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Book Review: Cases and Materials on Rights in Land

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REVIWES


This smallish volume in an expanding field shows the craftsman's touch within its chosen purpose. It follows the traditional division of Property as originally fashioned by John C. Gray and followed in many law schools and casebooks since. Among these Dean Bigelow's Cases on Rights in Land has always been popular. I had the honor of reviewing the first edition of Bigelow more years ago than I like to remember [(1920) 29 Yale L. J. 477], it is interesting to see how much of what I there said could be repeated here. For the present volume takes the subject much as the older books plotted it out—with some few eliminations of topics, such as public rights and the traditional historical introduction to land law—and brings it down to date in ways which Gray would have found fitting and proper. Here are the new decisions, the recent and pending Restatements, much of the new law review material. The work is therefore up to the minute, and yet it is a boon to teachers and curriculum fashioners in that it is briefer than other books on what we always called "Property II." For Personal Property, that conglomeration of leftovers from Sales and Torts, was Property I, and the topics of conveyances, titles, estates, and future interests came later, with their own appropriate Roman numbers. Property II is slightly conglomerate itself; it deals with "Possessory Interests"—earth, air, land, and water—subjects which the restaters have relegated to "Torts," and with "Interests in the Land of Another," which is, aptly enough, to be restated by "the Property II group." Nevertheless, this arrangement of subject matter has survived in most law schools; and they need up-to-date books as tools of the trade. Hence, this new volume amply justifies itself.

Moreover, there is a lot of developing interest in these topics, and so far as private land law goes, full advantage has been taken of it here. From his position as reporter of the pending restatement of Property II, the editor is familiar with the ideas and purposes of that work. That, together with Dean Fraser's "Torts" Restatement of the possessory interests, furnishes the main basis of departure for all the topics as yet wholly or partially restated. And it is a good jumping-off point—particularly the editor's own work of restatement which contains an unusual number of trial balloons, refreshing, indeed, if a bit unusual, in a supposed mere recording of existing law. Such, for example, is the division of easements in gross into the categories of commercial and non-commercial easements, which represents a valiant attempt to cut the Gordian knot of assignability vel non by a new christening to furnish a new dichotomy. His forthcoming restatement of running covenants, somewhat foreshadowed herein, will, it seems, have its goodly share of new condiments. All this makes for pleasant, vigorous discussion in an attractive teaching field.

Again, several innovations of detail will interest property teachers. Perhaps the most striking is the treatment of Rights Respecting the Use of Land Arising by Contract or Agreements, which covers the field traditionally
divided between "covenants running with the land" and "equitable restrictions." Here the editor has eliminated consideration of leasehold covenants, leaving them to the law of landlord and tenant, while he considers the real-covenant and equitable-restriction cases as a single subject matter under various topics such as intent of the parties, privity, "touching" and "concerning," and so on, rather than as separate and isolated phenomena. I suspect quite a few will dislike this treatment; on the whole it seems to me sound and workable. Personally, I would be disposed to pick a bone or two with the editor on some other points where we have pleasantly disagreed previously, such as the summary treatment of the usual rule of non-assignability of easements in gross, or a like brusque disposition of the modern English rule of licenses in theatre-ticket cases, though rather extensive consideration is devoted to the traditional cases. But these are questions of taste and predilections, and the material is in any event sufficient so that an instructor can take off in any and all directions he wishes. I like, too, various details as to arrangement, such as the chapter introductory notes, which at least suggest aim, direction, and purpose to the wondering student. Clear and readable type, attractive page, and a brief workable index are joys. All in all, one can confidently expect ready acceptance of this as a workable trade tool.

Of course there may be some doubters, such as Professor McDougal of Yale, who feel that this traditional arrangement of property teaching serves to emphasize the by-waters of the law, rather than the rushing stream, if not the wave, of the future. The editor does not yield an inch to such critics; he leaves all matters of public housing, zoning, municipal planning, soil erosion, drainage, irrigation, power, and other schemes quite undisturbed. I will not quarrel with him for his plan and purpose. Students are waiting to be taught, and teachers to teach; and while the McDougals are toying with the law which is to come (to the law schools—maybe it is already here so far as the courts are concerned), by all means let's give the others the efficient help required by their immediate purpose. I confess, however, to a bit of surprise that not even a gesture of compromise towards the newer trends was permitted. While the life of a compromiser is hard, since he runs the risk of damnation from all sides, the middle way does have certain advantages in law curricula development. The new materials are hard to discover or create and to canalize into workable teaching materials, and, unfortunately, the new thought course tends to be at first disorganized, diffuse, and dull, rather than vigorous and virile as, theoretically, it should be. Until it finds its sea legs it suffers by comparison with the older course, where the teaching highlights have long been shrewdly exploited. And so a judicious compromise of the new and the old may often help to break new ground without too many or too serious birth pains. Hence, I should have thought that a section, or at least a chapter, on new public controls in various types of modern land development would have fitted in quite handily with the editor's general scheme, as well as afforded an opportunity for a little worthwhile experimentation in pedagogy.

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