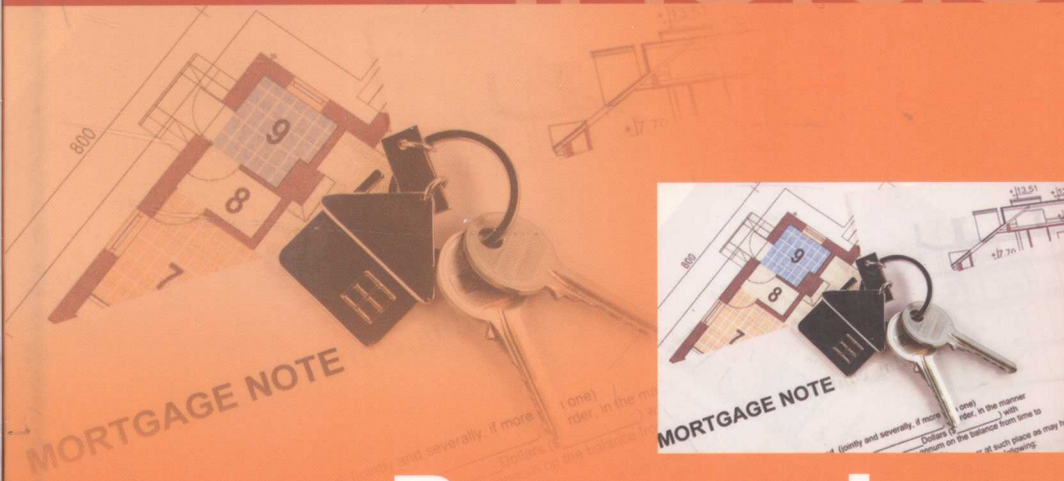


ASPEN PUBLISHERS

Inside



Property Law

What Matters and Why

Daniel B. Bogart

John Makdisi



Wolters Kluwer

Law & Business



ISHERS

30805972

Inside Property Law

What Matters and Why

Daniel B. Bogart

*Donley and Marjorie Bollinger Chair in Real Estate Law
Chapman University School of Law*

John Makdisi

*Professor of Law
St. Thomas University School of Law*



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

© 2009 Aspen Publishers. All Rights Reserved.
<http://lawschool.aspenpublishers.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 any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

To contact Customer Care, e-mail customer.care@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers
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 978-0-7355-7232-4

Library of Congress Cataloging-in-Publication Data

Bogart, Daniel B., 1960-

Inside property law : what matters and why / Daniel B. Bogart, John Makdisi. —
1st ed.

p. cm.

Includes index.

ISBN 978-0-7355-7232-4 (pbk. : alk. paper) 1. Property—United States. 2. Estates (Law)—United States. 3. Real property—United States. I. Makdisi, John. II. Title.

KF560.B64 2009
346.7304—dc22

2009008283

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer 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 supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small 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.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

*To David Walker, who gave me my first job in teaching,
and Parham Williams, who gave me my second.*

DBB

*To my property students over the past thirty years who have
never failed to keep me on my toes.*

JM

Preface

Property law touches on something very basic and emotional: our rights to own, enjoy, use, and dispose of real and personal property. We spend our lives accumulating property of all kinds, and we want to know the extent of our rights.

Property comes in all forms: It can be “real” (involving land) or personal; it can be tangible or purely conceptual; and it can be defined by a relationship (such as landlord–tenant law or mortgage law). Property law allows us to resolve disputes between two or more people claiming some right in a valuable interest.

For many years, anyone discussing “Property Law” in a traditional American law school would be concerned chiefly with relationships and rules derived from English common law. Today, however, property law includes generous portions of constitutional law, land use, tort law, contract and land conveyancing law, and laws forbidding illegal discrimination, among other areas of inquiry.

Property law historically changed at a glacial pace. Yet in recent years it has been altered by aggressive attempts of courts and scholars to reflect modern markets and expectations. Property law is therefore a wide umbrella covering a vast and dynamic array of rules and relationships.

The authors have taught Property Law for many years. We teach the course because, to be quite blunt, we love doing so. This is a challenging course: It requires us to tie history to modernity, social welfare to individual expectations, and old legal rules to the crucible of change. The personalities and characters populating property law cases are inevitably colorful. Their stories will stay with you long after you leave law school.

Together, we have already written a book for Aspen Publishers on Estates in Land and Future Interests, an area of property law that is historical in nature and often intimidating to students. It is the arcane shorthand used by lawyers to transfer rights in property over time. We cover estates in land and future interests in this book as well.

Professor Bogart comes to property law with a distinct interest in real estate transactions; this is his background. He is an expert in the area of commercial leasing. He speaks often on various subjects in real estate transactions, and is a member of the American College of Real Estate Lawyers. Professor Makdisi has a special interest in estates in land and future interests, the historical origins of the common law, and comparative aspects of property law with Islamic law.

We want to make the material covered in your first-year Property course accessible. This book contains a number of features with this purpose in mind; these features are common to the Inside the Law series. You will find a short overview at the beginning of each chapter. The overview will help place that chapter’s material in the larger picture of the Property Law course. We also provide and answer frequently asked questions (FAQs). Over the years, students have tended to ask certain questions on a relatively regular basis. But there are also questions and issues that are

a bit off the beaten path, or just deserve special treatment. We deal with these in sidebars.

This book is the result of the collaboration of two friends and colleagues who teach at different schools, but who do so with a similar hope: that we can spark in our students a lifelong interest in a great area of the law.

Acknowledgments

We could not have finished this book without the help and support of a number of individuals and institutions. First and foremost, we thank Jessica Barmack, Developmental Editor at Aspen Publishers. Jessica is a patient, funny, and very hard-working professional, and the book is the better for her efforts. In addition, Professor Bogart thanks Dean John C. Eastman for his support of this project and the award of a summer research and writing stipend. Professor Bogart also thanks Chapman Law School graduate Scott Ashby, for help in preparing the Table of Cases. Similarly, Professor Makdisi thanks Dean Alfredo Garcia of St. Thomas University School of Law for the award of a summer research stipend in 2007.

April 2009

*Daniel B. Bogart
John Makdisi*

Inside Property Law

What Matters and Why

Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface and Acknowledgments</i>	<i>xix</i>
Chapter 1 Property: Definition and Possession	1
Chapter 2 Estates and Future Interests	31
Chapter 3 Concurrent Ownership	61
Chapter 4 Marital Interests and Community Property	81
Chapter 5 Landlord–Tenant Law	95
Chapter 6 The Real Property Purchase and Sale Transaction	135
Chapter 7 The Real Property Loan Transaction	175
Chapter 8 Protections	199
Chapter 9 Easements, Covenants, and Servitudes	223
Chapter 10 Land Use Controls	247
<i>Table of Cases</i>	285
<i>Index</i>	287

Contents

<i>Preface and Acknowledgments</i>	xix
Chapter 1. Property: Definition and Possession	1
A. The Concept of Property	2
1. The Bundle of Sticks	2
2. Gray Area Interests	3
B. Methods of Acquiring Property: Possession and First-in-Time	4
1. Creation	5
a. The Basic Rule	5
b. Creation Is Not a Perfect Mechanism	6
c. Intellectual Property.....	7
2. Capture	9
a. The Basic Rule	9
b. Capture as a Variation of the Rule of Creation	9
c. Some Common Ambiguities in Applying the Rule of Capture	9
d. A Brief Detour into Economics.....	11
3. Found Property	12
a. The Basic Rule	12
b. Stolen Property and Bailments.....	14
4. Gift	16
a. The Basic Rule	16
b. Three Elements of a Gift.....	16
c. Gifts <i>Causa Mortis</i>	18
d. Gifts of Real Property	19
e. Timing Issues in Gift Law.....	19
5. Adverse Possession.....	20
a. Rationale for a Counterintuitive Rule.....	21
b. Elements	21
c. Personal Property	25
d. Some Words of Caution.....	25

Chapter 2. Estates and Future Interests.....	31
A. Estates.....	33
1. Life Estate and Fee Simple.....	33
2. Fee Tail.....	34
3. Subcategories of Estates	34
B. Interests.....	37
1. Future Interests Owned by the Grantor.....	37
2. Vested and Contingent Interests.....	38
3. Future Interests Owned by a Grantee	38
C. Conditions.....	41
1. Condition Subsequent	41
2. Condition Precedent	42
D. Class Ownership.....	45
1. Defining the Class	46
2. Class Closing Rules.....	48
E. Rules	50
1. No Gap in Seisin Rule.....	50
2. Destructibility of Contingent Remainders Rule	50
3. Backup Rule	50
4. Piggyback Rule.....	51
5. Merger Rule.....	52
6. Common Law Rule Against Perpetuities (RAP)	52
7. Subsidiary Rules to the Common Law RAP.....	56
8. Alternative Rules to the Common Law RAP	57
a. Wait-and-See Rule.....	57
b. <i>Cy Pres</i> Doctrine	58
c. Uniform Statutory Rule Against Perpetuities (USRAP)	58
Chapter 3. Concurrent Ownership.....	61
A. Fights over Concurrently Owned Property: An Endemic Problem.....	62
B. Categories of Concurrent Estates.....	63
1. Basic Characteristics, Creation, and Severance	63
a. Tenants in Common.....	64
b. Joint Tenants with Right of Survivorship.....	65
c. Tenancy by the Entireties.....	67
2. Modern Presumptions	68

C. Cheating Creditors, Not Death	69
1. Joint Tenants.....	69
2. Tenants by the Entireties	70
D. Getting Along.....	70
1. Sharing Income.....	71
a. Accounting.....	71
b. Rent from Other Concurrent Owners.....	72
2. Bearing Costs	73
3. Waste.....	74
E. Moving Along: Partition.....	74
1. Categories of Partition: Presumption for Partition in Kind.....	75
2. Court Order of Partition: Basic Requirements	76
3. Effects of Partition on Joint Tenants	77
4. Profits and Costs: Distribution on Partition	77
a. Profits	77
b. Costs.....	78
 Chapter 4. Marital Interests and Community Property	 81
A. The Common Law	82
1. Dower and Curtesy.....	82
2. The Forced Elective Share.....	83
3. Tenancy by the Entireties Revisited.....	84
B. Community Property.....	85
1. What Property Constitutes Community Property?	85
2. Can Property Be Sold by an Individual Spouse or Does It Take Two to Tango?	88
3. Can an Individual Spouse Manage Community Property Without Permission of the Other?	88
4. Does an Individual Spouse Have Fiduciary Obligations to the Other Spouse in the Use and Management of Community Property?	89
5. What Is the Effect on the Property Rights When a Couple Moves from a Common Law Jurisdiction to a Community Property Jurisdiction and Vice Versa?	90
 Chapter 5. Landlord–Tenant Law.....	 95
A. Context of Landlord–Tenant Law	96
B. The Nonfreehold Estate	97

C. What Is a Lease?	98
D. Types of Leases	100
1. At Will Tenancy.....	100
2. Periodic Tenancy.....	100
3. Term of Years	101
a. The Statute of Frauds.....	101
4. Tenancy at Sufferance: The <i>Big Election</i>	102
a. Holdover Tenant as Trespasser	103
b. Holdover Tenant as Tenant Under a New Lease	104
c. What Constitutes Landlord's Notice?	104
E. Other Ways the Lease May Terminate	105
1. Another Election: Tenant Vacates Space Before the End of the Term.....	105
a. The Landlord May Elect to Treat the Lease as in Full Force and Effect.....	105
b. The Landlord May Elect to Accept Surrender of the Premises.....	106
F. Landlord's Remedies for Tenant's Default	107
1. Damages	107
2. Security Deposits.....	107
3. Eviction	108
a. Eviction with the Help of the Court.....	109
b. Self-Help	110
G. Landlord's Duties and Obligations	110
1. The Landlord's Obligation to Place Tenant in Possession	111
a. A Tale of Two Trespassers.....	111
2. The Landlord's Covenant of Quiet Enjoyment	112
3. The Implied Warranty of Habitability	114
a. Need for the IWH	114
b. The Elements of the IWH.....	115
c. Unintended Consequence of the IWH	116
d. A Very Difficult Scenario: Mom and Pop Meet the Nasty Commercial Landlord	117
e. Retaliatory Eviction	118
4. The Landlord's Limited Obligation to Avoid Tortious Acts.....	119
a. Common Areas	119
b. Products Liability.....	120
H. Tenant's Transfer of the Tenancy	120
1. Liability for Rent upon Transfer of Tenancy	121
a. Privity of Estate.....	121
b. Privity of Contract	122

c. Putting It All Together	123
2. Tenant's Right to Transfer Tenancy	124
a. The Modern World Assumes Reasonable Parties	125
b. The Retail Lease.....	126
c. Contract Law Allows Parties to Restrict Transfer	127
3. Who Gets to Keep the Profits on Transfer?.....	128
I. Landlord's Transfer of Its Rights as Landlord.....	128
J. Discrimination in Leasing	129

Chapter 6. The Real Property Purchase and Sale Transaction..... 135

A. Real Estate Transaction as a Timeline.....	136
B. The Purchase and Sale Transaction	137
1. Precontract	137
a. Brokers	138
b. Precontract Obligations	141
2. The Executory Period.....	142
a. Executory Period: The Purchaser's Time for Action.....	142
b. Executory Period: The Important Underlying Law.....	144
3. Closing	152
a. Some Things That Happen at Closing.....	152
b. Some Definitions	153
c. Some Important Law	153
4. Postclosing.....	159
a. Title Problems Postclosing.....	159
b. Quality Problems Postclosing: The Impact of Caveat Emptor.....	164

Chapter 7. The Real Property Loan Transaction..... 175

A. Basic Loan Transaction Timeline	176
1. The Loan Commitment	176
2. Closing	176
3. Borrower's Default of the Loan	176
4. Foreclosure	177
5. Postforeclosure	177
B. The Loan Transaction.....	177
1. The Order of the Purchase and the Loan: The Purchase Comes First	178
2. Types of Loans	179
3. Basic Mortgage Theories	180
4. Checks on the Borrower	181

5. Checks on the Lender	184
6. Transfer of Mortgaged Property by the Borrower.....	185
7. Transfer of Mortgaged Property by Lender (and a Comment on the Historic Mortgage Meltdown)	187
a. The Secondary Market	187
b. The Credit and Mortgage Crisis	188
8. Foreclosure	191
a. Types of Foreclosure Proceedings	191
b. Invalidating the Foreclosure Sale.....	192
c. Foreclosure Rules	193
9. Postforeclosure Statutory Redemption.....	195

Chapter 8. Protections..... 199

A. Recording	200
1. How to Do a Title Search	201
2. The Protection of Recording Acts	202
a. Race	203
b. Notice	205
c. Race-Notice	206
3. Types of Notice.....	206
4. Shelter Rule	207
5. Wild Deed	208
6. Problems with Recording.....	209
a. Transfer of Title Without a Document.....	209
b. Incorrect Name or Description in the Document	210
c. Defective Acknowledgment Not Detectable in the Deed	210
d. Incorrect Name or Description Placed by the Recorder in the Index	211
e. Circular Lien Problem.....	211
7. Extension of the Chain of Title Search in Some Jurisdictions	213
a. Early Recordings That Count.....	213
b. Late Recordings That Count	214
8. Marketable Record Title Legislation	215
B. Title Insurance: A Return Visit.....	216
C. Incidental Rights Inherent in the Nature of Ownership.....	216
1. Support	216
2. Water Use from a Stream.....	217
a. Riparian Rights.....	217
b. Prior Appropriation	218
3. Littoral Rights.....	218
4. Surface Water Flow	219
a. The Common Enemy Doctrine	219
b. The Civil Rule.....	219

c. The Reasonable Use Rule..... 220
 5. Accretion and Reliction 220

Chapter 9. Easements, Covenants, and Servitudes 223

A. Dominant and Servient Estates..... 224
B. Easements in Gross 225
C. Easements Appurtenant 225
 1. By Deed..... 226
 a. Misuse of Easement by Owner of the Dominant Estate..... 226
 b. Misuse of Easement by Owner of the Servient Estate..... 227
 2. By Necessity 228
 3. Implied by Prior Use..... 228
 4. By Prescription..... 229
D. Profits à Prendre..... 230
E. Covenants Running with the Land 231
 1. Intent That the Covenant’s Benefit Run 231
 2. Touch and Concern 231
 3. Horizontal Privity 232
 4. Vertical Privity..... 232
F. Equitable Servitudes..... 233
 1. By Deed..... 233
 2. Implied Equitable Servitude 234
 3. Third-Party Beneficiaries..... 236
G. Chain of Title Problem 238
H. Termination 240
I. License 240
J. Restraints on Alienation..... 241
K. Discrimination..... 241

Chapter 10. Land Use Controls 247

A. Nuisance..... 248
 1. Nuisance Distinguished from Trespass..... 248
 2. Winnowing Down the Private Nuisance Action..... 249
 a. Precursor Elements: Superman Need Not Apply..... 250
 b. Public Versus Private Behavior..... 251
 c. Intentional Behavior 252
 d. Unintentional Behavior 252
 3. Tests for Unreasonable Behavior 252

4. Remedies	254
a. Injunction Versus Damages	254
b. Efficiency	255
c. Property Rule Versus Liability Rule	257
5. Four Possible Outcomes in a Case.....	258
6. Fairness Versus Efficiency.....	260
B. Zoning.....	260
1. Constitutional Standard of Validity	260
2. Distinction from Takings Clause.....	261
3. The Comprehensive Plan	262
4. The Standard of Validity Under a Comprehensive Plan.....	262
5. Variances.....	263
6. Exceptions	264
7. Nonconforming Uses	264
a. Transfer of Vested Rights	266
b. Estoppel	267
c. Laches	267
8. Spot Zoning.....	267
9. Modern Methods of Zoning Control	268
a. Conditional Rezoning	268
b. Contract Zoning.....	268
c. Floating Zones	269
d. Planned Development Districts.....	269
e. Planned Unit Developments.....	270
10. Constitutional Constraints on Zoning.....	270
a. First Amendment Freedom of Speech Clause.....	270
b. First Amendment Establishment of Religion Clause.....	271
c. Fourteenth Amendment Due Process Clause	271
d. Fourteenth Amendment Equal Protection Clause.....	272
C. Eminent Domain.....	272
1. Rationale and Authority for Takings.....	272
2. What Constitutes a Taking.....	274
a. Permanent Physical Occupation Takings	274
b. Temporary Physical Use Takings	275
c. Regulatory Behavior	275
d. Temporary Restrictive Takings.....	279
e. Summary of Factors to Consider	279
f. Exactions.....	279
3. What Constitutes Public Use	280
4. What Constitutes Just Compensation	282
TABLE OF CASES.....	285
INDEX.....	287