PROPERTY LAW
CASES, MATERIALS, AND QUESTIONS
LexisNexis Law School Publishing
Advisory Board

William D. Araiza
Professor of Law
Brooklyn Law School

Lenni B. Benson
Professor of Law & Associate Dean for Professional Development
New York Law School

Raj Bhala
Rice Distinguished Professor
University of Kansas, School of Law

Ruth Colker
Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
The Ohio State University, Moritz College of Law

Richard D. Freer
Robert Howell Hall Professor of Law
Emory University School of Law

David Gamage
Assistant Professor of Law
University of California, Berkeley School of Law

Craig Joyce
Andrews Kurth Professor of Law & Co-Director, Institute for Intellectual Property and Information Law
University of Houston Law Center

Ellen S. Podgor
Professor of Law
Stetson University College of Law

David I. C. Thomson
LP Professor & Director, Lawyering Process Program
University of Denver, Sturm College of Law
PROPERTY LAW
CASES, MATERIALS, AND QUESTIONS

Second Edition

EDWARD E. CHASE
Visiting Professor of Law
Loyola University College of Law, New Orleans
Professor Emeritus
Rutgers, The State University of New Jersey School of Law — Camden

JULIA PATTERSON FORRESTER
Professor of Law
Southern Methodist University
Dedman School of Law
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.
# Table of Contents

**Preface**

**Acknowledgments**

<table>
<thead>
<tr>
<th>Chapter 1</th>
<th>PROPERTY: AN INTRODUCTION</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>PROPERTY AS THINGS AND AS INTERESTS IN THINGS</td>
<td>1</td>
</tr>
<tr>
<td>1.</td>
<td>The “Bundle of Sticks” Metaphor</td>
<td>2</td>
</tr>
<tr>
<td>Adams v. Cleveland-cliffs Iron Co.</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Jacque v. Steenberg Homes, Inc.</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>11</td>
</tr>
<tr>
<td>2.</td>
<td>Classification of Property</td>
<td>12</td>
</tr>
<tr>
<td>a.</td>
<td>Real and Personal Property</td>
<td>12</td>
</tr>
<tr>
<td>Johnson v. Hicks</td>
<td></td>
<td>13</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>16</td>
</tr>
<tr>
<td>b.</td>
<td>Intellectual Property</td>
<td>16</td>
</tr>
<tr>
<td>International News Service v. Associated Press</td>
<td></td>
<td>16</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>24</td>
</tr>
<tr>
<td>Parks v. Laface Records</td>
<td></td>
<td>26</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>31</td>
</tr>
<tr>
<td>B.</td>
<td>ACQUIRING INTERESTS IN THINGS: THREE STUDIES IN POSSESSION</td>
<td>33</td>
</tr>
<tr>
<td>1.</td>
<td>First Possession: Wild Animals</td>
<td>33</td>
</tr>
<tr>
<td>Pierson v. Post</td>
<td></td>
<td>33</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>36</td>
</tr>
<tr>
<td>Keeble v. Hickeringill</td>
<td></td>
<td>38</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>40</td>
</tr>
<tr>
<td>Popov v. Hayashi</td>
<td></td>
<td>42</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>48</td>
</tr>
<tr>
<td>2.</td>
<td>Subsequent Possession: Losers and Finders</td>
<td>50</td>
</tr>
<tr>
<td>Armory v. Delamirie</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>51</td>
</tr>
<tr>
<td>NOTE: BAILMENTS</td>
<td></td>
<td>52</td>
</tr>
<tr>
<td>Benjamin v. Lindner Aviation, Inc.</td>
<td></td>
<td>53</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>60</td>
</tr>
<tr>
<td>Corliss v. Wenner</td>
<td></td>
<td>62</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>67</td>
</tr>
<tr>
<td>3.</td>
<td>Adverse Possession</td>
<td>68</td>
</tr>
<tr>
<td>a.</td>
<td>Adverse “Possession”</td>
<td>72</td>
</tr>
<tr>
<td>Schultz v. Dew</td>
<td></td>
<td>72</td>
</tr>
<tr>
<td>NOTES AND QUESTIONS</td>
<td></td>
<td>75</td>
</tr>
</tbody>
</table>
Table of Contents

Marengo Cave Co. v. Ross ........................................ 77
NOTES AND QUESTIONS ........................................ 81
NOTE ON TACKING ............................................. 85
NOTES AND QUESTIONS ........................................ 86
NOTE ON DISABILITY ......................................... 87

b. "Adverse" Possession ...................................... 88
   Gruebele v. Geringer ......................................... 89
   NOTES AND QUESTIONS ..................................... 92
   Mannillo v. Gorski ........................................... 95
   NOTES AND QUESTIONS ..................................... 100
   Carpenter v. Ruperto ......................................... 101
   NOTES AND QUESTIONS ..................................... 105

c. Possession Under Color of Title ........................... 107
   Lott v. Muldoon Road Baptist Church, Inc. ................ 107
   NOTES AND QUESTIONS ..................................... 112
   MORE NOTES AND QUESTIONS ................................. 113

d. Adverse Possession of Personal Property .................. 114
   O’keeffe v. Snyder ........................................... 114
   NOTES AND QUESTIONS ..................................... 124

C. TRANSFERRING INTERESTS IN THINGS: GIFTS .............. 126

1. Requirements ................................................ 126
   Scherer v. Hyland ............................................ 126
   Woo v. Smart .................................................. 130
   NOTES AND QUESTIONS ..................................... 134
   Gruen v. Gruen ................................................ 136
   NOTES AND QUESTIONS ..................................... 140
   Lindh v. Surman ............................................... 141
   NOTES AND QUESTIONS ..................................... 146

2. Declarations of Trust ....................................... 147
   Farkas v. Williams ........................................... 147
   NOTES AND QUESTIONS ..................................... 152

Chapter 2 ESTATES IN LAND AND FUTURE INTERESTS ............. 155

A. PRESENT ESTATES ........................................... 156

1. The Fee Simple (to “A and His Heirs”) ...................... 156
   a. Creation of a Fee Simple ................................ 160
      McLaurin v. McLaurin ..................................... 160
      NOTES AND QUESTIONS ................................ 161
      Dickson v. Alexandria Hospital ......................... 162
      NOTES AND QUESTIONS ................................ 164

   b. Inheritance of a Fee Simple ............................ 165
### Table of Contents

NOTES AND QUESTIONS ............................................. 168  
PROBLEMS .......................................................... 169  
c. Devised of a Fee Simple ........................................ 170  
   Stevens v. Casdorph ............................................ 170  
   NOTES AND QUESTIONS ....................................... 174  
d. Responsibility: Abandonment of a Fee Simple .............. 176  
   Pocono Springs Civic Assoc., Inc. v. Mackenzie ............ 176  
   NOTES AND QUESTIONS ....................................... 178  

2. The (Obsolete) Fee Tail ......................................... 179  
   NOTES AND QUESTIONS ....................................... 180  
   PROBLEMS ...................................................... 182  

3. The Life Estate .................................................. 183  
a. Creation .......................................................... 184  
   Williams v. Estate Of Williams ............................... 184  
   NOTES AND QUESTIONS ....................................... 186  
b. Sale by the Life Tenant ........................................ 186  
   Long v. Crum .................................................. 187  
   NOTES AND QUESTIONS ....................................... 191  
   Ogle v. Ogle .................................................. 194  
   NOTES AND QUESTIONS ....................................... 198  
c. Division of Benefits and Burdens ............................ 199  
   Estate Of Campbell ............................................ 199  
   NOTES AND QUESTIONS ....................................... 202  
d. Responsibility for the Condition of the Premises: Waste . 203  
   Moore v. Phillips ............................................. 203  
   NOTES AND QUESTIONS ....................................... 206  

4. The Nonfreehold (Landlord and Tenant) Estates ............ 208  

5. Qualification of Estates: Defeasibility ...................... 209  
a. Creation .......................................................... 210  
   Forsgren v. Sollie ............................................. 210  
   NOTES AND QUESTIONS ....................................... 214  
b. Breach ........................................................... 216  
   Red Hill Outing Club v. Hammond ............................. 217  
   NOTES AND QUESTIONS ....................................... 220  

   NOTES ON DEFEASIBLE FEES WITH EXECUTORY INTERESTS ... 223  
   INTERESTS ..................................................... 223  
   Hermitage Methodist Homes v. Dominion Trust Co. ........ 224  
   NOTES AND QUESTIONS ....................................... 227  
d. Statutory Restrictions ......................................... 231  
   Ludington & Northern Railway v. Epworth Assembly .......... 231  

vii
Table of Contents

NOTES AND QUESTIONS ........................................................................ 235
6. Restraints on Alienation ................................................................. 235
   Alby v. Banc One Financial ......................................................... 236
NOTES AND QUESTIONS ................................................................ 242
B. FUTURE INTERESTS ..................................................................... 245
   1. Classification by Party ............................................................ 247
      a. Interests in the Transferor: Reversionary Future Interests .... 247
      b. Interests in a Transferee: Nonreversionary Future Interests ... 249
      c. Distinguishing reversionary and nonreversionary interests ... 250
   2. Conditions and Classification: Contingent and Vested Future Interests . 251
      a. Condition Precedent: Contingent Remainders .................... 252
      b. Condition Subsequent: Vested Remainders Subject to Divestment . 253
      c. Unconditional Remainders: Indefeasibly Vested .............. 255
      PROBLEMS ............................................................ 256
      d. Vested Remainders Subject to Open: Class Gifts ............. 257
         Canoy v. Canoy .................................................. 259
         NOTES AND QUESTIONS .................................. 261
         ADDITIONAL NOTES ON FUTURE INTERESTS ........ 262
   3. Consequences: Why Classification Matters (or Mattered) ............ 263
   4. The Rule Against Perpetuities ................................................... 267
      a. Introduction to the Rule ..................................................... 267
         City Of Klamath Falls v. Bell ............................................ 269
         NOTES AND QUESTIONS .................................. 272
         ADDITIONAL EXERCISES ON THE RULE .......... 274
         ADDITIONAL NOTES ON THE RULE .................. 275
      b. The Rule and Commercial Transactions .............................. 277
         Ferrero Construction Co. v. Dennis Rourke Corp. ............... 277
         NOTES AND QUESTIONS .................................. 284

Chapter 3 CONCURRENT INTERESTS ............................................. 287

A. TYPES OF CONCURRENT INTERESTS ..................................... 287
   1. Creation of the Joint Tenancy ............................................... 290
      a. Intent: Clarity and Extrinsic Evidence ............................... 290
         Hoover v. Smith ................................................... 291
         NOTES AND QUESTIONS .................................. 293
         Camp v. Camp .................................................... 295
         NOTES AND QUESTIONS .................................. 298
         NOTES ON REFORMATION .................................. 300
         NOTES ON MULTIPLE-PARTY BANK ACCOUNTS ........ 301
      b. The Four Unities ......................................................... 302
         Lipps v. Crowe ..................................................... 303

viii
# Table of Contents

NOTES AND QUESTIONS ........................................ 305

2. Severance of the Joint Tenancy ................................ 306
   a. Severance by Conveyance .................................. 307
      *In Re Knickerbocker* ...................................... 307
   NOTES AND QUESTIONS ........................................ 309
   b. Severance by Mortgage ...................................... 311
      *People v. Nogarr* .......................................... 311
   NOTES AND QUESTIONS ........................................ 313
   c. Unconventional Severance: Homocide and Common Disasters .... 316
      *Bradley v. Fox* ........................................... 316
   NOTES AND QUESTIONS ........................................ 319
   d. Indestructible Rights of Survivorship ....................... 320
      *Albro v. Allen* ........................................... 321
   NOTES AND QUESTIONS ........................................ 322

3. The Cotenant’s Rights and Duties ............................ 324
   a. Partition .................................................. 324
      *Cunningham v. Hastings* ................................... 325
   NOTES AND QUESTIONS ........................................ 326
   b. Accounting and Contribution ................................ 329
      *Martin v. Martin* .......................................... 329
   NOTES AND QUESTIONS ........................................ 330

4. The Tenancy by the Entirety ................................... 332
   a. Creation of the Tenancy by the Entirety ..................... 333
   b. Consequences of the Tenancy by the Entirety ................. 334
      *King v. Greene* ........................................... 335
   NOTES AND QUESTIONS ........................................ 339

B. OTHER MARITAL PROPERTY ISSUES ............................. 344
   1. Divorce: Equitable Distribution of Assets ..................... 345
      *Elkus v. Elkus* ........................................... 345
   NOTES AND QUESTIONS ........................................ 349
   2. The Surviving Spouse’s Elective Share ....................... 352
      *Sullivan v. Burkin* ........................................ 353
   NOTES AND QUESTIONS ........................................ 356
   NOTES ON COMMUNITY PROPERTY ................................ 357
   3. Unmarried Cohabitants ..................................... 358
      *Watts v. Watts* ........................................... 358
      *Ireland v. Flanagan* ...................................... 371

C. PROPERTY AND PROTECTION: THE HOMESTEAD EXEMPTION .... 374
   *Michels v. Kozitsa* .......................................... 375
   NOTES AND QUESTIONS ........................................ 377
Table of Contents

Chapter 4 LEASES: PROPERTY AND CONTRACT ............ 381

A. ISSUES IN LEASE FORMATION .......................... 382
1. The Types of Tenancies ................................ 382
   a. The Term of Years Tenancy .......................... 382
      Stanmeyer v. Davis ................................. 383
      NOTES AND QUESTIONS ............................. 385
   b. The Periodic Tenancy ............................... 387
      NOTES AND QUESTIONS ............................. 388
   c. The Tenancy at Will ............................... 389
      Garner v. Gerrish ................................. 390
      NOTES AND QUESTIONS ............................. 392
2. The Statute of Frauds .................................. 393
   a. Coverage: Leases “Within” the Statute .......... 393
   b. Compliance: The Required Writing ............... 395
   c. Noncompliance: Avoiding the Statute .......... 396
      PROBLEMS ......................................... 397
      Crossman v. Fontainebleau Hotel Corp. .......... 398
      NOTES AND QUESTIONS ............................. 401
      Farash v. Sykes Datatronics, Inc ................. 402
      NOTES AND QUESTIONS ............................. 406
3. Leases and Licenses .................................... 408
   Weiman v. Butterman ................................. 409
   NOTES AND QUESTIONS ............................... 412
4. Leases and Bilateral Contracts .......................... 413
   University Club Of Chicago v. Deakin ............... 413
   NOTES AND QUESTIONS ............................... 416
B. TENANT’S RIGHTS AND REMEDIES ......................... 419
1. Delivery of Possession ............................... 419
   Hannan v. Dusch ................................. 420
   NOTES AND QUESTIONS ............................... 424
   PROBLEMS ......................................... 426
2. Possession and Enjoyment During the Lease Term .......... 428
   a. Access: Actual Eviction .......................... 428
      Smith v. Mcenany ................................. 429
      NOTES AND QUESTIONS ............................. 430
   b. Enjoyment: “Constructive” Eviction .......... 431
      Echo Consulting Services, Inc. v. North Conway Bank 432
      NOTES AND QUESTIONS ............................. 436
3. Condition of the Premises ................................ 443
   a. The Implied Warranty of Habitability ......... 444
Table of Contents

Javins v. First National Realty Corp. ......................... 444
NOTES AND QUESTIONS .................................. 454
PROBLEMS .............................................. 460

b. Habitability in Commercial Leases. ........................ 461
   Davidow v. Inwood North Professional Group ............... 461
   NOTES AND QUESTIONS .................................. 464
   Richard Barton Enterprises, Inc. v. Tserrn ................. 466
   NOTES AND QUESTIONS .................................. 470

c. The Landlord’s Tort Liability ............................. 472
   Ortega v. Flaim ....................................... 473
   NOTES AND QUESTIONS .................................. 479

4. Security of Possession: The Tenant’s Protections Against Retaliatory and Discriminatory Conduct and Eviction Without Cause .......... 480
   a. Retaliatory Eviction .................................. 480
   b. Protection Against Discrimination: Fair Housing Issues ....... 481
      THE FAIR HOUSING ACT ................................ 481
      CIVIL RIGHTS ACT OF 1866 ............................ 484
      NOTES, QUESTIONS, AND PROBLEMS ................. 484
      PROBLEMS .............................................. 486
   c. Good Cause for Termination or Nonrenewal ................. 488

C. LANDLORD’S RIGHTS AND REMEDIES .......................... 490

1. Rent and Rental Value .................................. 491
   a. Suits for Rent ....................................... 493
      First National Bank Of Omaha v. Omaha National Bank .... 493
      NOTES ANDQUESTIONS ............................... 494
   b. Termination of the Lease and Recovery of Possession ....... 495
      Cain Partnership, Ltd. v. Pioneer Investment Services Co. ... 495
      NOTES AND QUESTIONS .................................. 500
   c. Security Deposits .................................... 504
      Neihaus v. Maxwell .................................... 504
      NOTES AND QUESTIONS .................................. 507

2. Remedies Against the Abandoning Tenant .................. 508
   a. Duty to Mitigate or Not? ................................ 509
      Sommer v. Kridel ...................................... 509
      NOTES AND QUESTIONS .................................. 513
   b. No Duty to Mitigate: Landlord’s Remedies ................ 516
      Maida v. Main Building Of Houston ......................... 517
      NOTES AND QUESTIONS .................................. 521
      Richard v. Broussard ................................... 522
      NOTES AND QUESTIONS .................................. 525
      Hawkinson v. Johnston .................................. 526
Table of Contents

NOTES AND QUESTIONS ............................................ 531

3. Remedies Against the Holdover Tenant .................................................. 532
   Gym-n-i Playgrounds, Inc. v. Snider ............................................. 533
   NOTES AND QUESTIONS ............................................. 536

4. Use and Condition of the Premises .................................................. 538
   a. Use ............................................................................. 538
      Mercury Investment Co. v. F.w. Woolworth Co. .................................. 538
      NOTES AND QUESTIONS ............................................. 545
   b. Condition of the Premises ................................................ 549
      Brizendine v. Conrad .................................................................. 549
      NOTES AND QUESTIONS ............................................. 553

NOTES ON FRUSTRATION OF PURPOSE AND IMPOSSIBILITY
OF PERFORMANCE IN LEASES ........................................... 554

D. RUNNING PROMISES IN LEASES: ASSIGNMENT AND
   SUBLEASE .................................................................. 556
1. Power to Transfer Lease Interests ................................................ 557
   Kendall v. Ernest Pestana, Inc. ................................................ 557
   NOTES AND QUESTIONS ............................................. 562

2. Assignment or Sublease? .......................................................... 564
   NOTES AND QUESTIONS ............................................. 564

3. Consequences of Transfer .......................................................... 565
   First American National Bank v. Chicken System of America, Inc. ........ 566
   NOTES AND QUESTIONS ............................................. 572

Chapter 5 REAL ESTATE TRANSACTIONS: SALES .......................... 575

A. PRELIMINARIES .......................................................... 575
1. An Overview of the Process ................................................ 575
2. Sellers and Brokers .......................................................... 577
   QUINTIN JOHNSTONE, LAND TRANSFERS: PROCESS AND
   PROCESSORS .................................................................. 577
3. Statute of Frauds .......................................................... 580
   Shattuck v. Klotzbach .................................................................. 580
   NOTES AND QUESTIONS ............................................. 583

B. THE GAP PERIOD: FROM CONTRACT TO CLOSING ..................... 584
1. Conditions in the Contract of Sale ................................................ 585
   a. Financing .................................................................... 585
      Luttinger v. Rosen ......................................................... 585
      NOTES AND QUESTIONS ............................................. 586
   b. Marketable Title .......................................................... 587
      Lohmeyer v. Bower ......................................................... 587
      NOTES AND QUESTIONS ............................................. 591
Table of Contents

2. Equitable Conversion ................................... 595
   *Holscher v. James* .................................. 595
   NOTES AND QUESTIONS ................................... 601

3. Remedies for Breach of Contract ......................... 602
   a. Money Awards: Damages and Restitution ................. 603
      *Wolofsky v. Behrman* ................................ 603
      NOTES AND QUESTIONS ................................... 605
      *Kutzin v. Pirmie* .................................... 606
      NOTES AND QUESTIONS ................................... 614
   b. Specific Performance .................................. 615
      *Centex Homes Corp. v. Boag* .......................... 615
      NOTES AND QUESTIONS ................................... 618

C. THE CLOSING ......................................... 619
   1. Delivery of a Deed ..................................... 619
      *Salter v. Hamiter* .................................... 619
      NOTES AND QUESTIONS ................................... 625
   2. Escrow ............................................. 625
      *Ferguson v. Caspar* .................................. 625
      NOTES AND QUESTIONS ................................... 632
   3. The Merger Doctrine .................................... 633
      *Secor v. Knight* ....................................... 633
      NOTES AND QUESTIONS ................................... 636

D. DISPUTES AFTER CLOSING .............................. 637
   1. Title Disputes with Third Party Claimants — The Recording System . . 638
      a. Title Search .......................................... 638
         *WILLIAM B. STOEBUCK & DALE A. WHITMAN THE LAW OF
          PROPERTY 869-70, 892-93* .......................... 638
      b. Operation of Recording Acts ............................ 640
         *Burris v. Mcdougald* .................................. 640
         NOTES AND QUESTIONS ................................... 642
      c. The Index ............................................. 644
         *Howard Savings Bank v. Brunson* ....................... 644
         NOTES AND QUESTIONS ................................... 649
      d. Chain of Title Problems ................................ 650
         *Witter v. Taggart* ..................................... 650
         NOTES AND QUESTIONS ................................... 653
      e. Marketable Title Legislation ............................. 656
         *H & F Land, Inc. v. Panama City-bay County Airport* .......... 656
   2. The Seller’s Deed Covenants .............................. 663
      *Seymour v. Evans* ....................................... 663
      NOTES AND QUESTIONS ................................... 669
Table of Contents

Bridges v. Heimburger .................................. 672
NOTES AND QUESTIONS .................................. 674

3. Claims Against the Title Insurer ................... 675
   Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc. ........ 675
   Greenberg v. Stewart Title Guaranty Co. .................. 679
   NOTES AND QUESTIONS .................................. 684

4. Condition of the Premises ............................ 685
   a. Fraud and Nondisclosure ............................. 685
      Stambovsky v. Ackley ................................ 685
      Johnson v. Davis ..................................... 689
      NOTES AND QUESTIONS .................................. 692
   b. Implied Warranty .................................... 695
      Lempke v. Dagenais ................................... 695
      NOTES AND QUESTIONS .................................. 700

Chapter 6  EASEMENTS ...................................... 701

A. CREATION OF EASEMENTS .............................. 702
   1. Express Creation .................................... 702
      a. Theory: Possession and Use ....................... 702
         Walton v. Capital Land, Inc. ...................... 702
         NOTES AND QUESTIONS .................................. 704
         NOTES ON ISSUES IN SERVITUDES CASES AND ON THE NEW
         RESTATEMENT OF PROPERTY .......................... 706
      b. Intent and Form: Grant, Reservation, and Promise ..... 709
         Fitzstephens v. Watson .............................. 709
         NOTES AND QUESTIONS .................................. 713
      c. Third-Party Beneficiaries .......................... 715
         Garza v. Grayson ..................................... 715
         NOTES AND QUESTIONS .................................. 717
   2. Running of Burden and Benefit ..................... 718
      a. Running of the Burden .............................. 719
         Witter v. Taggart ................................... 719
         NOTES AND QUESTIONS .................................. 719
      b. Running of the Benefit ............................. 721
         Luevano v. Group One ................................ 721
         NOTES AND QUESTIONS .................................. 725
      c. Transferability of In-Gross Benefits ................ 725
         O’donovan v. McIntosh ................................ 725
         NOTES AND QUESTIONS .................................. 730
         PROBLEMS ............................................. 731
   3. Informal Easements .................................. 733
Table of Contents

a. Easements at Will: Licenses ............................................. 733
   Mandia v. Applegate ........................................... 733
   NOTES AND QUESTIONS ........................................... 733

b. Estoppel ........................................................................ 739
   Henry v. Dalton ...................................................... 739
   NOTES AND QUESTIONS ........................................... 742

c. Prior Use ....................................................................... 744
   Otero v. Pacheco ...................................................... 744
   NOTES AND QUESTIONS ........................................... 747

d. Necessity ....................................................................... 749
   Canali v. Satre .......................................................... 749
   NOTES AND QUESTIONS ........................................... 752

e. Adverse Use ................................................................... 754
   Fiese v. Sitorius .......................................................... 754
   NOTES AND QUESTIONS ........................................... 758

B. SCOPE OF EASEMENTS ..................................................... 762
   Scherger v. Northern Natural Gas Co. ............................... 762
   NOTES AND QUESTIONS ........................................... 765
   Frenning v. Dow ............................................................ 769
   NOTES AND QUESTIONS ........................................... 772
   Raven Red Ash Coal Co. v. Ball ......................................... 773
   NOTES AND QUESTIONS ........................................... 776

C. TERMINATION OF EASEMENTS ........................................ 777
   1. Expiration ..................................................................... 777
      Howell v. Clyde .......................................................... 777
      NOTES AND QUESTIONS ........................................... 780
   2. Extinguishment ............................................................. 781
      a. Conduct of Easement Holder ........................................ 781
         Strahin v. Lantz .......................................................... 781
         NOTES AND QUESTIONS ........................................... 784
      b. Conduct of the Servient Owner ..................................... 786
         Estojak v. Mazsa .......................................................... 786
         NOTES AND QUESTIONS ........................................... 793
      c. Conduct of Both Parties ............................................... 793
         Pergament v. Loring Properties, Ltd. .............................. 793
         NOTE .................................................................. 797
      d. Termination Pursuant to Statute .................................... 797
         H & F Land, Inc., v. Panama City-bay County Airport ........ 797
   D. NEGATIVE EASEMENTS ................................................. 797
      United States v. Blackman ............................................... 798
      NOTES AND QUESTIONS ........................................... 804
Table of Contents

NOTES ON ANCIENT LIGHTS AND SPITE FENCES ............ 806
NOTE: WHAT IS AN EASEMENT? ......................... 807

Chapter 7 PROMISES RUNNING WITH THE LAND ......... 809

A. ENFORCEMENT OF PROMISES RUNNING WITH THE LAND . 810
1. Real Covenants: Enforcement by the Damages Remedy ..... 810
   a. Creation of Covenants ............................ 810
   b. Running of Burden and Benefit ........................ 811
      Gallagher v. Bell .................................. 811
   NOTES AND QUESTIONS .............................. 818
   PROBLEMS ........................................... 824
2. Equitable Servitudes: Enforcement by Equitable Remedies .... 825
   a. Running Requirements ............................... 825
      Tulk v. Moxhay ..................................... 826
   NOTES AND QUESTIONS .............................. 827
   NOTESS ON RUNNING COVENANTS IN LEASES ............ 828
   PROBLEMS ........................................... 830
   b. Implied Creation ................................... 831
      Sanborn v. Mclean .................................. 831
   NOTES AND QUESTIONS .............................. 834
3. Third-Party Beneficiaries of Promises ....................... 835
   Snow v. Van Dam ...................................... 835
   NOTESS AND QUESTIONS .............................. 839

B. (SOME FURTHER) CONSEQUENCES OF CLASSIFICATION .... 841
1. Covenants and Easements ................................ 842
   a. Third-Party Beneficiaries ........................... 842
      Nature Conservancy v. Congel ........................ 842
   NOTES AND QUESTIONS .............................. 843
   b. Running Burdens with Benefits in Gross ............... 844
      Caullett v. Stanley Stilwell & Sons, Inc. ............ 844
   NOTES AND QUESTIONS .............................. 848
2. Leases, Licenses, Contracts, and Servitudes ............... 849
   Todd v. Krolick ...................................... 849
   NOTES AND QUESTIONS .............................. 851
   Aronsohn v. Mandara .................................. 852
   NOTES AND QUESTIONS .............................. 856
3. Covenants and Deferable Fees Compared ..................... 856
   Humphrey v. C.g. Jung Educational Center ............... 857
   NOTES AND QUESTIONS .............................. 861
C. SCOPE AND TERMINATION OF COVENANTS .................... 862
1. Scope ................................................ 862
# Table of Contents

*Hill v. Community Of Damien Of Molokai* ........................................ 862  
NOTES AND QUESTIONS .......................................................... 870  

2. Termination ................................................................. 872  
*Cowling v. Colligan* .......................................................... 872  
NOTES AND QUESTIONS .......................................................... 875  

D. COMMON INTEREST COMMUNITIES ........................................... 877  
*Nahrstedt v. Lakeside Village Condominium Assoc., Inc.* ............... 879  
NOTES AND QUESTIONS .......................................................... 888  
*Armstrong v. Ledges Homeowners Association, Inc.* ..................... 891  
NOTES AND QUESTIONS .......................................................... 898  

Chapter 8 GOVERNMENT REGULATION AND TAKING OF LAND .................. 899  

A. NUISANCE ........................................................................... 899  
*Burch v. Nedpower Mount Storm, Llc* ........................................ 899  
NOTES AND QUESTIONS .......................................................... 908  

B. ZONING ............................................................................. 910  
1. Validity .............................................................................. 910  
U.S. DEPARTMENT OF COMMERCE STANDARD STATE ZONING ENABLING ACT (1926) ......................................................... 910  
NOTES ................................................................................... 913  
*Village Of Euclid v. Ambler Realty Co.* ...................................... 914  
NOTES AND QUESTIONS .......................................................... 921  
2. Nonconforming Uses and “Vested Rights” .................................. 923  
*Village Of Valatie v. Smith* ....................................................... 924  
NOTES AND QUESTIONS .......................................................... 928  
3. Zoning Flexibility .................................................................. 931  
a. Amendments: Rezoning .......................................................... 932  
*Griswold v. City Of Homer* ....................................................... 932  
NOTES AND QUESTIONS .......................................................... 941  
b. Variances ............................................................................. 942  
*Matthew v. Smith* .................................................................. 942  
NOTES AND QUESTIONS .......................................................... 952  
c. Special Exceptions ................................................................ 953  
*Trustees Of Union College v. Members Of The Schenectady City Council* ................................................................. 953  
NOTES AND QUESTIONS .......................................................... 956  

a. Aesthetics ........................................................................... 958  
*Anderson v. City Of Issaquah* .................................................. 958  
*Lamar Corp. v. City Of Twin Falls* ........................................... 966  

xvii
Table of Contents

NOTES AND QUESTIONS ........................................... 971
b. Exclusionary Zoning ........................................... 972  
   Casperen v. Town Of Lyme .................................... 972
   English v. Augusta Township .................................. 977
   NOTES AND QUESTIONS .......................................... 981
   Britton v. Town Of Chester .................................... 981
   NOTES AND QUESTIONS .......................................... 987
c. Restrictions on the “Family” ................................... 988
   Dinan v. Board Of Zoning Appeals .............................. 988
   NOTES AND QUESTIONS .......................................... 995
C. EMINENT DOMAIN .................................................. 995
   NOTES AND QUESTIONS .......................................... 1003
D. REGULATORY TAKINGS: INVERSE CONDEMNATION ............... 1003
   1. Origins of the Doctrine ..................................... 1004
      Pennsylvania Coal Co. v. Mahon ............................. 1004
      NOTES AND QUESTIONS ...................................... 1008
   2. The Search for Method ...................................... 1010
      a. “Ad hoc, factual inquiries” ................................. 1010
         Penn Central Transportation Co. v. City Of New York ... 1010
         NOTES AND QUESTIONS ..................................... 1025
      b. Categorical Tests ......................................... 1026
         Lucas v. South Carolina Coastal Council .................. 1026
         NOTES AND QUESTIONS ..................................... 1033
      c. Refining the Tests ........................................ 1034
         Palazzolo v. Rhode Island .................................. 1034
         Tahoe-sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency .......................... 1039
         NOTES AND QUESTIONS ..................................... 1052
d. Exactions ...................................................... 1053
   Dolan v. City Of Tigard ...................................... 1053
   NOTES AND QUESTIONS .......................................... 1061
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

xix
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 "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
Preface to the First Edition

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
Preface to the First Edition

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.

The following research assistants — present or past students at Rutgers Law School — provided invaluable assistance in the compiling of the manuscript: Jon Batastini, David T. Blonder, Kristie Curtis, Andrew Podolski, and Lynda Searles. (Andrew and Lynda also provided expert assistance in the compilation of tables.) My secretary Debbie Comuso provided her usual superb help on tasks great and small.

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

Permission to reproduce excerpts from the following materials is gratefully acknowledged:

American Law Institute, Restatement of Property (1944); Restatement (Second) of Property, Landlord and Tenant (1977); Restatement (Third) of Property, Donative Transfers (2000); Restatement (Third) of Property, Servitudes (2000); Restatement of Contracts (1932); Restatement (Second) of Contracts (1981). Reprinted by permission of the American Law Institute.


John Stone, “The Truck,” from In All This Rain (1980). Reprinted by permission of the author.

Table of Consanguinity, reproduced from California Decedent Estate Practice, Volumes I & 2, copyright © 1986, 2000, by the Regents of the University of California. Reproduced with permission of Continuing Education of the Bar–California. (For information about CEB publications, telephone toll free 1-800-CEB-3444 or go to our web site, CEB.com.)