

SALES AND PERSONAL PROPERTY TAUGHT IN . . . ONE PACKAGE

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This is not the place to expand upon the pressures that are making our law-school offerings, actual and potential, a constant perplexity to curriculum committees. It is enough barely to mention that (1) the traditional courses are expanding in content—witness Constitutional Law; (2) lusty newcomers like Taxation, Labor Law, Administrative Law, Regulation of Business, International Law and Organization, etc., are receiving a well-merited and constantly enlarging place in the curriculum; (3) the current (and justified) wave of self-examination emphasizes the need for increased training of law students in legal writing, research, planning, drafting, and problem-handling. With all this and more (Legal Method, Legal History, Legal Philosophy—to mention but a few), can those of us who instruct in the traditional private-law courses continue to clamor for more space and time? Ought we not, on the contrary, to devise some way of *cutting down*? If we *must* bring into our courses additional matter which we deem essential, should we not try some way of doing it without asking for more hours?

It was in an attempt to meet the problem suggested by these questions that the course labeled "Chattel Transactions" was devised some years ago at the Duke Law School as a first-year course, and that materials for that course were prepared. The course and the material prepared for it have the following objectives:

1. To combine Personal Property (and Bailments) with Sales, so as to cut down the time that would be devoted to separate courses in those subjects.
2. To use the course, thus combined, as a springboard for the study in the first year of the judicial process and thereby eliminate a separate course in Legal Method.
3. To make more efficient use of classroom time and student preparation time by editorial comment which invites and directs pre-class room analysis and speculation.

Let me explain and try to justify this adventure.

1. Combining Personal Property and Sales

Before going further, let us face the question: Why teach Personal Property at all? In some schools the subject has been abandoned, except in so far as the security functions of chattels have found their way into other courses. The justification for its retention is, I believe, that there are some very good things about the (shall I say "old") Personal Property course. For one thing, its factual situations readily come within the comprehension and experience of the beginning law student—as distinguished, say, from the facts in the *Hartford Empire* or the multiple-basing-point cases. While no beginning law student is probably financing himself from

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savings accumulated as a chimney sweep, the drama of the chimney sweep's boy, the wily goldsmith, and the jewel presumably of the finest water is one that he readily grasps. We can forego considerable hunting of foxes, harpooning of whales, and speculation as to the home-coming intent of a bee. But there are topics in the Personal Property course (liens, bailments, gifts, etc.) that are of practical and doctrinal importance and offer "good" pedagogical material. Moreover, to anticipate a point which I shall further develop in a moment, Personal Property materials afford an admirable springboard for a lower-level, first-year course on the nature of the judicial process.

As for combining Personal Property and Sales, the subjects are closely related in several respects. They both deal with "goods and chattels," they both involve much concern (perhaps too much) about possession and title; they both present questions concerning formalities that have a common philosophic basis, viz., the delivery requirement in Gifts and the Statute of Frauds requirements in Sales. Moreover, the combination avoids a Procrustean allocation of time and permits robbing Personal Property a bit to pay Sales—a redistribution of wealth which can be justified. This feature per se can be viewed as time-saving—at the expense of Personal Property. A further time saving is achieved, I believe, by studying the formality requirements of the Statute of Frauds and of delivery in Gifts at the same time, interspersing the one with the other.

2. *Using the Personal Property-Sales Combination as a Vehicle of Instruction in Legal Method*

Here we are on controversial ground. The basis of the controversy is not, I presume, that the beginning student should learn "the law" rather than methodology. But it can be urged that an instructor has no business indoctrinating in his particular brand of legal philosophy the beginning student who has as yet worked up no adequate defense against it. Nevertheless, I venture the opinion that orientation in the judicial process and awakening a critical alertness to the function and manipulation of legal concepts should start early, and the further opinion that Personal Property and Sales lend themselves surpassingly to that end. Better pedagogical material for this purpose can hardly be found than in the concepts of possession, conversion, and title. Perhaps the subheadings in the first chapter of the mimeographed materials on Chattel Transactions that have been prepared for this course will illustrate what I mean:

- Chapter 1. Introduction to Operation of the Concept of Possession
 - A. Some Miscellaneous Statements about Possession
 - C. The "Elements" of Possession
 - D. Some Doubts about the "Elements"
 - E. Some Doubts about Possession as Decision-Maker
 - F. Some Doubts about the Unity (Stability) of Possession

Moreover, it is arguable—indeed, our curriculum committee is convinced—that comprehension of the judicial process and of the power of legal conceptions can better be achieved in a close study, directed toward that end,

of a particular field of law rather than through a general orientation course. For that reason, no first-year course in Legal Method is offered at Duke. (It is conceded that there is more to a Legal Method course than inquiry into the nature of the judicial process and into legal philosophy; other measures have been taken for part of this deficiency.) Accordingly, Chattel Transactions is deliberately planned to inquire into the judicial process, the potentialities that lie in decided cases as precedents, the manipulation of legal concepts, the adequacy or inadequacy of legal concepts to resolve difficulties, the inarticulate considerations that may be producing results under cover of legal concepts, etc. This is nothing new; every instructor goes into these matters. But the materials that have been prepared for Chattel Transactions directly raise these matters in the text instead of leaving them to be explored for the first time in the classroom. To illustrate, the following text is taken from early pages, immediately following the classic case of *Armory v. Delamirie*:

2. Before this case, it was by no means clear that possession of itself was enough to enable the possessor to recover full value from a wrongdoer. True, possessors had maintained such actions, but the explanation usually given was that the possessor in question (say, a "bailee," about which more later) had assumed an absolute responsibility to the owner for the thing and for that reason had a "special property" in the thing; whereas here it is fairly certain that even at that day the finder would not have been liable to the true owner had the jewel, say, been stolen from him.

3. Are there not several ways of stating the doctrine of the case? Thus:

(a) A finder has "property" in the chattel superior to that of all except the true owner?

(b) Possession is title as against all but the true owner? (True, the report did not mention possession; it said the finder acquired a "property" in the thing. The court thus was able to stick to the traditional language of older cases. But arguably, the only "property" in the finder was his possession?)

(c) Possession is title as against *wrongdoers*? (We shall soon see a judicial decision that so viewed *Armory v. Delamirie*.)

(d) Possession is prima facie evidence of title where the true owner is unknown? (We shall see a judicial decision that so viewed *Armory v. Delamirie*.)

(e) Possession entitles the possessor to recover full value from one who wrongfully deprives him of possession of the chattel? (Observe that in this statement of the principle the terms "title," "property," are not used. Is this statement more meaningful than the preceding ones with their abstract conceptions of title and property?)

(f) *Rightful* possession gives the possessor the rights above mentioned? (The finder had committed no wrong in acquiring possession.)

(g) Possession *under claim of qualified ownership* gives the possessor the above rights? (The ancient cases had held that possession, even wrongful possession, under a claim of ownership protected the possessor against wrongdoers; here the finder, though not claiming unqualified ownership, can at least be said to claim ownership if the true owner does not appear?)

Let us not conclude that some one of the above statements is necessarily *the true* doctrine of the case. What is important is to note that, by

close analysis, several ways can be discovered of stating what a case stands for. If exactly the same case arises again, it makes little difference how you state the doctrine of the former. But if the next case varies somewhat in its facts, it may make a vital difference. Naturally, the opposing counsel will urge that the case stands for different propositions; as their contentions are adopted by the courts, the common law grows.

4. Let us reconsider the court's statement in *Armory v. Delamirie* that the finder "has such a property as will enable him to keep it against all but the true owner." In the reporter's brief report of that case, no authority is cited for that statement; probably no former case had so held. Yet that statement, here made, now becomes law for the future? So the common law grows.

Also note that all the case had to decide was that a finder, under these circumstances, is entitled to recover full value from one whom the finder permitted to inspect the chattel and who now refuses to give it back. The reasoning (rationale) used by the court goes beyond what it was necessary to decide; if the statement which the court made is "the law," then the finder would have prevailed even over the owner of the house where the chimney was being swept, even had the jewel been found in the course of sweeping the chimney (unless it actually belonged to the house-owner). But would a subsequent court, or this very court, feel bound to apply this statement literally in the subsequent case of *Houseowner v. Finder*? That takes us into theory of precedent.

If a statement is mere dictum, a court feels considerable freedom in departing from it; thus, if the court here had added a sentence like this: "If this finder had been trespassing on the place where he found the jewel, he would have no rights"—that would have been "pure dictum" (expression of opinion on a point not before the court). The statement we are considering was not pure dictum; it was the reason (unduly broad perhaps, but yet the reason) that the court gave for its decision. Nevertheless, a court would not necessarily feel that the doctrine of "stare decisis" (following precedent) would be violated if in the next case it should favor the house owner over the finder; it could still say that it was respecting the actual *decision* of *Armory v. Delamirie*, although not pursuing to its logical conclusion everything that was *said* in the opinion in that case. This makes for growth of the law, although it also makes for some uncertainty because you cannot predict, on the basis of this case alone, the outcome of the future case of *Houseowner v. Finder*.

5. Note that the form of action was "trover". Do you believe that abolition of the forms of action makes the doctrine of the case (whichever way you state the doctrine under Note 3 above) obsolete?

The following excerpt illustrates an attempt to create an awareness of the possible question-begging nature of some of our legal concepts. The discussion relates to the case of *Barwick v. Barwick*.¹

Recall that the *Barwick* case distinguished a finder on the ground that a finder has title, except as against the owner. You should reflect carefully on whether that is begging the question. For what do we mean when we say: I have title? That I stand in such relationship to the chattel (maybe I made it or bought it or have held it many years, etc.) that the law affords me a formidable array of its remedies against others. *E.g.*:

¹ 133 N. C. 80 (1850).

- (1) If *X* takes it from me, I can get it back by legal action or, perhaps, I am privileged to use self-help;
- (2) I can get damages from *X*, full value;
- (3) I have those same remedies against *X*'s transferees or those who take it from *X*;
- (4) I can transfer my rights, whether I am in possession or not, so as to give my transferee the above remedies.
- (5) Etc., etc.

If some or all of these remedies are denied me, can it be said I have title? Consider whether I have these remedies because I have title, or whether, since there are "good reasons" for giving me these remedies because of my relationship to this chattel, we can say, for short, that I have "title"?

So, is it possible that "the truth" is that a finder recovers, not because he has title, but because there are reasons which have appealed to the courts for letting him recover and which lead us to say, for short, that he has title? (A "special" title, at any rate; *i. e.*, one assertable against some persons, not against the owner. So also where for some reason a possessor is absolutely liable for the preservation of the chattel; we can say he has a "special property.")

To invite the student to question whether concepts like possession, title, etc., really account for the results in the decisions, comments like the following are inserted:

The foregoing arrangement of cases has been presented to you as if the only thing that really mattered in the cases were possession—as if the driving force which by relentless logic impelled the court to its final conclusion were the presence or absence of the elements that go to make up that concept.

But is that so? May not a number of factors have been present, pulling the court toward one direction or toward another? Among these factors, a preconceived legal tenet about the composition of possession may have been merely one of the factors, and perhaps a relatively minor one? Indeed, frequently the opinions themselves, in portions which have been omitted from the foregoing pages, reveal these other factors. One of these factors we may call the "public policy" factor. Rather than try to define this term, let us go back and use some of the preceding cases as illustrations. Thus: . . . consider *Young v. Hichens*, *Liesner v. Wanie*, *Eads v. Brazelton*, and *The Tubantia* as a group. If you restate the issue in those cases, not in technical legal concepts like possession, but in non-legal terms of fairness and social interests, might you not come out with something like this: Before the plaintiff had done the things to the chattel upon which he based his claim of property rights, the field of contest with respect to acquiring ownership of the chattel was open to competition; given the notions of justice we entertain, had the plaintiff *done enough* toward getting the chattel that in all fairness competition ought to be declared closed? In short, were the defendant's acts still within the limits of fair competition? Old cases perhaps should be evaluated in the light of the then existing notions of fair competition; those notions might be different in a pioneer background with nineteenth century ideas as compared with today. Consider, for instance, how little the first comer had done in *Eads v. Brazelton*, as compared with what the first comer had done in *The Tubantia*.

When cases are chosen (and many are so chosen) for the light they throw on the function that is being served by the legal concept involved and on the manipulability of the concept, the accompanying editorial comment frequently directs inquiry into a different formulation of doctrine, stated in terms that avoid the concept. Thus, in one case¹ the buyer brought replevin where the seller was threatening to sell the goods to third parties and the buyer succeeded in his action despite the fact that the seller was still in possession and that by the usual rules about title-passing title would not yet have passed (seller had contracted to deliver at a specific place and had not yet done so); yet the court's rationale was that title *had* passed. The editorial comment directs inquiry as to whether title is being manipulated to reach a result that could be better stated as follows: Where the goods that buyer and seller have bargained for are identified, on making and keeping good a tender of the price the buyer may recover the goods themselves from the seller if the latter repudiates or refuses to deliver. This being substantially the position taken in the proposed Uniform Revised Sales Act, analysis is invited of the pertinent section of that Act. Comparison with that Act, incidentally, is found time and again to offer excellent methodology material, as well as good technical equipment.

To repeat, legal methodology can better be appreciated by the beginning student in a close analysis of a group of such cases in a particular field of study than by a general methodology course. The synthesis of legal philosophies had better be left for the more advanced students. I may add that additional orientation at the Duke Law School is given the first-year students at the very beginning by a mimeographed manuscript on "Introduction to Civil Procedure" by Professor Stansbury.

3. *A Casebook with Extensive Editorial Comment.*

Merely to combine Personal Property and Sales would achieve only a small degree of time saving. The addition of a Legal Method slant would only be adding volume and requiring more time. If that were all, the major time-saving claim would perhaps be the elimination of a separate Legal Method course. The materials that have been prepared for Chattel Transactions, however, seek to achieve a further saving, both in classroom time and in student preparation time. This is done by extensive editorial comment, as well as by such usual devices as summarized cases.

Many casebooks are, of course, getting away from a mere collection of cases. Editors are increasingly prefacing or supplementing a case with comment analogous to what would pass for a note, comment, or even a short article in law reviews. Evidently many editors are getting away from the idea that a casebook should "put out the law," objectively, impersonally, through the mouths of the authorities, unmixed with the views and prejudices which the editor may have developed from twenty years' thinking about the subject. The materials prepared for Chattel Transactions go a step further; frequently the editorial remarks following a case (or a group of cases) will be a running commentary along the lines that the instructor normally waits to develop in the classroom. At times, accompanying a case will be found the sort of comment that is found in the teacher's manual. "Spoon-feeding"? I don't think so. In fact, the student complaint against these

¹ *Glass v. Blazer Brothers*, 91 Mo.App. 564 (1902).

materials is quite the contrary: they complain that the materials confuse them and leave them without certainty as to "what the law is."

As a matter of fact, I don't see why teachers' manuals, written with a slightly different orientation, should not be put into the student's hands. Is it not barely possible that if the instructor finds guidance in a "manual," more efficient use of the student's time and better understanding on his part could also be achieved by some manual-like comment? A properly edited casebook might succeed in striking a balance between the Socratic and un-Socratic extremes of classroom performance. With a mere case-after-case casebook, the more Socratic of us is lucky if he gets through two cases in an hour. His goal is admirable: to make the student think for himself and to guide the student on to his own discovery of "the law." Could not some of that thinking (and better thinking) be done outside the classroom if the student has a channelizing suggestion? And must all digging for nuggets, in the Socratic approach to discovery, be done in the classroom? Suppose, instead, the student were given a hint where to dig and the classroom were reserved for discussing the result of the digging or assaying the product?

The un-Socratic instructor tries to make up for the casebook editor's scholarly humility in refraining from injecting editorial comment by coming out of his corner at the bell, taking a deep breath, and lecturing at full speed till the bell ends the round.

The materials prepared for Chattel Transactions tend to avoid these extremes. They are a combination of cases, text, questions, dogmatic statements of law, critical remarks, directive analysis, espousal of causes, suggestions for testing judicial rationales, inquiries into policy, and miscellanies. The few excerpts heretofore reproduced give some indication of the degree of departure both from mere cases and from the type of text appropriate to a textbook. Occasionally, a section will not contain a single main case that is reproduced substantially in full. That is true, for instance, of the chapter (about ten pages) dealing with accession, confusion, adverse possession, and judgment. One classroom hour has been found adequate for that chapter. From time to time in examinations I have given problems involving those topics, and my conclusion is that the students handle the problems about as well as they did in former years after three to five times as much classroom attention. (Not all areas, of course, can stand that type of treatment).

Chattel Transactions is given as a four-hour, first-year course, two hours each semester. One might observe that this is not much time saving, except in so far as the course saves a separate course on Legal Method, for it is quite common to give two hours to Personal Property and two hours to Sales. The saving lies in this: time has been found for comparison with the thinking underlying the proposed Uniform Revised Sales Act and for emphasizing matters concerning obligations and remedies. (By remedies I mean to include the course of action, even to jockeying for position, to be followed by one party where the other party has defaulted.) To illustrate, the part dealing with "Remedies: Moves and Counter-Moves of Seller and Buyer upon Actual or Threatened Default" is broken down into the following sub-headings:

1. Perfecting the right to sue (including Seller's next move on Buyer's failure to furnish shipping instructions, and the resulting jockeying for position).
2. Buyer accepts defective performance, yet sues for damages.
3. Same, under a unilateral contract.
4. Seller sues for the purchase price.
5. Seller's right, despite Buyer's repudiation, to continue performance and to earn the purchase price.
6. Same, on the strength of no-cancellation clause.
7. The scheme of the Uniform Revised Sales Act as to price action and risk of loss.
8. Buyer seeks specific performance.
9. Some aspects of damages between Buyer and Seller (herein of hypothetical market, and of covering transactions).
10. Seller, unpaid, withholds Buyer's goods.
11. Seller exercises the right of stoppage in transit.
12. Resale by the seller (including relevance of rescission theory).
13. The unpaid seller's rescission—further aspects.
14. Storing and caring for refused goods—charges and liens.
15. Seller ships despite Buyer's repudiation (or Seller reships after Buyer's return).
16. Seller fears Buyer's insolvency and cancels credit terms.
17. The aggrieved party moves to shed his burden—the Buyer rejects.
18. Buyer withholds payment for defective prior installments, yet expects continued delivery.
19. Buyer rejects for stated reasons—waiver of unstated objections.
20. Buyer rejects—rejection of a defective portion.
21. Buyer rejects—or has he accepted?
22. Buyer rescinds—defective quality.
23. Buyer rescinds and seeks damages.
24. Buyer rejects and proceeds "against the goods."

While there is really nothing new in the above list, this emphasis on remedies easily ramifies, more so perhaps than the familiar Sales game of hide-and-seek with "title." Yet pursuits of those matters, I submit, is more rewarding than chasing "title." It may be difficult to pursue those matters, together with the proposed revised Act, and at the same time cut down the Sales course. Perhaps my colleagues may even yet persuade me to cut the present course from four hours to three, with the bulk of the material relating to obligations and remedies put into the second semester, by which time the student is fairly well along in Contracts. The upper reaches of financing (*e.g.*, secured commercial transactions) had better be left for finer pursuit elsewhere, perhaps in specialized seminar work.