

ASPEN CASEBOOK SERIES

*BARROS  
HEMINGWAY*

PROPERTY LAW



Wolters Kluwer

ASPEN CASEBOOK SERIES

# PROPERTY LAW

**D. BENJAMIN BARROS**

Professor of Law  
Widener University School of Law

**ANNA P. HEMINGWAY**

Associate Professor of Law  
Widener University School of Law



Wolters Kluwer

Copyright © 2015 CCH Incorporated.

Published by Wolters Kluwer in New York.

Wolters Kluwer serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. ([www.wolterskluwerlb.com](http://www.wolterskluwerlb.com))

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at [www.wolterskluwerlb.com](http://www.wolterskluwerlb.com), or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-3763-3

Library of Congress Cataloging-in-Publication Data  
Barros, D. Benjamin, author.

Property law / D. Benjamin Barros, Professor of Law, Widener University School of Law;  
Anna P. Hemingway, Associate Professor of Law, Widener University School of Law. pages cm. —  
(Aspen casebook series)

Includes bibliographical references and index.

ISBN 978-1-4548-3763-3 (alk. paper)

1. Property—United States. 2. Possession (Law)—United States. I. Hemingway, Anna P., author. II. Title.

KF561.B37 2015

346.7304—dc23

2014048366



SUSTAINABLE  
FORESTRY  
INITIATIVE

Certified Chain of Custody

Promoting Sustainable Forestry

[www.sfiprogram.org](http://www.sfiprogram.org)

SFI-01042

SFI label applies to the text stock

# PROPERTY LAW

## EDITORIAL ADVISORS

### **Erwin Chemerinsky**

Dean and Distinguished Professor of Law  
Raymond Pryke Professor of First Amendment Law  
University of California, Irvine School of Law

### **Richard A. Epstein**

Laurence A. Tisch Professor of Law  
New York University School of Law  
Peter and Kirsten Bedford Senior Fellow  
The Hoover Institution  
Senior Lecturer in Law  
The University of Chicago

### **Ronald J. Gilson**

Charles J. Meyers Professor of Law and Business  
Stanford University  
Marc and Eva Stern Professor of Law and Business  
Columbia Law School

### **James E. Krier**

Earl Warren DeLano Professor of Law  
The University of Michigan Law School

### **Richard K. Neumann, Jr.**

Professor of Law  
Maurice A. Deane School of Law at Hofstra University

### **Robert H. Sitkoff**

John L. Gray Professor of Law  
Harvard Law School

### **David Alan Sklansky**

Professor of Law  
Stanford Law School

## ABOUT WOLTERS KLUWER LAW & BUSINESS

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, ftwilliam.com and MediRegs family of products.

**CCH** products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**ASPEN PUBLISHERS** products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**KLUWER LAW INTERNATIONAL** products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

**LOISLAW** is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

**FTWILLIAM.COM** offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

**MEDIREGS** products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

To Jody, Griffin, and Brayden, with love.

—*D.B.B.*

To my husband Kevin  
and my children Kevin and Patrick,  
who make wherever we are together  
a home.

—*A.P.H.*

# PREFACE

This book is designed to introduce law students to the law of property. Property is a foundational part of the law school curriculum. Like other property textbooks, this book covers the basics of the law of ownership in the United States. A quick look at the table of contents of this book will reveal an outline of topics that is similar to that in other property textbooks, and that will be familiar to any experienced property professor.

This book, however, covers these topics in a fundamentally different way than the traditional law school casebook. The traditional approach starts from complexity and then attempts, often unsuccessfully, to move toward simplicity. We take the opposite approach, starting from simplicity and then moving toward complexity. The traditional approach begins each subject with a case and then expects students to derive legal principles from the case.

We clearly and concisely introduce the legal principles first, and then present cases as examples of application of those principles. We give the reader the basic concepts necessary to understand a case before we present the case itself. The traditional method of beginning with the case is intended in part to develop the student's case reading skills. These skills are vital to the practice of law, and we do not mean to minimize their importance. However, we have learned over the years that new law students do not have the background knowledge necessary to gain a full understanding of legal principles from cases alone. An entire industry of secondary sources has developed to help students understand the concepts that first-year casebooks unrealistically expect students to learn without introduction or explanation. We have written this book so that students should not need to use these secondary sources to fully understand the material.

Our ultimate goal is to give the reader a solid foundation in property law. Throughout the book, we use clear examples to illustrate the concepts that we are covering. We also use illustrations, charts, tables, and sidebars to present material clearly. We highlight recurring themes by noting them in the margin. Themes are indicated by markers like the one that accompanies this paragraph. In many places throughout the book, we include problems that allow students to apply the principles that we have covered. We include explanatory answers to these problems in the appendix at the end of the book.

THEME



# ACKNOWLEDGMENTS

The authors gratefully acknowledge permission to reprint excerpts or to reproduce images from the following:

Cohen, Charles E., *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, Harvard Journal of Law and Public Policy Vol. 29 (2006): 491-510. Reprinted with permission.

Seller's Property Disclosure Statement (SPD), reprinted with the permission of the Pennsylvania Association of Realtors.

Strahilevitz, Lior Jacob, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835 (2006). Reprinted with the permission of the author.

*Tom the Dancing Bug* © Ruben Bolling. Reprinted with permission of Universal Uclick. All rights reserved.

# PROPERTY LAW

# SUMMARY OF CONTENTS

CONTENTS	xi
PREFACE	xxi
ACKNOWLEDGMENTS	xxiii
CHAPTER 1 AN INTRODUCTION TO THE LAW OF OWNERSHIP	1
CHAPTER 2 PRESENT AND FUTURE INTERESTS	133
CHAPTER 3 CONCURRENT OWNERSHIP	197
CHAPTER 4 LEASING REAL PROPERTY—LANDLORD AND TENANT LAW	271
CHAPTER 5 REAL ESTATE TRANSACTIONS	383
CHAPTER 6 SERVITUDES	541
CHAPTER 7 NUISANCE	713
CHAPTER 8 LAND USE REGULATION	743
CHAPTER 9 TAKINGS	829
CHAPTER 10 INTANGIBLE PROPERTY, INTELLECTUAL PROPERTY, AND PROPERTY IN THE HUMAN BODY	979
APPENDIX EXPLANATORY ANSWERS	1029
TABLE OF CASES	1069
INDEX	1085

# CONTENTS

PREFACE	xxi
ACKNOWLEDGMENTS	xxiii
CHAPTER 1 AN INTRODUCTION TO THE LAW OF OWNERSHIP	1
A. POSSESSION PART I—THE LAW OF PERSONAL PROPERTY	2
1. The Rule of Capture	2
<i>Pierson v. Post</i>	3
Notes and Questions	9
2. Bailments	10
<i>Peet v. Roth Hotel Co.</i>	14
<i>First American Bank, N.A. v. District of Columbia</i>	18
Questions	22
Problems	22
3. Finding	22
<i>Armory v. Delamirie</i>	23
Note	23
<i>Benjamin v. Lindner Aviation, Inc.</i>	25
Questions	35
Notes	35
<i>Corliss v. Wenner</i>	36
Notes	43
Problems	43
4. Finding Remedies and the Rule of Capture, Again	44
<i>Popov v. Hayashi</i>	45
Notes and Questions	55
5. Gifts of Personal Property	55
Note	57
<i>Carter v. Percy</i>	58
Questions	64
<i>Gruen v. Gruen</i>	65
Notes and Questions	71
Problems	71
B. POSSESSION PART II—POSSESSION OF REAL PROPERTY	72
1. The Doctrine of Discovery	72
<i>Johnson v. M'Intosh</i>	73
Notes and Questions	81
2. Adverse Possession	81
<i>Marengo Cave Co. v. Ross</i>	83
Notes and Questions	90
<i>Mannillo v. Gorski</i>	93
Notes	99
<i>Howard v. Kunto</i>	102

Notes	106
Adverse Possession Problems	114
C. EXCLUSION	117
Lior Jacob Strahilevitz, <i>Information Asymmetries and the Rights to Exclude</i>	117
Question	123
<i>Jacque v. Steenberg Homes, Inc.</i>	123
<i>State v. Shack</i>	126
Notes and Questions	130
CHAPTER 2 PRESENT AND FUTURE INTERESTS	133
A. PRESENT INTERESTS: THE SYSTEM OF PRESENT ESTATES IN LAND	134
1. The Fee Simple Absolute	134
2. The Life Estate	138
3. The Tenancies	138
4. The (Largely Extinct) Fee Tail	140
5. Defeasible Interests	141
B. FUTURE INTERESTS	145
1. Future Interests Created in the Grantor	146
a. The Possibility of Reverter and the Right of Entry	146
b. The Reversion	146
2. Future Interests Created in Grantees	147
a. The Remainders	148
b. Executory Interests	154
C. CLASSIFYING PRESENT AND FUTURE INTERESTS	155
D. RULES AGAINST RESTRAINTS ON ALIENABILITY	161
E. AMBIGUOUS CONVEYANCES AND NUMERUS CLAUSUS	163
<i>White v. Brown</i>	165
Notes and Questions	170
F. FUTURE INTERESTS AND ALIENABILITY	170
1. How Trusts Solve Alienability Problems	172
2. Rules Favoring Alienability	175
a. The Doctrine of Worthier Title	175
b. The Rule in Shelley's Case	176
c. Destructibility of Contingent Remainders	176
d. The Rule Against Perpetuities	177
G. RULE AGAINST PERPETUITIES PROBLEM SET	191
1. Perpetuities Reform	192
2. Avoiding Perpetuities Problems in Practice	193
H. RELATIONS BETWEEN PRESENT AND FUTURE INTEREST HOLDERS—THE LAW OF WASTE	194

CHAPTER 3	CONCURRENT OWNERSHIP	197
A.	THE TENANCY IN COMMON	197
1.	Partition	199
	<i>Ark Land Co. v. Harper</i>	200
	Notes	209
	Problem	210
2.	Rights and Obligations of Co-Tenants	211
	<i>Esteves v. Esteves</i>	211
	<i>Spiller v. Mackereth</i>	214
	Notes	217
	Problem	219
B.	THE JOINT TENANCY	219
1.	Creation of Joint Tenancies	220
2.	Severance of Joint Tenancies	223
	<i>Harms v. Sprague</i>	228
	Note	233
	Problem	233
C.	THE TENANCY BY THE ENTIRETY AND MARITAL PROPERTY	233
1.	Tenancy by the Entirety	233
	<i>Sawada v. Endo</i>	235
	Notes	240
	Problem	242
2.	Marital Property	242
a.	The Evolution of Marital Property Law	242
	<i>William Blackstone</i>	242
	Notes and Questions	243
	<i>Married Women's Property Act</i>	244
	Note and Questions	244
b.	The Common-Law Marital Property Model, a.k.a. the Separate Property System	245
	<i>Connor v. Southwest Florida Regional Medical Center, Inc.</i>	246
	Notes and Questions	250
	<i>Mahoney v. Mahoney</i>	251
	Notes	256
	Problems	257
c.	The Community Property System	258
	Notes and Questions	259
	Problems	260
	Notes	261
	Note and Questions	262
	Problem	263
d.	Migrating Couples	263
	Problem	264
e.	Unmarried Couples	264
	<i>Posik v. Layton</i>	265
	Note and Questions	268

CHAPTER 4	LEASING REAL PROPERTY—LANDLORD AND TENANT LAW	271
A.	CREATING A LEASEHOLD	272
1.	Types of Leasehold Estates	272
a.	The Term of Years	273
b.	The Periodic Tenancy	273
c.	The Tenancy at Will	275
	Problems	275
	<i>Effel v. Rosberg</i>	276
	Note	279
2.	The Lease: Considerations for Landlords and Tenants Negotiating and Entering the Leasehold	279
a.	Negotiating the Lease	279
	Questions	281
b.	The Lease Itself	281
3.	Delivery of Possession	285
	<i>Adrian v. Rabinowitz</i>	286
	Notes and Questions	287
	Problem	290
4.	Protection Against Discrimination: Considerations for Landlords Selecting Tenants	290
	Notes	295
	Exercise	297
	Problems	297
	<i>Neithamer v. Brenneman Property Services, Inc.</i>	298
	Note	302
B.	THE TENANT'S RIGHTS AND REMEDIES	303
1.	The Covenant of Quiet Enjoyment and Constructive Eviction	303
	<i>Fidelity Mutual Life Insurance v. Kaminsky</i>	303
	Notes and Questions	308
2.	The Implied Warranty of Habitability	309
	<i>Javins v. First National Realty Corporation</i>	310
	<i>Hilder v. St. Peter</i>	320
	Notes and Questions	327
	Problem	330
C.	THE LANDLORD'S RIGHTS AND THE TENANT'S DUTIES	330
1.	The Tenant's Duty to Pay Rent	331
2.	The Tenant's Duty to Not Use the Premises for Illegal Purposes	331
3.	The Tenant's Duty to Not Commit Waste	331
D.	TRANSFERRING THE LEASE	332
1.	Assignments and Subleases: When Tenants Transfer Interests	332
	Problems	336
	<i>Neal v. Craig Brown, Inc.</i>	337
	Exercise	340
2.	Restricting the Tenant's Right to Transfer	340
	<i>Kendall v. Ernest Pestana, Inc.</i>	341

Notes and Questions	348
Problems	349
<b>E. ENDING THE LEASEHOLD</b>	<b>350</b>
1. Abandonment and the Duty to Mitigate	350
<i>Sommer v. Kridel</i>	350
Notes and Questions	355
Problems	356
2. Holdovers and the Tenancy at Sufferance	357
<i>Crechale &amp; Polles, Inc. v. Smith</i>	357
Note and Questions	361
Problem	361
3. Eviction	361
a. Legal Process vs. Self-Help	362
<i>Berg v. Wiley</i>	362
Notes and Questions	368
Problem	368
b. Eviction for Acts of Third Parties	368
<i>Department of Housing and Urban Development v. Rucker</i>	369
Notes and Questions	373
c. Retaliatory Eviction	374
<i>Edwards v. Habib</i>	375
Notes and Questions	380
<b>CHAPTER 5 REAL ESTATE TRANSACTIONS</b>	<b>383</b>
<b>A. BROKERS, AGENTS, AND THE LAW OF REAL ESTATE PROFESSIONALS</b>	<b>384</b>
1. The Seller-Listing Agent Relationship	385
2. The Buyer-Agent Relationship	387
<i>Stortroen v. Beneficial Finance Co. of Colorado</i>	389
3. Dual Agency	403
4. Unauthorized Practice of Law	404
<b>B. MAJOR RISKS IN A REAL ESTATE TRANSACTION</b>	<b>407</b>
<b>C. TITLE ISSUES</b>	<b>410</b>
1. The Recording System and Recording Acts	411
a. The Indexes and Title Searching	411
b. Protecting Subsequent Interest Holders: Race, Notice, and Race-Notice Statutes	413
c. Three Types of Notice	420
<i>Harper v. Paradise</i>	421
A Note on Priority	424
<i>In re Clare House Bungalow Homes, L.L.C.</i>	425
d. Further Recording Issues	432
e. Summary: The Recording System and Title Risk	439
2. Allocating Title Risk in Contracts and Deeds	440
a. Marketable Title	440



<i>Lohmeyer v. Bower</i>	443
Problem	446
b. Merger	446
c. Deeds and Deed Warranties	447
Problem	457
3. Title Insurance	457
4. Surveys and Physical Inspections	459
5. Seller Disclosure Laws	460
6. Summary: Title Assurance	461
<b>D. PHYSICAL CONDITION ISSUES</b>	<b>463</b>
1. Duty to Disclose Physical Defects—From Caveat Emptor to State Disclosure Statutes	463
<i>Johnson v. Davis</i>	465
Notes	469
Pennsylvania Seller Disclosure Law	470
Notes	476
2. Inspection Contingencies	477
3. The Stigma Issue	479
4. The Implied Warranty of Quality	481
<b>E. OTHER MAJOR CONTRACTING ISSUES</b>	<b>484</b>
1. The Statute of Frauds	484
<i>Hickey v. Green</i>	487
Problem	489
a. Electronic Contracting and the Statute of Frauds	490
<i>Brantley v. Wilson</i>	491
Notes and Questions	496
2. Equitable Conversion and Risk of Loss	497
3. Remedies for Breach of Contract	498
<b>F. THE CLOSING AND DEED DELIVERY</b>	<b>501</b>
1. The Closing Process	501
2. Deeds and Deed Delivery	502
<i>Rosengrant v. Rosengrant</i>	507
Notes and Questions	511
<b>G. REAL ESTATE FINANCE</b>	<b>514</b>
1. Introduction: Secured Finance, Mortgages, and Deeds of Trust	514
2. Foreclosures	518
a. The Foreclosure Process—Judicial Foreclosure and Power of Sale Foreclosure	519
b. Deficiency Judgments and the Recourse—Non-Recourse Distinction	520
c. Adequacy of Foreclosure Sale Price	523
d. The Assumption—Subject-To Distinction	524
e. Foreclosure and Priority	526
<i>Citizens Bank &amp; Trust v. Brothers Construction &amp; Manufacturing, Inc.</i>	531
3. Installment Land Contracts	538