Concise Introduction to Property Law
First Edition
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Concise Introduction to Property Law

First Edition

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To

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Preface

If there ever was a consensus about what should be taught in the first-year Property course, that consensus disappeared years ago. Rapid technological advances have created many new types of assets to which property rights may attach, while most law schools have shortened the Property course from two semesters to one. Property professors thus have had to make hard decisions about what to cover in their classes and what to omit.

One unfortunate consequence of these developments is that Property casebooks have become compendiums of property-related subject matter that invite professors to pick and choose as they will, leading students to believe that Property law is not an integrated whole, but merely a series of disconnected concepts. While it is probably true that the typical property casebook of today is a bit shorter than its counterpart of fifty years ago, those older books were crafted with the expectation that they would be used in year-long courses. Consequently, casebooks have come to look more and more like hornbooks illustrated by cases rather than like traditional casebooks.

The first version of this book, published in 1998 as “Property Law and the Public Interest,” was a different sort of Property textbook. It was first and foremost a casebook. No excerpts from secondary sources appeared in the book — though students were directed to a wide array of such works through the notes — and all of the note material was written specifically for the text by the authors. The first ten chapters provided a comprehensive survey of real, personal, and intellectual property that could be covered in a single four-credit course. Materials on estates in land and future interests were reduced significantly, whereas it included substantial amounts of material on intellectual property, and brought the materials on the police power, the Takings Clause, and eminent domain from their traditional place in the back of a Property book to the front. For those instructors who wished to add a more pronounced public law emphasis for the course, additional materials on housing discrimination, zoning, and environmental law were provided in the final sections of the book. In addition, the book was designed to expose first year law students to the rich historical heritage of American law. All the most significant cases in the history of American Property law, as well as famous judges, politicians, novelists, and legal philosophers whose work significantly affected Property law appeared throughout its pages.

This First Edition remains true to these original goals, but is retitled “CONCISE INTRODUCTION TO PROPERTY LAW,” to emphasize that it is suitable and teachable in a one-semester Property course. However, while the materials in this edition overlap substantially with those in “Property Law and the Public Interest,” this is essentially a new book.

Chapter 1 provides students with an overall analytical framework for understanding property law. It contains clear, concise explanations of the concepts essential for understanding how property rights arise and are changed over time to serve the interests of individuals and of society as a whole. The chapter begins with the fundamental idea that property rights are “relational,” consisting of the rights that an owner has, in relation to others, with respect to assets. It then introduces several other concepts that play a part in the justification and evolution of property law, including standards of judicial review, federalism, separation of powers, the jurisprudence of legal decisionmaking, judicial
Preface

curtailment of property rights in the face of wealth inequality, and the particularly troublesome problem of retroactivity. Distinctions between tangible and intangible property are then discussed, followed by an introduction to emerging types of assets in the field of intellectual property. The chapter concludes with property rights associated with that most traditional of assets: real property.

Chapter 2 continues the consideration of land as the object of property rights. The chapter examines how governmental conduct may affect land ownership in such ways as to require that the government provide a remedy to the landowner. Outright condemnation through eminent domain receives updated treatment, including discussion of Berman v. Parker and post-Kelo developments, as does the doctrine of regulatory taking. The various other forms of governmental conduct that may affect real estate rights are reviewed, including local land use controls, the evolution of nuisance law, and environmental protection statutes and ordinances.

Chapter 3 covers the classic property law notions of estates and future interests, concurrent forms of ownership, and marital property. Chapter 4 examines the modern problems that have arisen in landlord-tenant law. We have also included housing discrimination materials because of the importance of housing in property markets.

Chapter 5 covers the field of servitudes — including licenses, easements and equitable servitudes — and discusses constitutional limitations on such property rights. Chapter 6, the book’s concluding chapter, covers real estate transactions. The typical real estate transactions is traced, covering the contract of sale, deeds, title assurance, security of title, fraudulent transfers, and real estate liens and their enforcement.

Property instructors will find many of the familiar cases used in most Property textbooks, as well as many new cases that we found exciting for our students. The notes in all chapters not only point out legal developments and new cases, but also provide substantial detail on the historical and social context in which the principal cases arose. The notes also provide a glimpse into the lives of the parties to the cases, some of whom are famous and many of whom are not. The book also has a definite comparative law perspective. This is primarily manifested by special attention to cases arising in the state of Hawaii, the one American jurisdiction whose “property history” departs from the national experience in dramatic ways. (This was also made possible by the encyclopedic knowledge of Hawaii case law by co-author David Callies.) In this edition, we have expanded the comparative focus with a series of notes that examine the ways in which other legal systems address key questions of property ownership and property rights.

This casebook has been a collaborative effort among the four co-authors. In one way or another, each has contributed to every part of the book. The basic framework of the casebook was put together by David Callies and Gordon Hylton, with invaluable help from Dan Mandelker. John Martinez, who joins the book for the first time in this edition, has added his unique perspective on the jurisprudence of Property law.

We owe special thanks and appreciation to Keith Moore of Lexis/Nexis, who is both an extremely capable editor and an extremely patient person. The book has also been much improved by the comments of our colleagues at other institutions who have used prior editions of the book. At the risk of omitting the name of someone who should be on this list, we extend special thanks to all those who shared their comments on what should, and should not, be included in the book. John Martinez is most grateful to his wife, Karen L. Martinez, for being supportively critical of his efforts on the book.
Preface

We also owe a great deal to the library staffs of Marquette University, the University of Hawaii, Washington University, and the S.J. Quinney College of Law at the University of Utah. In addition, we wish to thank our own students at those four universities for their comments — sometimes given freely and sometimes not so freely — and for giving us the opportunity to find out what works in the classroom and what does not. A special note of thanks goes to our student research assistants. David Callies was ably assisted by Nichole Thomas during countless hours spent proofing, integrating and formatting text, and adding dozens of revised and new notes and citations. Gordon Hylton received invaluable help from Andrea Austin and extends special thanks to the law libraries at Marquette and the University of Virginia. Dan Mandelker’s work on the book would not have been possible without the help of Arianne Aughey. John Martinez extends special thanks to John Bevan at the S.J. Quinney Law Library for his research assistance.

David L. Callies
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# TABLE OF CONTENTS

Preface to the First Edition

## Chapter 1

**INTRODUCTION TO PROPERTY AS A LEGAL CONCEPT** ..................................... 1

A. **THE PUBLIC INTEREST AND PROPERTY RIGHTS** ...................... 2

[1] **A Seemingly Simple Case About a Dog** ........................ 3

Sentell v. New Orleans & C.R. Co. .......................... 3

Notes and Questions ......................................... 5

[2] **When a Farm is Not Just a Farm** ............................. 11

State v. Shack ........................................ 11

Notes and Questions ................................... 14

[3] **Property Rights, Gender Equality and Retroactivity** ............... 15

Kirchberg v. Feenstra ................................ 15

Notes and Questions ................................... 18

B. **PROPERTY RIGHTS AND TANGIBLE PERSONALTY** ............ 20

A Note on the Classification of Assets for Purposes of Property Rights . 20

[1] **Bailments — Transfers for a Limited Purpose** ................... 22

Allred v. Brown ...................................... 22

Notes and Questions ................................... 25

[2] **Gifts — Voluntary Gratuitous Transfers** ........................ 27

Newman v. Bost ...................................... 27

Notes and Questions ................................... 31

Hocks v. Jeremiah .................................... 33

Notes and Questions ................................... 35

[3] **Finders, Abandonment, and Statute of Limitations on True Owner**

Claims — Involuntary Gratuitous Transfers ........................ 38

[a] **Finders** ............................................. 38

Benjamin v. Lindner Aviation, Inc. ........................... 38

Notes and Questions ................................... 44

[b] **Abandonment** ........................................ 46

Columbus-America Discovery Group v. Atlantic

Mutual Insurance Co. .................................. 46

Notes and Questions ................................... 54

[c] **Statute of Limitations on True Owner Claims** ............... 56

Songbyrd, Inc. v. Estate of Albert B. Grossman .............. 56

Notes and Questions ................................... 59

C. **PROPERTY RIGHTS AND INTANGIBLE PERSONALTY** —

**INTELLECTUAL PROPERTY** ................................. 61

[1] **The Right to Publicity** .................................. 61

Tennessee Ex Rel. the Elvis Presley International Memorial Foundation
# TABLE OF CONTENTS

- **v. Crowell** .................................................. 61
  - Notes and Questions ......................................... 69
- **[2]** Property in Ideas ........................................ 73
  - *Downey v. General Foods* .................................. 73
  - Notes and Questions ......................................... 76
- **[3]** Copyright and Patent ................................... 78
  - *Holmes v. Hurst* ............................................ 78
  - Notes and Questions ......................................... 83
- **[4]** News and its Presentation — State and Federal Domains .... 86
  - *National Basketball Ass’n v. Motorola* ................. 87
  - Notes and Questions ......................................... 92
- **[5]** Property Rights in Cyberspace .......................... 94
  - *Lund v. Commonwealth* ...................................... 94
  - Notes and Questions ......................................... 97
- **D. RIGHTS OF LANDOWNERS ASSOCIATED WITH REAL PROPERTY** .... 100
  - **[1]** The Right to Support .................................. 100
    - *Noone v. Price* ............................................ 100
    - Notes and Questions ......................................... 104
  - **[2]** The Right to Exclude .................................. 105
    - [a] The Concept of the Right to Exclude .................. 105
      - *Kaiser Aetna v. United States* ......................... 105
      - Notes and Questions ........................................ 111
    - [b] Limitations on the Right to Exclude ................. 113
      - [i] Custom .................................................. 113
        - Notes and Questions ....................................... 120
      - [ii] The Public Trust Doctrine ......................... 121
        - *Illinois Central Railroad Company v. Illinois* .... 122
        - Notes and Questions ....................................... 125
      - [iii] The First Amendment and Public Access .......... 125
        - *Pruneyard Shopping Center v. Robins* ............... 131
        - Notes and Questions ....................................... 137
  - **[3]** Adverse Possession ................................... 147
    - *Marengo Cave Co. v. Ross* ................................ 147
    - Notes and Questions ......................................... 152
    - *Campbell v. Hipawai Corp.* ............................... 154
    - Notes and Questions ......................................... 157
### TABLE OF CONTENTS

[4] Control of Airspace ................................................. 159
   *Geller v. Brownstone Condominium Ass’n* ........................... 159
   Notes and Questions .................................................. 161

#### Chapter 2 TAKINGS AND THE PUBLIC REGULATION OF LAND .......... 163

**A. TRANSFERS TO THE SOVEREIGN: EMINENT DOMAIN .................. 163**

[1] The Public Use Doctrine .............................................. 163
   *Berman v. Parker* ..................................................... 164
   Notes and Questions ................................................... 169
   *Kelo v. City of New London* ............................................ 171
   Notes and Questions ................................................... 178

[2] Consequential Damages ................................................. 181
   *Pumpelly v. Green Bay Company* ....................................... 181
   Notes and Questions ................................................... 184

[3] Limitations on Highway Access ....................................... 185
   *State of Indiana v. Dunn* .............................................. 186
   Notes and Questions ................................................... 192

[4] Off-Set of Special Benefits .......................................... 194
   *Acierno v. State of Delaware* .......................................... 195
   Notes and Questions ................................................... 200

**B. LAND DEVELOPMENT AND THE POLICE POWER ...................... 203**

[1] Foundation: Police Power and Land Use .................................. 204
   *Pennsylvania Coal Co. v. Mahon* ..................................... 204
   Notes and Questions ................................................... 207

[2] Regulatory Takings ...................................................... 208
   *Penn Central Transportation Co. v. City of New York* .......... 209
   Notes and Questions ................................................... 221
   *Lucas v. South Carolina Coastal Council* ............................ 223
   Notes and Questions ................................................... 234
   A Note on Other Related Constitutional Claims ....................... 238

   *Robinson v. Ariyoshi* ................................................... 246
   Notes and Questions ................................................... 250

**C. (LOCAL) LAND USE CONTROLS ........................................ 251**

[1] Zoning ................................................................. 251
   [a] Elements of Zoning ................................................ 251
      *Village of Euclid, Ohio v. Ambler Realty Co.* .................... 252
      Notes and Questions ................................................ 259
   [b] The Zone ............................................................. 261
      *Pierro v. Baxendale* ............................................... 261
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notes and Questions</td>
<td>268</td>
</tr>
<tr>
<td>[c] Amendments</td>
<td>270</td>
</tr>
<tr>
<td><em>Bartram v. Zoning Commission of City of Bridgeport</em></td>
<td>270</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>273</td>
</tr>
<tr>
<td>[d] Special or Conditional Uses</td>
<td>275</td>
</tr>
<tr>
<td><em>Gorham v. Town of Cape Elizabeth</em></td>
<td>276</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>282</td>
</tr>
<tr>
<td>[e] Variance</td>
<td>283</td>
</tr>
<tr>
<td><em>Topanga Ass’n for a Scenic Community v. County of Los Angeles</em></td>
<td>284</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>289</td>
</tr>
<tr>
<td>[f] Nonconformities</td>
<td>290</td>
</tr>
<tr>
<td><em>City of Los Angeles v. Gage</em></td>
<td>291</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>296</td>
</tr>
<tr>
<td>A Note on Vested Rights and Development Agreements</td>
<td>298</td>
</tr>
<tr>
<td>[2] Specialized Controls</td>
<td>300</td>
</tr>
<tr>
<td>[a] Aesthetics and Historic Preservation</td>
<td>300</td>
</tr>
<tr>
<td><em>Reid v. Architectural Board of Review of City of Cleveland Heights</em></td>
<td>300</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>306</td>
</tr>
<tr>
<td>[b] Subdivision and Planning</td>
<td>308</td>
</tr>
<tr>
<td><em>Youngblood v. Board of Supervisors of San Diego County</em></td>
<td>310</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>312</td>
</tr>
<tr>
<td>[c] Land Development Conditions as an Extension of Subdivision</td>
<td>313</td>
</tr>
<tr>
<td>Requirements</td>
<td></td>
</tr>
<tr>
<td><em>Nollan v. California Coastal Commission</em></td>
<td>313</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>321</td>
</tr>
<tr>
<td><em>Dolan v. City of Tigard</em></td>
<td>322</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>328</td>
</tr>
<tr>
<td><em>Commercial Builders of Northern California v. Sacramento</em></td>
<td>331</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>333</td>
</tr>
<tr>
<td>D. NUISANCE</td>
<td>334</td>
</tr>
<tr>
<td><em>Bove v. Donner-Hanna Coke Corp.</em></td>
<td>335</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>339</td>
</tr>
<tr>
<td>E. ENVIRONMENTAL PROTECTION</td>
<td>341</td>
</tr>
<tr>
<td>[1] Private Ownership of Natural Resources</td>
<td>341</td>
</tr>
<tr>
<td>[a] Rights to Wild Animals</td>
<td>342</td>
</tr>
<tr>
<td><em>Pierson v. Post</em></td>
<td>342</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>346</td>
</tr>
<tr>
<td><em>Ghen v. Rich</em></td>
<td>349</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>351</td>
</tr>
</tbody>
</table>
## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[b]</td>
<td>Rights to Water</td>
<td>353</td>
</tr>
<tr>
<td></td>
<td><em>Evans v. Merriweather</em></td>
<td>354</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>356</td>
</tr>
<tr>
<td></td>
<td><em>Yonadi v. Homestead Country Homes</em></td>
<td>358</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>361</td>
</tr>
<tr>
<td>[c]</td>
<td>Rights to Oil and Gas</td>
<td>362</td>
</tr>
<tr>
<td></td>
<td><em>Barnard v. Monongahela Natural Gas Co.</em></td>
<td>362</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>364</td>
</tr>
<tr>
<td>[d]</td>
<td>Rights to Land</td>
<td>366</td>
</tr>
<tr>
<td></td>
<td><em>Plume v. Seward &amp; Thompson</em></td>
<td>367</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>369</td>
</tr>
<tr>
<td>[e]</td>
<td>Rights to Persons</td>
<td>374</td>
</tr>
<tr>
<td></td>
<td><em>Commonwealth v. Aves</em></td>
<td>374</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>376</td>
</tr>
<tr>
<td>[2]</td>
<td>Rights to the Use of Natural Resources</td>
<td>377</td>
</tr>
<tr>
<td>[a]</td>
<td>Vegetation</td>
<td>377</td>
</tr>
<tr>
<td></td>
<td><em>Whitesell v. Houlton</em></td>
<td>378</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>380</td>
</tr>
<tr>
<td>[b]</td>
<td>Sunlight</td>
<td>381</td>
</tr>
<tr>
<td></td>
<td><em>Prah v. Maretti</em></td>
<td>381</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>387</td>
</tr>
<tr>
<td>[a]</td>
<td>Coastal Zone</td>
<td>389</td>
</tr>
<tr>
<td></td>
<td><em>Topliss v. Planning Commission</em></td>
<td>390</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>398</td>
</tr>
<tr>
<td>[b]</td>
<td>Wetlands</td>
<td>398</td>
</tr>
<tr>
<td></td>
<td><em>Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers</em></td>
<td>398</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>409</td>
</tr>
<tr>
<td></td>
<td><em>Homestake Mining Co. v. United States Environmental Protection Agency</em></td>
<td>412</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>415</td>
</tr>
<tr>
<td>[d]</td>
<td>Clean Air</td>
<td>417</td>
</tr>
<tr>
<td></td>
<td><em>Citizens Against Refinery’s Effects, Inc. v. United States Environmental Protection Agency</em></td>
<td>418</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>421</td>
</tr>
<tr>
<td>[e]</td>
<td>Endangered Species Protection and Property Rights</td>
<td>422</td>
</tr>
<tr>
<td></td>
<td><em>Defenders of Wildlife v. Bernal</em></td>
<td>423</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>430</td>
</tr>
<tr>
<td>[f]</td>
<td>Public Lands</td>
<td>430</td>
</tr>
</tbody>
</table>

xiii
TABLE OF CONTENTS

Kleppe v. New Mexico ........................................ 431
Notes and Questions ....................................... 437

Chapter 3 ESTATES IN LAND AND FUTURE INTERESTS .... 439

A. THE ESTATE CONCEPT ..................................... 439

B. LIFE ESTATES ............................................ 441
   Brokaw v. Fairchild ................................... 441
   Notes and Questions .................................. 448

C. REMAINDERS ............................................. 450
   [1] Contingent Remainders .............................. 450
   [2] The Vesting of Remainders .......................... 452
      Abo Petroleum Corp. v. Amstutz ..................... 453
      Notes and Questions ................................ 456
      Rutherford v. Keith ................................... 458
      Notes and Questions ................................ 460

D. THE ESTATE OF FEE TAIL ................................ 460
   Long v. Long ............................................ 462
   Notes and Questions .................................. 466

E. CONDITIONAL AND DETERMINABLE ESTATES ............ 466
   Storke v. Penn Mutual Life Insurance Co. .......... 468
   Notes and Questions .................................. 472

F. EXECUTORY INTERESTS .................................... 475

G. THE RULE AGAINST PERPETUITIES ....................... 476
      Notes and Questions ................................ 478
      Deiss v. Deiss ....................................... 480
      Notes and Questions ................................ 482
   [3] The Rule Against Perpetuities and Executory Interests .... 483
      Fletcher v. Ferrill ................................... 483
      Notes and Questions ................................ 486
   [4] Perpetuities Reform .................................. 489

H. CONCURRENT ESTATES .................................... 491
      Giles v. Sheridan ................................... 491
      Notes and Questions ................................ 494
   [2] Rights of Concurrent Tenants ....................... 496
      McKnight v. Basilides ................................ 496
      Notes and Questions ................................ 500

xv
**TABLE OF CONTENTS**

   *Dutcher v. Owens* ..................... 502  
   Notes and Questions ..................... 505

I. MARITAL PROPERTY ................................... 506  
[1] Tenancy by the Entirety ............................. 506  
   *Robinson v. Trousdale County* ............. 506  
   Notes and Questions ..................... 508

[2] Other Forms of Marital Property .................... 511  
   *Hoak v. Hoak* ..................... 511  
   Notes and Questions ..................... 515

[3] Community Property .................................... 517

Chapter 4 THE LAW OF HOUSING: LANDLORD/TENANT AND RELATED DOCTRINES ........................ 519  
A. THE LANDLORD-TENANT RELATIONSHIP ..................... 521  
[1] Lease for Intended Use ..................... 521  
   *Anderson Drive-In Theatre, Inc. v. Kirkpatrick* ............. 521  
   Notes and Questions ..................... 524

[2] The Duty to Put the Tenant into Possession ................ 524  
   *Adrian v. Rabinowitz* ..................... 524  
   Notes and Questions ..................... 527

[3] Sublease and Assignment ..................... 528  
   *Jaber v. Miller* ..................... 528  
   Notes and Questions ..................... 532

B. ABANDONMENT AND CONSTRUCTIVE EVICTION ............. 535  
[1] Abandonment ..................... 535  
   *Reid v. Mutual of Omaha Insurance Company* ............. 535  
   Notes and Questions ..................... 540

[2] Constructive Eviction ..................... 541  
   *Petroleum Collections, Inc. v. Swords* ............. 541  
   Notes and Questions ..................... 544

[3] Holdover Tenants ..................... 546  
   *Crechale & Polles v. Smith* ............. 547  
   Notes and Questions ..................... 551

C. CONTEMPORARY ISSUES IN LANDLORD-TENANT LAW ............. 552  
[1] The Implied Warranty of Habitability ..................... 552  
   *Javins v. First National Realty Corp.* ............. 553  
   Notes and Questions ..................... 555

   *Walls v. Oxford Management Company* ............. 559  
   Notes and Questions ..................... 562
### TABLE OF CONTENTS

D. STATUTORY INTERVENTION IN THE LANDLORD-TENANT RELATIONSHIP ........................................ 565

   *Edwards v. Habib* ........................................ 566
   Notes and Questions ..................................... 568

[2] Rent Control ........................................... 571
   [a] Rent Control in Theory and Practice ....................... 571
   [b] The Constitutionality of Rent Control: The Case of Mobile Homes . . 572
      *Yee v. City of Escondido* ........................................ 572
      Notes and Questions ..................................... 578

E. HOUSING DISCRIMINATION .................................. 581

[1] Federal Fair Housing Legislation ........................... 581

[2] Rental Housing ........................................... 582
   *Bronson v. Crestwood Lake Section 1 Holding Corp.* .......... 583
   Notes and Questions ..................................... 590

   *South-Suburban Housing Center v. Greater South Suburban Board Of Realtors* .... 593
   Notes and Questions ..................................... 599

   *Larkin v. State Of Michigan Department Of Social Services* .......... 602
   Notes and Questions ..................................... 608
   A Note on the Constitutional Alternative .................... 610

Chapter 5 SERVITUDES ......................................... 613

A. LICENSES .................................................. 614

[1] Licenses Distinguished from Easements and Profits .............. 614
   *McCastle v. Scanlon* ..................................... 615
   Notes and Questions ..................................... 619

   *Holbrook v. Taylor* ..................................... 622
   Notes and Questions ..................................... 625

B. PROFITS A PRENDRE ........................................ 625
   *St. Helen Shooting Club v. Mogle* ............................ 626
   Notes and Questions ..................................... 629

C. EASEMENTS ............................................... 630

[1] Easements Appurtenant ..................................... 630
   *Cushman Virginia Corp. v. Barnes* .......................... 631
   Notes and Questions ..................................... 637

[2] Easements in Gross ......................................... 638
   *Miller v. Lutheran Conference & Camp Ass’n* .................. 639
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notes and Questions</td>
<td>643</td>
</tr>
<tr>
<td>[a] Express Easements</td>
<td>645</td>
</tr>
<tr>
<td>[b] Easements Implied in Fact</td>
<td>646</td>
</tr>
<tr>
<td><em>Hellberg v. Coffin Sheep Co.</em></td>
<td>646</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>650</td>
</tr>
<tr>
<td>[c] Easements Implied in Law (Prescriptive Easements)</td>
<td>652</td>
</tr>
<tr>
<td><em>MacDonald Properties, Inc. v. Bel-Air Country Club</em></td>
<td>652</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>655</td>
</tr>
<tr>
<td><em>Preseault v. United States</em></td>
<td>656</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>660</td>
</tr>
<tr>
<td>Note on Terminating Easements in General</td>
<td>660</td>
</tr>
<tr>
<td>[5] Negative Easements</td>
<td>662</td>
</tr>
<tr>
<td>[a] The Nature and Scope of Negative Easements</td>
<td>662</td>
</tr>
<tr>
<td><em>Petersen v. Friedman</em></td>
<td>662</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>664</td>
</tr>
<tr>
<td>[b] The Conservation Easement</td>
<td>665</td>
</tr>
<tr>
<td><em>United States of America v. Blackman</em></td>
<td>666</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>672</td>
</tr>
<tr>
<td>D. RESTRICTIVE COVENANTS</td>
<td>674</td>
</tr>
<tr>
<td>[1] Equitable Servitudes</td>
<td>674</td>
</tr>
<tr>
<td>[a] Covenants in Equity</td>
<td>675</td>
</tr>
<tr>
<td><em>Cheatham v. Taylor</em></td>
<td>675</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>680</td>
</tr>
<tr>
<td>[b] The Power to Enforce</td>
<td>684</td>
</tr>
<tr>
<td><em>Rodgers v. Reimann</em></td>
<td>684</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>688</td>
</tr>
<tr>
<td>[2] Covenants Running with the Land</td>
<td>689</td>
</tr>
<tr>
<td>[a] The Limits of Equity</td>
<td>690</td>
</tr>
<tr>
<td><em>Moseley v. Bishop</em></td>
<td>690</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>695</td>
</tr>
<tr>
<td>[b] Covenants that Touch and Concern the Land</td>
<td>697</td>
</tr>
<tr>
<td><em>Whitinsville Plaza, Inc. v. Kotseas</em></td>
<td>698</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>703</td>
</tr>
<tr>
<td>[3] The Unification of Servitudes</td>
<td>704</td>
</tr>
<tr>
<td>[4] Limitations on Private Land Use Controls</td>
<td>705</td>
</tr>
<tr>
<td>[a] Public Policy Limitations on Covenants</td>
<td>706</td>
</tr>
<tr>
<td>[i] Unlawful Restraints on Alienation</td>
<td>706</td>
</tr>
<tr>
<td><em>Lauderbaugh v. Williams</em></td>
<td>706</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>708</td>
</tr>
</tbody>
</table>
TABLE OF CONTENTS

[iii] Abandonment and Selective Enforcement ........................................ 716
Mountain Park Homeowners Ass’n v. Tydings .................................... 716
Notes and Questions ........................................................................ 719

(iv) Covenants in Violation of Public Policy ...................................... 720
Crane Neck Association, Inc., v. New York City/Long Island County Services Group ....................................................... 720
Notes and Questions ........................................................................ 725

[v] Unreasonable Covenants ................................................................. 726
Nahrstedt v. Lakeside Village Condominium Association .................. 726
Notes and Questions ........................................................................ 731

[vi] Procedural Fairness ...................................................................... 734
Riss v. Angel .................................................................................... 734
Notes and Questions ........................................................................ 740

[b] Constitutional Limitations ............................................................... 742

[i] Racial Discrimination .................................................................... 742
Shelley v. Kraemer ........................................................................... 742
Notes and Questions ........................................................................ 749

[ii] Restrictions on Religion ................................................................. 751
West Hill Baptist Church v. Abbate ..................................................... 751
Notes and Questions ........................................................................ 754

[iii] Restrictions on Speech .................................................................. 755
Committee for a Better Twin Rivers v. Twin Rivers Homeowners’ Association ................................................................. 755
Notes and Questions ........................................................................ 762

Chapter 6 REAL ESTATE TRANSACTIONS ...................................... 767

A. THE UNIQUENESS OF REAL ESTATE ........................................ 767

Timberlake v. Heffin ........................................................................ 767
Notes and Questions ........................................................................ 771

Centex Homes Corp. v. Boag ............................................................... 773
Notes and Questions ........................................................................ 777

[3] Equitable Conversion ..................................................................... 779
Ross v. Bumstead ............................................................................. 779
Notes and Questions ........................................................................ 781

B. CONTRACTS FOR THE SALE OF LAND .................................. 784

[1] The Sales Contract ........................................................................ 784
TABLE OF CONTENTS

Notes and Questions .................................. 784

[2] Marketable Title ....................................... 785
  Tri-State Hotel Co. v. Sphinx Investment Co. ............... 785
  Notes and Questions .................................. 794

C. THE DEED ............................................ 796

[1] Components of the Deed ................................ 796
  Capozzella v. Capozzella ................................ 798
  Notes and Questions .................................. 804
[3] Covenants of Title ..................................... 805
  Brown v. Lober ....................................... 806
  Notes and Questions .................................. 810
[4] Title Insurance ......................................... 812
  Fidelity National Title Insurance Co. v. Miller .......... 813
  Notes and Questions .................................. 818

D. SECURITY OF TITLE .................................... 818

[1] The Recording System .................................. 818
  Leasing Enterprises, Inc. v. Livingston .................... 821
  Notes and Questions .................................. 824
  Notes and Questions .................................. 831

E. FRAUDULENT TRANSFERS .................................. 832

[1] Forged Deeds ......................................... 832
  Hauck v. Crawford ..................................... 832
  Notes and Questions .................................. 835

F. LIENS AND MORTGAGES .................................. 836

[1] Strict Foreclosure ..................................... 836
  Dieffenbach v. Attorney General of Vermont ............... 836
  Notes and Questions .................................. 841
  Countrywide Home Loans, Inc. v. First National Bank of Steamboat Springs .............................. 842
  Notes and Questions .................................. 847