

# Book Review: Cases on the Law of Property: By Russell Denison Niles and Elmer M. Million

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## BOOK REVIEW

Russell Denison Niles\* and Elmer M. Million,\*\* *CASES ON THE LAW OF PROPERTY*: Bobbs-Merrill Company, Vol. 1, 1951, \$8.50; Vols. 2 and 3, 1957, \$7.50 each.

The volumes to be reviewed were quite obviously prepared by their authors with the purpose of providing a modern property casebook for the law student foremost in mind. But their accomplishment has been multi-fold as the writer shall attempt to prove. The works shall not be gauged against a standardized property authority; the intent is merely to examine the contents of the volumes and perhaps to evaluate them. All three volumes are considered so as to give a complete indication of the arrangement utilized by the authors in presenting a thorough explanation of both real and personal property law.

Volume I of the set treats of the vital property concepts of possession and ownership. To provide a sturdy foundation for the beginning property student, the term "property" is defined per the Restatement:<sup>1</sup>

"The word 'property' is used in this Restatement to denote the legal relations between persons with respect to a thing. . . . The broader meanings of the word 'property', which include any relationships having an exchange value, are not used."

The basic legal relations which the student must comprehend are further subdivided and analyzed as "rights", "privileges", "powers", and "immunities" with definitions established for them. The fundamental objective of the initial chapter is to explain that the legal meaning of ownership is that of the vesting of a complex aggregate of legal rights, privileges, powers and immunities—all relating to the land or personality in question. Included in the introductory material is the distinction between rights *in rem* and *in personam*. Idolators of Justice Holmes will be satisfied in finding the famed opinion of *Marrone v. Washington Jockey Club*<sup>2</sup> included as a leading example.

The second chapter in Volume I is devoted to an explanation of the relation of Possession to Ownership. The major premise is that, as developed by the common law, "Seisin is Possession." The legal rights of the party in possession are then analyzed. This writer was rather pleased to note the limited coverage afforded to the hoary subject of Bailments. The authors explain at p. 120 of Volume I:

"Less time than formerly is now available for the study of bailments. Statutes have obliterated some of the important common-law distinctions, and much of the subject-matter is

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<sup>1</sup> RESTATEMENT, PROPERTY, pp. 3-11 (1936).

<sup>2</sup> 227 U.S. 633 (1913).

now found either in texts on Torts, or, in the case of the common callings, in courses in government regulation of business. Bailment relationships, however, continue to grow in number."

The chapter concludes with a consideration of the law of Adverse Possession. A valuable learning device is the inclusion of hypothetical questions giving practical applications of the various statutes of limitations.

Chapter 3 of Volume I deals with the acquisition of title to personal property. With such an important area of property law involved, it would seem that the authors could have given it greater emphasis, especially the section relating to voidable title<sup>3</sup> and estoppel — apparent authority questions. At p. 311 of Volume I, there is contained a succinct but thorough outline of the methods of obtaining title. This is but one of many study aids that the property student will enjoy in the use of the three volumes. Organization seems to have been well-fixed in the minds of the authors.

In the chapter on Security Interests in Personal Property,<sup>4</sup> a major criticism seems warranted as there is much emphasis on Simple Liens and Pledges and not enough on Conditional Sales Contracts, Chattel Mortgages and the like. But, in fairness, it should be noted that the avowed purpose of the authors is to present Property Law; the latter subjects might properly be considered as strictly belonging to the law of Sales.

The concluding chapter in Volume I deals with the Enjoyment of Land. The presentation might be considered sketchy, especially that of Airspace. The material on Water Rights is improved but more coverage could have been afforded the modern "reasonable-use" theories.<sup>5</sup> There is a redeeming section which presents an up-to-date treatment of Minerals, Oil and Gas.

Volume II of the set herein reviewed contains materials on Freehold and Non-freehold Estates. To maintain the firm foundation that they appear to have strived for and achieved quite well, the authors initiate their discussion with a consideration of the early feudal system.<sup>6</sup> The nature of the freehold estate is then explained,<sup>7</sup> followed by an analysis of the estate in fee simple.<sup>8</sup>

<sup>3</sup> 2 WILLISTON, SALES §348 (rev. ed. 1948) is merely cited for its rule, with no discussion of the problems the section has raised. See, e.g. Corman, *Cash Sales, Worthless Checks, and the Bona Fide Purchaser for Value*, 10 VAND. L. REV. 55 (1956); Vold, *Worthless Checks, Cash Sales, "Substantially Simultaneous" and Conflicting Analysis*, 1 HASTINGS L. J. 111 (1949).

<sup>4</sup> Chapter 4 of Volume I, pp. 315-351.

<sup>5</sup> See, e.g. Kenyon and McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891 (1940); Kenyon, *What Can A Riparian Proprietor Do?* 21 MINN. L. REV. 512 (1937).

<sup>6</sup> Quoting, as they do consistently throughout the volumes, from WALSH, HISTORY OF ANGLO-AMERICAN LAW (2d ed. 1932), pp. 31-47.

<sup>7</sup> Quoting from BLACKSTONE'S COMMENTARIES, Book 2, p. 103.

<sup>8</sup> A Note on Statutory Changes as to Creation of Estates in Fee, p. 35, is a

Property teachers may find the limited matter on the law of Future Estates a fit subject for pedagogical controversy. For those who labored with the taxing definitions and distinctions, the abbreviated discussion may appear as a welcome respite. But there will be many in the opposite corner, favoring a more thorough coverage of this important aspect of property law. The writer is of the opinion that at least a few token cases illustrating applications of the Rule Against Perpetuities or the Rule in Shelley's Case<sup>9</sup> could have been included in addition to the excerpts from Walsh, History of Anglo-American Law.

Again the authors have done the law student a service by including a dichotomic outline of Freehold and Non-freehold Possessory Estates at Common Law. These short but informative study aids might well be employed by more casebook authors to insure that the subject-matter is organized in the minds of the students. The authors of the instant volumes have shown such concern for insuring the acquisition of knowledge by students that it seems almost possible they recalled that they were once studying the law with the objective *inter alia* of obtaining a degree.

The second chapter of Volume II contains the consideration of the Estate for Life—Its Nature and Incidents, with coverage of such problems as alterations and improvements by the life tenant and his right of contribution therefor. Included are notes on Wasting Assets, particularly such as Mines, Wells, and Quarries. (Each volume appears to have been written with a view to recognition of the current importance of mining and mineral rights in property law.)

Chapter 3 is strictly concerned with the Marital Life Estate. Of course, dower—its essentials, and curtesy, along with the statutory changes, are considered. Here criticism can be noted of a condition that pervades the entire set of volumes. The authors cite all too many cases arising out of New York. But considering that the casebooks are intended for use at New York University, this situation might have been anticipated.

In chapter 4, most phases of Co-Ownership are dwelt upon. The authors initially pose a convenient set of problems to be solved during the discussion:

1. Which forms of co-tenancy have been abolished by statute or are deemed obsolete?
2. To what extent have common law constructional preferences ("presumptions") for one kind of co-tenancy as against another, been abolished or reversed?

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very valuable index to the innovations made in property law by the various state legislatures.

<sup>9</sup> 1 Coke 94. ". . . The heirs are words of limitation of the estate and not words of purchase."

3. To what extent have the various jurisdictions modified common law rules governing the requisites for creation of, and the incidents arising from, a given type of co-tenancy?

4. A corporation could be a co-tenant in which types?

5. Might there exist simultaneously in the same parcel of land, several different types of co-tenancy? If so, how many?

In the ensuing discussion, these problems are analyzed with the assistance of much secondary authority, including many of the Law Review citations. This approach is typical of the volumes *in totum* as the authors have not been content to include merely cases of great length, but rather have cited many cases and secondary sources on each restricted problem and so have compiled a valuable index for not only the student but the property practitioner. Often as many as a half-dozen A.L.R. and treatise citations along with the leading cases are cited in support of a proposition asserted in a concise note. Some law professors will be indeed pleased to note the authors' disregard of the ancient rigid case-by-case approach to the law.<sup>10</sup>

Part 2 of Volume II deals with Estates Less than Freehold or, of course, the law of Landlord and Tenant. Initially the cases show the nature of a leasehold interest at common law, with the modern law and relevant statutory modifications developed later. Licenses and various contractual interests are then distinguished from leases. A particularly well-documented note on the status of the cropper is included at pp. 309-312 of Volume II.

The tenancies of uncertain duration — tenancies at will and periodic tenancies — are considered in light of the many statutory ramifications introduced in the various states. The practitioner should find the exhaustive compilation of annotations of value. The material on the tenancies resulting from holding over, while well-organized, might have included more on the effect of the unlawful detainer statutes now enacted in most states.

The relation of Landlord and Tenant includes in its analysis the problem considered in the famous constitutional case of *Dorsey v. Stuyvesant Town Corp.*,<sup>11</sup> followed by a consideration of the legal aspects of Rent. In the final chapter of Volume II there is a section on Emergency Control of Rents and Evictions with a Selective Bibliographic Note on Rent Control Legislation, at p. 546, that is quite thorough.

In Volume III, Conveyancing is first analyzed. In consistent fashion, the authors outline the evolution of the practice at common

<sup>10</sup> The authors have even gone so far as to devote a Special Note to Community Property at p. 242, 243 of Volume 2, explaining that: "Although often treated as a subdivision of the Law of Persons or Domestic Relations . . . or recognized as an independent legal field community property is essentially a kind of concurrent ownership of real and personal property by husband and wife."

<sup>11</sup> 299 N.Y. 512, 87 N.E. 2d 541 (1949).

law both before and under the Statute of Uses. Thereafter, the statutory basis of the modern deed is explored, followed by an examination of its general requisites.<sup>12</sup>

The very important section of the volume pertaining to deed descriptions cites many up-to-date cases and, as still another aid to learning, there appears a list of rules of construction to govern conflicts between different calls or elements of the same description.

In the portion of the volume devoted to Delivery of Deeds, there is a deserved emphasis on the conditional delivery problem. Many of the leading cases in point that have been decided are cited, if not condensed in their holdings.

Chapter 13 of Volume III treats of the effect that Recording has on the practice of Conveyancing. Again, the compact but well-supported notes accompanying the foremost cases provide an excellent index to the law. Thus, it can be reiterated that the volumes should be of interest to the property lawyer as well as the student.

But this writer would have preferred a greater emphasis on the distinctions between the types of recording statutes—notice, race, and race-notice.

The following chapter is logically correct in discussing Title Standards, Title Examination and Title Reliance. The various means by which a prospective purchaser may be certain that he acquires perfect title to the premises are considered. This section, in addition to quoting from the leading cases in point as well as the statutes of many jurisdictions, includes the most comprehensive bibliography in the volume.

Part 4 of Volume III will perhaps be the most interesting portion of the instant works as it deals with Servitudes. The initial chapter contains a preliminary discussion of Easements and Profits which might have been more definitive in organization.<sup>13</sup> And the material on Licenses is abbreviated, if not sketchy.

In the matter of Creation of Easements, Wisconsin conveyancers will not be surprised to learn that *Duinneen v. Rich*<sup>14</sup> is included as a styled case. The problem of obtaining Easements by Prescription is thoroughly covered, and it appears that a critic would be hard pressed to find an aspect that is not examined in some detail. The same might be said of the Extent and Extinction of Easements. The authors at times completely abandon the traditional casebook method in favor of a treatise or hornbook approach. No complaint will be heard from this quarter.

<sup>12</sup> An Introductory Note at p. 593 contains the following bit of classical understatement: "Some variation exists between the usual components of a deed, and its irreducible minimum essentials."

<sup>13</sup> There may also be a question as to whether the authors were prudent in citing the Restatement so freely. See CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND, (2d ed. 1947).

<sup>14</sup> 22 Wis. 550 (1868).

Chapter 16 of Volume III handles the questions arising in Covenants Running With the Land. No attempt will be made to evaluate the merits of the authors' approach to this area of Property Law except to say that the fundamental division established by lifting an excerpt from Walsh<sup>15</sup> is most refreshing. The problems of privity are then detailed along with a discussion of equitable servitudes and restrictive covenants. The latter problem is given a constitutional approach to insure proper balance.

In fitting conclusion to the up-to-the-minute property law repository that they have compiled, the authors have included in their final chapter a discussion of Governmental Interference With, or Control Of, Private Ownership. In the most important subdivision, regarding Eminent Domain, there is stated at p. 1205:

"An elementary analysis may be facilitated by examining *seriatim* the italicized words in the following sentence:

*"Private property shall not be taken except for public use and upon payment of due compensation."*

The authorities cited in the succeeding analysis should be of practical utility as an index to the law for any attorney beset with the current flood of litigation which this area of the law has produced.

The authors have concluded their efforts by compiling a selective bibliography on Zoning and Planning which, with finality, stamps the volumes as "more than casebooks" and rather a valuable addition to the library of the property expert, to say nothing of the common practitioner. As indicated initially, the authors have modestly prefaced their work as casebooks for the law student. They seem to have succeeded in this attempt for their departure from a strict adherence to the case-by-case progression appears to the writer to be a bold stride in the way of clarity. But apart from creating something that should invoke pedagogical approval, the authors have collected in three volumes an index to property law (not to discount the authority they themselves have established) that will prove of some great value to the graduated student — the practicing lawyer.

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<sup>15</sup> WALSH, HISTORY ANGLO-AMERICAN LAW (2d ed. 1932), pp. 276-282.

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