

BASIC PROPERTY LAW

American Casebook Series



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AMERICAN CASEBOOK SERIES

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GENERAL EDITOR

© WEST PUBLISHING CO., 1966

St. Paul, Minn.

WEST PUBLISHING CO.

1966

Law School Publications

of

WEST PUBLISHING COMPANY

St. Paul, Minnesota 55102

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PREFACE

When in our time the hard necessity for curricular compression followed on the heels of curricular expansion and proliferation, it was perhaps inevitable that the law of property, more vast in its dimensions than any other field, was a prime object of pruning and consolidation. The first step in this direction was rather widely accepted: substitution of one basic course in the first year for the several traditional courses offered over a period of at least two years. When teachers face the difficult problem of designing such an omnibus course, considerable difference of opinion is inevitable about what matters are to be sacrificed and what retained, about the degrees of emphasis on accepted segments, and about the most effective order of presentation. Recent expressions of opinion on these matters indicate that there is about as much disagreement on these matters as there was twenty years ago. Casebooks have appeared in this interval, which may have reduced, but have not resolved, the differences in pedagogical preference.

To us it seems important somehow to impart a sense of the extent to which the institution of property reflects an organic unity or at least an identifiable pattern or structure. Although we do not believe that a first-year survey of the law of property can include any effective treatment of that large and burgeoning field which has to do with the transmission of family wealth, it seems equally clear that every other part of the law of property is either founded upon or is in some degree relevant to the doctrine and law of estates. But in a larger generic sense, the law of estates is but a part of that pattern of separable interests and inseparable incidents which for want of a better term may be subsumed under the head of "ownership." In its most ample sense, this term must include not only the way in which ownership is divided in the law of estates, but the way in which it may be burdened by easements and real covenants or equitable servitudes. It further includes the definition of the physical extent of ownership in the law relating to the division of land by horizontal planes above and below the surface, and in the limitations upon land use inherent in the adjustment of the conflicting rights of enjoyment by neighboring land owners.

All this should be reflected and emphasized by the order and arrangement of subject matter. To us this means, among other things, that the law of estates comes first. This was a hard choice, for this is grim stuff for beginners, and defers for a time any immersion in case analysis. We have no compunctions about the latter so long as case analysis comes soon after and comprises a major part of any first-year enterprise. Beginning students can, moreover, handle a text-and-problem treatment of estates about as well one time as another, and at least as well as an early encounter with the inescapable procedural details of appellate cases.

Apart from landlord and tenant, we have avoided presenting the law of estates by means of cases, except occasionally for special purposes. An elementary exposition of the law of estates, sufficient to meet the needs which follow in this course, would come at an exorbitant cost of time if it were done by means of case

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analysis. One can deal with the traditional meaning and legal consequences of various dispositive terminology without at this stage following the course of ambiguous variants through the chaos of the construction process. Much more must be built on this meager structure, to be sure, but this must come, as we have said, in later courses on donative property transactions. In this respect of course we are emulating worthy precedent.

In the treatment of estates, we have tended in our compression of this massive material to minimize attention to medieval historical antecedents. The significance of feudalism in the development of the idea of fragmented ownership has been overemphasized. Our inherited patterns of ownership survive because, for the most part, they serve modern needs. They may be presented on that basis, with such references to history as are necessary for our limited objectives.

Easements and covenants follow close after estates. This may seem to be a striking departure from a norm which was established when "Rights in Land" was a separate course. Matters of some consequence depend on an understanding of the difference between estates and servitudes, corporeal and incorporeal or possessory and non-possessory property. One category can be fully understood only in contrast to the other. Easements and covenants are sometimes thought of in terms of private land use controls and as introductory to the public control of land use. That sort of classification is valid for covenants but scarcely for easements. And where valid, it is not clear that value is gained by holding these chapters until further on except to demonstrate the inadequacy of private land use controls, which can be done in any case if covenants come somewhere before the public control of land use. As a further practical matter, we are permitted by our arrangement to deal later with priorities, recording, and title assurance without suffering the traditional frustration of proceeding there without any knowledge of these integral features of title law.

A brief chapter on bailment is tucked in after landlord and tenant. It may not be amiss to include bailment under a major division on ownership. The contrast with landlord and tenant deserves recognition. Each deals with the consequences of the rightful possession by one of a thing otherwise belonging to another. Technically in the one case ownership is divided, in the other it is not thought of in such terms. The difference is merely historical, but is instructive. So are the signs of a blurring of the lines between the two areas.

Bailment is one of three remnants here of all that used to be offered out of the so-called law of personal property. The two others are gifts of personal property and fixtures. The rest for us had gradually disappeared over the years, leaving us in a posture shared by other colleagues elsewhere. Where something had to give, wild animals and finders and company are expendable. These matters came to be justified as exercises in legal method or as providing practice in analytical skills. But now it would seem that there is little room left for materials which cannot do this and more. Nor do we offer any exercises in the law of possession as such. One must gain some sense of the role of possession in the emergence of any concept of ownership. Beyond this, one may limit the study of this elusive idea to matters where possession is essential or germane to problems under other heads. In this book these are bailment, adverse possession, and gifts of personal property.

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The second major part of this book on the transfer of ownership follows naturally after the first. Indeed the nature of ownership cannot be fully conceived apart from alienability. Obvious and practical reasons dictate that all methods of transferring property and the problems dependent thereon be arranged in some order under one head. Adverse possession can be taken at almost any point. We insert it first, partly because we think it offers a rigorous exercise in conceptual analysis which ought to come early enough in the year to insure the maximum value of such an exercise, and partly to avoid interrupting the progression of materials on voluntary transfers. Gifts of personal property also come early in this part and close enough to deeds of land so as to provide a helpful comparison of the meaning of delivery in the two types of transactions.

Twenty years ago there was considerable agitation about the proper place for and the extent of the study of the public control of land use. Like other problems about what to do for first year students, no obvious solution gained general acceptance. We are conscious that in making this the third of three major divisions of this book, we have gone farther than anyone else. We justify this on the ground that problems of land use control have recently assumed an urgency of compelling proportions. A property practitioner, even a neophyte, is as likely to face one of these problems as any other. The currency of these matters is also likely to quicken student interest and attention. The fluid and amorphous nature of this rapidly developing field calls for efforts to provide at an early stage some form and order for student thought on these matters. We are not deterred by the constitutional undergirding of many of the problems in this field, for we believe this can be managed at least well enough to get on with our job. It would of course be better if students could have constitutional law first. And municipal corporations as well. But the fact remains that in modern curricula, the majority of students will not cover this ground at all unless they find it here. The need for more concentrated attention on some of these problems, and upon the growing problems in the related field of natural resources, suggests the need for a basic survey at an early stage. Those who think otherwise can adjust their coverage accordingly, for the size of this book leaves room for some selection or differences in emphasis.

All parts of this book have been forced to emerge through the critical scrutiny of all three of us. This labor was not divided, but was performed collectively. The initial labor of compilation and writing was of course performed individually. This work was divided as follows: Browder—the Introduction and the Epilogue, the chapters on Easements, Promises Respecting the Use and Enjoyment of Land, the Physical Extent of Property in Land, and Adverse Possession, and the section on Delivery, Conditional Deeds, and Escrows; Cunningham—all of Part 3 on the Public Control of Land Use, the chapters on Devolution of Property at Owner's Death, Vendor and Purchaser, Priorities, and Land Title Assurance, and the sections on Nuisance, the Modern Deed of Conveyance, and the Preparation of the Deed for Delivery; Julin—the chapters on Estates, Landlord and Tenant, and Bailment. Allan F. Smith was one of the moving spirits in instigating this enterprise. When he became dean of the Michigan Law School, he was unable to continue in more than an advisory capacity. When he later assumed the office of Academic Vice President of the University of Michi-

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gan, he regretfully terminated all participation in the project. We must acknowledge, however, that the materials on Fixtures and Gifts of Personal Property which he prepared for the casebook on Property by Aigler, Smith and Tefft, have been revised by Browder for inclusion in this book. Another of our colleagues, Richard V. Wellman, prepared materials in mimeographed form on Description and Boundaries, which we have been using in class for several years. With his permission, these materials, as revised by Browder, are also included as a section in this book.

May, 1966.

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