

EXAMPLES & EXPLANATIONS

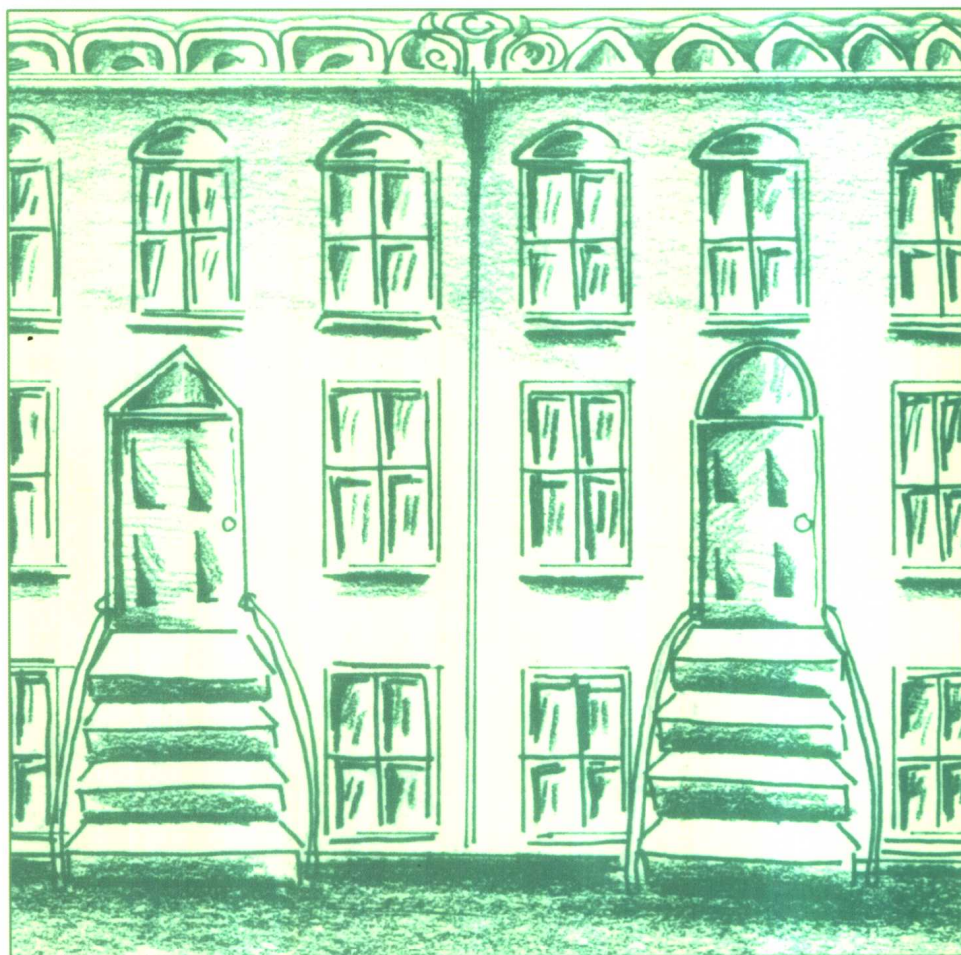
财产法

案例与解析

Property

印
系
列

[美] 巴洛·伯克, 约瑟夫·A·斯诺 / 著
Barlow Burke and Joseph A. Snoe



中信出版社
CITIC PUBLISHING HOUSE

EXAMPLES & EXPLANATIONS

财产法

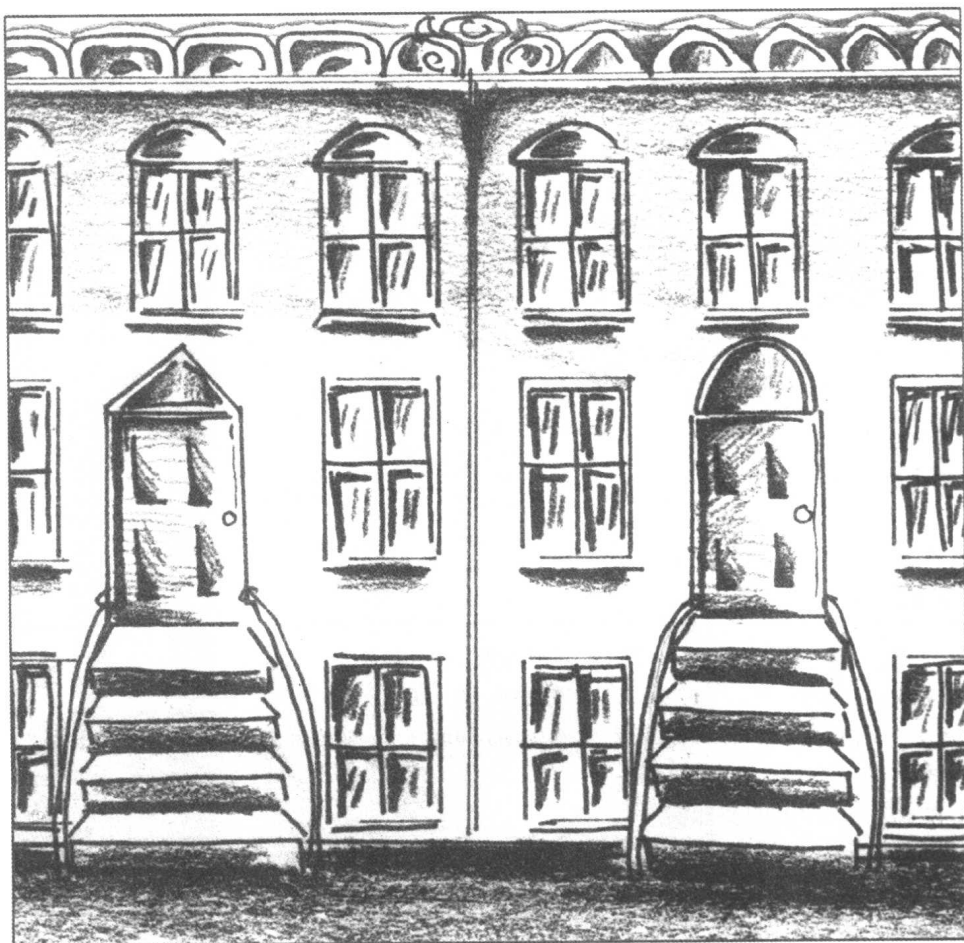
案例与解析

Property

影印系列

[美] 巴洛·伯克, 约瑟夫·A·斯诺/著

Barlow Burke and Joseph A. Snoe



中信出版社
CITIC PUBLISHING HOUSE

图书在版编目(CIP)数据

财产法(案例与解析系列)/(美)伯克等著.影印本.一北京:中信出版社,2003.7

书名原文:Property

ISBN 7-80073-792-6

I. 财… II. 伯… III. 民法-所有权-研究-美国-英文 IV. D971.23

中国版本图书馆CIP数据核字(2003)第048717号

This volume of Property, by Barlow Burke & Joseph A. Snoe, is an English Reprint Edition meant solely for publication in the country of China, published and sold by CITIC PUBLISHING HOUSE, by permission of ASPEN PUBLISHERS, INC., New York, New York, U.S.A., the owner of all rights to publish and sell same.

本书由中信出版社与Aspen Publishers, Inc.合作出版,未经出版者书面许可,本书的任何部分不得以任何方式复制或抄袭。

财产法

CAICHAN FA

著 者:[美]巴洛·伯克,约瑟夫·A·斯诺

责任编辑:袁婉君

责任监制:朱磊 王祖力

出版发行:中信出版社(北京市朝阳区东外大街亮马河南路14号塔园外交办公大楼 邮编 100600)

经 销 者:中信联合发行有限公司

承 印 者:北京牛山世兴印刷厂

开 本:787mm×1092mm 1/16 印 张:40.25 字 数:805千字

版 次:2003年7月第1版 印 次:2003年7月第1次印刷

京权图字:01-2003-2993

书 号:ISBN 7-80073-792-6/D·71

定 价:96.00元

版权所有·侵权必究

凡购本社图书,如有缺页、倒页、脱页,由发行公司负责退换。服务热线:010-85322521

E-mail:sales@citicpub.com

010-85322522

总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%—10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学院的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

PROPERTY

Examples and Explanations



ASPEN PUBLISHERS, INC.
Legal Education Division

EDITORIAL ADVISORS

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law
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 University

James E. Krier

Earl Warren DeLano Professor of Law
University of Michigan

Richard K. Neumann, Jr.

Professor of Law
Hofstra University

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard University

EMERITUS ADVISORS

E. Allan Farnsworth

Alfred McCormack Professor of Law
Columbia University

Geoffrey C. Hazard, Jr.

Trustee Professor of Law
University of Pennsylvania

Bernard Wolfman

Fessenden Professor of Law
Harvard University

About Aspen Law & Business Legal Education Division

With a dedication to preserving and strengthening the long-standing tradition of publishing excellence in legal education, Aspen Law & Business continues to provide the highest quality teaching and learning resources for today's law school community. Careful development, meticulous editing, and an unmatched responsiveness to the evolving needs of today's discerning educators combine in the creation of our outstanding casebooks, coursebooks, textbooks, and study aids.

ASPEN LAW & BUSINESS
A Division of Aspen Publishers, Inc.
A Wolters Kluwer Company
www.aspenpublishers.com

Preface

Property, the study of the rights and duties among persons with respect to objects, land, and other assets, is perhaps the least intuitive of all the required courses taught during the first year of law school. The course blends a mixture of abstract relationships and concrete rules, at once a remnant of laws introduced in bygone centuries and a dynamic reflection of changes occurring today.

Property: Examples and Explanations discusses the fundamental definitions, rules, and concepts covered in Property courses. Most of this book's readers will be first-year students either preparing for class, supplementing class discussion, or studying for examinations. We aim to make the book useful at each of these stages of your semester. It will help bring the course materials into focus and provide the many perspectives to help you to "think like a lawyer."

Each chapter contains an introductory overview that supplements (but does not supplant) your daily class assignments and aids in your review for examinations. Each overview provides a clear and accessible exposition of the fundamentals of the law of property, with the object of helping someone focusing on the subject for the first time.

Each chapter also includes a series of Examples that test your understanding of the material and your ability to apply the law to specific problems. We recommend that you think about, analyze, and write answers to as many Examples as you can. Writing out your responses is good practice for writing final examinations. It also forces you to analyze the facts and the law, evaluating possible solutions and ramifications of each choice you make. Alternatively, you might discuss each Example with a study partner or study group, gaining insight from the discussion.

Following the Examples in each chapter are Explanations that give our solutions. The Explanations discuss majority and minority rules and offer insights not readily grasped in class discussions or in the introductory overviews of the chapters themselves. Some Explanations will help you identify your weak areas; others will reinforce your conclusions and analysis. We have strived to make each Explanation a stepping stone on the path to success in your Property course.

There are no exhaustive citations of authority in this book. What citations are used in the text or in our Explanations we consider helpful either

to orient the student reader to casebook materials or to indicate basic writings and leading cases in the field.

We enjoy our magnificent subject and want students to grasp its fundamental rules and concepts, all the while enjoying their experience.

B. B.

J. S.

February 2001

Acknowledgments

Barlow Burke acknowledges the helpful and patient research of two research assistants, Les Anderson and Athena Cheng, while they were law students. He also acknowledges with appreciation the several summer faculty research grants of the Washington College of Law, American University, that kept this manuscript going there.

Joseph Snoe extends special thanks to Diane Wade, Computer Services Librarian at Cumberland School of Law, for her assistance on graphics. He also thanks Cumberland School of Law, Samford University, for summer research grants to work on this project.

We are both grateful for the guidance the several anonymous reviewers of this manuscript provided by Aspen Publishers, and for the firm editorial hands of Carol McGeehan, Jessica Barmack, and John Lyman at Aspen. Aside from the above, we acknowledge our limitations, inevitable and otherwise, in attempting to pull so diverse a subject within the covers of one book, and look forward to the diverse suggestions of readers for its improvement over what we trust will be a long shelf life in print.

B. B.

J. S.

PROPERTY

Examples and Explanations

Summary of Contents

<i>Contents</i>	<i>XI</i>
<i>Preface</i>	<i>XIX</i>
<i>Acknowledgments</i>	<i>XXI</i>
PART ONE: Possession, Personal Property, and Adverse Possession	1
1. The Law of Property	3
2. Personal Property and Possession	15
3. The Law of Finders and Prior Possessors	39
4. Bailments	55
5. Gifts	67
6. Good Faith or Bona Fide Purchasers	73
7. Fixtures	81
8. Adverse Possession	85
PART TWO: Common Law Estates and Interests in Real Property	105
9. Common Law Estates	107
10. Future Interests	133
11. Some Special Rules of Construction	155
12. The Rule Against Perpetuities	163
13. Concurrent Interests	181
14. Marital Estates	203
15. The Law of Waste	215
PART THREE: The Law of Landlord and Tenant	223
16. The Landlord and Tenant Relationship	225
17. Transfers of the Lease	241
18. Waste, Repair, and Destruction of Leased Premises	255
19. Termination and Abandonment of the Lease	263
20. Achieving Habitable Premises	281
21. Premise Liability of Landlords	305
22. The Holdover Tenant and Concluding Comments	315
PART FOUR: Transfers of Land	323
23. The Sales Contract	325
24. Executory Period Issues	341

25. Real Estate Closings	363
26. Post-Closing Title Assurances	381
27. The Recording Systems	403
PART FIVE: Private Land Use Controls	429
28. Private Nuisance	431
29. Creation of Easements	441
30. Assignability, Scope, and Termination of Easements	467
31. Real Covenants and Equitable Servitudes: Running with the Land	485
32. Real Covenants and Equitable Servitudes: Common Schemes and Termination	505
PART SIX: Public Land Use Controls	523
33. Constitutional and Statutory Constraints on Zoning	525
34. Variances, Special Exceptions, and Zoning Amendments	541
35. Selected Challenges to Zoning Ordinances	561
36. Takings	583
<i>Table of Cases</i>	605
<i>Index</i>	609

Contents

<i>Preface</i>	XIX
<i>Acknowledgments</i>	XXI

PART ONE

Possession, Personal Property, and Adverse Possession

CHAPTER 1: The Law of Property	3
Introduction	3
Common Law Cases	6
CHAPTER 2: Personal Property and Possession	15
Constructive Possession	20
Custom	21
More Uses for the Doctrine of Custom	23
Possession and Criminal Law: Larceny	24
Other Possessory Crimes	27
Natural Resources and Other Concerns	27
Water Law	29
Actionable Interference	30
A Concluding Note	31
CHAPTER 3: The Law of Finders and Prior Possessors	39
Finders and Landowners	40
Lost, Mislaid, and Abandoned Personalty	41
Prior Possession	42
Extensions of the <i>Armory</i> Rule—and a Right of Subrogation	44
Lost Property	46
Other Categories	48
Trover or Replevin	49
Recovering Possession of Real Property—Ejectment	50
Chain of Title	51
Delivery	52
CHAPTER 4: Bailments	55
Definition	55
Specialized Bailments	57

Misdelivery of Bailed Property	59
Loss or Damage of Bailed Property	60
CHAPTER 5: Gifts	67
Donative Intent	68
Delivery	68
Gifts Causa Mortis	70
CHAPTER 6: Good Faith or Bona Fide Purchasers	73
Bona Fide Purchasers	74
Entrustment	76
CHAPTER 7: Fixtures	81
CHAPTER 8: Adverse Possession	85
The Effect of Tax Payments	87
Color of Title	88
Two Theories of Adverse Possession	89
Disabilities	91
The State as True Owner	92
Tacking	92
Further Discussion of the Elements: Actual and Exclusive Possession	93
Continuous Possession	94
Open and Notorious Possession	95
Hostility	96
Boundary Disputes	98

PART TWO

Common Law Estates and Interests in Real Property

CHAPTER 9: Common Law Estates	107
Introduction	107
Some History	107
Estates and Interests	108
Seisin	109
The Fee Simple Absolute	111
Fee Simple Conditional and the Fee Tail	113
Issue—as in “Die Without Issue”	116
Getting to the Fee—as in Simple, Not Just a Payment for Your Services	116
Life Estates	118
The Creation of Life Estates	120
Defeasible Estates	121
Classifying Estates in Fee Simple	123

Two Statutory Modifications to Future Interests After a Defeasible Fee Simple	125
Financing Improvements on a Defeasible Fee Simple	125
CHAPTER 10: Future Interests	133
Introduction	133
Reversions	135
Remainders	137
Some Lessons from the Foregoing	140
Why We Distinguish Vested and Contingent Remainders	142
Rule of Destructibility of Contingent Remainders	143
Avoiding the Rule of Destructibility	144
Some History on the Statute of Uses	145
Executory Interests	147
CHAPTER 11: Some Special Rules of Construction	155
The Merger Rule	155
The Rule in Shelly's Case	155
Avoiding the Rule	157
The Rule in Wild's Case	158
The Doctrine of Worthier Title	159
CHAPTER 12: The Rule Against Perpetuities	163
Step One	164
Step Two	165
Step Three	167
An Updated Rule	168
RAP and the Executory Limitation	169
Summary	171
Further Reading	172
Further Summary	173
The Legal Consequences of Applying RAP	174
Statutory Reform of the Rule	174
CHAPTER 13: Concurrent Interests	181
Rents and Possession	183
Three Common Law Causes of Action	183
The Joint Tenancy, with a Right of Survivorship	187
Distinguishing Joint Tenancies from Tenancies in Common	187
Severance	189
Secrecy	191
Severance of a Joint Tenancy by a Mortgage	191
Tenancy by the Entirety	193
A Leading Case	196