

THEORY AND PRAXIS: ADVICE TO THOSE LEARNING PROPERTY AND A REQUEST TO THOSE WHO TEACH IT

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I. INTRODUCTION

This is not really an essay about learning property law. Or rather, it didn't start out as such. This essay began with the hypothesis that "property law should not be a required course in law school, particularly during the first year." It didn't take long before I realized that this position was untenable, however. In fact, my first conversation with another attorney (my wife, who practices in the area of tax and estate planning), convinced me otherwise. As my wife aptly pointed out, the one constant across every client an attorney will encounter is that each and every one will have some cognizable property interest.

Take, for instance, the most ascetic client, living in the woods of a national forest with no material possessions whatsoever. While that client ostensibly has no "possessions," he still has protected property interests in his privacy and the commercial value of his name or likeness.¹ Clearly then, property issues are pervasive, and it is this feature that dictates that the area deserves special attention within the curriculum.²

So why was it that I initially intended to argue that Property should not be a required class? The primary problem seemed to be irrelevance: during my second and third year classes and my summer associate experience, I never encountered any issues of Worthier Title, Shelley's Case, or the Rule Against Perpetuities. While I constantly encountered problems surrounding the substantive areas of contracts and torts, there were precious few opportunities to study or practice property law.

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1. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (reasoning that "the State's interest in permitting a 'right of publicity' is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment"); see also J. THOMAS MCCARTHY, *RIGHTS OF PUBLICITY AND PRIVACY* § 1:7 (2001) (stating that the "right of publicity is the right of a person to control the commercial use of his or her identity").

2. Likewise, a strong argument could be made that Property is more important now than ever before, since intellectual property has moved to the forefront of the economy.

Upon further reflection, however, it seems that my indifference to Property results from the fact that I've never fully understood where Property properly stands in the legal regime. At the most basic level, contract law involves the negotiation and arrangement of rights and duties between persons. Tort law concerns itself with the damage of protected interests, including property interests, by other persons. At first glance then, Property law nicely completes a triumvirate by defining those "things" altered by contract and damaged by tort. If this were the end of the story, there would be no problem.

II. SOME ADVICE

The source of my difficulty in learning property law, however, revolves around the fact that much of what is covered in Property does not fit into this neat little package. In fact, much of property law is in fact tort law, or contract law, or constitutional law. When all of these areas are carved off of the syllabus, what is left as "core" property law is in fact, very little. I am not suggesting that these other substantive areas of law are swallowing up property law.³ Rather, it is my intent to point out that much of what is taught in Property is perhaps better classified (if not covered) in other first year classes. While all substantive courses rely to a certain extent upon principles developed in other areas, property law is perhaps the least doctrinally defined area of law.

For example, most property courses examine the constitutional scope of the taking of property.⁴ From a property law standpoint, such cases delineate the outer boundary of the "bundle of sticks" that makes up property itself. However, it is completely impossible to appreciate the nuances of takings jurisprudence without a solid background in constitutional law. The "nickel tour" of constitutional law necessary to understand the issues simply does not allow the student to appreciate the complications involved in the disputes.⁵

Likewise, other areas studied in property law courses are better covered elsewhere. While there are important differences between a landlord/tenant dispute and a "run-of-the-mill" contract case, landlord-tenant law is in fact a subset of contract law, more so than a substantive area of property law. Similarly, most real estate transactions are contractual matters. While some

3. For a related discussion concerning the relationship between contract and tort, see GRANT GILMORE, *THE DEATH OF CONTRACT* (1995).

4. See, for example, the two articles concerning the recent *Palazzolo* case in this volume: William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 ST. LOUIS U. L.J. 833 (2002); and Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings after Palazzolo*, 46 ST. LOUIS U. L.J. 713 (2002).

5. I would submit that the converse is not true—that a brief background of property rights is sufficient to inform the first-year constitutional law student. Most students have no problem understanding that there is a continuum of property rights and responsibilities as between people and things.

property disputes between neighbors fall into the realm of contract (insofar as they arise out of servitudes), most are a subset of tort, since they involve damage to property; further, all nuisance cases are in fact tort cases, not property cases.

The difficulties of learning property can be illustrated by an innocuous case from property law, *Paradine v. Jane*.⁶ In *Paradine*, the lessor of a tract of land sued the lessee upon the lessee's failure to pay rent "at the usual feasts" for four years. By way of defense, the lessee argued that no rent was due because

a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 of July 18 Car. [1642] till the Feast of the Annunciation, 21 Car. [1645] whereby he could not take the profits.⁷

The court held that the marauding prince's occupation of the land did not relieve the lessee of his obligation to pay rent. *Paradine* is a great case because it illustrates the application of a bright line rule, even where such an application may result in an outcome that is seemingly "unfair." As a property case, *Paradine* explores (at least for 17th century England) the boundaries of the obligation to pay rent and the interaction between private and public relationships to land.⁸

The confusion comes in, however, because *Paradine* is not really a property case. In a note following *Paradine*, my casebook mentioned that "[a]s you will learn in your Contracts course, the Common Law has long since recognized an exception to the rule of *Paradine v. Jane* for contracts that are impossible to perform through no fault of the obligor."⁹ So *Paradine* is therefore properly a contract case. Or is it? Note that the court speaks in tort terms, and not contractual terms. Certainly the court points out the distinction between duties created between parties and duties created by law,¹⁰ but the

6. 82 Eng. Rep. 897 (1647).

7. *Id.*

8. Note, for example, that the very government that failed to defend the lessee's rights against Prince Rupert was the same government that forced the lessee to pay rent to Paradine. Rather than being "an enemy to the King" as alleged, Prince Rupert was in fact a nephew of King Charles I, and was acting in support of Charles in the skirmishes leading up to the English Civil War. See CHRISTOPHER HIBBERT, *CAVALIERS AND ROUNDHEADS* 56 (1993) (noting that "[a]lthough there were capable officers in the King's army more than twice Prince Rupert's age and with far greater experience, he was immediately appointed his Majesty's Lieutenant-General of Horse, a demonstration of royal favour and trust"); see also Eva Scott, *Prince Rupert Palatine* 59 (2d ed. 1900). The lessee was therefore in the unfortunate position of appealing to the King's Bench for relief from the acts of an agent of the King.

9. SANDRA H. JOHNSON ET AL., *PROPERTY LAW* 269 (2d ed. 1998).

10. *Paradine*, 82 Eng. Rep. at 897.

rationale provided sounds in tort more so than contract: “[a]nother reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor.”¹¹ Forget the Chicago School; we can now see that the Law in Economics movement really began in England in the latter part of the reign of Charles I.

The problems raised in classifying *Paradine* echo in much of the rest of property law. Issues that bear abundant theoretical fruit for professors and commentators are barren of lessons for those seeking assistance in the praxis-oriented worlds of the student or the practitioner.¹² Clients simply don’t come to lawyers with “property” issues, but rather with concrete disputes that must be characterized so that problems can be solved. If a *Paradine*-type case is really decided under contract principles sprinkled with the dialogue of tort, what tools does property law have to offer to future clients?

My advice to those learning property is to recognize first that property law looks outside itself much more than other substantive areas of law. What may be presented as a property issue may in fact be better analyzed as a problem in tort, contract, constitutional law, or some other area. Furthermore, I think that it is worthwhile to understand that the most difficult cases are those that lie at the intersection of all of the areas, and that what is taught traditionally as property law contains many such “hard cases.”

III. A REQUEST

Property law should be concerned at the root level with explaining the basis of “things”—what they are, how one goes about obtaining them, the rights associated with “ownership,” et cetera. This is where the practicing attorney can find tools to assist his clients. With this concept in mind, I’ll go out on a limb and suggest here and now that *future estates have no business in first year property courses*. This area of law is so arcane and so narrow that the practitioners who wish to learn these issues should bear the onus of seeking out these classes. We wouldn’t be alone in abandoning our vestigial tools. For instance, the Navy broke with its tradition by ceasing to teach celestial navigation in 1998.¹³ Engineers abandoned slide rules in the mid-1970’s.¹⁴

11. *Id.* at 898.

12. For a helpful discussion of a praxis-oriented approach to tort law, see Paul Passanante & Craig G. Moore, *Recent Developments in Trial Techniques*, 37 TORT INS. LAW JOURNAL (forthcoming winter 2002).

13. *Shooting the stars; Naval Academy: Celestial navigation as passe in Navy training as swordsmanship is to soldiering*, BALT. SUN, June 4, 1998, at 16A.

14. Bill Workman, *Along the El Camino: Retired Space Engineer Takes the Measure of an Era; Slide rules shouldn’t lose place in history, Palo Alto collector says*, S.F. CHRON., August 28, 1997, at A21.

Both acts raised alarm bells, but neither act has spelled the end of the profession thus far.

I can understand the pedagogical value in using future estates to teach rigorous thinking and adherence to detail. A misplaced comma can spell doom to a multi-million dollar transaction, and learning this early is of great value. However, the expansion of the ranks of the legal profession and the increased productivity created by the computer is doing away with the general practitioner, that jack-of-all trades who handled all legal issues. Gone are the days where every attorney was expected to handle a multitude of conveyances during their professional life. Our curriculum should recognize this change, just as the Navy recognized that the use of the sextant, while still useful, did not justify the time being spent learning it. My request for those who teach property law, therefore, is to examine the substantive areas that comprise the core of property law, and consider whether they are relevant to the expectations of clients and attorneys today.

IV. CONCLUSION

So where have I essayed thus far? It seems that this article has two purposes: a word of advice and a word of request. My advice for those seeking to learn property law is to think long and hard about where Property fits within the law overall. I think that if I had recognized there are no neat doctrinal packages that define every dispute, I'd have had an easier time learning property and an easier time applying it in subsequent classes and in the practicing world. My request for those who teach property law is to consider these same problems of classification, and to ask yourselves whether the core substantive areas that are taught as property are really those that will provide the greatest use for the greatest number of attorneys.