

1-1985

Modern Property Law: Cases and Materials

Dale A. Whitman

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Legal Education Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Dale A. Whitman, *Modern Property Law: Cases and Materials*, 38 *Vanderbilt Law Review* 237 (1985)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol38/iss1/5>

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

BOOK REVIEW

MODERN PROPERTY LAW: CASES AND MATERIALS. By Jon W. Bruce, James W. Ely, Jr., and C. Dent Bostick. St. Paul, Minn.: West Publishing Co., 1984. Pp. I, 1004. \$28.95.

*Reviewed by Dale A. Whitman**

INTRODUCTION

Most book reviews attempt to analyze the subject matter of the book under review. Casebooks, however, serve different purposes than other books; they are teaching tools that are useful only in the hands of an effective teacher. The editors of *Modern Property Law* are law teachers, and so am I. The purpose of this book review is to offer, as a professor of law, a personal view of this property casebook and to consider how it would function in the classroom. I have not yet used the book in my own property course because at the time of this writing the book has been available for only a few weeks. Therefore, the present comments are necessarily speculative, although I like the casebook and expect to use it in the future.

Professors Bruce, Ely, and Bostick have produced a first-year property casebook that contains several innovative features, the most apparent of which is the length of the book. Many current property casebooks have expanded as they have progressed through successive editions and now contain far more material than a professor reasonably could expect to cover in the usual first-year course. With this book's length of approximately one thousand pages, full coverage in a six-credit course¹ is at least conceiva-

* Dean and Professor of Law, University of Missouri-Columbia. B.E.S. 1963, Brigham Young University; L.L.B. 1966, Duke University.

1. First-year property most commonly is taught in a six-credit format, although the recent trend is toward reducing it to five or even four credits. Such reductions usually are compensated by the presence in the curriculum of a second-year course, which typically covers the conveyancing materials. One can think of a six-credit course as "standard," even though in many schools the actual first-year course will be shorter with a corresponding reduction in coverage.

ble. The book is long enough, however, to give the individual instructor some flexibility in deciding what portions should be eliminated. This review will analyze the content of the casebook, its pedagogical technique, and the teacher's manual.

A. Content

The editors of this book have decided to commence with landlord-tenant law² rather than an introduction of estates concepts or a philosophical debate about the nature of property. This arrangement is preferable primarily because most students already are acquainted with, and feel comfortable discussing, the landlord-tenant relationship. Indeed, many students begin the course with questions arising from their own experiences with landlords and therefore are interested intensely in the subject matter and ready to explore it.

Of course, beginning a property course with landlord-tenant law is theoretically unsatisfactory because this order puts the student in the position of studying one "tree" without a map of the large "forest." The coverage of estates in land and future interests is deferred to chapter three. Every property teacher recognizes that the interests of landlords and tenants are merely illustrations of the broader fabric of the law of estates and future interests. It is surely more orderly to approach the subject of property by first presenting the broad outline and then discussing its individual parts. The disadvantage of that approach is that the doctrines of estates are almost totally foreign to students and make for arduous study in the early weeks of the course. Having tried both approaches on a number of occasions, most recently with Jesse Dukeminier's and James Krier's casebook,³ I personally am satisfied that landlord-tenant law is a better place to begin the course.

After approximately a two hundred page discussion of landlord-tenant law, the authors move to personal property.⁴ I find this decision somewhat puzzling. Whether most of the personal property material even should be included is debatable. I well am aware of the argument that the *ferrae naturae* and finders cases present a microcosm of most of the major jurisprudential issues of property in a factual setting that every student readily can grasp. That ar-

2. See J. BRUCE, J. ELY, JR. & D. BOSTICK, *MODERN PROPERTY LAW: CASES AND MATERIALS* 2-195 (1984).

3. J. DUKEMINIER & J. KRIER, *PROPERTY* (1981).

4. See J. BRUCE, J. ELY, JR. & D. BOSTICK, *supra* note 2, at 196-278.

gument is not very persuasive. It is particularly unhelpful to place these cases after the landlord-tenant chapter rather than at the beginning of the casebook. The only benefit of these cases is to introduce students to property concepts in a gentle, familiar way. The landlord-tenant section, however, serves much the same function, and once it has been accomplished, the point of studying the animal and finders cases is (if the pun may be pardoned) lost on me.

The personal property chapter also introduces bailments, sales, gifts, and fixtures. I heartily endorse the inclusion of bailments, sales, and fixtures because of their genuine practical significance. The coverage of gifts, however, properly belongs in a course on family wealth transmission, and I probably will omit that topic when I use this book. The similarity of the delivery concepts in the law of gifts to those in the delivery of deeds does not justify including the gift coverage. Furthermore, cases dealing with the policy questions raised by gifts *causa mortis* or arising from a context of impending death have little relation to the rest of the policies underlying the law of real and personal property. First-year casebooks traditionally include these topics, however, and the present editors simply have followed that pattern.

The third chapter⁵ covers "interests in real property," which includes estates, future interests, concurrent ownership, easements, and covenants. The editors have devoted just two hundred pages to these subjects; clearly most compression of the book's length has occurred in this chapter. Although many other first-year property books include fifty to seventy-five pages of material on future interests, the editors here have covered the subject in just thirteen pages of text. Two modern cases dealing with the rule against perpetuities follow: the first introduces the familiar option problem; the second discusses the application of the *cy pres* doctrine. Fortunately, many detailed hypothetical examples for the student to analyze are included in the future interests material. Although covering the thirteen page segment on future interests will require several class days, I am satisfied that the textual approach is workable. Nevertheless, requiring first-year students to study some future interest cases in depth might be more beneficial. Future interests are exceedingly difficult, and working through the material builds intellectual rigor to a degree rarely matched in law school. The value lies not so much in the doctrine learned as in solidifying

5. See *id.* at 279-496.

the basic concepts of property transmission and the way in which present and future interests interact.⁶ Time and space savings, however, may justify the lost teaching opportunity. On the other hand, chapter three develops easements and covenants in a full-some way. The editors have devoted about forty-five pages to each of these topics, probably less than the average coverage but clearly adequate. The chapter also includes superficial coverage of condominiums and cooperatives; this is, however, a reasonable approach in a first-year book.

Chapter four⁷ covers conveyancing, and because I regard conveyancing as the most practical and interesting part of the first-year property course, I am delighted with the two hundred fifty page allocation to this subject. On the whole, the editors have provided excellent coverage in this chapter. Of course, for those professors who drop conveyancing entirely and leave it for coverage in the second year, elimination of this two hundred fifty pages materially cuts the size of the book—which is probably the effect most of these teachers would desire. This chapter includes a fairly complete discussion of the role of real estate brokers, an important topic often not found in first-year books. The editors also have provided, without novelty, reasonably thorough coverage of mortgages and other financing concepts, including the due-on-sale issue and the use of real estate installment contracts. Chapter four also provides brief coverage of the issue of warranty of quality in the sale of new housing. Adverse possession also appears in this chapter, rather than at an earlier point in the course as some other casebook editors have preferred.

Next follows a short chapter⁸ of about one hundred pages, encompassing a variety of real property topics. Although the chapter is entitled "Attributes of Ownership of Real Property," there is little here to tie together conceptually the individual components of ownership. The topics include the right to exclude; freedom of alienation; nuisance; lateral and subjacent support; and water, mineral, and air rights. Of course, first-year property teachers often cast these subjects overboard when they realize that the end of the course is approaching and there is too much material left to cover. Perhaps the editors should have bowed to the inevitable and placed this chapter last in the book. Whether a teacher will cover

6. I think particularly of the cases on worthier title, Shelley's Case, and executory interests. See J. CRIBBET & C. JOHNSON, PROPERTY 290-336 (5th ed. 1984).

7. See J. BRUCE, J. ELY, JR. & D. BOSTICK, *supra* note 2, at 497-752.

8. See *id.* at 753-843.

this chapter depends upon how well he or she manages classroom time.

The final chapter⁹ covers government control of land use, a topic that, until the last decade or two, was not considered part of the real property course at all. There is still a diversity of opinion on whether a first-year course should cover this subject; long ago I decided not to do so. My reasons are fairly simple: first, the material draws heavily on constitutional law and administrative law concepts to which the students have not yet been exposed; second, government control of land use has little conceptual relationship to the other components of the first-year property course; last, the subject usually receives more complete coverage in an advanced course in local government or one exclusively devoted to land use controls. Nevertheless, I cannot criticize the editors' inclusion of this material, since many property teachers disagree with me and want to cover this material in their first-year courses. In comparison with the competing casebooks, one hundred fifty pages on government control of land use provides fairly complete and surprisingly adequate coverage.

Overall, I think the editors' coverage decisions are commendable. I particularly am pleased with the heavy emphasis on conveyancing, a matter that I consider highly appropriate for first-year treatment and that is seldom covered in an advanced course if a particular school's curriculum includes conveyancing in the first-year course. I consider the editors' approach to future interests equally wise because that is a topic which nearly every student will meet again in second-year courses such as wills and trusts or family wealth transmission.

B. Pedagogical Technique

Each chapter begins with a hypothetical situation to which that chapter refers repeatedly. The first of these situations, for example, concerns a sixty-year old tenant couple who live in a rental apartment building that is about to be converted into condominiums. Oddly enough, the condominium concept is not developed in this chapter at all; instead, the hypothetical situation raises, and the chapter addresses, various problems that the tenants face in their relations with their landlord. The editors have not developed this approach particularly well; the chapter refers to the hypothetical situation only sporadically and at seemingly random intervals.

9. See *id.* at 844-994.

Although the editors have not been very successful in integrating the hypothetical situation into the substantive coverage, that sort of integration is not easy to accomplish. Professor Edward Rabin has been more successful with this approach in his property casebook,¹⁰ which uses much shorter chapters (typically with only two or three cases in a chapter) and a new hypothetical situation at the beginning of each chapter. The notes at the end of his chapters attempt to develop answers to the hypothetical situations by referring to and asking questions about the covered cases. This approach proves much more effective than the haphazard method in the Bruce, Ely, and Bostick casebook.

One of my pet peeves is a note or question following a principal case that raises issues for which the student has no background nor any realistic chance to answer. The Bruce, Ely, and Bostick casebook occasionally falls into this pattern. Sometimes the questions following the cases are thought provoking, but other questions are more apt merely to nonplus the student. Let me give two examples. Following *McCutcheon v. United Homes Corp.*,¹¹ a case concerning a landlord who attempts to exculpate himself from negligence though specific provisions in a residential lease, the editors ask: "What result if the lease . . . had been for business purposes?"¹² Although nothing in the case provides much information from which to answer this question, the student at least can point out the heavy emphasis in the opinion on the residential nature of the tenancy, and can speculate about what policy should influence a court in a commercial lease case. This question, therefore, seems useful.

On the other hand, on the subject of tenancy at will, the authors provide two paragraphs of textual explanation of the concept and then present the following problem: "T occupied L's house as a tenant at will. L died. How long may T remain in the house?"¹³ The preceding material contains no information to help the student answer the question. Furthermore, the question is by nature doctrinal, with little policy content. In other words, the typical student could not know that a tenancy at will is terminated by the death of a party to that tenancy. One, of course, could speculate about what might be a reasonably policy approach to the issue, but there is little point in asking an essentially doctrinal question with-

10. See E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (1982).

11. 79 Wash. 2d 443, 486 P.2d 1093 (1971).

12. J. BRUCE, J. ELY, JR. & D. BOSTICK, *supra* note 2, at 127.

13. *Id.* at 19.

out providing some solid basis for an answer.

Sometimes the editors pose doctrinal questions and then provide a source for the answer. This is, of course, a longstanding casebook technique, although a cynic might question how frequently the typical student will bother looking up the source to find the answer. Such questions serve little purpose unless the editors are indulging the unrealistic presumption that students will do outside reading.

A basic premise of the comments above is that the notes and questions following a principal case in a casebook should help the student prepare for class and should not serve merely as a guide to the class discussion itself. There is little point, then, in presenting the student with material with which he or she is unable to deal alone. One failure of the Bruce, Ely, and Bostick book concerns the material on marketable title statutes.¹⁴ The editors present an introductory commentary and the text of the marketable title act which appears as part of the Uniform Simplification of Land Transfers Act. The marketable title act is discouragingly opaque, and many experienced real estate lawyers would have difficulty making sense of it without more guidance than the drafters provided in the official comments. Following the text of the act, the editors ask three short questions that are almost surely beyond the capacity of any student to answer without the benefit of classroom discussion. Most students can understand a marketable title act's operation only through a series of carefully designed hypothetical examples; these editors have provided none. Another area in which the editors seem to miss an excellent opportunity for stimulating the student's thinking through the use of problem questions is the material including the real estate mortgage and note forms.¹⁵ The FNMA-FHLMC uniform note and mortgage forms are reproduced in full in the book, but the editors have made no effort to guide the student through them or to raise any of the many stimulating questions that the forms present.

In most areas of the book, however, the questions and notes are complete, well conceived and well within the capacity of the students to address. The recording act material is, in my judgment, particularly strong. The editors clearly have a thorough grasp of recording act operation and the material conveys the subject well. The editors also have made excellent use of recent cases, showing a

14. *See id.* at 641-46.

15. *See id.* at 566-73.

clear bias, in most situations, toward using more recent rather than earlier decisions. This is commendable because the casebook thus gives students the sense of more up to date coverage and usually results in presenting more readable opinions.

The editors also have made excellent use of the sample lease which is presented early in the landlord-tenant chapter.¹⁶ The lease is extracted from *American Jurisprudence* legal forms, and contains a number of interesting, if not particularly well-drafted, clauses. The editors wisely have refrained from attempting to develop these drafting issues immediately following the lease itself, because at that point the student would have little doctrinal basis to address those problems. There are, however, frequent references to the lease throughout the landlord-tenant chapter, as the material deals with the various landlord-tenant issues. For example, the lease clauses on assignment and subletting, renewal, and tenant holdover are referred to in the "Notes and Questions" where the book addresses these issues in depth. Thus, the sample lease form serves as a useful counterpoint to the cases.

C. *Teacher's Manual*

The editors have provided a 231-page teacher's manual to accompany the casebook. The manual is relatively brief, in sharp contrast to the dense tome provided for teachers of the Dukeminier and Krier book,¹⁷ for example. The Bruce, Ely, and Bostick teacher's manual deals with the typical case in one-half of a double-spaced page. The editors also give their opinions about the note questions but only briefly.

The teacher's manual is unquestionably useful. For a beginning professor a more complete guide would be better, but as an experienced property teacher I found Dukeminier and Krier's manual aggravatingly thorough; too often it told me what I already knew or did not care about, while leaving me to search the fine print for the point on which I really wanted or needed the editors' views. The manual provided by Bruce, Ely, and Bostick cannot be so criticized. For the experienced teacher, it is ideal.

CONCLUSION

I like this book very much. I especially appreciate the use of recent cases, the heavy emphasis on conveyancing, the inclusion of

16. *See id.* at 8-13.

17. *See* J. DUKEMINIER & J. KRIER, *supra* note 3.

several forms (even without explanation or guidance), the brief and handy teacher's manual, and the reasonable length. This casebook is not a marvel of radical innovation or creativity, but it is well crafted and should be appealing to both teachers and students. Bruce, Ely, and Bostick's *Modern Property Law* should find a solid place in the property casebook market.

