters permit. As to the above-described course in Property II, it would be difficult to talk us out of it; we have tried it, tinkered with it, and are satisfied that it is sound. However, we both have plans for future experimentation, I in the matter of teaching method, he in combining this course with Trusts and thereby saving three semester hours in the curriculum. I will explain mine, then give him the floor.

A Case-an-Hour Course

I am sure that I do not use at full efficiency the time my students can devote to my course in preparatory study, and this fact has some tendency to produce loss of efficiency in the use of classroom time. Being

⁴⁷ 1 Cox 324, 29 Eng.Rep. 1186 (Ch. 1787).

⁴⁸ 293 Pa. 273, 142 Atl. 284 (1928).

⁴⁹ 11 Hare 372, 68 Eng.Rep. 1319 (Ch. 1853).

⁵⁰ 30 Beav. 111, 54 Eng.Rep. 831 (1861).

⁵¹ 149 Mass. 19, 20 N.E. 454 (1889).

given seventy-five hours of classroom time, I believe that I can wrap up seventy-five capsules of material, one for each hour, each capsule to consist of some orientation reading, one principal case, and a series of problems on related matters. This will enable the student to know in advance just what matter will be covered, instead of confronting him with a situation where we take four days to cover two pages and one day to cover the next twenty. Under this fits-and-starts system the student frequently finds that his reading of today's material was done three weeks ago or was planned by him for tomorrow. I like as well as the next man to allow the course to drift where the winds of discussion or the zephyrs of whim push it, and perhaps that is the best way to do it after all; but I would like to try what I would call more systematic organization even though others might think it unscholarly regimentation. I am inclined to believe that this can be done without producing a wooden rigidity; after some fourteen years of teaching this subject, one ought to know about how much time fruitful discussion of a given case or topic is likely to consume. The option to discuss or ignore problem cases gives play in the joints for varying amounts of discussion which different classes may engage in. The notable cases in this course are peculiarly adaptable to this case-an-hour treatment. Something in the nature of this "capsule" course has already been done in Steffen's *Cases on Agency* (1933).

An Estate-Planning Course as a Substitute for Wills, Trusts, and Future Interests

(By A. James Casner)

My thinking with respect to a course in Estate Planning is very much in its infancy and anything I say about it at this time is subject to change without notice.

I want to deal with donative transactions without reference to the boundaries of existing courses. I want to train my students to think as broadly as is required to formulate intelligent judgments in advising clients how to settle their estates. This means considering not only what is traditionally treated in Wills, Future Interests, and Trusts, but also aspects of corporation law, conflict of laws, taxation, insurance, and accounting.

My present thought is to start the course by making a thorough examination of the estate plan that is made by law for everyone who does not choose to make one for himself. I propose to present to the class the situation of W. Barton Intestate, a man who dies owning a home in Massachusetts, a farm in Illinois, tangible personalty, a joint savings

account with his wife, some stock, some insurance, some government bonds, etc. He is survived by his wife and two children. The book I propose to prepare for use in this course will develop, through fully reported cases, problems, textual notes, and copies of documents, each step from the moment Mr. Intestate breathes his last to the final distribution of all his assets. In the course of this journey, problems will be raised of the type which recur with reasonable regularity in the administration of an intestate estate. It is my belief that a thorough understanding of what happens on intestacy is essential to sound estate planning.

The second phase of the course will be a consideration of the affairs of A. James Testator, a much more intelligent fellow than W. Barton Intestate. I see the material placed in the student's hands for the development of this phase somewhat as follows: A statement of the interview between the lawyer and the client; problems designed to test the adequacy of the interview; an outline of a suggested plan; problems based on the outline to test its thoroughness; initial drafts of documents to be executed to carry out the plan (these documents to consist of at least an inter vivos trust, an insurance trust, and a will) with significant omissions and intentionally planted mistakes in them; fully reported cases, problems, and textual notes designed to make apparent the omissions and mistakes in the initial drafts; copies of the documents as finally executed with a textual commentary and problems to make apparent the purpose of each paragraph in each instrument; a statement of facts arising after the execution of the instruments and prior to the death of Mr. Testator; cases, problems, and textual material related to such subsequent facts and copies of instruments executed to cope with them; death of Mr. Testator and a statement of all relevant circumstances existing at his death; development by cases, problems, and text of each step from the death of Mr. Testator until his estate is closed and until the trusts which he created are finally distributed to the beneficiaries of principal.

It is my belief that the proper arrangement and selection of material in connection with each phase of the course as outlined here will not only give the student an adequate knowledge of wills, future interests, trusts, and related matters, but will do so in the framework in which he will have to employ such knowledge in the future.