PROPERTY LAW
CASES, MATERIALS, AND QUESTIONS

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PROPERTY LAW CASES, MATERIALS, AND QUESTIONS

Second Edition

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MATTHEW BENDER

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Dedication

To my daughter Lisa, son-in-law Paul, and granddaughters Lauren and Rachel

— E.C.

To my parents, Don and Dorothy, for their constant love and support
To my children, Emily and Stuart, for the joy they bring to my life
And to Paul for his endless wit, good cheer, and fun

— J.P.F.

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Preface to the Second Edition

In the second edition, we have updated and have made improvements where we thought they were warranted, but we have continued to focus on the objectives stated in the preface to the first edition. We have emphasized the relationship of Property to Contracts and Torts, and we have continued to place an emphasis on remedies.

In choosing cases, we have selected the most recent available. Property has the reputation of being obscure and stodgy, and we want our students to see the modern relevance of the subject. Where cases in the first edition have proved unsatisfactory in the classroom, we have tried to replace them with recent cases. In our selection of all cases, recent or older, we have taken those that we believe represent the correct view (or at least one of the correct views).

Instead of including lengthy textual introductions to materials, we have continued to rely primarily on cases, with notes and questions to develop the material and flesh out the issues. However, we have included fewer questions than appeared in the first edition. We have tried to streamline the notes and questions where they were too cumbersome. In addition, when a case citation is provided to answer a question, we have provided a parenthetical answer. However, we have left the "thought" questions unanswered.

To make the materials more readable, we have continued using the editorial practices of the first edition. In editing cases and other materials, we have deleted sentences, paragraphs, and citations. We have run together separate paragraphs or parts thereof and separated single paragraphs into two. We have silently corrected grammatical and syntactical errors.

Professor Forrester would like to thank Amanda Burcham, Erin Melsheimer, Matt Enoch, Jessica Sheridan, Jennifer Larson, Kendall Banowsky, and Sean Bellah, students or recent graduates of Southern Methodist University Dedman School of Law, for their excellent research assistance. She would also like to thank Dean John Attanasio and SMU Dedman School of Law for providing research funds to complete this project.

Professor Chase would like to thank Michael Blackwell, Laken Davis, and Geoffrey Garber, all students at Loyola University College of Law in New Orleans, for valuable research assistance. He would also like to thank Dean Brian Bromberger for providing research funds for this project.

Professor Chase joins the foregoing Preface but wishes to state separately that the *really* new and important addition to the book is its co-author, Julie Forrester, and the fresh perspective, expertise, and welcome enthusiasm that she has brought to the project. With her, the book is far stronger than it otherwise would have been, and has been a lot more enjoyable to work on.

Edward E. Chase, Jr.
New Orleans, Louisiana

Julia Patterson Forrester
Dallas, Texas

March, 2010

Preface to the First Edition

Property is a difficult subject for students. It lacks a unifying theme. In Contracts, bargain serves as a theoretical focus (contrasted with reliance and unjust enrichment as alternative sources of obligation) and an organizational device (contracts casebooks consider, more or less in sequence, the formation of a valid bargain, interpretation of its terms, performance, remedies for nonperformance, and the like). In Torts, the concepts of intentional harms, negligently-caused harms, and strict liability provide theoretical focus and organizational structure. In contrast, Property appears to the beginning law student as life did to Frank Ward O'Malley: "just one damned thing after another." And while the subject remains as difficult as it ever was, the students who encounter it nowadays have changed. Although my students today are no less bright than their predecessors of a few years ago, they do come with different skills; in particular, they are less prepared than their predecessors to handle complex texts. It is useless to lament this; it is a fact of our lives as teachers at the graduate level of education.

These two concerns — the complexity of the topic to the newcomer and the changed aptitudes of the newcomers themselves — have caused this book to take the specific shape that it does. Although it is a tall order, I have tried to create materials that are at once accessible enough to allow students to learn some fundamentals on their own, and yet intellectually rigorous enough to allow for the kind of evaluating, questioning, and deepening of analysis that should occur in the classroom. Readers will have to judge whether I have accomplished that worthy goal.

Here are some specifics of the book:

Unity. To counteract the perceived disunity of property law, some books use economic analysis, or philosophy, or something else, as a unifying perspective. The following materials are usable with any such approach. My unifying device (such as it is), however, seeks to be internal to law: wherever possible, I try to familiarize students with the essential concepts of property law by building on ideas with which they are acquainted if not familiar. Thus the heavy emphasis in these materials on the relationship of Property to Contracts and (to a lesser extent) to Torts, the three essential sources of common law rights and duties, and three mainstays of the first-year curriculum. (The chapters on landlord and tenant and on servitudes provide the most obvious, but not the only, candidates for comparison to contract doctrine.)

Cases vs. text. Students seem to get much more from reading cases than from reading explanatory text. Perhaps, as a colleague of mine says, this is because cases present stories — dramatizations of events — to which students respond. In any event, I have tried to avoid or to condense lengthy textual introductions to chapters and sections, preferring to let the Notes and Questions develop the material. Of course, Notes and Questions are text also. But by coming after and dealing specifically with issues opened up by the cases, the Notes and Questions give students a concrete focus that mere explanatory text usually lacks. In the instances in which textual explication, introductory or otherwise, seemed unavoidable, I have tried to make it as clear, and to keep it as brief, as possible.

Case selection. Wherever possible, I have used the most recent cases available. This alone may help to shake some of the obscurity from the subject. I have also tried to avoid

using cases that get doctrine wrong (a pervasive problem in future interests — where, yes, I have ventured to use a couple of cases — and servitudes): partly this springs from my objection to hide-the-ball pedagogy; in addition, on efficiency grounds, it is a waste of valuable classroom time to expect students to learn some of the law from their own reading only to have them unlearn it in class discussion. Cases that get the law right but still raise timely and discussable questions are the ones I have aimed for.

Focus on remedies. As a descendant of the American Legal Realists, no modern casebook author can (or at least should) write a text that fails to devote much the same kind of rigorous attention to remedies that is devoted to the substantive law. Accordingly, materials on remedies appear at many points in this book. What is perhaps unusual about the coverage of remedies herein is that I have tried to include restitution — currently the subject of a new Restatement project under the Reportership of Professor Andrew Kull — in the discussion of available remedies wherever possible. Raven Red Ash v. Ball, dealing with restitution for an easement holder's misuse of the benefit, is one of the classics of restitution literature, and it appears here in Chapter 6. Edwards v. Lee's Administrator, another classic in the law of restitution, is discussed in the Notes following Marengo Cave Co. v. Ross in Chapter 1. Restitution in its intriguing role as a basis for the recovery of *reliance* expenditures by the disappointed promisee under a contract of lease that is invalid due to the Statute of Frauds also receives attention. Of course, attention is also devoted to damages and equitable remedies for the protection of property rights.

History of Property law. This may be heretical to old-line teachers of Property (I should say *other* old-line teachers), but like the New Critics in literature, I have tried consistently in this book to separate the question of the meaning of the rules of Property law from the question of the historical origin of those rules. I do this neither proudly nor lightly; no one enjoys exploring the historical development of doctrine more than I, and I know that such an exploration can enrich one's understanding of the law immeasurably. But with today's students, excursions into the legal history of doctrine tend to fall either flat or on deaf ears. So — and again, this is solely in the interest of effective pedagogy — knight service, grand serjeantry, common socage, and frankalmoign are not in this book; Quia Emptores and De Donis appear in passing; the Statute of Uses gets a short paragraph; lost grant, a shorter one. Where Property law is most burdened by its history (future interests and servitudes come immediately to mind), I try to present the law as a meaningful *conceptual* system, and doing that does not require extended discussions of legal history.

Questions. More than any other Property casebook of which I am aware, this book provides questions (usually many) after each principal case. (These questions are so integral to the structure and intent of the book that a reference to them is included in its subtitle.) In general, the questions begin with the issues raised in the cases to which the questions are appended, and expand outward from there. Instructors inclined to use all of the questions after each case will find that there is enough material to occupy whatever classroom time the instructor is likely to be willing to devote to the topic at hand. Instructors wishing to devote somewhat less time to a case or topic than the questions call for can do so by selectively assigning the questions. When an instructor disagrees with the line of analysis suggested by the questions (which seasoned instructors may do quite often), *that* disagreement itself can generate valuable classroom discussion.

Weighted coverage of topics. In addition to trying to present a book that is fair to

students as well as to the subject being presented to them, I have tried to write a book whose coverage and attention to detail reflect the course that I teach, rather than some other course. I have not deemed it wise to try to give the same kind of fulldress treatment to conveyancing, zoning, or regulatory takings that I give, for example, to servitudes, concurrent interests, and landlord-tenant law. My course, like many others, is a one-semester course, and conveyancing, zoning and regulatory takings are not part of it. On the core topics covered herein, I have included material on all aspects of the subjects that I believe anyone would want to cover in class or by outside reading; I have devoted considerable space to my organizing device (comparing the rules of Property, Contract and Tort); I have provided an extensive set of questions for each major case; and I have stated in detail in the Instructor's Manual my thoughts on the questions raised. On topics covered in less detail than the core topics, I have tried simply to give the big picture. This strategy of "weighting" the book's coverage according to the likelihood of the topic being covered in most schools, means that most teachers will have more than enough material to cover on core topics. On the other topics, my materials allow for a quick in-and-out treatment for anyone desiring that approach, and they allow for easy supplementation for any teachers wishing to develop the topics in greater depth than my materials do.

Sequencing. The chapters follow the traditional triadic structure of ownership (Chapters 1-3), transfer (4 and 5) and use (6-8) of land and other resources. But each chapter is intended as a self-contained unit, and an instructor can as well begin with estates (Chapter 2) or landlord and tenant (chapter 4) as with animals or finders. (I have in the past started the course at different points in the materials, and will continue to do so in the future. The opportunity for this kind of re-shuffling of the deck, with the occasional insights afforded thereby, is the one big advantage of the disunity of the subject.)

Editorial practices. Since this book is intended for use as a teaching tool, I have engaged in editorial practices that would be unthinkable in a work designed for different purposes and audiences. The overriding aim of these practices has been to make the materials readable, accomplished through the elimination of distracting editorial intrusions. Accordingly: I have deleted sentences and paragraphs (parts of, or entire) without the usual ellipses so indicating; I have occasionally run together separate paragraphs, or separated single paragraphs. I have silently corrected most grammatical or syntactical errors. And so on. All of the recited practices have aided sense or at least not detracted from it, and all seem self-evident to me. One final practice — whose justification is far from self-evident — is my consistent omission of the case authorities cited in the judicial opinions reprinted herein; I have retained only those case citations identifying a quote or serving some other important purpose. This is a difficult choice because one of the requirements of effective advocacy that we try to instill in our students is that of making authoritative statements in support of the propositions they advance, and what better way to teach it than to show it being done over and over? But the overall savings in space, as well as the relative meaninglessness to students of string citations of authority, more than compensate for the advantage lost.

Like any author, I have incurred academic debts in the preparation of this book. The two largest debts will happily never be paid in full, because the accounts remain active. Professor Craig Oren, a fellow teacher of the basic Property course at Rutgers for many years, has often and in detail shared with me his insights about the substance and the

pedagogy of Property. Much of whatever virtue there is in the materials on future interests and servitudes is owed to him, and I am grateful. Professor (Emeritus) Hunter Taylor, my longtime good friend, sometime coauthor, and *compadre* of many an academic battle, taught me all the Contracts law I know, and thus made an indelible impression on Chapter 4, the longest in the book. A Renaissance teacher, he also volunteered to teach the book in draft form to a section of evening students, and his insights from that experience have immeasurably improved the final text and the Instructor's Manual. I am indebted to him beyond the power of words to express. I also thank Dean Rayman Solomon for generous financial support in the preparation of this book and, more importantly, for creating an atmosphere at Rutgers that encourages and acknowledges scholarly endeavors.

I owe a debt that transcends academics to my brother Charley, a Presbyterian minister in Dothan, Alabama. For many years, and at every place and turn, he has enlarged my steps so that my feet would not slip. I am eternally grateful to, and for, him.

I thank Professor Glen Weissenberger for helping me to get into this project, as well as for writing two seminal articles in the field of landlord and tenant law that it has been my pleasure to read and profit from. At Anderson Publishing Company, I have had the good fortune to fall into the expert hands of Sean Caldwell, whose incomparable editorial skills and judgment are exceeded only by his patience and tact in dealing with my interminable delays in forwarding material to him.

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This is my first book, and I am acutely aware, having finished it, of what Paul Tillich called "the incompleteness of the completed." Who knows what revisions a deeper understanding of the subject might have prompted, what lines of authority a more searching analysis might have detected, what infelicities of style or content yet another proofreading might have uncovered? But you have to go into production sometime, and I am reasonably satisfied that this book is the one I wanted to and was capable of writing at this time.

Edward E.Chase, Jr.

Acknowledgments

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