

Preface to the Second Edition xxiii

Acknowledgments xxv

Introduction xxxi

PART I DEFINITION AND ACQUISITION OF PROPERTY

1. THE FOUNDATIONS OF PROPERTY LAW 3

A. Introduction 3

B. What Is Property? 4

C. The Policies Behind Property Law 8

1. Economic Efficiency: Wealth Maximization 9

2. Fairness: Rewarding Labor 13

Haslem v. Lockwood 13

3. Certainty 17

Johnson v. M'Intosh 21

4. Democracy 27

5. Personhood 29

D. The Bundle of Sticks 31

1. The Right to Exclude 31

Jacque v. Steenberg Homes 32

a. Exclusion and the Public Interest 39

State v. Shack 39

Robins v. Pruneyard Shopping Center 41

b. Exclusion and Personal Property 43

c. The *Ad Coelum* Doctrine 44

United States v. Causby 44

Orr v. Mortvedt 46

2. The Right to Use 47

Burke v. Smith 48

- 3. The Right to Destroy 54
 - Eyerman v. Mercantile Trust Co., N.A. 55
- 4. Limitations of the Bundle of Sticks Metaphor 56

Summary 59

2. PROPERTY ACQUISITION 61

A. The Rule of Capture 61

- Pierson v. Post* 62
- Ghen v. Rich 69
- 1. Surface Water Allocation 71
- 2. Groundwater 74
- 3. Oil and Gas 75
- 4. The Internet 78
 - Virtual Works, Inc. v. Volkswagen of America, Inc.* 79

B. The Law of Finders 84

- Armory v. Delamirie* 85
- Willcox v. Stroup* 88
- Hannah v. Peel* 92

C. Acquisition by Gift 102

- Newman v. Bost* 105
- Gruen v. Gruen 110

D. Adverse Possession 111

- Van Valkenburgh v. Lutz* 117
- Humbert v. Rector, Churchwardens & Vestrymen of Trinity Church 125
- Jasperson v. Scharnikow 127

Summary 138

3. CREATION: AN INTRODUCTION TO INTELLECTUAL PROPERTY 141

A. The Policies of Intellectual Property Protection 142

B. The Principal Sources of Intellectual Property Protection 144

- 1. Patent 147
- 2. Copyright 148
 - Eldred v. Ashcroft 150
- 3. Trademark 151
- 4. Trade Secret 152

C. The Balance of Interests in Intellectual Property Law	155
1. The Balance of Interests in Trademark Law	155
<i>San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee</i>	156
<i>Louis Vuitton Malletier S.A. v. Haute Diggity Dog</i>	162
2. The Balance of Interests in Copyright Law	163
<i>Campbell v. Acuff-Rose Music, Inc.</i>	164
3. The Balance of Interests in Patent Law	166
<i>Association for Molecular Pathology v. Myriad Genetics, Inc.</i>	166
Summary	172

PART II SPLITTING UP THE BUNDLE OF STICKS

4. CONCURRENT INTERESTS 175

A. Introduction 175

B. Types of Co-Ownership 176

1. Tenancy in Common 176
 - a. Creation 176
 - b. Characteristics 177
2. Joint Tenancy 177
 - a. Creation 178
 - b. Characteristics 180
 - c. Severance and Partition 181
 - d. Personal Property 182
 - e. Intellectual Property 183
3. The Tenancy by the Entirety 183
 - a. Creation 184
 - b. Characteristics 184

C. Joint Tenancy Creation Issues 185

D. Joint Tenancy Severance Issues 187

- In the Matter of the Estate of Johnson* 187
Tenhet v. Boswell 198

E. Partition Issues 200

- Eli v. Eli* 201

F. Tenancy by the Entirety 211

- RBS Citizens, N.A. v. Ouhרבka* 211

G. Rights and Relations Between Co-Tenants 217

1. Ouster and Duty to Pay Rent 217
Spiller v. Mackereth 217
2. Ouster and Adverse Possession 222
O'Connor v. Larocque 222
3. General Rules of Co-Tenant Relations 224

H. Marital Property 226

1. Community Property 227
2. Rights upon Death 231
 - a. Dower and Curtesy 231
 - b. Elective Share 234
Hamilton v. Hamilton 235
3. Rights upon Dissolution 239
4. Cohabiting Couples 242

Summary 244**5. ESTATES AND FUTURE INTERESTS 247****A. Introduction 247****B. An Introduction to Wills 249****C. Types of Estates and Future Interests 252**

1. Fee Simple Absolute 253
2. Life Estate 256
White v. Brown 257
 - a. Relations Between Present and Future Owners 264
Beach v. Beach 264
 - b. Contingent and Vested Remainders 271
Hammons v. Hammons 272
3. Defeasible Fees 274
4. Estate for Years 279

D. Limitations on Dead Hand Control 282

1. Abolition of Fee Tail 283
2. Rule Against Perpetuities 285
 - a. Modern Reforms of the Rule Against Perpetuities 291
 - b. The Rule and Options to Purchase 293
Symphony Space, Inc. v. Pergola Properties, Inc. 293

E. An Introduction to Trusts 295**Summary 299**

6. LANDLORD-TENANT 301

A. Introduction 302

B. What Is a Lease: The Basics 304

1. Essential Nature of the Landlord-Tenant Relationship 304
 - Township of Sandyston v. Angerman 306
 - Muniz v. Kravis 307
2. Categories of Leases 310
 - a. Tenancy for a Term of Years 310
 - b. Periodic Tenancy 311
 - c. Tenancy at Will 312
 - d. Tenancy at Sufferance and Holdover Tenancy 314

C. Managing the Relationship: Rights and Obligations of Landlord and Tenant 316

1. Landlord's Duties and the Consequences of Failure 316
 - a. The Right to Possession 316
 - Hannan v. Dusch* 318
 - Keydata Corp. v. United States* 320
 - b. The Right of Quiet Enjoyment 325
 - Reste Realty Corp. v. Cooper* 330
 - c. Minimum Levels of Habitability 339
 - Hilder v. St. Peter* 340
2. Tenant's Duties and the Consequences of Failure 353
 - a. "I Surrender"; Giving Back the Keys and Walking Away 354
 - Sommer v. Kridel* 356
 - b. The Opposite of Surrender: The Tenant Defaults but Stays in Possession 364
 - Bender v. North Meridian Mobile Home Park* 366
 - c. The Duty to Not Commit Waste 373

D. Transfer of the Premises 374

1. Distinguishing an Assignment from a Sublease 375
 - Ernst v. Conditt* 376
2. May Tenant Transfer His Lease Rights (Either by Assignment or Sublease)? 384

E. Discrimination in Leasing of Real Property (and More Generally, Housing Sales) 393

1. Reconstruction and Afterward 394
2. The Fair Housing Act 396
 - a. Application of the Fair Housing Act 396
 - b. Disparate Treatment v. Disparate Impact 402
 - c. Missteps Happen 406

Summary 406

PART III TRANSFER OF OWNERSHIP

7. THE REAL ESTATE PURCHASE AND SALE TRANSACTION 411

A. Introduction: Lawyers and Transactions 412

1. Viewing the Purchase and Sale as a Transaction, Not a Lawsuit 412
2. What Lawyers Do: An Initial Comment 412
3. The Transaction Timeline 413

B. The Pre-Contract Period—The Broker 415

1. Listing Agreements 415
2. The Commission 416
3. Fiduciary Duties 418
 - Haymes v. Rogers* 419
4. A Few Final Broker Issues 425

C. The Contract/Executory Period 427

1. The Enforceable Contract and the Statute of Frauds 428
 - a. The Basics 429
 - b. The Description of Real Property 432
 - Crawley v. Hathaway* 433
 - c. Exceptions to the Statute of Frauds 441
 - Hickey v. Green* 442
2. Title Examination and Marketable Title 447
 - a. Marketable Title 448
 - b. Contract Title 450
 - Lohmeyer v. Bower* 452
3. Quality of Property—*Caveat Emptor* 458
 - Stambovsky v. Ackley* 461
 - a. Discovering the Problem 462
 - b. The Seller's Representations 463
 - c. Stigma Cases 465
 - Van Camp v. Bradford* 465
4. Getting the Loan 477
 - a. The Loan—Some Basic Elements 477
 - b. The Loan Contingency Provision 478
5. Equitable Conversion 480
6. Remedies 484
 - a. Damages 484
 - Roscoe-Gill v. Newman* 485
 - b. Equitable Remedies 491

D. Closing 494

1. The Deed 495
 - a. Delivery 498
Rosengrant v. Rosengrant 499
 - b. Acceptance 504
2. The Merger Doctrine 505

E. Post-Closing 507

1. Title Assurance 507
 - a. Deed Protections 507
 - b. Other Forms of Title Assurance 513
2. Problems with Quality 519
 - a. Express Warranties 520
 - b. Implied Warranties 520

Summary 521**8. RECORDING 525****A. Introduction 525****B. Recordation 527**

1. The Indexes 530
 - a. Grantor/Grantee Indexes 531
 - b. Tract Index 535
2. Computerized Records and Searching 536

C. Recording Statutes 537

1. Types of Recording Statutes 538
 - a. Race 538
 - b. Notice 541
 - c. Race-Notice 543
Luthi v. Evans 545
2. Recording Statutes Protect Purchasers (and Sometimes Lien Creditors) 552
Tomlinson v. Clarke 553
3. What Does Notice Really Mean? 559
 - a. Actual Notice 559
 - b. Constructive Notice 559
 - c. Inquiry Notice 560
4. Getting Documents into the Records 566
Allen v. Allen 569
5. Chain of Title 575
 - a. Missing Links 576

- b. Competing Chains of Title 579
- c. Deeds from a Common Grantor 580

D. Attempts to Improve Certainty of Title: Torrens Registration and Marketable Title Acts 581

- 1. Torrens Registration 582
- 2. Marketable Title Acts 583

Summary 587

9. THE LOAN TRANSACTION 589

A. Introduction 589

B. History and Terminology 591

C. The Promissory Note—The Written Obligation to Repay 592

D. The Mortgage—The Pledge of Collateral 597

- 1. What Is a Mortgage? 598
- 2. Mortgage Theories 598

E. Foreclosure 599

- 1. Conducting a Sale—and Doing the Math 602
- 2. Judicial and Non-Judicial Foreclosure 605
 - a. Judicial Foreclosure 606
 - b. Non-Judicial Foreclosure 609
 - Murphy v. Financial Development Corp.* 613
- 3. Moving to the Front of the Line 626

F. Waste 626

G. Disguised Mortgages 630

Lee v. Beagell 630

Summary 635

PART IV SERVITUDES

10. EASEMENTS 641

A. Creation of Easements 643

- 1. Express Easements 644
- 2. Easement by Estoppel 650
 - Kienzle v. Myers* 651
- 3. Easements Implied by Prior Use or Necessity 656
 - Boyd v. BellSouth Telephone Telegraph Co.* 657

4. Easement by Prescription	665
<i>O'Dell v. Stegall</i>	666
B. Scope and Termination	683
1. Misuse	684
<i>Brown v. Voss</i>	685
2. Abandonment: The Rails to Trails Context	691
3. Easement Valuation	694
Summary	694
11. REAL COVENANTS AND EQUITABLE SERVITUDES	697
A. Real Covenants—Running with the Land at Law	699
B. Equitable Servitudes	701
<i>Tulk v. Moxhay</i>	703
C. The Touch and Concern Requirement	707
<i>Neponsit Property Owners' Association, Inc. v. Emigrant Industrial Savings Bank</i>	708
D. Implied Covenants	716
E. Termination or Modification of Covenants	718
<i>Vernon Township Volunteer Fire Department, Inc. v. Connor</i>	719
F. Common-Interest Communities and Homeowners Associations	720
<i>Hughes v. New Life Development Corp.</i>	721
<i>Nahrstedt v. Lakeside Village Condominium Association, Inc.</i>	730
Summary	735

PART V LAND USE CONTROL

12. JUDICIAL LAND USE CONTROL: NUISANCE	741
A. Introduction	741
B. The Restatement Nuisance Test: Balancing the Utilities	745
<i>Prah v. Maretti</i>	745
C. “Substantial Harm” Test Compared	755
D. Effect of Zoning or Covenants on Nuisance Analysis	758

E. Questions of Remedy 760

Boomer v. Atlantic Cement Co. 760

F. Public Nuisance 767**Summary 768****13. LEGISLATIVE LAND USE CONTROL: AN INTRODUCTION TO ZONING 771****A. Introduction 771****B. A Brief History of Zoning 772****C. Constitutional Issues: *Village of Euclid v. Ambler Realty Co.* 776**

Village of Euclid v. Ambler Realty Co. 777

D. The Zoning Process 788

1. Variances 792

Martin v. City of Alexandria 793

State ex rel. Ziervogel v. Washington County Board of Adjustment 802

2. Nonconforming Uses 804

a. Amortization 805

Village of Valatie v. Smith 805

b. Abandonment 811

Summary 813**14. CONSTITUTIONAL LIMITATIONS ON LAND USE CONTROL: THE TAKINGS CLAUSE 815****A. Eminent Domain 817**

1. Just Compensation 818

2. The “Public Use” Limitation 820

Kelo v. City of New London 822

B. Regulatory Takings 8391. *Pennsylvania Coal* and the Rise of the “Regulatory Taking” Concept 840

Pennsylvania Coal Co. v. Mahon 843

2. The *Penn Central* Balancing Test 849

Penn Central Transportation Co. v. New York City 850

3. Categorical Takings: *Loretto* and *Lucas* 859

a. Permanent Physical Occupation 859

Horne v. Department of Agriculture 860

- b. “Total Takings” 861
 - Lucas v. South Carolina Coastal Council* 861
 - Palazzolo v. Rhode Island 877
 - Murr v. Wisconsin 879
- 4. Development Exactions: *Nollan* and *Dolan* 880
 - Nollan v. California Coastal Commission* 881
 - Dolan v. City of Tigard 888
- 5. The Next Frontier: “Judicial Takings”? 889
 - Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection 890

Summary 892

Table of Cases 895

Index 907