

PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES

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PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES

Third Edition

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MATTHEW  BENDER

**PREFACE TO THE THIRD EDITION:
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.

(7) *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

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