LAND OWNERSHIP AND USE

Third Edition

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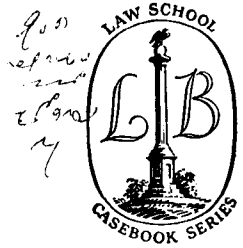

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PREFACE TO THE THIRD EDITION

Another seven years have passed, and once again I must pen a preface. Because this edition already contains two prefaces, which together express my view about the coverage and stress of a first-year property course, this preface should be read in conjunction with its predecessors.

Those who are acquainted with the earlier editions of Land Ownership and Use will see that I have succumbed, finally, to the entreaties of those teachers who believe (as I do) that personal property offers a wonderful first exposure to legal thought and analysis. Chapter 2, Of Property in Things, is brand new and, I confess, borrowed heavily and with gratitude from Professor Bernard Keenan of the Suffolk University Law School. Personal property does not appear in the first and second editions because, in the ideal curriculum, Property would not be taught until the second semester. By then, most law students have acquired analytical competence that makes much of personal property, however skillfully taught, pedagogically redundant. But since Property still remains a year-long enterprise at most law schools, instructors whose students begin Property in their first weeks may wish to start with Chapter 2.

In one respect, this edition has a slightly changed organization. I have brought together all the landlord and tenant materials (except those dealing with the running of covenants) at Chapters 4-6. Many book users have urged this concentration, and I am satisfied it makes sense. Moreover, the concentration appears relatively early in the course and, coming in the wake of freehold estates, gives students a more contemporaneous, as well as directly personal, vision of the property system.

Finally, in this edition I have expanded the materials on marital property, rent control, and condo conversions, have responded further to the growing constitutionalization of our once intensely private realm, have reflected the ongoing work on the Restatement (Second) of Property, and have added another dash or two of economics to the brew.

New York City
July 1982

PREFACE TO THE SECOND EDITION

The last step in preparing the second edition has been to reread the preface to the first edition to see what I could still embrace. Happily, nearly everything: I am less emphatic about delaying the student's exposure to real estate transactions and have included introductory conveyancing materials. These should ready students for the more intricate tax and financing issues of upper-class electives. And I have omitted the urban renewal and public housing materials, which time and changing governmental philosophy have dated. Otherwise, instructors who are acquainted with the first edition will find much that is familiar here.

For teachers of property, the years since 1968 have brought a rich harvest of key statutes and decisions: the Civil Rights Act of 1968, *Javins,* the National Environmental Policy Act of 1969, *Ramapo, Mount Laurel,* the Uniform Residential Landlord and Tenant Act, *Roth,* and *Shack;* to name a few. I have tried to capture the detail and the mood of these eventful years. I have also tried for greater teachability—expanding the textual treatment where this could facilitate instruction, and making the organization more explicit where this could enlarge the student's grasp. And, finally, I have tried to indicate the continuing challenge of this demanding and endlessly provocative subject.

New York City
June 1975

PREFACE TO THE FIRST EDITION

This book represents one teacher's conclusions about the assembly of materials for a first-year property course. As such, the book reflects certain basic convictions about coverage; intracurricular relationships; the use of classroom time; the skills a lawyer should acquire; the role of courts, legislatures, and other decision-makers; and, not least, the interests and ambitions of the young people we teach. In general, the convictions are the following:

First: Conveyancing does not belong in the first-year curriculum. Real estate transactions—as they are practiced today—are pregnant with considerations of income taxation, financing, and contracts. Except possibly for contracts, a beginning law student lacks the necessary background in these areas, and if we ignore them we waste everyone's time. An additional justification for deferring transactions until an advanced course is that they should be taught partly by the problem method and through exercises in drafting or negotiation—approaches to instruction that are better left to the second or third year.

Second: It seems irrelevant to concentrate on future interests in a course that emphasizes land in present-day America. Except for the defeasible estates, which remain a common device for enforcing private and public conditions on the use or alienation of land, future interests now serve their major role as tools of estate planning. Most students eventually take a course in wealth transmission; there they can study future interests in a far more meaningful context.

Third: Resource allocation, and the means to achieve it, deserve equal billing with the more conventional chapters on estates in land. I regard the land-planning materials in the last third of the book as so basic that I seriously considered putting them first, both to make clear this high regard and to offset our tendencies to hurry through or cut final chapters. But every text has its own sequential logic, and it seemed vital that students first absorb some of the language of property. I hope, however, that the instructor who uses this book will not misallocate his or her own resources of time, so that the students must await a third-year seminar to become thoroughly acquainted with the land-planning materials, or worse yet, become lawyers knowing nothing about zoning, eminent domain, urban renewal, etc.

Fourth: Property is no longer a common-law (or even a private-law) discipline, a realization that has been slow to arrive. State and local legisla-

tures—and, of course, the federal government—are recasting the institution of property with breathtaking speed; to what end is what this course examines. Thus, the book begins with major excerpts from the Civil Rights Bill of 1966, and throughout, where it has seemed fit, statutory material appears. As a teacher, I demand that students become as adept in their handling of statutes as they are professional in their dealings with cases.

Some of my older colleagues, still deadened by their own sterile, anachronistic encounter with property as students, wonder that I find the subject so relevant and stimulating. Yet, this is where in the law school curriculum we first consider man's struggle to control his environment, to find beauty, comfort, and order in his daily life, and to achieve a sense of consequence in his relations with government and fellow man. What is more timely, vital, or exciting?

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SUMMARY OF CONTENTS

PART I THE INSTITUTION OF PROPERTY 1

Chapter 1 What Is Property? 3

PART II FORMATION OF INTERESTS IN THINGS 71

Chapter 2 Personal Property Issues 73

PART III FORMATION OF INTERESTS IN LAND 139

Chapter 3 Estates in Land: The Freehold Estates 141
Chapter 4 Estates in Land: The Nonfreehold Estates 203
Chapter 5 Landlord and Tenant: Tenant Rights and Remedies 235
Chapter 6 Landlord and Tenant: Landlord Remedies 363
Chapter 7 Concurrent Interests 417
Chapter 8 Marital Property Interests 461
Chapter 9 Adverse Possession and Prescription 499

PART IV THE ALLOCATION AND DEVELOPMENT OF LAND RESOURCES THROUGH PRIVATE ARRANGEMENT 529

Chapter 10 Creating the Private Arrangement 531
Chapter 11 Modifying or Terminating the Arrangement 635

PART V THE ALLOCATION AND DEVELOPMENT OF LAND RESOURCES THROUGH RELIANCE ON THE COURTS 669

Chapter 12 The Judicial Doctrines 671

PART VI THE ALLOCATION AND DEVELOPMENT OF LAND RESOURCES THROUGH COMMUNITY PLANNING 709

Chapter 13 When Is Regulation a Taking? How Do Courts Decide? 711
Chapter 14 The Planning Process 735
Chapter 15 Zoning 761
Chapter 16 Problems of Zoning Application 799
Chapter 17 Toward Zoning Flexibility 931
Chapter 18 Eminent Domain 1015

PART VII REAL ESTATE TRANSACTIONS 1103

Chapter 19 Introducing the Real Estate Transaction 1105

Table of Cases 1183
Index 1193

PART I

THE INSTITUTION OF PROPERTY

Chapter 1

What Is Property?

§1.1 Law and Property; Property and Law

BENTHAM, THEORY OF LEGISLATION: PRINCIPLES OF THE CIVIL CODE

111-113 (Hildreth ed. 1931)

The better to understand the advantages of law, let us endeavour to form a clear idea of *property*. We shall see that there is no such thing as natural property, and that it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing, which we are said to possess, in consequence of the relation in which we stand towards it.

There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands; to keep it; to make it; to sell it; to work it up into something else; to use it;—none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The aliment which is incorporated into my very body may belong to another, to whom I am bound to account for it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law, that I am able to enclose a field, and to give myself up to its cultivation, with the sure though distant hope of harvest.

But it may be asked, what is it that serves as a basis to law, upon which to begin operations, when it adopts objects which under the name of property, it promises to protect? Have not men, in the primitive state, a *natural* expecta-

tion of enjoying certain things,—an expectation drawn from sources anterior to law?

Yes. There have been from the beginning, and there always will be, circumstances, in which a man may secure himself by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer, may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given, but that of law. A feeble and monetary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result, only from law. That which in the natural state was an almost invisible thread, in the social state, becomes a cable.

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

COMMUNITY REDEVELOPMENT AGENCY v. ABRAMS

15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 423 (1975)

SULLIVAN, J. In this action in eminent domain both parties have appealed from a judgment which, inter alia, awarded compensation to the condemnee, a pharmacist, for the value of certain "ethical drugs" located on the condemned real property but refused to award any compensation for loss of business goodwill resulting from the taking. In dealing with the questions thus presented we are required to address a broad question of constitutional law which, to borrow the image used by one learned commentator in a similar context, has proved remarkably "resistant to analytical efforts." (See Sax, Takings, Private Property and Public Rights (1971) 81 Yale L.J. 149, 149.) Simply stated, the question is this: When and to what extent do the state and federal Constitutions require that the "just compensation" to be paid upon the taking or damaging of private property for public use[2] include payment over and above the fair market value of the property taken on account of business losses sustained by the condemnee as a result of the taking?

Sixty years ago we answered this question in decisive fashion, and thereby stated the rule which presently applies in this state and, generally speaking, in all other jurisdictions of this nation. ". . . [t]he real contention of

2. The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, (Chicago, Burlington, etc. R'd v. Chicago (1897) 166 U.S. 226, 233-241, 17 S. Ct. 581, 41 L. Ed. 979), provides in relevant part: ". . . nor shall private property be taken for public use, without just compensation."

Article I, section 19 (replacing former art. I, §14) of the California Constitution provides in relevant part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."