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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

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121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
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MATTHEW  BENDER

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

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

Table of Contents

	<i>Marengo Cave Co. v. Ross</i>	77
	NOTES AND QUESTIONS	81
	NOTE ON TACKING	85
	NOTES AND QUESTIONS	86
	NOTE ON DISABILITY	87
b.	“Adverse” Possession	88
	<i>Gruebele v. Geringer</i>	89
	NOTES AND QUESTIONS	92
	<i>Mannillo v. Gorski</i>	95
	NOTES AND QUESTIONS	100
	<i>Carpenter v. Ruperto</i>	101
	NOTES AND QUESTIONS	105
c.	Possession Under Color of Title	107
	<i>Lott v. Muldoon Road Baptist Church, Inc.</i>	107
	NOTES AND QUESTIONS	112
	MORE NOTES AND QUESTIONS	113
d.	Adverse Possession of Personal Property	114
	<i>O’keeffe v. Snyder</i>	114
	NOTES AND QUESTIONS	124
C.	TRANSFERRING INTERESTS IN THINGS: GIFTS	126
1.	Requirements	126
	<i>Scherer v. Hyland</i>	126
	<i>Woo v. Smart</i>	130
	NOTES AND QUESTIONS	134
	<i>Gruen v. Gruen</i>	136
	NOTES AND QUESTIONS	140
	<i>Lindh v. Surman</i>	141
	NOTES AND QUESTIONS	146
2.	Declarations of Trust	147
	<i>Farkas v. Williams</i>	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
	<i>Mclaurin v. Mclaurin</i>	160
	NOTES AND QUESTIONS	161
	<i>Dickson v. Alexandria Hospital</i>	162
	NOTES AND QUESTIONS	164
b.	Inheritance of a Fee Simple	165

Table of Contents

	NOTES AND QUESTIONS	168
	PROBLEMS	169
c.	Devise of a Fee Simple	170
	<i>Stevens v. Casdorff</i>	170
	NOTES AND QUESTIONS	174
d.	Responsibility: Abandonment of a Fee Simple	176
	<i>Pocono Springs Civic Assoc., Inc. v. Mackenzie</i>	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
	<i>Williams v. Estate Of Williams</i>	184
	NOTES AND QUESTIONS	186
b.	Sale by the Life Tenant	186
	<i>Long v. Crum</i>	187
	NOTES AND QUESTIONS	191
	<i>Ogle v. Ogle</i>	194
	NOTES AND QUESTIONS	198
c.	Division of Benefits and Burdens	199
	<i>Estate Of Campbell</i>	199
	NOTES AND QUESTIONS	202
d.	Responsibility for the Condition of the Premises: Waste	203
	<i>Moore v. Phillips</i>	203
	NOTES AND QUESTIONS	206
4.	The Nonfreehold (Landlord and Tenant) Estates	208
5.	Qualification of Estates: Defeasibility	209
a.	Creation	210
	<i>Forsgren v. Sollie</i>	210
	NOTES AND QUESTIONS	214
b.	Breach	216
	<i>Red Hill Outing Club v. Hammond</i>	217
	NOTES AND QUESTIONS	220
	NOTES ON DEFEASIBLE FEES WITH EXECUTORY	
	INTERESTS	223
c.	Consequences	223
	<i>Hermitage Methodist Homes v. Dominion Trust Co.</i>	224
	NOTES AND QUESTIONS	227
d.	Statutory Restrictions	231
	<i>Ludington & Northern Railway v. Epworth Assembly</i>	231

Table of Contents

	NOTES AND QUESTIONS	235
6.	Restraints on Alienation	235
	<i>Alby v. Banc One Financial</i>	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
	<i>Canoy v. Canoy</i>	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
	<i>City Of Klamath Falls v. Bell</i>	269
	NOTES AND QUESTIONS	272
	ADDITIONAL EXERCISES ON THE RULE	274
	ADDITIONAL NOTES ON THE RULE	275
b.	The Rule and Commercial Transactions	277
	<i>Ferrero Construction Co. v. Dennis Rourke Corp.</i>	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
	<i>Hoover v. Smith</i>	291
	NOTES AND QUESTIONS	293
	<i>Camp v. Camp</i>	295
	NOTES AND QUESTIONS	298
	NOTES ON REFORMATION	300
	NOTES ON MULTIPLE-PARTY BANK ACCOUNTS	301
b.	The Four Unities	302
	<i>Lipps v. Crowe</i>	303

Table of Contents

	NOTES AND QUESTIONS	305
2.	Severance of the Joint Tenancy	306
a.	Severance by Conveyance	307
	<i>In Re Knickerbocker</i>	307
	NOTES AND QUESTIONS	309
b.	Severance by Mortgage	311
	<i>People v. Nogarr</i>	311
	NOTES AND QUESTIONS	313
	PROBLEMS	315
c.	Unconventional Severance: Homicide and Common Disasters	316
	<i>Bradley v. Fox</i>	316
	NOTES AND QUESTIONS	319
d.	Indestructible Rights of Survivorship	320
	<i>Albro v. Allen</i>	321
	NOTES AND QUESTIONS	322
3.	The Cotenant’s Rights and Duties	324
a.	Partition	324
	<i>Cunningham v. Hastings</i>	325
	NOTES AND QUESTIONS	326
b.	Accounting and Contribution	329
	<i>Martin v. Martin</i>	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
	<i>King v. Greene</i>	335
	NOTES AND QUESTIONS	339
B.	OTHER MARITAL PROPERTY ISSUES	344
1.	Divorce: Equitable Distribution of Assets	345
	<i>Elkus v. Elkus</i>	345
	NOTES AND QUESTIONS	349
2.	The Surviving Spouse’s Elective Share	352
	<i>Sullivan v. Burkin</i>	353
	NOTES AND QUESTIONS	356
	NOTES ON COMMUNITY PROPERTY	357
3.	Unmarried Cohabitants	358
	<i>Watts v. Watts</i>	358
	<i>Ireland v. Flanagan</i>	371
C.	PROPERTY AND PROTECTION: THE HOMESTEAD EXEMPTION	374
	<i>Michels v. Kozitza</i>	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
	<i>Stanmeyer v. Davis</i>	383
	NOTES AND QUESTIONS	385
b.	The Periodic Tenancy	387
	NOTES AND QUESTIONS	388
	PROBLEMS	388
c.	The Tenancy at Will	389
	<i>Garner v. Gerrish</i>	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
	<i>Crossman v. Fontainebleau Hotel Corp.</i>	398
	NOTES AND QUESTIONS	401
	<i>Farash v. Sykes Datatronics, Inc</i>	402
	NOTES AND QUESTIONS	406
3.	Leases and Licenses	408
	<i>Weiman v. Butterman</i>	409
	NOTES AND QUESTIONS	412
4.	Leases and Bilateral Contracts	413
	<i>University Club Of Chicago v. Deakin</i>	413
	NOTES AND QUESTIONS	416
B.	TENANT’S RIGHTS AND REMEDIES	419
1.	Delivery of Possession	419
	<i>Hannan v. Dusch</i>	420
	NOTES AND QUESTIONS	424
	PROBLEMS	426
2.	Possession and Enjoyment During the Lease Term	428
a.	Access: Actual Eviction	428
	<i>Smith v. Mcenany</i>	429
	NOTES AND QUESTIONS	430
b.	Enjoyment: “Constructive” Eviction	431
	<i>Echo Consulting Services, Inc. v. North Conway Bank</i>	432
	NOTES AND QUESTIONS	436
3.	Condition of the Premises	443
a.	The Implied Warranty of Habitability	444

Table of Contents

	<i>Javins v. First National Realty Corp.</i>	444
	NOTES AND QUESTIONS	454
	PROBLEMS	460
b.	Habitability in Commercial Leases.	461
	<i>Davidow v. Inwood North Professional Group</i>	461
	NOTES AND QUESTIONS	464
	<i>Richard Barton Enterprises, Inc. v. Tsern</i>	466
	NOTES AND QUESTIONS	470
c.	The Landlord’s Tort Liability	472
	<i>Ortega v. Flaim</i>	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
	<i>First National Bank Of Omaha v. Omaha National Bank</i>	493
	NOTES AND QUESTIONS	494
b.	Termination of the Lease and Recovery of Possession	495
	<i>Cain Partnership, Ltd. v. Pioneer Investment Services Co.</i>	495
	NOTES AND QUESTIONS	500
c.	Security Deposits	504
	<i>Neihaus v. Maxwell</i>	504
	NOTES AND QUESTIONS	507
2.	Remedies Against the Abandoning Tenant	508
a.	Duty to Mitigate or Not?	509
	<i>Sommer v. Kridel</i>	509
	NOTES AND QUESTIONS	513
b.	No Duty to Mitigate: Landlord’s Remedies	516
	<i>Maida v. Main Building Of Houston</i>	517
	NOTES AND QUESTIONS	521
	<i>Richard v. Broussard</i>	522
	NOTES AND QUESTIONS	525
	<i>Hawkinson v. Johnston</i>	526

Table of Contents

	NOTES AND QUESTIONS	531
3.	Remedies Against the Holdover Tenant	532
	<i>Gym-n-i Playgrounds, Inc. v. Snider</i>	533
	NOTES AND QUESTIONS	536
4.	Use and Condition of the Premises	538
a.	Use	538
	<i>Mercury Investment Co. v. F.w. Woolworth Co.</i>	538
	NOTES AND QUESTIONS	545
b.	Condition of the Premises	549
	<i>Brizendine v. Conrad</i>	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
	<i>Kendall v. Ernest Pestana, Inc.</i>	557
	NOTES AND QUESTIONS	562
2.	Assignment or Sublease?	564
	NOTES AND QUESTIONS	564
3.	Consequences of Transfer	565
	<i>First American National Bank v. Chicken System of America, Inc.</i>	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
	<i>Shattuck v. Klotzbach</i>	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
	<i>Luttinger v. Rosen</i>	585
	NOTES AND QUESTIONS	586
b.	Marketable Title	587
	<i>Lohmeyer v. Bower</i>	587
	NOTES AND QUESTIONS	591

Table of Contents

2.	Equitable Conversion	595
	<i>Holscher v. James</i>	595
	NOTES AND QUESTIONS	601
3.	Remedies for Breach of Contract	602
a.	Money Awards: Damages and Restitution	603
	<i>Wolofsky v. Behrman</i>	603
	NOTES AND QUESTIONS	605
	<i>Kutzin v. Pirnie</i>	606
	NOTES AND QUESTIONS	614
b.	Specific Performance	615
	<i>Centex Homes Corp. v. Boag</i>	615
	NOTES AND QUESTIONS	618
C.	THE CLOSING	619
1.	Delivery of a Deed	619
	<i>Salter v. Hamiter</i>	619
	NOTES AND QUESTIONS	625
2.	Escrow	625
	<i>Ferguson v. Caspar</i>	625
	NOTES AND QUESTIONS	632
3.	The Merger Doctrine	633
	<i>Secor v. Knight</i>	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
	<i>Burris v. Mcdougald</i>	640
	NOTES AND QUESTIONS	642
c.	The Index	644
	<i>Howard Savings Bank v. Brunson</i>	644
	NOTES AND QUESTIONS	649
d.	Chain of Title Problems	650
	<i>Witter v. Taggart</i>	650
	NOTES AND QUESTIONS	653
e.	Marketable Title Legislation	656
	<i>H & F Land, Inc. v. Panama City-bay County Airport</i>	656
2.	The Seller’s Deed Covenants	663
	<i>Seymour v. Evans</i>	663
	NOTES AND QUESTIONS	669

Table of Contents

	<i>Bridges v. Heimburger</i>	672
	NOTES AND QUESTIONS	674
3.	Claims Against the Title Insurer	675
	<i>Bear Fritz Land Co. v. Kachemak Bay Title Agency, Inc.</i>	675
	<i>Greenberg v. Stewart Title Guaranty Co.</i>	679
	NOTES AND QUESTIONS	684
4.	Condition of the Premises	685
a.	Fraud and Nondisclosure	685
	<i>Stambovsky v. Ackley</i>	685
	<i>Johnson v. Davis</i>	689
	NOTES AND QUESTIONS	692
b.	Implied Warranty	695
	<i>Lempke v. Dagenais</i>	695
	NOTES AND QUESTIONS	700
Chapter 6	EASEMENTS	701
A.	CREATION OF EASEMENTS	702
1.	Express Creation	702
a.	Theory: Possession and Use	702
	<i>Walton v. Capital Land, Inc.</i>	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
	<i>Fitzstephens v. Watson</i>	709
	NOTES AND QUESTIONS	713
c.	Third-Party Beneficiaries	715
	<i>Garza v. Grayson</i>	715
	NOTES AND QUESTIONS	717
2.	Running of Burden and Benefit	718
a.	Running of the Burden	719
	<i>Witter v. Taggart</i>	719
	NOTES AND QUESTIONS	719
b.	Running of the Benefit	721
	<i>Luevano v. Group One</i>	722
	NOTES AND QUESTIONS	725
c.	Transferability of In-Gross Benefits	725
	<i>O'donovan v. Mcintosh</i>	725
	NOTES AND QUESTIONS	730
	PROBLEMS	731
3.	Informal Easements	733

Table of Contents

a.	Easements at Will: Licenses	733
	<i>Mandia v. Applegate</i>	733
	NOTES AND QUESTIONS	738
b.	Estoppel	739
	<i>Henry v. Dalton</i>	739
	NOTES AND QUESTIONS	742
c.	Prior Use	744
	<i>Otero v. Pacheco</i>	744
	NOTES AND QUESTIONS	747
d.	Necessity	749
	<i>Canali v. Satre</i>	749
	NOTES AND QUESTIONS	752
e.	Adverse Use	754
	<i>Fiese v. Sitorius</i>	754
	NOTES AND QUESTIONS	758
B.	SCOPE OF EASEMENTS	762
	<i>Scherger v. Northern Natural Gas Co.</i>	762
	NOTES AND QUESTIONS	765
	<i>Frenning v. Dow</i>	769
	NOTES AND QUESTIONS	772
	<i>Raven Red Ash Coal Co. v. Ball</i>	773
	NOTES AND QUESTIONS	776
C.	TERMINATION OF EASEMENTS	777
1.	Expiration	777
	<i>Howell v. Clyde</i>	777
	NOTES AND QUESTIONS	780
2.	Extinguishment	781
a.	Conduct of Easement Holder	781
	<i>Strahin v. Lantz</i>	781
	NOTES AND QUESTIONS	784
b.	Conduct of the Servient Owner	786
	<i>Estojak v. Mazsa</i>	786
	NOTES AND QUESTIONS	793
c.	Conduct of Both Parties	793
	<i>Pergament v. Loring Properties, Ltd.</i>	793
	NOTE	797
d.	Termination Pursuant to Statute	797
	<i>H & F Land, Inc., v. Panama City-bay County Airport</i>	797
D.	NEGATIVE EASEMENTS	797
	<i>United States v. Blackman</i>	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
	<i>Gallagher v. Bell</i>	811
	NOTES AND QUESTIONS	818
	PROBLEMS	824
2.	Equitable Servitudes: Enforcement by Equitable Remedies	825
a.	Running Requirements	825
	<i>Tulk v. Moxhay</i>	826
	NOTES AND QUESTIONS	827
	NOTES ON RUNNING COVENANTS IN LEASES	828
	PROBLEMS	830
b.	Implied Creation	831
	<i>Sanborn v. Mclean</i>	831
	NOTES AND QUESTIONS	834
3.	Third-Party Beneficiaries of Promises	835
	<i>Snow v. Van Dam</i>	835
	NOTES AND QUESTIONS	839
B.	(SOME FURTHER) CONSEQUENCES OF CLASSIFICATION	841
1.	Covenants and Easements	842
a.	Third-Party Beneficiaries	842
	<i>Nature Conservancy v. Congel</i>	842
	NOTES AND QUESTIONS	843
b.	Running Burdens with Benefits in Gross	844
	<i>Caullett v. Stanley Stilwell & Sons, Inc.</i>	844
	NOTES AND QUESTIONS	848
2.	Leases, Licenses, Contracts, and Servitudes	849
	<i>Todd v. Krolick</i>	849
	NOTES AND QUESTIONS	851
	<i>Aronsohn v. Mandara</i>	852
	NOTES AND QUESTIONS	856
3.	Covenants and Defeasible Fees Compared	856
	<i>Humphrey v. C.g. Jung Educational Center</i>	857
	NOTES AND QUESTIONS	861
C.	SCOPE AND TERMINATION OF COVENANTS	862
1.	Scope	862

Table of Contents

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

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

Preface to the First Edition

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 full-dress 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.

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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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