

Q. Why Is This Course Different from All Other Courses?

A. Maybe It's Not

PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE. By John P. Dwyer and Peter S. Menell. New York, New York: Foundation Press, 1998. Pp. xli, 1076.

*Reviewed by Louise A. Halper**

I. WHY USE A NEW BOOK?

A recent survey of Property syllabi suggests that property law is losing ground in law school curricula.¹ According to the survey's authors, a "notable trend appears to be a reduction in the number of hours allocated to Property."² A generation ago, most schools gave Property six hours in the first-year curriculum; today it appears that less than half do.³ Our colleagues, it seems, are not convinced of the central importance of the topic we teach, perhaps because we have not succeeded in making clear to them, or to ourselves, just what it is. There is no canon in first-year Property, except perhaps that provided by the widespread use of Dukeminier and Krier, the leading "brand name" in property texts and the single most popular casebook on any topic in American law schools.⁴ But even when using Dukeminier and Krier, the first-year Property teacher whose course lasts only one semester (and that is apparently a growing category) must choose those pieces of the traditional property course she (a) cannot do without and (b) can fit into fourteen weeks. Teaching Property, an art like any other teaching, has become not painting, but collage.

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1. Roberta Rosenthal Kwall & Jerome M. Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205 (1997).

2. *Id.* at 206.

3. *Id.*

4. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (4th ed. 1998).

The result of all these decisions to cut or not to cut is that the elements of the traditional Property course most often taught, estates in land and future interests,⁵ are those probably least used in practice. Perhaps those elements retain their place in the syllabus from a sense that they present the first-year student with the law's past, with those magic syllables that whisk us into the realm of the law: possibility of reverter, right of reentry, fee tail, springing executory interest, and we're off! Our rationale is not a visit to Narnia or the Land of Cockaigne, of course, but a sentence or two about the disciplined framework of the estates system or the mental acuity won by close attention to future interest problems. A more generous explanation is that some grounding in the estate system is necessary in order to get to the topics that students are likely to see in their practice, topics like concurrent interests and landlord-tenant law. And yet a third explanation, and one I intend to pursue further down in this piece, is that they represent all that is left of Property's unique subject concerns.

This unsatisfactory situation—lack of agreement on the basic substance of a Property course, dependence upon the most archaic segments of property law, our colleagues' skepticism—means that Property professors may well be intrigued by a text that promises to "reestablish[] the primacy of property law in the curriculum."⁶ And for those less ambitious and perhaps a bit burned out, the casebook authors also pledge to "breathe[] new life into the basic property course."⁷ Altogether, an attractive proposition.

It certainly was to me when I was faced with transforming a six-credit two-semester course into a four-credit spring semester one. I had used Dukeminier and Krier for some five years previous and thought the task of condensing and cutting would be made easier with a new textbook, one that did not necessarily contain the cases to whose teaching I had become accustomed and even attached. So, in Spring 1998, I adopted a casebook new to me and new to the world, Dwyer and Menell's *Property Law and Policy*,⁸ which had just been published. My choice was based on a page-turning perusal and the authors' preface.

5. All forty respondents to Kwall and Organ's request for Property syllabi covered estates in land and future interests, as well as concurrent interests. Everyone covered adverse possession and servitudes; 90% covered landlord-tenant; 75% covered real estate transactions and regulation of land use. Kwall & Organ, *supra* note 1, at 207-08.

6. JOHN DWYER & PETER MENELL, *PROPERTY LAW AND POLICY*, at v (1998).

7. *Id.*

8. *Id.*

In the preface, the authors reject the "heavy emphasis of traditional property texts on common law" as "both anachronistic and poorly suited to preparing students."⁹ They suggest that the resurrection of the Property course (and professor) can be accomplished through an epistemologic apparatus, "comparative institutional analysis."¹⁰ Property, they say, is not rights in land or other resources, but "a triadic relation among institutions, resources and culture."¹¹ Thus, property law should no longer be taught as "a disparate set of doctrinal areas loosely tied together by their relationship to land."¹² Instead of focusing on land, the casebook authors suggest looking at resources generally through a "comparative analysis of the major institutions—legal, social, market, and political—governing [them]."¹³ They suggest a shift in pedagogic focus from the common law to the more practical and realistic analysis of statutes, regulations, and a "range of legal, market, and political institutions."¹⁴

The authors' claim is to a unique recognition of (1) "the interplay of common law, statutory and constitutional regimes," (2) "the growing significance of non-land forms of property," (3) "the emergence of environmental values," and (4) "the central importance of public policy analysis to resolution of complex social problems."¹⁵ This is certainly an approach that can benefit the first-year Property teacher whose course is set in a semester that may also contain courses focusing on positive law, like Civil Procedure, Administrative Law, Constitutional Law, or Criminal Procedure, as mine does.

II. WHAT THIS BOOK IS ABOUT

The chapters of the book are divided by their focus on rules and institutions, social norms and institutions, and on institutions themselves—the market, the political structure—in turn, rather than, as is more typical, some particular aspect of the law of property, *e.g.*, landlord-tenant, estates in land, covenants, easements and servitudes. Chapter I, the introductory chapter, described in the preface as introducing the "basic themes of the book,"¹⁶ begins with philosophi-

9. *Id.*

10. *Id.*

11. *Id.* at vi.

12. DWYER & MENELL, *supra* note 6, at v.

13. *Id.* at v.

14. *Id.* at vi.

15. *Id.* at v.

16. *Id.* at vi.

cal perspectives on property. I am not sure why these are "basic themes," given the reliance upon the "triadic relation" of institutions, resources and culture, which is earlier said to be the focus of inquiry.¹⁷ It may be that philosophical perspectives stand in for culture in this section, for the next two sections of the chapter deal with institutions and resources. But it is not clear how an introduction to natural rights, personhood, distributive justice and utilitarian theories of property is a guide to varied cultural perspectives on property, since all the excerpts in that section are from post-Enlightenment English or American writers who share commitments, of varying intensity, to the market.¹⁸

The next section of the basic themes chapter uses the work of William Cronon¹⁹ to illustrate differing institutional approaches to Property. This seems to me to focus more specifically on culture, since Cronon's work explicitly contrasts the conceptions of property held by 16th and 17th century Native Americans and the English religious dissidents who settled among them. Nonetheless, it is labeled as an examination of "institutions to manage and allocate resources."²⁰ The third section, which compares customary rules of the whaling, oyster and lobster fisheries for examples of property regimes that vary based upon the nature of the resource in which rights are assigned, might also be considered an examination of institutions.²¹ I confess then to some confusion as to the distinctions among culture, resources and institutions as they are used to give structure to this casebook. I am also unclear as to the respect in which this amounts to a "comparative" approach as the text's title suggests. It may be that an integrated teacher's manual, unavailable to me during the semester I used the newly-published book, provides further explanation of a topic which remained opaque to me throughout the semester.

The first chapter contains no cases and it is not until the second chapter on background legal rules and institutions, almost seventy pages into the text, that one reaches the first case, *Johnson v. M'Intosh*.²² Thus, the teacher must make a decision quite rapidly as

17. *Id.*

18. They are: John Locke on natural rights; Margaret Radin on personhood; James Q. Wilson on distributive justice (!); and Richard Posner and Garrett Hardin on utilitarianism. See DWYER & MENELL, *supra* note 6, at 1-63.

19. *Id.* at 21-47 (quoting WILLIAM CRONIN, CHANGES IN THE LAND: INDIANS, COLONISTS AND THE ECOLOGY OF NEW ENGLAND 37-49, 53-75, 128-31 (1983)).

20. *Id.* at xix.

21. *Id.* at 56-63.

22. 21 U.S. (8 Wheat.) 543 (1823). By contrast, in *DUKEMINIER & KRIER*, *supra* note 4, where that case is also first, it is reached on the third page.

to how to proceed with the course. One may postpone case reading until after the first or second week of the semester, and begin with a fairly abstract level of discussion that does not directly utilize legal discourse, an approach which may arouse some negative student reaction. On the other hand, one could dispense with the first chapter and plunge immediately into the cases, thereby giving up the opportunity to make the book's framework, and the philosophical and economic underpinnings of private property, apparent at the beginning.

I consider this rather a Hobson's choice. Introducing philosophical and cultural perspectives on property are part of what makes the course interesting and thus so enjoyable to teach. When students recognize the philosophical and economic baggage attached to some naive preconceptions and presumptions about the nature of property, they must examine previously unexamined, perhaps even unconscious, assumptions they have held about the social and the physical world. Bringing these to light, making their application concrete, and considering the alternatives, are the wonderful shared task of student and teacher. So, it is hard to give up the explicit examination of perspectives. But on the other hand, without some cases to reference, it is difficult to move perspectives from abstraction to particularity. Perhaps some suggestion as to how to integrate the first chapter's readings into a syllabus that began with the second chapter would be a useful addition to a teacher's manual.

Chapter II is perhaps the most traditional of the chapters, for it concentrates on background legal rules, largely in terms of the common law. In this chapter are the sections that are the usual fodder of the first half of a Property course: how property is acquired, including discovery and conquest; adverse possession; and capture from the common pool. (The introductory staple of the traditional Property course—finders—is omitted entirely, which I rather regret, since the old chestnut, *Armory v. Delamirie*,²³ is fun to teach.) Next come estates in land and future interests; concurrent interests and marital property; then trespass, nuisance and takings; and finally, closing out this big chapter (about a third of the whole book) is real estate transactions. Aside from landlord-tenant and covenants, easements and servitudes, this is pretty much the whole of the corpus of first-year Property.

This chapter teaches well, on the whole. I was particularly pleased with the two cases in the water subsection of the section called

23. 1 Strange 505 (K.B. 1722).

"Acquisition of Other Resources."²⁴ The authors have found a pair of cases with virtually identical facts that come out in precisely opposite ways.²⁵ Students discover that water is valued very differently as a resource in Illinois and Colorado, the two states where the cases are decided, and that it is this contextualization of the resource in its natural world which accounts for the cases' opposed outcomes. I would have liked to see more pairings of this kind in the text as a whole, an approach which would, I think, be consonant with the stated purpose of giving more attention to environmental issues than is usual in the standard property casebook.

The book's teaching approach is well-displayed in the second chapter. There is a fair amount of text and discussion, some statutory material showing how the common law is codified and modified by statute, and a problem for students to think through at the end of each subsection. On the other hand, there is very little of the traditional fodder for in-class discussion. The entire section on estates in land and future interests has only four cases *in toto*.²⁶ Only four of the forty-seven separate sections of this chapter contain more than one case. The more typical section has text, a single case, and a problem, or no case at all and simply text and a problem. And because there is generally only one case per section, cases rarely illustrate problems and tensions in the rule, but simply set forth the rule itself, the reasoning one must follow to apply the rule to facts, or the historical course by which the rule has been reached. Thus, even where there are cases in the text, they are not often the kinds of cases that encourage the dialogic inquiry that introduces first-year students to the nature of legal reasoning.

Teaching without many cases exposing the path of legal reasoning is problematic.²⁷ The intention of the authors seems to be that discussion of case-based problems at the end of most sections should replace the more traditional textual discussion. But I found it difficult to use the problems in class to achieve the kind of dialogic interplay that case discussion usually evokes. The problems seemed more generally suited to exam questions or out-of-class written exercises than to in-class discussion and I often found myself lecturing, which I do not like. In short, I did not like teaching without cases and my

24. DWYER & MENELL, *supra* note 6, at 94-130.

25. Compare *Evans v. Merriweather*, 4 Ill. 492 (1842), with *Coffin v. The Left Hand Ditch Co.*, 6 Colo. 443 (1882).

26. DWYER & MENELL, *supra* note 6, at 133-69.

27. By contrast to this book's 65 cases, *DUKEMINIER & KRIER*, *supra* note 4, with essentially the same coverage, contains 111 cases.

students did not like learning without cases; indeed, it was a matter mentioned in some evaluations.²⁸

It may be that the philosophy of this text demands a de-emphasis on cases, replaced by statutory and regulatory materials. But I wonder if it is not possible to integrate cases and text in such a way that students get the benefit of the traditional in-class, case-based dialogue that we think so important for the first year, while also learning that not all cases rely upon the common law, but that interpretation of positive law is also a characteristic of lawyerly thinking. It is not clear to me that the institutionalist approach chosen by the authors is at fault; I am not sure that a property textbook which emphasizes statute and regulation more than is usual need necessarily skimp on cases. For example, *Moore* incorporates a range of judicial discussion of the applicability of both common law and statute which could provide students with a good basis for comparing the two.²⁹ Similarly, *International News Service v. Associated Press*,³⁰ with its separate opinions by Justices Peckham, Holmes and Brandeis, is a wonderful case for discussing the common law approach to new legal issues, as opposed to the Realist arguments in favor of statutory resolution. That case, like *Moore*, is not in this casebook.

After the first chapter on culture/philosophy/resources and the large second chapter on background legal rules, the authors go on to fill in the other point of their notional triangle, social institutions, in three additional separate chapters. Thus, Chapter III deals with social norms, Chapter IV with markets, and Chapter V with political institutions. The section on social norms uses water rights, intellectual property rights and law-firm partnership rights as illustrative of the way in which the resolution of property conflicts may depend upon the cultural contexts in which they occur. It relies largely on textual material, with only two cases in the whole chapter. Chapter IV uses landlord-tenant and nonpossessory real interests, the latter both common law and contractual,³¹ as grist for a discussion of market institutions. The chapter on political institutions examines zoning,

28. E.g., "I would complain a little about the text Not very many cases, but lots of text"; "Casebook—not enough cases to illustrate the material"; "I think the handouts w/pictures [from Dukeminier & Krier] may be a more interesting book." Spring 1998 Evaluations, Halper Property Course, Washington & Lee University School of Law (on file with the author).

29. See *Moore v. Regents of The University of California*, 793 P.2d 479 (Cal. 1990) (discussing the applicability of CAL. HEALTH & SAFETY CODE § 7054.4, 7150 (West 1990)).

30. 248 U.S. 215 (1918).

31. On the one hand, covenants, easements, and servitudes, and on the other, common interest communities and homeowner associations.

police power, and land use planning generally. I find these latter topics rather awkwardly separated from the sections on nuisance and takings which appear in the second chapter on legal institutions.

III. WHY A NEW BOOK DOESN'T HELP

After teaching from the book for one semester, I am not yet convinced that revivifying Property in the first-year curriculum is a matter of a comparative institutionalist approach, although I appreciate the impetus that leads scholars to choose it. Instead, I think that if we are to convince our colleagues that Property should, as Dwyer and Menell urge, regain its "primacy . . . in the curriculum,"³² it must be because what students learn in Property is, first of all, not learned elsewhere, and second, necessary to what is learned elsewhere. At one time, everyone believed that; today they do not. Why?

In other areas of the law, some pedagogic problems have come from the inability of faculty to convince students that the law, rather than politics, is actually at work. A good example is the Constitutional Law course which can no longer be said to be free in any of its parts from fairly severe rupture along political lines, a rupture which hardly bothers any more to masquerade as doctrinal difference.³³ But in regard to Property, while political issues certainly make doctrine, they are not in its forefront, not ineluctable and intractable, the way abortion, affirmative action and workplace conduct, just for example, are. Rather, I think the problem with teaching Property is the same as the problem with property law itself. Property, as we learned from the Realists,³⁴ has become dephysicalized and abstracted from the world of sensuous apprehension. Property is not the thing, but it is value, and value, as Holmes told us, is a social creation.³⁵ But value

32. DWYER & MENELL, *supra* note 6, at v.

33. See, e.g., *Romer v. Evans*, 517 U.S. 620, 636, (1996) (Scalia, J., dissenting) (where Justice Scalia in dissent is in the position of supporting what he himself describes as a "Kulturkampf").

34. See, e.g., *Truax v. Corrigan*, 257 U.S. 312 (1921) (Holmes, J., dissenting). There he adverts to the dangers of calling anything with value property: "[You] make it seem like land." *Id.* at 342. And he goes on to warn that "you cannot give it [a valuable business] definiteness of contour by calling it a thing. It is a course of conduct." *Id.* See also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (characterizing property as "sovereign power compelling service and obedience [D]ominion over things is also imperium over our fellow human beings").

35. *Int'l News Serv.*, 248 U.S. at 246-48 (Holmes, J., dissenting).

is not just the preserve of Property teachers, but is also the subject of Contracts and of Torts in the first-year curriculum.

Those of us who teach *Moore*,³⁶ for example, find ourselves discussing whether there was an implied contract between Moore and his doctors, and evaluating the expectations of the parties as to the use of cells found in tissue taken from Moore's body. And we have to pull back and say that what we want to focus on is the property issues in the case, not the contract issues. But how real is that distinction? How real is that distinction when we teach cases like *Kendall v. Ernst Pestana*³⁷ that interpret the expectations of parties to a landlord-tenant contract as to whether the landlord's consent to allow a sublet may be withheld unreasonably?³⁸ Of course, one of the themes of many Property courses is the way in which contracts, like leases, that were once seen as unique to, and governed by, property law, have now entered into the more general realm of contract law. But of course this only exacerbates the situation I am describing in which the special province of property law becomes less and less apparent.³⁹

In a sense, the basic Property course contains three functional categories—first, there are cases and readings which set up the basic question of what property rights are and are for, cases like *Moore* and *Pierson v. Post*⁴⁰ and *Johnson v. M'Intosh*.⁴¹ These cases are great fun to teach, but students often want to move on from what they perceive, and not pleasantly, as "philosophy" or "economics." Second, there are the materials which introduce students to the arcana of estates in land. Third, there are cases and materials whose subject matter we contest with the other first-year common law courses, such as Contracts and Torts, as well as with the Constitutional Law course.⁴² These fall in the realm of landlord and tenant, of private land-use

36. *Moore*, 793 P.2d 479.

37. 709 P.2d 837 (Cal. 1985).

38. Neither *Moore* nor *Ernst Pestana* are included in this book. I am particularly surprised in regard to the omission of the former, since it is a case in which the possibly conflicting rules of the common law and statute are discussed, as are the cultural constructions which govern the use of the body in law. For an interesting discussion of that aspect of *Moore*, see ALAN HYDE, *BODIES OF LAW* 67-74 (1997).

39. I should also note that, when the course is cut from a year to a semester, one of the things that often seems to be lost is the very interesting and teachable introduction to marital property, which gets left to family law, and thus is learned only by those who take that course, rather than by all first year students.

40. 3 Cai. R. 175, 2 Am. Dec. 204 (N.Y. 1805).

41. 21 U.S. (8 Wheat.) 543 (1823).

42. In regard to the latter, I think particularly of nuisance law, which often falls between the two schools, and the tort duties of owners and possessors of real property, which most often comes up in the context of injuries to tenants.

controls and of public land-use restrictions, including the law of takings. The truth is that, were we to leave aside the magic syllables I referred to at the beginning of this screed, we have very little of a plain case to make about our difference from other subjects in the first-year curriculum. And so we cling to our magic, while knowing that there is nothing in the first-year curriculum so generally thought by our colleagues to be as dated, technical and trivial as the taxonomy of estates in land and future interests.

But insisting upon the necessity of apprehending the difference between a determinable fee and a fee subject to condition subsequent is not the only way to deal with the problem. In fact, I think there is also virtue in the vice of our inability to distinguish property from torts or contracts. One of the things that makes Property fun to teach is precisely the way in which we can awaken an understanding in our students of the idea that property is value, and that value is socially created.

I once heard Joan Chalmers Williams say in an AALS panel discussion that there were no Formalists left in the law,⁴³ except of course first-year students. Nowhere is their formalism more on display than in the Property course, where everyone starts out thinking that property is precisely their relation to the thing, and that that relation is one of complete control. We of course spend a good deal of our time with students contending with that notion. Property, one says, holding up a front-row student's casebook, is not what I have in my hand, but is rather a network of connections surrounding it, connections that we have decided to make for our own reasons, reasons which are sometimes in conflict and often far from clear or conscious. And those connections, those relationships, limit our control over the thing, require us to allow access to it in some circumstances, arrange the possible dispositions we may make of it, and restrict its potential uses. This central Realist insight is what is interesting about teaching property law today.

That is what makes *Property Law and Policy* appear an attractive text. It recognizes that the 19th century conception of property as land, which is reflected in many current property textbooks, does a disservice to the reality of nonphysical property. It also explicitly recognizes that common law rules have been codified, modified, supplanted and rethought with the result that positive law must be the

43. Similar words were used in these very pages last year in the Constitutional Law Casebook Review issue. "No one believes in formalism anymore." Edward Rubin, *Politics, Doctrinal Coherence and the Art of Casebook Writing*, 21 SEATTLE U.L. REV. 837, 838 (1998).

practitioner's first, rather than last, resource. Moreover, the common law is admitted to be a framework for policy rather than a set of ancient rules innocent of social concerns. And property itself is seen as socially constructed, while the social institutions that are developed to govern it—"legal rules, social norms, markets, and political institutions"⁴⁴—themselves reflect both the nature of the resources themselves and the culture(s) in which they exist. This is a modern approach to property, (or perhaps one should say, a Modernist approach to property).

IV. SUMMING UP

An approach that looks not only at common law, but at positive legal institutions and legal culture, although attractive, may be more aspirational than real. When we say a topic is common law, we generally means that its decisional reasoning is based on analogy and precedent. A positive law topic is one whose decisional course is interpretive and relies upon an attempt to find meaning in, or give meaning to, the language of the statute and perhaps (*pace* Justice Scalia) to uncover the intention of its framers. To treat property law like positive law is of itself a political choice about property and one whose rationale the cases often do not adopt. While it is undoubtedly true that the practitioner's work with property law is located within the realm of statute and regulation, the notion that these are fundamental to the topic, as they are to securities regulation or employment law, say, is not always and everywhere accepted.⁴⁵

I think it is for this reason that, in the end, I found the material less than fully satisfying. While the text includes statutory modifications of the common law, it did not strike me as focusing students' attention on the choices which the statutes represented, as opposed to the positions of the common law. Oddly enough, I think that Dukeminier and Krier, though it makes no claim to a new approach to property,⁴⁶ may be better able to direct students to a consideration of

44. DWYER & MENELL, *supra* note 6, at vii.

45. The Supreme Court in particular is attempting to reconstitute the common law of property as a guide to the "muddle" of the takings issue. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

46. Dukeminier & Krier's aim, according to the preface to the First Edition is the very traditional one of teaching "the complicated structure and functions of property doctrine and something of legal method, legal reasoning, and legal analysis." *DUKEMINIER & KRIER, supra* note 4, at xxxv.

the policy choices that are embodied in different modes of conceptualizing and codifying the common law.

A good example is the differing treatments of *Sommer v. Kridel*,⁴⁷ a case both texts use. In Dukeminier and Krier, the note questions on the case direct students' attention to the Restatement (Second) of Property;⁴⁸ Powell's treatise, *The American Law of Property*; Judge Posner's *Economic Analysis of the Law*;⁴⁹ and The Uniform Residential Landlord Tenant Act (URLTA),⁵⁰ for a variety of positions on the landlord's duty to mitigate by re-leasing if the tenant abandons. This makes for a discussion in which the purpose of the common law rule can be contrasted to potential and actual modifications by statute and interpretation.

The review text makes the discussion focus instead on contract remedies that may be available by statute or otherwise. This kind of focus seems particularly unwise, for it is precisely by confronting directly the tensions between the common law of property and the statutory modifications, actual and potential, that bring property law closer to other kinds of law. In that way, we can point out to the students the ways in which property law reflects the contradictions within our society regarding rights and ownership. It is only by doing that, I think, that we can justify our old claims to "primacy . . . in the curriculum."⁵¹

To sum up then, I applaud the book's pedagogic intentions, which seem to me, as they did when I chose the text, a useful and potentially instructive approach to property teaching, but am less pleased with its pedagogic execution, that is, the way it actually teaches in the classroom.

47. 74 N.J. 446 (1977).

48. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 12.1 cmt. i (1977).

49. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 121 (5th ed. 1988).

50. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 4.208 (1972).

51. DWYER & MENELL, *supra* note 6, at v.