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Cases and Materials on the Law of Possessory Estates (Book Review)

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CASES AND MATERIALS ON THE LAW OF POSSESSORY ESTATES. By Richard R. Powell. St. Paul: West Publishing Co., 1933, pp. xxii, 541.

This book evidences a planned effort to arrange materials for the study of the law of possessory estates in lands as an introductory course in the law of real property at Columbia Law School, to be followed by courses in Landlord and Tenant, Vendor and Purchaser, Future Interests and Trust Estates. The materials for these courses have already appeared in volumes by the same publishers, two of them edited by faculty associates of Professor Powell.

In the words of the author, "these books have been planned to present an integrated and harmonious whole for a complete offering in the law of property."¹ In preparing the series, community of purpose and effort has been strengthened by an association of co-workers in cooperative planning, who are members of the same faculty in teaching the subject matter to a common student body. Inasmuch as the other volumes of the series appeared much earlier, and have been reviewed as each was published, this review will treat this book as a separate work and not even as part of the whole, albeit the book probably is more fully effective as a teaching book when used with the other volumes by a student pursuing the entire course for which these books have been prepared.

The plan of the book is disclosed in the first chapter, which opens with introductory paragraphs of background material, such as one on the *métier* of our thinking, the historical basis of the modern law of real property requiring a knowledge and interpretation of the beginning and development of society and its institutions, the social philosophy of law makers, including judges, the nature and influence of medieval conceptualism, *etc.* The next twenty-five pages are devoted to excerpts from the writings of Bigelow² and others, on the Feudal System. This "background" material is followed by *In re Holliday*,³ a discussion of Tenure in the United States from Bigelow, *A Quest for Tenure*,⁴ by Professor Vance, and by two modern cases. Chapter 2, which deals with Estates in Fee Simple, includes a development of the concept of estate based upon the Restatement of the Law of Property. The selection of cases and the arrangement of this material again serves to stress the background and also the foreground. This arrangement is maintained throughout the remaining ten chapters of the book. The last chapter has to do with equitable estates in land. The material in this chapter, which contains a discussion of the economic demands and social forces which brought into origin the "use," its subsequent growth and development, in the form of excerpts from various articles by Bigelow, Holmes, Digby, Maitland, Radin and others, is especially noteworthy.

¹ Preface to CASES AND MATERIALS ON POSSESSORY ESTATES, by Powell.

² BIGELOW, INTRODUCTION TO THE LAW OF REAL PROPERTY.

³ 2 Chancery 698 (1922).

⁴ (1918) 33 YALE L. J. 248.

Only six illustrative cases are used. It is to be noted that no attempt is made here, as elsewhere in the book, to present the development of the law through cases. On the contrary, they are used to illustrate the principles set forth in the text material, especially the modern application and significance of the same.

Besides the text materials, to which forty per cent of the book is devoted, and eighty-one cases, the book also contains relevant statutes and excerpts from the Restatement and Law Review articles, many rich footnotes, provocative questions and problems for the student. This material is interspersed throughout in an attractive way, and makes for a new approach. The material of Chapter 5 under the caption of Characteristics of Estates for Life, contains the formulae for computing the benefits and burdens between life estates and subsequent interests. The text material footnotes explain the use of mortality tables and also make clear the rule for computing the present value of a wife's contingent right of dower during the life of her husband, as laid down in *Jackson v. Edwards*.⁵ This part of the book should be of value to lawyers who usually meet with that vexing problem which will probably be with us for some time to come. The cases on Waste in the same chapter are modern and well chosen.

For a student beginning the law of property, the reviewer believes that material should be in his hands to develop concepts of title and possession of chattels, and also to show the distinction between real and personal property. Material dealing with the law of fixtures and emblements, *etc.*, should be given to him in a first-year course. Furthermore, the term "property" as set forth in the Restatement of the Law,⁶ and as brought out in the cases, should precede the development of the theory of estates. Here again, the formidable concept of possession and its many variations creating possessory rights, should be developed in a course in property. The liability for possession in crime, I believe, is made clearer if a student has mastered some idea of the rights created by possession. The omission of material on adverse possession is unfortunate; the concept of possession is of such great importance and the problems involved in adverse possession so difficult, that the student should have the benefit of classroom instruction in this subject.

One can sympathize with Professor Powell's feeling that there is "a real danger in a course which concerns itself solely with the law as it existed prior to modern times."⁷ But most students are not "enamoured" with "Medieval Conceptualism." Indeed, we are reminded of Lord Birkenhead's revulsion, and his determination to change it all. Nevertheless, the law of Real Property, as it now is, cannot be rationalized without an understanding of the historical concepts. Modern conveyancing is effected by terms that connote concepts which find explanation in the ancient law, and which are important in the present legal relationship created. The rights, powers and duties created by a transfer of an interest in land, that are attached to such relationship, are not set forth in so many words, but are woven into the relationship by force of law. Historical concepts are so interwoven into the law that it is impossible in any analytical method to ignore them. Often they are the only

⁵ 7 Paige 386 (N. Y. 1839).

⁶ RESTATEMENT OF LAW OF PROPERTY, AM. LAW INST. (1929) c. 1, pp. 9-10.

⁷ *Supra* note 1.

real medium of understanding the concepts involved in reversions and remainders. Here the text material is of great benefit. It is without doubt profitable for the student to have before him in print the notions of the concepts as set forth by Prof. Bigelow; and then, to portray the modern significance of the ancient by a late case adds interest by showing how the law works in everyday life.

One of the problems in an introductory course in real property law, is to arrange material so as to acquaint the students with the problems involved in future interests. Non-possessory interests developed historically with possessory interests, and are of such great importance today, that the question whether they should be separated and put into an advanced course when they are a part of a connected whole, is one on which teachers are not in full accord. Surely, if a student is not compelled to take an advanced course in future interests, he should at least have some instruction and material for them in a first-year course.

As suggested above, while the book is an excellent part of a splendid whole, and also undoubtedly can be used with great advantage by a student in conjunction with a good case book on personal property, it is not a sufficient offering for a complete course in property to a first-year student in the subject.

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CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS.
Second edition. By George P. Costigan, Jr. St. Paul: West Publishing Co., 1933, pp. xxiv, 768.

At a recent dinner of the Gridiron Club in Washington, the President of the United States was a guest. In the course of a skit aimed at the Chief Executive, one satirist inquired of a fellow performer:

"What is ethics, Mr. Jackson?"

By way of reply, Mr. Jackson said:

"Ethics is a noble sentiment that reaches its peak in Presidents—between elections."

The cynicism of the author of the Gridiron sketch is akin to that which many persons presently entertain concerning the ethics of the legal profession. From what they say, they seem to regard the ethics to which the law lays claim as a noble sentiment about which judges, members of Bar Associations and professors are accustomed to moralize, but which has little, if any recognition within the courtroom or law office. These persons, furthermore, appear to be without hope that the ethics of our profession will ever improve—no matter what the effort in that direction. Their despondency upon the subject classifies them as giving some assent to the philosophy of Schopenhauer, who said: