

Property

Property

Cases, Documents, and Lawyering Strategies

FOURTH EDITION

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Online Materials

Throughout this edition of *Property: Cases, Documents, and Lawyering Strategies*, we have included references to additional materials and appendices available online. This online material can be accessed at caplaw.com/sites/cprop4.

Preface to the Fourth Edition

A Property Course for the Twenty-First Century, with Traditional Coverage

(1) *A Modern Casebook with Traditional Coverage.* Though rooted in history, property is not a musty, dusty subject. This casebook makes it come to life by emphasizing traditional subjects of property law in a modern context, with modern cases, problems, and discussion.

On the one hand, the book covers the traditional broad subjects expected by law professors: personal property, real estate transactions, servitudes, leases, common law estates, and land regulation—the subjects that long have formed the backbone of the property course all are present. But it does so with modern cases and includes modern subjects. Property transactions are approached from the point of view of a contemporary lawyer representing a client. The book covers current documents, contemporary doctrines, and relevant concepts. The personal property coverage includes the now-vital forms of intangible personal property.

(2) *Pedagogical Flexibility.* A course can begin with Chapter 2 on intellectual property or with Chapter 8 on personal property. Either can serve as the introduction to the course. We will add more about that option later in this Preface.

(3) *Modern Context.* Every property casebook covers a large amount of highly forgettable material—forgettable because it no longer applies. This book recognizes that understanding the past can illuminate the present, but we believe that dead doctrines probably should not become an end in themselves. For example, most property casebooks include the following concepts:

- The Rule in Shelley’s case, even though it has been abolished nearly everywhere;
- Finder’s cases about who owns lost or mislaid property, which are extremely rare;
- Profits a prendre, even though the terminology is no longer controlling; and
- Ownership of wild animals pursued by hunters—not a major practice area.

This casebook covers many of these topics, but as background or history. On the other hand, many property casebooks omit the following subjects, and some of these topics are unique to this book:

- Escrows, which are used in virtually every real property transaction today;
- Intellectual property, which is critical to businesses, large and small ;
- Strategies for curing property defects, which is a frequent issue today; and
- Negotiation—an omnipresent skill needed in property lawyering and lawyering generally.

Although this casebook provides the foundation of a traditional property course, it covers these subjects too—subjects that are important today for understanding and practicing property law.

(4) *A Course About Developing Big Ideas.* Whenever practicable, this book uses cases from the last thirty years to show the development of big ideas including how private investment, within a framework of public regulation, can make people's lives better. It is about the future, not just the past. Up-to-date cases emphasize this and allow you to learn what lawyers and their clients *do*—not what they *did* hundreds of years ago.

(5) *Using Problems to Understand the Law and Develop Lawyering Strategies.* Unlike many property books, this book is designed to prepare students to practice law. We believe strongly that law school should teach the competencies and strategies that lawyers actually use: client counseling, negotiation, document production, and litigation.

This book develops the strategy component. Each of the transactional chapters features optional exercises that put you in lawyering situations. You will learn that lawyering is not about reading appellate court opinions and discussing in a vacuum whether they are “good” or “bad.” Instead, it is about avoiding or resolving problems. The exercises are set in a variety of different property settings and call for a variety of strategies including counseling, negotiation, document preparation, and litigation. Assessments include student performance on these exercises that are based on modern problems involving private and public property law.

And we achieve those learning objectives with a book that fits within the first year, and provides the coverage that upper-level professors legitimately expect. Therefore, the bulk of the material requires analyzing statutes, appellate opinions, and other traditional materials. Still, the strategies and competencies of property lawyering are developed here, so that students can learn about them.

(6) *A Focus on Documents and the Role of Private Law.* Property law is private law. If parties to a real estate transaction made an agreement, a court will likely rely on it to resolve any dispute. There are, of course, public law aspects of property law. They

are important, and this book develops them. But modern property law focuses on negotiation and documentation of private agreements—and their litigation. Private law is as important as public law. Therefore, property transfer agreements, brokerage documents, deeds, mortgages, title insurance policies, promissory notes, and other documents all are set out and explored in this book.

But once again, this book is not primarily composed of documents. The cases and the documents go together and the traditional method of teaching through court opinions dominates.

(7) *Shaquille O’Neal as an Example*. It was reported that the former center for the Los Angeles Lakers, Mr. O’Neal, also was the general partner in a business that was to buy to 21 apartment communities for \$100 million to provide thousands of apartments for low-income residents. This book will help you recognize, not just the law, but what it means: what concrete steps would a lawyer who represented Mr. O’Neal take? If all you do is read court opinions, you’ll know the law, but not how to use it. The cases do not tell you what to do. The cases will not teach you how to prepare or analyze a proposed purchase agreement, or a deed, or a mortgage, or a real estate note, or a title report, or an escrow agreement, or a set of deed restrictions, or a title insurance policy. And Shaq—we mean Mr. O’Neal—will need all of these.

To help every client, you will need to study documents and learn how analyze them. At times, it can be challenging to read documents. They have to be read clause by clause, and lawyers cannot be content with generalities. But the fine print will become fascinating when you realize that you now know how to put together a real and important transaction. And that is what this book is all about. It will put you in a position to actually be helpful to Shaq in his quest for affordable housing, or to other clients with valuable ideas.

(8) *Customary Transactions and Documents*. A property lawyer must know customary ways of doing things. There may be no “law” in the sense of a statute or case that tells the lawyer that a transaction “must” be done a certain way, but instead there simply is a customary way of doing it. Lawyers know that doing the transaction differently may be entirely unworkable. For example, using a “straight” mortgage in a “deed of trust” state is not against the law but it is foolish, and no lawyer representing the other parties in the transaction will accept it. The customary private agreement, in other words, becomes the law. And because national, quasi-public agencies are major players in the real estate market, the transactions feature documents with dozens of customary clauses, each of which the lawyer must understand if the client is to be properly represented.

In this situation, what is meant by “the law”? Does this term refer merely to the public statutes and decisions? These are background, but they are not the focus of the lawyer’s efforts. The law that governs what the lawyer actually does is composed of familiar documents, traditional clauses, and customary transactions. Again, property law is fundamentally private law.

But once again, this book avoids a too-narrow focus. Public law is important, both in the form of interpretive principles for private documents and in the guise of land use regulation and titles. We shall study the function and limits of government land regulation here, for example, as well as private “regulation” through neighborhood governance.

(9) *Solving Problems by Using Property Law*. This book will equip you use the law to develop with strategies to assist clients. For example, imagine that Georgia Gearhead has developed a computer program that will make people’s lives better in a modest way, and asks you to analyze an agreement that will help her bring it to market. Or, Harry Homebuyer has reached an impasse with his prospective mortgage lender because of a defect in the title to the dream residence he wants to buy, and he hires you to cure the problem. Or, Celeste Citybuilder seeks to acquire dilapidated public housing units and to rehabilitate them for occupancy by low-income tenants, and she wants you to help her buy the property, insure the title, obtain financing, close the transaction, and begin construction. Will you be able to do these things? Yes, if you master the concepts set out here. In summary, a goal of the book is to put you in a position where you not only can read and criticize an court opinion, but also advance the ideas of clients such as these toward fruition.

(10) *Theoretical Thinking: Law and Economics; Ethical and Political Philosophy*. Of course it would be a mistake to omit theoretical analysis. Microeconomics is one of the most important theoretical bases of property law. And so the “Law and Economics of Property Law” is covered in online Appendix A. And because property law is also shaped by our ethics and politics, “Ethical and Political Theories of Property” is covered in online Appendix B. The appendices assume no knowledge of economics, ethical philosophy, or political theories and will get the basics across to those who have never studied these subjects. Although not necessary to use the book, they can increase students’ intellectual capacity for policy analysis at many points in the regular chapters.

(11) *Reflecting on Your Future Career*. Online Appendix C is entitled “The Personal Dimension of Lawyering—or Can a Lawyer be Competent, Diligent, Professional, Successful, and Altruistic . . . and also Live a Full Life?” It will help you gain an appreciation of what awaits you.

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We hope that you will enjoy and learn from this book as much as our students seem to have—and as much as we have from developing it!

David Crump
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