

A Walk Through the Woods of the Property Course with Dukeminier and Krier's Casebook on Property

PROPERTY, 4th Edition. By Jesse Dukeminier[†] and James E. Krier.[‡]
New York, New York: Aspen Publishers, Inc., 1998. Pp. xiii,
1247.

*Reviewed by Charles I. Nelson**

The first edition of *Property* by Jesse Dukeminier and James E. Krier appeared in 1981.¹ At the time, I had been teaching the basic Property course for only three years and was well-satisfied with the book I was then using. When I received my review copy of the book, I put it aside for later review, thinking that it was probably just a rehash of other casebooks I had seen. Sometime later I picked it up, looked through it and was struck immediately by how clearly it expressed my own notions about how Property should be taught. As I read through the book, I knew almost immediately that I was going to adopt it for my course. Adopt it I did, and I have never looked back. Now in its fourth edition,² the casebook has shifted its focus on a number of occasions but has always remained true to the central themes of the first edition. In this essay, I hope to share with you what I find to be so engaging about the casebook and why I think it is such an outstanding pedagogical tool.

In choosing a casebook, it is important to me that I be able to articulate its themes so that students are able to know where they are going and how the steps along the way fit together. This casebook is organized along three main themes even though it has five major parts.³ The first two parts seem to me to focus on relative rights in property.³ The third part discusses transfer of property interests and assurances of title and the fourth discusses regulation of land use by private and

† Maxwell Professor of Law, University of California, Los Angeles.

‡ Earl Warren DeLano Professor of Law, University of Michigan.

* Associate Dean, Academics and Professor of Law, Pepperdine University. B.S., Abilene Christian University, 1962; J.D., The University of Texas at Austin, 1965.

1. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (1981).

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

3. *Id.* at 1-415.

public means.⁴ The majority of this essay will look at those themes and how they play out in the casebook and in my course. In the latter part of the essay, I will discuss some of the things I find most engaging about the book and why I continue to use it.

I. THEMES OF THE CASEBOOK

A. *Relative Rights in Property—Herein of Possessors*

The book begins with an examination of the ways in which we come to possess property, and what it means to “possess” something. The authors believe that while we all use the term “property” in our conversations, it is important for lawyers to understand how property comes to be.⁵ It is that understanding which forms the basis for a discussion of the relative rights of one person as against those of another. The first case discussed is a fascinating one, *Johnson v. M’Intosh*,⁶ in which persons claiming through purchase from Native Americans were suing persons claiming through a grant from the United States. Chief Justice Marshall expounds the principles of prior possession by the Native Americans, the discovery by Europeans, the assertion of sovereignty by the European countries and the restrictive impact that had upon the Native Americans’ interests.⁷ The opinion establishes once and for all that a person in lawful possession may be preempted by a successful assertion of sovereignty.⁸ To the extent that the sovereign has granted title to private owners, the case also establishes that title is preeminent over possession.⁹ Thus, in the hierarchy of property rights, sovereignty has been established as the preeminent right, with title being a secondary right, and possession being inferior to both. That does not extinguish the value of either title or possession, but it does place a restriction upon the concept of title and makes possession an inferior value to both. This is a theme that is echoed throughout the first part of the book.

Moving beyond the opening case, the authors look at the relative rights that are created by capture. Although there might well be cases that illustrate the more modern applications of the rule of capture, such as oil and gas cases or water appropriation cases, the authors choose to

4. *Id.* at 417-541.

5. *See id.* at 3.

6. 21 U.S. (8 Wheat.) 543 (1823).

7. *See id.*

8. *Id.* at 603.

9. *Id.* at 604.

use that wonderful case of *Pierson v. Post*,¹⁰ in which sportsmen who are “riding to the hounds” are foiled in their attempt to capture the fox by Pierson, who killed the fox and carried it off. Since neither party owned the fox, the question was whether anyone acquired any rights in the fox which could be enforced against the other party. This is a case which has delighted law students for years since, at bottom, the questions are why people choose to fight over the dead carcass of a fox and how should such a decision be made. The court decides the question on the basis of when possession first occurs and says that it occurs when the fox is “captured.”¹¹ That raises a further question of how we know when something is captured. Does capture happen when we begin to make efforts to appropriate something; when we have asserted such dominion that it is certain to be appropriated; when we limit the ability of others to appropriate it; or when we have restricted it in such a way that no one else can appropriate it? The majority hold that capture occurs when the fox has been mortally wounded, and the hunter intends to continue the pursuit.¹² Why choose that principle? At this point, there is a wonderful opportunity to discuss jurisprudence and the reasons why we make judicial decisions. Should it be, as the majority suggests, to promote certainty? Should it be to promote fox hunting, as the minority suggests, to rid us of noxious beasts? Who decides what is noxious and what is a valuable resource? Should it be based upon investment in the enterprise to encourage economic ventures? All of these inquiries are important to challenging student thinking about how and why we make decisions. Frankly, I like to leave students without much in the way of answers to these questions but tell them that we will resume the discussion at the next class as I find it stimulates discussion among them and sharpens the debate at the subsequent class.

The opening section concludes with a discussion of property rights that arise from creation of the property. The case used is *Cheney Brothers v. Doris Silk Corp.*,¹³ in which plaintiff sought to protect original designs for silk clothes. Since the designs were useful only for a limited period of time, plaintiff sought limited protection.¹⁴ The designs could not be copyrighted and so plaintiff asked the court for an injunction to prevent defendant from copying its designs.¹⁵ This

10. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).

11. See, e.g., DUKEMINIER & KRIER, *supra* note 2, at 21.

12. *Id.*

13. 35 F.2d 279 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930).

14. *Id.* at 279-80.

15. *Id.* at 281.

provides an opportunity to discuss with students the concept that not all property interests are protectible. My experience is that it offends students' sense of justice that one can spend money, time, and effort in creating designs and then have them immediately appropriated by another; however, the court says that Congress has adopted a copyright law which does not allow room for common law copyright. It is a subject which tends to disturb students because of its patent injustice to the plaintiff, but is well worth the time in defining the limits of a court's power and introducing the doctrine of judicial restraint.

One of the concluding cases in the chapter is *Moore v. Regents of the University of California*.¹⁶ This case involves an attempt to create property rights in tissue taken from the spleen of a leukemia patient at UCLA Medical Center.¹⁷ Without his knowledge or consent, the tissue was used to make certain cell lines for research purposes which were then sold.¹⁸ Moore sued to recover part of the profits from such sales on the ground that his "property" had been converted to the use and benefit of the defendants.¹⁹ The court of appeals determined that the issue should be decided by dominion which involves rights of use, control, and disposition.²⁰ It found that the plaintiff had not abandoned his tissue nor given it to the hospital.²¹ As such, it was still his.²² On appeal, the state supreme court decided that, using the analysis of the court of appeals, the plaintiff could not use the tissue, nor could he control its disposition since that was precluded by law.²³ It then looked at the tort remedy of conversion and decided that it should not be extended to this type of situation because public policy dictated that such extension was best left to the legislature and that rights of privacy and informed consent provided adequate protection of any interest of the plaintiff.²⁴ Again, this case is at the frontier of thinking about property interests and provides a wonderful opportunity to explore the question of whether there is a difference between "personal rights" and "property rights."

Having come to the end of these cases where very challenging and far-reaching concepts of property have been discussed, one of the

16. 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 936 (1991).

17. *See id.*

18. *Id.* at 481.

19. *Id.* at 482-83.

20. *See id.*

21. *Moore*, 793 P.2d at 483.

22. *Id.*

23. *Id.* at 486-87.

24. *Id.* at 487-88, 496.

difficult tasks is to try to tie it together in some form of coherent whole. My experience is that it is this chapter, together with estates in land and future interests, which cause the greatest difficulty for students trying to grapple with the whole. My own summation focuses not on creating a coherent body of law from the chapter but rather recognizing that the discussion of property is a discussion of whether my rights are greater than yours and whether I have any rights which are worthy of protection. Understanding that distinction is the key to understanding the concepts that follow.

Following the discussion of the most difficult questions concerning fundamental problems with rights in property, the book then turns to the rights of prior and subsequent possessors.²⁵ It begins with a discussion of the rights of finders, *i.e.*, those who have no title. Following a suggestion made by the authors, I like to begin this discussion by walking over to a student's desk and picking up a book or a pen. I then ask the student if that is his or her property. When the answer is "yes," I then challenge the student to prove it. I extend the discussion by asking the student to prove that his or her clothes belong to him. That puts us clearly into the discussion of how we protect the rights we assert in property. The cases in this section establish that possession alone can be the basis for a claim to property. Title, which we have previously suggested is superior to possession in the hierarchy of rights, is nevertheless not essential to establishing rights in much of property. The material explores concepts of "constructive possession" and when that concept should and should not be applied.

Having discussed that section at some length, we are now ready to turn to one of the more troublesome areas of property, adverse possession. It is important at the outset to set the stage for the discussion by dealing with its moral implications. Invariably, some students will raise the question: "Do you mean to tell me that a person who has no title can steal the land of another person?" I answer that question with a forthright "yes" but follow it with an explanation that this is not the usual context in which adverse possession arises. I also point out to students that we expect that people will guard their property rights. We have no moral problem in saying that property which is lost is subject to being appropriated by another or that property may be abandoned and thus subject to that appropriation. Since land cannot be secreted, it is reasonable to expect that the owner will protect his interest where necessary. I use the cases

25. DUKEMINIER & KRIER, *supra* note 2, at 99-184.

to show that the common law elements of adverse possession are usually incorporated into a statute but that a court has the discretion to apply the statute strictly or liberally, depending upon its view of adverse possession or the facts of the case. Again, one of the more difficult aspects of this discussion to overcome is the tendency to focus solely on the elements of the cause of action without understanding that we are using possession as a means of granting ownership to the possessor in order to achieve a public policy goal of settling stale claims, encouraging owners to protect their interests and encouraging the productive use of land.

One of the ways in which the authors encourage students to think about the limits of adverse possession is the section on adverse possession of chattels. The case of *O'Keefe v. Snyder*²⁶ piques students' interest since it involves Georgia O'Keefe and her attempt to recover paintings that she alleges were stolen from her years previously. This case provides a great opportunity to ask whether the same rules should apply to all kinds of property or whether different types of property demand different rules and, if so, what those rules should be. In this case, it is more difficult to ask the owner to protect his interest since he does not know the location of the property. For that reason, the traditional rule has been that no duty arises until the owner knows the location of the property; however, the Supreme Court of New Jersey held that the owner is still required to take reasonable steps to protect his interest and that, if he does not, the statute will run against him.²⁷ That is a choice which reinforces the jurisprudential underpinnings of adverse possession.

The authors then transition to a discussion of the transfer of possession by gift. In this section, I focus on evidentiary concerns. How do we know what the intent of the transferor was? What proof should we demand and should the proof be different in different types of cases? Since all of the students have had experience with gifts, they tend to have notions about how the rules should work. I try to force them to face the question of whether a trier of fact, which has no knowledge of the actual transaction, has a right to expect more in the way of proof than we might expect from our own experience. The *gift causa mortis* problem brings that into fairly sharp focus since the person who had to form the intent is not present to give evidence of intent.

26. 416 A.2d 862 (N.J. 1980).

27. See *id.* at 873.

B. *Relative Rights in Property—Herein of Owners*

The book next turns to a discussion of estates in land and future interests, co-ownership and marital estates, and landlord and tenant law.²⁸ Let me begin this discussion by saying that I have not, do not, and will not ever understand our wanting to teach the subject of estates in land and future interests (including the Rule against Perpetuities) by the case method. My own experience as a student (dated though that may be) reinforces that view. The principle objectives that I hold for my students are that they see estates in land as a systematic whole and that they be able to classify the estate. There is a methodology to that process which is dependent upon seeing possessory and nonpossessory estates in relation to each other and that is why the problem method works so much better than cases. I do not teach this section of the book but abandon it in favor of a problem book. Having said that, I think that this casebook does an excellent job of telling the student that the material can only be understood in an historical context and then proceeding to develop that context very carefully and very thoroughly. When the authors do turn to cases, they seem to recognize that the history of the subject matter goes so far back into English common law that it becomes an almost surreal discussion which has little or nothing to do with modern day life. For that reason, they choose a number of modern cases in which the issue becomes one that is contemporary and urgent. The problems created by the cases are usually repeated in hypotheticals which follow the case along with variations of the problem. The chapter concludes with the Rule against Perpetuities, and it is here that I believe the coverage of the casebook is weak. It does not do much in the way of giving the student a method by which to approach the application of the rule. It should be noted again that the cases, with one exception, are very modern cases. One of the failings of modern perpetuities teaching is that of not teaching how to avoid it. Understanding of the rule is most valuable when it is then turned around to focus on good drafting. This book does little of that; although, to be fair, it is not intended to be a book about drafting.

The book then turns to the interests of co-owners and concurrent estates.²⁹ It is here that I believe the book really makes an outstanding effort in bringing the student face to face with reality. In the discussion of relative rights, nowhere is that more focused than where the actions of one party are inherently limiting of, or intrusive into, the

28. DUKEMINIER & KRIER, *supra* note 2, at 185-541.

29. *Id.* at 321-58.

rights of another party. This book looks at the problem from the perspective of those relationships created by contract (joint tenancies, tenancies in common, and tenancies by the entirety) and those created by status (common law marital property and community property). In the former area, the authors spend a little time with the formation of joint interests in land but then go into the problems joint owners face. It is in this section that I begin to hear the questions prefaced with "Do you mean to tell me that . . .?" most often. One co-owner can sever the joint tenancy without telling the other? One can occupy and take the profits for herself without having to share? One can lease to a third party without the joinder of the other co-tenant? The closer those relationships are, the more difficult the concept of relative rights becomes. The book does an excellent job of posing all of those problems in cases that trigger valuable discussion. Since a significant percentage of co-tenancies are held by marital partners, the difficulties posed by that are confronted by several of the cases and provide an excellent opportunity for exploring that aspect of the relationship.

From there, the casebook moves to a discussion of marital estates,³⁰ a subject my students have generally found to be fascinating. While almost everyone has had some experience with joint ownership by family members, most of the students sense the immediacy of marital property for their personal lives. My own preference would be to only cover a limited amount of this material, leaving the remainder to the course on Family Law and, in my school, the course on Community Property. However, the sense of immediacy that students feel allows me to involve them in a more personal way in discussing the differences between status and contract, how and why we have certain marital interests based upon status, what the underlying assumptions are about those interests, and the different views that common law and community property states take of those interests. It has proven to be one of the more satisfying discussions in my course over the last few years. The one criticism I have of this section is that it tries to do too much. It tries to cover both dissolution and inheritance from the perspective of common law, community property and the uniform acts. To cover everything requires too much background material in order for most students to discuss it intelligently.

The final major section covers landlord and tenant issues.³¹ Some would probably question whether landlord and tenant should be

30. *Id.* at 361-415.

31. *Id.* at 417-541.

covered in Contracts or Regulation of Housing rather than in Property. This book is up front about the fact that landlord and tenant law is in a state of change. It, therefore, chooses to approach the subject from a transactional point of view. It begins with the selection of tenants including the Civil Rights Acts³² and the Fair Housing Law.³³ I try to spend quite a bit of time with that section since it is such a problem in urban areas. The book then moves through the creation of the various types of tenancies and the requirements for termination to the rights and duties of both landlord and tenant. It is in this area that I have one of my most difficult challenges. A number of students seem to have such a "landlord = bad, tenant = good" mentality, probably based on their own less-than-satisfactory experience, that they focus on the tenant's rights section of the material without giving due consideration to the landlord's rights and the duties of both. I choose to discuss the economics of leasing in the section concerning restrictions on transfer of the tenant's interest. Students sometimes have a great deal of difficulty understanding that landlords have an interest to be protected by such clauses and in accepting that, in some cases, those interests are best protected by letting the landlord be arbitrary in granting or withholding consent. Similarly, when we get to the section on tenant's rights and are primarily discussing what defenses tenants may assert, I try to get students to focus on the context in which warranty of habitability or illegal lease arises. The more common perception, again based on experience, is that if there are problems with the house or apartment, I should not have to pay regardless of the contract. If the apartment does not meet my expectation, I should be able to walk away. Focusing on the specific requirements of constructive eviction or the meaning of "fit for human habitation" is always the most difficult part of the task. However, doing that is essential to them understanding the section on affordable housing which concludes this chapter. Regretfully, I usually reach this point at the end of the first semester and can do little or nothing to expand upon the subjects of affordable housing, landlord-tenant reform, rent control, or public housing.

C. *Transfers of Land and Assurances of Title*

I am particularly fond of the way in which this book begins the discussion of transfers of interests in land by describing the role of the attorney and the impact of the law on a typical transaction involving

32. 42 U.S.C. § 1982 (1994).

33. 42 U.S.C. § 3601-3619, 3631 (1994).

the sale and purchase of a house. It then turns to a case, *State v. Buyers Service Co.*,³⁴ in which Buyers Service was sued to prevent them from engaging in the unauthorized practice of law, since they provided title reports, prepared legal documents of transfer, handled the closing, and recorded the documents of title. This is a wonderful opportunity to raise the question of why it is important that such activities be handled by those trained in the law when the services may be provided at lower immediate cost and more efficiently by those who are not professionally trained. What does the "practice of law" really entail? I also use it as an opportunity to discuss the problem of dual representation in negotiation of real estate transactions even though the book only makes passing reference to it. To facilitate that discussion, I pass out the professional responsibility rules and have the students study them prior to class.

It has always seemed to me that this section of the book is one best taught by letting students see the documents involved in the transfer of land. The chapter begins with the contract of sale, and I bring into the classroom a contract of sale even though the majority of residential real estate contracts are no longer drafted by attorneys. I have tried, in distributing the contract, to build in ambiguous language, factual errors, and omissions to get the student to concentrate on the requirements of the contract; however, I no longer do that since I found that students later forget what the error is and accept it as the norm. When we get to the material on disclosure of defects, I bring in a disclosure statement so that students see how detailed it is. We spend quite a bit of time discussing what should be included under the category of other matters that may affect the use or value of the property. This is one area where I think students need to gain a feel for the practice of real estate transactions and documents seem to provide an excellent way to do that. The final document I bring in is a general warranty deed. The casebook includes the language of a general warranty deed, but I want them to see one in its entirety and then to learn the parts of the deed as they see it from the form.

It is at this point that we begin a discussion of warranties of title on which I spend some time. I like to give specific factual examples of each warranty so that students understand what the warranty is there for. I particularly want the students to understand that it is not likely that most grantees are going to sue on the covenants of title, except as a means of recovering against the title insurer or against the attorney who wrote the title opinion. It is important to me in this

34. 357 S.E.2d 15 (S.C. 1987).

section to make sure that students understand who can be sued for breach of covenant, depending upon the type of deed and the covenant involved, and the concept of damages and their calculation, something I do not spend much time on up to this point. The *Rockafellor v. Gray*³⁵ case in the book is particularly good for teaching that, since it discusses both liability and damages.

The final aspect of deeds is delivery. I choose to begin this section by discussing the presumptions that aid in determining whether delivery has occurred and then I move to the cases. It seems to me that the cases almost always focus on aberrational facts that raise interesting issues about delivery. Although, in most instances, the logical place to begin is with the presumptions that must be overcome and an evaluation of the cases in light of whether the presumption has been overcome.

The last part of the chapter is devoted to mortgages. Up until five or six years ago, I did not spend much time with mortgages, choosing rather to leave that to the Real Estate Finance course. Of late, however, I have decided that it should not be omitted since it is a fundamental part of almost every real estate purchase in the United States, and since it is the one part of the transaction about which a number of students have little or no knowledge. I now devote one and one-half classes to it, going beyond the material in the casebook to encompass the theory of the mortgage, the differences between the types of security instruments, the difference between the mortgage and the obligation, foreclosure, redemption, deficiency judgments, and antideficiency legislation.

Having already focused the students' attention on covenants of title as a means of assuring good title to the buyer, we now turn to a discussion of the recording system and the protection it affords. One of the things I have always wanted to do in my course is to give students the description of a residential property and have them go to the County Recorder's Office to see if they can follow the title back for ten or fifteen years. I have not done so for two reasons. One is the logistical problem of seventy students descending upon an unsuspecting County Recorder, and the other is the computerization of records that makes the practice almost moot. Nevertheless, I continue to think it would be a good exercise in the theory of how one constructs a chain of title.

One of the more difficult things about this chapter for my students seems to be recognizing the difference between a race statute,

35. 191 N.W. 107 (Iowa 1922).

a race-notice statute, and a notice statute and then understanding what protection each gives. The casebook does not set out those statutes until some twenty-five pages into the discussion, whereas I prefer to begin with the first-in-time, first-in-right rule and then go directly to the statutes. I believe strongly that students must recognize at the outset that the only protection a later grantee has is what the statute gives and that you must go to the statute first, identify it as to type and protection given, and then apply it to the facts. Having done that, the book then provides an interesting array of problems that allow the students to explore the protection that the statute can give, where the statute has its limitations, and how courts apply the statutes in ways that sometimes make sense and sometimes do not. The chapter concludes with a discussion of who is entitled to the protection of the statute; however, I prefer to focus the students' attention on that when I am discussing the three types of statutes, since it is part of reading the statute itself. Having done that, I elect to treat the subject of marketable title acts somewhat cursorily and to omit the discussion of title registration systems, since that has never caught on in our statutory schemes.

At this point, I turn to title insurance as the third method of protecting title. Some students do not know much about insurance policies and so it is important here to familiarize them with the concepts of policy coverage, exceptions to coverage, and exclusions from coverage. They particularly need to understand that title insurance is basically assuring the quality of title and not the physical characteristics of the property. The two cases included for discussion form the basis of an excellent exploration of the limits of coverage under the policy.

D. Regulating the Use of Land

The final theme covered is the schemes for regulating the use of land. That discussion begins with nuisance. Nuisance is an important part of this area since it is the foundation of zoning. However, I only give it cursory treatment since so much of the subject has been coopted by the Torts course. I do cover the rules on lateral and subjacent support briefly since a number of students will ultimately do construction litigation. Following that, I go directly to an examination of servitudes.

In my opinion, this casebook stands out as one of the best on the subject of servitudes. I say that because it begins with sufficient historical introduction to let the student know that this is not a modern scheme, but rather one which reaches back to a time when the use of

land was very different from modern day usage. It does not bore the student with the history of servitudes, but gives enough to set the necessary background. The book then turns to a discussion of the best understood servitude, the easement. The case chosen is *Willard v. First Church of Christ, Scientist*³⁶, which can be used to teach students the basic law regarding creation of easements, the difference between creating easements by grant, reservation and exception, the conceptual difficulties posed by the common law to reserving an easement in a third party, and the court's view of the equitable hardships imposed by the common law. Since the law of servitudes is the subject of major revision in the Restatement (Third) of Property, Servitudes,³⁷ and is still in draft, the authors in this section begin the practice of focusing student attention on the positions that will be taken by the Restatement as a means of challenging their thinking about how the law should develop to meet modern land usage. Those positions are given throughout this section.

The subject then moves to licenses and, in particular, the use of the doctrine of equitable estoppel and license coupled with an interest as a limitation upon the right of the licensor to revoke. Some students seem to have a conceptual difficulty with the difference between a license coupled with an interest, which may not be revocable, and an easement. The *Holbrook v. Taylor*³⁸ case is particularly good on that point since it makes clear that the license, even though not currently revocable, may nevertheless become revocable upon the occurrence of certain future events.

The subject of implied easements is covered by notes and questions, followed by one case which is rather difficult factually, *Othen v. Rosier*.³⁹ In later editions, the authors have made it easier to understand with an excellent map. I choose to spend some time on this subject as I think it important for students to understand that there is no private right of eminent domain in most jurisdictions and easements to a parcel of land can significantly affect its value. The case is followed by additional material on easements by necessity and I believe it useful to spend some time distinguishing easements by necessity and those based upon prior use.

The section on easements closes with discussions of assignability, scope of the easement, and termination of easements. Of those three

36. 498 P.2d 987 (Cal. 1972).

37. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (Tentative Draft No. 7, 1998).

38. 532 S.W.2d 763 (Ky. 1976).

39. 226 S.W.2d 622 (Tex. 1950).

subjects, I spend most of my time with scope of the easement, and overburdening and termination of the easement. The materials in this section, particularly on termination, are excellent and students seem to have very little difficulty grasping the concepts.

We are now ready to turn to one of the more difficult areas of the book, covenants running with the land. The book begins by pointing out why we have covenants, *i.e.*, that owners are working out the mutual use of their land to protect or adjust the use and value.⁴⁰ The book then turns to the historical development of such covenants and how they were treated at common law. It is much easier for students to accept the discussion of privity of estate when they understand that it is not the logic of it that is important but the historical context of it being a roadblock to the enforcement of covenants against purchasers who took without knowledge because of the lack of a recording system. Having set out the requirements at common law for covenants to run, the authors then elect to bring in equitable servitudes to show how and why they differ and what the historical context was that gave rise to them.⁴¹ That completes the theoretical framework for servitudes, and the task now becomes one of fleshing out the framework with cases that illustrate the various parts. Having said that covenants are required to be in writing, the book turns to implied covenants.⁴² Having said that there must be vertical privity, the book presents the argument that homeowner's associations, which own no estate, can enforce covenants.⁴³

The next section covers the limits of covenants that come up against legislation or public policy.⁴⁴ Since this has become a significant area of litigation, with prevailing social policy concerning the physically and mentally challenged favoring the establishment of group homes or hospice home in residential neighborhoods, it is important to understand the extent to which covenants can be used to blunt that policy. While most of my students seem to have little difficulty dealing with the conflict over racial covenants, I have found they have much more difficulty with other types of activities that conflict directly with residential usage. I find it very useful in this situation to try to identify the particular interests which each of the parties is trying to protect and then to ask how and why that interest is threatened. When students identify the value of the property as

40. DUKEMINIER & KRIER, *supra* note 2, at 857-58.

41. *Id.* at 863-67.

42. *Id.* at 880-90.

43. *Id.* at 891-902.

44. *Id.* at 902-07.

being a primary interest to be protected by covenants, they have learned why it is so important to insist upon adherence to such covenants. One can then turn to an examination of how important the public policy threatening the covenant really is and examine whether it is only a perceived threat or a real one. I leave students to draw their own conclusion about the ultimate outcome but insist that they be as honest as possible about giving due weight to the interests of both parties.

In the section on termination of covenants, I think *Western Land Co. v. Truskolaski*⁴⁵ is an outstanding teaching tool. Since the authors have included a plat of the subdivision, it is easy to focus students' attention on who has the greatest interest in protecting the subdivision by enforcement of the covenants.⁴⁶ Once that has been identified, the interest of the developer can be explored. While the case adheres to the general rule that covenants will be enforced unless they have been abandoned or no longer serve the purpose for which they were intended, that leaves the developer with a significant economic loss. That raises the question as to whether the landowners should be able to appropriate the land covered by the covenant for their own protection if it means that the plaintiff will suffer that kind of unintended loss. I like to pose the question of whether there is any way in which the interests of both parties can be accommodated. While there are a number of compromises the parties might make, students rarely get to the one that was the ultimate solution, building commercial buildings that look like homes. I am fortunate to have pictures of the property at issue, provided by a former student, which show what the property looked like after it was developed. This helps students to visualize alternative solutions.

In the final section of the material on servitudes, the authors take up common interest communities.⁴⁷ It is likely that this is where most of the litigation over servitudes will take place over the next several decades. Because people live in such close proximity, their usage becomes critical to their neighbors. The tendency in such situations is to overregulate common interest communities, and that overregulation has a way of infringing upon personal freedom, taste, and interest. When that happens, one has to decide whether the covenant should be enforced as to everyone, or whether exceptions should be made and, if so, upon what basis. Ultimately, it becomes a

45. 495 P.2d 624 (Nev. 1972).

46. DUKEMINIER & KRIER, *supra* note 2, at 911.

47. *Id.* at 919-40.

question of whether we give owners the freedom to contract and to enforce the contract as written, or whether we place standards of reasonableness upon the contract no matter how written. The cases presented here provide an excellent basis for discussing how that should play out.

The final section of the book is public regulation of land use and the takings clause.⁴⁸ Takings law is the final chapter in the book; however, since I know that I am not going to get there in the course of the semester, I prefer to use it as a prelude to the zoning material. I approach it from the regulatory taking standpoint, emphasizing that if zoning goes too far, a taking results. I try to spend no more than one class on takings material in order to get to the zoning material. By the time I get to zoning, I am usually under such time pressure that I have to choose three or four topics to cover. My general approach is to lecture on the general background of zoning, how the process is organized in local government, and what the economics are that drive the system. The second area I cover is flexibility devices such as variances, special exceptions, contract, and conditional zoning so that students know that the system is not a rigid one. I then turn to aesthetic regulation as the final subject matter that I cover in the course since that appears to be an area of increasing litigation.

II. WHY THIS CASEBOOK? BEYOND THE THEMES

There are a number of things I like about this casebook beyond the fact that its themes articulate property concepts as I believe they should be taught. The first is that this book gives the student a visual sense of the cases. By that, I mean that the authors have gone to great lengths to put into the casebook pictures of persons such as Chief Justice Marshall⁴⁹ and Sir William Blackstone⁵⁰ so that students have some sense of the person who is writing the opinions. Wherever possible, there are pictures or sketches of the properties that are the subject of litigation so that student understands this is not some mythical piece of property named Blackacre. In the discussion of adverse possession of chattels, there are pictures of Georgia O'Keefe's paintings.⁵¹ All of that has a way of keeping the student interested in the cases since they have some sense of what exactly is at issue. I

48. *Id.* at 739-1210.

49. *Id.* at 13.

50. *Id.* at 25.

51. *Id.* at 155, 163.

hope that, over the years, more pictures will be added, as I think it makes a significant difference to the student.

The book also has a sense of humor. Where it is appropriate to do so, the authors will include a *New Yorker*⁵² cartoon or tell a humorous story that illustrates the point under discussion. This is important to students for whom the reading of cases and their discussion often become tedious. In addition to the humor, the authors have gathered a great deal of background material on some of the cases, which they use to bring out something of the personality of the parties or their real motives in bringing litigation. All of that helps the student to understand that they must often look beyond the case to the story behind it in order to fully understand what is going on. Even where the information is not found in the book, I think it is sometimes helpful to speculate what the motives of the parties might be that allowed this case to be litigated rather than settled.

Having said all that, it is the note material that I appreciate most. Having seen casebooks where the note material is exhaustive and tedious, I continue to value this book for its use of note material, problems and questions, which both relate well to the principle under discussion and which force the student to probe the limits of the principles and to consider alternative approaches. Over the years, I have found that my students often ask whether they are responsible for the note material. When I reply in the affirmative, I get the impression that I have laid some insurmountable burden upon them. In this casebook, most of my students seem anxious to read the note material because they understand that it will put the case in context, give them alternatives to consider and challenge their thinking, all of which better prepares them for classroom discussion. Indeed, I often get questions in class that come right out of the note material. If I have one quibble, and it is just that, it is that there are not enough problems for students to work through. It is in the problems that I find most students gain a sense of accomplishment and mastery over the material.

I suppose it would be stating the obvious at this point to say that I like this casebook a lot. I am always looking for a better one; however in the years since 1981, I have never found it. I learn something new from the book every time I prepare my course. My wish is that it continue to age well and that future generations of students have the benefit of its wisdom.

52. See, e.g., *id.*