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# Cases and Materials on Property

Robert E. Parella

# BOOK REVIEWS

**Cases and Materials on Property.** By JOHN E. CRIBBET, WILLIAM F. FRITZ, AND CORWIN W. JOHNSON. Brooklyn, New York: The Foundation Press, Inc. 2d Ed. 1966. Pp. xxii, 1272 $14.00.

The second edition of this casebook has appeared relatively soon after the first, with "no radical changes either in coverage or organization."[1] Consequently, it is difficult to evaluate this volume without recalling the impact of the earlier work. In that regard, the generally favorable reviews[2] of the first edition are concurred in and incorporated by reference. Suffice it to say that the work is erudite, compact, and replete with textual notes, thereby bringing within the two covers of a twelve hundred page casebook a remarkable wealth of material for doctrinal development and analysis.

Nonetheless, this writer does not share the opinion, expressed in a review of the first edition,[3] that any significant portion of the materials should be selected and arranged for an intensively jurisprudential approach. There is precious little time in this truly non-static subject, as evidenced by the need, each year, to summarize or eliminate matters covered the year before. Part One, "A Glance at Philosophy," seems adequate, if considered in connection with the last few chapters, for whatever excursion is necessary, leaving the rest to courses in jurisprudence proper. Moreover, the materials as constituted in this and other property casebooks seem well-suited for sophisticated preparation of the real estate practitioner both in skills and social consciousness. To put it otherwise, the so-called "gap" between the property course and office practice is not as great as with other first-year courses such as Torts or Contracts. As a result, no apology should be necessary for any lack of jurisprudential materials. This is especially so when one considers that many professors are faced with reduced curriculum hours and the fact that many students do not take an advanced course in land use, conveyancing, or the like. Indeed, the one new topic in the second edition is a short chapter dealing with the lawyer's role and reputation in the real estate transaction and related questions of unauthorized practice of law—a challenge for the law schools as well as the bar.

In addition to the new chapter mentioned above, textual treatment of the mortgage has been included under the new heading "Financing Arrangements,"[4] thus eliminating the need for any background lecture on this subject. The authors indicate that about one-fourth of the cases throughout the book are new, the majority of these having been decided since the first edition.[5] Although all parts of the volume have received the authors' attention, the revision is by no means evenly distributed. A short excerpt has been added to Part One.[6] In Parts Two, Three, and Four there are minor changes in the form of added or substituted cases and notes. The transfer of bailments from "Non-Volitional Transfers" to

[1] Cribbet, Fritz & Johnson, Cases and Materials on Property at ix (2d ed. 1966).
[2] See, e.g., McGonagle, Book Review, 15 J. Leg. Ed. 238 (1962).
[3] Smith, Book Review, 70 Yale L.J. 1404 (1961).
[4] Cribbet, Fritz & Johnson, supra note 1, at 539.
[5] Id. at ix. If the landlord and tenant cases are excluded, the number of recently decided new cases is considerably more than a majority.
[6] Id. at 23-24.

chapter three, "Volitional Transfers," appears logical and functional. The separate topic of Part Four, "Donative Transfers," is attractive analytically, and the juxtaposition of delivery problems dealing with chattels and the deed permits interesting if not odious comparisons. However, this writer would prefer the more conventional arrangement of completing the personal property materials with gifts of chattels and including delivery of the deed in the later chapter on the deed.

The most extensive revision is in Part Five, the landlord-and-tenant materials. About three-fourths of the cases are new, replacing an approximately equal number in the first edition. The coverage is broader and more pertinent with an easily discernible emphasis on analytical continuity. Materials that are primarily repetitious have been omitted. This is seen in the development of the constructive eviction doctrine. A note suggests the precarious position of the tenant who must decide whether to vacate; it is followed by a solution sanctioned by a Massachusetts court, and a further note raising an inquiry as to the practicability of such a solution in many cases.[7] The *Lippman*, *Crew Corporation*, and *Gilbert* cases[8] involve the percentage lease, tax increases due to improvements, and options to purchase in modern business transactions—a rather appropriate climax for this part.

Throughout the book there are many excellent choices for new cases. *In Re Estate of Michaels*[9] is especially instructive as an enlightened opinion on the problematic matter of joint bank accounts. *Cohen v. Kranz*[10] contains a rather complete statement of the principles of tender and reflects a healthy attitude on the part of the court. *Baker v. Koch*[11] is interesting in that the court decided a case involving conflicting descriptions in a deed as a chain-of-title problem. *Mayer v. Sumergrade*[12] contains expanded discussion of the extent to which the contract is merged in the deed. In addition, several current cases have been added to reclassify and supplement the zoning and planning materials.

There are also occasional disappointments. While *King v. Greene*[13] is a worthwhile addition to the entireties section, the preceding case might well have been omitted in favor of a reference to the doctrinal conflict in some states when the tenancy is converted because of an insured casualty loss,[14] condemnation, or foreclosure surplus. The *Key* case,[15] a quiet-title suit brought by an adverse possessor, is an important addition, but it seems better placed in the discussion of statutes of limitation as a method of title assurance. Finally, in the zoning and planning materials no reference has been made to the issue of de facto segregation.

In summary one can prudently conclude that the authors have improved an excellent casebook, especially heightening its usefulness as a teaching tool. In the process, they have probably discharged the burden of justifying an early

[7] Id. at 366-81. Compare the holdover cases, at 349-54, with the corresponding materials in the first edition.
[8] Id. at 442, 455, 464.
[9] Id. at 299.
[10] Id. at 584.
[11] Id. at 777.
[12] Id. at 793.
[13] Id. at 209.
[14] See Hawthorne v. Hawthorne, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963).
[15] Cribbet, Fritz & Johnson, supra note 1, at 571.

revision to all who may be interested. Yet the fact that there is no drastic change in coverage leads one to speculate whether we might not be at a transitional period induced by the cascading legislation in this field. In the single jurisdiction of New York there is hardly a topic which has not been affected by legislation enacted since 1958. The list runs the gamut from a restructuring of the determinable fee[16] to a comprehensive definition of the rights of finders of lost chattels.[17] Along the way one can find an "Enoch Arden" law for missing co-tenants[18] and a related statute dealing with adverse possession.[19]

The legislation will continue to flow. The population explosion, the growth of megalopolis, the appearance of high-rise buildings in the suburbs, combined with the growth of title insurance and lawyers' title guaranty funds—these are the forces at work that will produce the demand for greater title security, for alienability and use of land free of technical, non-substantial, and hidden defects. The concern of the organized bar is seen in the American Bar Association Proceedings, Real Property Division, of the past several years. Even the Supreme Court reapportionment cases will exercise an influence; as legislatures become more urban-oriented, they will probably become increasingly tenant-minded, and as a result will turn their attention to common-law rules. It is becoming increasingly unsatisfactory and incomplete for casebooks merely to develop a common-law rule, discuss its possible avoidance by draftsmen and indicate, anticlimactically, that there is statutory modification in some states. This is not to say that the subject has been ignored.[20] Rather, it is a matter of emphasis. The suggestion is for expanded treatment of the need for remedial legislation, analysis of representative statutes, and application of these statutes in cases or problems.

Unfortunately, such an approach would squeeze even more appellate decisions from the curriculum. The rigorous logic and conceptualism, the demand for precision of expression and attention to detail, are well taught through appellate opinions and judicially evolved doctrine.[21] Moreover, the currently litigated cases involving complex, modern business transactions are often decided on the basis of traditional judicial authority, although the results reached are not always to be approved. Pertinent examples would be some aspects of the landlord-tenant relationship and the development of the joint-bank-account theory, the latter of which has suffered under the analogy to joint tenancies in real property.

Another aspect of this subject relates to arrangement of materials. The "new look" property casebook, with increased emphasis of modern problems of land use and decreased coverage of common-law doctrines such as nuisance, waste and support, appeared in response to a problem of logistics. Some choice had to be made between a proliferation of competing materials. That problem has been so successfully resolved that energies can now be focused strongly on methodology. The learned textual introductions and case analysis of this case-

16 N.Y. Real Prop. Actions Law §§ 1951, 1953, 1954 (McKinney 1963).
17 N.Y. Real Prop. Actions Law §§ 251-258 (McKinney 1963).
18 N.Y. Real Prop. Actions Law § 1211 (McKinney 1963).
19 N.Y. Real Prop. Actions Law § 541 (McKinney 1963).
20 See, e.g., Cribbet, Fritz & Johnson, supra note 1, at 773-77.
21 And not in spite of, but especially because of the circular reasoning, fictions, and over-conceptualizations so frequently encountered. After all, a questioning attitude is an important attribute of a lawyer—as the authors remind us with reference to their first, and very colorless utterance. Id. at 1.