PROPERTY:
CASES, DOCUMENTS, AND
LAWYERING STRATEGIES
LexisNexis Law School Publishing
Advisory Board

Paul Caron
Professor of Law
Pepperdine University School of Law
Herzog Summer Visiting Professor in Taxation
University of San Diego School of Law

Olympia Duhart
Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher
Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland
Professor of Law and Senior Scholar
Elon University School of Law

Joan Heminway
College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried
Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus
Haynes Professor of Law
William and Mary Law School

John Sprankling
Distinguished Professor of Law
McGeorge School of Law

Melissa Weresh
Director of Legal Writing and Professor of Law
Drake University Law School
PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES

Third Edition

David Crump
John B. Neibel Professor of Law
University of Houston Law Center

David S. Caudill
Professor of Law & Arthur M. Goldberg Family Chair
Villanova University School of Law

David Charles Hricik
Professor of Law
Mercer University, Walter F. George School of Law
A Property Course for the Twenty-First Century, with Traditional Coverage

(1) Making Property Transactions Come to Life: A Modern Casebook, with Traditional Coverage. Property is not a musty, dusty subject. A casebook should make it come to life. This casebook does that, by emphasizing aspects of property transactions that are important today. At the same time, its organization and coverage reflect the custom of past course coverage.

On the one hand, the broad subjects covered in this book are traditional, and law professors will not be surprised by them. Personal property, real estate transactions, servitudes, leases, common law estates, and land regulation—the subjects that long have formed the backbone of the property course—all are present. On the other hand, this is a course for the Twenty-First Century. Personal property can be treated through coverage of intellectual property: patents, copyrights, trademarks and trade secrets. Property transactions are approached from the point of view of a contemporary lawyer representing a client. The book covers current documents, contemporary doctrines, and relevant concepts.

(2) Two Alternative Approaches. We have set up the book to facilitate its use in either of two alternative ways. One is to begin with the intellectual property chapter mentioned above. This is a novel approach. The other is more traditional: The professor can decide to begin with the chapter on personal property generally. We have designed that chapter so that it, too, can serve as an introduction to the course. We shall have more to say about these two alternatives later in this Preface.

(3) A Course for the Twenty-First Century, with Emphasis on Today’s Subject Matter. Every property casebook covers a large amount of highly forgettable material—forgettable because it no longer applies. In some instances, a page or two of history can illuminate the present, but dead doctrines probably should not become an end in themselves. For example, property coursebooks almost always include the following concepts:

- The Rule in Shelley’s case (abolished nearly everywhere)
- “Finder’s” cases about who owns lost or mislaid property (extremely rare)
- Profits a prendre (the terminology is no longer controlling)
- Ownership of wild animals pursued by hunters (not a major practice area)

This casebook will cover many of these topics, but it will treat them as background or history.

On the other hand, the casebooks tend to omit the following subjects (and some of these topics are not in any of them):
• Escrows (used in virtually every real property transaction today)
• Intellectual property (a huge and growing practice)
• Strategies for curing property defects (a frequent issue)
• Negotiation (omnipresent in property lawyering)

Although this casebook contains coverage of traditional subjects, it contains these subjects too—subjects that are important in the Twenty-First Century.

(4) Cases from the 1990s and 2000s: A Course about Developing Big Ideas. Whenever it is practical to do so, this casebook uses court decisions from the 2000s. Next in order of preference, it uses cases from the 1990s. Property law is a course about the development of big ideas. It is a course about the way in which private investment, within a framework of public regulation, can make people’s lives better. It is about the future, not just the past. Up-to-date cases emphasize this.

(5) Lawyering Strategies, Developed through Problems: A McCrate-Responsive Coursebook. And there is another way in which this book is different. Several years ago, the McCrate Report urged law schools to do more about preparing graduates to practice law. Essentially, the message of the McCrate Report was that law school should teach the competencies and strategies that lawyers actually use: client counseling, negotiation, document production, and litigation.

This casebook is McCrate-responsive. It develops the strategy component. Each of the transactional chapters features optional problems that put the student into lawyering situations. After all, lawyering is not about reading appellate court opinions and discussing in a vacuum whether they are “good” or “bad.” Instead, it is about resolving or avoiding problems. To achieve those ends, lawyers use strategies for counseling, negotiation, document preparation, and litigation. The problems are set in a variety of different property settings and call for a variety of strategies.

But this book is not primarily about strategies. The property course must fit with other courses in the first year, and it must fulfill the legitimate expectations of upper-level instructors who assume certain coverages. Therefore, analysis of statutes, reading of appellate opinions, and other traditional materials make up the bulk of this book. Still, the strategies and competencies of property lawyering are developed here, so that students can learn about them.

(6) Private Law: A Focus on Documents. Property law is private law. If the parties to a real estate transaction have entered into an agreement, the odds are good that a court will use it to resolve their dispute. There are, of course, public law aspects in the law of property. They are important, and this book will develop them. But most of the effort of lawyers in property transactions focuses upon negotiation and documentation of private agreements. The documents are as important as public law. Therefore, property transfer agreements, brokerage documents, deeds, mortgages, title insurance policies, promissory notes, and other documents, all are set out and explored in this book.

But once again, this book is not primarily composed of documents. The cases and the documents go together. And again, the traditional method of teaching, through court opinions, dominates these materials.
A Specific Example: Will You Be Able to Represent Shaquille O’Neal in His Quest for “Affordable Housing”? Here is an example, taken from a newspaper. Consider the following article and imagine what concrete steps you would take if you represented Shaquille O’Neal. Will your law school education prepare you for this?

Shaq becomes a giant-size landlord

Shaquille O’Neal has worked out a nearly $100 million deal to buy housing intended for thousands of lower-income Colorado residents.

The Los Angeles Lakers center is a general partner with American Housing Preservation Corp. of Portland, Maine, to buy 21 communities from Greenwood Village, Colo.-based Urban Inc., an investor and developer of affordable housing.

“My dream is to own $1 billion a year in affordable housing,” O’Neal said. The units are in Denver, Pueblo, Buena Vista, Fort Lupton and Canon City.

“It’s a Shaq-sized deal,” said Michael Liberty, chairman and founder of American Housing, referring to the 7-foot-1-inch, 350-pound player. “Shaq is now the biggest landlord in the country.”

“It’s not about the money,” Shraiberg said. “It’s about the preservation of affordable housing.”

Will you be ready to represent Shaq when you graduate from law school? Unfortunately, you won’t, if all you have done is to read court opinions. The cases do not tell you what to do. The cases will not teach you how to prepare or analyze a proposed purchase agreement, or a deed, or a mortgage, or a real estate note, or a title report, or an escrow agreement, or a set of deed restrictions, or a title insurance policy. And Shaq will need all of these.

To help your client, you will need to study the documents themselves and learn to analyze them. At times, it can be challenging to read documents. They have to be read clause by clause, and you cannot be content with generalities. But the fine print in those documents will suddenly become fascinating when you realize that you now know how to put together a real and important transaction. And that is what this book is all about. It will put you in a position to actually be helpful to Shaq in his quest for affordable housing, or to other clients with valuable ideas.

(8) Customary Transactions and the Problem Solutions That Have Developed from Them. A real estate lawyer must know customary ways of doing things. There may be no “law” in the sense of a statute or decision that tells the lawyer that the transaction “must” be done in a certain way, but still, doing the transaction differently may be entirely unworkable. Using a “straight” mortgage in a “deed of trust” state is not against the law; it merely is foolish, and no lawyer representing the other parties in the transaction will put up with it. The customary private agreement, in other words, becomes the law. And because national, quasi-public agencies are major players in the real estate market, the transactions feature documents with dozens of customary clauses, each of which the lawyer must understand if the client is to be properly represented.
In this situation, what is meant by “the law”? Does this term refer merely to the public statutes and decisions? These are background, but they are not the focus of the lawyer’s efforts. The law that governs what the lawyer actually does is composed of familiar documents, traditional clauses, and customary transactions. Again, property law is fundamentally private law.

But once again, this book must avoid a too-narrow focus. Public law is important, both in the form of interpretive principles for private documents and in the guise of land use regulation and titles. We shall study the function and limits of land regulation here, for example, as well as private “regulation” through neighborhood governance.

(9) The Goal: Developing Your Ability to Represent a Client Who Has a Worthwhile Idea. The goal of these materials is to equip you with strategies that will enable you to assist clients who have ideas. For example, imagine that Georgia Gearhead has developed a computer program that will make people’s lives better in a modest way, and she asks you to analyze an agreement that will help her bring it to fruition. Or, Harry Homebuyer has reached an impasse with his prospective mortgage lender because of a defect in the title to the dream residence he wishes to purchase, and he employs you to cure the problem. Or, Celeste Citybuilder seeks to acquire dilapidated public housing units and to rehabilitate them for occupancy by low-income tenants; and she wants you to help her buy the property, insure the title, obtain financing, close the transaction, and begin construction. Will you be able to do these things? Yes, if you master the concepts set out here.

In summary, the goal of these materials is to put you in a position where you not only can read and criticize an opinion by the United States Supreme Court, but also advance the ideas of clients such as these toward fruition.

(10) Theoretical Thinking: Law and Economics; Ethical and Political Philosophy. But it would be a mistake to omit theoretical analysis because of the effort to develop a strategic approach. One of the most important theoretical bases of property law is microeconomics. And so we have added an unusual Appendix A, on the Law and Economics of Property to this book. And property law ultimately is shaped by our ethics and politics. Therefore, we also have added an Appendix B, on Ethical and Political Theories of Property. The appendices assume no knowledge of economics, ethical philosophy, or political theories; they are designed to get the basics across to those who have never studied these subjects. The appendices are not necessary to the use of this book. But they can increase the reader’s intellectual capacity for policy analysis at many points in the regular chapters.

(11) Two Possible Ways to Use This Book: Intellectual Property as a Starting Point, or a More Traditional Beginning That Explores General Principles of Personal Property. Traditional property books sometimes begin with personal property cases, and the “finders’” cases referred to above are a favorite. These are cases in which someone has found a diamond ring or bag of money lost or mislaid by another person, and the finder litigates against the landowner to keep it.

Perhaps nothing more symbolizes the difference in this book than the optional substitution of intellectual property cases for finders’ cases as a beginning point. You may never deal with a finder’s case, but the odds are very high that you will deal with intellectual property protectable by patent, copyright, trademark, or trade secrets. The intellectual property cases are interesting. They
develop the nature of property as well as, and in some instances better than, the finders’ cases.

On the other hand, we have set up the book so that it also can begin in a more traditional way. Chapter 1 is a short chapter called, “What Is Property?” After that, the professor who wants a traditional beginning can skip over to Chapter 8, covering “Personal Property.” We have deliberately written Chapter 8 as an alternative starting point. That chapter contains finder’s cases and other traditional materials. Then, the professor can come back to Intellectual Property in Chapter 2—or skip it and go to Chapter 3, Real Property.

We, the authors, prefer beginning with Intellectual Property. We think it accomplishes all of the traditional beginning goals and teaches highly relevant materials, too. But either way makes sense, and either way will work with this book.

* * *

We hope that you will enjoy and learn from this book as much as our students seem to have—and as much as we have from developing it!

David Crump
David Caudill
David Hricik
Summer 2013
# SUMMARY TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>WHAT IS “PROPERTY”?</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>INTELLECTUAL PROPERTY: AN INTRODUCTION TO COPYRIGHTS, TRADEMARKS, PATENTS, AND TRADE SECRETS</td>
<td>5</td>
</tr>
<tr>
<td>3</td>
<td>REAL PROPERTY OWNERSHIP, INCLUDING MULTIPLE OWNERSHIP</td>
<td>77</td>
</tr>
<tr>
<td>4</td>
<td>REAL ESTATE TRANSACTIONS: THE PURCHASE AGREEMENT</td>
<td>133</td>
</tr>
<tr>
<td>5</td>
<td>REAL ESTATE TRANSACTIONS: FINANCING AND CONVEYANCING DOCUMENTS</td>
<td>223</td>
</tr>
<tr>
<td>6</td>
<td>REAL ESTATE TRANSACTIONS: TITLE ASSURANCE</td>
<td>299</td>
</tr>
<tr>
<td>7</td>
<td>REAL ESTATE TRANSACTIONS: CLOSING, TERMINATION, AND REMEDIES</td>
<td>355</td>
</tr>
<tr>
<td>8</td>
<td>PERSONAL PROPERTY: OWNERSHIP, TRANSFER, AND MISAPPROPRIATION</td>
<td>395</td>
</tr>
<tr>
<td>9</td>
<td>LIMITS ON GOVERNMENT POWER OVER PROPERTY</td>
<td>463</td>
</tr>
<tr>
<td>10</td>
<td>LAND USE REGULATION: FROM ZONING TO THE ENVIRONMENT</td>
<td>513</td>
</tr>
<tr>
<td>11</td>
<td>EASEMENTS, COVENANTS, AND OTHER SERVITUDES: PRIVATE LAND-USE ARRANGEMENTS</td>
<td>591</td>
</tr>
<tr>
<td>12</td>
<td>COMMON LAW ESTATES: POSSESSORY AND FUTURE INTERESTS</td>
<td>691</td>
</tr>
<tr>
<td>13</td>
<td>LANDLORD AND TENANT, PART I: THE LEASE AS A CONVEYANCE AND A CONTRACT</td>
<td>753</td>
</tr>
</tbody>
</table>
CHAPTER 14: LANDLORD AND TENANT, PART II:
MODERN REGULATION OF THE LEASE RELATIONSHIP ................. 833

APPENDIX A: LAW AND ECONOMICS: APPLYING BASIC ECONOMIC
PRINCIPLES TO PROPERTY LAW ........................................ A1

APPENDIX B: ETHICAL AND POLITICAL PHILOSOPHY:
THEORETICAL JUSTIFICATIONS OF PROPERTY LAW ............ B1

APPENDIX C: THE PERSONAL DIMENSION OF LAWYERING—
OR “CAN A LAWYER BE COMPETENT, DILIGENT, PROFESSIONAL,
SUCCESSFUL, AND ALTRUISTIC . . . AND ALSO LIVE A FULL LIFE?” ........ C1

APPENDIX D: SIMULATION EXERCISES: MATERIALS AND
INSTRUCTIONS ................................................................. D1

TABLE OF CASES ............................................................ TC1

INDEX .............................................................................. I1
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Preface to the Third Edition</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>CHAPTER 1: WHAT IS “PROPERTY”?</strong></td>
<td>1</td>
</tr>
<tr>
<td>§ 1.01 What This Course Is About</td>
<td>1</td>
</tr>
<tr>
<td>Notes on the Significance of “Property” Interests</td>
<td></td>
</tr>
<tr>
<td>§ 1.02 Historical, Theoretical, and Strategic Aspects of the Question “What Is Property?”</td>
<td>2</td>
</tr>
<tr>
<td>Note on Historical, Theoretical, and Strategic Perspectives</td>
<td>2</td>
</tr>
<tr>
<td>§ 1.03 Two Ways to Use This Book</td>
<td>3</td>
</tr>
<tr>
<td>§ 1.04 Patents, Copyrights, Trademarks, and Trade Secrets as Property Interests</td>
<td>3</td>
</tr>
<tr>
<td>Note on Our Use of Intellectual Property as a Beginning Example</td>
<td>3</td>
</tr>
<tr>
<td><strong>CHAPTER 2: INTELLECTUAL PROPERTY: AN INTRODUCTION TO COPYRIGHTS, TRADEMARKS, PATENTS, AND TRADE SECRETS</strong></td>
<td>5</td>
</tr>
<tr>
<td>§ 2.01 Intellectual Property: Its Creation and Validity</td>
<td>5</td>
</tr>
<tr>
<td>[A] Copyrights</td>
<td></td>
</tr>
<tr>
<td>Note on Copyrights</td>
<td>5</td>
</tr>
<tr>
<td>United States Constitution Art. I, § 8, cl. 8 (Patents; Copyrights)</td>
<td>5</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>5</td>
</tr>
<tr>
<td>17 U.S.C. § 102 (from the Copyright Act)</td>
<td>6</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>7</td>
</tr>
<tr>
<td>How to Read the Case of <em>OddzOn Products Inc. v. Oman</em></td>
<td>8</td>
</tr>
<tr>
<td><em>OddzOn Products Inc. v. Oman</em></td>
<td>8</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>11</td>
</tr>
<tr>
<td>How to Brief the Case of <em>OddzOn Products Inc. v. Oman</em></td>
<td>12</td>
</tr>
<tr>
<td>[B] Trademarks (And Unfair Competition)</td>
<td></td>
</tr>
<tr>
<td>[1] Trademarks, Registered or Unregistered</td>
<td>13</td>
</tr>
<tr>
<td>Note on Trademarks</td>
<td>13</td>
</tr>
<tr>
<td>How to Brief a Statute or Rule: Lanham Act § 1127</td>
<td>14</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>14</td>
</tr>
<tr>
<td><em>Qualitex Co. v. Jacobson Products Co., Inc.</em></td>
<td>16</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>20</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[2] Unfair Competition and Unregistered Trade Dress</td>
<td>21</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>21</td>
</tr>
<tr>
<td>Two Pesos, Inc. v. Taco Cabana, Inc.</td>
<td>21</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>24</td>
</tr>
<tr>
<td>Note on Terminology: Are “Copyright” and “Trademark” Useable as Adverbs?</td>
<td>24</td>
</tr>
<tr>
<td>[C] Patents</td>
<td>25</td>
</tr>
<tr>
<td>35 U.S.C. §§ 101, 103 (Selected Patentability Statutes)</td>
<td>25</td>
</tr>
<tr>
<td>United States v. Adams</td>
<td>25</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>26</td>
</tr>
<tr>
<td>Note on How to Read the KSR Case that Follows</td>
<td>27</td>
</tr>
<tr>
<td>KSR International Co. v. Teleflex, Inc.</td>
<td>28</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>31</td>
</tr>
<tr>
<td>Note on the Meaning of the “Claims” in a Patent</td>
<td>32</td>
</tr>
<tr>
<td>[D] Trade Secrets</td>
<td>33</td>
</tr>
<tr>
<td>Note on Trade Secrets</td>
<td>33</td>
</tr>
<tr>
<td>Al Minor &amp; Associates, Inc. v. Martin</td>
<td>33</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>36</td>
</tr>
<tr>
<td>§ 2.02 Transferring Intellectual Property: The Documents</td>
<td>38</td>
</tr>
<tr>
<td>Note on Property Transfer Documents</td>
<td>38</td>
</tr>
<tr>
<td>Crump, How to Read a Contract Proposal Written by Someone Else, or</td>
<td>38</td>
</tr>
<tr>
<td>Evaluating the Seven Elements of the Agreement</td>
<td>38</td>
</tr>
<tr>
<td>Simulation Exercise 2A (Document Preparation): Copyright Assignment</td>
<td>45</td>
</tr>
<tr>
<td>and Publication Problem</td>
<td></td>
</tr>
<tr>
<td>§ 2.03 The “Bundle of Rights” in Intellectual Property</td>
<td>46</td>
</tr>
<tr>
<td>[A] What Rights Are Protected, with What Pragmatic Consequences?</td>
<td>46</td>
</tr>
<tr>
<td>Note: Remembering the “Five Questions” about Property</td>
<td>46</td>
</tr>
<tr>
<td>Alan D. Rosenthal, Intellectual Property for Business Lawyers</td>
<td>46</td>
</tr>
<tr>
<td>[B] Defining Infringement: Enforcing the Bundle of Rights</td>
<td>50</td>
</tr>
<tr>
<td>Note on the Doctrine of Equivalents and on Patent Estoppel</td>
<td>50</td>
</tr>
<tr>
<td>Festo Corporation v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.</td>
<td>52</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>56</td>
</tr>
<tr>
<td>Notes on Copyright Infringement</td>
<td>56</td>
</tr>
<tr>
<td>Notes on Trademark Infringement</td>
<td>58</td>
</tr>
<tr>
<td>§ 2.04 Some Additional Intellectual Property Rights</td>
<td>58</td>
</tr>
<tr>
<td>Notes on Rights in Internet Domain Names</td>
<td>58</td>
</tr>
<tr>
<td>Sumner, Popularly Known as Sting v. Urvan</td>
<td>59</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

| Notes and Questions | .......................................................... 61 |
| Protecting the Right of Publicity | .......................................................... 62 |
| *White v. Samsung Electronics America, Inc.* | .......................................................... 62 |
| Notes and Questions | .......................................................... 68 |

### § 2.05 Applying What You Have Learned: Two Lawyering Problems

- **Problem 2B (Counseling): Protecting Property Interests in “Valcom,” A Computer Program** .......................................................... 68
- **Problem 2C (Counseling): Protecting Property Interests in a Professional Wrestler’s Persona (“The Hammer”)** .................. 69

### § 2.06 Analyzing an Actual Patent Document: A Pop-Top as a Protected Invention

- **Note on the Pop-Top Patent That Appears Below** .......... 70
- **United States Patent No. 5,224,618: Easy Opening Tab for Container** .......... 70
- Notes and Questions .......................................................... 75

### CHAPTER 3: REAL PROPERTY OWNERSHIP, INCLUDING MULTIPLE OWNERSHIP

### § 3.01 What this Chapter Is About

- **Note on Ownership of Real Property** .......................................................... 77

### § 3.02 Acquisition and Creation of Real Property Interests

- **Note on Creation of Real Property Interests** .......................................................... 77

#### [A] By Gift, Devise, or Descent

- **Brewer v. Brewer** .......................................................... 78
- Notes and Questions .......................................................... 80

#### [B] By Purchase: Equitable Title under Property Transfer Agreements

- **Note on Title Transfer** .......................................................... 81
- **Plog v. Plog** .................................................................. 81
- **Simulation Exercise 3A (Document Analysis): Pravelka-Damani Residential Real Estate Purchase Agreement** .......................................................... 82

#### [C] Original Creation of Real Property Interests: Adverse Possession, Discovery and Occupation, and Conveyance by Land Patent from the State

- **[1] Adverse Possession: Title by Limitation** .......................................................... 82
- **Note on Adverse Possession** .......................................................... 82
- **Toiman v. Malloy** .................................................................. 83
- **Davis v. Parke** .................................................................. 85
- Notes and Questions .......................................................... 86
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>88</td>
</tr>
<tr>
<td>[D]</td>
<td>Lawyering Competencies and Strategies in Real Property Transactions</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>Note on Competencies, Strategies, and Lawyering Problems</td>
<td>89</td>
</tr>
<tr>
<td></td>
<td>DeCotiis &amp; Steele, <em>The Skills of the Lawyering Process</em></td>
<td>90</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>95</td>
</tr>
<tr>
<td></td>
<td>Contrary Considerations to DeCotiis &amp; Steele’s Work</td>
<td>96</td>
</tr>
<tr>
<td>§ 3.03</td>
<td>Possessory and Future Interests in Land: A Brief Introduction</td>
<td>96</td>
</tr>
<tr>
<td></td>
<td>Note on Multiple Ownership of Real Property: Issues and Terminology</td>
<td>96</td>
</tr>
<tr>
<td></td>
<td>Note on Possessory Estates and Remainders</td>
<td>97</td>
</tr>
<tr>
<td></td>
<td>Problems about Possessory Estates and Remainders</td>
<td>98</td>
</tr>
<tr>
<td>§ 3.04</td>
<td>Undivided Concurrent Interests: Tenancy in Common, Joint Tenancy, and Tenancy by the Entirety</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td>Note on Concurrent Interests</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td>Problems about Tenancy in Common and Joint Tenancy</td>
<td>100</td>
</tr>
<tr>
<td>[A]</td>
<td>Tenancy in Common: Rights, Duties, and Pitfalls</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td><em>Chinn v. Chinn</em></td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>102</td>
</tr>
<tr>
<td>[B]</td>
<td>Joint Tenancy with Right of Survivorship</td>
<td>103</td>
</tr>
<tr>
<td></td>
<td><em>Estate of Mitchell</em></td>
<td>103</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>108</td>
</tr>
<tr>
<td>[C]</td>
<td>A Problem about Concurrent Ownership: Document Preparation</td>
<td>109</td>
</tr>
<tr>
<td></td>
<td><em>Simulation Exercise 3B (Document Preparation): Pravelka-Damani Deed,</em></td>
<td>109</td>
</tr>
<tr>
<td></td>
<td><em>Conveying Residence as a Tenancy in Common</em></td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>Deed Forms (Three Types)</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>Note on the Special Warranty Deed and Quitclaim</td>
<td>112</td>
</tr>
<tr>
<td>[D]</td>
<td>Tenancy by the Entirety: Husband and Wife</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>Note on Tenancy by the Entirety</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td><em>Goldman v. Gelman</em></td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>114</td>
</tr>
<tr>
<td>§ 3.05</td>
<td>Security Interests</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td><em>Goldman v. Gelman</em></td>
<td>114</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>114</td>
</tr>
<tr>
<td>§ 3.06</td>
<td>Marital Property</td>
<td>115</td>
</tr>
<tr>
<td></td>
<td><em>Estate of Mitchell</em></td>
<td>115</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

| Note on Common Law Marital Property Principles | 116 |
| Note on Community Property | 117 |
| Notes and Questions | 118 |
| Note on Valuation of Property | 119 |
| *In re Graham* | 121 |
| Notes and Questions | 124 |
| Note on Homestead in Marital Property Law | 125 |

§ 3.07 Trusts | 126 |
| Note on the Characteristics, Creation, and Functions of Trusts | 126 |
| *Estate of Rothko* | 127 |
| Notes and Questions | 130 |

## CHAPTER 4: REAL ESTATE TRANSACTIONS:
### THE PURCHASE AGREEMENT | 133

§ 4.01 What this Chapter (and the next Several Chapters) Are About | 133
| A Simplified Road Map of a Real Estate Transaction | 133 |

§ 4.02 The Atmosphere of Risk in Which Property Transfers Are Negotiated | 135

[A] Appealing Rhetoric That Lacks Sufficient Meaning | 135
| Isaac Asimov, *Foundation* | 135 |
| Notes and Questions | 136 |

[B] Powerful Players Who Act Deceptively or Unpredictably | 137
| Steve McElroy (with Anne S. Lewis), *Ross and Me: The Story of Our Deal* | 137 |
| Notes and Questions | 141 |

[C] The Disadvantages of Litigation over Property Disputes | 142
| Notes and Questions | 142 |

[D] How Should a Transactional Lawyer Think About These Risks? | 143
| Tina L. Stark, *Thinking Like a Deal Lawyer* | 143 |
| Notes and Questions | 147 |

§ 4.03 Brokerage | 147

[A] The Brokerage Agreement: Contents and Requirements | 147
| Note on Brokerage | 147
| *Frady v. May* | 149 |
| Notes and Questions | 152 |
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[B] The Broker’s Liability (and the Broker’s Concern for Preventing It)</td>
<td>153</td>
</tr>
<tr>
<td>Hoffman v. Connall</td>
<td>153</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>156</td>
</tr>
<tr>
<td>Miller v. Keyser</td>
<td>157</td>
</tr>
<tr>
<td>[C] The Brokerage Agreement Itself</td>
<td>158</td>
</tr>
<tr>
<td>Model Brokerage Agreement for the “State of West York”</td>
<td>158</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>161</td>
</tr>
<tr>
<td>§ 4.04 Negotiations for a Contract of Purchase</td>
<td>161</td>
</tr>
<tr>
<td>[A] Letters of Intent or Understanding: Are They Enforceable?</td>
<td>161</td>
</tr>
<tr>
<td>Vestar Development II, LLC v. General Dynamics Corporation</td>
<td>162</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>163</td>
</tr>
<tr>
<td>“Status Letter”</td>
<td>165</td>
</tr>
<tr>
<td>[B] Negotiation Techniques</td>
<td>166</td>
</tr>
<tr>
<td>Dorsaneo &amp; Crump, How Does Litigation Get Settled?</td>
<td>166</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>172</td>
</tr>
<tr>
<td>Problems about Negotiation</td>
<td>173</td>
</tr>
<tr>
<td>[C] Ethics and Overreaching in Negotiations</td>
<td>173</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>175</td>
</tr>
<tr>
<td>§ 4.05 Conditions and Requisites of the Document Expressing the Real Estate Agreement</td>
<td>177</td>
</tr>
<tr>
<td>[A] The Statute of Frauds: The Requirement of Sufficient Writing</td>
<td>177</td>
</tr>
<tr>
<td>Note on the Statute of Frauds</td>
<td>177</td>
</tr>
<tr>
<td>Meyer v. Kesterson</td>
<td>177</td>
</tr>
<tr>
<td>Gagne v. Stevens</td>
<td>180</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>181</td>
</tr>
<tr>
<td>Simulation Exercise 4A (Litigation): Wilson v. Prairie at Garwood Center, Inc.</td>
<td>182</td>
</tr>
<tr>
<td>[B] Conditions Precedent or “Preconditions”</td>
<td>182</td>
</tr>
<tr>
<td>[1] Conditions for Inspection</td>
<td>182</td>
</tr>
<tr>
<td>Note on Conditions for Inspection</td>
<td>182</td>
</tr>
<tr>
<td>Allen v. Cedar Real Estate Group, LLP</td>
<td>183</td>
</tr>
<tr>
<td>Frady v. May</td>
<td>187</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>188</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>[3] Title Conditions</td>
<td>188</td>
</tr>
<tr>
<td>Note on Title Conditions</td>
<td>189</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>189</td>
</tr>
<tr>
<td>[C] Options to Purchase Real Property</td>
<td>190</td>
</tr>
<tr>
<td>Note on Options</td>
<td>190</td>
</tr>
<tr>
<td><em>Beale Street Development Corporation v. Miller</em></td>
<td>191</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>193</td>
</tr>
<tr>
<td>§ 4.06 Escrow Agreements and Earnest Money</td>
<td>194</td>
</tr>
<tr>
<td>Note on Escrow Arrangements</td>
<td>194</td>
</tr>
<tr>
<td><em>In the Matter of Akivis</em></td>
<td>194</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>195</td>
</tr>
<tr>
<td>§ 4.07 The Provisions of a Typical Real Estate Agreement</td>
<td>196</td>
</tr>
<tr>
<td>Note on How to Approach a Real Estate Agreement</td>
<td>196</td>
</tr>
<tr>
<td>A Sample Residential Purchase and Sale Agreement</td>
<td>199</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>206</td>
</tr>
<tr>
<td>§ 4.08 Liability Outside (and Inconsistent With) the Agreement: Claims for Fraud, Negligence, Violations of Consumer Legislation, Etc.</td>
<td>209</td>
</tr>
<tr>
<td>Note on the Effect of the Parol Evidence Rule and the Effects of Merger Clauses</td>
<td>209</td>
</tr>
<tr>
<td>Note on Types of Extra-Contractual Liability</td>
<td>210</td>
</tr>
<tr>
<td>[A] Actual Fraud</td>
<td>210</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>210</td>
</tr>
<tr>
<td>[B] Nondisclosure as the Basis of Fraud Liability</td>
<td>212</td>
</tr>
<tr>
<td><em>Stambovsky v. Ackley</em></td>
<td>212</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>214</td>
</tr>
<tr>
<td>[C] Negligent Misrepresentation, Warranty, and Consumer Legislation</td>
<td>214</td>
</tr>
<tr>
<td>[1] Negligent Misrepresentation or Warranty</td>
<td>214</td>
</tr>
<tr>
<td><em>Amyot v. Luchini</em></td>
<td>214</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>217</td>
</tr>
<tr>
<td><em>KleczeK v. Jorgenson</em></td>
<td>219</td>
</tr>
<tr>
<td>[3] Unenforceability as a Statutory Remedy to Prevent Fraud or Overreaching</td>
<td>220</td>
</tr>
<tr>
<td>Note on Statutes Making Nonconforming Contracts Unenforceable</td>
<td>220</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>220</td>
</tr>
<tr>
<td>§ 4.09</td>
<td>A Problem Involving Renegotiation of a Real Estate Purchase Agreement</td>
<td>221</td>
</tr>
<tr>
<td></td>
<td>Simulation Exercise 4B (Negotiation and Document Preparation):</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Renegotiation of Pravelka-Damani Purchase Agreement</td>
<td>221</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 5: REAL ESTATE TRANSACTIONS: FINANCING AND</strong></td>
<td>223</td>
</tr>
<tr>
<td></td>
<td><strong>CONVEYANCING DOCUMENTS</strong></td>
<td></td>
</tr>
<tr>
<td>§ 5.01</td>
<td>Real Estate Lenders and Loan Documentation</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>Note on Real Estate Lenders</td>
<td>223</td>
</tr>
<tr>
<td></td>
<td>Note on Loan Documentation: the Big Picture</td>
<td>224</td>
</tr>
<tr>
<td>§ 5.02</td>
<td>The Core Documents: the Promissory Note, Deed, and Security Instrument</td>
<td>227</td>
</tr>
<tr>
<td></td>
<td>Note on the Core Documents: Promissory Note, Deed, and Mortgage or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Deed of Trust</td>
<td>227</td>
</tr>
<tr>
<td></td>
<td>[A] The Note (or Promissory Note)</td>
<td>229</td>
</tr>
<tr>
<td></td>
<td>Note on Real Estate Promissory Notes</td>
<td>229</td>
</tr>
<tr>
<td></td>
<td>Note on How to Read the Case of Moore v. Bank Midwest</td>
<td>230</td>
</tr>
<tr>
<td></td>
<td>Moore v. Bank Midwest</td>
<td>231</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>234</td>
</tr>
<tr>
<td></td>
<td>A Sample Real Estate Promissory Note</td>
<td>235</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>238</td>
</tr>
<tr>
<td></td>
<td>[B] The Deed</td>
<td>239</td>
</tr>
<tr>
<td></td>
<td>Note on Real Estate Deeds</td>
<td>239</td>
</tr>
<tr>
<td></td>
<td>Thought Problem: The Shady Oaks Deed</td>
<td>240</td>
</tr>
<tr>
<td></td>
<td>Note on Deed Descriptions</td>
<td>241</td>
</tr>
<tr>
<td></td>
<td>Note on How to Read the Case of Ferriter v. Bartmess</td>
<td>242</td>
</tr>
<tr>
<td></td>
<td>Ferriter v. Bartmess</td>
<td>242</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>245</td>
</tr>
<tr>
<td></td>
<td>Simulation Problem 5A (Document Analysis): Drawing a Sketch Plat</td>
<td>246</td>
</tr>
<tr>
<td></td>
<td>from a Metes-and-Bounds Description</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[2] The Warranty: General, Special, or None?</td>
<td>246</td>
</tr>
<tr>
<td></td>
<td>Ohio Rev. Code §§ 5302.05-.08, .11</td>
<td>246</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>248</td>
</tr>
<tr>
<td></td>
<td>Geodyne Energy Income Production Partnership E-I v. Newton Corporation</td>
<td>239</td>
</tr>
<tr>
<td></td>
<td>Note on the Covenants Implied by a General Warranty</td>
<td>250</td>
</tr>
<tr>
<td></td>
<td>Brown v. Lober</td>
<td>250</td>
</tr>
<tr>
<td>Page</td>
<td></td>
<td></td>
</tr>
<tr>
<td>------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>253</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>254</td>
<td></td>
</tr>
<tr>
<td>[C] The Mortgage or Deed of Trust and the Vendor’s Lien</td>
<td>255</td>
<td></td>
</tr>
<tr>
<td>[1] The “Straight” Mortgage</td>
<td>255</td>
<td></td>
</tr>
<tr>
<td>Note on the “Straight” Mortgage</td>
<td>255</td>
<td></td>
</tr>
<tr>
<td>NYCTL 2005-A Trust v. Rosenberger Boat Livery, Inc.</td>
<td>256</td>
<td></td>
</tr>
<tr>
<td>[2] The Deed of Trust Mortgage</td>
<td>257</td>
<td></td>
</tr>
<tr>
<td>Note on the Deed of Trust Mortgage</td>
<td>257</td>
<td></td>
</tr>
<tr>
<td>Dreyfuss v. Union Bank of California</td>
<td>258</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>261</td>
<td></td>
</tr>
<tr>
<td>Does a Precarious Mortgage Situation Spell Doom for the National Economy?</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>§ 5.03 Documenting the Mortgage or Deed of Trust</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>[A] The Deed of Trust Document</td>
<td>263</td>
<td></td>
</tr>
<tr>
<td>Note on How to Read This Document</td>
<td>264</td>
<td></td>
</tr>
<tr>
<td>A Sample Deed of Trust</td>
<td>266</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>272</td>
<td></td>
</tr>
<tr>
<td>Note on the Due-on-Sale Clause</td>
<td>273</td>
<td></td>
</tr>
<tr>
<td>[B] The Straight Mortgage Document</td>
<td>274</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>274</td>
<td></td>
</tr>
<tr>
<td>§ 5.04 Mortgage Foreclosure</td>
<td>274</td>
<td></td>
</tr>
<tr>
<td>[A] The Process</td>
<td>274</td>
<td></td>
</tr>
<tr>
<td>Bank-Fund Staff Federal Credit Union v. Vivado</td>
<td>274</td>
<td></td>
</tr>
<tr>
<td>Hoffman v. Ameriquest Mortgage Company</td>
<td>277</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>279</td>
<td></td>
</tr>
<tr>
<td>A Form of Notice of Default (or Notice to Cure)</td>
<td>280</td>
<td></td>
</tr>
<tr>
<td>Simulation Exercise 5B (Document Preparation): Default and Substitute Trustee Sale of the Damani Property</td>
<td>281</td>
<td></td>
</tr>
<tr>
<td>[B] The Equity of Redemption and Its Foreclosure</td>
<td>281</td>
<td></td>
</tr>
<tr>
<td>Note on the Equity of Redemption</td>
<td>281</td>
<td></td>
</tr>
<tr>
<td>Emanuel v. Bankers Trust Company</td>
<td>283</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>285</td>
<td></td>
</tr>
<tr>
<td>Note on the “Clogging Doctrine”: The Prohibition on Clogging the</td>
<td>285</td>
<td></td>
</tr>
</tbody>
</table>
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity of Redemption</td>
<td>286</td>
</tr>
<tr>
<td>[C] Wrongful Foreclosure: Damage Liability for the Lender or Trustee</td>
<td>287</td>
</tr>
<tr>
<td><em>Hwang v. Stearns</em></td>
<td>287</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>290</td>
</tr>
<tr>
<td>§ 5.05 Bad Loan Bargains: Can They Amount to “Predatory Lending”?</td>
<td>291</td>
</tr>
<tr>
<td>Debra Pogrund Stark, <em>Predatory Lenders Beware</em></td>
<td>291</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>292</td>
</tr>
<tr>
<td>§ 5.06 Liens That Can Arise by Operation of Law</td>
<td>293</td>
</tr>
<tr>
<td>Note on Purchase Money (or Vendor’s) Liens</td>
<td>293</td>
</tr>
<tr>
<td><em>Chrissikos v. Chrissikos</em></td>
<td>293</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>295</td>
</tr>
<tr>
<td>[B] Construction Liens</td>
<td>296</td>
</tr>
<tr>
<td><em>Lee’s Home Center, Inc. v. Akins</em></td>
<td>296</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>297</td>
</tr>
<tr>
<td>§ 5.07 Sale of Mortgaged Property: Assumption Sales and Subject-to Sales</td>
<td>298</td>
</tr>
<tr>
<td>Simulation Exercise 5C (Document Preparation): Assumption Sale of the</td>
<td>298</td>
</tr>
<tr>
<td><em>Pravelka-Damani Property</em></td>
<td>298</td>
</tr>
</tbody>
</table>

### CHAPTER 6: REAL ESTATE TRANSACTIONS: TITLE ASSURANCE 299

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 6.01 The Seller’s Duty under the Agreement: Record Title, Good Title,</td>
<td>299</td>
</tr>
<tr>
<td>Marketable Title, Insurable Title, and Permitted Encumbrances</td>
<td>299</td>
</tr>
<tr>
<td>Note on Title Requirements in Purchase Agreements</td>
<td>300</td>
</tr>
<tr>
<td><em>Conklin v. Davi</em></td>
<td>300</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>301</td>
</tr>
<tr>
<td>§ 6.02 Public Recording Acts</td>
<td>302</td>
</tr>
<tr>
<td>Note on Race, Notice, and Race-Notice Recording Acts</td>
<td>302</td>
</tr>
<tr>
<td>[A] The Pure Race Form of Statute</td>
<td>303</td>
</tr>
<tr>
<td>North Carolina General Statute § 47-18</td>
<td>303</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>303</td>
</tr>
<tr>
<td>[B] The Pure Notice Form of Statute</td>
<td>304</td>
</tr>
<tr>
<td>Texas Property Code § 13.001</td>
<td>304</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>304</td>
</tr>
<tr>
<td>Note on the Meanings of “Notice” and on the “Acknowledgment”</td>
<td>304</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanchez v. Telles</td>
<td>305</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>308</td>
</tr>
</tbody>
</table>

[C] The Race-Notice Form of Statute

New York Real Property Law § 291 | 310
Notes and Questions | 310
Vitale v. Pinto | 310
Notes and Questions | 311

[D] Putting It Together: How the Statutes Work

Notes, Questions, and Diagrams | 312

[E] Sale to a Remote Purchaser: A Problem Unanswered by the Recording Acts

Note on Problems of Remote Purchasers | 313

§ 6.03 The Title Search and the Chain of Title | 314

[A] The Title Search: What Should It Cover?

Ellingsen v. Franklin County | 314
Notes and Questions | 316

[B] The Chain of Title: How It Influences the Title Search

Note on Indexing: Grantor-Grantee and Reverse | 317
Note on the Chain of Title: What Is a Reasonable Search?
In re Dlott | 319
Note on How to Read the Case of Nally v. Bank of New York | 320
Bank of New York v. Nally | 322
Notes and Questions | 326

§ 6.04 Legislation Affecting the Title Search | 327

[A] Marketable Title Legislation

Note on Marketable Title Acts | 327

[B] Indexing by Tract: Abstracts, Title “Plants,” and the Torrens System

Note on a Better Way (Possibly): Keeping Records by Tract, Rather Than by Grantor and Grantee | 329

§ 6.05 Title Insurance | 330

[A] The Title Insurer’s Contractual Liability under the Policy | 330
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Manley v. Cost Control Marketing &amp; Management, Inc.</strong></td>
</tr>
<tr>
<td>Notes and Questions</td>
</tr>
</tbody>
</table>

[B] Extra-Contractual Liability
- Note on the Insured’s Motivation for Seeking Extra-Contractual Liability | 333
- *Somerset Savings Bank v. Chicago Title Insurance Company* | 334
- Notes and Questions | 337
- *Columbia Town Center Title Company v. 100 Investment Ltd. Partnership* | 337

[C] The Title Policy
- Note on the Title Policy and its Structure | 338
- American Land Title Ass’n Title Insurance Policy | 340
- Notes and Questions | 345

§ 6.06 Third Party Liability: Attorneys, Abstractors, Surveyors, and Lenders | 347
- Notes and Questions | 347

§ 6.07 Curing Title: Repairing Defects | 348
- Note on Curing Title | 348
- *Simulation Exercises 6A & B (Document Analysis; Counseling): Curing Title for the Pravelka-Damani Transaction* | 349
- Note on Client Relations: Professional Dealings with the Client in Performing This Task | 349
- Morgan, *Client and Public Relations* | 350

### CHAPTER 7: REAL ESTATE TRANSACTIONS: CLOSING, TERMINATION, AND REMEDIES

§ 7.01 The Closing | 355
- Note on the Closing | 355

§ 7.02 Terminating the Transaction Short of Closing | 356
- [A] Termination for Failure of a Condition Before Closing | 356
- Note on Clauses Permitting Termination | 356

- [B] Termination on the Eve of (or at) Closing Because of Breach | 356
- A Thought Problem: Hypothetical Closing Difficulties in the Pravelka-Damani Transaction | 357
- *Pendleton v. Witcoski* | 357
- Notes and Questions | 361

- [C] Closing Documents and Non-Lawyer Readers: How
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comprehensible Do the Instruments Need to Be?</td>
<td>361</td>
</tr>
<tr>
<td>A Typical HUD-1 Residential Closing Statement</td>
<td>361</td>
</tr>
<tr>
<td>Note on Arguments about Using “Plain English” in Document Preparation</td>
<td>363</td>
</tr>
<tr>
<td>Crump, Against Plain English: The Case for a Functional Approach to Legal Document Preparation</td>
<td>365</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>365</td>
</tr>
<tr>
<td>[D] Destruction or Loss of the Property Before Closing</td>
<td>367</td>
</tr>
<tr>
<td><em>Hilliard v. Franklin</em></td>
<td>367</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>368</td>
</tr>
<tr>
<td>§ 7.03 Contract for Deed: An Alternative Method of Conveyancing</td>
<td>369</td>
</tr>
<tr>
<td>Note on Contract for Deed</td>
<td>369</td>
</tr>
<tr>
<td><em>Turbiville v. Hansen</em></td>
<td>370</td>
</tr>
<tr>
<td>§ 7.04 Remedies for Breach of the Agreement</td>
<td>372</td>
</tr>
<tr>
<td>[A] Damages: The Basic Legal Remedy</td>
<td>372</td>
</tr>
<tr>
<td>Note on the Measure of Damages in Real Estate Transactions</td>
<td>372</td>
</tr>
<tr>
<td>[1] Buyer’s Damages: Measuring Buyer’s Recovery When Seller Breaches</td>
<td>375</td>
</tr>
<tr>
<td><em>Harrison v. McMillan</em></td>
<td>375</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>379</td>
</tr>
<tr>
<td><em>Mihalich v. Heyden, Heyden &amp; Hindinger II</em></td>
<td>380</td>
</tr>
<tr>
<td>Note on Valuation by Appraisers</td>
<td>381</td>
</tr>
<tr>
<td>[2] Contractual Restrictions on Damages</td>
<td>381</td>
</tr>
<tr>
<td>Note on Restrictive Remedies Clauses in Real Estate Contracts</td>
<td>381</td>
</tr>
<tr>
<td>[3] Liquidated Damages and Earnest Money Retention</td>
<td>382</td>
</tr>
<tr>
<td><em>Kelly v. Marx</em></td>
<td>382</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>384</td>
</tr>
<tr>
<td>[B] Equitable Remedies</td>
<td>385</td>
</tr>
<tr>
<td>Note on the Origins and Characteristics of Equity</td>
<td>385</td>
</tr>
<tr>
<td>[1] Specific Performance</td>
<td>386</td>
</tr>
<tr>
<td><em>Hilliard v. Franklin</em></td>
<td>386</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>386</td>
</tr>
<tr>
<td>[2] Lis Pendens: A Claimant’s Notice, Filed in the Public Record</td>
<td>387</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>387</td>
</tr>
</tbody>
</table>
**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[3]</td>
<td>Rescission and Reformation</td>
<td>387</td>
</tr>
<tr>
<td></td>
<td>Pendleton v. Witkoski</td>
<td>388</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>388</td>
</tr>
<tr>
<td>[4]</td>
<td>Equitable Remedies Generally</td>
<td>388</td>
</tr>
<tr>
<td></td>
<td>Note on Equitable Remedies Generally</td>
<td>388</td>
</tr>
<tr>
<td>[5]</td>
<td>Declaratory Judgments</td>
<td>391</td>
</tr>
<tr>
<td></td>
<td>Note on Declaratory Relief</td>
<td>391</td>
</tr>
</tbody>
</table>

§ 7.05 Title Litigation: Updating the Common Law Remedy of Ejectment | 392 |
| | Note on Ejectment and Trespass to Try Title | 392 |

**CHAPTER 8: PERSONAL PROPERTY: OWNERSHIP, TRANSFER, AND MISAPPROPRIATION** | 395 |

§ 8.01 What this Chapter Is About: A Starting Point for the Property Course or, Alternatively, a Chapter Containing Principles Regarding Personalty (as Opposed to Realty) | 395 |
| | Introductory Note | 395 |

§ 8.02 The Significance of Possession | 395 |
| | Armory v. Delamirie | 395 |

[A] Finders’ Cases: Finders Versus Landowners | 396 |
| | Note on Mislaid, Lost, and Abandoned Property | 396 |
| | Terry v. Lock | 397 |
| | Hendle v. Stevens | 400 |
| | Notes and Questions | 401 |

[B] The Concept of Bailment: Property Consensually Possessed by a Non-Owner | 403 |
| | Note on the Bailment Relationship | 403 |
| | Wausau Insurance Company v. All Chicagoland Moving and Storage Company | 404 |
| | Miceli v. Riso | 407 |
| | Standard Fire Insurance Company v. Thompson | 408 |
| | Notes and Questions | 409 |

[C] Ownership of “Fugacious” Things under the Rule of Capture: Baseballs, Wild Animals, and Oil and Gas Production | 411 |
| | Note on Capture as a Basis of Ownership | 411 |
| | Knighton v. Texaco Producing, Inc. | 411 |
| | Notes and Questions | 414 |
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 8.03</td>
<td>Transfers of Personal Property</td>
<td>419</td>
</tr>
<tr>
<td>§ 8.03.01</td>
<td>Note on Personal Property in the Marketplace</td>
<td>419</td>
</tr>
<tr>
<td>[A]</td>
<td>Ownership of Negotiable Instruments</td>
<td>419</td>
</tr>
<tr>
<td>[A.01]</td>
<td>Note on Ownership of Transferred Promissory Notes</td>
<td>420</td>
</tr>
<tr>
<td>[A.02]</td>
<td>Cadle Company v. Errato</td>
<td>421</td>
</tr>
<tr>
<td>[A.03]</td>
<td>Notes and Questions</td>
<td>422</td>
</tr>
<tr>
<td>[2]</td>
<td>The Status of a “Holder in Due Course” of a “Negotiable Instrument”</td>
<td>423</td>
</tr>
<tr>
<td>[2.01]</td>
<td>Note on the Holder-in-Due-Course Doctrine</td>
<td>423</td>
</tr>
<tr>
<td>[2.03]</td>
<td>Notes and Questions</td>
<td>430</td>
</tr>
<tr>
<td>[B]</td>
<td>Unauthorized Transfers to Good Faith Purchasers</td>
<td>431</td>
</tr>
<tr>
<td>[B.01]</td>
<td>Note on “Void” and “Voidable” Transfers</td>
<td>431</td>
</tr>
<tr>
<td>[B.02]</td>
<td>Graffman v. Espel</td>
<td>431</td>
</tr>
<tr>
<td>[B.03]</td>
<td>Notes and Questions</td>
<td>436</td>
</tr>
<tr>
<td>[C]</td>
<td>Security Interests in Personality (and Transfers Subject to Them)</td>
<td>437</td>
</tr>
<tr>
<td>[C.01]</td>
<td>Note on Security Interests in Personalty</td>
<td>437</td>
</tr>
<tr>
<td>[C.02]</td>
<td>Usinor Industeel v. Leeco Steel Products, Inc.</td>
<td>438</td>
</tr>
<tr>
<td>[C.03]</td>
<td>Notes and Questions</td>
<td>439</td>
</tr>
<tr>
<td>[C.04]</td>
<td>A Sample UCC-1 Financing Statement</td>
<td>441</td>
</tr>
<tr>
<td>§ 8.04</td>
<td>Conversion and Trespass: Wrongful Interferences with Personal Property</td>
<td>441</td>
</tr>
<tr>
<td>§ 8.04.01</td>
<td>Note on the Forms of Action: The Historical Development of Claims Involving Personality</td>
<td>441</td>
</tr>
<tr>
<td>[D.01]</td>
<td>Notes and Questions</td>
<td>449</td>
</tr>
<tr>
<td>[E]</td>
<td>Intel Corporation v. Hamidi</td>
<td>451</td>
</tr>
<tr>
<td>[E.01]</td>
<td>Notes and Questions</td>
<td>453</td>
</tr>
<tr>
<td>§ 8.05</td>
<td>Property Interests in the Human Persona: Identity, Likeness, and Bodily Extracts</td>
<td>454</td>
</tr>
<tr>
<td>§ 8.05.01</td>
<td>Moore v. Regents of the University of California</td>
<td>454</td>
</tr>
<tr>
<td>[F]</td>
<td>Notes and Questions</td>
<td>460</td>
</tr>
</tbody>
</table>

## CHAPTER 9: LIMITS ON GOVERNMENT POWER OVER PROPERTY

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 9.01</td>
<td>Constitutional and Statutory Limits on Government Power over Property</td>
<td>463</td>
</tr>
<tr>
<td>§ 9.02 Substantive Due Process and Equal Protection</td>
<td>463</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>-----</td>
<td></td>
</tr>
<tr>
<td>Text of the Constitution: Due Process and Equal Protection</td>
<td>463</td>
<td></td>
</tr>
<tr>
<td>[A] The Rational Basis Test: A Low Level of Constitutional Scrutiny</td>
<td>464</td>
<td></td>
</tr>
<tr>
<td>Note: Substantive Due Process and the Historical Basis of the Fourteenth Amendment</td>
<td>464</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>465</td>
<td></td>
</tr>
<tr>
<td><em>FCC v. Beach Communications, Inc.</em></td>
<td>466</td>
<td></td>
</tr>
<tr>
<td>[B] Debating the Rational Basis Test: Should the Courts Demand “Impartial” or Apolitical Legislators?</td>
<td>468</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>468</td>
<td></td>
</tr>
<tr>
<td>§ 9.03 Taking of Property Without Just Compensation</td>
<td>469</td>
<td></td>
</tr>
<tr>
<td>Text of the Constitution</td>
<td>469</td>
<td></td>
</tr>
<tr>
<td>Notes on Eminent Domain</td>
<td>469</td>
<td></td>
</tr>
<tr>
<td>Note on the Purposes of the Takings Clause</td>
<td>469</td>
<td></td>
</tr>
<tr>
<td>[B] Taking by Physical Invasion or by Destruction</td>
<td>471</td>
<td></td>
</tr>
<tr>
<td><em>Loretto v. Teleprompter Manhattan CATV Corp.</em></td>
<td>471</td>
<td></td>
</tr>
<tr>
<td><em>Nollan v. California Coastal Commission</em></td>
<td>471</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>474</td>
<td></td>
</tr>
<tr>
<td><em>Dolan v. City of Tigard</em></td>
<td>476</td>
<td></td>
</tr>
<tr>
<td>[C] Taking by Regulation of Use</td>
<td>477</td>
<td></td>
</tr>
<tr>
<td><em>Penn Central Transportation Co. v. City of New York</em></td>
<td>477</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>483</td>
<td></td>
</tr>
<tr>
<td><em>Lucas v. South Carolina Coastal Council</em></td>
<td>485</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>487</td>
<td></td>
</tr>
<tr>
<td><em>Problem 9A</em></td>
<td>488</td>
<td></td>
</tr>
<tr>
<td><em>First English Evangelical Lutheran Church v. County of Los Angeles</em></td>
<td>488</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>490</td>
<td></td>
</tr>
<tr>
<td>[D] Delays Owing to Moratoria and Rejections of Successive Applications: an Evolving Issue</td>
<td>491</td>
<td></td>
</tr>
<tr>
<td>Note on Regulatory Delays and Excessive Planning as Potential Takings: The <em>Tahoe</em> and <em>Monterey</em> Cases</td>
<td>491</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>[E] Problems Associated with Price Regulation</td>
<td>492</td>
<td></td>
</tr>
<tr>
<td></td>
<td>492</td>
<td></td>
</tr>
<tr>
<td>[F] The “Public Use” Requirement</td>
<td>493</td>
<td></td>
</tr>
<tr>
<td></td>
<td>493</td>
<td></td>
</tr>
<tr>
<td><em>Kelo</em> v. <em>City of New London</em></td>
<td>493</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>495</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>Appendix to § 9.03: Constitutional Law in Practice–Due Process and Takings Clause Issues in <em>Ball Development Co. v. City of Virginia City</em></strong></td>
<td>497</td>
<td></td>
</tr>
<tr>
<td><strong>Problem 9B: Background to the Dispute: Ball Development Co. v. City of Virginia City</strong></td>
<td>497</td>
<td></td>
</tr>
<tr>
<td>Plaintiff's Complaint Asserting Taking, Due Process, and Other Claims</td>
<td>498</td>
<td></td>
</tr>
<tr>
<td>Note on Defendant's Answer</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>Plaintiff's Motion for Summary Judgment on Constitutional and Other Claims</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>Stipulation of Facts (Offered in Support of Motion for Summary Judgment)</td>
<td>501</td>
<td></td>
</tr>
<tr>
<td>Affidavit Showing Facts Supporting Plaintiff's Motion for Summary Judgment</td>
<td>502</td>
<td></td>
</tr>
<tr>
<td>Note on the Defendant City's Cross-Motion for Summary Judgment</td>
<td>504</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>504</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>§ 9.04 Market Value as Just Compensation: The Process of Eminent Domain</strong></td>
<td>506</td>
<td></td>
</tr>
<tr>
<td><em>United States v. 50 Acres of Land</em></td>
<td>506</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>509</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>§ 9.05 State-Law Restrictions on Regulation of Property</strong></td>
<td>510</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>510</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>CHAPTER 10: LAND USE REGULATION: FROM ZONING TO THE ENVIRONMENT</strong></td>
<td>513</td>
<td></td>
</tr>
<tr>
<td><strong>§ 10.01 Common Law “Land Use Regulation”: Nuisance and Trespass</strong></td>
<td>513</td>
<td></td>
</tr>
<tr>
<td>Note on Nuisance and Trespass</td>
<td>513</td>
<td></td>
</tr>
<tr>
<td><em>Pestey v. Cushman</em></td>
<td>514</td>
<td></td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>520</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td><strong>§ 10.02 Euclidean Zoning</strong></td>
<td>521</td>
<td></td>
</tr>
<tr>
<td></td>
<td>521</td>
<td></td>
</tr>
<tr>
<td>Note on Euclidean Zoning</td>
<td>521</td>
<td></td>
</tr>
<tr>
<td><em>Village of Euclid v. Ambler Realty Co.</em></td>
<td>521</td>
<td></td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Enabling Act (&quot;SZEA&quot;) (1926)</strong></td>
<td>524</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>525</td>
</tr>
<tr>
<td><strong>[B] Evenhandedness and Change: A “Comprehensive Plan” Versus</strong></td>
<td></td>
</tr>
<tr>
<td>&quot;Spot Zoning&quot;</td>
<td>526</td>
</tr>
<tr>
<td>Note on Zoning Changes: The Comprehensiveness Issue</td>
<td>526</td>
</tr>
<tr>
<td><strong>[1] The Strict Approach: A Written Comprehensive Plan; Decisions</strong></td>
<td></td>
</tr>
<tr>
<td>Reviewed as Administrative Duties</td>
<td>528</td>
</tr>
<tr>
<td><em>Fasano v. Board of County Commissioners</em></td>
<td>528</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>529</td>
</tr>
<tr>
<td><strong>[2] The More Liberal Approach: An Evolving, or Unwritten,</strong></td>
<td></td>
</tr>
<tr>
<td>Comprehensive Plan; Decisions Analogized to Legislative Acts</td>
<td>529</td>
</tr>
<tr>
<td><em>Bell v. City of Elkhorn</em></td>
<td>529</td>
</tr>
<tr>
<td><em>Gallo v. Mayor and Township Council of Lawrence Township</em></td>
<td>531</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>533</td>
</tr>
<tr>
<td><strong>[C] Disfavored Objectives: From Aesthetics to Exclusionary Zoning</strong></td>
<td></td>
</tr>
<tr>
<td><em>Anderson v. City of Issaquah</em></td>
<td>535</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>539</td>
</tr>
<tr>
<td>Notes and Questions on Exclusionary Zoning</td>
<td>541</td>
</tr>
<tr>
<td><strong>[D] The Zoning Process: Law or Politics?</strong></td>
<td>543</td>
</tr>
<tr>
<td><strong>[1] The Zoning Authority</strong></td>
<td>543</td>
</tr>
<tr>
<td><em>Act (&quot;SZEA&quot;) (1926)</em></td>
<td>543</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>544</td>
</tr>
<tr>
<td><strong>[2] Getting along Without Zoning: The Houston Example</strong></td>
<td>545</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>545</td>
</tr>
<tr>
<td><strong>§ 10.03 Non-Euclidean Zoning: Adding Flexibility</strong></td>
<td>547</td>
</tr>
<tr>
<td>Notes on Flexible Zoning</td>
<td>547</td>
</tr>
<tr>
<td><strong>[A] Conditional Zoning, Special Use Permits, and Other Devices</strong></td>
<td>547</td>
</tr>
<tr>
<td><em>Trustees of Union College v. Members of the Schenectady City Council</em></td>
<td>547</td>
</tr>
<tr>
<td><em>City of Laredo v. Villareal</em></td>
<td>549</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>550</td>
</tr>
<tr>
<td>Notes on Floating Zones and Planned Unit Developments (PUDs)</td>
<td>551</td>
</tr>
<tr>
<td><strong>[B] Hardships: Vested Rights and Variances</strong></td>
<td>551</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[1]</td>
<td>Nonconforming Uses and the Doctrine of Vested Rights</td>
<td>551</td>
</tr>
<tr>
<td></td>
<td>Notes on Nonconforming Uses and Vested Rights</td>
<td>552</td>
</tr>
<tr>
<td></td>
<td>Village of Valatie v. Smith</td>
<td>552</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>554</td>
</tr>
<tr>
<td>[2]</td>
<td>Hardships and Variances</td>
<td>556</td>
</tr>
<tr>
<td></td>
<td>Notes on Variances and the Hardship Standard</td>
<td>556</td>
</tr>
<tr>
<td></td>
<td>Rancourt v. City of Manchester</td>
<td>557</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>558</td>
</tr>
</tbody>
</table>

§ 10.04 A Lawyering Problem: Representing a Client Before the Zoning Authority 561


§ 10.05 Subdivision Regulation 561

[A] Plat Approval 561

Notes on Subdivision Regulation Through Plat Approval 561

*Kaufman v. Planning & Zoning Commission* 563

[B] Exactions: Requiring Public Dedication 568

Notes and Questions 568

*Dudek v. Umatilla County* 570

Notes and Questions 573

§ 10.06 Regional Planning 573

[A] Growth Management or Prevention 573

Note on No-Growth and Slow-Growth Initiatives 573

*Norbeck Village Joint Venture v. Montgomery County Council* 574

*Lesher Communications, Inc. v. City of Walnut Creek* 575

Notes and Questions 578

[B] Hold Zones: Mapping for Public Acquisition 579

Notes on Public Maps and Development Prohibitions 579

*Miller v. City of Beaver Falls* 579

[C] Extra-Territorial Jurisdiction: Regulating the Surrounding Countryside 581

Notes and Questions 581

§ 10.07 Environmental Regulation and Land Use 582

[A] The Example of CERCLA 582

Note on How CERCLA Works 582
### TABLE OF CONTENTS

**Northeast Doran, Inc. v. Key Bank** ........................................ 584
Notes and Questions .................................................. 587
Note on the “Brownfields Amendments” of 2002 .................. 587

[B] Other Environmental Laws .......................................... 588
Note on the Impact of Environmental Laws on Owners of Land .. 588

**CHAPTER 11: EASEMENTS, COVENANTS, AND OTHER SERVITUDES:**
**PRIVATE LAND-USE ARRANGEMENTS** .................................. 591

§ 11.01 Servitudes: An “Unspeakable Quagmire” (But a Necessary One) .......................... 591
   Note on Servitudes: The Law of Neighborhoods ..................... 591
   *Citizens for Covenant Compliance v. Anderson* .................... 591
   Notes and Questions ............................................. 592
   *McNair v. McNulty* ........................................... 592
   Notes on Terminology: Different Types of Servitudes ............. 593
   Problems about Servitude Terminology ............................ 595

§ 11.02 Easements: How Servitudes Are Created ...................... 596
   [A] Easements Created by Express Conveyance ...................... 596
       Note on Express Easements .................................. 596
       *Willard v. First Church of Christ, Scientist* ............... 596
       Notes and Questions ........................................ 596

   [B] Easements by Operation of Law (Through Implication or Equity) ........................ 599
       Note on Non-Express Theories of Easement Creation ........... 599

   [1] Easements by Necessity (Without Prior Use) .................. 600
       Note on Requirements for an “Easement by Necessity” .......... 600
       *Kennedy v. Bedenbaugh* ................................... 600
       Notes and Questions ........................................ 602

   [2] Implied Easements from Prior Use, plus Necessity .......... 603
       Note on Easements by Necessity and by Implication .......... 603
       *Schwab v. Timmons* ......................................... 603
       Notes and Questions ........................................ 607
       Note on the Statute of Frauds, Recording Acts, and Servitudes .. 608

   [3] Prescriptive Easements .......................................... 609
       *Han Farms, Inc. v. Molitor* .................................. 609
       *Coleman v. Keith* .......................................... 612
       Notes and Questions ........................................ 612
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[4]</td>
<td>Easements by Public Dedication: Roads Open to All Comers</td>
<td>614</td>
</tr>
<tr>
<td></td>
<td>Note on Public Dedication</td>
<td>614</td>
</tr>
<tr>
<td></td>
<td><em>Hatton v. Grigar</em></td>
<td>614</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>617</td>
</tr>
<tr>
<td>[5]</td>
<td>Easements by Estoppel (and Other Equitable Easements)</td>
<td>618</td>
</tr>
<tr>
<td></td>
<td><em>Prospect Development Company, Inc. v. Bershader</em></td>
<td>618</td>
</tr>
<tr>
<td></td>
<td><em>Flaig v. Gramm</em></td>
<td>619</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>620</td>
</tr>
<tr>
<td>[C]</td>
<td>Putting it All Together: a Litigation Problem about Easements</td>
<td>622</td>
</tr>
<tr>
<td></td>
<td><em>Simulation Exercise 11A (Litigation): An Access Easement to the Del Toro Development</em></td>
<td>622</td>
</tr>
<tr>
<td>§ 11.03</td>
<td>The Scope and Meaning of the Servitude (The “Bundle of Rights”)</td>
<td>622</td>
</tr>
<tr>
<td></td>
<td>Note on the Bundle of Rights Created by a Given Servitude</td>
<td>622</td>
</tr>
<tr>
<td></td>
<td><em>Carrollsburg v. Anderson</em></td>
<td>623</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>626</td>
</tr>
<tr>
<td></td>
<td><em>Swaim v. Simpson</em></td>
<td>627</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>628</td>
</tr>
<tr>
<td></td>
<td><em>Brown v. Voss</em></td>
<td>629</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>630</td>
</tr>
<tr>
<td>[C]</td>
<td>A Document Preparation Problem Concerning an Easement</td>
<td>631</td>
</tr>
<tr>
<td></td>
<td><em>Simulation Exercise 11B (Document Preparation): The Wheeler Sisters’ Conveyance of Residential Easements</em></td>
<td>631</td>
</tr>
<tr>
<td>§ 11.04</td>
<td>Covenants That “Run with the Land” and Equitable Servitudes</td>
<td>632</td>
</tr>
<tr>
<td></td>
<td>Note on “Real Covenants” and “Equitable Servitudes”</td>
<td>632</td>
</tr>
<tr>
<td>[A]</td>
<td>Real Covenants: Does the Covenant Run with the Land?</td>
<td>633</td>
</tr>
<tr>
<td>[1]</td>
<td>The Common Law Formalities for Real Covenants to Run with the Land</td>
<td>633</td>
</tr>
<tr>
<td></td>
<td>Note on Formal Requirements for Covenants Running with the Land</td>
<td>633</td>
</tr>
<tr>
<td></td>
<td><em>Klefstad Companies v. New Boston Allison Limited Partnership</em></td>
<td>633</td>
</tr>
<tr>
<td></td>
<td><em>Sonoma Development, Inc. v. Miller</em></td>
<td>636</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>638</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Privity; Viewing Touch-and-Concern in Policy Terms</td>
</tr>
<tr>
<td>Notes and Questions</td>
</tr>
</tbody>
</table>

| Note on Commercial Real Covenants | 642 |
| *Davidson Bros., Inc. v. D. Katz & Sons, Inc.* | 642 |
| Notes and Questions | 647 |

[B] The Scope and Meaning of a Real Covenant: The Bundle of Rights | 648 |
| Notes and Questions | 648 |
| Notes on Exclusionary Use of Covenants: Invidious Discrimination and the “NIMBY” Problem | 649 |

[C] Equitable Servitudes as Compared to Real Covenants: “Reciprocal Negative Easements” | 651 |
| Note on the Need for Equitable Servitudes | 651 |
| *Sanborn v. McLean* | 652 |
| Notes and Questions | 652 |
| *Citizens for Covenant Compliance v. Anderson* | 653 |

§ 11.05 Neighborhood Governance: The Interpretation and Enforcement of Covenants by Owners Associations | 657 |
| Note on Subdivision Development and Owners Associations | 657 |

[A] Aesthetics and Other Controversial Types of Private Regulation | 659 |
| *Raintree Homeowners Association, Inc. v. Bleimann* | 659 |
| Notes and Questions | 661 |

[B] Maintenance Assessments, Lien Foreclosures, and Expenditures | 663 |
| *Regency Homes Ass’n v. Egermayer* | 663 |
| Notes and Questions | 668 |
| Thom Marshall, *Homeowner Woes Rated as Hot News* | 670 |
| Notes and Questions | 671 |

§ 11.06 Condominia and Condominium Associations | 674 |
| Note on Condominium Ownership | 674 |
| A Typical Form of Condominium Resale Certificate | 676 |
| *Woodside Village Condominium Association, Inc. v. Jahren* | 676 |
| Notes and Questions | 677 |

§ 11.07 Termination and Modification of Servitudes | 678 |

[A] Termination by Abandonment | 678 |
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rutland v. Mullen .............................................. 678</td>
</tr>
<tr>
<td>[B] Changed Conditions and Equitable Termination ...................... 679</td>
</tr>
<tr>
<td>Pietrowski v. Dufrane ........................................... 679</td>
</tr>
<tr>
<td>Notes and Questions ............................................ 681</td>
</tr>
<tr>
<td>[C] Covenant Provisions Allowing Termination or Amendment ............. 682</td>
</tr>
<tr>
<td>Note on Conflicts Between Developers and Homeowners .................. 682</td>
</tr>
<tr>
<td>Dunne v. Shenandoah Homeowners Association, Inc. ..................... 684</td>
</tr>
<tr>
<td>Notes and Questions ............................................ 685</td>
</tr>
<tr>
<td>[D] Termination by Merger of Ownership of the Dominant and Servient Estates ....................................................... 686</td>
</tr>
<tr>
<td>[E] A Title Curing Problem Concerning a Doubtful Easement ............... 687</td>
</tr>
<tr>
<td>Problem 11C (Document Preparation): Curing a Putative “Driveway Servitude” for the Pravelka-Damani Transaction .......... 687</td>
</tr>
<tr>
<td><strong>CHAPTER 12: COMMON LAW ESTATES: POSSESSORY AND FUTURE INTERESTS</strong> ................................................................. 691</td>
</tr>
<tr>
<td>§ 12.01 The Basic Concept: Dividing Ownership along the Plane of Time ............. 691</td>
</tr>
<tr>
<td>Note on Themes in this Chapter ...................................... 691</td>
</tr>
<tr>
<td>§ 12.02 A Brief History of Common Law Estates .......................... 692</td>
</tr>
<tr>
<td>Historical Background: From the Feudal System and Quia Emptores to More Modern Times ................................................. 692</td>
</tr>
<tr>
<td>§ 12.03 Possessory Interests: The Fee Simple and Life Estate ............. 695</td>
</tr>
<tr>
<td>Note on Some Principles That Facilitate Understanding of Common Law Estates .............................................................. 695</td>
</tr>
<tr>
<td>A Simplified Chart of the Most Basic Future Interests ................... 697</td>
</tr>
<tr>
<td>Note on Possessory Estates: Fee Simple Absolute and Life Estate .......... 697</td>
</tr>
<tr>
<td>Problems about Basic Possessory and Future Estates ...................... 699</td>
</tr>
<tr>
<td>Imerys Marble Company v. J.M. Huber Corporation .......................... 700</td>
</tr>
<tr>
<td>Notes and Questions ............................................ 701</td>
</tr>
<tr>
<td>§ 12.04 Future Interests: Reversions, Vested Remainders, Contingent Remainders, and Executory Interests ................................................................. 703</td>
</tr>
<tr>
<td>Note on Classification of Future Interests .................................. 703</td>
</tr>
<tr>
<td>[A] Reversions: Interests Retained by Grantors ......................... 704</td>
</tr>
<tr>
<td>Notes and Questions ............................................ 704</td>
</tr>
</tbody>
</table>
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[B] Vested and Contingent Remainders</td>
<td>704</td>
</tr>
<tr>
<td>Note on the Different Types of Remainders</td>
<td>704</td>
</tr>
<tr>
<td>Problems about Remainders and Reversions</td>
<td>706</td>
</tr>
<tr>
<td><em>Estate of Zucker</em></td>
<td>707</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>710</td>
</tr>
<tr>
<td>[C] Executory Interests</td>
<td>711</td>
</tr>
<tr>
<td>Note on Executory Interests</td>
<td>711</td>
</tr>
<tr>
<td>Problems about Remainders, Reversions, and Executory Interests</td>
<td>713</td>
</tr>
<tr>
<td><em>Richards v. Maiden</em></td>
<td>713</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>714</td>
</tr>
<tr>
<td>§ 12.05 The Defeasible Fees and Their Future Interests</td>
<td>715</td>
</tr>
<tr>
<td>[A] The Creation and Types of Defeasible Fees</td>
<td>715</td>
</tr>
<tr>
<td>Note on the Fee Simple Determinable (&quot;FSD&quot;) and Fee Simple Subject to a Condition Subsequent (&quot;FSCS&quot;)</td>
<td>715</td>
</tr>
<tr>
<td>Problems about the Defeasible Fees and Their Future Interests</td>
<td>717</td>
</tr>
<tr>
<td><em>Queler v. Skowron</em></td>
<td>718</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>722</td>
</tr>
<tr>
<td>[C] The Modern Mineral Lease as a Defeasible Fee</td>
<td>723</td>
</tr>
<tr>
<td>Note on the Customary Form of an Oil and Gas Lease: A Fee Simple Determinable</td>
<td>723</td>
</tr>
<tr>
<td>§ 12.06 Putting It All Together: The Five Possessory Estates and the Five (or Six) Future Interests</td>
<td>725</td>
</tr>
<tr>
<td>Chart Showing Common Law Estates</td>
<td>725</td>
</tr>
<tr>
<td>Note on All of the Common Law Estates</td>
<td>725</td>
</tr>
<tr>
<td>Comprehensive Problems about Possessory and Future Estates</td>
<td>725</td>
</tr>
<tr>
<td>§ 12.07 Historical Rules Favoring Marketability</td>
<td>726</td>
</tr>
<tr>
<td>Note on the Conflict Between Ancient Marketability Rules and Modern Policy</td>
<td>726</td>
</tr>
<tr>
<td>[A] The Destructibility of Contingent Remainders</td>
<td>727</td>
</tr>
<tr>
<td>Note on the Destructibility Doctrine</td>
<td>727</td>
</tr>
<tr>
<td>[B] The Rule in Shelley’s Case and the Doctrine of Worthier Title</td>
<td>727</td>
</tr>
<tr>
<td>Note on the Rule in Shelley’s Case</td>
<td>727</td>
</tr>
<tr>
<td><em>Estate of Hendrickson</em></td>
<td>729</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>732</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

Note on the Doctrine of Worthier Title ............................................. 733

§ 12.08 Modern Marketability Doctrines: The Rules Against Restraints on Alienation and Against Perpetuities ................................................................. 733

[A] The Rule Against Restraints on Alienation ..................................... 733
   Imerys Marble Company v. J.M. Huber Corporation .......................... 733
   Notes and Questions ............................................................. 734

[B] The Rule Against Perpetuities .................................................. 734
   [1] The Elements of the Rule ..................................................... 734
       Note on Understanding the Rule Against Perpetuities .................. 734
       Estate of Kreuzer ............................................................ 737
       A Five-Step Method for Applying the Rule Against Perpetuities ...... 739
       Notes and Questions ......................................................... 740

       Note on Savings Clauses: Drafting to Avoid the Rule .................... 742
       Note on Statutory and Judicial Modifications ............................. 742
       Estate of Kreuzer ............................................................ 744
       Notes and Questions ......................................................... 744

       Note on Application of the Rule to Options, Rights of First Refusal, and Other Contractual Interests ................................................................. 745
       Notes and Questions ......................................................... 746

       Note on the Strange (and Dangerous) Creatures Created By the Rule:
       From the Fertile Octogenarian to the Magic Gravel Pit .................. 746

   [5] Fun with Future Interests: The Rule Against Perpetuities Goes to the Movies ......................................................... 748
       A Problem Based on the Motion Picture “Body Heat” ...................... 748

§ 12.09 Common Law Estates in Modern Transactions .................................. 750

[A] Family Transactions Using Future Interests .................................... 750
   Notes and Questions ............................................................. 750

[B] Commercial Transactions and Common Law Estates .......................... 751
   Notes and Questions ............................................................. 751
### TABLE OF CONTENTS

#### CHAPTER 13: LANDLORD AND TENANT, PART I: THE LEASE AS A CONVEYANCE AND A CONTRACT

<table>
<thead>
<tr>
<th>§ 13.01 What Is a Leasehold?</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>An Introduction to This (and the Next) Chapter</td>
<td>753</td>
</tr>
<tr>
<td>[A] The Different Types of Tenancies</td>
<td>753</td>
</tr>
<tr>
<td>Note on Tenancy Types: Fix, Periodic, At Will, At Sufferance, or Statutory</td>
<td>753</td>
</tr>
<tr>
<td><em>Miller &amp; Desatnik Management Co., Inc. v. Bullock</em></td>
<td>754</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>757</td>
</tr>
<tr>
<td>[B] The Characteristics of a Leasehold</td>
<td>758</td>
</tr>
<tr>
<td>Note on Leases under the Common Law</td>
<td>758</td>
</tr>
<tr>
<td>Note on the Statute of Frauds and Recording Acts</td>
<td>759</td>
</tr>
<tr>
<td>Problems about Leaseholds, Recording, and Statutes of Frauds</td>
<td>760</td>
</tr>
</tbody>
</table>

| § 13.02 Transfer of the Leasehold: Assignment, Sublease, Subordination, and Attornment | 760 |
| Note on Lease Transfers | 760 |
| [A] The Lessor’s Interest in Preventing Transfer: Consent Clauses | 761 |
| Note on How to Read the *Kendall* Case | 761 |
| *Kendall v. Ernest Pestana, Inc.* | 762 |
| *Trinity Professional Plaza Associates v. Metrocrest Hospital Authority* | 768 |
| Note on Law and Economics: Reconsidering the “Majority Rule” Allowing Landlords’ Withholding of Consent | 768 |
| Notes and Questions | 771 |
| [B] Assignment or Sublease?: The Distinction and Its Consequences | 772 |
| Note on the Differences Between Assignments and Subleases | 772 |
| *Bob Ferstl Chrysler-Plymouth, Inc. v. Budget Rent-a-Car Systems, Inc.* | 773 |
| [C] Subordination and Attornment: What Happens to the Tenant When the Landlord Transfers the Underlying Fee? | 774 |
| Notes and Questions | 774 |
| How to Think About the SNDA Clause | 776 |
| *Miscione v. Barton Development Company* | 778 |
| Notes and Questions | 781 |

| § 13.03 The Premises: Possession, Use, Enjoyment, and Physical Condition | 782 |
| [A] Possession, Occupancy, and Use | 782 |
TABLE OF CONTENTS

[1] Does the Landlord Have a Duty to Deliver Possession?: The Problem of Holdovers ....................................... 782
Keydata Corporation v. United States ........................................ 783
Notes and Questions .................................................. 785

[2] Is the Tenant Obligated to Take Possession?: The Commercial Tenant Who “Goes Dark” .................................... 786
Oklahoma Plaza Investors, Ltd. v. Wal-Mart Stores, Inc. ............ 786
Oklahoma Plaza Investors, Ltd. v. Wal-Mart Stores, Inc. ............ 790
Notes and Questions .................................................. 790

[3] The Tenant’s Use of the Premises ..................................... 792
Notes and Questions .................................................. 792

[B] Agreements about Premises Quality in Commercial Leases .............. 793

[1] Premises Quality During a Commercial Tenancy ........................ 793
Anderson Drive-In Theatre v. Kirkpatrick .................................. 793
Wesson v. Leone Enterprises, Inc. ........................................ 794
Notes and Questions .................................................. 796

[2] Premises Restoration at the Conclusion of the Tenancy: Waste, Repairs, Wear and Tear, and Fixtures ......................... 797
Armstrong v. Maybee ................................................ 797
Fortis Financial Services, LLC v. Fimat Futures USA, Inc. .......... 798
Notes and Questions .................................................. 799
Pfeifle v. Tanabe .................................................. 800
Notes and Questions .................................................. 802

[C] Premises Liability: Torts, Losses, and Injuries ........................ 803
Cramer v. Balcor Property Management, Inc. ......................... 803
Notes and Questions .................................................. 803
Bonifacio v. 910-930 Southern Boulevard LLC ....................... 804

§ 13.04 Rent Clauses and Other Payment Obligations ......................... 806
Note on Variations in Rent Provisions .................................. 806

[A] Gross (or Fixed) Rentals, Triple-Net Leases, and Escalators .......... 807
How to Read the McLaren Case .......................................... 807
United States ex Rel. Goodstein v. McLaren Regional Medical Center ... 808
Notes and Questions .................................................. 813

[B] Percentage Rents .................................................. 815
In re Adoption of [a Prohibition on Percentage Leases] by
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>the State Board of Optometrists</td>
<td></td>
<td>815</td>
</tr>
<tr>
<td>§ 13.05</td>
<td>Termination and Renewal of the Lease</td>
<td>816</td>
</tr>
<tr>
<td>[A]</td>
<td>Termination or Renewal in Compliance with the Lease Instrument</td>
<td>816</td>
</tr>
<tr>
<td>Zlotolow v. United States</td>
<td></td>
<td>816</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td></td>
<td>819</td>
</tr>
<tr>
<td>Miller &amp; Desatnik Management Co., Inc. v. Bullock</td>
<td></td>
<td>820</td>
</tr>
<tr>
<td>[B]</td>
<td>Surrender, Abandonment, and Destruction</td>
<td>820</td>
</tr>
<tr>
<td>Guaranty Bank &amp; Trust Co. v. Mid-State Insurance Agency, Inc.</td>
<td></td>
<td>820</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td></td>
<td>821</td>
</tr>
<tr>
<td>[C]</td>
<td>Holdovers</td>
<td>822</td>
</tr>
<tr>
<td>Note on Issues Raised by Holdovers</td>
<td></td>
<td>822</td>
</tr>
<tr>
<td>Commonwealth Building Corporation v. Hirschfield</td>
<td></td>
<td>822</td>
</tr>
<tr>
<td>[D]</td>
<td>Termination as a Remedy for Default</td>
<td>824</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td></td>
<td>824</td>
</tr>
<tr>
<td>§ 13.06</td>
<td>The Lease Instrument and Its Provisions</td>
<td>824</td>
</tr>
<tr>
<td>[A]</td>
<td>Residential Leases</td>
<td>824</td>
</tr>
<tr>
<td>Note on Terms in Residential Leases: The “Big Picture”</td>
<td></td>
<td>824</td>
</tr>
<tr>
<td>A Sample Residential Lease</td>
<td></td>
<td>825</td>
</tr>
<tr>
<td>[B]</td>
<td>Commercial Leases</td>
<td>830</td>
</tr>
<tr>
<td>Note on Customary Terms in Commercial Leases</td>
<td></td>
<td>830</td>
</tr>
<tr>
<td>Simulation Exercise 13A (Negotiation and Document Preparation): Completing the Commercial Lease Between Carr Reality Company and Mertz Equipment Rental, Inc.</td>
<td></td>
<td>830</td>
</tr>
</tbody>
</table>

### CHAPTER 14: LANDLORD AND TENANT, PART II:
MODERN REGULATION OF THE LEASE RELATIONSHIP | 833 |

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 14.01</td>
<td>The Range of Modern Lease Regulations</td>
<td>833</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td></td>
<td>833</td>
</tr>
<tr>
<td>§ 14.02</td>
<td>The Implied Covenants of Quiet Enjoyment and Habitability</td>
<td>834</td>
</tr>
<tr>
<td>[A]</td>
<td>The Basic Covenant: Quiet Enjoyment</td>
<td>834</td>
</tr>
<tr>
<td>Note on Quiet Enjoyment, Constructive Eviction, and Habitability</td>
<td></td>
<td>834</td>
</tr>
<tr>
<td>Pfeifle v. Tanabe</td>
<td></td>
<td>836</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td></td>
<td>839</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

[B] The Implied Covenant of Habitability ........................................... 840

[1] In Residential Leases ................................................................. 840
   Note on Habitability and Rent Offset ....................................... 841
   Javins v. First National Realty Corporation ............................. 841
   Notes and Questions .............................................................. 845
   Dick v. Pacific Heights Townhouses ......................................... 846
   Metz v. Duenas ...................................................................... 847
   Notes and Questions .............................................................. 847
   Note on Law, Economics, and Habitability .............................. 849
   Pinzon v. A & G Properties .................................................... 850

[2] Habitability in Commercial Leases (Should an Implied “Covenant of Suitability” Exist?) ................................................................. 850
   Notes and Questions .............................................................. 850

   Gym-N-I Playgrounds, Inc. v. Snyder ....................................... 851

§ 14.03 Landlords’ Remedies for Tenants’ Breaches ................................. 852

[A] Security Deposits and Similar Payments ....................................... 852
   Garcia v. Thong .................................................................. 852
   Notes and Questions .............................................................. 854

[B] Damage Recovery and the Duty to Mitigate .................................. 854
   Note on Recoverable Damages ............................................... 854
   Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc. ............ 855
   Notes and Questions .............................................................. 858
   Stonehedge Square Limited Partnership v. Movie Merchants, Inc. .. 859
   Notes and Questions .............................................................. 860
   Notes on Legislative Modification of Austin Hill: Should the Duty to Mitigate Be Made Nonwaiveable? ........................................ 861

[C] Self-Help: Lockout, Retaking of Possession, and the Landlord’s Lien ........ 862
   Notes and Questions .............................................................. 862

[D] Eviction under Special Procedures .............................................. 863

[1] How the Eviction Statutes Work .................................................... 863
   Note on Conditions and Processes for Eviction ......................... 864
   Metz v. Duenas .................................................................. 865
   Notes and Questions .............................................................. 867
TABLE OF CONTENTS

Page

[2] Retaliatory Eviction .......................................................... 868
  Edwards v. Habib .............................................................. 868
  Notes and Questions ....................................................... 870
  Central Bank v. Mika ......................................................... 871

[E] Equitable Relief ............................................................ 871
  Dover Shopping Center, Inc. v. Cushman’s Sons, Inc. ................. 871
  Notes and Questions ....................................................... 872
  Note on Equitable Relief for the Tenant: The “Yellowstone Injunction” 873

[F] The Landlord’s Rules and Regulations .................................. 874
  Notes and Questions ....................................................... 874

§ 14.04 Antidiscrimination Legislation ...................................... 874

[A] Policies Against Racial Discrimination: The Fair Housing Act .... 874
  Fair Housing Act of 1968 (As Amended) ................................ 874
  Notes and Questions ....................................................... 875
  Note on Proof Burdens under Civil Rights Legislation: How to Read the
    Case that Follows, Asbury v. Brougham .............................. 876
  Asbury v. Brougham .......................................................... 877
  Notes and Questions ....................................................... 880
  United States v. Starrett City Associates ............................. 880
  Notes and Questions ....................................................... 882

[B] The Americans with Disabilities Act and Familial-Status Discrimination ... 882
  The Fair Housing Act of 1968 (As Amended) .......................... 882
  Notes and Questions ....................................................... 883
  Roe v. Boulder Housing Authority ......................................... 884

§ 14.05 Rent Control and Related Regulations ............................. 885

[A] Arguments for and Against Rent Stabilization Laws .................. 885
  Pennell v. City of San Jose ............................................... 885
  Note on the Meaning, Results, and Administration of Rent Control ...... 887

[B] Ancillary Regulation Required for Rent Stabilization ............... 888
  Danekas v. San Francisco Residential Rent Stabilization and
    Arbitration Board ........................................................ 888
  Notes and Questions ....................................................... 890

[C] Comprehensive Regulation of Landlords’ Performance ............... 891
  Chicago Board of Realtors, Inc. v. City of Chicago .................. 891
TABLE OF CONTENTS

§ 14.06 Affordable Housing Through Subsidy ..................................... 894
    Note on Methods of Housing Subsidy ..................................... 894

APPENDIX A: LAW AND ECONOMICS: APPLYING BASIC ECONOMIC
    PRINCIPLES TO PROPERTY LAW ........................................... A1

APPENDIX B: ETHICAL AND POLITICAL PHILOSOPHY: THE
    THEORETICAL JUSTIFICATIONS OF PROPERTY LAW ..................... B1

APPENDIX C: THE PERSONAL DIMENSION OF LAWYERING–OR “CAN A
    LAWYER BE COMPETENT, DILIGENT, PROFESSIONAL,
    SUCCESSFUL, AND ALTRUSTIC . . . AND ALSO LIVE A FULL LIFE?” .......... C1

APPENDIX D: SIMULATION EXERCISES: MATERIALS AND INSTRUCTIONS . D1

TABLE OF CASES ........................................................ TC1

INDEX .................................................................................. II