

Land Development Law Case and Material

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BOOK REVIEWS

Land Development Law: Cases and Materials. By GEORGE LEFCOE.† New York: The Bobbs-Merrill Co. 1966. Pp. xlix, 1,681. \$14.50.

It is unfortunate, indeed, that Professor Lefcoe has become the bearer of the straw which has broken this particular law teacher's back. For, clearly, he has labored greatly, read exhaustively, selected and arranged assiduously, and indexed extensively, to produce the book which is my subject. Why then do I carp?

First, let us note that Professor Lefcoe's labors have yielded a volume of 1,681 pages. Of these, 1,618 are the actual "Cases and Materials," and 63 pages are bibliography and index. The whole is preceded by a 20-page (separately numbered) table of contents. These materials appear to be primarily intended for use in a modernized version of the basic property course—"a contemporary, contextual property course."¹ This intention seems misdirected. The materials furnish a stunning substantive exposition of that which is relevant to the contemporary commercial and public land-development processes, and I would recommend them in extravagant terms for the practitioner's shelf. I would not, however, particularly care to use them for a basic property course, especially if it is to occupy its usual place in the first-year curriculum. For these materials, considered as teaching materials, seem to me to illustrate and indeed to epitomize a whole series of maladies which have descended with increasing ravagement upon the law casebook industry, and which threaten to render it moribund.

Before venturing some very tentative thoughts about a cure, let me describe these frightful ills, as particularly exemplified in the present volume.

1. *Gigantiasis*: The tendency to far exceed the quantity of material that can be covered with reasonable care in a course. The required basic property sequence at Professor Lefcoe's school occupies two hours in the second half of the first year and three hours throughout the second year, a total of eight "semester hours" or about twelve "quarter hours," representing approximately 120 hours of instruction. Assuming that the whole slice were devoted to the book under review, it could be covered at a rate of about 13 pages a day. This seems fairly high, for my taste, emphatically so for a first-year course, which is where the entirety of the basic property coverage occurs in most curriculums. Of course, the pages-per-day figure would be even higher if the time allotted were less; an eight semester-hour slice is probably more time than most schools allow for the coverage of basic property materials.

Does the answer perhaps lie in the law teacher's power to select? I think not. For the bigger the books get,² the greater the amount of material that has to be

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¹ Lefcoe, "Preface" to *Land Development Law: Cases and Materials* at viii (1966).

² A quick check revealed the following, which may be suggestive if not exactly demonstrative:

(1) Casner & Leach, *Cases and Text on Property*, pp. 1326 (1st ed. 1951); pp. 1439 (1st ed. & Supp. 1964).

(2) Cribbet, Fritz & Johnson, *Cases and Materials on Property*, pp. 1198 (1st ed. 1960); pp. 1272 (2d ed. 1966).

It is perhaps a tribute to Professor Lefcoe's energy that, working alone, he has turned out a greater quantity of material than recent triumvirates of authors in the property field, e.g., Browder, Cunningham & Julin, *Basic Property Law* (1966), as well as Cribbet, Fritz & Johnson, *supra*. Needless to say, there may be advantages to mutual editing and pruning in any field so vast.

eliminated—if this is the path chosen—and the harder it gets to eliminate enough without doing basic violence to the course. There are subtle psychological pressures, moreover, which lead to galloping, or at least cantering, rather than easing back beyond a certain point. The material is there, after all, which means that the student (1) has paid for it, and (2) somehow feels that it defines the area about which he should be learning. If it is “in” the book, faculty colleagues may not seriously try to cover it in subsequent or complementary courses even if you do not, in fact, cover it yourself. Besides, this book includes about 450 pages of textual material. Text tends to be subtly interlocking in deliberate ways that cases are not, and is consequently even harder to pare down sharply than case materials. The result, then, may be galloping, which badly aggravates the second morbid condition I wish to describe. While this first disease is the most dramatically visible, it nevertheless is probably somewhat milder than some that I shall describe, at least in its necessary effects.

2. *Surveyitis*: In this related syndrome, the ultimate victim—the student—is characterized by a hyperactive eye and atrophied brain. A vast number of topics are covered quickly and without pause for deep reflection. Those who are exposed emerge feeling that they have acquired knowledge of a number of rules—or, better, “policies”—but their brains have actually remained as inactive as they were in the series of undergraduate excursions of a similar nature. True mastery of the lawyer’s skills requires that students—especially first-year students, but also second- and third-year students—develop the ability to read, with shrewd and sensitive comprehension, every word on a page, and to appreciate the many things that are not said, as well as the most suggestive or significant ramifications of exactly what is said. Until they have learned to approach material in this way, it does not matter whether one tries to cram 500 pages or 5,000 into their heads; nor, if what goes in is treated as a *datum* and nothing more, does it matter whether the sensory-bits come labelled “rules” or “policies.” It might be well if we were seriously to consider placing a mandatory limit of 300 pages, or 200, or even 100, on at least one of the full-year courses of the first year. Certainly the casebook publishers are not making this any easier. The 20-page table of contents of the present volume comprehends such varied offerings as “The Puerto Rican Experience: From Expropriation to Subsidy of Private Enterprise” (4-11); “Judicial Review of Relocation in the Soviet Union” (104-05); “Specific Performance and the Bankruptcy Act” (257-59); “The Innocent Purchaser and Utility Installation Costs” (367-87); “Real Estate Brokers and Race Relations” (472-80); “Licensing as a Condition to Receiving a Commission” (496-98); “Obtaining a Home Loan” (623-30); “Shareholders’ Rights in Savings Institutions” (640-52); “Usury” (660-83); “Remedies” (of mortgage and other land-security-device holders) (779-858); “The Effect of the Soldiers’ and Sailors’ Relief Act Upon . . . Remedies” (859-66); “Maintenance Assessments” (1138-48); “Tax Deeds” (1262-66); and “Real Property Taxation” (1513-1618). In the last, there is even “A Digression: Federal and Local Tax Lien Priorities;” and there is something about a “digression” occurring at page 1608 that makes one wonder what, if anything, the publisher’s editorial people were engaged in doing.

In his Preface,³ Professor Lefcoe cites with approval Alfred North Whitehead’s

³ Lefcoe, *supra* note 1.

vigorous attack upon education overladen with "inert ideas."⁴ It would, perhaps, have been well if the author had pursued Whitehead's classic statement one paragraph further:

Let us now ask how in our system of education we are to guard against this mental dryrot. We enunciate two educational commandments, "Do not teach too many subjects," and again, "What you teach, teach thoroughly."

The result of teaching small parts of a large number of subjects is the passive reception of disconnected ideas, not illumined with any spark of vitality . . .⁵

3. *Noncasitis*: This is a somewhat distinct and very deadly syndrome. The traditional means of developing the kind of intellectual acuity which is the chief and most important end of the law-teaching program has been the study of cases. This has become progressively less fashionable in recent years, in part for sound reasons. In particular, exclusive emphasis on cases creates a distorted view of the law-creating process and may lead to the atrophy of other kinds of legal analytical skills. The products of legislative, administrative, and private-drafting processes should also be closely considered and understood. The present morbid condition, however, is characterized by a declining reliance on cases as a teaching tool, and their replacement with materials that do not accomplish the purposes which underlay the dropping of the cases in the first place.

Some statistics on the present offering might prove useful. Only some 950 of the 1,618 pages are occupied with cases. The remainder breaks down as follows: author's text (270 pages), law review and other text (178 pages), problems and questions (127 pages), newspaper and magazine articles (39 pages), statutes (34 pages), sample documents (10 pages), congressional materials (9 pages), court rules (1 page).

The imbalance between the statute and document categories and the textual materials seems to me impressive.⁶ Nor do the law review and textual materials appear chosen for their provocative content. They are generally of the "definitively-lay-it-out" kind, soporific to thought, but splendid, as I have noted, for the already-educated practitioner's law library. At pages 823-25, for example, there appears an impressive cataloguing, reprinted from the *Ohio State Law Journal*, of nine highly specific "do's" and eight highly specific "don'ts" for the drafting of hopefully-enforceable liquidated damages clauses. They are finely tuned, coherently stated answers to many of the salient questions that arise in this context. *That is just the trouble*. They reduce an area of immense complexity and deep pedagogical allure to a recipe for baking a cake. The author of the article, a practicing lawyer, has done us a service by formulating them and putting them where practitioners are likely to see and use them. But Professor Lefcoe has done us a disservice, I deeply fear, by putting them where first (or second) year students can readily get their hands on them for use—not only in property courses but in contract courses as well—in responding to the barbs and queries

⁴ Whitehead, *The Aims of Education and other Essays* 2 (Williams & Norgate ed. 1932).

⁵ *Ibid.*

⁶ At least, in a book this long, one could hope that the author might have given the student the texts of an actual real estate contract and of an actual title insurance policy. One might hope, conceivably, for a commercial lease as well, although leases are little discussed. In a case at 1075 and text at 1205, however, there are some good examples of draft covenants.

of their instructors. An instructor who used this book, indeed, would not even bother to launch the barb or query. A whole area calculated to afford intensive mental stimulation to the acolyte has been reduced to a browsing ground for the ingestion of pat responses.

What has happened, I suspect, is that the author (and other recent casebook authors), here and again and again elsewhere, has found textual materials which gave him profound satisfaction in their comprehensive suggestion of solutions to intricate problems with which he and all of us have persistently wrestled. They were clearly first-rate products of the human mind. But this does not ordain their inclusion in the book being undertaken. On the contrary, we pedagogues must bear in mind that some foods in quantity will kill a new-born babe, not least among them champagne and caviar. What comes to us as a revelation following our own intensive intellectual ferment on a problem can come to a beginner as a substitute for fledgling processes of independent thought—a *rara avis* whose rarity is not even recognized because the student has no realization of the complexity and depth of the problems it has attempted to slice through and solve.

The difficulty is not resolved by the problems and questions. These are not separately identified except in a few instances, and in my page-count I have tried to sort them out from the author's text in which they are generally embedded. Many of them prove to be essentially rhetorical, answered in the next breath. Others are not, but they nevertheless suffer from two pervasive faults. (1) Answers to the usual and central questions that arise out of the materials have largely been "laid out." What is left to ask questions about is therefore largely peripheral. This often results in substituting questions on narrow topics on which the student has little background, and very general questions on value choices and attitudes for which it is particularly hard to find disciplined answers, in place of questions in more tightly defined areas where the student's replies (particularly the beginning law student's replies) can and should be subjected to careful critical scrutiny. For example, under a statute of frauds discussion, there is a terminal series of procedural and ethical questions, such as: "If a client admits he had a bona fide oral agreement which he now seeks to evade out of economic self-interest, should his attorney plead the Statute?"⁷ Interesting, but how much *can* we cover in the basic property course? What do we leave out—or lay out—in order to cover this? I can easily imagine one of the precious class hours, perhaps one per cent of the classtime, going to the questions on this page. (2) The second fault of the non-rhetorical questions is that they ramify, to an even greater extent than the cases, over such a vast amount of legal, economic, and social territory that I fail to see how the beginning student can come to grips in a meaningful way with more than a tiny fraction of them. The end result is that the student will have received spoon-feeding in the areas he will really and constantly need to know about, and will have to come to grips with material in a memorable way in only a few borderlands.

4. *Anticasisitis*: This is a disease very similar to the last, but even more dangerous, for its symptoms tend to remain well disguised and to become readily recognizable only when a cure is beyond hope. Fortunately, Professor Lefcoe's volume contains only traces of this malady. The characteristic of this syndrome is that things which at first appear to be cases really are "anticases." These are

⁷ Lefcoe, *supra* note 1, at 544.

reports of decisions which have been included for reasons wholly different than the usual reasons for putting cases in a casebook. On careful examination, nearly all of the facts will prove to have been edited out, and the court will almost inevitably pronounce a clear general statement of the "modern law" on the subject. The anticase syndrome is also definable negatively: anticases do not present detailed or intricate fact-patterns that lend themselves to Socratic classroom variation and elaboration; anticases are never chosen because they are wrongheaded; anticases are rarely confusing; anticases supply doctrine—here performing a function similar to the nice reassuring bit of text in the previous syndrome—they do not stimulate thought. Since anticases do, however, come in the outward guise of cases, this disease has also sometimes been known as *trojanhorsitis*.

5. *Antibasitis*: This final malady perhaps is not as serious as those which, collectively, directly impair the thought-processes of those who come in contact with the afflicted, but it is of some significance as it concerns the matters on which those thought-processes operate and, more particularly, the orderliness with which it is possible to stimulate and develop those processes. It is probably the most persistent malady of the present volume, insofar as the book's potential utility as a teaching tool is in question. Perhaps Professor Lefcoe's real intention is to start off with some other, preliminary, material or to use the book only for students who have already completed some kind of introductory course. If it is not, I am a little at a loss to see how the student will ever grasp some of the chief underlying features of the real property transactions with which he is supposed to be concerned.⁸ I can find no materials in the volume aimed at setting forth the classic scheme of estates in land and future interests, or laying the groundwork for further consideration of such problems as divided ownership (both concurrent—joint tenancy, etc.—and consecutive—freehold or nonfreehold present estates followed by remainders, reversions, rights of re-entry for condition broken, etc.). I find in the index only four pages on any aspect of "fee simple" (on compensability of taking of a fee simple defeasible), and two pages on "condition subsequent," and my reading has not revealed any other secret repository of such learning.⁹ "Life estate" gets about nine pages (nearly all on the two subjects of deed-delivery and conflicts between habendum and granting clauses).

⁸ Naturally, as the title suggests, such traditional personal property subjects as gifts—except for "gifts of public money" to developers—and bailments are excluded.

⁹ Surely the assumption cannot be that the modern practitioner is out of the woods on all of these subjects. Indeed, this can be forcefully illustrated by a problem (1129-30) in which the author asks whether a tract developer can assure that earlier buyers do not decide to sell off or utilize open spaces held in common—thus hampering current sales efforts—"by a clause . . . [providing] that if the recreational areas cease to be used for recreational and open space purposes, title will revert to the grantor and his heirs." The "title will revert" language, if ever seriously fixed in the mind of a draftsman, would suggest a perilous course, one that a student carefully instructed in the significance of possibilities of reverter and rights of re-entry for conditions broken and judicial hostility to them should be alert to avoid. In *Storke v. Penn Mutual Life Ins. Co.*, 390 Ill. 619, 61 N.E.2d 552 (1945), for example, the court construed a deed which stated that if liquor were sold on the premises, "said premises shall immediately revert to the grantors" and the grantee would "forfeit all right, title and interest." The conveyance did not create a fee simple determinable, the court held, because courts, "in doubtful cases," would "prefer to construe provisions that terminate an estate as conditions subsequent . . ." *Id.* at 626, 61 N.E.2d at 555. And, as a condition subsequent, the clause was ineffective, for "a court of equity will not aid a forfeiture where no right of re-entry is provided in the covenant." *Id.* at 626, 61 N.E.2d at 556. The classic incantations that include "but if" (with an express "right to re-enter") and "so long as" are, alas, not dead.

"Tenancies in common" get about nine pages; joint tenancies and community property appear to get none. All this suggests that some of the property curriculum must be dealt with elsewhere. Yet it cannot be intended to be very much, since there are long chapters on such staples as recording and title assurance. Other parts of the basic corpus, however, are treated in such a way as to suggest that this is to be held out as the *only* curricular treatment, and at the same time are treated quite cursorily, at least for my taste.

Perhaps the most important of all these *lacunae* is in the vital contemporary area of landlord and tenant. (This may be meant by the author to be treated in a separate course, but there is scattered material—not gathered into any specific section of the book—suggesting this is not so; in any event, the coverage is totally inadequate.) The question of condition of the premises receives four pages (422-25), consisting chiefly of one horribly decapitated anticase; constructive eviction receives three pages (1068-70); the statute of frauds as applied to leases is treated in about a page (540), and together with about five lines on holdover tenants (on 778), constitutes all I can locate on how leaseholds are formed and terminated; landlords' remedies receive approximately seven pages (1068-75); and there are a scant half-dozen scattered pages focused on the shopping center. I find nothing on such matters as restrictions preventing the landlord from leasing to competitive businesses, which can be an important part of many development schemes, or what happens if the premises are not ready for the tenant to occupy and how the parties can seek to protect themselves from this important contingency. On the other hand, such relatively rarified subjects as parking facility leases (mostly in connection with whether the eminent domain power can be used to acquire parking lots for lease to private parties) and cooperatives get 20 and 35 pages, respectively.

When the author reaches such an omnibus topic as "Comparison of Licenses, Leases, Covenants, Conditions and Easements as Means of Establishing and Retaining Rights in the Land of Another," one wonders (apart from the question whether too much all-gathering may not confuse the student, in a distinctly non-constructive way, even if he has made it to page 1113) if it is not an unequal battle, between the covenants and easements, on which the student has by then been given a great corpus of materials, and all the others, on which he has been given very little.

There are other compressions of material, however, as on the statute of limitations (where the focus is on gut questions such as boundary disputes and effect on holders of future interests) with which I am inclined to agree, despite the serviceability—from a pedagogical point of view—of the omitted materials. I am a little sorry, indeed, that the same treatment is not meted out to recording, which occupies a full 100-page chapter (867-966).¹⁰ It also seems a bit unfortunate, all things considered, that two of the longest case reports in the volume (1020-40) are devoted to the relatively minor subject of land registration.

I have now said enough to amend my original comment to state, without

¹⁰ This is less—at least in nominal pagination, perhaps not in print—than the space devoted by Casner & Leach in their 1951 volume (125 pages), but more than the current Cribbet, Fritz & Johnson and Browder, Cunningham & Julin casebooks, which have approximately 75 each on recording. This seems plenty, and a more schematic presentation, using "A," "B," and "C" type problems more freely in lieu of cases, could probably be justified, which might allow cutting the material to fifty pages or less.

being misunderstood, that Professor Lefcoe's book is a fine book for a law office or for a second- or third-year course which deliberately sets out, following a full-scale first-year property course, to explore some of the contemporary problems by making a carefully planned selection of materials from the present book. Even so, I would strongly prefer for the latter purpose to see a number of the textual extracts cut down or eliminated, and replaced with drafting, statutory, or administrative materials of a more thought-provoking nature.

Beyond the particular book, I have attempted a symptomology with, of course, a much broader significance. The diseases described are not incurable. As a start, I would suggest the casebook industry search its heart of hearts to see if the remedy might not be sought along the following lines:

(1) Keep in mind that the clear primary goal of a first-rate legal education is and will remain—and this is so *a fortiori* in the first-year courses—to get law students to think about problems in particular creative, probing, and critical ways, not to assimilate great gobs of data in the guise of rules or “policy considerations.”

(2) Get some tough, knowledgeable editors. Most of us are Thomas Wolfe's under the skin.

(3) Remember always that different materials serve different functions. If the author has 80% thought-provoking cases, statutes, and draft instruments, and 20% gloriously-written textual revelations which kill the provocations, put the 80% in a casebook and the 20% in a teachers' manual. Law teachers should get used to seeing teachers' manuals without regarding them as a slur on their abilities, and students should get used to seeing casebooks without teachers' manuals incorporated in them. By the same token, if service to the practitioner is one goal, print a separate volume designed to make it easy for the practitioner to find all the answers. The student doesn't need all the answers; he needs all the questions.

After all my carping, however, I shall reiterate once more the other point of my review, which is of equal significance once one has sorted out the vital question of appropriate functions. There is sufficiency of good and useful material in this encyclopedic volume, nearly 700 pages of which consists of non-case materials, to render it one of the really important books of recent decades for the shelf of the practitioner concerned with real estate development problems.

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