

SUGGESTED READING FOR PLEASURE AND PROPERTY

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In the 1960's, satirist Tom Lehrer worried that, unlike previous wars, thermonuclear war might not have any really good songs, so he solved the problem by composing *So Long, Mom (A Song for World War III)*.¹ Similarly, there's nothing wrong with first-year Property that could not be solved by the identification of some good introductory books to recommend to entering students. From their early reading of *A Civil Action*² and *The Buffalo Creek Disaster*,³ beginning law students share a common experience and knowledge base which our colleagues teaching Civil Procedure in recent years have been able to tap at various times over the course of the semester. Are there not similar texts for those who teach Property?

Property instructors need look no further than the winners of the Pulitzer Prize for Fiction in 1992 and 1997, Jane Smiley's *A Thousand Acres*,⁴ and Steven Millhauser's *Martin Dressler: The Tale of an American Dreamer*.⁵ Reading these books during the summer preceding law school matriculation would inform and considerably demystify the subsequent study of property law.⁶

I. MARTIN DRESSLER: THE TALE OF AN AMERICAN DREAMER

For Property students, *Martin Dressler* is a cautionary tale helpful in understanding the psyche of future clients. It is also a morality story painfully familiar to Property professors with backgrounds in transactional real estate practice. Commercial land developers are obsessive visionaries. While most

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1. TOM LEHRER, *So Long, Mom (A Song for World War III)*, on THAT WAS THE YEAR THAT WAS (Reprise Records 1965).

2. JONATHAN HARR, *A CIVIL ACTION* (1995).

3. GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

4. JANE SMILEY, *A THOUSAND ACRES* (1991).

5. STEVEN MILLHAUSER, *MARTIN DRESSLER: THE TALE OF AN AMERICAN DREAMER* (1996).

6. Of course, those Property instructors who believe they derive some benefit from the vague sense of dread with which first-year students approach Property, only later to express on evaluations how much their enjoyment of the course exceeded expectations, might see demystification as hurtful to their interests.

people who gaze upon vacant Blackacre see nothing more than a pile of dirt (except, of course, for Property instructors who see a bundle of sticks), the real estate developer pictures a mixed-use office/retail complex. At the height of his career in turn-of-the-twentieth century Manhattan, Martin Dressler saw hotels, though not of the ordinary chain variety. Dressler dreamed of vast mega-plexes, surpassing even the most colossal and outlandish pleasure palaces to be constructed in Las Vegas a century later. The hotels of Dressler's imagination were new concepts in urban living, easily capable of satisfying every human need or desire. They were permanent residences and theme parks rolled into one. Where other hotel developers think fantasy suites, Martin Dressler built multiple fantastic subterranean levels, each more extravagant and audacious than the next. A Dressler hotel was a city within the city, "a complete and self-sufficient world, in comparison with which the actual city was not simply inferior, but superfluous."⁷

Consider the following description of his penultimate hotel, the New Dressler, whose grand opening in 1902 coincided with Martin's 30th birthday:

Much attention was drawn by the seven underground levels, composed of a landscaped park with real squirrels and chipmunks (the first level), a complete department store (the second, third, and fourth levels), a series of Vacation Retreats (the fifth and sixth levels) . . . for the use of hotel guests: a campground with tents in a brilliantly reproduced pine forest with swift-flowing streams; the deck of a transatlantic steamer, with canvas deck chairs, shuffleboard courts, and hand-tinted films of ocean scenery displayed on the walls, a wooded island with log cabins in a large lake with a ferry; a replica of the Atlantic City boardwalk, complete with roller-chair rides, as well as half a dozen streets crowded with theaters and movie houses; a health spa with mineral baths; and a national park containing a geyser, a waterfall, a glacier, a small canyon, and winding nature trails.⁸

Like so many successful land developers in non-fiction, Martin Dressler came from modest beginnings as a cigar shopkeeper's son. Starting out as a bellboy at age fourteen, he swiftly worked his way up from the ground floor to a height of dreamlike good fortune in the New York City hotel industry. That Dressler would wind up losing it all while still in his thirties is foretold in the very first paragraph when the author describes the realization of one's dreams as "a perilous privilege, which the gods watch jealously, waiting for the flaw, the little flaw, that brings everything to ruin, in the end."⁹ In the final analysis, Dressler's fatal flaw was a lethal admixture of the very qualities essential to success in commercial real estate—ambition and audacity. Overwhelmed by a sense of confusion and longing for the familiar, potential renters and customers

7. MILLHAUSER, *supra* note 5, at 265.

8. *Id.* at 236-37.

9. *Id.* at 2.

refused to patronize Dressler's signature project, upon which he had staked his entire fortune and all his hopes. The Grand Cosmo thus became an early example of the real estate development genre that would come to be known in the late twentieth century as a "see-through," under-occupied and destined to be lost in foreclosure. As his final dream, in what Millhauser describes as "an act of disobedience,"¹⁰ Martin Dressler had defied the deities. No longer content with the mere creation of spaces, he sought to become the ultimate creator of "a world within the world, rivaling the world; and whoever entered its walls had no further need of that other world."¹¹ In the process, Dressler had blasphemously usurped an attribute which belongs to only one real estate developer, King of the Universe.

Students will find Millhauser's lyrical prose descriptions of his protagonist's vision useful in analyzing the owner's right to exclude, one of the most treasured strands in the metaphorical bundle of property rights.¹² In the three decades following the Supreme Court's holding in *Lloyd Corp. v. Tanner*,¹³ the issue of whether the regional shopping center constitutes a public forum which must be made available for the exercise of freedom of expression has continued to be litigated vigorously on a state-by-state basis.¹⁴ In concept and execution, Dressler's hotels were precursors of the late twentieth century festival marketplaces. Although their ultimate purpose was to be commercial, their uses were all-embracing, almost without limit, projecting a community image. According to Dressler,

The idea was to lure customers in . . . and then to persuade them that they never had to leave, since everything they desired was immediately at hand. It struck him that what the stores really ought to do, if they wanted to keep customers there for as long as possible, was add several hundred parlor-and-bedroom suites. And as Martin pursued such thoughts, again he was struck by the kinship between the hotel and the department store, for each sought to attract and hold customers, each sought to be a little world in itself, each brought into a single large structure an immense number of juxtaposed objects serving a single ideal. The department store and the hotel were little cities, cities in advance of the city, for they represented in different forms the thrust

10. *Id.* at 281.

11. *Id.* at 284.

12. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

13. 407 U.S. 551 (1972) (holding that a privately-owned shopping center may exclude Vietnam War protestors seeking to exercise their freedom of expression, but allowing state courts to interpret their own state constitutions as granting greater free speech rights than those guaranteed by the U.S. Constitution).

14. Supported by their trade association, the International Council of Shopping Centers, mall owners to date have prevailed in Arizona, Connecticut, Georgia, Michigan, New York, North Carolina, Pennsylvania and Wisconsin, and lost in California, Massachusetts, New Jersey, Oregon and Washington.

toward vertical community that seemed to Martin the great fact of the modern city.¹⁵

II. A THOUSAND ACRES

Awarded both the Pulitzer Prize and the National Book Critics Circle Award, *A Thousand Acres* is the timeless King Lear story transplanted in the rich soil of rural Zebulon County, Iowa, during an era when corporate agriculture was fast replacing the family-owned farm. Like Lear several centuries earlier, Jane Smiley's patriarch, Larry Cook, late in life suddenly and unwisely offers to incorporate his 1000-acre farm and divide ownership among his three daughters. Ginny and Rose, who live and work on the farm with their husbands, readily accept their father's proposition. When youngest daughter Caroline, a Des Moines attorney, rejects the idea, her outraged father reacts swiftly by cutting her out. Because it is the modern era, the strife that ensues inevitably includes intra-family litigation.

Smiley grew up in Saint Louis before leaving to study at Vassar and the University of Iowa, where she received her Ph.D. She is familiar to academicians as the author of *Moo*,¹⁶ a darkly wicked satire that chronicles the

15. MILLHAUSER, *supra* note 5, at 181. Compare Chief Justice Wilentz, writing for the court in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 774 (N.J. 1994), *cert. denied*, 516 U.S. 812 (1995):

The regional and community shopping centers have achieved their goal: they have become today's downtown and to some extent their own community; their invitation has brought everyone there for all purposes. Those purposes in fact—regardless of their clear subjective profit motive—go far beyond buying goods; they include not only expressive uses but so many different uses without any commonality other than the mix of uses that define a community, and in terms of the centers' motivation, almost anything that will bring people to the centers.

Id.

16. JANE SMILEY, *MOO* (1995). Published to considerable popular and critical acclaim, *Moo* recounts the exploits of a multitude of characters representing each of the various academic constituencies—administrators, senior and junior faculty members, students and staff. By way of example is the scene when the department lothario catches his first glimpse of an attractive stranger at the beginning of the new academic year:

Here it was that he gazed upon a sight he had never seen in Stillwater Hall, the sight of a beautiful dark-haired girl with the natural exotic grace that Midwestern women never had. She was replacing a pin in her hair, then she was picking up her briefcase, which students never carried, so he deduced that she was some kind of faculty member, then she was putting her hand on the knob of the classroom door right next to his classroom door, and then he was saying, 'Can I help you?' and she was saying, 'No' and he was saying, 'I'd certainly like to,' and she was throwing him an amused glance, and he was thinking that forty-five classes in the semester were forty-five chances to make a favorable impression, and he had better take his time, and if she heard his class through the wall laughing that would be a good start, so he went in and told a joke and they did laugh, and it did reach the ears of Cecilia Sanchez and she did smile.

intrigue, liaisons and academic politics within the horticulture department at a fictitious Midwest research university. Written in an entirely different voice and style, *A Thousand Acres* evidences the breadth of Smiley's talent. Unlike the page-turning pace of her earlier novel, readers of *A Thousand Acres* will find themselves more likely to put down the book after completing a chapter to contemplate its significance before moving forward.

A Thousand Acres, like *Lear*, illustrates dramatically the peril of premature divestment of property in a dysfunctional family. After receiving control of the farm, the daughters no longer have reason to indulge the irritating behavior of their now useless and aged father. Perceiving their ungratefulness and rejection, and his own isolation and confusion, Cook rails against his daughters, "You think because I gave you girls the farm, you don't have to make up to me any more. I know what's going on."¹⁷

The failure to resolve family inheritance disputes short of asset- and emotion-draining litigation is a recurring theme in the first-year course.¹⁸ In *Pigg v. Haley*,¹⁹ testator Edward Haley left wife Eva a life estate with power of disposition in his personalty, and in his one-half interest in their 152-acre farm, with the remainder to distant relative Garland Pigg. Distraught over her husband's death and misinformed as to her rights under his will, Eva soon entered into an agreement with Pigg by which she gave up her power of disposition over the realty in return for the relinquishment of his remainder interest in the personalty. Later, Eva sought to void the agreement for failure of consideration. Because she had the power to spend or otherwise dispose of all of the personal property during her life, she argued that in reality Pigg had given up nothing. The court upheld the agreement. It did confer upon Eva the not insubstantial benefit of dying well-off. Before the agreement, someone in Eva's position might have felt compelled to prematurely divest herself of her property *inter vivos*, lest it otherwise pass to Pigg upon her death. After the agreement, Eva could enjoy all of the benefits (such as invitations from potential heirs to Sunday dinners) of living out her life as a wealthy woman, in dramatic contrast with *Lear* and Larry Cook.

Because so much of modern property law doctrine has its origins in agrarian contexts, it is not surprising that *A Thousand Acres* illustrates themes and fact patterns of cases studied in the first-year course. In *Moseley v. Bishop*,²⁰ the Indiana Supreme Court found that the horizontal privity required to enforce a covenant between two adjacent landowners was satisfied by the

Id. at 16.

17. SMILEY, *supra* note 4, at 174.

18. *See, e.g.,* Woodrick v. Wood, No. 218870, 1994 WL 236287 (Ohio Ct. App. May 26, 1994) (involving a remainderman daughter who sued her own mother to enjoin life tenant from razing barn).

19. 294 S.E.2d 851 (Va. 1982).

20. 470 N.E.2d 773 (Ind. 1984).

existence of a drainage easement appurtenant. When the current servient parcel owner refused to perform his predecessor's promise to maintain the drainage tiles in good condition, the dominant parcel owner sued for damages caused by the resulting flooding.

Readers of *A Thousand Acres* will appreciate the impact of soil drainage conditions on agricultural land valuation: standing water transforms farmland into malarial marsh. Larry Cook had been able to acquire portions of his acreage cheaply for this reason. In her role as narrator, Ginny describes the absence of standing water as a sign of a good farm (together with clean fields, neatly painted buildings, breakfast at six and no debts). To the farmer, arable land is

created by magic lines of tile. . . . Tile 'drew' the water, warmed the soil, and made it easy to work, enabled him to get into the fields with his machinery a mere twenty-four hours after the heaviest storm. Most magically, tile produced prosperity—more bushels per acre of a better crop, year after year, wet or dry.²¹

A tile floor, Ginny says, is

better than a trust fund, more reliable than crop insurance, a farmer's best patrimony. It took . . . a generation, twenty-five years, to lay the tile lines. . . . I in my Sunday dress and hat, driving in the Buick to church, was a beneficiary of this grand effort, someone who would always have a floor to walk on. However much these acres looked like a gift of nature, or of God, they were not. We went to church to pay our respects, not to give thanks.²²

Returning to *Mosely*, it's small wonder, then, that Edith Mosely would litigate vigorously to enforce William Bohn's covenant to keep the tile drain on his property in good repair.

When Larry Cook, joined by Caroline, files suit against Ginny and Rose for rescission, the family lawyer who had previously handled the restructuring advises the two sisters that they must now hire their own attorney. "I thought you were our lawyer," they replied. "I can't be. It's not ethical," he answers correctly, only later to re-appear as plaintiffs' counsel, in breach of the standards of professional responsibility.²³

The sisters' meeting with their newly hired lawyer, Jean Cartier, is described in three brilliantly-nuanced pages that capture the essence of the attorney-client relationship. An initial client consultation is a delicate ballet in which both parties seek to determine whether each is right for the other. When Cartier expresses over-zealousness, Ginny reacts adversely. "I felt a tightening in my chest at this remark, as if, should we get the farm, Daddy would be

21. SMILEY, *supra* note 4, at 15.

22. *Id.*

23. *Id.* at 239-40.

consigned to wander around in the rain for the rest of his life,”²⁴ Ginny says. Cartier registers his own uncertainty after a comment that suggests the sisters’ true motivation might be vengeance. A conscientious lawyer seeks at the outset to screen clients who will likely not be satisfied regardless of the outcome.

A thorough and skillful interviewer, Cartier “explored the family rift in the deliberate way a surgeon might probe a wound, not poking or cutting, but holding one layer out of the way while inspecting deeper ones.”²⁵ Not until the second hour of the consultation did he offer his own advice. “In my experience, passing down the farm is always difficult,”²⁶ he sympathized, “[e]very farmer remembers what an unusually sober and industrious young man he was himself.”²⁷ Cartier emphasized the critical importance of maintaining appearances for public consumption during the pendency of litigation. “You ladies, you wear dresses every day, and keep the lawn mowed and the porch swept,”²⁸ he advised.

It is apparent that Cartier clearly made a very favorable impression on his new clients. “[W]hen we entered the world of Jean Cartier,” Ginny notes, “a lot of things began to seem different, less impossible than they had before. Nothing changed, but it all coexisted more agreeably, as if the march of time that would soon make everything crash together were suspended.”²⁹ First-year students could be exposed to no better exemplar of the essential nature of the lawyer’s craft.

These are my suggestions of reading for pleasure and property. I look forward to yours.

24. *Id.* at 283.

25. *Id.* at 281-82.

26. SMILEY, *supra* note 4, at 283.

27. *Id.*

28. *Id.* at 284.

29. *Id.* at 282.