

The Old Chestnut Explored: Thoughts About the Survival of Casner's *Cases and Text on Property* Long Past Its Prime[†]

CASES AND TEXT ON PROPERTY, 3d Edition. By A. James Casner and W. Barton Leach. New York, New York: Aspen Publishers, Inc., 1984. Pp. xxxviii, 1315.

*Reviewed by Barry Brown**

Mr. Casner¹ was the clear antithesis of every element of my 1960s consciousness, and he relished that idea. I was confronted by the visage of A. James Casner before I had the slightest idea that his name appeared on the spine and title page of the text originally authored by his mentor, Barton Leach.² Smaller than I had imagined, Mr. Casner had a chiseled and angular face, strong chin, perfectly combed gray hair, and a dark blue suit that apparently had never seen a wrinkle. In those days,³ the stomach-wrenching benefit of fear, skillfully manipulated through the angles and curves of the Socratic method, was the law teacher's favorite tool, and Casner clearly did not intend for a moment to pass without obtaining strategic advantage over the class by utilizing that methodology. And so, with palms that sweat to this day,

† The allusion is to two important law review articles by W. Barton Leach. See W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); W. Barton Leach, *The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965). Leach was instrumental in the design and formulation of the original edition of the text and his particular approach to property issues continues to influence the Casner text.

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1. Faculty of professional rank at the Harvard Law School prefer to be referred to as "Mr." or "Ms." not "Professor."

2. This Article describes the Third Edition of the case textbook originally published by A. James Casner and W. Barton Leach in 1947 by Little, Brown & Co. The current edition, now in further revision, is published by Aspen Law and Business Publishers and hereinafter is referred to variously in the article as "the text" or "the casebook" and in the footnotes as "Casner & Leach." Casner describes his gratitude to his mentor W. Barton Leach in the Preface of the text. A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY (3d ed. 1984) xxxv-xxvi.

3. Roughly the years between 1968-1972.

I recall, in tones that still stop my otherwise regular habit of breathing: "The facts, please, in *Pierson v. Post*⁴ . . . Mr. Brown."

I am quite certain that the events of that class were not cherished as much by Mr. Casner as they are by me. It was neither a particularly enlightened nor noble moment in my career as a law student. Thirty years later, however, with much fondness, gratitude, and respect, I still open my law classes in first-year Property with those words, and Casner's text sits before the hundred or so students I have in each of two sections, as it has in various editions for the past thirty years. And while, as a teacher, I hope I have rounded some of the more brutal edges of Casner's approach to the Socratic method, I have gained an ever greater respect for his text as a superb instrument for introducing law students to property theory and analysis. While not free from sins of class consciousness and social narrow-mindedness, it finds no equal (except by imitation) in creating an understanding of the law of property, both in its historical and analytical contexts.

BUNDLES OF RIGHTS AND BUNDLES OF CASES

The pedagogy of the Casner text—now often imitated—assumes a fractional approach to private property. The Hohfeldian bundle of rights rational for allocation and justification of property interests did not begin with Casner or Leach,⁵ but the fact that the first edition of the book bearing the combined authors' names appeared in 1947 and has been in continuous use since that time is a testament to the insight of its writers and to its timelessness.⁶ That the structure and themes of the text have been followed in a host of casebooks is, no doubt, the sincerest form of flattery.⁷

There are two thematic underpinnings of the book: the most important is the core concept that independent and identifiable rights to property coexist as definable interests and combine to comprise the totality of all possible interests in private property that can exist at any particular moment in time.⁸ Since these interests may be held by

4. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), reprinted in CASNER & LEACH, *supra* note 2, at 10.

5. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917); see also Arthur L. Corbin, *Rights and Duties*, 33 Yale L.J. 501 (1924).

6. As noted previously, the text is currently in further revision under new authorship. See *supra* note 2 and accompanying text.

7. Very few, if any, casebooks have survived in continuous publication and use for over fifty years.

8. CASNER & LEACH, *supra* note 2, at 65 (Note on *The Relativity of Title*).

separate parties in the same piece of property at the same time, they come into conflict when one of the holders of an interest (e.g., a finder) attempts to assert control over the property claimed by another (e.g., the owner of the *locus in quo*).⁹ In this universe of competing parties seeking to control a piece of property, whether real or personal, order is obtained by defining the limits of each property interest in the bundle so that, in the event of conflict, the adjudicator can simply inform the adversaries of the limits of their rights and advise them where they stand in the pecking order of ultimate control of the property.¹⁰

Of course, the goal of the orderly identification and limitation of interests in the bundle is, as the student finds, more easily articulated in theory than in practice. That, of course, is the intentional irony of the Casner text and its particular approach to understanding the law of property. While postulating on one hand that the assertion of control over all forms of property is based upon competing fractional interests ordered in a way that establishes priority among the holders of the interests,¹¹ its cruel joke on the students is the difficulty in actually prioritizing one interest over another. That difficulty is asserted at the first possible moment in the text by illustrating chasing after wild animals in a variety of forms and locations.

Even the most trusting student cannot but wonder what point is to be made by spending the first days of the semester in the woods or on desolate beaches analyzing rights in and to wild animals. Of course, there is no way for new students of the law to know that those first cases, problems, and discussions are intended to identify the issues that will be repeated in each chapter and in subject analysis throughout the text. But the presentation is masterful and serves well as a symbol of the theory of property that is espoused chapter after chapter: two parties compete in the "state of nature," free from the claims of the "true" owner or paramount title holder, and establish by their labor,¹²

9. See *Hannah v. Peel*, 1 K.B. 509 (1945), reprinted in CASNER & LEACH, *supra* note 2, at 29.

10. One of the clearest examples of relative interests in property is presented in Lord Esher's concurring opinion in *Cochrane v. Moore*, 25 L.R. - Q.B.D. 57 (1890), quoted in CASNER & LEACH, *supra* note 2, at 94. A gift is accomplished by actual delivery only. Such delivery "is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is part of the proposition itself." *Id.*

11. As Casner and Leach comment: "[W]hat we call 'title' to land or to chattel is not so much a relationship to the thing as it is a relationship to a multitude of other people with reference to the thing." CASNER & LEACH, *supra* note 2, at 65.

12. See *Pierson*, 3 Cai. R. at 175, reprinted in CASNER & LEACH, *supra* note 2, at 10.

skill,¹³ cunning,¹⁴ or physical control¹⁵ rights in and to the animal and its derivative products. The relationship of each of the competitors in interest is at issue: has one party struggled against the forces of nature more than the other with the result that, but for the exertion of the labor and effort of the one, the other would not be able to succeed to its physical possession?¹⁶ Similarly, has a party in interest added such value to the property so as to validate its continuing economic interest in the resulting property or product, notwithstanding the fact that it does not have physical possession?¹⁷

The message provided to the students by the creatures of the oceans and forests is both a statement of the vagaries of the common law and a unique (for Casner) admission of economic determinism. Chapter 2 makes quite clear that private property, both real and personal, is the physical manifestation of the effort and industry of those who have come in contact with it,¹⁸ and that by a combination of law, custom,¹⁹ or physical control, interests in property are established and coexist with one another. In this legal construct, the obligation of the student in each chapter is to prioritize the relative values of these interests and to determine which of the parties should be awarded the control and benefit of the property to the exclusion of others.

In order to accomplish this analytical task, each chapter follows, with rare exception, a similar pedagogical pattern whether the subject matter is bailment or conveyance: namely, to proceed from a traditional, and, at times ancient, common law rule and to impose challenges to that simple construct by the introduction of increasingly modern cases that require the student to question the common law precept and arrive at a working understanding of the property principle in the current application of the law.

Two illustrations from different portions of the text will illustrate this pedagogical structure. Each of the sections of Chapter 3 begins

13. See *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881), reprinted in CASNER & LEACH, *supra* note 2, at 25.

14. See *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 1127 (K.B. 1707), reprinted in CASNER & LEACH, *supra* note 2, at 17.

15. *Pierson*, 3 Cai. R. at 175, reprinted in CASNER & LEACH, *supra* note 2, at 10.

16. *Id.*

17. See *Ghen*, 8 F. at 159, reprinted in CASNER & LEACH, *supra* note 2, at 25; see also CASNER & LEACH, *supra* note 2, at 22, Problem 2.1 (referencing *Mullet v. Bradley*, N.Y.S. 781 (N.Y. Sup. Ct. 1898)).

18. *Pierson*, 3 Cai. R. at 175, 180, reprinted in CASNER & LEACH, *supra* note 2, at 12 (Livingston, J., dissenting).

19. *Ghen*, 8 F. at 159, reprinted in CASNER & LEACH, *supra* note 2, at 25.

with a case stating a historic and overly simplistic common law rule such as "a finder to any article which has been lost" has title "against all the world except the true owner."²⁰ However, before the unwary student can gain any comfort in the simplicity of the precept and simply commit the same to memory, the text appropriately undermines the acceptance of the black letter law. Can one be a finder of property on someone else's land?²¹ Does the status of the finder in relation to the owner of the premises impact upon the possessory rights of the finder?²² How is it possible to reconcile the common law principle that respects the rights of the owner of the *locus in quo*, concerning property affixed to the land or improvements made thereto, with the modern pragmatic judicial view of human nature that rewards the finder of lost property rather than risk the failure of disclosure and search for the true owner?²³

Similarly, the infamous²⁴ and complex Chapter 28, concerning recording, also leads its readers down a garden path. Anxious students grasp on to the priority of title obtained by recording without notice²⁵ only to find that the assurance of priority is dependent upon the excruciatingly complex definitions of what constitutes both notice and the chain of title from which such notice is derived.²⁶

While ultimately benefiting students' powers of analysis, the internal structuring of the chapters moving toward increasing levels of complex and unanswered questions has the concomitant effect, in the short term, of undermining students' confidence and creating frustration with the text. In part, creation of that anxiety and frustration is, I think, intended to drive students to search for answers and points of view from outside sources and to reduce dependence on the casebook

20. *Armory v. Delamirie*, 1 Strange 505 (K.B. 1722), reprinted in CASNER & LEACH, *supra* note 2, at 66.

21. See *Hannah*, 1 K.B. at 509, reprinted in CASNER & LEACH, *supra* note 2, at 29.

22. See CASNER & LEACH, *supra* note 2, at 34-35, Problems 3.3 and 3.4 (regarding trespassers and volunteers).

23. This is one of the frequent offshoots of the cases and problems that is not adequately discussed in the materials and needs to be supplemented from other sources.

24. Infamous in the sense that after gaining a sense of confidence and ease with the transactional aspects of modern land law, students are thrown into an entirely new and foreign concept and vocabulary that is hauntingly like the suffering they endured in the study of estates in land and future interests in Chapters 12-16.

25. See *Earle v. Fiske*, 103 Mass. 491 (1870), reprinted in CASNER & LEACH, *supra* note 2, at 806.

26. After suggesting to the student that notice to a subsequent bona fide purchaser is only that which is derived from the record title, Chapter 28 proceeds to disabuse the reader of that notion by dissecting the definition of notice and chain of title. CASNER & LEACH, *supra* note 2, at 816.

itself. However, unless that objective is revealed by the instructor to the class, many will experience increasing dissatisfaction with the blind alleys and dead ends that raise more queries than would appear to be appropriate in a basic first-year casebook.²⁷

POSSESSION, TITLE, AND OWNERSHIP

A second dominant theme works its way through the Casner text, raising in its path both philosophical and pedagogical issues. Specifically, the terms "possession," "title," and "ownership" are kept vague and ethereal by design. The latter two words appear far less often than the word "possession," which consumes the student's attention in the early chapters. The ability to understand the distinction between physical and legal control of both real and personal property is essential to the mastery of the subject matter. For this reason, the emphasis is upon identifying and defining various forms and classifications of possession, from unconscious²⁸ to adverse²⁹, and has, at its heart, the goal of making the student aware that physical control of property varies by type, while legal possession is defined by the interest obtained, usually by durational limits or the absence thereof.³⁰

What is less clear to the student and, unfortunately, often to the instructor, is the need constantly to revisit concepts of legal possession throughout the text in the context of relativity of interests and to avoid the temptation to express ownership interests in property in absolute terms.

Taken to its extreme, the concept of relativity and bundled rights leads to the conclusion that there is no absolute "owner," but only a person at the top of the food chain, such as the venerable feudal sovereign and Great Lords, described by Casner with such loving precision in Chapter 12. As discussed in more detail below with respect to the substantive content of specific chapters, this decided preference for assisting the student to understand the range of

27. The cross references to other texts, law reviews, and the American Law of Property are further evidence of the intent of the authors to direct the students outward for answers.

28. See CASNER & LEACH, *supra* note 2, at 29.

29. *Id.* at 53.

30. Examples abound. A finder's physical control varies in relation to the type of property found as does the degree of his legal control balanced against that of the true owner or, for that matter, a trespasser. Similarly, the physical and legal control of a mortgagee will also vary in such relative terms. Casner introduces students to the concept of present and future interests very early on in the text. See, e.g., CASNER & LEACH, *supra* note 2, at 56, Problem 3.12(b); see generally CASNER & LEACH, *supra* note 2, ch. 7 (regarding retention of rights of the donor).

coexisting interests in property rather than to dwell upon control and ownership has, in fact, caused the text to be of lasting value.

In any political or economic environment, from market capitalism to the economically deterministic approach of Critical Legal Studies, the empirical identification and classification of interest holders in and to private property is a necessary tool of legal analysis and lawyering distinct from the overlay of any philosophical or political disagreement as to the appropriateness of such interests.³¹ By equipping students to assess relative legal relationships of interest holders claiming rights in and to a piece of property, Casner allows the freedom to his students to engage in the next stage of learned discussion, namely whether the interests themselves are appropriate in political, social, or economic terms. Such critical social and economic commentary is virtually nonexistent in the Casner work, but the groundwork for developing the ability to inject that social and economic perspective is deeply rooted in the book. Many teachers and students would prefer that the impact of private property as the source of wealth and economic disparity in society be discussed by Casner in more direct and critical terms. In fact, the empirical approach of the text leaves open to the instructor and students social, political, and economic argument free from polemic on the printed page.

STRUCTURE AND DEVELOPMENT

Given the approach taken by the authors for building on the variety of interests obtainable in private property, it is both rational and understandable that the chapter progression of the text should move from building blocks of the smallest interests to those that—at least for the first-year law student—are the most complex. As discussed above, the underlying theme of the early pages of the text is to introduce the student to the distinguishing marks of physical and legal possession and to destroy the myth of absolute ownership.

In terms of setting the stage for this pedagogy, Chapter 3 accomplishes the goal reasonably well in theory if not in content. The chapter circumnavigates unconscious, involuntary, constructive, and adverse possession, introducing the student to finders, bailees, trespassers, and thieves. And while its purpose is noble, the brevity with which it treats these topics, both in terms of explanation and case content, places substantial burdens on the teacher to fill out and interrelate the material to other parts of the course. For example, the

31. The political, economic, and philosophical arguments regarding the impact of fee simple title are distinct from the process of identifying and categorizing those interests.

sections of the chapter regarding involuntary and constructive possession fail to integrate, except in the most rudimentary fashion, the role of the UCC in determining the status and liability of the possessor.³² Additionally, the increasing pragmatic acceptance by courts of the possessory rights of the finder are very much ignored, giving the student no sense of the trend in the law to resolve contests between possession of property in the hands of others than the true owner where no express or implied agreement of possession is in place.³³ Finally, the chapter appropriately introduces the concept of obtaining possession that may lead to title against the will of the owner through adverse possession, but deals with the concept far too briefly in terms of the application to both real and personal property.³⁴ Following this introduction of adverse possession for definitional purposes, the text lets the topic die rather than integrate this important practical issue in the discussion regarding the modern land transaction or, for that matter, elsewhere in the text.³⁵

Also an anomaly is the remedies chapter (Chapter 4) which has at its heart only one major point, namely the *jus tertii* defense³⁶ viewed in several contexts by courts applying the principle to different types of property. The substance of the chapter is useful to direct the attention of the student to the application of a common law maxim to both personal and real property;³⁷ however, it reads as an afterthought and would be more properly included with the materials in Chapter 3. Interestingly enough, it is in this rather unimportant chapter that the authors relegate to a footnote the credit due to Hohfeld³⁸ and put in

32. See CASNER & LEACH, *supra* note 2, Section III, Chapters 9 through 11 (which are particularly confusing and dated on this point with respect to the application of the UCC to common law principles concerning the status of the bona fide purchase of personal property).

33. See *Rofrano v. Duffy*, 291 F.2d 848, 850 (2d Cir. 1961).

34. For example, issues regarding the application of the discovery rule to personal property are relegated to a note on page 63 and an overly simplistic discussion of *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980). CASNER & LEACH, *supra* note 2, at 63.

35. Casner & Leach treat adverse possession as a component of problems in possession generally and then drop the topic for the remainder of the text without regard to its importance in the land transaction chapters.

36. See *The Winkfield*, [1900-1903] All E.R. 346 (P. 1901), reprinted in CASNER & LEACH, *supra* note 2, at 67.

37. The introduction of the idea of present and future interests in the form of holders of life estates and remaindermen in *Zimmerman v. Shreeve*, 59 Md. 357 (1882), reprinted in CASNER & LEACH, *supra* note 2, at 70, and *Rogers v. Atlantic, Gulf & Pacific Co.*, 107 N.E. 661 (N.Y. 1915), reprinted in CASNER & LEACH, *supra* note 2, at 72, is important and useful to the students, but is at this juncture confusing and isolated from later discussions with respect to donative transactions and estates in land.

38. CASNER & LEACH, *supra* note 2, at 65 n.1.

the briefest of notes regarding the theory of relativity of title.³⁹ One would think that a principle so central to the pedagogical theme of the text, as well as the person responsible for that principle, would deserve a more prominent place and more expansive discussion.

A similar lack of integration and logical presentation occurs in Part III of the text in Chapters 9 through 11 regarding bona fide purchases of personal property. While we may respect that the authors were the first to assimilate into a single text the multitude of disparate property courses that existed prior to the first edition of the book,⁴⁰ the adoption of the Uniform Commercial Code, along with the evolution of law school curricula to support and explain the UCC in basic commercial law courses, makes the section of the text both unnecessary and confusing to students, particularly in the context of first-year Contract Courses which now regularly introduce the UCC in contract terms related to Sales.⁴¹ The course book would be better served by integrating the issues of possession with the discussion regarding bailments, entrustment, and apparent authority with respect to void and voidable title.⁴²

No such criticisms can be leveled at the material in Chapters 5 through 8, however. Here, as in the presentation of estates in land and future interests, the book shines. In thirty-two pages,⁴³ the cases, problems, and notes live up to their expectations. Students are taken through the concepts of intent, delivery, and acceptance efficiently, but without sacrificing challenge. The pedagogical structure of testing basic common law principles—through the twists and turns of the problems and more modern judicial interpretation—works both for the substantive goals of the chapter and as an introduction to present and future interests.

In Chapter 5, Lord Eshers' requirement of actual physical delivery gives way subtly through a series of problems to a discussion of both

39. *Id.*

40. See the Preface for Casner crediting himself with restructuring the teaching of Property in American law schools. CASNER & LEACH, *supra* note 2, at xxxv.

41. See RANDY E. BARNETT, *CONTRACTS, CASES AND DOCTRINE* (1995); E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, *CASES AND MATERIALS ON CONTRACTS* (5th ed. 1995).

42. The separation of these issues, beginning in Chapter 3 and not reappearing until Chapter 9, is particularly confusing to students.

43. CASNER & LEACH, *supra* note 2, at 93-125. For the purpose of this computation, I have not included the chapter on oral trusts which is not particularly useful.

donative transactions subject to the occurrence of conditions imposed by the donor and constructive and symbolic delivery.⁴⁴

In Chapter 7, the first serious look is given to the division of property interests into durational segments, an essential concept for the student to master in order to gain an understanding of present and future interests. As factually simple as the present transfer of a future interest in stock or a bank account may seem, fixing the right to what is transferred, as well as its value, is handled well, particularly in the bank account cases, which are useful in part because savings and checking account transactions are readily within the students' frame of reference outside of law school.⁴⁵ The result of the exercise is to leave the student prepared with the ground work for taking on the more difficult and, at times, irrational exercise required to master the concept of present and future interests in the study of estates in land.

TYING UP THE BUNDLES

All roads in Casner's work, rough as they may be by the potholes formed through the lack of integration of some sections and concepts (the UCC, for example), lead to two points of intellectual mastery. The first is the core of the text—estates in land and future interests—and the second, although somewhat paling by comparison, is the modern land transaction, including the recording system. I am omitting from this string of praise the lengthy section on landlord tenant law, for which I utilize my own materials for reasons I will discuss below.

There is a tendency in the current teaching of property to first-year students to reduce or even to eliminate the discussion of estates in land and future interests. This is, I think, a mistake. Nothing provides a mastery of basic property concepts as does the historic perspective obtained through an understanding of the variety of interests in land and the reasons for the introduction of each. To offer the student less is to deny to that person the full understanding of the evolution of property law and to make him or her that much less of an effective lawyer. Resolution of problems in private practice, as well as advocacy in the courtroom and the legislature, suffers when such

44. See CASNER & LEACH, *supra* note 2, at 98-99, Problems 5.2 through 5.9. Even though the emphasis in Chapter 5 concerns delivery, students come to understand the importance of the donor's intent in imposing conditions on the transfer either impliedly (*gift causa mortis*) or directly by establishing express conditions. See CASNER & LEACH, *supra* note 2, at 99, Problem 5.10.

45. I find that students are very interested to discuss the rights of parties to a joint bank account. See *Malone v. Walsh*, 53 N.E.2d 126 (Mass. 1944), *reprinted in* CASNER & LEACH, *supra* note 2, at 120.

context and mastery do not exist. Clearly, Casner's text offers the opportunity to provide the student with a thorough, basic understanding of these topics. If the choice of the teacher, for whatever reason, is to downplay the historic analysis of estates, she or he might just as well chose another text.⁴⁶

With the exception of the last pages of Chapter 12 and similar exclusions from Chapter 16, I utilize all of the material in Part IV of the text.⁴⁷ The presentation supports the theme of the course with respect to relativity of title, but if carefully applied it goes much farther to explain the original purpose and function of the various estates. I find time spent on the Statute *Quia Emptores* useful to demonstrate the pragmatism of the Great Lords in seeking to prevent the loss or dilution of their services and incidents by ending the practice of subinfeudation only to find that the legal acuity of the freeholders outmatched this attempt. Over the next centuries, ironically, the Great Lords' attempts to preserve their position had the effect of both undermining the source of their own wealth and freeing England's economy from its dependence on land by establishing a market for its transfer for value and the eventual trading of it as any other commodity.⁴⁸

This vision of king and lords struggling with very basic economic issues is a useful revelation to students and helps them compare postfeudal times with our own in spite of what appears to be insurmountable vocabulary and language differences.⁴⁹ Painted as a historical narrative leading to our modern law, the balance of the material in the chapters on estates is accepted by most students and actually is appreciated by a large number of them. Chapter 13 can be seen as demonstrating the effort of the newly emboldened freeholders

46. The chapters on estates in land comprise the materials from pages 183 through 351, a central and prominent location in the text to which earlier chapters lead and back to which the later chapters refer. CASNER & LEACH, *supra* note 2, at 183-351.

47. These materials include the introduction to the historic context for the evolution of English and American land law (Chapter 12), identification of the types of interests obtainable in land (Chapter 13), concurrent interests (Chapter 14), very much out of place in the text, Future Interest and common law rules (Chapter 15), and the Statute of Uses of 1536 and the Rule Against Perpetuities (Chapter 16)—the latter two chapters being the most difficult for students to master.

48. Casner and Leach give a hint of the economic changes that occurred as a result of the acts of the Great Lords and sovereign in the thirteenth century, but if the instructor wishes to pursue the economic determinism of these acts he or she will have to reach for material far beyond the text. See CASNER & LEACH, *supra* note 2, at 196-203.

49. See the text excerpt of the Statute of *Quia Emptores* which, once one gets past the Middle English, is quite blunt and pragmatic as to the Lord's interests and intent. CASNER & LEACH, *supra* note 2, at 197.

to establish interests in land permitted by *Quia Emptores* and similar thirteenth-century edicts. From this point of departure, students can examine the evolution of legal devices designed to divide present and future interests in land and to place conditions upon land use and its disposition to future generations.⁵⁰ Subsequent material in Chapter 13, and particularly in Chapter 15, demonstrate the reaction of the growing class of grantees and devisees who sought freedom from the restrictions imposed by their forebears and, eventually, persuaded the courts to adopt "common law rules" that restricted the right of a grantor to undermine the alienability of freehold interests.⁵¹ The progression from the largest of possessory interests to the smallest of freehold and nonfreehold interests is logical and reasonably easy for the students to grasp. The problems, however, are torture and perhaps are intended to be. Unless handled with compassion by the teacher, questions with tricks and turns⁵² can alienate even the most intelligent student from the material—a result clearly pedagogically unsound.

Along with the section in Chapter 16 concerning the Rule Against Perpetuities,⁵³ Chapter 15 is perceived by students as being the most difficult part of the exploration into estates in land, and for good reason. Like the study of Latin in high school, memorization of rules seems to outweigh logic and the need for such effort in the application to modern law seems totally lacking. So why spend time on the destructibility of contingent remainders,⁵⁴ or the Doctrine of Worthier Title,⁵⁵ or the Rule in Shelley's Case⁵⁶ when even the most persuasive teacher cannot convince the class of the present value of such doctrines? For two reasons, I think. The first, as stated above, is that property law has evolved in such logical progression over such a long period of time that knowledge of the historical progress is necessary to articulate the current state of the law and, for that matter, to argue intelligently for its change. The second reason is consistent with the goals of the text: namely, to cause the student to become seasoned and competent intellectually in the ability to identify and analyze competing property interests whenever they may exist, present or historic, in order to determine the extent of the rights claimed by each in

50. The text should do more to connect its discussion of the changes that occurred in the thirteenth century with the rise of freehold estates.

51. See CASNER & LEACH, *supra* note 2, at 297.

52. See, e.g., CASNER & LEACH, *supra* note 2, at 125, Problems 13.8 and 13.9.

53. See *id.* at 335-51.

54. *Id.* at 293.

55. *Id.* at 310.

56. CASNER & LEACH, *supra* note 2, at 302.

comparison to the sphere of control asserted by others. The fact that the material utilized to gain this ability is often arcane, verbose, and of historic relevance only, really matters less than the end result of causing a law student to become keenly capable of recognizing, understanding, and articulating the full range of property interests that evolved during the common law period. Additionally, the chapters on future interests in estates and land, and particularly the problems presented in these chapters, introduce the concept of estate planning to students by having each student create, utilize, and modify the various property interests to establish plans of disposition and inheritance. To this extent, the material on estates in land and concurrent interests in Chapters 12 through 16 is a culmination of Casner's goal to make students conscious of Hohfeldian analysis and relativity of title.⁵⁷

If the study of estates in land is the law school equivalent in Casner's text to the study of high school Latin or Anatomy in medical school, the section of the text on the modern land transaction is the equivalent of the conversational romance language or, to carry forward the medical school analogy, the study of how to identify the disease and prescribe a cure—both exercises which are ultimately more satisfying than anachronous discussions of ancient law.

The text's approach to the purchase, conveyance, and recording of a residential property is precise in providing the student with a practical skills course on the topic. From the discussion of the role of the broker to the procedure required at the closing, Casner has provided in this section what many students thought they would be dealing with from day one of the course. It is in Chapters 25 through 28 that the teacher can combine case law with practical negotiating and drafting concepts in consideration of the offer to purchase,⁵⁸ the purchase and sale agreement,⁵⁹ the deed,⁶⁰ and the mortgage.⁶¹ If there is a problem in presentation, it arises from the fact that the cases, as opposed to the problems and notes, are often dated and not relevant to modern practice.⁶² Similarly, the material in Chapter 27 on deeds, including the problems, is in dire need of updating not because it is

57. *Id.* at 65.

58. *Id.* at 700.

59. *Id.* at 706-16.

60. CASNER & LEACH, *supra* note 2, at 755-99.

61. *Id.* at 739-54.

62. Students wonder why cases like *Lurette v. Bank of Italy National Trust & Savings Ass'n*, 42 F.2d (9th Cir. 1930), reprinted in CASNER & LEACH, *supra* note 2, at 722, and *Clapp v. Tower*, 93 N.W. 862 (N.D. 1903), reprinted in CASNER & LEACH, *supra* note 2, at 725, continue to take up space in the text (except, of course, for Mr. Tower's wonderful first name).

wrong, but because the nature of conveyancing practice now no longer deals regularly with issues of delivery or enforcement of covenants of title.⁶³

The authors' favorite part of this modern land section is clearly the material on recording.⁶⁴ While the other chapters in this section are marked with deficiencies with respect to problems and cases, the recording chapter has no such faults. Its cases and problems are superb and serve as a culmination of the theme of relative relationships of interests in property as a means of establishing the priority of varied title and lesser interests. An example of such success in presentation is the series of cases beginning with *Ayer v. Philadelphia & Boston Face Brick Co.*⁶⁵ and running through *Sanborn v. McLean*.⁶⁶ In each of these cases, the issue concerns the definition and sufficiency of notice on the record to a subsequent purchaser. But, in fact, each case is much more. *Ayer* reveals the strong distaste of Judge Holmes toward legislative attempts to undermine the common law, whether it be by curing debtors' problems through bankruptcy legislation⁶⁷ or ignoring precepts such as estoppel by deed.⁶⁸ The case is a masterful attempt by Holmes to ignore the precedent set in Massachusetts by *Morse v. Curtis* so as to uphold only that information contained in the record as evidenced in the direct chain of title and thereby to reassert the common law principle of first in time first in right cloaked in the revered concept of warranty.⁶⁹ Similarly, *Buffalo Academy of the Sacred Heart v. Boehm Bros.*,⁷⁰ *Guillette v. Daly Dry Wall*,⁷¹ and *Sanborn v. McLean*,⁷² by expressing jurisdictional differences concerning the definition of notice on the record regarding subdivisions, challenge the student to visualize the physical structure of the recording system in order to determine what an examiner sees in the record and how far one must search from the direct chain of title to be

63. Much more needs to be done with issues of title insurance, for example, and perhaps to integrate the later discussion of easements, covenants, and restrictions into this chapter.

64. CASNER & LEACH, *supra* note 2, at 801. This is not mere supposition. Casner actually made a film (in *noir* style) called *Fifty Years to a Warranty Deed*, filmed at the Middlesex Registry of Deeds in Massachusetts, which he regularly inflicted on his students. He was the narrator and star.

65. 34 N.E. 177 (Mass. 1893), *reprinted in* CASNER & LEACH, *supra* note 2, at 819.

66. 206 N.W. 496 (Mich. 1925), *reprinted in* CASNER & LEACH, *supra* note 2, at 837.

67. *Ayer*, 34 N.E. at 177-78, *reprinted in* CASNER & LEACH, *supra* note 2, at 822.

68. *Id.* at 823.

69. See *Morse v. Curtis*, 2 N.E. 929 (Mass. 1885), *reprinted in* CASNER & LEACH, *supra* note 2, at 825.

70. 196 N.E. 42 (N.Y. 1935), *reprinted in* CASNER & LEACH, *supra* note 2, at 829.

71. 325 N.E.2d 572 (Mass. 1975), *reprinted in* CASNER & LEACH, *supra* note 2, at 834.

72. 206 N.W. 496 (Mich. 1925), *reprinted in* CASNER & LEACH, *supra* note 2, at 837.

assured of priority against other subsequent bona fide purchasers.⁷³ Through a study of these cases, the image once again emerges of holders of interests in real property, some clearly voidable or based on mere color of title, competing for control and priority in an artificial, but acceptable system that favors, in most instances, the person who purchases without notice.⁷⁴ As at the start of the text, holders of property rights are seen as competing components of a whole, whose contest is resolved in part by the recording system. To this extent the chapter on recording fulfills the books' thematic objective.

LOOSE STICKS IN THE BUNDLE

The authors of the text must be given credit for assimilating the multitude of disparate and duplicative property courses that existed at midcentury law schools throughout the country into a coherent and thematically sound first-year course that bundled personal and real property together with estates in land and forever changed the manner in which the subject would be taught.⁷⁵ No such assimilation can be perfect, however. Things will be left out of the mix, or handled either not at all or in too cursory a manner. Nevertheless, the criticisms that are leveled at this text pale by its accomplishments both in providing students with a working analytical approach for viewing all property within the common law and in laying the groundwork for more sophisticated specialty courses to be introduced into the law school curriculum. The deficiencies are, I think, readily fixable and, hopefully, will be in the next edition of the text.

To its detriment, the Casner text incorporates into its own approach too much of the early common law consciousness regarding gender. The status of women with respect to ownership and control of private property is relegated to an occasional note⁷⁶ or is completely ignored. Worse still, there is the taste of clubby male chauvinism that must be eliminated from the text, notwithstanding the decided preference for the position of men under the early common law. One can discuss the inequitable perspective that denied women coequal rights in property without resorting to publishing little rhymes by former law students who appear to lack both poetic gift and gender

73. Problems 28.12, 28.13, 28.15, and 28.16 are also useful for this purpose. CASNER & LEACH, *supra* note 2, at 824, 828.

74. Other variants are presented by the text, including race notice statutes, but more explanation should be included regarding the tract system which is almost totally ignored.

75. The impact of the curricular concept of a single Property course is perhaps more important for first-year law school education than the text.

76. See CASNER & LEACH, *supra* note 2, at 221-22 (discussion regarding dower).

consciousness.⁷⁷ An effort must be made that goes beyond inserting the female pronoun in problems to describe the adverse impact of property law on women's rights.

These enhancements could be accomplished by including additional material regarding property-related gender issues in Chapter 13, by updating the notes concerning recent state laws allowing for division of property in same gender relationships, and, in Chapter 14, by inclusion of historic case references that analyze due process and equal protection arguments identifying the common law tenancy by the entirety as an estate that detrimentally impacts the constitutional rights of women.⁷⁸

Additionally, the text needs to expand its coverage of the impact of property law upon the social status of minorities and the poor. This is not to suggest that the text needs to take on the Critical Legal perspective, but it cannot ignore the degree to which inequities in the social system have been perpetuated by the law of property. Refinements in federal law have occurred since the Civil Rights Act of 1968 and should be included as part of the examination of a developer's obligation to insure that no discrimination takes place on the ground of race, color, religion, sex, or national origin. In addition, it would be useful to include a critical examination of public law devises, such as zoning and urban renewal, as mechanisms that, at times, reinforce racial and ethnic boundaries rather than relieve discriminatory patterns. Unfortunately, the present material in Chapter 33 regarding public law devises emphasizes quality of life concerns, where commercial ventures are at odds with idealistic urban or suburban residential values. Communities that enforce large lot or "snob-zoning" often create redevelopment zones that decimate existing low income housing. Such issues should be brought to the attention of students to point out how municipal land use plans at times perpetuate stratification between economic and racial groups.

Finally, the tendency of traditional property law to affect economic divisions in society is no more clearly presented than in the landlord-tenant area in which the materials are also lacking in economic and

77. The holding of *Reeve v. Long*, 3 Lev. 408 (1695), granting rights in utero while, of course, ignoring the position of the mother, is memorialized in Chapter 15, footnote 14 as follows:

Let's fill the cups to Barron Turton
Who thought the law was clear and certain
Would rather help a little foetus
Than round out Charlie Fearn's dull treatise

CASNER & LEACH, *supra* note 2, at 300 n.14.

78. See, e.g., *D'Ercole v. D'Ercole*, 407 F. Supp. 1377 (D. Mass. 1976).

social analysis. The landlord-tenant material needs to be updated regarding landlord liability with respect to the condition and quality of premises affecting low income tenants, the implied warranty of habitability, and public housing. The inequities of the judicial system in advancing or protecting the rights of tenants in eviction and summary process proceedings are also not adequately presented. The text includes more emphasis than appropriate upon commercial leasing, while failing to focus on the effect of a declining rental housing inventory and the inability, at the state or federal level, to provide affordable housing for thousands of Americans. Commercial leasing aside, it is important for students to be conscious of the adverse pressure that inadequate housing can bring to bear upon one's social condition.

Apart from deficiencies in gender and social consciousness, I have a wish list of substantive topics that I would like to have appear in this otherwise superb teaching tool: more land use material, particularly zoning and most particularly environmental cases and topics to introduce the student to that subject matter. And yes, economic analysis to provide law students with a sense of the interplay between the capital markets and the fluctuating value of real estate, including how those markets affect the lives of the wealthy and the disadvantaged. Each of these requests, however, is a minor point compared to the resource that the Casner text provides. Fifty years after its introduction, its genius remains apparent, its deficiencies easily remedied. Most of all, as a teaching tool this book remains without equal.